

TCEQ DOCKET NUMBER 2011-2093-MWD

APPLICATION BY § **BEFORE THE**
CITY OF VICTORIA FOR TPDES § **TEXAS COMMISSION ON**
PERMIT NO. WQ0010466002 § **ENVIRONMENTAL QUALITY**

EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS

I. Introduction

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) files this Response to Hearing Requests (Response) on the application by City of Victoria (Victoria) for a new Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0010466002. Lillie Cardenas, Raymond Cardenas, Pauline B. Compean, Ynes P. Compean Sr., Rosemary Daugherty, Allan Dearman, Rhonda J Gant, Emilia Garcia, John Garcia, Ernest I. Hosey, Rosie Hosey, Sister Andrea Hubnik, Luciana Lopez, Kevin McNary, Rose McNary, Emily Perez, Henry Perez, Robert Perez, Jesse M. Sanchez, Paula R. Sanchez, Sister Patrice Schorp, and Sister Mildred Truchard submitted contested case hearing (CCH) requests.

Attached for Commission consideration are the following:

Attachment A - Technical Summary & Draft Permit
Attachment B – ED's Response to Comments (RTC)
Attachment C - Compliance History
Attachment D - ED's GIS Map

II. Description of the Facility

Victoria applied to the TCEQ for a new permit, Permit No. WQ0010466002, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 4.4 million gallons per day (MGD) in the interim phase, and 6.6 MGD in the final phase. The proposed WWTP will replace the existing WWTP.

The effluent limitations in the draft permit, based on a daily average, are: 20 milligrams per liter (mg/l) biochemical oxygen demand (BOD5) 20 mg/l total suspended solids (TSS); 126 colony forming units or most probable number (CFU/MPN) E. coli 2.0 mg/l dissolved oxygen (DO) and a pH of 6.0 to 9.0 standard units.

III. Procedural Background

The application for a new permit was received on August 20, 2010 and declared administratively complete on November 15, 2010. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published on November 28, 2010 in the Victoria Advocate. The alternative language NORI was published in Spanish on December 3, 2010 in Revista de Victoria. The Combined Notice of Application and Preliminary Decision (NAPD) and Notice of Public Meeting were published on June 21, 2011 in the Victoria Advocate. The alternative language NAPD and Notice of Public Meeting were published on July 8, 2011 in the Revista de Victoria. A public meeting was held in Victoria on July 21, 2011, and the public comment period ended on August 8, 2011. The ED's Response to Comments (RTC) was filed on October 7, 2011. The ED's

final decision letter and the RTC were mailed on October 11, 2011. The Hearing Request period ended on November 10, 2011.

This application was administratively complete on or after September 1, 1999; therefore, this application is subject to the procedural requirements adopted pursuant to House Bill 801 (76th Legislature, 1999).

IV. Evaluation of Hearing Requests

House Bill 801 established statutory procedures for public participation in certain environmental permitting proceedings. For those applications declared administratively complete on or after September 1, 1999, it established new procedures for providing public notice and public comment, and for the Commission's consideration of hearing requests. This application was declared administratively complete on February 23, 2007, and therefore is subject to the HB 801 requirements. The Commission implemented HB 801 by adopting procedural rules in Title 30 of the Texas Administrative Code (30 TAC) chapters 30, 59, and 55. The regulations governing requests for CCH are found at 30 TAC, Chapter 55.

A. Response to Requests

"The Executive Director, the public interest counsel, and applicant may submit written responses to [hearing] requests" 30 TAC §55.209(d).

Responses to hearing requests must specifically address:

- (1) whether the requestor is an affected person;
- (2) whether 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; and
- (6) a maximum expected duration for the contested case hearing.

30 TAC §55.209(e).

B. Hearing Request Requirements

In order for the Commission to consider a hearing request, the Commission must first determine whether the request meets certain requirements.

A request for a contested case hearing by an affected person must be in writing, must be filed with the chief clerk within the time provided . . . and may not be based on an issue that was 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. 30 TAC §55.201(c).

A hearing request must substantially comply with the following:

- (1) give the name, address, daytime telephone number, and where possible, fax number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number, and where possible, fax number, who shall be responsible for receiving all official communications and documents for the group;
- (2) identify the person's justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;
- (3) request a contested case hearing;
- (4) list all relevant and material disputed issues of fact that were raised 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 that the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy; and
- (5) provide any other information specified in the public notice of application.

30 TAC §55.201(d).

C. Requirement that Requestor be an "Affected Person"

In order to grant a contested case hearing, the commission must determine that a requestor is an "affected person."

- (6) For any application, an affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest.
- (7) Governmental entities, including local governments and public agencies with authority under state law over issues raised by the application may be considered affected persons.
- (8) In determining whether a person is an affected person, all factors shall be considered, including, but not limited to, the following:
 - (a) whether the interest claimed is one protected by the law under which the application will be considered;
 - (b) distance restrictions or other limitations imposed by law on the affected interest;
 - (c) whether a reasonable relationship exists between the interest claimed and the activity regulated;
 - (d) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;
 - (e) likely impact of the regulated activity on use of the impacted natural resource by the person; and
 - (f) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

30 TAC § 55.203.

D. Referral to the State Office of Administrative Hearings

“When the commission grants a request for a contested case hearing, the commission shall issue an order specifying the number and scope of the issues to be referred to SOAH for a hearing.” 30 TAC § 50.115(b). “The commission may not refer an issue to SOAH for a contested case hearing unless the commission determines that the issue: (1) involves a disputed question of fact; (2) was raised during the public comment period; and (3) is relevant and material to the decision on the application.” 30 TAC § 50.115(c).

V. Analysis of the Hearing Request

A. Whether the Requestors Complied With 30 TAC §§ 55.201(c) and (d).

The public comment period for this permit application ended on August 8, 2011. The period for timely filing a request for a contested case hearing on this permit application ended on November 10, 2011.

1. *Lillie Cardenas and Raymond Cardenas* filed timely, written CCH requests during the public comment period. Each of the hearing requests they provided included: 1) the requestor’s names, address, daytime phone number, 2) requested a contested case hearing, and 3) listed relevant and material disputed issues of fact that were raised during the public comment period. According to the GIS map (Attachment D), Lillie Cardenas and Raymond Cardenas, live within approximately half a mile of the facility; however, they do not live along the discharge route and did not

identify a personal justiciable interest sufficient to gain standing in their own right.

2. *Pauline B. Compean and Ynes P. Compean Sr.* filed timely, written CCH requests during the public comment period. Each of the hearing requests they provided included: 1) the requestor's names, address, daytime phone number, 2) requested a contested case hearing, and 3) listed relevant and material disputed issues of fact that were raised during the public comment period. According to the GIS map (Attachment D), Pauline B. Compean, Ynes P. Compean Sr., live within approximately half a mile of the facility; however, they do not live along the discharge route and did not identify a personal justiciable interest sufficient to gain standing in their own right.
3. *Rosemary Daugherty* filed a timely, written CCH request during the public comment period. The hearing request provided included: 1) the requestor's name, address, daytime phone number, 2) requested a contested case hearing, and 3) listed relevant and material disputed issues of fact that were raised during the public comment period. According to the GIS map (Attachment D), Rosemary Daugherty lives within approximately half a mile of the facility; however, she does not live along the discharge route and did not identify a personal justiciable interest sufficient to gain standing in her own right.
4. *Allan Dearman* filed a timely, written CCH request during the public

comment period. The hearing request provided included: 1) the requestor's name, address, daytime phone number, 2) requested a contested case hearing, and 3) listed relevant and material disputed issues of fact that were raised during the public comment period. According to the GIS map (Attachment D), Allan Dearman lives within approximately a quarter of a mile from the facility; however, he does not live along the discharge route and did not identify a personal justiciable interest sufficient to gain standing in his own right.

5. *Rhonda J. Gant* filed a timely, written CCH request during the public comment period. The hearing request provided included: 1) the requestor's name, address, daytime phone number, 2) requested a contested case hearing, and 3) listed relevant and material disputed issues of fact that were raised during the public comment period. According to the GIS map (Attachment D), Rhonda J. Gant, lives within approximately half a mile of the facility; however, she does not live along the discharge route and did not identify a personal justiciable interest sufficient to gain standing in her own right.
6. *Emilia Garcia and John Garcia* filed timely, written CCH requests during the public comment period. Each of the hearing requests they provided included: 1) the requestor's names, address, daytime phone number, 2) requested a contested case hearing, and 3) listed relevant and material disputed issues of fact that were raised during the public comment period.

According to the GIS map (Attachment D), Emilia Garcia and John Garcia, live adjacent to the facility; however, they do not live along the discharge route and did not identify a personal justiciable interest sufficient to gain standing in their own right.

7. *Ernest I. Hosey and Rosie Hosey* filed timely, written CCH requests during the public comment period. Each of the hearing requests they provided included: 1) the requestor's names, address, daytime phone number, 2) requested a contested case hearing, and 3) listed relevant and material disputed issues of fact that were raised during the public comment period. According to the GIS map (Attachment D), Ernest I. Hosey and Rosie Hosey live within approximately half a mile of the facility; however, they do not live along the discharge route and did not identify a personal justiciable interest sufficient to gain standing in their own right.
8. *Sister Andrea Hubnik, Sister Patrice Schorp, and Sister Mildred Truchard* filed timely, written CCH requests during the public comment period. Each of the hearing requests they provided included: 1) the requestor's names, address, daytime phone number, 2) requested a contested case hearing, and 3) listed relevant and material disputed issues of fact that were raised during the public comment period. According to the GIS map (Attachment D), Sister Andrea Hubnik, Sister Patrice Schorp, and Sister Mildred Truchard live within approximately half a mile of the facility; however, they do not live along the discharge route and did not

identify a personal justiciable interest sufficient to gain standing in their own right.

9. *Luciana Lopez* filed a timely, written CCH request during the public comment period. The hearing request provided included: 1) the requestor's name, address, daytime phone number, 2) requested a contested case hearing, and 3) listed relevant and material disputed issues of fact that were raised during the public comment period. According to the GIS map (Attachment D), *Luciana Lopez* lives within approximately a quarter of a mile from the facility; however, she does not live along the discharge route and did not identify a personal justiciable interest sufficient to gain standing in her own right.
10. *Emily Perez, Henry Perez, and Robert Perez* filed timely, written CCH requests during the public comment period. Each of the hearing requests they provided included: 1) the requestor's names, address, daytime phone number, 2) requested a contested case hearing, and 3) listed relevant and material disputed issues of fact that were raised during the public comment period. According to the GIS map (Attachment D), *Emily Perez, Henry Perez, and Robert Perez*, live within approximately half a mile of the facility; however, they do not live along the discharge route and did not identify a personal justiciable interest sufficient to gain standing in their own right.
11. *Jesse M. Sanchez and Paula R. Sanchez* filed timely, written CCH requests

during the public comment period. Each of the hearing requests they provided included: 1) the requestor's names, address, daytime phone number, 2) requested a contested case hearing, and 3) listed relevant and material disputed issues of fact that were raised during the public comment period. According to the GIS map (Attachment D), Jesse M. Sanchez, and Paula R. Sanchez, live within approximately a quarter of a mile from the facility; however, they do not live along the discharge route and did not identify a personal justiciable interest sufficient to gain standing in their own right.

*The Executive Director recommends that the Commission find that **Lillie Cardenas, Raymond Cardenas, Pauline B. Compean, Ynes P. Compean Sr., Rosemary Daugherty, Allan Dearman, Rhonda J Gant, Emilia Garcia, John Garcia, Ernest I. Hosey, Rosie Hosey, Sister Andrea Hubnik, Luciana Lopez, Emily Perez, Henry Perez, Robert Perez, Jesse M. Sanchez, Paula R. Sanchez, Sister Patrice Schorp, and Sister Mildred Truchard's hearing requests did not substantially comply with the requirements of 30 TAC §§ 55.201(d).***

1. *Kevin McNary and Rose McNary* filed timely, written CCH requests during the public comment period. Each of the hearing requests they provided included: 1) the requestor's names, address, daytime phone number, 2) requested a contested case hearing, and 3) listed relevant and material disputed issues of fact that were raised during the public

comment period, and 4) identified their personal justiciable interest as detailed below sufficient to gain them standing in their own right.

*The Executive Director recommends that the Commission find that **Kevin McNary and Rose McNary's** hearing request **substantially complied** with the requirements of 30 TAC §§ 55.201(c) and (d).*

B. Whether the Requestor Meets the Requirements of an Affected Person

The hearing requests submitted by Kevin and Rose McNary indicate that they are located adjacent to the facility. The hearing requests raised issues regarding nuisance odors, health concerns, and contamination of water supply. These interests are protected by the law under which the Application is being considered, and there is a reasonable relationship between the interests claimed and the activity regulated due to the close proximity of the McNary's houses to the facility. Specifically, due to their close proximity to the facility, members of their households are more likely to experience potential odor issues related to the facility with greater regularity than members of the general public. Accordingly, Kevin McNary and Rose McNary have an interest in the application that is not common to members of the general public.

*The ED recommends that the Commission find that **Kevin and Rose McNary** are **affected persons** because they meet the criteria set out in 30 TAC § 55.203.*

C. Whether Issues Raised Are Referable to State Office of Administrative Hearings (SOAH) for a Contested Case Hearing.

In addition to recommending to the Commission those persons who qualify as affected persons, the ED analyzes the issues raised in accordance with the regulatory

criteria. All of the issues discussed below were raised during the comment period. None of the listed issues were withdrawn. All identified issues in the response are considered disputed, unless otherwise noted.

1. Whether Victoria can comply with the nuisance odor control requirements at 30 TAC § 309.13(e).

This issue was raised and addressed in the ED's Response to Public Comment, Comment 1. The issue involves a question of fact and it is relevant and material to the decision on this application.

*The Executive Director concludes that this issue **is appropriate** for referral to SOAH.*

2. Whether Victoria has met the buffer zone requirements in 30 TAC § 309.13(c).

This issue was raised and addressed in the ED's Response to Public Comment, Comments 1, 6, 34, and 49. The issue involves a question of fact and it is relevant and material to the decision on this application.

*The Executive Director concludes that this issue **is appropriate** for referral to SOAH.*

3. Whether the WWTP will have a negative impact on the health of the surrounding community.

This issue was raised and addressed in the ED's Response to Public Comment, Comments 2, 7, 8, and 12. The issue involves a question of fact and it is relevant and material to the decision on this application.

*The Executive Director concludes that this issue **is appropriate** for referral to SOAH.*

4. Whether the proposed flows will have a negative impact on the aquatic life, and contact recreational uses in the Guadalupe River.

This issue was raised and addressed in the ED's Response to Public Comment, Comments 19 and 36. The issue involves a question of fact and it is relevant and material to the decision on this application.

*The Executive Director concludes that this issue **is appropriate** for referral to SOAH.*

5. Whether the proposed flows will have a negative impact on public water supply and nearby private water wells.

This issue was raised and addressed in the ED's Response to Public Comment, Comments 3, 11, and 19. The issue involves a question of fact and it is relevant and material to the decision on this application.

*The Executive Director concludes that this issue **is appropriate** for referral to SOAH.*

6. Whether the application was complete.

This issue was raised and addressed in the ED's Response to Public Comment, Comments 5-6, 9, 10, 14-18, 20-25, 26-28, 30-35, 37-38, 42-48 and 50. The issue involves a question of fact and it is relevant and material to the decision on this application.

*The Executive Director concludes that this **issue is appropriate** for referral to SOAH.*

VI. Requests for Reconsideration

Rhonda J. Gant, Sister Andrea Hubnik, Luciana Lopez, Kevin McNary, Rose McNary, Emily Perez, Henry Perez, Sister Patrice Schorp, and Sister Mildred Truchard filed timely requests for reconsideration, raising issues related to the buffer zone requirements, completeness of the application, odor, as well as, negative impacts the WWTP may have on health, aquatic life and contact recreational uses in the Guadalupe River.

These issues were raised during the comment period and the Executive Director responded to them in his Response to Public Comments. The draft permit complies with all applicable statutes and regulations, and the Requesters did not provide any additional information that would cause the Executive Director to alter his recommendation to issue the permit. Consequently, the Executive Director respectfully recommends denial of the requests for reconsideration.

*The Executive Director respectfully recommends that the Commission **deny the requests for reconsideration** submitted by **Rhonda J. Gant, Sister Andrea Hubnik, Luciana Lopez, Kevin McNary, Rose McNary, Emily Perez, Henry Perez, Sister Patrice Schorp, and Sister Mildred Truchard.***

VII. Duration of the Contested Case Hearing

If the Commission determines that this matter should be sent to SOAH for a Contested Case Hearing, the ED recommends that the duration between preliminary hearing and the presentation of a proposal for decision before the Commission be nine months.

VIII. Executive Director's Recommendation

The ED recommends the following actions by the Commission:

1. The ED recommends that the Commission find Kevin McNary and Rose McNary are affected persons because they meet the criteria set out in 20 TAC § 55.203.
2. Find that Lillie Cardenas, Raymond Cardenas, Pauline B. Compean, Ynes P. Compean Sr., Rosemary Daugherty, Allan Dearman, Rhonda J Gant, Emilia Garcia, John Garcia, Ernest I. Hosey, Rosie Hosey, Andrea Hubnik, Luciana Lopez, Emily Perez, Henry Perez, Robert Perez, Jesse M. Sanchez, Paula R. Sanchez, Patrice Schorp, and Mildred Truchard, are not affected persons and deny their hearing requests.
3. If referred to SOAH, first refer the matter to Alternative Dispute Resolution for a reasonable period.
4. If referred to SOAH, refer issues identified by the ED as 1-6.
5. If referred to SOAH, the duration of the hearing should be nine months.

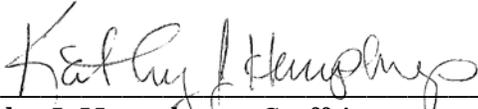
6. Deny all requests for reconsideration.

Respectfully submitted,

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Mark R. Vickery, P.G., Executive Director

Robert Martinez, Director
Environmental Law Division

By 

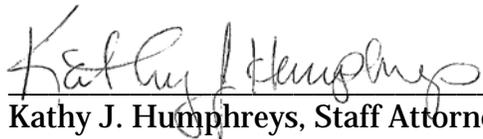
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REPRESENTING THE
EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2011 the original and seven true and correct copies of the "Executive Director's Response to Hearing Request" relating to the application for the City of Victoria, for a new TPDES Permit No. WQ0010466002 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.

A handwritten signature in cursive script, appearing to read "Kathy J. Humphreys", is written over a horizontal line.

**Kathy J. Humphreys, Staff Attorney
Environmental Law Division
State Bar No. 24006911**