

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



Garrett T. Arthur, *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 12, 2024

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 THE CITY OF MARBLE
FALLS FOR NEW TLAP PERMIT NO. WQ0016234001
TCEQ DOCKET NO. 2023-1593-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 dark ink that reads "Jessica M. Anderson".

Jessica M. Anderson, Attorney
Assistant Public Interest Counsel

cc: Mailing List

DOCKET NO. 2023-1593-MWD

**APPLICATION BY THE CITY
OF MARBLE FALLS FOR NEW
TLAP PERMIT NO.
WQ0016234001**

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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 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 the City of Marble Falls (Marble Falls or Applicant) for new Texas Land Application Permit (TLAP) No. WQ0016234001. The Commission received a hearing request from Will Fowler, III, on behalf of the Fowler family. For the reasons stated herein, OPIC respectfully recommends the Commission find that Mr. Fowler is an affected person, and further recommends that the Commission grant his hearing request.

B. Description of Application and Facility

Marble Falls applied for a new TLAP permit to authorize the proposed facility for disposal of treated domestic wastewater at a daily average flow limit of 1.5, 2.0, 3.0, and 4.0 million gallons per day (MGD) via surface irrigation of 360

acres of non-public access agricultural land in the Interim I, II, III, and Final phases, respectively. No discharge of pollutants into water in the state is authorized by the proposed permit.

The proposed facility will be an aerobic granular sludge wastewater treatment system (AGS) plant with treatments units in the first three phases including one bar screen, four aeration basins, one final clarifier, one sludge digester, and one chlorine contact chamber. Treatment units in the final phase will include two fine screens, a manual bar screen, two vortex grit removal systems, four AGS basins, two effluent filter units, a chlorine contact basin, two sludge buffer basins, and an aerated sludge storage tank.

In all phases, the facility will include two storage ponds with a total surface area of 16 acres and a total capacity of 220 acre-feet for storage of treated effluent prior to irrigation. The rate of wastewater application to the irrigated land must not exceed 4.74 acre-feet per year per acre irrigated. The irrigated crops include Bermuda/rye grass.

The proposed permit includes Sludge Provisions according to the requirements of 30 Texas Administrative Code (TAC) Chapter 312, Sludge Use, Disposal, and Transportation. Sludge generated from the proposed facility is hauled by a registered transporter and disposed of at a TCEQ-permitted landfill (Micro Dirt Landfill, Permit No. 42016, in Caldwell County). The proposed permit also authorizes the disposal of sludge at a TCEQ-authorized land application site, co-disposal landfill, wastewater treatment facility, or facility that further

processes sludge. Additionally, the proposed permit authorizes the processing, distribution, and marketing of Class A or Class AB biosolids via composting.

The proposed facility will be located approximately one mile northwest of the intersection of FM 1431 and U.S. Highway 281, in Burnet County, within the drainage basin of Marble Falls Lake in Segment No. 1405 of the Colorado River Basin.

C. Procedural Background

Marble Falls' application was received on October 3, 2022, and declared administratively complete on November 8, 2022. The Notice of Receipt and Intent to Obtain a Water Quality Permit was published in *The Highlander* on November 15, 2022. The Executive Director (ED) completed the technical review on March 4, 2022. The Notice of Application and Preliminary Decision was published in *The Highlander* on May 19, 2023. The public comment period ended on June 20, 2023. The ED's Response to Comments (RTC) was mailed on September 6, 2023. The deadline for filing requests for a contested case hearing and requests for reconsideration of the ED's decision was October 6, 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 Texas Administrative Code (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.

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 the requestor is an affected person

Will Fowler, III, on behalf of the Fowler family, filed timely combined comments and a hearing request. According to the map produced by ED staff, the Fowler family has three properties in trust at the following distances from the facility treatment plant point: 0.37 miles, 0.46 miles, and 0.37 miles. In his hearing request, Mr. Fowler raised concerns about human health and the environment, water quality, recreation, wildlife, erosion and runoff, and property values.

The ED's map shows that three Fowler properties are within half a mile of the facility. Mr. Fowler's concerns about water quality, human health, and recreational use and enjoyment of property, when combined with his proximity to the facility, give Mr. Fowler a personal justiciable interest in this matter which is not common to the general public. Also, his concerns are interests protected by the law under which this application is considered, and a reasonable relationship exists between those interests and the regulation of the proposed

facility. Finally, the location of the Fowler properties increases the likelihood of impacts to health, safety, and use of property. Therefore, OPIC finds that Mr. Fowler qualifies as an affected person under 30 TAC § 55.203(a) and (c).

B. Which issues raised in the hearing request are disputed

The affected requestor raised the following disputed issues:

1. Whether the proposed facility will have adverse effects on human health and the environment.
2. Whether the proposed facility will have adverse effects on water quality.
3. Whether the proposed facility will have adverse effects on opportunities for recreation.
4. Whether the proposed facility will have adverse effects on wildlife.
5. Whether the proposed facility will increase erosion.
6. Whether the proposed facility will have adverse effects on property values.

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. The issues raised here are issues of fact.

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

Issues 1-6 in Section III.B. were specifically raised by the affected requestor during the public comment period.

E. 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.

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).

Human Health, Water Quality, Recreation, and Animal Life

The requestor raised concerns about adverse effects to water quality and the consequential impacts on human health, animal life, and the environment. The Commission is responsible for the protection of water quality under Texas Water Code (TWC) Chapter 26 and 30 TAC Chapters 307 and 309. The Texas Surface Water Quality Standards (Standards) in Chapter 307 require that the

proposed permit “maintain the quality of water in the state consistent with public health and enjoyment, propagation and protection of terrestrial and aquatic life, operation of existing industries, and ... economic development of the state....” 30 TAC § 307.1. According to § 307.6(b)(4) of the Standards, “Water in the state must be maintained to preclude adverse toxic effects on aquatic life, terrestrial life, livestock, or domestic animals, resulting from contact, consumption of aquatic organisms, consumption of water, or any combination of the three.” Additionally, “[s]urface waters must not be toxic to man from ingestion of water, consumption of aquatic organisms, or contact with the skin, or to terrestrial or aquatic life.” 30 TAC § 307.4(d). Finally, 30 TAC § 307.4(e) requires that nutrients from permitted discharges or other controllable sources shall not cause excessive growth of aquatic vegetation which impairs an existing, designated, presumed, or attainable use. As Chapter 307 designates criteria for the regulation of water quality, the protection of human health and safety, and the protection of animal life, Issues No. 1-4 are relevant and material to the Commission’s decision regarding this application.

Erosion

The requestor raised concerns regarding the likelihood that the proposed facility would cause an increase in erosion. With respect to erosion, under 30 TAC § 309.12, “[t]he Commission may not issue a permit for a new facility or for the substantial change of an existing facility unless it finds that the proposed

site, when evaluated in light of the proposed design, construction, or operational features, minimizes possible contamination of water in the state.” In making this determination under 30 TAC § 309.12(1), the Commission may consider active geologic processes and their impact on groundwater contamination. According to 30 TAC § 309.11(1), active geologic processes consist of any natural process which alters the surface and/or subsurface of the earth, including, but not limited to, erosion. Although Chapter 309 authorizes consideration of “active geological processes,” OPIC interprets these regulatory provisions as being limited to specific existing conditions associated with a proposed site location, rather than potential erosion. Therefore, OPIC finds that Issue No. 5 is not relevant and material to the Commission’s decision on this application.

Property Values

The requestor raised concerns regarding the proposed facility’s impact on property value. The TCEQ does not have jurisdiction under the Texas Water Code or its regulations to address or consider property values or the marketability of adjacent property in its determination of whether to issue a water quality permit. Accordingly, Issue No. 6 is not relevant or material to the Commission’s decision on this application.

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.

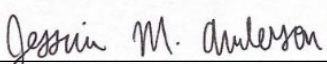
The rule further provides that, for applications filed on or after September 1, 2015, the administrative law judge must conclude the hearing and provide a proposal for decision by the 180th day after the first day of the preliminary hearing, or a date specified by the Commission, whichever is earlier. 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.

V. CONCLUSION

Having found that Will Fowler, III qualifies as an affected person in this matter, OPIC respectfully recommends the Commission grant his hearing request and refer Issues No. 1-4 specified in Section III.B. for a contested case hearing at SOAH with a maximum duration of 180 days.

Respectfully submitted,

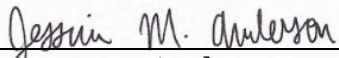
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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2024, 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
CITY OF MARBLE FALLS
TCEQ DOCKET NO. 2023-1593-MWD**

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