

Bryan W. Shaw, Ph.D., P.E., *Chairman*
Toby Baker, *Commissioner*
Jon Niermann, *Commissioner*
Richard A. Hyde, P.E., *Executive Director*



Vic McWherter, Public Interest Counsel

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

March 14, 2016

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: **VENTANA DEVELOPMENT MCCRARY, LTD.**
TCEQ DOCKET NO. 2016-0144-MWD

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in black ink, appearing to read "Rudy Calderon".

Rudy Calderon, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2016-0144-MWD

**IN THE MATTER OF THE
APPLICATION OF VENTANA
DEVELOPMENT MCCRARY, LTD
FOR TPDES PERMIT
NO. WQ0015241001**

**BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL QUALITY**

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

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

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Response to Requests for Hearing in the above-referenced matter and respectfully shows the following.

I. Introduction

A. Background of Facility

Ventana Development McCrary, Ltd. (Ventana or Applicant) has applied to the TCEQ for a new Texas Pollutant Discharge Elimination System (TPDES) Permit, No. WQ0015241001, that will authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 100,000 gallons per day (gpd) in the Interim phase, and a daily average flow not to exceed 200,000 gpd in the Final phase. The plant site will be located approximately 0.25 mile north of the intersection of Brandt Road and McCray Road, on the east side of McCrary Road, in Fort Bend County, Texas. The proposed wastewater treatment facility will ultimately serve the McCrary Meadows subdivision.

The McCrary Meadows Wastewater Treatment Facility will be an activated sludge process plant operated in the extended aeration mode for both phases. In the Interim phase, treatment units will include a bar screen, two aerobic sludge digesters, two

aeration basins, a final clarifier and a chlorine contact chamber. In the Final phase, treatment units will include a bar screen, three aerobic sludge digesters, three aeration basins, a final clarifier and chlorine contact chamber. The facility has not been constructed.

The effluent limitations in both the Interim and Final phases of the draft permit, based on a 30-day average, are 10 mg/l five-day carbonaceous biochemical oxygen demand (CBOD₅), 15 mg/l total suspended solids (TSS), 3 mg/l ammonia-nitrogen (NH₃-N), 126 colony-forming units (CFU) or most probable number (MPN) of *E. coli* per 100 ml, and 6.0 mg/l minimum dissolved oxygen (DO). The effluent shall contain a chlorine residual of at least 1.0 mg/l and shall not exceed a chlorine residual of 4.0 mg/l after a detention time of at least 20 minutes based on peak flow.

The treated effluent will be discharged via a 1,530 foot pipeline to an unnamed tributary; then to Jones Creek; and then to Brazos River Below Navasota River in Segment No. 1202 of the Brazos River Basin. The unclassified receiving water uses are limited aquatic life use for the unnamed tributary and high aquatic life use for Jones Creek. The designated uses for Segment No. 1202 are high aquatic life use, public water supply, and primary contact recreation.

B. Procedural Background

TCEQ received the application on April 2, 2014 and declared it administratively complete on May 15, 2014. The Applicant requested a change in the discharge route after publishing the original Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) on May 29, 2014. The original discharge route was from an unnamed tributary, then to Jones Creek; and then to Brazos River below Navasota River in Segment No. 1202 of the Brazos River Basin. The revised discharge route will be via a

1,530 foot pipeline to an unnamed tributary; then to Jones Creek; and then to Brazos River Below Navasota River in Segment No. 1202 of the Brazos River Basin. To ensure surrounding landowners had adequate notice of this change, the Applicant published a combined NORI and Notice of Application and Preliminary Decision (NAPD). This combined notice was published in the Spanish newspaper, *El Perico* on August 23, 2015, and in English on August 27, 2015 in the *Houston Chronicle*. The public comment period ended on September 28, 2015. On December 18, 2015, the ED filed his Response to Public Comment, and on December 23, 2015, the Chief Clerk mailed notice of the ED's final decision and Response to Comments. The deadline to request a contested case hearing was January 22, 2016.

TCEQ received timely comments and requests for a contested case hearing from Clark and Sara Blair, Gaile and Ronald Cradit, Cherie Gleghorn and Shawn Lee, Al and Darlene Glos, and Russell Roy.

II. Applicable Law

The ED declared this application administratively complete on May 23, 2014. Because the application was declared administratively complete after September 1, 1999, a person may request a contested case hearing on the application pursuant to the requirements of House Bill 801, Act of May 30, 1999, 76th Leg., R.S., § 5 (codified at TEX. WATER CODE (TWC) § 5.556).

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 the application.

30 TAC § 55.201(d).

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.”

30 TAC § 55.203(a). This justiciable interest does not include an interest common to the general public. *Id.* Governmental entities with authority under state law over issues contemplated by the application may be considered affected persons. *Id.* Relevant factors considered in determining whether a person is affected 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 and safety of the person, and on the 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.

30 TAC § 55.203(c).

A group or association may request a contested case hearing if:

- (1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;
- (2) the interests the group or association seeks to protect are germane to the organization’s purpose; and
- (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

30 TAC § 55.205(a). The ED, OPIC, or applicant may request the group or association provide an explanation of how the group or association meets these requirements. *Id.*

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, 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 of 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.

30 TAC § 55.209(e).

III. Discussion

A. Determination of Affected Person Status

Clark and Sara Blair

According to a map provided to OPIC by the ED and the location provided in the Blairs hearing request, the Blairs are not adjacent landowners nor does their property lie on the proposed discharge route. In their hearing request, the Blairs raise the issues of water quality, the suitability of the discharge route, the possibility of the proposed location of the facility being within the 100-year flood plain, and flooding. However, any

adverse effects or concerns would be attenuated by the Blairs location and distance from the proposed facility. Therefore, OPIC has concluded that the Blairs do not qualify as affected persons and should not be granted a contested case hearing.

Cherie Gleghorn and Shawn Lee

According to a map provided to OPIC by the ED and the location provided by Cherie Gleghorn and Shawn Lee in their joint hearing request, they are not adjacent landowners nor does their property lie on the proposed discharge route. In their hearing request, Cherie Gleghorn and Shawn Lee raise the issues of water quality, the suitability of the discharge route, and noise and light pollution. However, any adverse effects or concerns would be attenuated by their location and distance from the proposed facility. Therefore, OPIC has concluded that Cherie Gleghorn and Shawn Lee do not qualify as affected persons and should not be granted a contested case hearing.

Al and Darlene Glos

According to a map provided to OPIC by the ED and the location provided in the Glos' hearing request, the Glos are not adjacent landowners nor does their property lie on the proposed discharge route. In their hearing request, the Glos raise the issues of water quality, the suitability of the discharge route, and noise and light pollution. However, any adverse effects or concerns would be attenuated by their location and distance from the proposed facility. Therefore, OPIC has concluded that the Glos do not qualify as affected persons and should not be granted a contested case hearing.

Russell Roy

According to a map provided to OPIC by the ED and the location provided in the Mr. Roy's hearing request, Mr. Roy is not an adjacent landowner nor does his property lie on the proposed discharge route. In his hearing request, Mr. Roy raises the issues of

water quality, the suitability of the discharge route, and noise and light pollution. However, any adverse effects or concerns would be attenuated by his location and distance from the proposed facility. Therefore, OPIC has concluded that Mr. Roy does not qualify as an affected person and should not be granted a contested case hearing.

Ronald and Gail Cradit

According to a map provided to OPIC by the ED and the location provided in the Cradit's hearing request, the Cradits are not adjacent landowners nor does their property lie on the proposed discharge route. In their hearing request, the Cradits raise the issues of water quality, the suitability of the discharge route, and noise and light pollution. However, any adverse effects or concerns would be attenuated by their location and distance from the proposed facility. Therefore, OPIC has concluded that the Cradits do not qualify as affected persons and should not be granted a contested case hearing.

B. Issues Raised in the Hearing Request

The following issues have been raised in the hearing requests:

- (1) Whether the proposed discharge route is suitable?
- (2) Whether the proposed facility is located within the 100-year flood plain?
- (3) Whether the proposed facility will cause a nuisance condition, namely noise pollution?
- (4) Whether the proposed facility will cause a nuisance condition, namely light pollution?
- (5) Whether the proposed discharge will affect water quality in the receiving stream?
- (6) Whether the proposed discharge will create a flooding condition?

C. Issues Raised in the Comment Period

All of the issues raised in the hearing request were raised in the comment period and have not been withdrawn. 30 TAC §§ 55.201(c) and (d)(4), 55.211(c)(2)(A).

D. Disputed Issues

There is no agreement between the hearing requesters and the ED on the issues raised in the hearing requests.

E. 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. 30 TAC § 55.211(c)(2)(A). All of the issues presented are issues of fact appropriate for referral to SOAH.

F. Relevant and Material Issues

The hearing requests 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. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–51 (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”). Relevant and material issues are those governed by the substantive law under which this permit is to be issued. *Id.*

Although OPIC recommends denial of all hearing requests, we have provided the following analysis of all the issues raised in the hearing requests should the Commission decide that referral for a contested case hearing is appropriate.

Water Quality

All hearing requestors raised the issue of water quality in their hearing requests. The TCEQ is responsible for the protection of water quality under Chapter 26 of the TWC and 30 TAC Chapters 305, 307 and 309, as well as under specific rules related to wastewater systems found at 30 TAC Chapters 30 and 217. The Texas Surface Water Quality Standards in 30 TAC Chapter 307 require the proposed permit “maintain the quality of water in the state consistent with public health and enjoyment.” 30 TAC § 307.1. Therefore, should the Commission determine that any of the hearing requestors are affected persons, OPIC concludes the issue of water quality is relevant and material to the Commission’s decision regarding this application and is appropriate for referral to SOAH for a contested case hearing on this matter.

Suitability of the Discharge Route

All hearing requestors raised the issue of the suitability of the discharge route. One of the purposes of TCEQ rules regarding plant siting is to prohibit issuance of a permit for a facility to be located in an area determined to be unsuitable or inappropriate according to standards laid out in 30 TAC §309.10(b). Selecting a suitable and appropriate discharge route is an integral part of plant siting. Therefore, should the Commission determine that any of the hearing requestors are affected persons, OPIC concludes the issue of the suitability of the discharge route raised in the hearing requests is relevant and material to the Commission's decision regarding this

application and is appropriate for referral to SOAH for a contested case hearing on this matter.

Siting of Facility in the 100-year Flood Plain

Clark and Sara Blair, in their hearing request, raised the issue of the possibility the facility will be located within the 100-year flood plain. One of the purposes of TCEQ rules regarding plant siting is to prohibit issuance of a permit for a facility to be located in an area determined to be unsuitable or inappropriate according to standards laid out in 30 TAC § 309.13. Specifically, 30 TAC § 309.13(a) prohibits the location of a domestic wastewater treatment plant within the 100-year flood plain. Selecting a suitable and appropriate discharge route is an integral part of plant siting. Therefore, should the Commission determine that any of the hearing requestors are affected persons, OPIC concludes the issue of whether the facility will be located within the 100-year flood plain raised in the Blair's hearing request is relevant and material to the Commission's decision regarding this application and is appropriate for referral to SOAH for a contested case hearing on this matter.

Noise Pollution, Light Pollution, and Flooding

The TCEQ's jurisdiction in a discharge permit application is limited to the issues set out in Chapter 26 of the Texas Water Code. Chapter 26 does not provide the TCEQ with the authority to consider light pollution, noise pollution, and flooding in its determination of whether or not to issue a water quality permit. OPIC therefore concludes that these issues are not relevant and material to the Commission's decision regarding this application and should the Commission determine that any of the requestors are affected persons, these issues are not appropriate for referral to SOAH for a contested case hearing on this matter.

G. Issues Recommended for Referral

Although OPIC recommends denial of all hearing request, should the Commission decide that referral for a contested case hearing is appropriate, OPIC recommends that the following disputed issues of fact are appropriate for referral to SOAH for a contested case hearing:

- (1) Whether the proposed discharge route is suitable?
- (2) Whether the proposed facility is located within the 100-year flood plain?
- (3) Whether the proposed discharge will affect water quality in the receiving stream?

H. Maximum Expected Duration of Hearing

Commission Rule 30 TAC § 50.115(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.

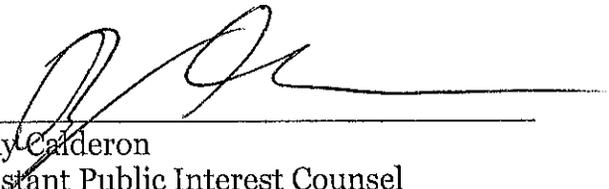
IV. Conclusion

OPIC recommends denying the hearing requests of Clark and Sara Blair, Gail and Ronald Cradit, Cherie Gleghorn and Shawn Lee, Al and Darlene Glos, and Russell Roy. Should the Commission find that referral to SOAH is appropriate, OPIC finds the issues referenced in Section III.G above, are appropriate for referral. OPIC further

recommends a hearing duration of nine months should a contested case hearing be granted.

Respectfully submitted,

Vic McWherter
Public Interest Counsel

By: 

Rudy Calderon

Assistant Public Interest Counsel

State Bar No. 24047209

P.O. Box 13087, MC 103

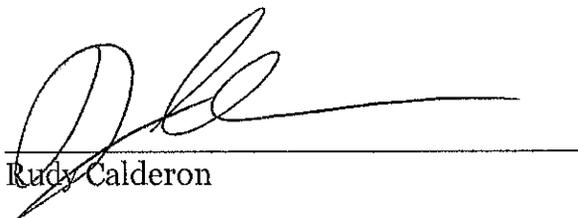
Austin, Texas 78711-3087

(512) 239-3144 Phone

(512) 239-6377 Fax

CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2016 the original and seven true and correct copies of the Office of 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, electronic mail, or by deposit in the U.S. Mail.



Rudy Calderon

MAILING LIST
VENTANA DEVELOPMENT MCCRARY, LTD.
TCEQ DOCKET NO. 2016-0144-MWD

FOR THE APPLICANT:

James B. Grover
Ventana Development McCrary, Ltd.
142 County Road 222
Bay City, Texas 77414-2846

Gregg B. Haan, P.E.
LJA Engineering
2929 Briarpark Drive, Suite 600
Houston, Texas 77042-3768
Tel: 713/ 953-5261

FOR THE EXECUTIVE DIRECTOR:

Celia Castro, Staff Attorney
TCEQ Environmental Law Division
MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-0600 Fax: 512/239-0606

David Akoma, Technical Staff
TCEQ Water Quality Division,
MC- 148
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-1444 Fax: 512/239-4430

Brian Christian, Director
TCEQ Environmental Assistance
Division, MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4000 Fax: 512/239-5678

FOR ALTERNATIVE DISPUTE
RESOLUTION

Kyle Lucas
TCEQ Alternative Dispute Resolution,
MC-222
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4010 Fax: 512/239-4015

FOR THE CHIEF CLERK:

Bridget Bohac
TCEQ Office of Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-3300 Fax: 512/239-3311

REQUESTER:

Clark T. & Sara A. Blair
3525 Merary Rd.
Richmond, Texas 77406-9184

Gail & Ronald Cradit
3927 Dawn Ln.
Richmond, Texas 77406-7662

Cherie Gleghorn & Shawn Lee
2619 McCrary Rd.
Richmond, Texas 77406-8183

Al & Darlene Glos
3917 Empress Ln.
Richmond, Texas 77406-8135

Russell L. Roy
4011 Brynmawr Dr.
Richmond, Texas 77406-8136