

TCEQ DOCKET NO. 2024-1720-MWD

APPLICATION BY § **BEFORE THE**
THE CLEAR UTILITIES LLC FOR § **TEXAS COMMISSION ON**
TPDES PERMIT NO. WQ0016360001 § **ENVIRONMENTAL QUALITY**

APPLICANT’S RESPONSE TO REQUESTS FOR HEARING AND REQUESTS FOR RECONSIDERATION

Clear Utilities, LLC (“Applicant”) files this Response to Requests for Hearing and Reconsideration pursuant to 30 Tex. Admin. Code § 55.209 and the Agenda Setting letter dated November 13, 2024, in the above-captioned matter.

I. INTRODUCTION

The Office of the Chief Clerk received requests for a contested case hearing from Shane Harman (“Mr. Harman”), Robert Martinez (“Mr. Martinez”), Roger McCrary (“Mr. McCrary”), Emily Harman (“Mrs. Harman”), Cynthia Weir (“Ms. Weir”), Sara and Chris Hightower (the “Hightower’s”), and Senator Mayes Middleton (“Senator Middleton”). The Office of the Chief Clerk also received requests for reconsideration filed by Shane McNamara (“Mr. McNamara”) and Melissa Jared (“Ms. Jared”).

For the reasons stated herein, Applicant asserts that the Commission should deny the hearing requests of Mr. Harman, Mr. Martinez, Mr. McCrary, Mrs. Harman, Ms. Weir, the Hightower’s and Senator Middleton. Furthermore, Applicant asserts that the Commission should deny the pending requests for reconsideration filed by Mr. McNamara and Ms. Jared.

II. PROCEDURAL BACKGROUND

On June 26, 2023, Applicant filed its application for new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0016360001 (“Application”), for authorization to discharge treated domestic wastewater from Applicant’s wastewater treatment facility, (the “Facility”), at a daily average flow not to exceed 75,000 gallons per day. The Facility will be

located approximately 0.49 miles northwest of the intersection of Cemetery Road and Country Side Street, in Galveston County, Texas 77517.

On August 9, 2023, the Texas Commission on Environmental Quality (the “Commission”) declared the Application administratively complete. The Applicant published the Notice of Receipt and Intent to Obtain a Water Quality Permit (“NORI”) in English in the *Galveston County Daily News* on August 22, 2023. After completing a technical review of the Application, on April 4, 2024, the Executive Director issued a preliminary decision in support of the permit application and prepared a draft permit. The Applicant published the combined NORI and Notice of Application and Preliminary Decision (NAPD) in English in the *Galveston County Daily News* on April 19, 2024, and in Spanish in *La Prensa De Houston* on April 28, 2024. On August 23, 2024, the Executive Director issued its Final Decision Letter in favor of the Application, finding that the Application met all statutory and regulatory requirements.

The public comment period ended on May 28, 2024. The deadline for filing requests for a contested case hearing and requests for reconsideration of the Executive Director’s decision was September 23, 2024. The Office of the Chief Clerk received hearing requests from Mr. Harman, Mr. Martinez, Mr. McCrary, Mrs. Harman, Ms. Weir, Mr. and Mrs. Hightower, and Senator Middleton, and requests for reconsideration from Mr. McNamara and Ms. Jared. As such, Applicant now files this response to requests for hearing and reconsideration on the Application.

III. REVIEW STANDARD

A. Requests for Hearing

For the Commission to grant a contested case hearing, the Commission must determine that a requestor is an affected person. 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.¹ An interest common to members of the general public does not qualify as a personal justiciable interest.²

In determining whether a person is an affected person, the Commission is to consider all factors, including, but not limited to, the following:

- (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; and
- (6) whether the requester timely submitted comments on the application which were not withdrawn.³

Further, a request for a contested case hearing by an affected person must be in writing and filed with the chief clerk within the time provided.⁴ The request must also 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;

¹ 30 TAC § 55.203(a)

² *Id.*

³ 30 TAC § 55.203(c).

⁴ 30 TAC 55.201(d).

- (2) identify the person's 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 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 facility or activity in a manner not common to members of the general public;
- (3) request a contested case hearing; and
- (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.⁵

B. Requests for Reconsideration

Any person may file a request for reconsideration of the Executive Director's decision under Title 30, TAC § 55.201(e). The request must be in writing and filed with the Chief Clerk no later than 30 days after the Chief Clerk mails the Executive Director's decision and Response to Comments ("RTC"). The request must expressly state that the person is requesting reconsideration of the Executive Director's decision and give reasons why the decision should be reconsidered.

IV. EVALUATION OF REQUESTS

The Commission received seven hearing requests on the Application, and two requests for reconsideration. Applicant has evaluated each request and recommends denial of each of the requests for the reasons set forth below.

A. Shane Harman

The request for hearing submitted by Mr. Harman falls short of meeting the requirements of 30 TAC § 55.201(d). Mr. Harman resides at 13924 Country Side Street, Santa Fe, Texas 77517.

⁵ *Id.*

While Mr. Harman resides in the general area of the Facility, Mr. Harman did not provide a written statement explaining his location and distance relative to the Facility, nor how or why he believes he will be adversely affected by the Facility in a manner not common to members of the general public, as required by 30 TAC § 55.201(d).

Mr. Harman filed a hearing request solely on the basis that the NORI was not sent to adjacent property owners. However, the NORI was sent to all adjacent landowners as evidenced by the landowner map submitted with the Application. Mr. Harman's property is not located adjacent to the property boundaries of Applicant's Facility or one mile downstream from the proposed discharge point; therefore, Mr. Harman was not required to be on the mailing list for adjacent landowners entitled to receive a copy of the NORI by mail. Accordingly, the requests filed by Mr. Harman failed to identify any justiciable interest affected by the application.

Additionally, although Mr. Harman's hearing request was timely, Mr. Harman had not previously submitted comments on the Application. It is well understood that all hearing requests must be based on a requestor's timely submitted comments. The Agenda Setting letter in this matter notes that a valid request must "raise disputed issues of fact that are relevant and material to the commission's decision on the application which were *raised by you* [i.e., the requestor] *during the comment period.*" Here, Mr. Harman has not complied with this requirement. As previously noted, the public comment period ended on May 28, 2024. Mr. Harman did not timely submit comments by the May 28, 2024 deadline. In fact, he did not make his first appearance in this matter until September 23, 2024, with the filing of his request for a contested case hearing.

Because Mr. Harman did not file public comments by the May 28, 2024 deadline—or at all—his hearing request is not only untimely, but it also cannot be based on issues raised in previously submitted comments. Therefore, the hearing request submitted by Mr. Harman must

be denied.

Additionally, Mr. Harman's property is not located within one mile downstream of the discharge point. As such, it is unreasonable to expect that at such a distance he would be affected by the facility or the discharge in a manner that is not common to members of the general public. 30 TAC § 55.203(c)(2). The distance between Mr. Harman's property and the discharge point represents a significant disconnect between his interests as an individual and the regulated activity and, as such, he has not demonstrated that he has a personal justiciable interest in this matter. Therefore, the hearing request submitted by Mr. Harman must be denied.

B. Robert Martinez

Distance restrictions or other limitations imposed by law on the affected interest argue against granting Mr. Martinez standing pursuant to 30 TAC § 55.203(c)(2). Mr. Martinez resides at 1100 Veronica Street, Santa Fe, Texas 77517. Historically, the Commission has considered people who own property adjacent to the facility or discharge route within a reasonable distance downstream from the discharge point to be affected persons. Mr. Martinez notes that his property is located on "the property line of the Eastside of the proposed planned community."⁶ However, being located on the property line of the eastside of the proposed development does not indicate the location of Mr. Martinez's property relative to the *Facility*, as required by 30 TAC § 55.201(d).

Because Mr. Harman's property is not located adjacent to the Facility or within a reasonable distance downstream of the discharge point, he fails to meet the TCEQ's commonly applied standard for determining affected person status; further, it is unreasonable to expect that at such a distance he would be affected by the facility or the discharge in a manner that is not common to

⁶ Hearing Requests of Robert Martinez, filed September 23, 2024 and May 15, 2024.

members of the general public. Therefore, because Mr. Martinez has not demonstrated that he has a personal justiciable interest in this matter, his request for hearing must be denied.

C. Emily Harman

The request for hearing submitted by Mrs. Harman should be denied, as it falls short of meeting the requirements of 30 TAC § 55.201(d). Mrs. Harman resides at 13924 Country Side Street, Santa Fe, Texas 77517. Although Mrs. Harman resides in the area of the proposed Facility, her hearing request fails to raise a personal justiciable interest and lacks demonstration of any likelihood that she would be affected by the Application due to her proximity to the Applicant's facility in a way not common to members of the general public. Rather, Mrs. Harman's hearing request raises concerns that the Applicant is "using a retention pond as their holding pond[,]" which she claims is "totally irresponsible and would be a disaster waiting to happen."⁷ Additionally, she raises concerns of flooding and notes that "[m]any high density neighborhoods are just downstream of this proposed site and would be at risk of contamination from a poorly vetted treatment plant."⁸ However, Mrs. Harman never addresses whether she is a resident of one of the supposed "at-risk" neighborhoods, or whether she will be impacted by the potential contamination she is concerned about.

Accordingly, because Mrs. Harman's hearing request fails to state the reason why she believes she will be adversely affected by the Facility in a manner not common to members of the general public, in accordance with 30 TAC § 55.201(d), her request should be denied.

D. Cynthia Weir

The hearing request filed by Ms. Weir on May 11, 2024, states in its entirety, "I am

⁷ Hearing Request of Emily Harman, filed May 28, 2024.

⁸ *Id.*

requesting a public hearing, this permit, effects [sic] my neighborhood, unfavorably.”⁹ Ms. Weir’s hearing request falls well short of meeting the requirements of 30 TAC 55.201(d). Ms. Weir does not provide her address; identify a justiciable interest affected by the Application; including a brief specific, written statement—let alone any statement—explaining in plain language the Ms. Weir’s location and distance relative to the Facility and how and why she believes she will be adversely affected by the facility or activity in a manner not common to members of the general public; nor list the relevant and material disputed issues of fact that are the basis of the hearing request.

Accordingly, Ms. Weir’s request for hearing should be denied as failing to comply with 30 TAC 55.201(d).

E. Sara and Chris Hightower

The Hightowers reside at 13816 Country Side Street, Santa Fe, Texas 77517. The Hightowers failed to identify in their request for hearing any issues or concerns suggesting that they would be affected by the facility or the discharge in a manner that is not common to members of the general public. The Hightower’s raise concerns about an increased risk in flooding due to the Facility’s close proximity to the bayou, as well as the potential risk of increased waste disposal and traffic in the community, all of which are nonjusticiable issues for which the Commission does not have jurisdiction under Chapter 26 of the Texas Water Code to address or consider.

However, The Hightower’s do not explain why they anticipate the proposed Facility will cause flooding or how this could impact their property, nor did they raise any correlation between the potential flooding and water quality. Likewise, the Hightower’s do not provide any explanation or support for their claim regarding the potential risk of increased waste disposal in the community.

⁹ Hearing Request of Cynthia Weir, filed May 11, 2024.

The Hightower’s request does not raise a personalized interest specific to them that can supply a basis for “affected person” status, but rather focuses on issues that are of general public concern. As such the Hightower’s request for hearing must be denied.

F. Senator Mayes Middleton

Senator Middleton is not entitled to a hearing on the Application because Senator Middleton is not an “affected person.” Senator Middleton filed a hearing request on behalf of the “affected individuals” within Senate District 11, on March 1, 2024. However, Senator Middleton did not name any of the individuals in which he is requesting the contested case hearing on behalf of, let alone identifying any particular and concrete injuries pertaining to the affected individuals. Further, Senator Middleton failed to state any grounds in support of granting Senator Middleton “affected person” status or granting his hearing request. Therefore, Senator Middleton’s hearing request should be denied.

G. Shane McNamara

Mr. McNamara’s request for reconsideration should be denied on grounds that he did not specify any of the Executive Director’s responses from the RTC that he disputes, nor did he give the reasoning behind such disputes in accordance with 30 TAC § 55.201(e). Mr. McNamara’s request for reconsideration was filed on May 28, 2024, prior to the end of the public comment period. Mr. McNamara requested that the Commission reconsider the Application due to concerns about the facility being in an area prone to flooding, however, he never addressed whether his concerns for flooding also involved concerns for water quality. The Executive Director addressed Mr. McNamara’s concerns in its RTC filed on August 19, 2024, noting that the “TCEQ does not

have jurisdiction to regulate flooding in the context of a wastewater discharge permit” without the flooding having an impact on water quality.¹⁰

To date, Mr. McNamara has not re-raised his request for reconsideration of the Executive Director’s decision following its filing of the RTC, let alone specified any of the Executive Director’s responses from the RTC that he disputes and why. As such, Mr. McNamara’s request for reconsideration fails to meet the requirements of 30 TAC § 55.201(e), and therefore, must be denied.

H. Melissa Jared

On May 28, 2024, Ms. Jared filed a request for reconsideration of the Application in this matter. The request for reconsideration filed by Ms. Jared was almost identical to the request for reconsideration filed by Mr. McNamara in this matter. Similar to Mr. McNamara’s request for reconsideration, Ms. Jared also filed her request prior to the end of the public comment period, and well in advance of the Executive Director filing its RTC. Ms. Jared requested that the Commission reconsider the Application due to concerns about the facility being in an area prone to flooding, however, she never addressed whether her concerns for flooding also involved concerns for water quality. The Executive Director addressed Ms. Jared’s concerns in its RTC filed on August 19, 2024, noting that the “TCEQ does not have jurisdiction to regulate flooding in the context of a wastewater discharge permit” without the flooding having an impact on water quality.¹¹

To date, Ms. Jared has not re-raised her request for reconsideration of the Executive Director’s decision following its filing of the RTC, let alone specified any of the Executive Director’s responses from the RTC that she disputes and why. As such, Ms. Jared’s request for

¹⁰ Executive Director’s Response to Public Comment, at 12.

¹¹ Executive Director’s Response to Public Comment, at 12.

reconsideration fails to meet the requirements of 30 TAC § 55.201(e), and therefore, must be denied.

V. CONCLUSION

For the reasons stated, the Applicant respectfully requests that the Commission take the following actions:

1. Applicant recommends the Commission deny requests for a contested case hearing filed by Mr. Harman, Mr. Martinez, Mr. McCrary, Mrs. Harman, Ms. Weir, the Hightower's and Senator Middleton.
2. Applicant recommends the Commission deny requests for reconsideration filed by Mr. McNamara and Ms. Jared.
3. If the Commission decides to refer this case to SOAH, then the Applicant recommends that the maximum duration of the hearing be 150 days.

Respectfully submitted,

Gregg Law PC

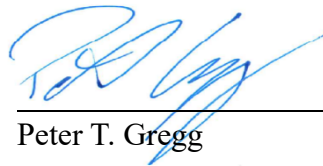


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ATTORNEY FOR APPLICANT

CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2024, a true and correct copy of the foregoing document has been served on all parties and their respective counsel of record in accordance with the Texas Rules of Civil Procedure.



Peter T. Gregg