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Garrett T. Arthur, *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

December 16, 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 LOWER VALLEY
WATER DISTRICT FOR TPDES PERMIT NO. WQ0016296001
TCEQ DOCKET NO. 2024-1811-MWD**

Dear Ms. Gharis:

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

Sincerely,

A handwritten signature in black ink that reads "Josiah Mercer".

Josiah T. Mercer, Attorney
Assistant Public Interest Counsel

cc: Mailing List

DOCKET NO. 2024-1811-MWD

APPLICATION BY LOWER VALLEY	§	BEFORE THE
WATER DISTRICT FOR TPDES	§	TEXAS COMMISSION ON
PERMIT NO. WQ0016296001	§	ENVIRONMENTAL QUALITY

**OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO REQUESTS 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 the hearing requests received in the above-captioned matter.

I. Introduction

A. Summary of Position

Before the Commission is the application of Lower Valley Water District for new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0016296001. The TCEQ Chief Clerk's office received a timely hearing request from an attorney—Vic McWherter—on behalf of the Fabens Take Charge Group, Magda Flores, Rosemaria Gallos-Avitia, Tom Housler, Maria Mendoza, Angel Ornelas, Rafael Ramirez, Ana Sanchez, and Eleuterio Sanchez & Maria Sanchez. As discussed herein, OPIC respectfully recommends that the Commission grant the hearing request of all requestors and refer this application for a 180-day hearing at the State Office of Administrative Hearings (SOAH) on Issue nos. 1-6 contained in §III.B.

B. Description of Application and Facility

On February 13, 2022, Lower Valley Water District (Applicant) applied to TCEQ for new TPDES Permit No. WQ0016296001 (Application) to authorize the discharge of treated domestic wastewater from the proposed Mesa Del Norte wastewater treatment plant (Facility) that would be located at 616 Northwest Camp Street, Fabens, in El Paso County. The Facility would be an activated sludge plant using sequencing aeration and continuous clarification. Treatment units in all phases would include a lift station, mechanical step screening, two aeration basins for nitrification, two aeration basins for denitrification, two final clarifiers, two surface filtration (disc filter) systems, two aerobic sludge digesters, and one ultraviolet disinfection channel.

The Application, if granted, would authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 0.3 million gallons per day (MGD) in the Interim Phase I, 0.6 MGD in the Interim Phase II, and 0.9 MGD in the Final Phase. The effluent would be discharged into San Felipe Arroyo, then to River Drain, then to Fabens Waste Channel, then to the Rio Grande Below Riverside Diversion Dam in Segment No. 2307 of the Rio Grande Basin. The designated uses for Segment No. 2307 are primary contact recreation, public water supply, and high aquatic life use. The Executive Director's staff has preliminarily determined that the effluent limits in the draft permit would maintain and protect the existing instream uses.

C. Procedural Background

TCEQ received the Application on February 13, 2022. On April 5, 2022, the Executive Director (ED) declared the Application administratively complete. The Notice of Receipt of Application and Intent to Obtain Water Quality Permit was published on June 9, 2023, in the *El Paso Times* in English and *El Diario de El Paso* in Spanish. The combined Notice of Application and Preliminary Decision and Notice of Public Meeting was published on December 7, 2023, in the *El Paso Times* in English and *El Diario de El Paso* in Spanish. The TCEQ's Office of the Chief Clerk held a public meeting for this Application on January 16, 2024, with the public comment period ending on that same day. The Chief Clerk mailed the ED's Decision and Response to Comments on September 27, 2024. The deadline for filing requests for a contested case hearing or requests for reconsideration was October 28, 2024.

II. Applicable Law

This Application was filed on or after September 1, 2015, and is therefore subject to the procedural rules adopted pursuant to Senate Bill 709.¹ Under Title 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.

¹ Tex. S.B. 709, 84th Leg., R.S. (2015).

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 person'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.²

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;

² 30 TAC § 55.201(d).

- (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.³

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.⁴

For applications filed on or after September 1, 2015, § 55.205(b) states that a hearing request by a group or association may not be granted unless all of the following requirements are met:

- (1) comments on the application are timely submitted by the group or association;
- (2) the request identifies, by name and physical address, one or more members of the group or association that would otherwise have standing to request a hearing in their own right;

³ 30 TAC § 55.203(c).

⁴ 30 TAC § 55.203(d).

(3) the interests the group or association seeks to protect are germane to the organization's purpose; and

(4) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

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 Requests

A. Whether the requestors are affected persons

Take Charge Group

The Office of the Chief Clerk received timely comments and hearing request from a group of citizens who call themselves the Fabens Take Charge Group or the Take Charge Group of Fabens (FTCG). Members of the group submitted extensive written and oral comments at the Public Meeting in this

matter, and a hearing request was submitted on behalf of the group by an attorney—Vic McWherter.⁵

In their hearing request, FTCTG claims to be a grassroots community group organized with the purpose of protecting environmental quality in the Fabens community through advocacy and community outreach. They raise concerns about the Facility's potential effect on water quality and the environment. The hearing request also identifies individual members of FTCTG who they claim would have standing to request a hearing in their own right—Magda Flores (0.38 miles), Rosamaria Gallo-Avita (0.15 miles), Thomas P. Housler (0.31 miles), Maria Medoza (0.18 miles), Angel Ornelas (0.34 miles), Rafael Ramirez (0.54 miles), Ana Sanchez (0.84 miles), and Eleuterio & Maria Sanchez (1.16 miles).⁶ All of these identified members submitted formal comments in an individual capacity and several submitted timely comments on behalf of FTCTG. Their comments and FTCTG's hearing request all share concerns about water quality, nuisance odors, and potential adverse effects to the local environment.

Because of their members' proximity to the proposed Facility—in addition to the relevance of their claimed issues—OPIC finds that FTCTG has properly identified individual members who would have standing to request a hearing in their own right as required by 30 TAC § 55.205(b)(2). Additionally, the interests that FTCTG seeks to protect are germane to their purpose as required by 30 TAC § 55.205(b)(3). Moreover, neither the claim asserted nor the relief requested

⁵ This request also included hearing requests on behalf of individual members of FTCTG. Those requests are discussed in the next section.

⁶ Distances come from the map prepared for Commissioners' Agenda by ED staff.

requires the participation of the individual members in the case.⁷ Therefore, because they have met all requirements for group standing—OPIC finds that FTCCG is an affected person.

Individual Requests

In the same document, Vic McWherter offered timely hearing requests on behalf of Magda Flores (0.38 miles), Rosamaria Gallo-Avitia (0.15 miles), Thomas P. Housler (0.31 miles), Maria Medoza (0.18 miles), Angel Ornelas (0.34 miles), Rafael Ramirez (0.54 miles), Ana Sanchez (0.84 miles), and Eleuterio & Maria Sanchez (1.16 miles).

All of these requestors made timely oral comments at the public meeting in their individual capacity—identifying that they live in proximity to the proposed Facility. Magda Flores raised concerns about the Applicant’s compliance history, odors, human health, and water quality. Rosamaria Gallo-Avitia did not raise any specific concerns in her oral comments—however, mailed in written comments raising concerns about odors and human health. Thomas Housler raised concerns about odors, human health, and the location of the Facility and discharge route in his oral comments. Maria Mendoza spoke about how worried she was about water quality, human health, and odors. Angel Ornelas commented on his concerns about odor and its potential to affect human health and the enjoyment of his property. Rafael Ramirez spoke about concerns he had with the location of the Facility and its potential to emit odors. Mr. Ramirez also submitted timely written comments with questions about buffer

⁷ 30 TAC § 55.205(b)(4).

zones and odors. Ana Sanchez submitted written comments and a USB drive in addition to her oral comments. She raised concerns about water quality, odor, buffer zones, and human health. Maria Sanchez made her oral comments in Spanish on behalf of her and her husband—raising concerns about water quality, human health, and odor.

All of these concerns are interests that are protected by the law under which this application is considered, and a reasonable relationship exists between those interests and regulation of the Facility.⁸ These requestors' proximity, in combination with their stated interests, demonstrates that they are more likely to be affected in a way not common to members of the general public—and thus possess personal justiciable interests in this matter.⁹ Therefore, OPIC finds that Magda Flores, Rosamaria Gallo-Avitia, Thomas P. Housler, Maria Medoza, Angel Ornelas, Rafael Ramirez, Ana Sanchez, and Eleuterio & Maria Sanchez qualify as affected persons.

B. Which Issues Raised in the Hearing Requests Are Disputed

The Requestors raised the following disputed issues in both hearing requests and timely public comment:

1. Whether the proposed Facility and draft permit comply with Texas Surface Water Quality Standards and are adequately protective of water quality;

(Raised by FTCTG, Magda Flores, Ana Sanchez, and Maria Sanchez.)

⁸ See 30 TAC § 55.203(c)(1) & (3).

⁹ See 30 TAC § 55.203(a).

2. Whether the Facility and draft permit are adequately protective of human health and local wildlife and vegetation;

(Raised by FTTCG, Magda Flores, Angel Ornelas, Rosamaria Gallo-Avitia, Thomas Housler, Ana Sanchez, and Maria Sanchez.)

3. Whether the draft permit contains sufficient provisions to prevent the creation of nuisance odor conditions;

(Raised by FTTCG, Magda Flores, Angel Ornelas, Rosamaria Gallo-Avitia, Thomas Housler, Rafael Ramirez, Ana Sanchez, and Maria Sanchez.)

4. Whether the proposed discharge route is properly characterized in the Application and will properly function as an operational feature of the Facility;

(Raised by FTTCG, Thomas Housler, and Rafael Ramirez.)

5. Whether the Application should be denied or modified based on the Applicant or operator's compliance history; and

(Raised by FTTCG and Magda Flores.)

6. Whether the Facility will comply with buffer zone requirements contained in 30 TAC, Chapter 309.

(Raised by FTTCG, Rafael Ramirez, and Ana Sanchez.)

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.¹⁰ The issues listed above are issues of fact.

D. Whether the Issues Were Raised During the Public Comment Period

All issues were specifically raised by requestors who qualify as affected persons during the public comment period.

¹⁰ 30 TAC § 55.211(c)(2)(A).

E. Whether the Hearing Requests are Based on Issues Raised Solely in a Withdrawn Public Comment

No public comments were withdrawn in this matter. Therefore, the hearing requests are not based on issues raised in withdrawn comments.

F. Whether the Issues are Relevant and Material to the Decision on the Application

The Requestors raise issues that are relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). To refer an issue to SOAH, the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit. The Commission can only consider issues within its jurisdiction. Therefore, relevant and material issues include those governed by the substantive law of the permit at issue.¹¹

Water Quality, Human Health, Wildlife, and Vegetation

The affected persons in this matter are concerned with adverse effects to water quality—including surface and well water—and its impacts on human health and local wildlife and vegetation. The Commission is responsible for the protection of water quality under Texas Water Code (TWC) Chapter 26 and 30 TAC Chapter 307. 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.”¹² According to § 307.6(b)(4) of the

¹¹ *Anderson v. Liberty Mutual, Inc.*, 477 U.S. 242, 248-51 (1986).

¹² 30 TAC § 307.1.

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.”¹³

Moreover, Section 309.10(b) states, “The purpose of this chapter is to condition issuance of a permit and/or approval of construction plans and specifications for new domestic wastewater treatment facilities...on selection of a site that minimizes possible contamination of ground and surface waters...”¹⁴ Therefore, Issue nos. 1 and 2 are relevant and material to the Commission’s decision regarding this Application and are appropriate for referral to SOAH.

Nuisance Conditions

The affected persons in this matter are concerned that the proposed Facility would cause nuisance odor conditions. Odor is specifically addressed by 30 TAC § 309.13(e), which requires that nuisance odor be abated and controlled. Further, § 307.4 delineates general criteria that surface waters must meet—in part to prevent nuisance conditions attributable to the proposed Facility. Finally, one of the purposes of Chapter 309 is “to minimize the possibility of exposing the public to nuisance conditions.”¹⁵ Therefore, Issue no. 3 is relevant and

¹³ 30 TAC § 307.4(d).

¹⁴ See also 30 TAC § 309.12.

¹⁵ 30 TAC § 309.10.

material to the Commission's decision regarding this Application and is appropriate for referral to SOAH.

Suitability of the Discharge Route

The affected persons in this matter are concerned that the proposed discharge route has been improperly characterized in the Application and would not function properly. This concern appears to be based on the suitability and functioning of the discharge route. They question whether the discharge route is accurately portrayed in the Application, and they are concerned that the discharge route would not be able to handle the proposed discharge. Proper functioning of a discharge route as an operational feature of a wastewater treatment plant may be addressed under 30 TAC § 309.12. Therefore, Issue no. 4 is relevant and material to the Commission's decision regarding this Application and is appropriate for referral to SOAH.

Compliance History

The affected persons in this matter are concerned that the relevant compliance histories have not been properly evaluated by the ED. Specifically, they maintain concerns that the Applicant's compliance history at other facilities suggests that this Facility would not be properly operated.

Pursuant to 30 TAC § 60.1(a)(1)(A), TCEQ is required to utilize an applicant's compliance history when making decisions regarding a permit.¹⁶ Further, the Commission is required to utilize compliance history for five years prior to the date the permit application is received by the ED, and specific

¹⁶ See also TWC § 5.754(e).

components must be included in this history.¹⁷ Additional rules regarding use of compliance history in making permitting decisions are found at 30 TAC § 60.3. Therefore, Issue no. 5 is relevant and material to the Commission's decision regarding this application and is appropriate for referral to SOAH.

Buffer Zones

The affected persons in this matter are concerned that the Facility does not meet applicable buffer zone requirements. TCEQ rules contain various buffer zone provisions related to water wells and prevention of nuisance odor.¹⁸ For example, according to 30 TAC § 309.13(c), a wastewater treatment plant unit may not be located closer than 500 feet from a public water well or 250 feet from a private water well. Therefore, Issue no. 6 is relevant and material to the Commission's decision regarding this application and is appropriate for referral to SOAH.

H. 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.¹⁹ To assist

¹⁷ 30 TAC §§ 60.1(b), (c).

¹⁸ *See generally* 30 TAC § 309.13.

¹⁹ 30 TAC § 50.115(d)(2).

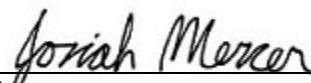
the Commission in setting a date by which the judge is expected to issue a proposal for decision, and as required by 30 TAC § 55.209(e)(7), OPIC estimates that the maximum expected duration of a hearing on this Application would be 180 days from the first date of the preliminary hearing until the proposal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

IV. Conclusion

For the reasons discussed above, OPIC finds that the Take Charge Group, Magda Flores, Rosamaria Gallo-Avitia, Thomas P. Housler, Maria Medoza, Angel Ornelas, Rafael Ramirez, Ana Sanchez, and Eleuterio & Maria Sanchez have demonstrated that they qualify as affected persons. Therefore, OPIC respectfully recommends that the Commission grant their hearing requests and refer Issue nos. 1-6 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

By: 
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CERTIFICATE OF SERVICE

I hereby certify that December 16, 2024, the Office of Public Interest Counsel's Response to Requests for Hearing and Requests for Reconsideration was filed with the Chief Clerk of the TCEQ and a copy was served on all persons listed on the attached mailing list via electronic mail, and/or by deposit in the U.S. Mail.



Josiah T. Mercer

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TCEQ DOCKET NO. 2024-1811-MWD**

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