

LOWERRE, FREDERICK, PERALES, ALLMON & ROCKWELL
ATTORNEYS AT LAW
707 Rio Grande, Suite 200
Austin, Texas 78701
(512) 469-6000 / 482-9346 [facsimile]

April 19, 2010

Ms. LaDonna Castañuela, Chief Clerk, MC-105
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 87811

Re: Reply to Responses to Request for Contested Case Hearing on the Application for an
Amendment to Permit # WQ0011787001 by the City of Bullard, Texas

Dear Ms. Castañuela:

On behalf of Texas Conservation Alliance (TCA) and Dr. Adrian Van Dellen, I am filing the attached Reply to the Responses of others to the requests for a contested case hearing on the above referenced application.

TCA and Dr. Van Dellen continue to request a hearing, of 9 months, with all relevant issues raised by them or HRC Cherokee Tree Farm L.P.

Sincerely,



Richard Lowerre

CC: Service List

TCEQ DOCKET NO. 2010-0237-MWD

APPLICATION OF CITY OF § BEFORE THE TEXAS COMMISSION
BULLARD FOR TPDES PERMIT NO. § OF
WQ0011787001 § ENVIRONMENTAL QUALITY

REPLY OF TEXAS CONSERVATION ALLIANCE (TCA) AND
DR. ADRIAN VAN DELLEN TO THE REPOSSES OF
THE EXECUTIVE DIRECTOR, OPIC AND THE CITY OF BULLARD

TO THE HONORABLE COMMISSIONERS:

Texas Conservation Alliance (TCA) and Dr. Adrian Van Dellen file this reply to the responses of others to their request for a contested case hearing and would respectfully show the following:

I. INTRODUCTION

Because different maps of the area apparently show different names for the receiving waters, there may be some confusion over the use by Dr. Van Dellen and others. This reply should help resolve that confusion and show clearly that Dr. Van Dellen has the requisite interests and standing to require a contested case hearing. Since he is a member of TCA, and TCA meets all three tests for associational standing, TCA's hearing request must also be granted.

TCA and Dr. Van Dellen continue to request a hearing, support a hearing of 9 months, and seek referral to SOAH of all relevant issues raised by them or HRC Cherokee Tree Farm L.P. (HRC). They also support the hearing request of HRC.

II. THE HEARING REQUESTS

In the hearing request TCA briefly explained its right to a hearing under Texas law:

TCA is a non-profit corporation with goals that include protection of the water resources of the state. TCA's goals also include representing its members in state proceedings that affect the natural resources used by its members. TCA is a membership organization with individual members and member organizations. TCA has members who will be affected by the proposed amendment. TCA seeks the same result as its members, denial or significant revisions to the permit amendment.

Thus, TCA meets the associational standing requirements of Texas law and TCEQ rules, if it has a

member who is “affected.” TCA has met all other requirements of Texas law and TCEQ rules and no other party has alleged it has not.

In the hearing request, Dr. Van Dellen and TCA state briefly that Dr. Van Dellen is seeking a hearing on his own and for TCA as one member of TCA who is affected. They then explain how Dr. Van Dellen is affected.

Dr. Van Dellen has taken canoe trips on Flat Creek including to the area of the creek where the unnamed tributary that is the initial receiving waters for the discharge of the City of Bullard enters Flat Creek. There may be some confusion on these locations, due to the fact that different maps label the creeks differently. Dr Van Dellen has, however, paddled a canoe for recreational purposes up Flat Creek to where CR 3707 (or School Bus Road) crosses it. This is approximately 0.2 mile upstream from where the receiving waters enter the actual Flat Creek as a tributary (incorrectly labeled at this confluence point as “Flat Creek” on Garmin’s Topo Map Source CD and other modern maps).

In addition, Dr. Van Dellen has taken boats (canoes & kayaks) on Flat Creek just downstream of this location. He has guided people on canoe trips on the Neches River and short segments of Flat Creek downstream of the discharge. He has taken photographs of wildlife and vegetation along Flat Creek downstream of the discharge. These guiding and photographic activities have been done as part of his profession, and Dr. Van Dellen intends to continue with these activities. Thus, Dr. Van Dellen’s economic interests will be affected, adversely if damage is done to Flat Creek or the Neches River from the operations of the wastewater treatment plant by the City of Bullard.

While TCA and Dr. Van Dellen believe they have alleged sufficient facts to support their hearing request, additional facts are provided below to show the extent that Dr. Van Dellen will be affected.

III. ADDITIONAL FACTS SUPPORTING DR. VAN DELLEN’S ALLEGATIONS THAT HE IS AN AFFECTED PERSON WITH STANDING TO REQUIRE A HEARING IN THIS MATTER

A. Summary: In brief, Dr. Van Dellen has canoed and waded in the creek into which the effluent is discharged. He has done so more than once and plans to continue to do so as it is one of the best creeks for his work on the Neches River. He does so for professional as well as recreational purposes. The concerns of OPIC and the ED seem to be that he may not have been or may not be in the future as far up the creek as necessary to make him “affected.” The ED also argues that his economic interests are speculative and that his harm is not different from the general

public.

First, Dr. Van Dellen has been within 1.5 miles of the discharge, probably closer, but he cannot say exactly. Second, he has repeatedly been on Flat Creek and up several tributaries to it. He intends to return to explore, photograph and guide on Flat Creek and its tributaries more, including areas of the receiving creek even closer to the discharge point, as long as that creek retains good water quality and supports the recreational and economic activities he intends to pursue. The discharge of effluent hot property treated clearly will adversely affect those activities and thus his interest. It will affect Dr. Van Dellen in ways different from the general public, because of the nature of his recreational and economic interests.

Again, Dr. Van Dellen plans to use all of the tributaries of Flat Creek and all parts of Flat Creek because of the qualities of those water bodies. They have provided and will continue to support his recreational and economic interests if they are not degraded, as the discharges from the City of Bullard's plant have at times in the past and will continue to do so in the future if not properly regulated, with enforceable conditions. His use plans include continued canoeing, wading and observing for recreational purposes for professional photography and as a professional guide for others.

Part of the problem with identifying the location that Dr. Van Dellen has been is the fact that some of the maps used make an arbitrary statement that the tributary or creek is divided into two sections, an unnamed tributary and Flat Creek itself. See for example the maps provided by OPIC and the ED. That division of Flat Creek may be the way the creek is shown on some maps, but not all. The unnamed tributary should be considered Flat Creek if Flat Creek is indeed where the OPIC and ED maps show it. As will be discussed below there is a disagreement as to which arm of the system is, in fact, Flat Creek.

Regardless of what this creek is called, Dr. Van Dellen has been up it, in canoe and on foot,

wading in the creek. He has been up it well above where the maps show the proposed North Lake. He has been up it above where a large creek comes in from the east well above that North Lake. He may not have been up as far as the one mile circle, but distances on the creek within the one mile circle are clearly more than a mile and it is difficult to determine on the river what the mileage may be. In any case, the discharge, while not large, makes a significant contribution to the flow in the creek where Dr. Van Dellen has been.

Dr. Van Dellen has used and enjoys this water body and the rest of the Flat creek from the location about 1.5 miles below the discharge to the Neches River. That use will be adversely affected by the normal discharge, and especially by the discharges that are results of the type of violations TCEQ has alleged Bullard to have made in the past. See Appendix 1. Thus, Dr. Van Dellen has a right to participate to make sure the permit is drafted to be enforceable and that it includes the special conditions needed to minimize the risks of violation such have occurred in the past. The compliance history of the City of Bullard shows a need for such special attention, and the needed adequate special conditions to create incentives for compliance have not been included in the draft permit.

B. Dr. Van Dellen's Past Use of the Area: Dr. Van Dellen is a Doctor of Veterinary Medicine and a retired Lieutenant Colonel with the Air Force. He is a vocational photographer whose images of the Neches River Basin have been included in numerous publications and websites, and sold professionally. He is also a professional guide, taking reporters, naturalists and others on canoe and walking trips on the Neches River and many of its tributaries, including Flat Creek.

Dr. Van Dellen is requesting a hearing, but he is not to seek denial of the proper permit, i.e. one that is drafted to protect the receiving waters and is enforceable by TCEQ and all others who have the legal right to enforce it. The current draft permit is not adequate. A proper permit will

reduce the risks of harm to his use and interests.

Dr. Van Dellen has made many trips to the Neches River and its tributaries. In 2005, for example, he contracted with Texas Conservation Alliance (TCA), then known as Texas Committee on Natural Resources, to provide GPS coordinates of major features of the River, such as road and pipeline crossings and the confluence of creeks, and to photograph interesting features and habitat for a planned publication, *Neches River User Guide*. The *Guide* was published in November of 2009 by Texas A&M University Press, with Dr. Van Dellen as a co-author.

Dr. Van Dellen's photography over the last 5 years encompasses areas of the Neches River and many tributaries, and he has been commercially successful. His most popular image is a large (23 x 48 inch) panoramic print that was sold to First Bank and Trust in Diboll, Texas, and currently displayed there.

He has sold a photograph of the endangered Neches River Rose Mallow, a hibiscus type flower, which he has found along the River. He has taken thousands of pictures on his trips on the Neches and its tributaries. He plans to continue do so.

His photography is also featured in various publications, including corporate annual reports and magazines. His photographs were recently published as part of a story in the *Texas Observer* about the Neches written by Dan Oko, and illustrated by Van Dellen's photography. See <http://www.texasobserver.org/datetime/still-wild-water>.

His professional photography includes areas of the tributary/creek downstream of the discharge, where he has also explored and enjoyed recreation of that tributary/creek

In recent years, Dr. Van Dellen has also guided a number of people on the Neches and its tributaries. He guided Lee Smith of the Texas Parks and Wildlife Department to help him obtain film footage of the Neches River for a documentary that was recently shown on PBS stations. It is called

“Texas: The State of Flowing Waters.” See <http://www.texasstateofwater.org>. Dr Van Dellen is shown in the documentary.

He has guided professional writers and other photographers who feature the Neches and its various tributaries in their publications. In 2007 and 2008 he guided Charles Kruvand along Neches’ riparian habitat and tributary creeks, including Flat Creek. Kruvand’s images will be published in a photo book titled, *Living Waters of Texas* – Ref: charleskruvand.com.

Van Dellen and Kruvand are currently taking photographs jointly for a book that will feature the entire Neches watershed, including Flat Creek and areas of the creek/tributary just down stream of the discharge..

Also, in 2009, Van Dellen guided a writer and photographer under contract with *Canoe & Kayak* magazine. The illustrated feature story is expected to be on the newsstand in May.

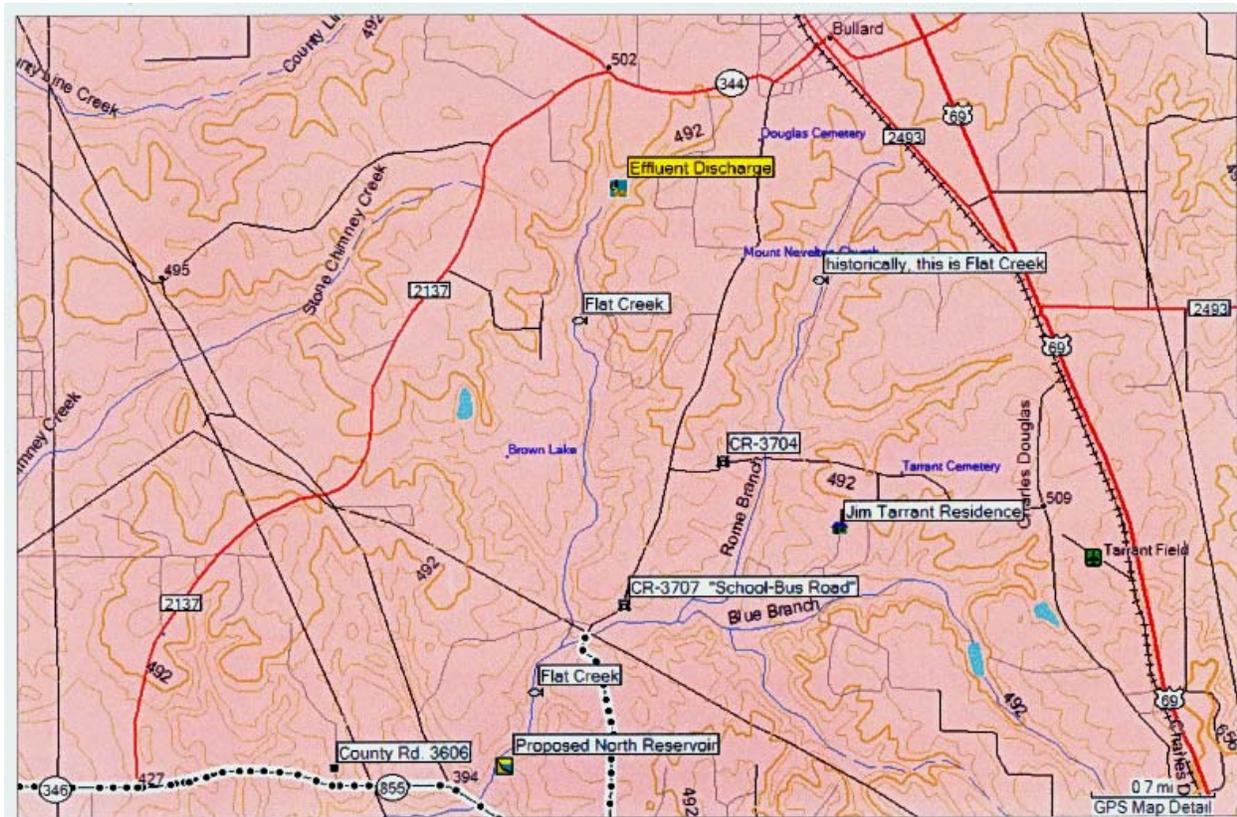
The first time Dr. Van Dellen went up the creek/tributary into which the discharge is made, he did so to explore the area for photographing. He has determined that it is just as good a stream for photography as other areas on Flat Creek, and actually better than some. Along its banks he found a variety of ferns, moss, flowers shrubs and trees. It appeared to be in relatively pristine condition at the time of that visit.

While most of Dr. Van Dellen’s guides are on the Neches, since it is wide enough to accommodate a large group, he takes individuals and small groups on trips up tributaries such as Flat Creek because of the isolation, beauty and unique opportunities of a smaller creek.

C. Locations of Dr. Van Dellen’s Use: Since Dr. Van Dellen’s first visit to Flat Creek in 2005, he has returned several times. He continues to explore, photograph and guide on it. Because Flat Creek is a perennial stream, easily navigable, its special features, including pristine stream-side ecology is very photogenic.

Van Dellen accesses (puts-in on) Flat Creek at four (4) different points: (1) at its confluence with the Neches (about a mile downstream from the dam at Lake Palestine); (2) at the bridge over Flat Creek on County Rd. 855 (3) at a second bridge on the Creek also on County Rd. 855 but farther upstream and (4) at the bridge on County Road 3707 (about 7 miles upstream from the confluence of Flat Creek and the Neches River). From these locations he goes both up and down Flat Creek and up and down tributaries to Flat Creek.

This last of the access points discussed above is actually on what is shown on the map below as the Rome Branch of Flat Creek. (Note on the map below, the vertical, dotted vehicular GPS Track that ends at the bridge/put-in). From here he paddles downstream on/in the Rome Br. channel about 350 yards to its confluence with Flat Creek. At times he walks within the stream in the summer time, when little rainfall has water levels at their lowest.



From the confluence of the Rome-Blue Br. waters with Flat Creek, Dr. Van Dellen has paddled and waded at least one (1) mile upstream on/in Flat Creek. The farthest upstream he has gone to date is approximately one and a half mile (1.5) downstream from the proposed effluent discharge.



Flat Creek at the second bridge on County Rd 855. Photo by Dr. Van Dellen.

According to some local residents, historically, Rome Br. was known as Flat Creek. Both are perennial streams and as one can see from the next photo, the Rome Branch is larger than Flat Creek, if Flat Creek is the stream shown on OPIC's maps and also labeled as such for consistency on the map above.



Confluence of the two streams looking upstream. Photo by Dr. Van Dellen.

Thus, the tributary that the City apparently calls Flat Creek may more properly be Rome Branch and what is labeled Rome Branch properly labeled instead Flat Creek. Likewise, the maps should be corrected to eliminate the indication of an unnamed tributary as the receiving waters. In any case, it should be clear that Dr. Van Dellen uses Flat Creek and its tributaries.

Flat Creek has two tributaries that add to its flow. One is Killough Creek, which is the site of the “Killough Massacre” of 1838. This is said to have been “the largest single Indian depredation in East Texas”, and took place near the site of present Old Larissa. Thus, there are also people interested in guided trips up Flat Creek and its tributaries for the history of the Native Americans and settlers.

Dr. Van Dellen believes he will continue to guide people and his work may increase on tributaries of the Neches and tributaries of the tributaries of the Neches, given the location of the new Neches River National Wildlife Refuge somewhat downstream of the location of Flat Creek and the Neches.

D. The Harm to Dr. Van Dellen’s Uses and Interests. The City of Bullard proposes to double its daily average discharge and triple its 2 hour peak discharge. While 438,000 gallons per day is not a large discharge to a river, it is to a small stream, such as the receiving waters here. It may be all or most of the flow at times.

Despite the repeated past violations by the City of Bullard to its current permit, significant impacts one to two miles downstream have not been observed by Dr. Van Dellen. The discharge to day has, however, been limited to ½ of the current average.

Dr. Van Dellen does have to wade in the Creek at times, to move his canoe out of shallow water and to take his photograph and to explore for photography and other activities. While, Dr. Van Dellen is an expert at canoeing, both he and his clients can tip over and fall into the water. Certainly it is not unusual for Dr. Van Dellen to touch the water with his hands.

Should the receiving waters become contaminated with high levels of bacteria, Dr. Van Dellen will clearly suffer greater health risks. Should the receiving waters become contaminated with high levels of phosphorus and nitrogen, for which there are not permit limits in the draft permit, the quality of the water will be adversely affected, to the detriment of Dr. Van Dellen's recreational and professional uses.¹ Should the chlorine residuals in the discharge have an adverse effect, possibly killing benthic organisms, including mussels, or fish, this will adversely affect Dr. Van Dellen's uses.

Due to Dr. Van Dellen education and training in Veterinary Medicine, he will understand and avoid risks at lower levels of pollution than the general public. Moreover, due to his keen eye for photography and for the flora and fauna he seeks to observe, photograph, or point out to others, Dr. Van Dellen will also clearly be affected differently from the general public.

The discharge permit as drafted is not adequate to protect Dr. Van Dellen, and thus TCA, from adverse effects upon their uses and interests, which uses and interests are different from the general public and which will be affected differently from the general public. Contamination of the waters will force Dr. Van Dellen and other members of TCA to reduce their use of the stream areas for recreational and professional activities because of health risk and reduced enjoyment of their recreational and professional uses. Their options for such uses will be limited.

IV. REPLY TO RESPONSE OF THE EXECUTIVE DIRECTOR ON AFFECTED PARTY STATUS AND ISSUES

A. Affected Party Status: The Executive Director appears to be making a very limited and incorrect interpretation of recreational interests as a basis for standing, arguing in essence, that Dr. Van Dellen's allegations of harm to future recreation interests, if true, are not sufficient to make him an affected person. The ED appears to be arguing that for either the recreational or economic

¹ TCA and Dr. Van Dellen agrees and adopts the statements by HRC Cherokee Tree Farm L.P. that the discharge from the Bullard treatment plant, even if meeting the new permit standards, will adversely affect water quality some 5 mile or more downstream by increasing the nutrients all the way to the North Lake proposed by HRC, if not farther.

interests, a person requesting a hearing must have some vested property right, such as land along the receiving water. That is not the law.

That cannot be the law, as it would mean that a discharger could avoid any contested case hearing simply by buying up all the land along the banks where the water maybe polluted, even if the water body was used by people, for swimming or fishing, or rafting companies. The ED's position would essentially eliminate the public participation role in state and federal law while telling the public that the public simply has to trust its government to do the right thing!

It would be great if TCEQ had all the resources it needed to always visit a discharge point, collect its own data and do the type of job that TCEQ and the public would like it to do.

Unfortunately, TCEQ does not have such resources. Moreover, as several current Commissioners have stated in clear terms in the past, the Commission benefits from the information that others can bring to the permitting process, information that applicants may not even know, or worse, do not disclose since it may not be in their interests to do so.

The Executive Director is wrong in his analysis of recreational interests. Such an interest that is the same as the general public would be one where someone wants to canoe Flat Creek, but has not or has done so once in the past, but can not show any intent to do so in the future.

On the other hand, Dr. Van Dellen's statements in the hearing request that he has used Flat Creek near the discharge, that he intends to do so again in the future and that his future use will be adversely affected makes his recreational interest different from the general public. His statements of fact are sufficient to require the Commission to approve his hearing request or give him, at least, a hearing on the hearing request where Dr. Van Dellen must present his evidence of being affected.

Nevertheless, the more detailed explanation above should resolve all doubt that his recreational use is 1) different from the general public, 2) is one that can be affected by the discharge, and 3) will be harmed by the discharge. This interests is sufficient to require a contested

case hearing.

Dr. Van Dellen and TCA, however, have a second basis for the hearing request and a finding that Dr. Van Dellen is an affected person. He has an economic interest different from the general public that will be adversely affected. His economic interests are not speculative, as the Executive Director states. He has an ongoing professional and economic interest in the quality of the receiving waters and his ability to use those waters for his professional activities of photography, guiding and research.

There is nothing in the cases that the ED has cited that states or implies that Dr. Van Dellen's interests are not adequate to meet the test of standing in Texas courts to appeal an action of TCEQ under Chapter 5 of the Water Code. There is certainly nothing in the cases that the ED has cited that states or implies that Dr. Van Dellen's interests are not adequate to meet the test of an "affected person" for purposes for a contested case hearing, a test that the Courts have said is less stringent than the test of standing in courts.

B. Issues for SOAH: One problem that occurs with the referral of issues to SOAH is that first the ED recharacterizes and combines comments for purposes of responding. The General Counsel's office then often recharacterizes the issues to create a list for the Commission to consider. The result is often the referral of issues that create confusion in the contested case hearing. The meaning of the issue, when compared to the comment that triggered it, is often confused.²

For example, here one commenter suggested the need to look at impacts on their water wells, while the other referenced groundwater. The ED characterizes the comments as raising the issue of protecting ground water, while OPIC's focused on "groundwater wells." The issue should be the broader on that the ED proposed.

² This problem could be solved if TCEQ would provide a model set of issues that the public, applicant and staff can use to develop comments for each of the major categories of permits. Such model could also make decisions on the language to use for an issue easier and more consistent from case to case.

Thus, TCA and Dr. Van Dellen are concerned about how the issues will be combined and drafted to reflect the scope of the actual comments. There have been disputes at SOAH about whether the language in a referred issue has to be strictly applied. Some SOAH judges have ruled yes, others no. The discussion of the issue will follow the discussion next on one important issue for the Commission; and if not in this case, then in future ones.

1. “Emerging Contaminants”:

Despite new positions taken by both the Commissioners and the Legislature in 2009, the ED continues to take the position that because neither TCEQ nor EPA has rules or policies in place to address such pollutants, “this issue is outside the scope of TCEQ regulations.” The ED recommends denial of the issue.

The ED is wrong on the law and policy. TCEQ clearly has authority to address these contaminants, and can do so without any special rules at TCEQ or EPA.

Texas Water Code states:

UNAUTHORIZED DISCHARGES PROHIBITED. (a) **Except as authorized by the commission**, no person may:...(B) (3) commit any other act or engage in any other activity which in itself or in conjunction with any other discharge or activity causes, continues to cause, or will cause pollution of any of the water in the state.... Section 26.121

where "water in the state" is defined to mean

means groundwater, percolating or otherwise, lakes, bays, ponds, impounding reservoirs, springs, rivers, streams, creeks.... Section 26.001(5)

and where "pollution" is defined to mean

the alteration of the physical, thermal, chemical, or biological quality of, or the contamination of, any water in the state that renders the water harmful, detrimental, or injurious to humans, animal life, vegetation, or property or to public health, safety, or welfare, or impairs the usefulness or the public enjoyment of the water for any lawful or reasonable purpose.

Moreover, TCEQ rules state:

The executive director may require more stringent design criteria of a collection system or treatment facility if the executive director determines it is necessary to protect public health or to meet water quality standards established by the commission. 30 TAC §217.3. (b).

In fact, the Commission has explicitly recognized its authority to regulate such pollutants in permits in early 2009. The Commission revised a proposal for decision on a waste water permit to make it clear that the issue can be appropriate for a contested case hearing. In granting the permit, the Commission added the following words to the proposed conclusion of law: "Under the facts in this record." The new and Commission adopted conclusion of law states:

Conclusion of Law No. 11: Under the facts in this record, WCID has no legal obligation under existing Texas law to monitor or treat its effluent for pharmaceuticals and personal care products (PPCPs) that may enter its treatment facility.

Thus, the Executive Director is incorrect in stating that the issue of removal of pharmaceuticals and other contaminants not traditionally addressed by permits is not a proper issue as a matter of law.

The issue requires a factual evaluation. For example, in the case of a discharge into a creek with significant recharge features for the Edwards Aquifer, consideration of the risk to drinking water may be sufficient to require special permit conditions. Likewise, a permit may need to have a provision to address the contaminants if it is shown that an endangered species, perhaps the reproductive capacity of an important mussel or amphibian in the receiving waters, will be damaged by such pollutants.

The TCEQ rule cited above provides that the agency "may require more stringent design criteria of a collection system or treatment facility **if the executive director determines it is necessary to protect public health.**" Obviously the Commission can determine "it necessary," even if the ED did not.

Moreover, the Texas Legislature expressed its desire that TCEQ begin addressing these contaminants in passing SB 1757.

Finally, there are clearly easy steps the City could take. Some cities have already set up drop off locations for pharmaceuticals and other materials that should not be added to the waste water system. Some have created public educational materials to encourage proper disposal. These are similar to TCEQ's programs to encourage local governments to hold hazardous waste disposal days to collect household hazardous wastes.

Under certain conditions, a permittee may be required to address such contaminants with discharge limitations that require better treatment or some "pre-treatment activities." A City, such as Bullard, may then chose a disposal service rather than upgraded treatment, because that saves money for the City.

2. Other issues for SOAH: TCA and Dr. Van Dellen want to discourage the approach taken by OPIC in its reply. It seems to suggest, contrary to the law, that issues HRC raised could only be referred if HRC were granted a hearing. The ED properly combined the issues to allow all to be referred regardless of who raised them.

The Executive Director also generally did, in this case, characterize most of the issues correctly based on the comments of TCA and Dr. Van Dellen. The ED, did not, however, include all the issues raised, some of which were identified by OPIC.

If the ED's list of issues is used, TCA and Dr. Van Dellen urge the following:

1. Refer as written the following ED's issues on pages 13 and 14 of its response:

1. Compliance history
2. Notice
3. Proper application
6. Groundwater
7. Impacts on Wetlands
8. Regionalization
9. Protection of public health and safety and the environment

2. Refer issues 4 and 5, but without the reference to the rules. Such references limit the issues more than the comments. For example, there are location requirements and limits in 30 T.A.C. Chapter 217 as well as 309. There is no reason to tie an issue to a specific rule or chapter.

3. Add the following issues for referral

* ED issue 11. Pharmaceuticals, etc.

* OPIC HRC Issues 3 and TCA Issue 10 on impacts to aquatic life, if not clear in ED issue 9.

* OPIC TCA Issue 4 on enforceable terms (or make that issue explicitly part of the compliance history issue. (Specifics, including, but not limited to, the latitude and longitude for the outfall and the proper name of the receiving water, are needed to facilitate enforcement.)

* OPIC TCA Issue 6 on relevant nuisance conditions, which would include odor.

C. Length of Hearing. TCA and Dr. Van Dellen do not object to the ED's recommendation of 9 months for the hearing. Time should also be allotted for negotiations.

V. REPLY TO RESPONSE OF OPIC ON AFFECTED PARTY STATUS AND ISSUES

A. Affected Party Status: OPIC's response appears to focus more on the location of the use than whether the recreational or economic interests are sufficient. Thus, the facts provided above would appear to resolve the matters raised by OPIC.

B. Issues for SOAH: See the reply above in Section IV on the ED's Response.

C. Length of Hearing. See the reply above in Section IV on the ED's Response.

VI. REPLY TO RESPONSE OF THE CITY OF BULLARD

A. Affected Party Status: The City of Bullard takes the same positions as the Executive Director on Dr. Van Dellen's "standing." Thus, the responses above to the ED's position on that matter will not be repeated here.

The Commission should, however, take this opportunity to make it clear to applicants that there is no one-mile rule to determine who is affected. Clearly people many miles downstream of a discharge could be much more affected than those 1 mile upstream of a discharge.

There is nothing in Texas or federal law to support an arbitrary distance as a rule for standing or even a rule of thumb. It would be nice to have “bright line tests” for all issues, but for many issues there are none. Thus, TCEQ staff has to use its best professional judgment for many technical issues for a permit when there is no standard in the rules. There is little difference in such an evaluation than for a standing evaluation. Often, facts have to be evaluated in detail. Sometimes that requires a hearing just on those facts.

Finally, the City of Bullard seems to be making an argument that TCA must be denied a hearing because the hearing requires the participation by Dr. Van Dellen. If so, that is strange and dangerous reasoning.

If it were true, then the members of organizations such as the Coastal Conservation Association, National Wildlife Federation or even a small local group would have to seek party status, and the organization could not. Think of the costs of a hearing with 500 individuals as parties rather than an organization to represent them. Organizations are often formed to help facilitate participation and save all other parties, taxpayers and TCEQ significant resources.

The issue is basically, are the individual members seeking the same results, such as changes to a draft permit to protect public health or the environment? If so, the organization should be a party to represent its members. Individual members may want to participate also, but that is their right if they are affected.

The arguments of the City of Bullard should be rejected by this Commission.

B. Issues for SOAH: See the reply above in Section IV on the ED’s Response.

C. Length of Hearing. See the reply above in Section IV on the ED’s Response.

VI. CONCLUSION

Therefore, TCA and Dr. Van Dellen request a hearing with a duration of 9 months and with the referral to SOAH of all relevant issues raised by them or HRC Cherokee Tree Farm L.P. (HRC).

They also support the hearing request of HRC.

Respectfully Submitted,

LOWERRE, FREDERICK, PERALES,

ALLMON & ROCKWELL

707 Rio Grande, Suite 200

Austin, Texas 78701

Phone: (512) 469-6000,

Facsimile: (512) 482-9346

By: _____

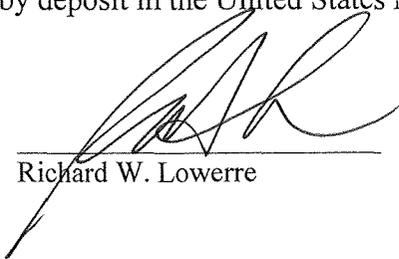
Richard W. Lowerre

State Bar No. 12632900

For TCA and Dr. Adrian Van Dellen

CERTIFICATE OF SERVICE

I hereby certify by my signature below that on April 19, 2010, the above reply was served on all parties listed below via facsimile transmission and by deposit in the United States Mail.



Richard W. Lowerre

Michelle Bacon
Staff Attorney for the Executive Director
Environmental Law Division, MC-173
Texas Commission on Environmental Quality
P. O. Box 13087
Austin, Texas 78711-3087
Facsimile: (512) 239-0606

James B Murphy
Assistant Public Interest Counsel, MC-103
Texas Commission on Environmental Quality
P. O. Box 13087
Austin, Texas 78711-3087
Facsimile: (512) 239-6377

Kyle Lucas
Texas Commission on Environmental Quality
Alternative Dispute Resolution, MC-222
P.O. Box 13087
Austin, Texas 78711-3087
Fax: (512) 239-4015

Barbara Boulware-Wells
Counsel for City of Bullard
Akers & Boulware-Wells, LLP
6618 Sitio Del Rio Blvd., Bldg E, Suite 102
Austin, TX 78730
Facsimile: (512) 367-5687

Phil Haag
Scott Rhodes
Counsel for HRC Cherokee Tree Farm, LP
McGinnis, Lochridge & Kilgore, LLP
600 Congress Ave, Suite 2100
Austin, Texas 78701
Facsimile: (512) 495-6093

APPENDIX 1

COMPLIANCE HISTORY COMPILED BY TCEQ

Compliance History Report

Customer/Respondent/Owner-Operator:	CN600667026	City of Bullard	Classification: AVERAGE	Rating: 1.73
Regulated Entity:	RN101720639	CITY OF BULLARD WWTP	Classification: AVERAGE	Site Rating: 1.73
ID Number(s):	WASTEWATER	PERMIT	WQ0011787001	
	WASTEWATER	PERMIT	TPDES0071188	
	WASTEWATER	PERMIT	TX0071188	
	WASTEWATER LICENSING	LICENSE	WQ0011787001	
Location:	FM 344, BULLARD, TX, 75757			
TCEQ Region:	REGION 05 - TYLER			
Date Compliance History Prepared:	June 12, 2009			
Agency Decision Requiring Compliance History:	Permit - Issuance, renewal, amendment, modification, denial, suspension, or revocation of a permit.			
Compliance Period:	April 22, 2004 to June 12, 2009			
TCEQ Staff Member to Contact for Additional Information Regarding this Compliance History				
Name:	Tom Harrigan	Phone:	239 - 4521	

Site Compliance History Components

1. Has the site been in existence and/or operation for the full five year compliance period? Yes
2. Has there been a (known) change in ownership/operator of the site during the compliance period? No
3. If Yes, who is the current owner/operator? N/A
4. If Yes, who was/were the prior owner(s)/operator(s) ? N/A
5. When did the change(s) in owner or operator occur? N/A
6. Rating Date: 9/1/2008 Repeat Violator: NO

Components (Multimedia) for the Site :

- A. Final Enforcement Orders, court judgements, and consent decrees of the state of Texas and the federal government.

N/A

- B. Any criminal convictions of the state of Texas and the federal government.

N/A

- C. Chronic excessive emissions events.

N/A

- D. The approval dates of investigations. (CCEDS Inv. Track. No.)

1	05/21/2004	(312049)
2	06/20/2004	(358884)
3	07/20/2004	(358885)
4	08/19/2004	(358886)
5	09/21/2004	(358887)
6	10/14/2004	(358888)
7	11/19/2004	(358889)
8	12/08/2004	(343057)
9	12/16/2004	(385606)
10	12/16/2004	(584098)
11	03/10/2005	(385604)
12	03/21/2005	(385605)
13	04/14/2005	(377737)
14	04/25/2005	(423603)
15	05/16/2005	(379399)
16	05/25/2005	(423604)
17	07/25/2005	(423605)

18 08/15/2005 (444404)
 19 08/15/2005 (444405)
 20 09/23/2005 (444406)
 21 10/26/2005 (584092)
 22 11/17/2005 (584094)
 23 12/19/2005 (584096)
 24 01/17/2006 (584099)
 25 02/21/2006 (584079)
 26 03/24/2006 (584081)
 27 04/20/2006 (584083)
 28 05/16/2006 (466344)
 29 05/22/2006 (584085)
 30 06/23/2006 (584087)
 31 07/20/2006 (584089)
 32 08/14/2006 (584090)
 33 09/20/2006 (584091)
 34 10/13/2006 (584093)
 35 11/16/2006 (584095)
 36 12/14/2006 (584097)
 37 01/22/2007 (584100)
 38 02/08/2007 (584080)
 39 03/16/2007 (584082)
 40 04/16/2007 (584084)
 41 05/21/2007 (584086)
 42 06/15/2007 (584088)
 43 07/18/2007 (608437)
 44 08/08/2007 (608438)
 45 08/22/2007 (572934)
 46 08/22/2007 (573183)
 47 09/21/2007 (608439)
 48 10/11/2007 (623100)
 49 11/15/2007 (623101)
 50 12/17/2007 (623102)
 51 01/07/2008 (674505)
 52 02/04/2008 (616736)
 53 02/18/2008 (674503)
 54 03/21/2008 (674504)
 55 04/14/2008 (692836)
 56 05/13/2008 (692837)
 57 07/14/2008 (714001)
 58 07/28/2008 (714000)
 59 08/20/2008 (714002)
 60 09/10/2008 (714003)
 61 09/24/2008 (720849)
 62 10/16/2008 (730038)
 63 10/27/2008 (706091)
 64 11/14/2008 (730039)
 65 12/12/2008 (730040)
 66 04/02/2009 (741288)

E. Written notices of violations (NOV). (CCEDS Inv. Track. No.)

Date:	01/31/2005	(385604)	CN600667026
Self Report?	YES		Classification: Moderate
Citation:	30 TAC Chapter 305, SubChapter F 305.125(1) TWC Chapter 26 26.121(a)		
Description:	Failure to meet the limit for one or more permit parameter		
Date:	02/28/2005	(385605)	CN600667026
Self Report?	YES		Classification: Moderate
Citation:	30 TAC Chapter 305, SubChapter F 305.125(1) TWC Chapter 26 26.121(a)		

Description: Failure to meet the limit for one or more permit parameter
 Date: 03/31/2005 (423603) CN600667026
 Self Report? YES Classification: Moderate
 Citation: 30 TAC Chapter 305, SubChapter F 305.125(1)
 TWC Chapter 26 26.121(a)

Description: Failure to meet the limit for one or more permit parameter
 Date: 04/30/2005 (423604) CN600667026
 Self Report? YES Classification: Moderate
 Citation: 30 TAC Chapter 305, SubChapter F 305.125(1)
 TWC Chapter 26 26.121(a)

Description: Failure to meet the limit for one or more permit parameter
 Date: 05/17/2005 (379399)
 Self Report? NO Classification: Moderate
 Citation: 30 TAC Chapter 305, SubChapter F 305.125(5)
 30 TAC Chapter 317 317.4(b)(1)

Description: Failure to maintain bar screen.
 Self Report? NO Classification: Moderate
 Citation: 30 TAC Chapter 305, SubChapter F 305.125(5)
 30 TAC Chapter 317 317.4(d)

Description: Failure to properly operate and maintain clarifiers.
 Self Report? NO Classification: Moderate
 Citation: 30 TAC Chapter 305, SubChapter F 305.125(5)
 30 TAC Chapter 317 317.1

Description: Failure to maintain sludge pumps.
 Date: 05/31/2005 (444404) CN600667026
 Self Report? YES Classification: Moderate
 Citation: 30 TAC Chapter 305, SubChapter F 305.125(1)
 TWC Chapter 26 26.121(a)

Description: Failure to meet the limit for one or more permit parameter
 Date: 08/31/2005 (444406) CN600667026
 Self Report? YES Classification: Moderate
 Citation: 30 TAC Chapter 305, SubChapter F 305.125(1)
 TWC Chapter 26 26.121(a)

Description: Failure to meet the limit for one or more permit parameter
 Date: 09/30/2005 (584092) CN600667026
 Self Report? YES Classification: Moderate
 Citation: 30 TAC Chapter 305, SubChapter F 305.125(1)
 TWC Chapter 26 26.121(a)

Description: Failure to meet the limit for one or more permit parameter
 Date: 10/31/2005 (584094) CN600667026
 Self Report? YES Classification: Moderate
 Citation: 30 TAC Chapter 305, SubChapter F 305.125(1)
 TWC Chapter 26 26.121(a)

Description: Failure to meet the limit for one or more permit parameter
 Date: 11/30/2005 (584096) CN600667026
 Self Report? YES Classification: Moderate
 Citation: 30 TAC Chapter 305, SubChapter F 305.125(1)
 TWC Chapter 26 26.121(a)

Description: Failure to meet the limit for one or more permit parameter
 Date: 12/31/2005 (584099) CN600667026
 Self Report? YES Classification: Moderate
 Citation: 30 TAC Chapter 305, SubChapter F 305.125(1)
 TWC Chapter 26 26.121(a)

Description: Failure to meet the limit for one or more permit parameter
 Date: 01/31/2006 (584079) CN600667026
 Self Report? YES Classification: Moderate
 Citation: 30 TAC Chapter 305, SubChapter F 305.125(1)
 TWC Chapter 26 26.121(a)

Description: Failure to meet the limit for one or more permit parameter
 Date: 03/31/2006 (584083) CN600667026
 Self Report? YES Classification: Moderate
 Citation: 30 TAC Chapter 305, SubChapter F 305.125(1)
 TWC Chapter 26 26.121(a)

Description: Failure to meet the limit for one or more permit parameter
 Date: 04/30/2006 (584085) CN600667026
 Self Report? YES Classification: Moderate
 Citation: 30 TAC Chapter 305, SubChapter F 305.125(1)
 TWC Chapter 26 26.121(a)

Description: Failure to meet the limit for one or more permit parameter
 Date: 05/16/2006 (466344) CN600667026
 Self Report? NO Classification: Moderate
 Citation: 30 TAC Chapter 305, SubChapter F 305.125(5)
 30 TAC Chapter 317 317.4(b)(1)

Description: Failure to maintain bar screen.
 Self Report? NO Classification: Moderate
 Citation: 30 TAC Chapter 305, SubChapter F 305.125(5)
 30 TAC Chapter 317 317.4(d)

Description: Failure to properly operate and maintain clarifiers.
 Self Report? NO Classification: Moderate
 Citation: 30 TAC Chapter 305, SubChapter F 305.125(5)
 30 TAC Chapter 317 317.1

Description: Failure to maintain sludge pumps.
 Self Report? NO Classification: Moderate
 Citation: 30 TAC Chapter 305, SubChapter F 305.125(5)
 30 TAC Chapter 317 317.4(b)(1)

Description: Failure to maintain bar screen.
 Self Report? NO Classification: Moderate
 Citation: 30 TAC Chapter 305, SubChapter F 305.125(5)
 30 TAC Chapter 317 317.5(e)(1)

Description: Failure to properly maintain sludge drying beds.
 Self Report? NO Classification: Moderate
 Citation: 30 TAC Chapter 305, SubChapter F 305.125(1)

Description: Failure to maintain DO, BOD, and TSS within permitted limits.
 Date: 05/31/2006 (584087) CN600667026
 Self Report? YES Classification: Moderate
 Citation: 30 TAC Chapter 305, SubChapter F 305.125(1)
 TWC Chapter 26 26.121(a)

Description: Failure to meet the limit for one or more permit parameter
 Date: 07/31/2006 (584090) CN600667026
 Self Report? YES Classification: Moderate
 Citation: 30 TAC Chapter 305, SubChapter F 305.125(1)
 TWC Chapter 26 26.121(a)

Description: Failure to meet the limit for one or more permit parameter
 Date: 01/31/2007 (584080) CN600667026
 Self Report? YES Classification: Moderate
 Citation: 30 TAC Chapter 305, SubChapter F 305.125(1)
 TWC Chapter 26 26.121(a)

Description: Failure to meet the limit for one or more permit parameter
 Date: 02/28/2007 (584082) CN600667026
 Self Report? YES Classification: Moderate
 Citation: 30 TAC Chapter 305, SubChapter F 305.125(1)
 TWC Chapter 26 26.121(a)

Description: Failure to meet the limit for one or more permit parameter
 Date: 04/30/2007 (584086) CN600667026
 Self Report? YES Classification: Moderate
 Citation: 30 TAC Chapter 305, SubChapter F 305.125(1)
 TWC Chapter 26 26.121(a)

Description: Failure to meet the limit for one or more permit parameter
 Date: 05/31/2007 (584088) CN600667026
 Self Report? YES Classification: Moderate
 Citation: 30 TAC Chapter 305, SubChapter F 305.125(1)
 TWC Chapter 26 26.121(a)

Description: Failure to meet the limit for one or more permit parameter
 Date: 06/30/2007 (608437) CN600667026
 Self Report? YES Classification: Moderate
 Citation: 2D TWC Chapter 26, SubChapter A 26.121(a)
 30 TAC Chapter 305, SubChapter F 305.125(1)

Description: Failure to meet the limit for one or more permit parameter
 Date: 07/31/2007 (608438) CN600667026
 Self Report? YES Classification: Moderate
 Citation: 2D TWC Chapter 26, SubChapter A 28.121(a)
 30 TAC Chapter 305, SubChapter F 305.125(1)

Description: Failure to meet the limit for one or more permit parameter
 Date: 08/28/2007 (573183) CN600667026
 Self Report? NO Classification: Minor
 Citation: 30 TAC Chapter 317 317.3(c)(1)
 30 TAC Chapter 317 317.3(c)(2)
 30 TAC Chapter 317 317.3(c)(3)
 30 TAC Chapter 317 317.3(c)(4)
 30 TAC Chapter 317 317.3(c)(5)
 30 TAC Chapter 317 317.3(c)(6)
 30 TAC Chapter 317 317.3(c)(7)

Description: Failure to have two operational pumps at the Courtney Drive lift station.
 Self Report? NO Classification: Minor
 Citation: 30 TAC Chapter 317 317.3(a)
 30 TAC Chapter 317 317.3(e)(4)(C)

Description: Failure to provide intruder resistance for the dentist office lift station.
 Self Report? NO Classification: Minor
 Citation: 30 TAC Chapter 317 317.3(d)(5)

Description: Failure to provide adequate hydraulic capacity for the discharge piping at the park lift station.
 Self Report? NO Classification: Minor
 Citation: 30 TAC Chapter 317 317.2(a)(1)

Description: Failure to maintain the wastewater collection system in a manner to minimize inflow in infiltration during rain events.
 Self Report? NO Classification: Minor
 Citation: 11787-001 PERMIT
 30 TAC Chapter 305, SubChapter F 305.125(1)

Description: Failure to maintain lift station maintenance and inspection documentation.
 Date: 08/28/2007 (572934)
 Self Report? NO Classification: Moderate
 Citation: 30 TAC Chapter 305, SubChapter F 305.125(1)

Description: Failure to comply with the 75/90 rule in this permit. This plant must be operated within the permitted effluent flow parameters.
 Self Report? NO Classification: Moderate
 Citation: 30 TAC Chapter 305, SubChapter F 305.126(a)

Description: Failure to comply with the 75/90 rule in this permit.
 Self Report? NO Classification: Minor
 Citation: 30 TAC Chapter 317 317.4(a)(8)
 30 TAC Chapter 317 317.7(i)

Description: Failure to perform the annual calibration on the Reduced Pressure Zone (RPZ) backflow preventer and to have the RPZ unit properly installed. The RPZ is installed below grade and the unit was under water.
 Self Report? NO Classification: Minor
 Citation: 30 TAC Chapter 305, SubChapter F 305.125(5)
 30 TAC Chapter 317 317.4(b)(1)

Description: Failure to prevent plastics, rubber and other materials from entering the wastewater treatment units.
 Self Report? NO Classification: Minor
 Citation: 30 TAC Chapter 305, SubChapter F 305.125(5)
 30 TAC Chapter 317 317.4(g)

Description: Failure to maintain the aeration basin in good condition. The walls were observed to be leaking partially treated sludge onto the ground and grass is growing in the unit.
 Self Report? NO Classification: Minor
 Citation: 30 TAC Chapter 305, SubChapter F 305.125(5)
 30 TAC Chapter 317 317.5(e)(1)

Description: Failure to maintain the sludge drying beds in good condition. The drying beds are full of weeds and grass.
 Date: 02/29/2008 (674504) CN600667026
 Self Report? YES Classification: Moderate
 Citation:

2D TWC Chapter 26, SubChapter A 26.121(a)
 30 TAC Chapter 305, SubChapter F 305.125(1)
 Description: Failure to meet the limit for one or more permit parameter
 Date: 03/31/2008 (692836) CN600667026
 Self Report? YES Classification: Moderate
 Citation: 2D TWC Chapter 26, SubChapter A 26.121(a)
 30 TAC Chapter 305, SubChapter F 305.125(1)

Description: Failure to meet the limit for one or more permit parameter
 Date: 04/30/2008 (692837) CN600667026
 Self Report? YES Classification: Moderate
 Citation: 2D TWC Chapter 26, SubChapter A 26.121(a)
 30 TAC Chapter 305, SubChapter F 305.125(1)

Description: Failure to meet the limit for one or more permit parameter
 Date: 05/31/2008 (714000) CN600667026
 Self Report? YES Classification: Moderate
 Citation: 2D TWC Chapter 26, SubChapter A 26.121(a)
 30 TAC Chapter 305, SubChapter F 305.125(1)

Description: Failure to meet the limit for one or more permit parameter
 Date: 09/24/2008 (720849) CN600667026
 Self Report? NO Classification: Moderate
 Citation: 30 TAC Chapter 305, SubChapter F 305.125(1)
 30 TAC Chapter 305, SubChapter F 305.125(17)

Description: NON-RPT VIOS FOR MONIT PER OR PIPE
 Date: 10/29/2008 (706091) CN600667026
 Self Report? NO Classification: Moderate
 Citation: 2D TWC Chapter 26, SubChapter A 26.121(a)

Description: Failure to properly prevent an unauthorized discharge as specified in the Texas
 Water Code §26.121(a).
 Date: 10/31/2008 (730039) CN600667026
 Self Report? YES Classification: Moderate
 Citation: 2D TWC Chapter 26, SubChapter A 26.121(a)
 30 TAC Chapter 305, SubChapter F 305.125(1)

Description: Failure to meet the limit for one or more permit parameter
 Date: 11/30/2008 (730040) CN600667026
 Self Report? YES Classification: Moderate
 Citation: 2D TWC Chapter 26, SubChapter A 26.121(a)
 30 TAC Chapter 305, SubChapter F 305.125(1)

Description: Failure to meet the limit for one or more permit parameter
 Date: 04/07/2009 (741288) CN600667026
 Self Report? NO Classification: Moderate
 Citation: 30 TAC Chapter 305, SubChapter F 305.126(a)

Description: Failure to meet the daily average flow permit limit as specified in TAC 305.126(a).
 Self Report? NO Classification: Moderate
 Citation: 30 TAC Chapter 317 317.6(b)(1)
 30 TAC Chapter 317 317.6(b)(1)(A)
 30 TAC Chapter 317 317.6(b)(1)(B)
 30 TAC Chapter 317 317.6(b)(1)(C)
 30 TAC Chapter 317 317.6(b)(1)(D)
 30 TAC Chapter 317 317.6(b)(1)(E)
 30 TAC Chapter 317 317.6(b)(1)(F)
 30 TAC Chapter 317 317.6(b)(1)(G)

Description: Failure to have an operational exhaust fan in the chlorine room.
 Self Report? NO Classification: Minor
 Citation: 30 TAC Chapter 305, SubChapter F 305.125(1)

Description: Failure to prevent debris from entering all of the treatment units.
 Self Report? NO Classification: Minor
 Citation: 30 TAC Chapter 305, SubChapter F 305.125(1)

Description: Failure to properly install flow measuring devices.
 Self Report? NO Classification: Minor
 Citation: 30 TAC Chapter 319, SubChapter A 319.7(a)
 30 TAC Chapter 319, SubChapter A 319.7(c)

Description: Failure to maintain calibration records for chlorine meters.
 Self Report? NO Classification: Moderate
 Citation: 30 TAC Chapter 305, SubChapter F 305.125(1)

Description: Failure to conduct sludge analysis for metals and fecal coliform/or Salmonella sp. in 2008.
Self Report? NO Classification: Minor
Citation: 30 TAC Chapter 305, SubChapter F 305.125(1)
Description: Failure to maintain a minimum DO of 6.0 mg/L as required by the City's permit.
Self Report? NO Classification: Minor
Citation: 30 TAC Chapter 305, SubChapter F 305.125(1)
Description: Failure to maintain a minimum chlorine residual of 1.0 mg/L for twenty minutes as required by the City's permit.

F. Environmental audits.

N/A

G. Type of environmental management systems (EMSs).

H. Voluntary on-site compliance assessment dates.

N/A

I. Participation in a voluntary pollution reduction program.

N/A

J. Early compliance.

N/A

Sites Outside of Texas

N/A