

Bryan W. Shaw, Ph.D., *Chairman*
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Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
Protecting Texas by Reducing and Preventing Pollution

December 30, 2009

LaDonna Castañuela, 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 VERNON
TCEQ DOCKET NO. 2009-1970-MWD

Dear Ms. Castañuela:

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 cursive script that reads "Vic McWherter".

Vic McWherter, Senior Attorney
Public Interest Counsel

cc: Mailing List

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 P.O. Box 13087 AUSTIN, TEXAS 78711-3087 512-239-6363

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TCEQ DOCKET NO. 2009-1970-MWD

IN THE MATTER OF THE	§	BEFORE THE
THE APPLICATION OF	§	
THE CITY OF VERNON	§	TEXAS COMMISSION ON
FOR	§	
TPDES PERMIT NO. WQ0004868000	§	ENVIRONMENTAL QUALITY

**THE 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) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Response to Requests for Hearing in the above-referenced matter and would respectfully show the following:

I. INTRODUCTION

The City of Vernon (City or Applicant) has applied to the TCEQ for a new Texas Pollutant Discharge elimination System (TPDES) Permit No. WQ0004868000 that would authorize the discharge of ion exchange water treatment wastes at a daily average flow not to exceed 46,000 gallons per day. The proposed plant would remove nitrates from a side stream and from on-site ground storage tanks to produce potable water. The facility would be located at 2801 Sullivan Street, approximately one mile east of the intersection of U.S. Highway 70 and U.S. Highway 287 in Wilbarger County, Texas. Wastewater effluent generated by the proposed plant would be discharged via pipeline to the Pease River in Segment No. 0230 of the Red River Basin. The Executive Director (ED) has performed Tier 1 and Tier 2 antidegradation reviews that have preliminarily determined that no significant degradation of the receiving waters is expected. The designated uses for the receiving stream are intermediate aquatic life use and contact recreation.

This application was filed on October 9, 2008 and declared administratively complete on October 27, 2008. The Notice of Receipt of Application and Intent to Obtain Permit was published in *The Vernon Daily Record* on November 13, 2008. The Notice of Application and Preliminary Decision was published in the same newspaper on July 29, 2009 following completion of the ED's technical review of the application. A public meeting was held in Vernon, Texas on August 31, 2009 and the public comment period closed the same day. The Chief Clerk of the TCEQ mailed the Executive Director's Response to Comments on November 4, 2009 and the period for requesting a contested case hearing closed on December 4, 2009. Numerous requests for contested case hearing were timely filed in the weeks and months preceding this deadline. As discussed more fully below, OPIC recommends denial of all pending hearing requests.

II. REQUIREMENTS OF APPLICABLE LAW

Because the application was declared administratively complete after September 1, 1999, it is subject to the requirements of Texas Health & Safety Code § 382.056 and Texas Water Code § 5.556 added by Acts 1999, 76th 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 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).

Under 30 TAC §55.205(a), a group or association may request a contested case hearing only if the group or association meets all of the following requirements: (1) one or more members of the group or association would otherwise have standing to request a hearing in their own right; (2) the interests the group or association seeks to protect are

germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

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.

III. HEARING REQUESTS

A. Affected Person Analysis

Timely filed hearing requests dated June 17, 2009 were filed by the following persons: Ken and Lisa Aderholt; Tommy and Tricia Alaniz; Buffy and Malcolm Borger; Lon Byars; Gloria Cardenas; Jose Cardenas; Lee Castleberry; Mary Castleberry; Shane Castleberry; Toby Castleberry; Ismael and Mary Ann Cortez; Carolyn and James Koontz; Dane Mount; Jay H. Pierce; Luis and Mary Rangel; Terry Weaver; and Edna and Elton Zoch. Most of these requesters submitted identical letters dated June 17, 2009 which listed their address and stated concerns about the safety and health of the requesters and their families. A separate hearing request dated May 27, 2009 was filed by Jose L. and Gloria Cardenas which stated concerns about the potential contamination of shallow wells on their property, potential adverse effects on their cattle and the source of drinking water for their cattle; and potential adverse effects on their pastures and soil conservation

efforts. By letter dated November 23, 2009, Mr. Andy Brumley and Mr. Jose L. Cardenas filed a hearing request on behalf of numerous individuals, including the individuals who previously submitted requests dated June 17, 2009, in addition to Mike Hardage, Clyde Harlin, Mike Herchman, Rusty and Dolly Riddle, James and Pat Spears, Tracy Taylor, and Don and Patsy Wilson. These requesters state that they will be adversely affected by the proposed wastewater discharge in a manner that is not common to the public because it will have a negative impact on their drinking water, land, cattle and crops.

From the information provided in the hearing requests and the Executive Director's map, it appears that all of the requesters are located either several miles downstream from the discharge point, or otherwise to the south of the facility and not along the proposed discharge route. The June 17, 2009 hearing requests state a general concern about health and safety. The separate requests from Mr. Cardenas and Mr. Brumley provide further details by stating that requesters are concerned about the contamination of their land and the water they use because their property is downstream an unspecified distance from the proposed discharge. However, based on the information provided by the requests and the Executive Director's map regarding the requesters' location relative to the proposed discharge point, OPIC cannot conclude that the facility is likely to have an impact on the requesters' stated interests or that there is a reasonable relationship between the interests claimed and the activity regulated. 30 TAC §55.203(c)(3). For this reason, OPIC finds that the requesters are not affected persons and must therefore recommend that the Commission deny their requests for a contested

case hearing. OPIC will reconsider its position based on any information contained in requesters' reply briefs filed and served by January 15, 2010.

B. Issues Raised in the Hearing Requests

In the event the Commission disagrees with OPIC's analysis and finds that the requesters are affected persons, or in the event the requesters submit additional information in a timely filed reply which changes OPIC's recommendation, OPIC submits the following analysis of the issues raised in the hearing requests.

The hearing request dated November 23, 2009 submitted by Mr. Jose L. Cardenas and Mr. Andy Brumley include, or expand upon, the more general issues raised in all prior requests. This request raises the following issues:

1. whether the proposed permit's provisions would provide for adequate treatment of the wastes to be discharged to ensure protection of human health and the environment.
2. whether the application contains all required information to determine compliance with applicable state and federal regulations and whether such information is accurate and complete.
3. whether the application identified all landowners for a reasonable distance along the watercourse from the discharge point and whether all surface water intake points for domestic drinking water supplies were identified as required.
4. whether the Pease River is a public drinking water supply and whether the proposed discharge would have a likely impact on nearby water wells.
5. whether the TCEQ's review of the application considered an accurate seven-day, two-year flow rate (7Q2) for the Pease River and adequately considered the relative size of the proposed discharge in relation to the 7Q2 of the Pease River.

6. whether the proposed permit's provisions will be adequately protective of the Pease river for drinking water and recreational uses.

7. whether the permit is based on an accurate recharge rate for the alluvial aquifer immediately adjacent to the Pease River.

1. Issues Disputed

All of the issues listed above remain disputed. The issues were raised during the comment period and in timely filed hearing requests. There is no indication that the requestors have been satisfied by the response to comment. They continue to request a contested case hearing to dispute the stated issues.

2. Issues of Fact

All of the issues discussed above are issues of fact.

3. Issues Raised During the Comment Period

All of the issues discussed above were raised during the comment period.

4. Relevant and Material Issues

Issues 1-7 listed above 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). They relate to the protection of human health and the environment and are addressed by the substantive law governing any proceeding on this application, including Texas Water Code Chapters 5 and 26; and 30 TAC Chapter 307 Texas Surface Water Quality Standards. Specifically, 30 TAC §307.5 (E) provides that "evidence can be introduced in public hearings, or through the public comment process, concerning the determination of existing uses and criteria; the assessment of degradation under Tier 1, Tier 2, and Tier 3; the social and economic justification for lowering water quality; requirements and conditions necessary

to preclude degradation; and any other issues which bear upon the implementation of the antidegradation policy.” Furthermore, 30 TAC §307.5(F) provides that “interested parties will be given the opportunity to provide comments and additional information concerning the determination of existing uses, anticipated impacts of the discharge, baseline conditions, and the necessity of the discharge for important economic or social development if degradation of water quality is expected under Tier 2.” With respect to Issue No. 3, 30 TAC Sections 305.45 and 305.48 address requirements for identifying potentially affected landowners. For these reasons, OPIC finds that Issues 1-7 listed above are relevant and material to the Commission’s decision on this application.

5. Issues Recommended for Referral to Hearing

In the event that the Commission finds that any of the requesters are affected persons, under 30 TAC §§ 50.115(b) and 55.211(b)(3)(A)(I), OPIC would recommend that the Commission refer to the State Office of Administrative Hearings (SOAH) issues 1-7 listed above.

C. 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 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 TAC § 55.209(e)(7), OPIC estimates that the maximum

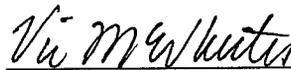
expected duration of a hearing on this application would be one year from the first date of the preliminary hearing until the proposal for decision is issued.

IV. CONCLUSION

For the reasons stated above, OPIC cannot find that the requesters are affected persons. Therefore, OPIC must recommend denial of all pending hearing requests. OPIC will reconsider its recommendation upon receipt and review of any reply from the requesters filed and served by January 15, 2010. In the event the Commission does find any hearing requester to be an affected person, OPIC would recommend referral of issues 1-7 listed in Section III. B. above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2010 the original and seven true and correct copies of the Office of the Public Counsel's Response to the Requests for Hearing were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via Inter-Agency Mail or by deposit in the U.S. Mail.



Vic McWherter

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