

Jon Niermann, *Chairman*
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Toby Baker, *Executive Director*



Vic McWherter, *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

October 8, 2021

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: **CITY OF FORT WORTH**
TCEQ DOCKET NO. 2021-1211-MWD

Dear Ms. Gharis:

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

Sincerely,

A handwritten signature in black ink, appearing to read "Amanda D. Pesonen", with a long horizontal flourish extending to the right.

Amanda D. Pesonen
Assistant Public Interest Counsel

cc: Mailing List

DOCKET NO. 2021-1211-MWD

**APPLICATION BY CITY OF
FORT WORTH FOR TPDES
PERMIT NO. WQ0015668001**

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**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL
QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO
REQUESTS FOR HEARING AND REQUESTS FOR RECONSIDERATION**

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 Requests for Hearing and Requests for Reconsideration in the above-captioned matter and respectfully submits the following.

I. INTRODUCTION

A. Summary of Position

Before the Commission is the City of Fort Worth's (Applicant) application for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0015668001. The Commission received timely comments and requests for a contested case hearing from 53 individual requestors, four groups or associations, and the Tarrant Regional Water District (TRWD). TRWD also submitted two timely requests for reconsideration. For the reasons stated herein, OPIC recommends the Commission find TRWD, Kian Amos, Julie Hencke, and Mikeala Van Horn are affected persons in this matter and grant their hearing requests as detailed below. OPIC recommends denying all other hearing requests as well as TRWD's requests for reconsideration. However, due to the large volume of effluent proposed to be discharged in the application as well as the substantial public response generated by the application, OPIC also recommends granting a hearing because the public interest warrants doing so, as authorized by Texas Water Code (TWC) § 5.556(f). OPIC further acknowledges that a person whose request for a contested case hearing is

denied may still seek to be admitted as a party if any hearing request is granted on this application, in accordance with Title 30, Texas Administrative Code (TAC) § 55.211(e). *See also* 30 TAC § 80.109(a).

B. Background of Facility

On March 23, 2018, the Applicant applied to the TCEQ for new TPDES Permit No. WQ0015668001. If issued, this permit would authorize the disposal of treated domestic wastewater at the proposed City of Fort Worth Mary's Creek Water Reclamation Facility (Facility) at an annual average flow not to exceed 10 million gallons per day (MGD) in the Interim Phase and an annual average flow not to exceed 15 MGD in the Final Phase.

The Facility is proposed to be located at 11091 Chapin Road, in the City of Fort Worth, Tarrant County, Texas 76108. The treated effluent will be discharged to Mary's Creek, then to Clear Fork Trinity River below Benbrook Lake in Segment No. 0829 of the Trinity River Basin. The unclassified receiving water use is high aquatic life use for Mary's Creek. The designated uses for Segment No. 0829 are primary contact recreation, public water supply, and high aquatic life use.

The Facility, which has not yet been constructed, will be a membrane bioreactor plant utilizing an activated sludge process operated in the extended aeration mode. Treatment units in the Interim Phase will include three coarse screens, two grit chambers, an equalization basin, a peak flow storage basin, three rotary drum fine screens, four anaerobic zones, four anoxic zones, four aerobic zones, eight membrane basins, four aerated storage tanks, two sludge thickeners, two sludge holding tanks, three sludge dewatering presses, and an Ultraviolet light (UV) disinfection system. Treatment units in the Final Phase will include four coarse screens, three grit chambers, an equalization basin, a peak flow storage basin, four rotary drum fine screens, six anaerobic zones,

six anoxic zones, six aerobic zones, twelve membrane basins, six aerated storage tanks, three sludge thickeners, two sludge holding tanks, four sludge dewatering presses, and a UV disinfection system.

The effluent limitations in the Interim and Final Phases of the draft permit, based on a 30-day average, are 5 milligrams per liter (mg/l) five-day carbonaceous biochemical oxygen demand (BOD₅), 5 mg/l total suspended solids (TSS), 2.0 mg/l ammonia-nitrogen (NH₃-N), 0.2 mg/l total Phosphorus, 126 colony forming units (CFU) or most probable number (MPN) of *E. coli* per 100 milliliters, and 4.0 mg/l minimum dissolved oxygen (DO). The permittee shall utilize a UV system for disinfection purposes. An equivalent method of disinfection may be substituted only with prior approval of the Executive Director (ED).

C. Procedural Background

The TCEQ received the permit application on March 23, 2018, and declared it administratively complete on May 11, 2018. Applicant published the Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) in English in the *Star-Telegram* on June 9, 2018, and in Spanish in the *Star-Telegram* on June 15, 2018. Applicant published the combined NORI and Notice of Application and Preliminary Decision (NAPD) in English in the *Star-Telegram* on August 3, 2020, and in Spanish in *La Estrella* on April 4, 2020. A public meeting was held on October 5, 2020, and the public comment period for the application closed on that date. The Chief Clerk mailed the ED's Decision and Response to Comments (RTC) on July 23, 2021. The deadline for filing requests for a contested case hearing was August 23, 2021.

The Commission received timely comments and requests for a contested case hearing from 53 individual requestors, four groups or associations, and TRWD. The TRWD also submitted two requests for reconsideration. For the reasons stated herein, OPIC recommends denying TRWD's

requests for reconsideration but granting the hearing requests of TRWD, Kian Amos, Julie Hencke, and Mikeala Van Horn. Although OPIC recommends denying all other hearing requests, OPIC recommends granting a hearing because the public interest warrants doing so due to the large volume of effluent proposed to be discharged in the application as well as the substantial public response generated by the application. OPIC also notes that a person whose request for a contested case hearing is denied may still seek to be admitted as a party at the State Office of Administrative Hearings (SOAH) if any hearing request is granted on this application. 30 TAC § 55.211(e); *see* 30 TAC § 80.109(a).

II. APPLICABLE LAW

A. Requests for Reconsideration

Any person may file a request for reconsideration of the ED's decision under 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 ED's decision and RTC. The request must expressly state that the person is requesting reconsideration of the ED's decision and give reasons why the decision should be reconsidered.

B. Requests for Hearing

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. 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.

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) 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.

30 TAC § 55.205(b).

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. Requests for Reconsideration

TRWD timely submitted two requests for reconsideration asserting concerns that water quality and recreational impacts were not adequately evaluated during review of the application, as well as concerns that adequate notice and opportunities for review and comment were not provided to the public. As more fully discussed below, OPIC finds the issues raised in the requests are relevant and material to the decision on this application. However, an evidentiary record would be necessary for OPIC to make a recommendation to the Commission as to whether the ED's decision should be reconsidered. At this time, an evidentiary record does not exist, and therefore OPIC cannot recommend that the requests for reconsideration be granted.

B. Determination of Affected Person Status

The Commission received timely public comments and hearing requests from TRWD, several groups or associations, and many individual requestors.

Tarrant Regional Water District

TRWD filed three timely requests for a contested case hearing.¹ The requests generally raise issues related to water quality and antidegradation of receiving waters, including the adequacy of TCEQ's water quality and antidegradation analyses; protection of human health and safety; and due process and public participation. Each of these interests are protected by the law under which this application will be considered.

In accordance with 30 TAC § 55.203(c)(7), governmental entities may be affected persons based on their statutory authority over or interest in the issues relevant to the application. Article XVI, section 59, of the Texas Constitution states that “[t]he conservation and development of all of the natural resources of this State, ... including the control, storing, preservation and distribution of ... the waters of its rivers and streams ... are each and all hereby declared public rights and duties.” Tex. Const. art. XVI, § 59(a). In accordance with this declaration, the Legislature is authorized to create “conservation and reclamation districts..., which districts shall be governmental agencies and bodies politic and corporate with such powers of government and with the authority to exercise such rights, privileges and functions concerning the subject matter of this amendment....” *Id.* § 59(b). TRWD was created pursuant to this constitutional directive. *See Tarrant Appraisal Dist. v. Tarrant Reg'l Water Dist.*, 547 S.W.3d 917, 920 (Tex. App.—Fort Worth 2018, no pet.).

TRWD's enabling legislation was enacted in 1957 and amended in 2001 and 2005. *See* Act of May 9, 1957, 55th Leg., R.S., ch. 268, *amended by* Act of May 15, 2001, 77th Leg., R.S., ch. 433, *and* Act of May 28, 2005, 79th Leg., R.S., ch. 1363 (hereinafter, Enabling Act). TRWD's Enabling Act authorizes TRWD to make and to enforce reasonable rules that are necessary to

¹ TRWD's requests were submitted by Woody Frossard, James M. Oliver, and Fred B. Werkenthin, Jr.

accomplish TRWD's authorized purposes, including preserving “the sanitary condition of all ... water controlled by the district,” and regulating “all recreational ... privileges on any body or stream of water ... owned or controlled by the district.” Enabling Act, §17(a)(2), (4).

In its initial hearing request, TRWD explains its “state charter requires it to provide raw water to TRWD’s customers and to develop recreation where possible” and states that it has invested over \$4 million in providing water recreation opportunities for the public. TRWD further states that it is the co-permittee for the Municipal Separate Storm Sewer System (MS4) permit for the City of Fort Worth (TPDES Permit No. WQ0004350000) and that under the MS4 permit, TRWD is responsible for water quality within the West Fork and Clear Fork of the Trinity River. According to TRWD, “[t]he confluence of Mary’s Creek with the Clear Fork Trinity River is approximately 7.5 miles downstream from the proposed discharge point.” TRWD is concerned it “will not be able to meet the criteria of this program and a potential violation of the MS4 permit will occur” if the Facility is permitted to operate in accordance with the proposed permit.

OPIC finds that TRWD has statutory authority over or interest in the issues raised by its hearing requests which are relevant to the application and further finds that TRWD has unique justiciable interests related to a legal right, duty, privilege, power, or economic interest affected by the application. For these reasons, OPIC finds TRWD has successfully demonstrated that it is an affected person in this matter.

Groups or Associations

The agency received hearing requests from the following groups or associations: Fort Worth Fly Fishers, Texas Council of Fly Fishers International, Texas Rivers Protection Association, and Trinity Coalition. To establish standing under 30 TAC § 55.205, a group or association must timely submit comments; show the interests the group seeks to protect are

germane to its purpose; show that neither the claim asserted nor the relief requested requires the participation of individual members; and identify, by name and residential address, one or more members of the group who would otherwise have standing to request a hearing in their own right.

Although each of these organizations submitted timely comments, demonstrated that the interests they seek to protect are germane to their purposes, and showed that neither the claims asserted nor the relief requested requires the participation of individual members, each failed to identify by name and address a member of the group who would otherwise have standing to request a hearing in their own right.

Fort Worth Fly Fishers

The requests of Fort Worth Fly Fishers were submitted by David Hooper and identify no other members of the group. According to the map prepared by the ED, Mr. Hooper resides over 11 miles from the Facility's outfall. At that distance, Mr. Hooper lacks the proximity necessary to establish a personal justiciable interest which is distinct from interests common to the general public. Without a personal justiciable interest, a hearing requestor cannot qualify as an affected person. Further, the intervening distance diminishes any likelihood that the regulated activity will impact his health, safety, or use of property. OPIC finds that Mr. Hooper would not have standing to request a hearing in his own right; therefore, Fort Worth Fly Fishers does not qualify as an affected person in this matter.

Texas Council of Fly Fishers International

The requests of the Texas Council of Fly Fishers International were submitted by Russell Husted and Andy Payne, and they identify group members Emily Craig, Jerry Hamon, Les Jackson, and Stephen Woodcock. Andy Payne did not disclose his residential address. The other identified group members reside farther than 6 miles from the Facility's outfall. At that distance,

each member lacks the proximity necessary to establish a personal justiciable interest which is distinct from interests common to the general public. Without a personal justiciable interest, a hearing requestor cannot qualify as an affected person. Further, the intervening distance diminishes any likelihood that the regulated activity will impact their health, safety, or use of property. OPIC finds that none of the group members identified in the Texas Council of Fly Fishers International's requests would have standing to request a hearing in their own right; therefore, the Texas Council of Fly Fishers International does not qualify as an affected person in this matter.

Texas Rivers Protection Association

The request of the Texas Rivers Protection Association was submitted by David Price and identifies no other members of the group. According to the map prepared by the ED, Mr. Price resides nearly 200 miles from the Facility's outfall. At that distance, Mr. Price lacks the proximity necessary to establish a personal justiciable interest which is distinct from interests common to the general public. Without a personal justiciable interest, a hearing requestor cannot qualify as an affected person. Further, the intervening distance diminishes any likelihood that the regulated activity will impact his health, safety, or use of property. OPIC finds that Mr. Price would not have standing to request a hearing in his own right; therefore, the Texas Rivers Protection Association does not qualify as an affected person in this matter.

Trinity Coalition

The requests of the Trinity Coalition were submitted by Teresa Patterson and identify no other members of the group. According to the map prepared by the ED, Ms. Patterson resides over 16 miles from the Facility's outfall. At that distance, Ms. Patterson lacks the proximity necessary to establish a personal justiciable interest which is distinct from interests common to the general public. Without a personal justiciable interest, a hearing requestor cannot qualify as an affected

person. Further, the intervening distance diminishes any likelihood that the regulated activity will impact her health, safety, or use of property. OPIC finds that Ms. Patterson would not have standing to request a hearing in her own right; therefore, the Trinity Coalition does not qualify as an affected person in this matter.

Individual Requestors

Requestors Within Relatively Close Proximity to the Facility

According to the map prepared by the ED, the following hearing requestors reside within four miles of the Facility's outfall: Kian Amos, Julie Hencke, and Mikeala Van Horn. Specifically, Kian Amos resides 1.36 miles from the outfall, Julie Hencke resides 3.42 miles from the outfall, and Mikeala Van Horn resides 2.26 miles from the outfall. These requestors raised concerns regarding protection of human health and safety, domestic animals and wildlife, and water quality; nuisance odors associated with the Facility and waters along the discharge route; and recreational interests that may be affected by operation of the Facility. These interests are protected by the law under which this application will be considered.

Each of these requestors has a personal justiciable interest based on their proximity to the Facility, the exceptionally large volume of wastewater to be treated and discharged from the Facility, and their concerns regarding nuisance prevention, water quality, and human health and safety. There are no statutory distance limitations on requestors considered to be affected persons regarding this application. Each requestor's proximity shows that they could be impacted in a manner not common to the general public and distinguishes their personal justiciable interests from an interest common to the general public. The § 55.203 affected person determination factors indicate that each requestor qualifies as an affected person. First, their concerns are interests protected by the law under which this application is being considered. Second, a reasonable

relationship exists between those interests and the regulation of water quality. Finally, their proximity to the Facility and the activities to be regulated under this permit increases the likelihood of impacts to these requestors' stated interests. OPIC therefore finds that Kian Amos, Julie Hencke, and Mikeala Van Horn qualify as affected persons in this matter.

Requestors Residing Farther from the Facility

According to the map prepared by the ED, the following hearing requestors reside over five miles from the Facility's outfall: Thomas William Ames, John S. Boid, Jerry Cate, Karla Cate, Travis Cate, Kelly Shea Clem, Noah Collins, Emily Anne Craig, Autumn N. Crawford, Chandler S. Davis, Betty Dillard, Taylor Ellison, William Jared Fuller, Landon Geary, Meaghan Geary, JD Granger, Shanna Cate Granger, Richard H. Grayson, George Gretser, Brittani Hall, Ryan Helm, Allison Jo Hocking, David R. Hooper, Russell Husted, Daniel Ivery, Michelle Kopp, Martha V. Leonard, Gregory Mark Mancino, Kevin McConnell, Megan W. McMullen, Johnnye Michael, Johnnye Panther Michael, Sydney O'Connell, Matt Oliver, Teresa Patterson, Jacob A. Posey, Jeremy Raines, Valerie Ann Ramos, Charles Reid, Mary Margaret Richter, Tristen Rodriguez, Gerard Joseph Schlegel, Gerry Schlegel, Andrew Ryan Sparks, Caroline Stephenson, Skyler Stephenson, Katherine Taft, Bailey Templin, Jodi Thomason, and Stephen M. Woodcock.

While there are no statutory distance limitations on requestors that may be considered affected persons for this application, OPIC cannot find that these requestors, located more than five miles from the Facility, have shown a personal justiciable interest which is distinct from the entire community's interest in protecting Mary's Creek as a vital resource. Also, based on the location of these requestors relative to the Facility, OPIC cannot find that the regulated activity likely will impact their health, safety, or use of property. OPIC therefore finds that none of these hearing requestors qualify as an affected person in this matter.

The ED's map does not provide a location for Mark Kolanowski, but independent mapping by OPIC indicates Mr. Kolanowski resides over five miles from the Facility. Moreover, Mr. Kolanowski did not submit timely public comments; therefore, OPIC finds he does not qualify as an affected person in this matter. 30 TAC § 55.203(c)(6).

The Public Interest Warrants Holding a Hearing

The Texas Water Code states the Commission may not grant a request for contested case hearing unless the Commission determines the request was filed by an affected person. TWC § 5.556(c). However, TWC § 5.556(f) clarifies that “[t]his section does not preclude the Commission from holding a hearing if it determines the public interest warrants doing so.” *See also* 30 TAC § 55.211(d)(1). Regardless of the Commission's position on the validity of any hearing requests, OPIC recommends that the Commission hold a hearing because the public interest warrants doing so.

OPIC acknowledges that few hearing requestors reside in close proximity to the proposed Facility or its outfall. While some requestors reside along the discharge route, most are located several miles downstream from the outfall. Moreover, the vast majority of requestors identified similar concerns: they have recreational interests in utilizing the waters along the discharge route and question whether the application will be adequately protective of their health and safety if they continue to utilize these waters for recreational purposes. Taken together, OPIC cannot conclude that most of these requestors' interests are distinguishable from interests common to the general public.

Nonetheless, the extraordinary volume of treated effluent that would be discharged—ten million gallons per day in the Interim Phase and fifteen million gallons per day in the Final Phase—coupled with the community's extensive primary contact recreational use of the waters along the

discharge route compel OPIC to conclude that a hearing is warranted to assure the community that Mary's Creek will be protected. Furthermore, public participation related to this matter has been significant. The Commission received approximately 200 comments and hearing requests on this matter. The public meeting held in October 2020 drew a large attendance, and many members of the community voiced their concerns by asking questions of the Applicant and TCEQ and by making oral comments on the record. Following the issuance of the ED's RTC, the Commission has continued to receive hearing requests from TRWD, community organizations, and individual requestors, indicating the prevailing public concerns have not abated.

Though OPIC finds that many hearing requestors did not state an interest distinguishable from interests of the general public, the relevant consideration from a public interest perspective is that the general public within the local community may be adversely affected by the operation of the proposed Facility. The community has an understandable interest in seeking assurance that this application has been carefully examined and operation of the proposed Facility will not result in harm to human health. The community has also expressed a strong interest in ensuring that the existing recreational uses of Mary's Creek are preserved. An evidentiary record developed through a contested case hearing would allow for a more fully informed Commission decision on this application, and the development of such a record in order to understand any decision on this permit application would provide greater context for the community. Thus, OPIC recommends the Commission find the public interest warrants a hearing on the issues raised by the community.²

² The issues raised by TRWD, Kian Amos, Julie Hencke, and Mikeala Van Horn are representative of the issues raised in virtually all of the hearing requests received on this application. Thus, OPIC recommends those issues be referred to SOAH regardless of whether a hearing is granted because the public interest warrants a hearing or because the Commission finds specific requestors to be affected persons.

C. Issues Raised in the Hearing Requests of Affected Persons

The affected persons raised the following issues in both timely comments and hearing requests:

1. Whether the draft permit and the operation of the proposed Facility will be adequately protective of human health and safety. (Raised by Kian Amos, Julie Hencke, Mikeala Van Horn, and TRWD)
2. Whether the draft permit and the operation of the proposed Facility will be adequately protective of terrestrial and aquatic animal life. (Raised by Kian Amos, Julie Hencke, and TRWD)
3. Whether the draft permit complies with applicable effluent guidelines for TPDES permits and adequately provides for protection of water quality. (Raised by Kian Amos, Julie Hencke, Mikeala Van Horn, and TRWD)
4. Whether the draft permit contains siting, operations, maintenance, or other conditions that adequately ensure the proposed Facility will not produce nuisance odors. (Raised by Julie Hencke)
5. Whether proposed effluent limits within the draft permit are adequate to maintain existing uses of receiving waters. (Raised by Kian Amos, Julie Hencke, Mikeala Van Horn, and TRWD)
6. Whether TCEQ's Tier 1 and Tier 2 antidegradation review appropriately analyzed the impact on all receiving waters to be affected by operation of the proposed Facility. (Raised by TRWD)
7. Whether operation of the proposed Facility will have an adverse impact on TRWD's water supply. (Raised by TRWD)
8. Whether the public received due process through adequate notice, opportunities for review and comment, and access to public information supporting the application during TCEQ's review of the application. (Raised by TRWD)
9. Whether an alternative discharge point would be more desirable than the discharge point proposed in the application. (Raised by TRWD)

D. Issues Raised in the Hearing Requests Remain Disputed

There is no agreement between the affected persons and the ED on the issues raised in the hearing requests; thus, they remain disputed.

E. The Disputed Issues Are Issues of Fact

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 of the issues raised are issues of fact.

F. Issues Were Raised by the Requestors During the Comment Period

All of the issues were raised by the requestors during the public comment period.

G. The Hearing Requests are Based on Issues Raised in Public Comments Which Have Not Been Withdrawn

The hearing requests are based on timely comments that have not been withdrawn.

H. Issues That are Relevant and Material to the Decision on the Application

The hearing requests raised 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 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).

Water Quality, Human Health and Safety, and Terrestrial and Aquatic Animal Life

The TCEQ is responsible for the protection of water quality under TWC Chapter 26 and 30 TAC Chapters 305, 307 and 309, as well as under specific rules related to wastewater systems found at 30 TAC Chapters 30 and 217. The Texas Surface Water Quality Standards (TSWQS) contained in 30 TAC Chapter 307 require a proposed permit "to maintain the quality of water in the state consistent with public health and enjoyment...." 30 TAC § 307.1. 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). The TSWQS further

provide that “[t]he commission may not issue a permit for a new 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.” 30 TAC § 309.12. As TCEQ regulations designate extensive criteria for the regulation of water quality and the protection of human health and safety, as well as the protection of terrestrial and aquatic animal life, Issues No. 1 through 3 are relevant and material to the Commission’s decision on this application and are appropriate for referral to SOAH.

Nuisance Odors

Nuisance odors are specifically addressed by 30 TAC § 309.13(e), which requires that nuisance odors be abated and controlled. Under this section, there are three options for discharge permit applicants to satisfy the nuisance odor and abatement control requirements. The applicant may comply with the rule by: 1) owning the buffer zone area; 2) obtaining restrictive easements from adjacent property owners for any part of the buffer zone not owned by the applicant; or 3) providing nuisance odor control. Therefore, Issue No. 4 is relevant and material to the Commission’s decision regarding this application and appropriate for referral to SOAH.

Existing Uses and Antidegradation

The TCEQ’s antidegradation policy requires that “[e]xisting uses and water quality sufficient to protect those existing uses must be maintained.” 30 TAC § 307.5(b). In this case, the designated uses for receiving waters include primary contact recreation, public water supply, and high aquatic life use, all of which are important interests to the affected persons identified by OPIC as well as the broader community. TRWD raised specific and extensive concerns that TCEQ’s antidegradation analysis did not extend to the waters of Clear Fork Trinity River below Benbrook Lake. TRWD questions whether the draft permit is protective of recreational interests promoted

by TRWD as well as TRWD's public water supply. Because TCEQ regulations designate criteria for antidegradation of water quality and protection of existing uses, Issues No. 5 through 7 are relevant and material to the Commission's decision regarding this application and are appropriate for referral to SOAH.

Public Participation and Due Process

TRWD's due process concerns related to public participation and the availability of materials supporting the application for public review are relevant and material to the Commission's decision because the Commission's Chapter 305 and Chapter 281 rules address the required contents of applications and specify that the draft permit is to be made available for public review. Further requirements pertaining to public notice and public participation are detailed in 30 TAC Chapter 39 and Chapter 55. Therefore, Issue No. 8 is relevant and material to the Commission's decision regarding this application and is appropriate for referral to SOAH.

Alternative Discharge Point

TRWD detailed a number of disadvantages associated with Applicant's selected discharge point into Mary's Creek and a number of advantages associated with utilizing alternative discharge points. As explained in the ED's RTC No. 8, The Commission does not have the authority to require relocation of the discharge point and can only evaluate the information provided in the application for compliance with applicable regulatory standards. Therefore, Issue No. 9 is not relevant and material to the Commission's decision on the application and is not appropriate for referral to SOAH.

I. Issues Recommended for Referral

As set forth above, OPIC recommends referral of Issues No. 1 through 8 specified in Section III.C to SOAH because they are relevant and material to the Commission's decision on this application.

J. Maximum Expected Duration of 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

OPIC respectfully recommends the Commission find that TRWD, Kian Amos, Julie Hencke, and Mikeala Van Horn qualify as affected persons in this matter, grant their hearing requests, and refer Issues No. 1 through 8 specified in Section III.C for a contested case hearing at SOAH with a maximum duration of 180 days. OPIC further recommends the Commission deny TRWD's requests for reconsideration and all other pending hearing requests. Finally, regardless of the Commission's position on the validity of any hearing requests, OPIC also respectfully

recommends that the Commission grant a hearing on this matter because the public interest warrants doing so.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2021, the foregoing document 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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