

Jon Niermann, *Chairman*
Emily Lindley, *Commissioner*
Bobby Janecka, *Commissioner*
Kelly Keel, *Interim Executive Director*



Garrett T. Arthur, *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 14, 2023

Laurie Gharis, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

RE: **Northwest Freeway Municipal Utility District (Applicant)**
TCEQ Docket No. 2023-0853-MWD

Dear Ms. Gharis:

Enclosed for filing is the Office of Public Interest Counsel's Response to Request for Hearing in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Jessica M. Anderson".

Jessica M. Anderson, Attorney
Assistant Public Interest Counsel

cc: Mailing List

DOCKET NO. 2023-0853-MWD

| | | |
|-----------------------------------|----------|------------------------------|
| APPLICATION BY | § | BEFORE THE |
| NORTHWEST FREEWAY | § | |
| MUNICIPAL UTILITY DISTRICT | § | TEXAS COMMISSION ON |
| FOR RENEWAL OF WATER | § | |
| QUALITY PERMIT NO. | § | ENVIRONMENTAL QUALITY |
| WQ0011913001 | § | |

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE
TO REQUEST FOR HEARING**

To the Members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (OPIC) at the Texas Commission on Environmental Quality (TCEQ) files this Response to Request for Hearing on the application in the above-captioned matter and respectfully submits the following.

I. INTRODUCTION

A. Summary of Position

Before the Commission is an application by Northwest Freeway Municipal Utility District (Northwest Freeway MUD or Applicant) to renew Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0011913001. The Commission received a timely hearing request from Dustin Lindsey. For the reasons stated herein, OPIC respectfully recommends the Commission find that Dustin Lindsey is not an affected person in this matter, and further recommends denial of his hearing request.

B. Description of Application and Facility

Northwest Freeway MUD applied for a renewal of its TPDES permit, which authorizes the discharge of treated domestic wastewater at a daily average flow

not to exceed 450,000 gallons per day. The Facility is located at 17924 Bullis Gap Drive in Harris County.

The treated effluent is discharged to Harris County Flood Control District ditch L117-01-00, then to Little Cypress Creek (intermittent with perennial pools), then to Little Cypress Creek (perennial) in Segment No. 1009 of the San Jacinto River Basin. The unclassified receiving water uses are minimal aquatic life use for Harris County Flood Control District ditch L117-01-00, limited aquatic life use for Little Cypress Creek and high aquatic life use for Little Cypress Creek. The designated uses for Segment No. 1009 are primary contact recreation, public water supply, and high aquatic life use.

C. Procedural Background

Northwest Freeway MUD's application was received on August 9, 2022, and was declared administratively complete on September 14, 2022. The Notice of Receipt of Application and Intent to Obtain a Water Quality Permit (NORI) was published in English on December 7, 2022, in the *Houston Chronicle* and in Spanish on December 14, 2022, in *La Voz*. The Notice of Application and Preliminary Decision (NAPD) was published in English on January 18, 2023, in the *Houston Chronicle*, and in Spanish on January 25, 2023, in *La Voz*. The public comment period for this application closed on February 24, 2023.

II. APPLICABLE LAW

A. Water Quality Permit Renewals

Texas Water Code § 26.028(d) allows the Commission to approve a permit renewal application without holding a hearing if certain conditions are met.

Those conditions are as follows:

- (1) the applicant is not applying to increase significantly the quantity of waste authorized to be discharged, or change materially the pattern or place of discharge;
- (2) the activities to be authorized by the renewed permit will maintain or improve the quality of waste authorized to be discharged;
- (3) notice and the opportunity to request a public meeting shall be given, and the commission shall consider and respond to all timely received and significant public comment; and
- (4) the Commission determines that an applicant's compliance history raises no issues regarding the applicant's ability to comply with a material term of its permit.

B. Hearing Requests

The Application was filed after September 1, 2015, and is therefore subject to the procedural rules adopted pursuant to Senate Bill 709. Tex. S.B. 709, 84th Leg., R.S. (2015). Under 30 Texas Administrative Code (TAC) § 55.21(c), a hearing request by an affected person must be in writing, must be timely filed, may not be based on an issue raised solely in a public comment which has been withdrawn, and, for applications filed on or after September 1, 2015, must be based only on the affected person's timely comments.

Section 55.201(d) states that a hearing request must substantially comply with the following:

- (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request;
- (2) identify the requestor's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;
- (3) request a contested case hearing;
- (4) list all relevant and material disputed issues of fact that were raised by the requestor during the public comment period and that are the basis of the hearing request. To facilitate the Commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the ED's responses to the requestor's comments that the requestor disputes, the factual basis of the dispute, and list any disputed issues of law; and
- (5) provide any other information specified in the public notice of application.

30 TAC § 55.201(d).

Under 30 TAC § 55.203(a), an "affected person" is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest. Relevant factors to be considered in determining whether a person is affected include:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;

- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person;
- (6) for a hearing request on an application filed on or after September 1, 2015, whether the requestor timely submitted comments on the application that were not withdrawn; and
- (7) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

30 TAC § 55.203(c).

Under § 55.203(d), to determine whether a person is an affected person for the purpose of granting a hearing request for an application filed on or after September 1, 2015, the Commission may also consider the following:

- (1) the merits of the underlying application and supporting documentation in the administrative record, including whether the application meets the requirements for permit issuance;
- (2) the analysis and opinions of the executive director; and
- (3) any other expert reports, affidavits, opinions, or data submitted by the executive director, the applicant, or hearing requestor.

30 TAC § 55.203(d).

Under 30 TAC § 55.211(c)(2)(A)(ii), for an application filed on or after September 1, 2015, the Commission must grant a hearing request made by an affected person if the request raises disputed issues of fact that were raised by the affected person during the comment period, that were not withdrawn by

filing a withdrawal letter with the Chief Clerk prior to the filing of the ED's RTC, and that are relevant and material to the Commission's decision on the application.

Under § 55.211(c)(2)(B)-(D), the hearing request, to be granted, must also be timely filed with the Chief Clerk, pursuant to a right to hearing authorized by law, and comply with the requirements of § 55.201.

III. ANALYSIS OF HEARING REQUEST

A. Whether a right to hearing exists

The Applicant seeks to renew a water quality permit, meaning Texas Water Code § 26.028 may limit the right to a contested case hearing. If the conditions of § 26.028(d) are met, then no right to hearing exists in this matter. First, the Applicant is not applying to increase the quantity of effluent authorized for disposal, nor change the pattern or place of disposal. Second, the activities to be authorized by the renewed permit will maintain the quality of wastewater authorized for disposal. Third, notice and the opportunity to request a public meeting were given. Section 26.028(d)(3) also requires the TCEQ to consider and respond to all timely received and significant public comment. Mr. Lindsey's hearing request was timely received. However, it contains no comments and was the only public correspondence received. Therefore, a Response to Comments from the Executive Director was not necessary. Finally, the Commission must determine that the Applicant's compliance history raises no issues regarding its ability to comply with a material term of its permit.

Regarding compliance history, OPIC notes that both Northwest Freeway MUD and its wastewater treatment plant (WWTP) have “high performer” compliance histories. By rule, a “high performer” compliance history classification applies to a performer who has an above-satisfactory compliance record. 30 TAC § 60.2(a)(1). The Applicant has a compliance history rating of 0.00, and the WWTP has a rating of 0.00. For reference, a rating of less than 0.10 is considered “high,” 0.10-55 is “satisfactory,” and greater than 0.55 is “unsatisfactory.” OPIC acknowledges that the standard is whether the Applicant’s compliance history raises any issues regarding its ability to comply with its permit, and the applicable compliance history classifications and ratings are not determinative. However, given the high ratings for both the MUD and the plant, OPIC finds that the Applicant’s compliance history would raise no issues regarding its ability to comply with the terms of its permit.

OPIC finds that the four conditions of § 26.028(d) have been met, and therefore, no right to hearing exists in this matter. For this reason, OPIC recommends that the hearing request be denied. If the Commission disagrees and finds there is a right to hearing on this application, OPIC provides the following analysis of the request.

B. Whether the requestor is an affected person

Dustin Lindsey submitted a hearing request that gave his address as Sunrise Church 5609 E Mount Houston Road in Houston. This location is more than thirty miles from Northwest Freeway MUD’s Facility, and Mr. Lindsey gives no alternate address. Furthermore, Mr. Lindsey does not raise any general or

specific concerns about this permit renewal. His hearing request contains language indicating his interest in requesting a contested case hearing but offers no objection to the permit renewal nor any ways in which he might be particularly affected by the permit renewal.

Given Mr. Lindsey's lack of proximity to the Facility, in combination with his failure to detail how he might be affected in a way that is different from the general public, OPIC must find that he lacks a personal justiciable interest in this matter. Without a personal justiciable interest, Mr. Lindsey cannot qualify as an affected person.

C. Which issues raised in the hearing request are disputed

No issues were raised in the hearing request, therefore, no issues are disputed.

D. Whether the dispute involves questions of fact or of law

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements. Dustin Lindsey raised no issues of fact.

E. Whether the issues were raised during the public comment period

No issues were raised during the public comment period.

F. Whether the hearing request is based on issues raised solely in a withdrawn public comment

No public comments were withdrawn in this matter, therefore, the hearing request is not based on issues raised in withdrawn public comments.

G. Whether the issues are relevant and material to the decision on the application

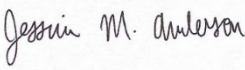
The hearing request does not raise any issues that are relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4)(B) and 55.211(c)(2)(A)(ii).

IV. CONCLUSION

Having found that, as a matter of law, no right to hearing exists in this case, OPIC respectfully recommends the Commission deny the hearing request. If the Commission finds that a right to hearing exists, Dustin Lindsey would not qualify as an affected person, and no relevant and material issues were raised in his hearing request.

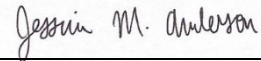
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2023, the original of the Office of Public Interest Counsel's Response to Request for Hearing was filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.



Jessica M. Anderson

**MAILING LIST
NORTHWEST FREEWAY MUD
TCEQ DOCKET NO. 2023-0853-MWD**

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REQUESTER(S):

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