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Toby Baker, *Commissioner*  
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Blas J. Coy, Jr., *Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

March 12, 2014

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: DHJB DEVELOPMENT, LLC  
TCEQ DOCKET NO. 2013-2228-MWD**

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in cursive script that reads "Vic McWherter".

Vic McWherter, Senior Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

**TCEQ DOCKET NO. 2013-2228-MWD**

**IN THE MATTER OF  
THE APPLICATION OF  
DHJB DEVELOPMENT,  
LLC FOR PERMIT NO.**

**WQ  
0014975001**

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**BEFORE THE TEXAS  
COMMISSION ON  
ENVIRONMENTAL  
QUALITY**

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

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY:

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (the Commission or TCEQ) and files this Response to Requests for Hearing and Request for Reconsideration in the above-referenced matter.

**I. INTRODUCTION**

**A. Background of Facility**

On September 24, 2012, DHJB Development, LLC ("DHJB" or the "Applicant") applied to the TCEQ to amend a Texas Pollutant Discharge Elimination System ("TPDES") permit, Permit No. WQ0014975001. The facility at issue has not yet been built and therefore is not currently operating. Its current permit authorizes disposal by irrigation rather than disposal to waters in the state. This is a major amendment which would authorize an increase of treated domestic wastewater discharge from a daily average flow not to exceed 75,000 gallons per day to a daily average flow not to exceed 350,000 gallons per day. The amendment would also authorize DHJB to convert from disposal via subsurface drip irrigation to disposal via discharge into waters in the state.

Although the proposed wastewater treatment facility is not constructed, it will be located in Comal County, Texas, approximately 0.7 miles north of Farm-to-Market Road 1863 and 0.5 miles east of US Highway 281.

According to the application and related materials, the effluent would be discharged to an unnamed tributary, then to Upper Cibolo Creek in Segment No. 1908 of the San Antonio River Basin. The segment of the proposed discharge route identified as an unnamed tributary has an unclassified use of limited aquatic life. Segment No. 1908 has designated uses of primary contact recreation, public water supply, aquifer protection, and high aquatic life use.

The effluent limitations in the Interim I phase, Interim II phase, and Final phase of the draft permit—based on a 30-day average—are:

- 5 mg/l total suspended solids
- 2 mg/l ammonia nitrogen
- 0.5 mg/l total phosphorus
- 126 CFU or MPN of *E. coli* per 100 ml
- 4.0 mg/l minimum dissolved oxygen
- 5 mg/l carbonaceous biochemical oxygen demand (5-day)

Additionally, the effluent must have a chlorine residual of at least 1.0 mg/l and must not exceed a chlorine residual of 4.0 mg/l after a detention time of at least 20 minutes based on peak flow.

## **B. Procedural Background**

The permit application was received on September 24, 2012 and declared administratively complete on November 7, 2012. This application is subject to the procedural requirements adopted pursuant to House Bill 801, 76<sup>th</sup> Legislature, 1999.

The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published in English on November 21, 2012 in the *New Braunfels Herald-Zeitung*. The Notice of Application and Preliminary Decision (NAPD) was published in English on May 17, 2013 in the *New Braunfels Herald-Zeitung*. The NORI and NAPD were published in Spanish on August 30, 2013 in the *La Voz*. The Executive Director's

("ED") Response to Comments ("RTC") was mailed on November 21, 2013, and the time period for filing hearing requests ended on December 23, 2013.

TCEQ received timely hearing requests from Robert Fly and Patricia Lux Graham. Robert Fly withdrew his hearing request on December 20, 2013. Ms. Graham filed a hearing request on May 13, 2013 and a subsequent hearing request and a request for reconsideration on December 6, 2013. As discussed below, OPIC recommends denial of Ms. Graham's request for reconsideration and granting her request for hearing.

## **II. ANALYSIS OF REQUEST FOR RECONSIDERATION**

Title 30 Texas Administrative Code (TAC) § 55.201(e) states that any person may file a request for reconsideration of the ED's decision, and the request must expressly state that the person is requesting reconsideration of the ED's decision and give reasons why the decision should be reconsidered. A response to a request for reconsideration should address the issues raised in the request. 30 TAC § 55.209(f). The request for reconsideration relies on the same issues supporting the hearing request, but an evidentiary record would be necessary for OPIC to make a recommendation to the Commission on whether the ED's decision to issue the permit should be reconsidered. Accordingly, OPIC recommends denying the request for reconsideration.

## **III. ANALYSIS OF REQUEST 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, 76<sup>th</sup> Leg., ch 1350 (commonly known as "House Bill 801"). Under 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 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;
- (3) request a contested case hearing;
- (4) list all relevant and material disputed issues of fact that were raised during the comment period 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." 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.

This standard does not require the requester to show that they will ultimately prevail on the merits, only that they “show that they will potentially suffer harm or have a justiciable interest that will be affected.” *United Copper Industries v. Grissom*, 17 S.W.3d 797, 803 (Tex. App.—Austin 2000, pet. dismissed) (citing *Heat Energy Advanced Tech., Inc. v. West Dallas Coalition for Envtl. Justice*, 962 S.W.2d 288, 289 (Tex. App.—Austin 1998, pet. denied)).

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;
- (7) a maximum expected duration for the contested case hearing.

**B. Determination of Affected Person Status**

Patricia Lux Graham submitted a timely hearing request on May 13, 2013, and then submitted a timely reconsideration request and second hearing request in a December 6, 2013 letter. Both submittals were timely filed before December 23, 2013.

Ms. Graham’s May 13, 2013 Hearing Request

Ms. Graham’s hearing request states that she owns land adjacent to DHJB’s Johnson Ranch Wastewater Treatment Facility. She states that DHJB will discharge

effluent onto a relatively level area and channel it approximately 1,000 feet onto her property. The map provided by the executive director's staff confirms the location of Ms. Graham's property and the path of the discharge route across her property.

Ms. Graham raises questions as to the appropriateness and adequacy of the discharge route. With respect to the area of her property through which the proposed discharge would be routed, Ms. Graham contends that "this area of her property is not a navigable waterway and does not come under the purview of the TCEQ or the State of Texas." Ms. Graham asserts that the purported discharge route that runs across her property is improper because it is only a drainage area for rainfall run-off and it is not a tributary of the Cibolo Creek. She claims that the route is not a navigable watercourse, and is, in fact, not even a tributary or otherwise a feature that should be classified as appropriate for receiving the proposed discharge.

Additionally, Graham claims that DHJB's discharge will adversely impact the use of her property for cattle grazing and may also adversely impact other possible future uses of her property.

#### Ms. Graham's December 6, 2013 Hearing Request

In Ms. Graham's second letter, she raises the following concerns:

- (1) In reaching its decision, TCEQ interpreted certain case law too broadly in allowing the State to authorize discharges from private corporate entities. *See Domel v. City of Georgetown*, 6 S.W.3d 349 (Tex. App.—Austin 1999); *see also Goldsmith & Powell v. State*, 159 S.W.2d 534 (Tex. Civ. App.—Dallas 1942). Ms. Graham claims the cited cases should only apply to government entities. She further claims these cases were not intended to apply to altered dry creeks.
- (2) TCEQ has not allowed or considered comment on the "perennial pool" issue contained in the ED's Response to Public Comments. On that issue, the Water Quality Standards Implementation Team determined the unnamed tributary is intermittent with perennial pools because aerial imagery showed "small pools located within the creek downstream from the discharge point." Executive Director's Response to Public Comment, at page 8.

- (3) The area of the proposed discharge route in question was altered by anthropogenic activities for many years and it should not be considered a naturally occurring body of water.
- (4) Ms. Graham questions whether the selected discharge route is a “watercourse.”
- (5) Ms. Graham raises concerns about the location, functionality and suitability of the the proposed discharge route. She questions whether during site work the beds and banks of the discharge route will be damaged. She is also concerned that the discharge route will travel through what will eventually be lots, streets, and utilities. Moreover, after the relevant site preparation work is completed, she is concerned that nothing will remain of the northerly fork of the dry creek. Ms. Graham questions whether a rerouting and a substantial modification of the existing proposed discharge route would be needed to render the route operational and suitable for receiving discharged effluent.
- (6) Ms. Graham contends that the “perennial pools” are actually man-made pools.
- (7) Ms. Graham also questions whether TCEQ has jurisdiction to regulate the specific area of the proposed discharge route that crosses her property.

Based on the location of her property in relation to the project and the issues raised in her hearing request and subsequent letter, Graham has shown that she has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application.<sup>1</sup> Ms. Graham’s request expresses concern about potential degradation of her private property and potential effects on her economic interests and uses of her property, including cattle grazing. She further asserts that future uses of her property could be adversely impacted. Because the discharge route runs through Ms. Graham’s property, there is a reasonable relationship between the interests claimed and the activity regulated.<sup>2</sup> Therefore, OPIC recommends that the Commission find that Ms. Graham is an affected person.

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<sup>1</sup> See 30 Tex. Admin. Code (“TAC”) §55.203(a); see also 30 TAC §55.203(b)(3).

<sup>2</sup> See 30 TAC §55.203(b)(3)

### **C. Issues Raised in the Hearing Requests**

The following issues have been raised specifically or by implication in Ms. Graham's hearing requests:

1. Whether the proposed discharge route is a tributary of Cibolo Creek or if it is merely a drainage area for rainfall run-off.
2. Whether the proposed discharge route running through Ms. Graham's property falls under TCEQ or State jurisdiction.
3. Whether the proposed discharge route is a navigable waterway.
4. Whether the proposed discharge route is a watercourse.
5. Whether the proposed discharge of wastewater will impact cattle grazing and other current and future uses of Ms. Graham's property.
6. Whether TCEQ interpreted the relevant case law too broadly.
7. Whether TCEQ should allow for public comments on the "perennial pool" issue.
8. Whether the dry creek or perennial pools have aquatic life and if these should be considered naturally occurring bodies of water.
9. Whether re-routing and substantial modification of the currently proposed discharge route would be needed to render the route operational and suitable for receiving discharged effluent.

### **D. Issues raised in Comment Period**

All of the issues in the hearing requests were raised during the public comment period.

### **E. Disputed Issues**

There is no agreement on the issues raised in the hearing requests and, therefore, these issues are disputed.

### **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. Issues 6 and 7 cited in Section C above concern issues of law and policy and are not issues of fact. Issue 2 concerning TCEQ and State jurisdiction is an issue of

law and not and not an issue of fact. The remaining issues are issues of fact; however, as discussed below, not all of the issues raised are relevant and material to the Commission's decision.

### **G. Relevant and Material Issues**

In order to refer an issue to State Office of Administrative Hearings ("SOAH"), the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit.<sup>3</sup> Relevant and material issues are those governed by the substantive law under which this permit is to be issued.<sup>4</sup>

Preliminarily, OPIC notes that this permit would not authorize any taking of private property or any trespass against private property rights. Under 30 TAC § 305.122(c), "[a] permit issued within the scope of this subchapter does not convey any property right of any sort, nor any exclusive privilege, and does not become a vested right in the permittee." Furthermore, the DHJB draft permit states, "[t]he issuance of this permit does not grant to the permittee the right to use private or public property for conveyance of wastewater along the discharge route described in this permit."<sup>5</sup>

OPIC further notes that the State has the right to authorize use of watercourses for a public purpose without seeking permission from any riparian landowners.<sup>6</sup> Courts have reasoned that "[t]he bed and banks of a watercourse are burdened with the flow of water through that watercourse regardless of who holds actual title."<sup>7</sup> Discharging treated wastewater into state watercourses is allowed under Texas law.<sup>8</sup> The waters in watercourses are the property of the State and are held in trust for the public.<sup>9</sup> Yet, before the State may burden a watercourse, the preliminary determination of whether a

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<sup>3</sup> 30 TAC30 TAC §§ 55.201(d)(4), 55.209(e)(6) and 55.211(c)(2)(A).

<sup>4</sup> 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.")

<sup>5</sup> DHJB draft permit, page 1.

<sup>6</sup> *Domel v. City of Georgetown*, 6 S.W.3d 349, 358 (Tex. App.—Austin 1999).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 360 (citing *See Abbott v. City of Kaufman*, 717 S.W.2d 927, 929 (Tex. App.—Tyler 1986, writ dismissed)).

<sup>9</sup> *Id.* at 353. Moreover, "[t]he Constitution of Texas, Art. 16, § 59a . . . designates rivers and streams as natural resources, declares that such belong to the State, and expressly invests the Legislature with the preservation and conservation of such resources." *Goldsmith & Powell v. State*, 159 S.W.2d 534, 535 (Tex. Civ. App.—Dallas 1942).

watercourse even exists must be made.<sup>10</sup> When determining whether a watercourse exists, the particular facts of a case must be examined.<sup>11</sup>

The test for whether or not the discharge route at issue here is a watercourse is found in substantive case law. *Hoefs v. Short*, decided by Supreme Court of Texas in 1925, establishes this test.<sup>12</sup> A watercourse will have “(1) a defined bank and beds, (2) a current of water, and (3) a permanent source of supply.”<sup>13</sup> In defining a permanent source of supply, this “merely means that the stream must be such that similar conditions will produce a flow of water, and these conditions recur with some degree of regularity, so that they establish and maintain a running stream for considerable periods of time.”<sup>14</sup> Whether a “watercourse” exists can only be determined by examining the facts of a particular case. Therefore, the issues raised by Ms. Graham concerning whether the proposed discharge route is actually a “watercourse” are factual issues appropriate for referral to SOAH.

Although the issue of whether the proposed discharge route is a watercourse is relevant and material, the issue of navigability is not. The Texas Water Code defines “water” or “water in the state,” in part, as those that are navigable or nonnavigable.<sup>15</sup> The TCEQ has the power and duty to regulate and protect the water quality of “water in the state.”<sup>16</sup> Moreover, the TCEQ “may issue permits and amendments to permits for the discharge of waste or pollutants into or adjacent to water in the state.”<sup>17</sup> The TCEQ has the duty and power to regulate both navigable and nonnavigable waters in the state, therefore, this issue is not relevant or material.

Likewise, the issue of whether the perennial pools are naturally occurring bodies of water is not relevant and material. The Texas Water Code defines “water” or “water in the state,” in part, as those that are natural or artificial.<sup>18</sup> The TCEQ has the power and

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<sup>10</sup> *Domel*, 6 S.W.3d at 353.

<sup>11</sup> *Id.* at 354.

<sup>12</sup> 273 S.W. 785, 788 (Tex. 1925).

<sup>13</sup> *Domel*, 6 S.W.3d at 353 (summarizing *Hoefs v. Short*).

<sup>14</sup> *Hoefs*, 273 S.W. at 788.

<sup>15</sup> Texas Water Code § 26.001(5).

<sup>16</sup> *Id.* § 26.011.

<sup>17</sup> *Id.* § 26.027.

<sup>18</sup> *Id.* § 26.001(5).

duty to regulate water quality of “water in the state.”<sup>19</sup> And because the TCEQ “may issue permits and amendments to permits for the discharge of waste or pollutants into or adjacent to water in the state,” the TCEQ has jurisdiction for purposes of pollution control.<sup>20</sup>

Ms. Graham’s request also raises concerns about the location, functionality and suitability of the proposed discharge route that are relevant and material under the Commission’s Chapter 309 rules. Ms. Graham alleges DHJB will discharge effluent onto a “relatively level area” and channel it 1,000 feet onto her property. Ms. Graham alleges that the proposed discharge route crossing her land is actually just a drainage area for rainfall run-off and it is not a tributary of the Cibolo Creek. Ms. Graham also states that the purported unnamed tributary is a dry creek with intermittent pools and not a stream.<sup>21</sup> Ms. Graham further contends that once site development is completed the discharge route will cross lots, streets, and utilities and there will be no significant dry creek bed remaining.

The purposes of 30 TAC Chapter 309, Subchapter B, Domestic Wastewater Effluent Limitation and Plant Siting requirements, include goals “to minimize the possibility of exposing the public to nuisance conditions” and “to prohibit issuance of a permit for a facility to be located in an area determined to be unsuitable or inappropriate, unless the design, construction, and operational features of the facility will mitigate the unsuitable site characteristics.” 30 TAC §309.10(b). Additionally, 30 TAC §309.12 provides that “the commission may not issue a permit for a new facility or for the substantial change of an existing facility unless it finds that the proposed site, when evaluated in light of the proposed design, construction or operational features, minimizes possible contamination of surface water and groundwater.” Therefore, Ms. Graham’s concerns regarding the adequacy of discharge route at the proposed location are relevant and material.<sup>22</sup>

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<sup>19</sup> *Id.* § 26.011.

<sup>20</sup> *See id.* § 26.027.

<sup>21</sup> Executive Director’s Response to Public Comment, pages 7- 8.

<sup>22</sup> *See, e.g.,* Texas Natural Resource Conservation Commission Interim Order, concerning a City of Bellville TPDES permit amendment application, considering allegations that debris and trash blocked a stream and caused an improperly functioning discharge route and referring to SOAH the issue of

Ms. Graham's concerns raise relevant questions concerning whether the inadequacies of the proposed discharge route render the proposed facility "unsuitable or inappropriate"<sup>23</sup> for the area. She questions whether a rerouting and a substantial modification of the existing proposed discharge route would be needed to render the route operational and suitable for receiving discharged effluent. These are relevant and material questions of fact appropriate for referral to SOAH.

Ms. Graham further questions whether the inadequacies of the discharge route will create nuisance conditions and cause contamination of her property, adversely affecting her use and enjoyment of property, including her cattle operations. These issues are within the Commission's jurisdiction and are relevant and material to the Commission's decision on this application under Chapter 26 of the Texas Water Code and the Texas Surface Water Quality Standards found in the Commission's Chapter 307 rules.

#### **H. Issues for Referral**

OPIC recommends that the Commission refer the following disputed issues of fact to the State Office of Administrative Hearings for a contested case hearing:

1. Is the portion of the proposed discharge route that crosses Ms. Graham's property a tributary of the Cibolo Creek and a watercourse with (a) a defined bank and beds, (b) a current of water, and (c) a permanent source of supply?
2. Do the functional characteristics of the proposed discharge route, as it currently exists without any modifications, render the facility unsuitable for the proposed location?
3. Would the proposed facility's operations, including the functioning and operations of the discharge route, create nuisance conditions or contamination that would interfere with Ms. Graham's use and enjoyment of her property, including her cattle operations?

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"[w]hether the Bellville facility is creating and maintaining a nuisance condition which interferes with the requesters' use and enjoyment of their properties." (Doc. No. 2001-0324-MWD; TPDES Permit No. 10385-002).

<sup>23</sup> See 30 TAC § 309.10(b).

#### IV. MAXIMUM EXPECTED DURATION OF HEARING

Commission Rule 30 TAC § 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 TAC §55.209(d)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be nine months from the first date of the preliminary hearing until the proposal for decision is issued.

#### V. CONCLUSION

For the reasons stated above, OPIC recommends granting the hearing request of Patricia Lux Graham and referring this application to the State Office of Administrative Hearings for a contested hearing of no longer than nine months on the issues listed in Section III H above.

Respectfully submitted,

Blas J. Coy, Jr.  
Public Interest Counsel

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 12, 2014 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, Inter-Agency Mail or by deposit in the U.S. Mail.

*Vic McWhorter*  
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Vic McWhorter

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**TCEQ DOCKET NO. 2013-2228-MWD**

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