

TCEQ DOCKET NO. 2023-1557-MWD

**APPLICATION BY VENETIAN 141
SWISHER, LLC FOR NEW TPDES
PERMIT WQ0016165001**

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**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

**APPLICANT VENETIAN 141 SWISHER, LLC'S
RESPONSE TO HEARING REQUESTS**

Venetian 141 Swisher, LLC LLC (“*Venetian*”) files this response to the Requests for Contested Case Hearing (the “*Hearing Requests*”) submitted on Venetian’s Application for Texas Pollutant Discharge Elimination System (“*TPDES*”) Permit No. WQ0016165001 (“*Application*”). In accordance with applicable legal standards, Venetian respectfully requests that the Commissioners of the Texas Commission on Environmental Quality (“*TCEQ*”) deny the only Hearing Request which was submitted by the North Texas Municipal Water District (“*NTMWD*”).

I. FACTUAL AND PROCEDURAL BACKGROUND.¹

An affiliate of Venetian has acquired approximately 125 acres generally located directly southwest of the City of Weston, Texas for purposes of development as a residential community (“*Development*”). None of the property within the 125 acres is currently receiving wastewater service, although the entirety of the 125 acres is located within the City of Weston’s sewer Certificate of Convenience and Necessity (“*CCN*”) No. 20999 issued by the Public Utility Commission of Texas (“*PUC*”).

As part of the Development project, Venetian submitted the Application for new TPDES Permit No. WQ0016165001, which was received by TCEQ on May 9, 2022, to authorize the discharge of treated wastewater at a volume not to exceed a daily average flow of 200,000 gallons per day to an unnamed tributary and into a Soil Conservation Service reservoir, and then via an

¹ The background relating to historic procedural steps is largely duplicative of the information in the TCEQ Commissioners’ Integrated Database and in the ED’s Response to Public Comment (“*RTC*”).

unnamed tributary to Honey Creek, and then to the East Fork Trinity River above Lake Lavon. TCEQ Executive Director (“*ED*”) staff completed the administrative review on August 25, 2022. The Notice of Receipt of Application and Intent to Obtain Water Quality Permit was published on August 28, 2022. The Notice of Application and Preliminary Decision of the ED was mailed on December 16, 2022 and published on January 6, 2023. The comment period ended on February 6, 2023, and the only comments received by the deadline were from three individuals, from the Collin County Soil & Water Conservation District, and from NTMWD. The ED’s Response to Public Comment (“*RTC*”) and ED’s Final Decision Letter was mailed on July 14, 2023, and the deadline for the Hearing Requests was August 14, 2023. The only Hearing Request received was from NTMWD dated January 13, 2023 (“*NTMWD Hearing Request Letter*”).

The Application was administratively complete on or after September 1, 2015. Therefore, it is subject to the procedural requirements adopted pursuant to House Bill 801, 76th Legislature, 1999, and Senate Bill 709, 84th Legislature, 2015.

II. APPLICABLE LAW FOR HEARING REQUESTS²

NTMWD’s Hearing Request can only be granted if several specific administrative, procedural and substantive requirements are met.

First, NTMWD’s Hearing Request must be in writing, must be timely filed no later than 30 days after mailing of the ED’s decision and RTC, may not be based on an issue raised in a public comment that was withdrawn, and must be based on the requestor’s own timely comments.³

² Hearing Requests and Commission decisions regarding Hearing Requests for the Application in this case are governed primarily by statutory provisions in TEX. GOV’T CODE § 2003.047 and TEX. WATER CODE §§ 5.115 and 5.556 which are implemented by various provisions in 30 TEX. ADMIN. CODE, CHAPTER 50, SUBCHAPTER F and CHAPTER 55, SUBCHAPTER F. In the interest of efficiency and since TCEQ’s rules comprehensively encompass all relevant statutory provisions, and because various provisions of such TCEQ’s rules overlap and are duplicative but consistent, every citation herein does not include every applicable TCEQ rule is not cited in every circumstance.

³ See 30 TEX. ADMIN. CODE § 55.201(c).

Second, NTMWD's Hearing Request must substantially comply with the following specific requirements:

- (1) Give the name, address, daytime telephone number, and, where possible, fax number of NTMWD;
- (2) Identify NTMWD's purported personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language NTMWD's location and distance relative to the proposed wastewater treatment facility and how and why NTMWD believes NTMWD will be adversely affected by the wastewater treatment facility in a manner not common to members of the general public;
- (3) Request a contested case hearing; and
- (4) For applications filed :
...
(B) On or after September 1, 2015, list all relevant and material disputed issues of fact that were raised by NTMWD 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, NTMWD should, to the extent possible, specify any of the executive director's responses to the requestor's comments that NTMWD 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.⁴

Third, the Commissioners may not grant NTMWD's Hearing Request unless the Commissioners first determine NTMWD is an "affected person".⁵ An "affected person" is:

[O]ne 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."⁶

NTMWD may be an affected person as a local government if NTMWD has authority under state law over issues raised by the Application.⁷ In determining whether NTMWD is an affected person, the Commissioners must consider the following factors:

- (1) Whether NTMWD's interest claimed is one protected by the law under which the Application will be considered;

⁴ *Id.* § 55.201(d).

⁵ *Id.* §§ 55.201(b), 55.211(c)(2). (The Commission, the ED or an applicant may also request a contested case hearing).

⁶ *Id.* § 55.203(a).

⁷ *Id.* § 55.203(b).

- (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 wastewater treatment plant on the health and safety of NTMWD, and on the use of property of NTMWD;
- (5) Likely impact of the regulated activity on use of the impacted natural resource by NTMWD;
- (6) Whether NTMWD timely submitted comments on the Application that were not withdrawn; and
- (7) NTMWD's statutory authority over or interest in the issues relevant to the Application.⁸

In addition, the Commissioners may consider the following additional factors in determining whether NTMWD is an affected person:

- (1) The merits of the underlying Application and supporting documentation in the commission's administrative record, including whether the Application meets the requirements for permit issuance;
- (2) The analysis and opinions of the ED; and
- (3) Any other expert reports, affidavits, opinions, or data submitted by the ED, the Venetian, or NTMWD.⁹

The burden to show that NTMWD is an affected person lies entirely with NTMWD.¹⁰

Based on the foregoing, then, NTMWD must carry the burden to demonstrate that NTMWD has “statutory authority over or interest in the issues relevant to the Application”¹¹ or that NTMWD has another personal justiciable interest that is not common to members of the general public.¹² NTMWD must present evidence and demonstrate facts to meet its burden. However, NTMWD cannot meet its burden if its alleged personal justiciable interests are “couched in terms of

⁸ *Id.* § 55.203(c).

⁹ *Id.* § 55.203(d).

¹⁰ *See Tex. Comm'n on Env't'l Quality v. City of Aledo*, 2015 Tex.App. LEXIS 6940 at *12 (Tex. App.—Austin July 8, 2015, no pet.) (explaining that if no showing is made on any one or more of the factors in 30 TEX. ADMIN. CODE § 55.203, “there is nothing in the statutes or rules placing the burden on the Commission or [Administrative Law Judge] draw out from the person such information.”).

¹¹ *See* 30 TEX. ADMIN. CODE § 55.203(a) and (c)(7) (emphasis added).

¹² *Id.* § 55.203(a) (emphasis added).

potentialities or events that “*may*” happen” are “*mere speculation, and as such, it falls short of establishing a justiciable interest and standing.*”¹³

[To] have such an interest, the complainant must show that a concrete, particularized, actual or imminent injury faces him due to the decision; a *hypothetical or speculative injury is not enough.*”¹⁴

Further, the Texas Third Court of Appeals has determined that it is reasonable to conclude that hearing requesters are not affected persons if the proposed “*activity will have minimal effect on their health, safety use of property, and use of natural resources.*”¹⁵ As explained below, NTMWD has not met its burden.

Fourth, *only if* the Commissioners determine NTMWD is an affected person can issues be referred to the State Office of Administrative Hearings (“*SOAH*”) for a contested case hearing. The only issues that can be referred are issues which involve a disputed question of fact or a mixed question of law or fact raised by NTMWD during the public comment that was not withdrawn, and only if the issue is relevant and material to the decision on the application.¹⁶

III. RESPONSE TO NTMWD’S HEARING REQUEST

NTMWD’s Hearing Request should be denied. But if it is granted, there are is only one issue which should be referred to SOAH for a contested case hearing.

¹³ *Texas Disposal Systems Landfill, Inc. v. Texas Comm’n on Env’tl. Quality*, 259 S.W.3d 361, 363-64 (Tex.App.—Amarillo 2008, no pet.) (emphasis added).

¹⁴ *Id.* at 363 (emphasis added).

¹⁵ *See Tex. Comm’n on Env’tl. Quality v. Sierra Club*, 455 S.W.3d 228, 240 (Tex. App. – Austin 2014) (emphasis added).

¹⁶ *See* 30 TEX. ADMIN. CODE §§ 50.115(c) and (f)-(g), 55.211(c)(2)(A)(ii). Although 30 TEX. ADMIN. CODE § 55.211(d) allows the Commissioners to refer an application to SOAH if the Commissioners determine it would be in the public interest to do so, the administrative record does not indicate that there is such a public interest regarding the Application in this case.

A. The NTMWD’s Hearing Requests Should be Denied Based on NTMWD’s Inability to Demonstrate that NTMWD is an Affected Person

The only support NTMWD offers for the assertion that NTMWD is an affected person is based on NTMWD’s status as “the TCEQ-designated regional entity to collect, transport, treat, and discharge wastewater within the Regional Area.”¹⁷

However, NTMWD does not have a sewer CCN covering any of the 125 acres within the Development which would be served by Venetian’s TPDES Permit No. WQ0016165001. Thus, NTMWD does not have statutory right or obligation to provide retail wastewater service per Chapter 13 of the Texas Water Code or PUC’s rules in 16 Tex. Admin. Code, Chapter 24 which govern CCNs.¹⁸

Further, although TCEQ does not have express rules relating to regionalization pursuant to Tex. Water Code § 26.081, other than in 30 Tex. Admin. Code, Chapter 351, which primarily designates regional providers in seven discreet areas of the State of Texas, TCEQ has provided guidance regarding its regionalization policy prominently on its website.¹⁹ Even if NTMWD is a regional wastewater provider, nothing in the applicable statutes, in TCEQ rules, or in TCEQ’s published regionalization policies suggests NTMWD has a monopoly right to provide wastewater service. Although NTMWD claims to have a “statutory right, privilege, and economic interest” to provide wastewater services to the 125 acres within the Development as a regional wastewater

¹⁷ NTMWD Hearing Request letter, at 3, citing TEX. WATER CODE §§ 26.003, 26.081-087, 30 TEX. ADMIN. CODE § 351.35.

¹⁸ An owner of more than 25 acres in certain counties, which includes Collin County in which the 125 acres within the Development is located, has a statutory right to remove on an expedited basis the property from a CCN held by another person or entity, pursuant to TEX. WATER CODE § 13.2541 and the PUC’s rules at 16 TEX. ADMIN. CODE § 24.245(h). Thus, the 125 acres can be removed at any time from the City of Weston’s sewer CCN at the option of the landowner. Further, the territory of Collin County Municipal Utility District No. 8 which has a pending TCEQ Registration Permit No. D06222022050 and is registered with TCEQ per RN111523643 CN606031946 encompasses all or almost all of the 125 acres within the Development, and does not need a CCN to provide retail water utility service.

¹⁹ See <https://www.tceq.texas.gov/permitting/wastewater/tceq-regionalization-for-wastewater>, last visited on November 20, 2023.

provider, TCEQ has determined recently that: (i) the policy in Tex. Water Code § 26.003 to “encourage and promote” regional wastewater systems is permissive, (ii) NTMWD has a duty to provide regional wastewater collection and treatment service *if ordered to do so* by TCEQ, and (iii) TCEQ has *no duty to require service* by a regional entity in all circumstances.²⁰ Thus, without a present legal right to force wastewater service on the 125 acres within the Development, NTMWD cannot presently establish a personal justiciable interest in the Application.

B. Only One Issue Would Be Eligible for Referral to SOAH if NTMWD were an Affected Person

The Commission may only refer to SOAH relevant and material disputed issues of fact or mixed questions of law which were raised by NTMWD if NTMWD is an affected person (which the NTMWD is not).²¹ Thus, if the Commissioners determine that NTMWD is an affected person, the only appropriately referable issue raised by NTMWD is as follows: Whether the Commission should deny or alter the terms and conditions of the Draft Permit based on consideration of need under Tex. Water Code § 26.0282 and the general policy to promote regional or area-wide systems under Tex. Water Code § 26.081.

Although NTMWD also suggested that the issue of “Whether the Application meets the requirements in 30 Texas Administrative Code Chapters 21, 39, 281 and 305” should be referred to SOAH, this issue is not referable. Tex. Gov’t. Code § 2003.047(e-1) expressly provides that in order for an issue to be referable, it must “be detailed and complete” and must have been raised during the comment period (*i.e.*, not explained for the first time in a hearing requester’s reply to responses to the hearing request). In addition, per TCEQ’s rules at 30 Tex. Admin. Code

²⁰ *Application by Restore the Grasslands, LLC and Harrington/Turner Enterprises, LP for New Texas Pollution Discharge Elimination System Permit No. WQ0016003001*, TCEQ Docket No. 2022-0326-MWD, SOAH Docket No. 582-22-002586, TCEQ Commission Order, COL. 18.c., 21.a., and 21.b. ((August 24, 2023).

²¹ See 30 TEX. ADMIN. CODE §§ 50.115(c) and (f)-(g), 55.211(c)(2)(A)(ii).

§ 55.115(g), only an issue that is “detailed and complete” can be referred to SOAH. There is nothing remotely detailed and complete enough in NTMWD’s generalized references to TCEQ’s rules to formulate an issue for referral to SOAH, and NTMWD has provided no detailed or complete insights into what it means by its passing references to TCEQ’s rules. Thus, since NTMWD has offered nothing in its comments to explain any detailed or complete issues by only referring to TCEQ’s rules, NTMWD cannot provide for the first time a detailed and complete explanation in its reply to responses to hearing requests.

IV. CONCLUSION AND PRAYER

For the foregoing reasons, Venetian respectfully requests that the Commission deny NTMWD’s Hearing Requests, adopt the ED’s RTC, approve the Application, and issue TPDES Permit No. WQ0016165001.

Alternatively, in the event the Commission determines that NTMWD is an affected person, Venetian respectfully requests that only the following issues be referred to SOAH: Whether the Commission should deny or alter the terms and conditions of the Draft Permit based on consideration of need under Tex. Water Code § 26.0282, and the general policy to promote regional or area-wide systems under Tex. Water Code § 26.081.

Venetian further respectfully requests that if the Application is referred to SOAH, that the Commissioners direct SOAH to issue a proposal for decision by the 180th day after the first day of the preliminary hearing.²²

²² See 30 TEX. ADMIN. CODE §50.115(d)(2).

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Venetian 141 Swisher, LLC's foregoing Response to Hearing Requests has been forwarded via electronic mail or U.S. Mail to the persons on the mailing list attached hereto, on November 20, 2023. Such mailing list is substantially the same mailing list utilized by the Chief Clerk of the Texas Commission on Environmental Quality in the November 8, 2023 letter in this docket.

By:



Derek Seal

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