

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*

November 20, 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: **IN THE MATTER OF THE APPLICATION BY VENETIAN 141  
SWISHER, LLC FOR TPDES PERMIT NO. WQ0016165001  
TCEQ DOCKET NO. 2023-1557-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 "Jennifer Jamison".

Jennifer A. Jamison, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

DOCKET NO. 2023-1557-MWD

APPLICATION BY VENETIAN  
141 SWISHER, LLC, FOR TPDES  
PERMIT NO. WQ0016165001

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BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL  
QUALITY

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 in the above-captioned matter and respectfully submits the following.

**I. INTRODUCTION**

**A. Summary of Position**

Before the Commission is an application by Venetian 141 Swisher, LLC for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0016165001. The Commission received timely comments and a request for a contested case hearing from Attorney Lauren J. Kalisek on behalf of North Texas Municipal Water District (NTMWD). For the reasons stated herein, OPIC respectfully recommends the Commission find that NTMWD is an affected person in this matter and grant its pending hearing request.

**B. Background of Facility**

Venetian 141 Swisher, LLC, (Venetian) applied to the TCEQ for new TPDES Permit No. WQ0016165001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 200,000 gallons per day. If

issued, this permit would serve a residential development located approximately 0.52 miles southwest of the intersection of FM Road 455 and North Main Street in zip code 75097. The proposed plant site would be located approximately 0.5 miles southwest of the intersection of West FM Road 455 and North FM Road 543, in Collin County. The Weston 125A Wastewater Treatment Facility would be an activated sludge process plant operated in the single stage nitrification conventional aeration mode. Treatment units would include a bar screen, an on-site lift station, two aeration basins, a final clarifier, four sludge digesters, and a chlorine contact chamber.

The effluent limitations in the draft permit, based on a 30-day average, are 10 mg/l (milligrams per liter) five-day carbonaceous biochemical oxygen demand, 15 mg/l total suspended solids, 3 mg/l ammonia-nitrogen, 126 colony-forming units or most probable number of E. coli per 100 ml, and 4.0 mg/l minimum dissolved oxygen. According to the draft permit, the effluent would contain a total chlorine residual of at least 1.0 mg/l and must not exceed a total chlorine residual of 4.0 mg/l after a detention time of at least 20 minutes based on peak flow.

If authorized, the treated effluent would be discharged to an unnamed tributary of Honey Creek, then to Soil Conservation Service (SCS) Site 8f Reservoir, then to an unnamed tributary of Honey Creek, then to Honey Creek, then to the East Fork of the Trinity River above Lake Lavon in Segment No. 0821 of the Trinity River Basin. The unclassified receiving water uses are limited aquatic life use for the unnamed tributary of Honey Creek (above SCS reservoir)

and SCS Site 8f Reservoir, minimal aquatic life use for the unnamed tributary of Honey Creek (below SCS reservoir), and intermediate aquatic life use for Honey Creek. The designated uses for Segment No. 0821 are primary contact recreation, public water supply, and high aquatic life use.

### **C. Procedural Background**

The permit application for a new TPDES permit was received on May 9, 2022, and declared administratively complete on August 25, 2022. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published in the *Dallas Morning News* on August 28, 2022. The Executive Director's (ED) staff completed technical review of the application on November 23, 2022, and prepared a draft permit. The Notice of Application and Preliminary Decision (NAPD) for a Water Quality Permit was published in the *Dallas Morning News* on January 6, 2023. The public comment period ended on February 6, 2023. The Chief Clerk mailed the ED's Decision and Response to Comments (RTC) on July 14, 2023, and the deadline for filing requests for a contested case hearing was August 14, 2023.

## **II. APPLICABLE LAW**

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 TAC § 55.201(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.

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. As provided by § 55.203(b), governmental entities, including local governments and public agencies, with authority under state law over issues raised by the application may

be considered affected persons. 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.

Under 30 TAC § 55.211(c)(2)(A)(ii), for an application filed on or after September 1, 2015, the Commission shall 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. DISCUSSION**

#### **A. Determination of Affected Person Status**

NTMWD timely filed its hearing request on January 13, 2023. In its request, NTMWD states that it is a conservation and reclamation district under Article XVI, Section 59 of the Texas Constitution that was created to serve regional water and wastewater needs in the area north and east of Dallas. The request further represents that NTMWD provides wastewater service to this area from fourteen NTMWD-owned or operated wastewater treatment plants (WWTP). NTMWD states that it has expended significant resources to develop its regionalization agreement with the City of Anna, and that proposed collection lines from the City of Anna will be available to serve the Applicant's proposed service area. NTMWD included in its request an attached map detailing the location of proposed collection lines within three miles of Applicant's proposed WWTP. In addition,

the request states that NTMWD's primary concern is that, if approved, activities authorized by this permit would interfere with NTMWD's statutory right, privilege, and economic interest as the TCEQ-designated regional entity to collect, transport, treat, and discharge wastewater within the regional area.

Given the relevance of NTMWD's stated concerns and its governmental authority as a conservation and reclamation district, OPIC finds that NTMWD is a governmental entity with statutory authority over its stated issues of concern and, therefore, an affected person pursuant to 30 TAC § 55.203(b) and (c)(7).<sup>1</sup> OPIC finds that information in the request detailing the location of proposed collection lines, in addition to existing agreements between NTMWD and the City of Anna, sufficiently demonstrates the foreseeability of the proposed system for the purpose of establishing a personal justiciable interest. Accordingly, given the relevance of requestor's concerns, and the proximity of NTMWD's proposed collection system to the proposed WWTP, OPIC finds that NTMWD has a unique interest related to a legal right, duty, privilege, power, or economic interest affected by the application that is not common to the general public. NTMWD's stated ability and willingness to provide wastewater treatment service is reasonably related to its concerns about the application, including the application's potential conflicts with the state's policies on regionalization and need. For these reasons, OPIC finds that NTMWD is a governmental entity with

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<sup>1</sup> Further, per Texas Water Code § 26.083(c), the Commission may consider existing or proposed systems then capable or which in the reasonably foreseeable future will be capable of serving the waste collection, treatment, or disposal needs of all or part of the area.

statutory authority over its stated issues of concern and, therefore, an affected person pursuant to 30 TAC § 55.203(b) and (c)(7).

**B. Which issues raised in the hearing request are disputed**

NTMWD raised the following issues:

1. Whether issuance of the draft permit is contrary to the state's regionalization policy or Texas Water Code § 26.0282; and
2. Whether the Commission should deny or alter the terms and conditions of the draft permit based on the consideration of need under Texas Water Code § 26.0282.

**C. 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. All issues raised by NTMWD are issues of fact.

**D. Whether the issues were raised during the public comment period**

Issues 1-2 in Section III. B were specifically raised by NTMWD during the public comment period.

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

All issues are based on timely public comments period that have not been withdrawn.

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

The hearing request raises 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). To refer an issue to the State Office of Administrative Hearings

(SOAH), the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny the permit. Relevant and material issues are those governed by the substantive law under which the permit is to be issued. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-51 (1986).

*Regionalization and Need*

Under Texas Water Code § 26.081(a), it is “state policy to encourage and promote the development and use of regional and area-wide waste collection, treatment, and disposal systems ... to prevent pollution and maintain and enhance the quality of the water in the state.” The Texas Water Code further states:

In considering the issuance ... of a permit to discharge waste, the commission may deny or alter the terms of the proposed permit ... based on consideration of need, including the expected volume and quality of the influent and the availability of existing or proposed areawide or regional waste collection, treatment, and disposal systems not designated as such by commission order....

TWC § 26.0282. Therefore, Issues No. 1-2 regarding regionalization and need are relevant and material to the Commission's decision on the Application and are appropriate for referral to SOAH.

**G. Maximum expected duration for the contested case hearing**

Commission rule 30 TAC § 50.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that, for applications filed on or after September 1, 2015, the administrative law judge must conclude the hearing and provide a

proposal for decision by the 180th day after the first day of the preliminary hearing, or a date specified by the Commission, whichever is earlier. 30 TAC § 50.115(d)(2). To assist the Commission in setting a date by which the judge is expected to issue a proposal for decision, and as required by 30 TAC § 55.209(e)(7), OPIC estimates that the maximum expected duration of a hearing on this Application would be 180 days from the first date of the preliminary hearing until the proposal for decision is issued.

#### IV. CONCLUSION

Having found that NTMWD qualifies as an affected person in this matter, OPIC respectfully recommends the Commission grant its hearing request and refer Issue Nos. 1-2 specified in Section III. B. for a contested case hearing at SOAH with a maximum duration of 180 days.

Respectfully submitted,

Garrett T. Arthur  
Public Interest Counsel

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 20, 2023 the original of the Office of Public Interest Counsel's Response to Hearing Requests was filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.

  
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Jennifer Jamison

**MAILING LIST**  
**VENETIAN 141 SWISHER, LLC**  
**TCEQ DOCKET NO. 2023-1557-MWD**

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