

Bryan W. Shaw, Ph.D., *Chairman*  
Toby Baker, *Commissioner*  
Zak Covar, *Executive Director*



## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

September 16, 2013

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: VICTORIAN GARDENS, LTD.  
TCEQ DOCKET NO. 2013-1281-MWD**

Dear Ms. Bohac:

Enclosed for filing is the Office of Public Interest Counsel's Response to Hearing Request in the above-entitled matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Garrett Arthur".

Garrett Arthur, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure



**DOCKET NO. 2013-1281-MWD**

**VICTORIAN GARDENS, LTD.      §      BEFORE THE  
PROPOSED PERMIT            §      TEXAS COMMISSION ON  
NO. WQ0015056001        §      ENVIRONMENTAL QUALITY**

**OFFICE OF PUBLIC INTEREST COUNSEL'S  
RESPONSE TO HEARING REQUEST**

**To the Members of the Texas Commission on Environmental Quality:**

The Office of Public Interest Counsel (OPIC) at the Texas Commission on Environmental Quality (TCEQ) files this response to the hearing request in the above-referenced matter.

**I. Background**

On August 23, 2012, Victorian Gardens, Ltd. (Applicant) applied to the TCEQ for a new Texas Pollutant Discharge Elimination System (TPDES) permit. The proposed permit would authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 600,000 gallons per day. The wastewater treatment plant would be located 1,640 feet northwest of the intersection of Bissonnet Street and Clodine Road in northeast Fort Bend County. The treated effluent would be discharged to Keegans Bayou and eventually flow into Brays Bayou in Segment No. 1007 of the San Jacinto River Basin.

TCEQ declared the application administratively complete on November 1, 2012. The first newspaper notice was published in English on November 7, 2012 in the *Fort Bend Herald*, and in Spanish on November 14, 2012 in *Las Noticias de Fort Bend*. The second newspaper notice was published February 27, 2013 and March 6, 2013 in the same newspapers. The Executive Director's (ED) Response to Comments was mailed June 3, 2013.

The deadline to submit a hearing request was July 3, 2013. The TCEQ timely received a hearing request from Denise Breaux. For the reasons stated herein, OPIC recommends the Commission deny the hearing request.

## **II. Applicable Law**

This application was declared administratively complete after September 1, 1999, and is therefore subject to the procedural requirements adopted pursuant to House Bill 801 (76th Leg., 1999).

Under Title 30, Texas Administrative Code (TAC) § 55.201(d), 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;
- (2) identify the person's personal 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.

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. An interest common to members of the general public does not qualify as a personal justiciable interest. Section 55.203(c) provides relevant factors to 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.

Under 30 TAC § 55.211(c)(2), a hearing request made by an affected person shall be granted if the request:

- (A) raises disputed issues of fact that were raised during the comment period, that were not withdrawn by the commenter by filing a withdrawal letter with the chief clerk prior to the filing of the executive director's response to comment, and that are relevant and material to the commission's decision on the application;
- (B) is timely filed with the chief clerk;
- (C) is pursuant to a right to hearing authorized by law; and
- (D) complies with the requirements of § 55.201.

### **III. Analysis of Hearing Request**

#### **A. Whether the requestor is an affected person**

Mrs. Breaux states that her home in the Keegan Ridge subdivision is located approximately one-half mile from the proposed plant site. She also states that she is a board member of the Keegan Ridge Home Association. Mrs. Breaux writes that the residents of Keegan Ridge are concerned about property values, air and water quality, and the overall appearance of the neighborhood. She further writes that she is the contact person for any correspondence concerning this matter. Though Mrs. Breaux states she is a board member of the home association and the contact person, she does not state that she represents the home association. She also does not state that she is requesting a hearing on behalf of the home association. OPIC will therefore treat this hearing request as an individual request by Mrs. Breaux and not a request by the home association.

According to the map prepared by ED staff, Mrs. Breaux does not reside adjacent to the proposed plant site or discharge route. Mrs. Breaux also does not appear on the list of property owners adjacent to the proposed plant site or on the discharge route within one mile downstream of the discharge point. An affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by an application.<sup>1</sup> An interest common to members of the general public does not qualify as a personal justiciable interest.<sup>2</sup> Because Mrs. Breaux does not reside adjacent to the proposed plant site or discharge route, OPIC finds Mrs. Breaux lacks the proximity necessary to establish a personal justiciable interest which is distinct from interests common to the general public.

Based on our review of the law and information before us, including the hearing request and the ED's map, we find that Mrs. Breaux does not qualify as an affected person in this matter. However, should the Commission determine she is an affected person, we offer the following analysis of the issues raised by Mrs. Breaux.

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<sup>1</sup> 30 TEX. ADMIN. CODE § 55.203(a).

<sup>2</sup> *Id.*

**B. Which issues raised in the hearing request are disputed**

All of the issues raised in the hearing request are disputed.

**C. Whether the dispute involves questions of fact or of law**

All of the disputed issues involve questions of fact.

**D. Whether the issues were raised during the public comment period**

All of the issues were raised during the public comment period.

**E. Whether the hearing request is based on issues raised solely in a public comment which has been withdrawn**

The hearing request is not based on issues raised solely in a public comment which has been withdrawn.

**F. Whether the issues are relevant and material to the decision on the application**

*Air Quality*

The hearing requestor has raised the issue of air quality. While air quality is not regulated by a wastewater discharge permit, odor is specifically addressed by TCEQ regulations concerning the siting of domestic wastewater plants.<sup>3</sup> If Mrs. Breaux's concern for air quality includes odor, then this issue is relevant and material to the Commission's decision on the application.

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<sup>3</sup> See 30 TEX. ADMIN. CODE § 309.13.

### Water Quality

The hearing requestor has raised the issue of water quality. Water quality is an issue addressed by the Chapter 307 Texas Surface Water Quality Standards, and the issue is therefore relevant and material to the Commission's decision on this application.<sup>4</sup>

### Property Value and Aesthetics

Mrs. Breaux is concerned about property value and the overall appearance of the neighborhood. The TCEQ does not have jurisdiction to consider property value or aesthetics, and these issues are therefore not relevant and material to the Commission's decision.

## **IV. Conclusion**

Having found that Denise Breaux is not an affected person in this matter, OPIC respectfully recommends the Commission deny her hearing request. However, if the Commission does grant a hearing, we also find that Mrs. Breaux has raised disputed issues of fact that are relevant and material to the Commission's decision on this application. Those issues are as follows:

1. Whether the proposed plant or discharge will cause nuisance odors?
2. Whether the proposed plant or discharge will adversely impact water quality?

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<sup>4</sup> See 30 TEX. ADMIN. CODE, Ch. 307.

For any contested case hearing, OPIC recommends a duration of nine months from the first day of the preliminary hearing to issuance of the proposal for decision.

Respectfully submitted,

Blas J. Coy, Jr.  
Public Interest Counsel

By 

Garrett Arthur  
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## CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2013, the foregoing document was filed with the TCEQ Chief Clerk, and copies were served to all parties on the attached mailing list via hand delivery, facsimile transmission, electronic mail, inter-agency mail, or by deposit in the U.S. Mail.

  
\_\_\_\_\_  
Garrett Arthur



**MAILING LIST**  
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**TCEQ DOCKET NO. 2013-1281-MWD**

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