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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

December 29, 2011

Bridget Bohac, 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 VICTORIA
TCEQ DOCKET NO. 2011-2093-MWD**

Dear Ms. Bohac:

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

Sincerely,


Scott A. Humphrey, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2011-2093-MWD

**IN THE MATTER OF
THE APPLICATION OF
THE CITY OF
VICTORIA FOR TPDES
PERMIT NO.
WQ0010466002**

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**BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL
QUALITY**

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

TO THE MEMBERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL
QUALITY:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (the Commission or TCEQ) files this Response to Requests for Hearing and Requests for Reconsideration of the Executive Director's Decision in the above-referenced matter.

I. INTRODUCTION

A. Background of Facility

The City of Victoria (Victoria or Applicant) applied with the TCEQ for a new Texas Pollutant Discharge Elimination System TPDES Permit No. WQ0010466002, which would authorize the discharge of treated domestic wastewater at an annual average flow not to exceed 4.4 million gallons per day (MGD) in the interim phase, and an annual average flow not to exceed 6.6 MGD in the final phase. The Odem Street Wastewater

Treatment Plant (WWTP) would be an activated sludge process plant operated in the conventional mode in the interim and final phases. Treatment units would include a bar screen, aeration basins, final clarifiers and an ultraviolet disinfection system. The facility has not been constructed.

The effluent limitations in all phases of the draft permit, based on a 30-day average, are 20 milligrams per liter (mg/l) biochemical oxygen demand (BOD₅), 20mg/l total suspended solids (TSS), 126 colony forming units (CFU) or most probable number (MPN) *E. coli* per 100 ml, 2.0 mg/l minimum dissolved oxygen (DO), and pH between 6.0 and 9.0 standard units. Additionally, in both phases the 30-day average total phosphorus must be reported.

The treated effluent would be discharged via pipe to the Guadalupe River Below the San Marcos River in Segment No. 1803 of the Guadalupe River Basin. The designated uses for Segment No. 1803 are high aquatic life use, public water supply and contact recreation. The WWTP would be located along Hand Road, between Southwest Ben Jordan Street and Odem Street; 1.5 miles west of the intersection of US Highway 87 and US Highway 29, south of Victoria's city limits in Victoria County, Texas.

B. Procedural Background

TCEQ received Victoria's permit application on August 20, 2010. The ED declared the application administratively complete on November 15, 2010. The Notice of Receipt and Intent to Obtain Water Quality Permit (hereinafter "NORI") was published in *The Victoria Advocate* on November 28, 2010. 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 was published on June 21, 2011 in *The Victoria Advocate*. The alternative language combined notice was published on July 8, 2011 in *Revista de Victoria*. A public meeting was held in Victoria on July 21, 2011.

C. Public Comment and Requests for Hearing

The public comment period ended on August 8, 2011 30 days after the NAPD was published. The ED filed a Response to Comments on October 11, 2011. In response to

the various notices, the TCEQ received numerous requests for contested case hearings and requests for reconsideration. OPIC recommends granting the six of the hearing requests and denying the requests for reconsideration.

III. ANALYSIS OF REQUESTS FOR CONTESTED CASE HEARING

A. Applicable Law

This application was declared administratively complete after September 1, 1999, and is subject to the requirements of Texas Water Code (TWC) § 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).

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

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

House Bill 801 also allows for another procedural mechanism, a request for reconsideration. Therefore, following the ED's technical review and consideration of comments, a person may file a request for reconsideration, a contested case hearing or both. TWC § 5.556; 30 TAC § 55.201(e). Any person may file a request for reconsideration of the ED's decision. 30 TAC § 55.201(e). A request for reconsideration must state the reasons why the decision should be reconsidered. *Id.* Responses to requests for reconsideration should address the issues raised in the request. 30 TAC § 55.209(f).

B. Determination of Affected Person Status

1. Rose McNary

Rose McNary states she lives across from the proposed facility (500 feet). She is concerned that all affected landowners may not have been identified or notified pursuant to TWC § 5.115. She also states that the applicant did not provide information that any permanent school fund land would be affected by the application. She also claims that

sufficient information was not provided regarding buffer zone requirements or compliance with 30 TAC § 309.13 (Unsuitable Characteristics).

Because Ms. McNary lives across from the facility, she is an affected person. Her concerns regarding buffer zone requirements and compliance with the unsuitable characteristics requirements are protected by the law under which this application is being considered. A reasonable relationship exists between the interest claimed and the activity regulated. There is a likely impact of the regulated activity on her property and her use of natural resources. Therefore, OPIC recommends finding that Rose McNary is an affected person entitled to a contested case hearing.

2. Kevin McNary

Mr. McNary submitted two hearing requests. He states that he lives 200 yards from the proposed facility and has family members. In one of his hearing requests, he states the application's worksheet (domestic worksheet 4.0—pollutant analysis requirements) is incomplete. In his other hearing request, he asserts that the Applicant's release of hazardous biohazards will present a threat to public health and environment, contaminate water wells, and create nuisance odors.

Although Mr. McNary's property is not specifically identified on the ED's adjacent landowner's list, OPIC considers his 200 yard distance from the facility to be sufficiently close as to be impacted. His concerns regarding completeness of the application, the facility's impact on public health and environment, possible contamination of water wells and nuisance odors are all protected by the law under which this application is being considered. There is a likely impact of the regulated activity on his property and on his use of natural resources. Therefore, OPIC recommends finding that Kevin McNary is an affected person entitled to a contested case hearing.

3. Sisters Andrea Hubnik, Patricia Schorp and Mildred Truchard

The sisters all reside at the Incarnate Word Convent, which they all state is 0.25 miles from the proposed facility. They each cite areas of the application that are incomplete (such as pipe size and method for sludge disposal). They also express

concerns regarding the sufficiency of toxicity testing requirements and possible contamination of vegetation and impacts on endangered species.

The convent at which the nuns reside has been identified by the ED as an affected adjacent landowner. The issues they raise concerning completeness of the application, impacts on vegetation and animals and sufficiency of toxicity testing are protected by the law under which this application is being considered. A reasonable relationship exists between the interests claimed and the activity regulated. There is a likely impact of the regulated activity on their property and their uses of natural resources. Therefore, OPIC recommends that the sisters are all affected persons entitled to a contested case hearing.

4. Luciana Lopez

Ms. Lopez states she lives 1/8 of a mile (500 feet) from the proposed facility. She states the application is incomplete with regards to providing a site plan that uses FEMA flood plain maps to determine if the facility is subject to a 100-year frequency flood event or obtaining necessary authorization from the U.S. Corp of Engineers concerning wetlands. She also states it is incomplete because it does not provide a sewage sludge solids management plan that includes all the criteria requested and it does not provide information regarding whether there are surface water intakes for domestic drinking water supply located within five miles downstream from the points of discharge. Finally, she claims the applicant has failed to show compliance with Chapter 217 (Criteria Design for Sewage Systems) because it did not meet design calculations that show the ability of the treatment system to meet effluent quality for each phase.

The ED has already identified Ms. Lopez as an affected adjacent landowner. Her concerns regarding completeness of the application and compliance with Design Criteria for Domestic Wastewater Systems are protected by the law under which this application is being considered. A reasonable relationship exists between the interests claimed and the activity regulated. There is a likely impact of the regulated activity on her property and her use of natural resources. Therefore, OPIC recommends finding that Luciana Lopez is an affected person entitled to a contested case hearing.

5. Rhonda Gant (on behalf of Mr. and Mrs. E.I. Hosey, Sr.)

Ms. Gant states she and the Hoseys live 0.25 miles from the proposed facility. She states the application is incomplete with respect to permitted and/or proposed flows and that the applicant has failed to demonstrate the need for the facility.

Neither Ms. Gant nor the Hoseys are identified on the ED's adjacent landowner list. Based on their representation of their distance from the proposed facility, OPIC cannot say that they are affected persons entitled to a contested case hearing. If OPIC receives more information regarding their location with respect to the discharge route, OPIC may change its recommendation.

6. Henry and Emily Perez

The Perezes state they live one mile from the proposed facility. They echo other protesting parties' concerns about the completeness of the application (proposed flows, information regarding surface water intakes, flood plan maps, management plans) as well as failure to comply with Chapter 217.

The Perezes are not identified on the ED's adjacent landowner list and based on their representation of their distance from the proposed facility, OPIC cannot say they are affected persons entitled to a contested case hearing. If OPIC receives more information regarding their location with respect to the discharge route, OPIC may change its recommendation.

7. The Petition

A petition requesting a hearing was signed by the following: Henry Perez; Emily Perez; Robert Perez; Rosemary Dougherty; Raymond Cardenas; Lillie Cardenas; Ernest Hosey; Rosie Hosey Rhonda Gant; Jesse Sanchez; Paula Sanchez; Allan Dearman; Alonzo Uresto; Cricelia Uresto; Christine Uresto; John Garcia; Emilia Garcia; Ynes Compean; and Pauline Compean. They are concerned about the proposed facility's location in a minority neighborhood and claim that the land obtained for the site was obtained corruptly.

The petitioners all claim that they live about 1/8 of a mile from the proposed facility. Not one of the petitioners is on the ED's affected landowner list, and based on their representation, OPIC cannot say that they are affected persons entitled to a contested case hearing. If OPIC receives more information about the petitioners' locations with respect to the discharge route, OPIC may change its recommendation.

C. Issues Raised in the Hearing Requests

The hearing requests raised the following issues that may be referred to SOAH:

1. Is the application complete?
2. Does the application comply with buffer zone requirements?
3. Will the facility adversely impact public health and the environment?
4. Will the proposed facility contaminate drinking water wells?
5. Will the facility create nuisance odors?
6. Will the facility adversely impact vegetation and endangered species?
7. Does the proposed permit contain adequate toxicity testing requirements?
8. Does the proposed permit comply with Chapter 217 design criteria?

D. Issues raised in Comment Period

The issues raised in the hearing requests were timely raised during the comment period.

E. Disputed Issues

All of the issues raised in the comment period remain in dispute. Regarding the completeness of the application, the ED responded to comments related to specific issues regarding completeness in Response to Comments Nos. 5 (FEMA flood plain maps), 15 (route from the WWTP to the Guadalupe River), 16 (physical address of the facility), 17 (photographs of point of discharge), 18 (permitted and proposed flows), 22 (documentation to initiate engineering and financial planning), 24 (analysis of the pollutants in the treated effluent), 28 (involvement of sealing caves, fractures, sinkholes or other karst features), 30 (county location, method to haul sludge), 32 (information about surface water intakes for domestic drinking water supply within five miles

downstream from point of discharge), 34 (buffer zone requirements), 38 (waste load evaluation), 43 (areas served by facility), 45 (damaging historic property), 47 (landowners' map) and 48 (permanent school fund land).

Regarding buffer zone issues, in Response No. 6, the ED states that TCEQ rules do not require a buffer zone map to be signed and sealed by an engineer but rather by a principal executive officer or a ranking elected official. Furthermore, in Response No. 34, the ED states the applicant included a buffer zone map and stated that it owns the required buffer zone area.

Concerning impact on health and environment, in Response No. 2, the facility is permitted by rule (under 30 TAC §§ 106.1, 106.531 and 106.532), and the ED has predetermined that the WWTP will not make a significant contribution of air contaminants to the atmosphere. As to chemicals used, in Response No. 8, the ED states that while chlorine and ozone are typically used in wastewater treatment for disinfection, Victoria is proposing ultraviolet light for disinfection. Chlorine and ozone will not be used at any stage of the treatment process. In Response No. 12, the ED asserts that Texas Water Quality Standards require that discharges may not degrade receiving waters and may not result in situations that impair existing, attainable or designated uses and that surface waters not be toxic to man, or to terrestrial or aquatic life (30 TAC §§ 307.5, 307.6(b)).

With respect to contamination of drinking water wells, the ED says in Response No. 11 that TCEQ rules prohibit WWTP units from being closer than 250 feet from private wells (30 TAC § 309.13(c)). The ED further notes that according to the application, the WWTP will comply with the unsuitable site characteristics requirements in 30 TAC § 309.13 (a) through (d).

In reference to nuisance odors, in Response No. 1 the ED states that buffer zone requirements are established for the abatement and control of nuisance odors. Ownership of the buffer zone is one method for meeting buffer zone requirements, and Victoria claims ownership of the buffer zone.

Regarding impacts on vegetation and species, the ED replies in Response No. 19 that the requirements of the draft permit will be protective of surface water issues, including existing aquatic life, public water supply and recreation. Pursuant to 30 TAC §

307.5, an antidegradation review was performed. The Tier 1 review preliminarily determined that existing water quality uses would not be impaired by this permit action. A Tier 2 review has preliminarily determined that no significant degradation of water quality is expected in Guadalupe River Below San Marcos River, which has been identified as high aquatic life use. Moreover, in Response No. 37, regarding endangered species, the United States Fish and Wildlife Service biological opinion issued in 1998 addressed the assumption by the TPDES. The document outlines the interagency coordination necessary to ensure that endangered and threatened aquatic and aquatic-dependent species are identified and that concerns are addressed appropriately.

With respect to toxicity testing requirements, the ED's Response No. 9 states that the TCEQ does not require permittees with an approved TPDES to sample and analyze the influent or effluent of each WWTP for tributyltin (TBT) unless there is a reason to believe it is present in the effluent. Testing would only be required for wastewater from certain commercial or industrial operations, none of which apply to this facility. Also, since the facility has not been constructed, there is no wastewater to be analyzed.

Finally with regard to design calculations, in Response No. 23, Victoria attached a revised page 1 of the Domestic Technical Report 1.0 and included a description of each requested phase and revised design information. Victoria used the design criteria in 30 TAC Chapter from which the treatment units sizing was derived, and the results of the calculations were verified by ED staff.

F. Issues of Fact

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements. All of the above described issues are issues of fact that are appropriate for referral to SOAH. *See* 30 TAC §55.211(b)(3)(A) and (B).

G. Relevant and Material Issues

Hearing requests may raise issues relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). In

order to refer an issue to SOAH, the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit.¹ Relevant and material issues are those governed by the substantive law under which this permit is to be issued.² As discussed in Section D (Disputed Issues) *supra*, all of the above-referenced issues are material to the Commission's decision to issue or deny this permit.

H. Issues Recommended for Referral

OPIC recommends the following issues be referred to SOAH for a contested case hearing:

1. Is the application complete?
2. Does the application comply with buffer zone requirements?
3. Will the facility adversely impact public health and the environment?
4. Will the proposed facility contaminate drinking water wells?
5. Will the facility create nuisance odors?
6. Will the facility adversely impact vegetation and endangered species?
7. Does the proposed permit contain adequate toxicity testing requirements?
8. Does the proposed permit comply with Chapter 217 design criteria?

I. Maximum Expected Duration of Hearing

Commission Rule 30 TEX. ADMIN. CODE § 55.115(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 TEX. ADMIN. CODE §55.209(d)(7), OPIC estimates

¹ See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-251(1986) (in discussing the standards applicable to reviewing motions for summary judgment the Court stated "[a]s to materiality, the substantive law will identify which facts are material. ... it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs.")

² *Id.*

that the maximum expected duration of a hearing on this application would be twelve months from the first date of the preliminary hearing until the proposal for decision is issued.

J. Requests for Reconsideration

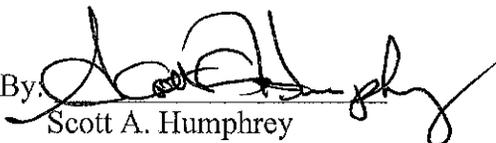
Other than the petition, all of the other hearing requests also contained a request for reconsideration of the ED's decision. OPIC understands the concerns raised in the hearing requests; however, in the absence of an evidentiary record, OPIC cannot support the requests for reconsideration.

III. CONCLUSION

For the above-stated reasons, OPIC recommends granting the hearing requests of Rose McNary, Kevin McNary, Sisters Andrea Hubnik, Patricia Schorp and Mildred Truchard and Luciana Lopez with the above-referenced issues for a hearing duration of twelve months. OPIC further recommends denying the remaining hearing requests and all requests for reconsideration of the ED's decision.

Respectfully submitted,

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Public Interest Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2011 the original and seven true and correct copies of the Office of the Public Interest Counsel's Response to 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 hand delivery, facsimile transmission, other electronic transmission, Inter-Agency Mail or by deposit in the U.S. Mail.


Scott A. Humphrey

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