

No. 2007-0004-MWD

IN THE MATTER OF	§	TEXAS COMMISSION	STAMP AUG 27 AM 9:01
THE CITY OF SABINAL, TEXAS	§	ON ENVIRONMENTAL	
TDPES PERMIT NO. WQ00146890001	§	QUALITY	CHIEF CLERKS OFFICE

**APPLICANT'S RESPONSE TO REQUEST FOR RECONSIDERATION  
AND CONTESTED HEARING**

**I.**

NOW COMES the City of Sabinal, Texas ("Applicant") and files its response to the single Request for Reconsideration filed by L. T. McCann ("Requestor"). Applicant seeks to replace an antiquated lagoon treatment system located within the floodplain with a new aerated wastewater treatment plant. Both the existing and the proposed facility discharge into the Sabinal River.

**II.**

Applicant's Response to Contested Case Hearing Request

**(1) 30 Tex. Admin Code § 55.209 (e)(1)**

The request for hearing is inadequate as a matter of law pursuant to 30 Tex. Admin. Code § 55.201(d)(2). Texas Commission on Environmental Quality ("Agency") rules provide:

A hearing request must substantially comply with the following:

- (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;

30 Tex. Admin Code § 55.201(d).

Counsel for Requestor provided the legal description of the entirety of “requestor’s location,” but did not allege or quantify the distance “relative to the proposed facility” to be permitted. (*See* letter of David Gottfried dated December 22, 2006). The mere provision of a legal description to some 142.29 odd acres, and the assertion that the property is adjacent to the proposed facility fails to meet the “substantial compliance” requirement of § 55.201(d) *supra*, and requires the Commission to assume that the “location” is within the required distance from the point of discharge in order to afford Requestor affected person status. Similarly, the letter of L.T. McCann, dated December 20, 2006 provides in part: “I L.T. McCann Request a Contested Case Hearing. I am a land owner affected by this decision for several reasons 1) Property line several feet of the proposed discharge area, ...” (*See* letter of L.T. McCann to Chief Clerks Office). Neither of these notices provide proof of substantial compliance with the administrative prerequisite demonstrating the Requestor’s “distance relative to the proposed facility.” Accordingly, Requestor’s requests for reconsideration of the Executive Director’s decision and a contested case hearing are inadequate as a matter of law and should be denied in their entirety.

**(2) 30 Tex. Admin Code § 55.209 (e)(2), (e)(3), (e)(4), (e)(5), (e)(6), (e)(7)**

(e)(2) The Requestor’s hearing request is so vague that Applicant cannot determine the issues raised in the hearing request. Applicant disputes Requestor’s claim that his “water rights” or “grazing rights” will be directly affected by the Agency’s decision to grant the permit. Besides, these issues are not addressed by the Agency in discharge permit matters.

Applicant disputes Requestor's claim that the granting of the permit will negatively affect Requestor's health, safety and economic interests. The draft permit complies with the effluent limitations and is consistent with applicable stream standards.

(e)(3) The dispute presently before the Commission does not involve issues of fact upon which reasonable minds may differ. All factual allegations presented during the public comment period have been addressed by the Executive Director and entitle the Applicant to a permit under Agency rule and substantive law.

(e)(4) As stated earlier, the request for hearing is so vague and confusing that Applicant is unable to determine the issues raised in the request, so Applicant cannot determine if these issues were raised in the comment period.

(e)(5) Issues in the hearing request were not withdrawn by the Requestor prior to the filing of the Executive Director's Response to Comment.

(e)(6) The general objection to the permit does not raise any issue of disputed fact; only the Requestor's non-expert opinion based upon speculation and hypothetical assumptions. The gravamen of the Requestor's statement is that the applicable Agency standards, effluent limitations, and general conditions do not protect water quality. This type of complaint can be raised in rule-making hearings regarding these requirements, not in a particular permit. The Agency has investigated the application and proposed a draft permit that complies with all applicable requirements. Accordingly, the issues raised by Requestor and his Counsel in the request for Reconsideration and Contested Case Hearing are neither relevant or material to the decision on the application.

(e)(7) The maximum expected duration for the contested case hearing is expected to be two (2) days.

### III.

#### Applicant's Response to Request for Reconsideration pursuant to

#### 30 Tex. Admin Code § 55.209 (f)

The Request for Reconsideration is inadequate pursuant to 30 Tex. Admin. Code § 55.201(d)(4). Agency rules requires the Requestor to:

- (4) list all relevant and material disputed issues of fact that were raised 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 executive director's responses to comments the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy;

30 Tex. Admin. Code § 55.201(d)(4).

In his written request for reconsideration and a contested hearing, counsel for Requestor provided the following statement:

My client is an "affected person" relating to the subject application he is a landowner of property immediately adjacent to the property upon which waste effluent is proposed to be discharged. My client owns property within the discharge zone and through which discharge will flow. My client also owns property that is immediately downstream from the proposed discharge site. In addition, my client owns water rights to withdraw water from the Sabinal River, raises cattle and horses on the property, and uses the property for grazing. Those uses and rights will be directly affected by the granting of this

permit and negatively affect my clients [sic] health, safety and economic interests. As such, my client has a person justiciable interest related to a legal right, duty, privilege, power and economic interest.

(See letter of David M. Gottfried dated December 22, 2006)

The letter from Counsel wholly fails to comply with the administrative requirements of 30 Tex. Admin. Code § 55.201(d)(4) as it does not “list all relevant and material disputed issues of fact that were raised during the public comment period.” It wholly fails to specify any of the executive director’s responses to comments that the Requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy. While the letter claims Requestor will be adversely affected, it fails to state how he will be affected and is the mere “net” opinion of its author.

Similarly, the letter of Requestor L.T. McCann dated December 20, 2006 (See Exhibit A-1 attached) fails to provide any specificity as to the basis for the request other than to suggest that because he is an adjacent landowner, he will be “at risk” due to close proximity from the effluent discharge. Requestor’s letter disputes the opinions of Staff Attorney Marc Friberg to comments 1, 2, 3, 4 and 6 of the Executive Director’s Response to Public Comment. As to comments 1 and 2 it fails to provide the any “factual basis” for his dispute; it provides only non-expert opinion which asserts Attorney Friberg’s decision is factually incorrect and alleges “negligence” and “biological ignorance.” Allegations of negligence and biological ignorance do not form the basis of any factual, legal, or policy basis upon which the Commission may act. Comments 3, 4, 5, and 6 were summarily addressed by Attorney Friberg on behalf of the TCEQ (Agency) and speak for themselves: Namely 3) Erosion is not a part of the wastewater permitting process; 4) the proposed site location is not within the 100

year floodplain and the permit application was declared technically complete by the Agency; 5) the draft permit requires the permittee to ensure at all times that the “system of collection, treatment, and disposal are properly operated and maintained;” 6) The existing sewer plant which is adjacent to Requestor’s property has been in existence in excess of thirty years prior to Requestor’s purchase of his property. Any affect that the presence of a sewer plant has on the marketability of Requestor’s subdivision occurred decades before the plat was filed and decades before Requestor acquired the property. Taken together, both Requestor and Counsel have wholly failed to provide any “new” or “different” information for the Commission to act upon. Accordingly, the request for reconsideration of the Executive Director’s Response to Public Comment and the Request for Contested Case Hearing should be denied.

IV.

Prayer for Relief

WHEREFORE PREMISES CONSIDERED, Applicant requests that the Commission deny the request for Reconsideration and Contested Case Hearing and grant the application pursuant to 30 Tex. Admin. Code § 55.27(a)(1).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been delivered to the mailing list of the Texas Commission on Environmental Quality, Docket No. 2007-0004-MWD, on this the 27<sup>th</sup> day of August, 2007.

Patrick W. Lindner w/ permission  
PATRICK W. LINDNER  
- Maria Sanchez