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Blas J. Coy, Jr., *Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

August 27, 2007

LaDonna Castañuela, Chief Clerk  
Texas Commission on Environmental Quality  
Office of the Chief Clerk (MC-105)  
P.O. Box 13087  
Austin, Texas 78711-3087

CHIEF CLERKS OFFICE

2007 AUG 27 PM 2: 26

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

RE: **CITY OF SABINAL**  
**TCEQ DOCKET NO. 2007-0004-MWD**

Dear Ms. Castañuela:

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

Sincerely,

A handwritten signature in cursive script that reads "Christina Mann".

Christina Mann, Attorney  
Public Interest Counsel

cc: Mailing List

Enclosure

**TCEQ DOCKET NO. 2007-0004-MWD**

**IN THE MATTER OF  
THE APPLICATION OF  
THE CITY OF SABINAL  
FOR WATER QUALITY  
PERMIT NO.  
WQ00146980001**

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**BEFORE THE TEXAS  
COMMISSION ON  
ENVIRONMENTAL  
QUALITY**

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

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (the Commission or TCEQ) and files this Response to Requests for Reconsideration and Requests for Hearing in the above-referenced matter.

**I. INTRODUCTION**

The City of Sabinal (Sabinal or Applicant) has applied to TCEQ for new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014689001 to authorize the discharge of treated wastewater at a volume not to exceed a daily average flow of 340,000 gallons per day. The domestic wastewater treatment facility is proposed to be located approximately 5,300 feet south of the intersection of State Highway 187 and Dunlap Avenue, along Dunlap Avenue and Rhylander Road (County Road 386) in Uvalde County, Texas. The discharge route is proposed to run from the plant site to an unnamed tributary of the Sabinal River; thence to the Sabinal River.

The application was received on January 23, 2006 and was declared administratively complete on March 9, 2006. The Notice of Receipt of Application and

Intent to Obtain a Water Quality Permit Amendment (NORI) was published in the *Uvalde Leader-News* on March 26, 2006. The Executive Director completed the technical review of the application and prepared a draft permit, which was mailed by the Chief Clerk's Office on June 7, 2006. The Notice of Application and Preliminary Decision (NAPD) was published in the *Uvalde Leader-News* on July 6, 2006.

The comment period ended on August 7, 2006. The chief clerk of the TCEQ mailed the Decision of the Executive Director and the Executive Director's Response to Comments (RTC) on November 28, 2006. L.T. McCann is the only requestor. The TCEQ received a series of timely comments and hearing requests from L.T. McCann dated June 14, 2006 and June 15, 2006.<sup>1</sup> The TCEQ also received a hearing request and a separate request for reconsideration from L.T. McCann dated December 20, 2006 and received in the Office of the Chief Clerk on December 27, 2006. On December 27, 2006, David Gottfried, attorney, also filed a hearing request and request for reconsideration on behalf of L.T. McCann.

## II. REQUESTS FOR RECONSIDERATION

### A. Applicable law

A person may file a request for reconsideration no later than 30 days after the chief clerk's transmittal of the executive director's decision and response to comments.

TEXAS WATER CODE § 5.556; 30 TAC §55.201(a) and (e).

Any person may file a request for reconsideration of the ED's decision. 30 TAC § 55.201(e). The request for reconsideration must state the reasons why the decision should be reconsidered. 30 TAC § 55.201(e). Responses to requests for reconsideration should address the issues raised in the request. 30 TAC § 55.209(f).

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<sup>1</sup> These hearing requests and comment letters were received on June 14, June 16, June 19, June 28 2006.

**B. Requests for Reconsideration filed on the Application**

L.T. McCann filed two requests for reconsideration. In his request for reconsideration dated December 20, 2006, L.T. McCann expresses a general concern that the Executive Director (ED) did not carefully research all issues related to the application. The request also raises the specific issue that the plant is too close to the Sabinal River and should not discharge into the river. In addition, in a request dated December 22, 2006, L.T. McCann states that he never appeared on the adjacent/downstream landowner's mailing list and therefore never received mailed notice, despite having owned the property since June 8, 2005, well before the first notice was mailed. He further states that although this notice defect was made known to the applicant, the applicant did not correct the problem.

OPIC cannot recommend the granting of L.T. McCann's requests. The environmental issues given as reasons for requesting reconsideration are based on concerns which are governed by the law applicable to this permit (effect of discharge on the Sabinal River, siting of the facility next to the river). Moreover, these concerns are within the jurisdiction of the Commission to address in the context of proceedings on this application. An evidentiary record, however, would be necessary for OPIC to make a recommendation to the Commission as to whether the permit should be denied based on these concerns.

With respect to the notice issue, L.T. McCann had actual notice of the application, as TCEQ received a series of comments/hearing requests from the requestor during the comment period in June 2006. Likewise, L.T. McCann submitted a hearing request, dated December 20, 2006, raising specific disputed issues in response to the Executive

Director's Response to Public Comment and final decision letter. Therefore, OPIC cannot support granting L.T. McCann's request for reconsideration of the Executive Director's decision. However, OPIC recommends granting the requestor's hearing requests as discussed below.

### III. REQUESTS FOR CONTESTED CASE HEARINGS

#### A. Applicable Law

This application was declared administratively complete after September 1, 1999, and is subject to the requirements of Texas Water Code § 5.556 added by Acts 1999, 76<sup>th</sup> Leg., ch 1350 (commonly known as "House Bill 801"). Under the applicable statutory and regulatory requirements, a hearing request must substantially comply with the following: give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; identify the requestor's personal justiciable interest affected by the application showing why the requestor is an "affected person" who may be adversely affected by the proposed facility or activity in a manner not common to members of the general public; request a contested case hearing; list all relevant and material disputed issues of fact that were raised during the comment period that are the basis of the hearing request; and provide any other information specified in the public notice of application. 30 TEXAS ADMINISTRATIVE CODE (TAC) § 55.201(d). Under 30 TAC § 55.203(a), an affected person is "one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application." This justiciable interest does not include an interest common to the general public, 30 TAC § 55.203(c) also provides relevant factors that will be considered in determining whether a person is affected. These factors 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, safety, and 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) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

The Commission shall grant an affected person's timely filed hearing request if:

- (1) the request is made pursuant to a right to hearing authorized by law; and (2) the request raises disputed issues of fact that were raised during the comment period and that are relevant and material to the commission's decision on the application. 30 TAC §55.211(c).

Accordingly, pursuant to 30 TAC § 55.209(e), responses to hearing requests must specifically address:

- (1) whether the requestor is an affected person;
- (2) which issues raised in the hearing request are disputed;
- (3) whether the dispute involves questions of fact or law;
- (4) whether the issues were raised during the public comment period;
- (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's response to Comment;
- (6) whether the issues are relevant and material to the decision on the application; and
- (7) a maximum expected duration for the contested case hearing.

**B. Determination of Affected Person Status**

The Office of the Chief Clerk received timely filed requests for a contested case hearing on the issuance of Applicant's permit from L.T. McCann (requestor) in June 2006 and December 2006.

Mr. McCann states that he owns property with a property line within several feet of the proposed discharge location, and the plant will be erected on the neighboring property. He raises issues related the environmental impacts of the discharge, ability of the Sabinal River to properly discharge the effluent, and health concerns related to the proposed discharge.<sup>2</sup> Because of the proximity of the requestor's property to the discharge point and facility and the environmental and health concerns raised by Mr. McCann, there is a reasonable relationship between the interests claimed and the activity regulated. OPIC recommends the Commission find L.T. McCann to be an affected person.

**C. Issues Raised in the Hearing Requests**

Mr. McCann raises issues the following issues.<sup>3</sup>

- 1) Will the proposed activities negatively impact the unique and sensitive aquatic environment near the discharge?
- 2) Has the permit adequately considered the flow rate of the Sabinal River as it relates to modeling performed to ensure protection of water quality?
- 3) Will the proposed activities negatively impact Mr. McCann's use and enjoyment of his property and recreational interests in the Sabinal River?
- 4) Will the permitted activities result in erosion along the discharge route?
- 5) Is the proposed plant to be located in a 100 year/500 year flood plain?
- 6) Are there neglected sewer lines going under the Sabinal River?

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<sup>2</sup> See letter dated and received June 15, 2006, from L.T.McCann.

<sup>3</sup> Found in the hearing requests/comments received in June 2006 and December 2006.

- 7) Is the proposed plant to be inappropriately located adjacent to subdivided properties?
- 8) Are there discrepancies in the information presented in the engineer's application?
- 9) Will the proposed discharge negatively affect Mr. McCann's economic interests since he uses the property for grazing and watering cattle and horses?
- 10) Was notice of the application legally deficient?

Mr. McCann raises Issue 10, the issue of mailed notice, in a hearing request received December 27, 2006. He states that he has never been on the adjacent landowners' mailing list, although he has been an adjacent landowner since June 8, 2005. Although OPIC does not find that this issue was raised in written comment available to OPIC for consideration, Mr. McCann states that the notice issue was raised in writing in June 2006. OPIC finds that this issue was timely raised because the issue of notice can be raised at any time as notice questions are jurisdictional.

**D. . Issues raised in Comment Period**

With the exception of the economic impact related to livestock grazing of the proposed activities, and potentially the notice issue, all of the issues raised in the hearing requests were raised in the comment period and have not been withdrawn. 30 TAC §§55.201(c) and (d)(4), 55.211(c)(2)(A). Because the issue of economic impact was not raised during the comment period, OPIC cannot recommend that the issue be referred to hearing.

**E. Disputed Issues**

There is no agreement between the requestor and the applicant or Executive Director on the issues raised in the hearing requests.

**F. 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. *See* 30 TAC §55.211(b)(3)(A) and (B). However, the issue related to discrepancies in the engineer's data is too broad to be referred as an issue of fact that the Commission could refer in a meaningful way to the State Office of Administrative Hearings (SOAH) for evaluation. Therefore, OPIC does not recommend this issue be considered an issue of fact appropriate for referral to SOAH.

**G. Relevant and Material Issues**

The hearing requests raise issues relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). In order 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.<sup>4</sup> Relevant and material issues are those that are governed by the substantive law under which this permit is to be issued.<sup>5</sup> Issues concerning the permitted activity's effect on water quality are all relevant and material to the Commission's decision. Issues 1 and 2 above directly relate to protection of water quality. The requestor's recreational interests and potential impacts on the use and enjoyment of his property are also relevant and material to the

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<sup>4</sup> *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-251(1986) (in discussing the standards applicable to reviewing motions for summary judgment the Court stated "[a]s to materiality, the substantive law will identify which facts are material. ... it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs.")

<sup>5</sup> *Id.*

Commission's decision on this application (Issue 3, above). An issue related to locating the plant within a flood plain is relevant and material to the Commission's decision on an application. The ED includes a requirement for the Applicant to provide protection for the facility in the event of a 100 year flood.<sup>6</sup>

The issue related to the location of the plant adjacent to subdivided property (Issue 7), as raised in the initial request, has been interpreted by the ED in his RTC to relate to unsuitable site characteristics.<sup>7</sup> In a later request, the requestor explains that the location of the plant adjacent to subdivided property that he owns will negatively impact his ability to sell the property.<sup>8</sup> OPIC interprets this to be a concern associated with property values. The Commission does not have jurisdiction to consider property values when evaluating a wastewater application. Therefore, this issue is not relevant and material to the Commission's decision on the application.

From the hearing request itself, it is not clear how the issue related to sewer lines (Issue 6, above) is specifically relevant to this application. The requestor does not allege that this plant would be tying into old sewer lines which could result in unauthorized discharges from operation of the facility. Additionally, the permit itself does not authorize any discharges from sewage lines running to and from the plant. Therefore, OPIC cannot find this issue to be relevant and material to the Commission's decision on this application.

L.T. McCann is concerned about the potential for increased erosion along the discharge route. The ED states in his RTC that "TCEQ typically does not address

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<sup>6</sup> See Executive Director's Response to Public Comment, page 4, response 4; mailed on November 28, 2006.

<sup>7</sup> *Id.* at page 4, response 6.

<sup>8</sup> See December 20, 2006 hearing request, received December 27, 2006, page 1.

concerns about erosion as part of the wastewater permitting process” and relates this concern to private property rights.<sup>9</sup> OPIC agrees. Under 30 TAC § 309.12 and 309.11(1) the Commission can consider whether “active geologic processes,” including erosion, may have a negative impact on surface water or groundwater; however, the requestor has not raised that specific issue relating to potential effects on water quality. Therefore, OPIC cannot recommend the Commission refer this issue related to erosion.

As stated above in OPIC’s response to Requests for Reconsideration, OPIC finds that L.T. McCann had actual notice of the application, as evidenced by the series of requests and comments received by TCEQ. Therefore, this notice issue is not relevant to the Commission decision.

#### **H. Issues Recommended for Referral**

OPIC recommends that the following disputed issues of fact be referred to the State Office of Administrative Hearings for a contested case hearing:

- 1) Will the proposed activities negatively impact the unique and sensitive aquatic environment near the discharge?
- 2) Has the permit adequately considered the flow rate of the Sabinal River as it relates to modeling performed to ensure protection of water quality?
- 3) Will the proposed activities negatively impact Mr. McCann’s use and enjoyment of his property and recreational interests in the Sabinal River?
- 4) Is the proposed plant to be located in a flood plain?

#### **I. Maximum Expected Duration of Hearing**

Commission Rule 30 TAC § 55.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by

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<sup>9</sup> See ED’s RTC, Page 4, response 3.

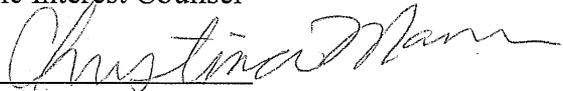
stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. To assist the Commission in stating a date by which the judge is expected to issue a proposal for decision, and as required by 30 TEX. ADMIN. CODE §55.209(d)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be nine months from the first date of the preliminary hearing until the proposal for decision is issued.

#### IV. CONCLUSION

OPIC recommends referring the matter to SOAH for an evidentiary hearing on the issues recommended above. OPIC further recommends a hearing duration of nine months.

Respectfully submitted,

Blas J. Coy, Jr.  
Public Interest Counsel

By   
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#### CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2007 the original and eleven true and correct copies of the Office of the Public Interest Counsel's Response to Requests for Reconsideration and Requests for Hearing and were 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 or by deposit in the U.S. Mail



Christina Mann

**MAILING LIST**  
**CITY OF SABINAL**  
**TCEQ DOCKET NO. 2007-0004-MWD**

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MEMORANDUM

TO : THE PRESIDENT

FROM : THE SECRETARY OF DEFENSE

SUBJECT: [Illegible]

DATE: [Illegible]

[Illegible]

[Illegible]