

Buddy Garcia, *Chairman*  
Larry R. Soward, *Commissioner*  
Bryan W. Shaw, Ph.D., *Commissioner*  
Mark R. Vickery, P.G., *Executive Director*



# TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

April 6, 2009

LaDonna Castañuela, Chief Clerk  
Texas Commission on Environmental Quality  
P.O. Box 13087, MC 105  
Austin, Texas 78711-3087

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2009 APR - 6 PM 2: 20  
CHIEF CLERKS OFFICE

Re: Executive Director's Exceptions to the Proposal for Decision  
TCEQ Docket No. 2006-0631-UCR  
SOAH Docket No. 582-06-2663

Ms. Castañuela:

Enclosed for filing is the "Executive Director's Exceptions to the Proposal for Decision."

Please find one copy of this letter to you, and eight (8) copies of the Exceptions. Also, please file stamp one copy of the document and return them to Brian MacLeod, Attorney, Environmental Law Division, MC 173. If you have any questions or comments, please call me at 512/239-0750.

Sincerely,

Brian D. MacLeod  
Attorney  
Environmental Law Division

Enclosures

cc: Attached service list  
via e-mail

Buddy Garcia, *Chairman*  
Larry R. Soward, *Commissioner*  
Bryan W. Shaw, Ph.D., *Commissioner*  
Mark R. Vickery, P.G., *Executive Director*



## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

April 6, 2009

The Honorable Lilo D. Pomerleau  
Administrative Law Judge  
State Office of Administrative Hearings  
PO Box 13025  
Austin, Texas 78711-3025

Re: Executive Director's Exceptions to the Proposal for Decision  
TCEQ Docket No. 2006-0631-UCR  
SOAH Docket No. 582-06-2663

Dear Judge Pomerleau:

Enclosed is a true and correct copy of the "Executive Director's Exceptions to the Proposal for Decision" for the above listed case. The original of the Filing was filed with the Office of the Chief Clerk of the Texas Commission on Environmental Quality by Brian MacLeod, Attorney, Environmental Law Division, MC 173. If you have any questions or comments, please call me at 512/239-0750.

Sincerely,

A handwritten signature in black ink, appearing to read "B. MacLeod".

Brian D. MacLeod  
Attorney  
Environmental Law Division

Enclosures

cc: Attached service list  
via e-mail

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

TCEQ DOCKET NO. 2006-0631-UCR 2009 APR -6 PM 2: 20

CHIEF CLERKS OFFICE

APPLICATION OF THE CITY OF MCKINNEY TO AMEND SEWER CERTIFICATE OF CONVENIENCE AND NECESSITY NO. 20071 IN COLLIN COUNTY, TEXAS APPLICATION NO. 35035-C

§ § § § § §

BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

THE EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE PROPOSAL FOR DECISION

COMES NOW, the Executive Director (ED) of the Texas Commission on Environmental Quality (Commission or TCEQ) by and through a representative of the ED's Environmental Law Division and files these exceptions to the Proposal for Decision (PFD) entered by the Administrative Law Judge (ALJ) in the captioned case. The ED generally concurs with the PFD, but suggests that the deference to the landowners' wishes to be excluded from the Certificate of Convenience and Necessity (CCN) be more prominent in the final order, if not honored by allowing the landowners to be excluded from the CCN.

SYNOPSIS OF THE ED'S POSITION AT SOAH

In the closing argument at the State Office of Administrative Hearings (SOAH), the ED contended that the area in which the landowner protestants were located had only meager evidence of a need for additional service.<sup>1</sup> The ED further reasoned that the convenience and

<sup>1</sup> While the City offered evidence to demonstrate a need for service in the entire area for which it requested a CCN, the City's evidence of need for service in the area the landowners wanted excluded (called the "identified area" in the proceedings at SOAH) was weaker than it was for the other parts of the requested area. The City indicated that its growth predictions and plan showed the identified area would develop a light industrial mix of use. Brian James offered testimony regarding some small indications that the general growth trend would also occur in the identified area. (TR P 177 L 20 - P 179 L 23). The testimony elicited from Ms. Neff on the Landowners' cross examination cuts against these indications of need in the identified area. Specifically, while the McKinney Application (McKinney Exhibit 1) showed many requests for service and subdivision plat requests, none of them were in the identified area. (TR P 48 L 12-14 & TR P 53 L 6 - P. 54 L 11). In fact, on cross examination Ms. Neff testified that there was no "immediate need" for sewer service in the identified area. (TR P 48 L 15-22). She did, however, also testify that the general

accommodation of the public would still be served by granting the CCN because it would only increase the options for the landowners in the area because the CCN did not create an obligation on the part of the landowners to accept service, but instead only created an obligation on the part of the CCN holder to provide service. Also, the ED argued that when the landowners state directly that they do not think that it will serve or accommodate them, the landowners' wishes are entitled to some weight. The ED noted that the Commission should effectuate the policies that the legislature has outlined in the statutory scheme, and that many indications in the last two legislatures evince a desire to give great weight to the preferences of landowners when granting CCNs.<sup>2</sup> In this case, the ED contended that the weight to be given that desire to be excluded from the CCN outweighed the other factors.

---

growth in the area did show a need for a CCN in order for the area to develop in a more orderly fashion. (TR P 48 L 3-11). Ms. Neff also testified that she was "not aware of any specific growth in the identified area," (TR P 83 L 6-9). She explained that the general growth in the entire requested area required a comprehensive plan for the entire area. (TR P 83 L 19-22).

<sup>2</sup> Action of both the Commission and the legislature have shown that there is a policy trend to allowing landowners more input in determining whether or not their land should be included in a CCN. The Commission issued an order in October 2004 requiring notice to be provided to all landowners on any CCN application. In 2005, the legislature enacted several laws that also evidenced the state's policy of honoring the wishes of landowners on whether or not they would be included in CCNs. The 79<sup>th</sup> legislature passed a law stating that all landowners who owned over 50 acres of land had to be given notice of CCN applications. Prior to that time, the only statutory notice to landowners was published notice. The 79<sup>th</sup> legislature also added language to the considerations for granting CCNs that showed an interest in giving deference to landowners. Specifically, the legislature added the language in TEXAS WATER CODE § 13.246(c)(2) regarding the relevance of landowners' requests for service, § 13.246(c)(3) stating that the effect on landowners was now a consideration, and adding an entirely new ninth factor with § 13.246(c)(9) concerning the effect on the land. The 79<sup>th</sup> legislature passed a law allowing landowners to opt out of a CCN application if they filed a request to be opted out within 30 days of the notice of the application. The 79<sup>th</sup> Legislature passed a law allowing a landowner to get expedited release from a CCN if the landowner could meet certain requirements. The 79<sup>th</sup> legislature passed a law stating that a municipality could not extend its CCN outside of its ETJ unless it had written consent of the landowners who were covered by the application who resided outside of the ETJ. In 2007, the legislature repealed the law regarding the requirement of consent before the City could obtain a CCN outside of its city limits, but made the notice requirements to landowners of CCN applications more stringent. Specifically, the legislature increased the number of landowners who would receive notice of CCN applications by stating that landowners who owned more than 25 acres would have to receive notice (previously the requirement had been 50 acres). In the current legislature, there also has been a spate of bills favoring giving deference to a landowners' desire to be excluded from a CCN.

**SYNOPSIS OF THE POSITION TAKEN IN THE PFD**

The PFD states that while the landowners' desire to be excluded is relevant, it did not outweigh the other factors to be considered when issuing a CCN. Specifically, on pages 16 and 17 of the PFD, the following excerpt is found: "The policies cited by the ED are entitled to consideration, but they do not outweigh the facts when considered pursuant to the statutory factors applicable to this CCN application."

**THE ED'S EXCEPTIONS**

The ED acknowledges that the factors in this case make this a very close call and respects the ALJ's decision on how the factors are to be weighed. However, the ED wants to call the Commission's attention to the importance of landowner desire should the Commission decide to weigh the factors differently. The ED suggests that should the Commission decide to agree with the ALJ's decision on how to weigh the factors, that the findings of fact and conclusions of law make it clear that a landowners' desire to be excluded from a CCN is a factor to be considered in granting CCNs. Specifically, the ED suggests that the following subtitle and finding of fact be added to in the PFD:

**Landowners desire to be excluded from the CCN**

132. Landowners requested clearly and without qualification that they desired to be excluded from the CCN.

The ED also suggests that the following conclusion of law be added to those found in the PFD:

11. The Landowners' desire to be excluded from the CCN is entitled to some weight, but the desire does not outweigh the statutory factors that are applicable to this CCN application.

CONCLUSION AND PRAYER

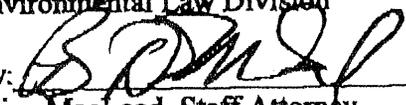
WHEREFORE, PREMISES CONSIDERED, the ED respectfully requests that the Commission add the additional finding of fact and conclusion of law specified above, or, if the Commission decides to exclude the landowners' property, to order the City to provide maps excluding the landowners' property for the approved CCN.

Respectfully submitted,

TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

Mark Vickery, Executive Director

Robert Martinez, Director  
Environmental Law Division

By: 

Brian MacLeod, Staff Attorney

State Bar No. 12783500

P.O. Box 13087, MC-173

Austin, Texas 78711-3087

(512) 239-0750

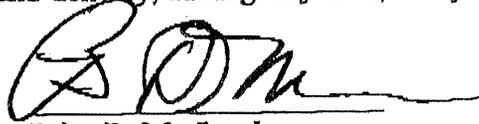
(512) 239-0606 (Fax)

ATTORNEY FOR

THE EXECUTIVE DIRECTOR

**CERTIFICATE OF SERVICE**

I hereby certify that on this 6th day of April 2009, a true and correct copy of the foregoing document was delivered via facsimile, email delivery, hand delivery, interagency mail, or by deposit in the U.S. Mail to all persons on the attached mailing list.



Brian D. MacLeod  
Brian MacLeod, Staff Attorney  
Environmental Law Division

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2009 APR - 6 PM 2: 20  
CHIEF CLERKS OFFICE

**Mailing List  
City of McKinney  
TCEQ Docket No. 2006-0631-UCR  
SOAH Docket No. 582-06-2663**

The Honorable Lilo D. Pomerleau  
Administrative Law Judge  
State Office of Administrative Hearings  
Post Office Box 13025  
Austin, Texas 78711-3025  
Tel: (512) 475-4993  
Fax: (512) 475-4994

**FOR THE APPLICANT:**

Emily W. Rogers, Attorney  
Bickerstaff, Heath, Smiley, Pollan, Kever, & Caroom, L.L.P.  
816 Congress Avenue, Suite 1700  
Austin, Texas 78701  
Tel.: (512) 472-8021  
Fax: (512) 320-5638

**FOR THE PUBLIC INTEREST COUNSEL:**

Scott Humphrey  
Texas Commission on Environmental Quality  
Office of the Public Interest Counsel, MC 103  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel.: (512) 239-6363  
Fax: (512) 239-6377

**FOR THE CHIEF CLERK:**

LaDonna Castañuela, Chief Clerk  
Texas Commission on Environmental Quality  
Office of the Chief Clerk, MC 105  
P. O. Box 13087  
Austin, Texas 78711-3087  
Tel.: (512) 239-3300  
Fax: (512) 239-3311

**FOR THE LANDOWNERS**

Dr. Cynthia Kaminsky, Pro Se  
2782 Briar Trail  
McKinney, Texas 75069  
Tel.: (972) 898-3910  
Fax: (972) 542-4077 (call first)



# FAX TRANSMITTAL

Protecting Texas  
by Reducing and  
Preventing Pollution

DATE: April 6, 2009 NUMBER OF PAGES (including this cover sheet): 9

TO: Name See List Below  
Organization \_\_\_\_\_  
FAX Number \_\_\_\_\_

FROM: **TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**  
Name Brian D. MacLeod, Attorney  
Division/Region Environmental Law Division  
Telephone Number (512) 239-0750  
FAX Number (512) 239-3434

NOTES:

RE: **ED's Exceptions to the Proposal for Decision**  
SOAH Docket No.: 582-08-2663  
TCEQ Docket No.: 2006-0631-UCR

TO: The Honorable Lilo D. Pomerleau  
Administrative Law Judge  
SOAH  
512-475-4994

Emily Rogers, Attorney  
512-320-5638

Scott Humphrey  
TCEQ-OPIC  
512-239-6377

LaDonna Castañuela  
TCEQ- Chief Clerk  
512-239-3311

CHIEF CLERKS OFFICE  
2009 APR - 6 PM 2: 20  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY