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March 28, 2022

VIA CERTIFIED MAIL RETURN RECEIPT REQUESTED
#7018 0680 0002 2556 9441

Executive Director
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Re: Petition for Rulemaking

Dear Executive Director:

Enclosed please find a Petition for Rulemaking for filing on behalf of the cities of San Marcos, McAllen and Jarrell.

Please return a file stamped copy in the self-addressed, stamped envelope provided.

Thank you for your attention to this matter.

Sincerely,


Arturo D. Rodriguez, Jr.

Enclosures

TCEQ DOCKET NO. _____

PETITION FOR RULEMAKING

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**BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL QUALITY**

PETITION FOR RULEMAKING

TO THE HONORABLE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY BY AND THROUGH ITS EXECUTIVE DIRECTOR:

Pursuant to the provisions of Title 30 of the Texas Administrative Code Chapter 20, the cities of San Marcos, McAllen, and Jarrell (collectively, “Petitioners”) submit this Petition for Adoption of a Rule (the “Petition”) to the Texas Commission on Environmental Quality (“TCEQ” or “Commission”), seeking adoption of rules that formalize established guidance, permit application requirements and previous policy expressions of the Commission as it relates to regionalization considerations applicable to wastewater discharge permits.

I. Introduction

The TCEQ and the State of Texas pride themselves with providing for predictable and appropriate regulatory processes. Ad hoc rule making, or determinations not supported by statute, rule or Commission guidance, or circumvention of these by applicants are not consistent with a predictable regulatory environment.

Establishment of predictable regulatory processes (permitting, compliance, and enforcement) as it relates to wastewater permits is within the purview of the TCEQ. Within this legislative charge, the Legislature has outlined in the Texas Water Code (“TWC”) the state’s policy as it relates to regionalization:

“Sec. 26.003. POLICY OF THIS SUBCHAPTER. It is the policy of this state and the purpose of this subchapter to maintain the quality of water in the state consistent with the public health and enjoyment, the propagation and protection of terrestrial and aquatic life, and the operation of existing industries, taking into consideration the economic development of the state; to encourage and promote the development and use of regional and areawide waste collection, treatment, and disposal systems to serve the waste disposal needs of the citizens of the state; and to require the use of all reasonable methods to implement this policy.”

“Sec. 26.081. REGIONAL OR AREA-WIDE SYSTEMS; GENERAL POLICY.
(a) The legislature finds and declares that it is necessary to the health, safety, and welfare of the people of this state to implement the state policy to encourage and promote the development and use of regional and area-wide waste collection, treatment, and disposal systems to serve the waste disposal needs of the citizens of the state and to prevent pollution and maintain and enhance the quality of the water in the state.”

Sec. 26.0282. CONSIDERATION OF NEED AND REGIONAL TREATMENT OPTIONS. In considering the issuance, amendment, or renewal of a permit to discharge waste, the commission may deny or alter the terms and conditions of the proposed permit, amendment, or renewal based on consideration of need, including the expected volume and quality of the influent and the availability of existing or proposed areawide or regional waste collection, treatment, and disposal systems not designated as such by commission order pursuant to provisions of this subchapter. This section is expressly directed to the control and treatment of conventional pollutants normally found in domestic wastewater.”

It is important to note that the Legislature further outlines its strong preference of and for regionalization in Chapters 13, 15, 16 and 17 of the Water Code. Collectively, these references better define the State’s policy and unquestionable preference for regionalization.

The Legislature has defined regionalization in Chapter 15 of the Water Code as the development of a water supply or wastewater collection and treatment system that incorporates multiple service areas into an areawide service facility or any such system that serves an area that includes more than a single county, city, special district, or other political subdivision of the state.

Specific to the provisions of Chapter 26, under the purview of the TCEQ, the Commission has issued guidance documents, application form instructions and included specific questions in

the regionalization portion of the TCEQ approved wastewater or TPDES permit application that attempt to address regionalization.

While each of these may have been developed at different times, as it relates to regionalization, the Commission has maintained a consistent approach - regionalization is the unquestionably preferred approach, however, one of three exceptions apply. The exceptions are:

1. There is not a system within a reasonable distance of your planned system.
2. Service was requested and the request for service was denied.
3. An exception to regionalization is warranted based on costs, affordable rates, financial, managerial and technical capabilities of the nearby system.

Pursuant to the Commission's for a Texas Pollution Discharge Elimination System ("TPDES") permit, the Permit Application – specifically under Domestic Technical Report 1.1, Section 1. Justification for Permits, B. Regionalization of facilities, Question 3, the applicant must answer the following questions:

- Are there any domestic permitted wastewater treatment facilities or collection systems located within a three-mile radius of the proposed facility? If yes:
 - a. Attach a list of these facilities that includes the permittee's name and permit number, and an area map showing the location of these facilities.
 - b. Attach copies of your certified letters to these facilities and their response letters concerning connection with their system.
- Does a permitted domestic wastewater treatment facility or a collection system located within three (3) miles of the proposed facility currently have the capacity to accept or is willing to expand to accept the volume of wastewater proposed in this application? If yes,
 - a. Attach an analysis of expenditures required to connect to a permitted wastewater treatment facility or collection system located within 3 miles versus the cost of the proposed facility or expansion.

Previous historical expression of the Commission's policy relative to regionalization has clearly carried over in similar format and inquiry to the TPDES permit application form and associated instructions.

The TCEQ issued instructions for the TPDES application referenced above state that the TCEQ is required to implement the state policy to encourage and promote the development and use of regional and area-wide waste collection, treatment, and disposal systems. This is consistent with the statutory requirements highlighted above.

As it relates to nearby wastewater treatment facilities or collections systems, the instructions read as follows:

“If there are any permitted domestic wastewater treatment facilities or sanitary sewer collection systems located within a three-mile radius of the proposed wastewater treatment facility, provide a list of all of these facilities, including the permittee's name and wastewater permit number. Identify these facilities on an area map. To obtain a map with the location of domestic wastewater permits, contact the TCEQ Information Services staff at 512-239-DATA. Provide copies of your certified letters to these facilities and their response letters concerning providing wastewater service for the proposed service area. If any of these facilities agree to provide service, provide justification and a cost analysis of expenditures that shows the cost of connecting to these facilities versus the cost of the proposed facility or expansion.”

To date, however, even knowing that no rules or guidance exists, the Commission has not adopted rules that clearly spell out these requirements and expectations.

Ambiguity in application, interpretation, and adherence in review of these requirements has led to contested cases, delayed permitting timelines and delayed advancement of desired economic development.

The Commission, last year, in considering a proposal for decision from an Administrative Law Judge in Docket 582-20-4141 acknowledged in part the need for greater clarity and guidance as it relates to regionalization. The Commission encouraged staff to begin work on yet another guidance document as it relates to regionalization.

Petitioners welcome these comments and acknowledgement of the need for greater regulatory certainty. Thus, Petitioners respectfully submit that a more appropriate manner of adherence with Legislative directive and agency policy as it relates to regionalization is through rule development. This will add regulatory certainty and eliminate additional deviation from predictable processes. It will also eliminate the ad hoc administration of the State’s statutory policy on regionalization.

This Petition satisfies the requirements for rulemaking as enumerated in Texas Government Code Chapter 2001, Subchapter B and 30 Texas Admin. Code Chapter 20.

II. Petitioners’ Names and Address

Petitioners are municipalities in the state of Texas and permitted by the TCEQ to operate wastewater facilities with sufficient capacity to serve their current residents and associated commercial and industrial facilities as well as other nearby or regional demands for wastewater treatment due to expansion and growth. Similarly, the Petitioners have secured or issued bonds and made other investments to maintain and expand these permitted wastewater facilities. As it is common for Texas wastewater systems, a significant portion if not the entire portion of investments to construct, maintain and expand these systems is in the form of public supported debt to be secured through the Texas Water Development Board (“TWDB”).

The address of the Petitioners are:

City of San Marcos 630 E. Hopkins San Marcos, TX 78666	City of McAllen 1300 Houston Avenue McAllen, Texas 78501
City of Jarrell 161 Town Center Blvd. Jarrell, Texas 76537	

For purposes of this Petition, Petitioners may be contacted through Arturo D. Rodriguez, Jr. at the contact information below:

Arturo D. Rodriguez, Jr.
Russell Rodriguez Hyde Bullock, LLP
1633 Williams Drive
Building 2, Suite 200
Georgetown, Texas 78628
T: 512-930-1317
arodriguez@txlocalgovlaw.com

III. Brief Explanation of Proposed Rule

The proposed rule would amend §305.48 of the Commission's rule by clearly outlining regionalization criteria requirements and demonstration of actual compliance in advancement of the state's regionalization policy. No additional requirements are being recommended beyond that which current agency application form and associated guidance request. In essence, the requested amendment will codify these requirements and remove ambiguity.

IV. Text of Proposed Rule

A full copy of the proposed rule is attached as Exhibit A and is incorporated by reference herein as if copied verbatim.

V. Statement of Commission's Authority

Texas Water Code §§ 5.102 and 5.103 authorize the Commission to adopt rules as necessary to carry out its powers and duties, which includes the authority to adopt rules to implement and advance the state's policy as it relates to regionalization as noted in §26.003, §26.081 and §26.0282. Accordingly, the Commission has both the authority and the duty to adopt the requested rules.

VI. Injury or Inequity Resulting from Failure to Adopt Rule

If the proposed rule is not enacted, the Commission will continue to lack consistent and enforceable guidance and requirements to hold applicants for TPDES permits accountable as it

relates to providing the Commission with predictable and accurate information and to make appropriate determinations in TPDES permit applications as they relate to regionalization considerations. A decision to not enact the proposed rule will potentially result in continued inconsistency by applicants in the submittal of requested documentation to allow the Commission to reach an informed determination as it relates to regionalization in TPDES permits. Additionally, if the rule is not enacted, continued delays in permitting due to fact issue disputes in permits will continue as evidenced by historical and recent contested case matters that speak to regionalization.

Petitioners are also concerned that ad hoc determinations and interpretation of Commission requests as they relate to regionalization will result in the establishment of more point sources of pollution than otherwise are necessary if a meaningful regionalization review were performed.

Lastly, adoption of the proposed rule would not only codify Commission policy and requirements that are not consistent with what the application, instructions and previous guidance call for, but would also assist the Commission in advancing the state's strong preference for regionalization. Such action would increase the benefit and value as it relates to the substantial funds that have been expended by Petitioners and similarly positioned TPDES permit holders that have secured public supported debt for the expansion in capacity to provide wastewater treatment on an area wide or regional basis. Particularly when much of these type projects are funded through state assistance and supported debt as administered by the TWDB.

VII. Conclusion

For the reasons set forth above, Petitioners respectfully request that the Commission grant this Petition and initiate a rulemaking that is consistent with the rule proposed in Exhibit A.

Respectfully submitted,

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(512) 930-1317
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arodriguez@txlocalgovlaw.com

/s/ Arturo D. Rodriguez, Jr.
ARTURO D. RODRIGUEZ, JR.
State Bar No. 00791551

EXHIBIT A

Texas Administrative Code
TITLE 30 ENVIRONMENTAL QUALITY
PART 1 TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
CHAPTER 305 CONSOLIDATED PERMITS
SUBCHAPTER C APPLICATION FOR PERMIT OR POST-CLOSURE ORDER
RULE §305.48 Additional Contents of Applications for Wastewater Discharge Permits

(a) The following shall be included in an application for a wastewater discharge permit.

(1) The original and one copy of the permit application shall be submitted on forms provided by or approved by the executive director, and shall be accompanied by a like number of copies of all technical supplements and attachments.

(2) If the application is for the disposal of any waste into or adjacent to a watercourse, the application shall show the ownership of the tracts of land adjacent to the treatment facility and for a reasonable distance along the watercourse from the proposed point of discharge. The applicant shall list on a map, or in a separate sheet attached to a map, the names and addresses of the owners of such tracts of land as can be determined from the current county tax rolls or other reliable sources. The application shall state the source of the information. This subsection does not apply to:

(A) an application to renew a permit; and

(B) an application for a new Texas Pollutant Discharge Elimination System (TPDES) permit for a discharge authorized by existing state permit issued before September 14, 1998 for which the application does not propose any term or condition that would constitute a major amendment to the state permit under §305.62 of this title (relating to Amendment).

(3) The applicant shall submit any other information reasonably required by the executive director to ascertain whether the facility will be constructed and operated in compliance with all pertinent state and federal statutes, including, but not limited to, the following:

(A) the operator's name, address, and telephone number;

(B) whether the facility is located on Indian lands;

(C) up to four Standard Industrial Classification (SIC) codes and North American Industry Classification System (NAICS) codes which best reflect the principal products or services provided by the facility.

(4) The applicant shall submit information concerning regionalization of domestic wastewater treatment facilities. Failure to provide the following regionalization information at the time of initial permit submission will result in the application being returned to the applicant. The following information shall be provided at a minimum:

(A) If any portion of the proposed service area is located within an incorporated city, provide correspondences from the city stating whether the city consents to provide service. If consent to provide service is available from the city, provide justification for the proposed facility and a cost analysis of expenditures that shows the direct cost of connecting to the city versus the cost of the proposed facility or expansion.

(1) Justification for the proposed facility shall include an anticipated construction start date and operation schedule for each phase being proposed. If construction is dependent upon housing/commercial development, provide information from the developer. Provide information such as the size of the development (number of lots), the date construction on the development is scheduled to begin, and the anticipated fully built out rate of the development (number of houses per month or year). Attach population estimates and/or projections used to derive the flow estimates and anticipated growth rates for the development. Provide the source and basis upon which population figures were derived (census and/or other methodology). Also, provide population projections at the end of the design life of the treatment facility (usually 50+ years) and the source and basis upon which population figures were derived.

Failure to provide sufficient justification for the continued need for the permit and/or each proposed phase will result in a recommendation for denial of the application or proposed phases.

(2) The cost analysis of expenditures shall be a good faith effort based on quantifiable and readily available data representative of actual and necessary expense for connection to the existing system versus construction of a stand-alone facility. Such cost analysis shall be limited to criteria that is within the Commission's jurisdiction and based on actual cost estimate to connect to an existing system as compared to construction, maintenance and operation of a new system. Legal costs of connection requirements required by the nearby facility which are outside the Commission's jurisdiction shall not be included in determining costs.

(B) If any portion of the proposed service area is located inside another utility's sewer certificate of convenience and necessity ("CCN") area, attach a justification for the proposed facility and a cost analysis of expenditures that includes the cost of connecting to the CCN system versus the cost of the proposed facility or expansion.

(1) Justification for the proposed facility shall include an anticipated construction start date and operation schedule for each phase being proposed. If construction is dependent upon housing/commercial development, provide information from the developer. Provide information such as the size of the development (number of lots), the date construction on the development is scheduled to begin, and the anticipated fully built out rate of the development (number of houses per month or year). Attach population estimates and/or projections used to derive the flow estimates and anticipated growth rates for the development. Provide the source and basis upon which population figures were derived (census and/or other methodology). Also, provide population projections at the end of the design life of the treatment facility (usually 50+ years) and the source and basis upon which population figures were derived.

Failure to provide sufficient justification for the continued need for the permit and/or each proposed phase will result in a recommendation for denial of the application or proposed phases.

(2) The cost analysis of expenditures shall be a good faith effort based on quantifiable and readily available data representative of actual and necessary expense for connection to the existing system versus construction of a stand-alone facility. Such cost analysis shall be limited to criteria that is within the Commission's jurisdiction and based on actual cost estimate to connect to an existing system as compared to construction, maintenance and operation of a new system. Legal costs of connection requirements required by the nearby facility which are outside the Commission's jurisdiction shall not be included in determining costs.

(C) If any domestic permitted wastewater treatment facilities or collection systems is located within a three-mile radius of the proposed facility, attach a list of these facilities that includes the permittee's name and permit number, and an area map showing the location of these facilities. Attach copies of the applicant's certified letters to these facilities and their response letters concerning connection with their system. If a permitted domestic wastewater treatment facility or a collection system located within three (3) miles of the proposed facility currently has the capacity to accept or is willing to expand to accept the volume of wastewater proposed in this application, provide justification for the proposed facility and a cost analysis of expenditures that shows the cost of connecting to the nearby facility versus the cost of the proposed facility or expansion.

(1) Justification for the proposed facility shall include an anticipated construction start date and operation schedule for each phase being proposed. If construction is dependent upon housing/commercial development, provide information from the developer. Provide information such as the size of the development (number of lots), the date construction on the development is scheduled to begin, and the anticipated fully built out rate of the development (number of houses per month or year). Attach population estimates and/or projections used to derive the flow estimates and anticipated growth rates for the development. Provide the source and basis upon which population figures were derived (census and/or other

methodology). Also, provide population projections at the end of the design life of the treatment facility (usually 50+ years) and the source and basis upon which population figures were derived.

Failure to provide sufficient justification for the continued need for the permit and/or each proposed phase will result in a recommendation for denial of the application or proposed phases.

(2) The cost analysis of expenditures shall be a good faith effort based on quantifiable and readily available data representative of actual and necessary expense for connection to the existing system versus construction of a stand-alone facility. Such cost analysis shall be limited to criteria that is within the Commission's jurisdiction and based on actual cost estimate to connect to an existing system as compared to construction, maintenance and operation of a new system. Legal costs of connection requirements required by the nearby facility which are outside the Commission's jurisdiction shall not be included in determining costs.

(D) Notwithstanding (A-C) above, when determining the justification for a new stand-alone facility or expansion of an existing facility versus connecting to an existing facility, the executive director shall weigh the impacts of a new facility and establishment of additional sources of pollution as it relates to the overall protection of human health and the environment consistent with regional economic development. Impacts to be considered may include but is not limited to, the impact of reuse impacts, conservation efforts, and other efforts environmental impacts.

(E) During the review and processing of the application up to consideration of the application by the commission, the applicant shall submit all new and updated information as it pertains to regionalization as identified by the applicant or requested by the executive director. Such additional information must be considered by the executive director. Failure to provide all updated and relevant information regarding regionalization by the applicant will result in the application being returned to the applicant.

(F) Validly adopted service conditions by a nearby provider may not be used as a justification for a new stand alone facility versus connecting to an existing facility.

(G) An insufficient regionalization determination may result in permit denial.

(b) The following regulations contained in 40 Code of Federal Regulations, Part 122, which are in effect as of the date of TPDES program authorization, as amended, are incorporated by reference.

(1) Subpart B - Permit Applications and Special NPDES Program Requirements, §122.21(g), providing application requirements for existing manufacturing, commercial, mining, and silvicultural dischargers.

(2) Subpart B - Permit Applications and Special NPDES Program Requirements, §122.21(h), providing application requirements for manufacturing, commercial, mining, and silvicultural facilities which discharge only nonprocess wastewater, except 40 Code of Federal

Regulations §122.21(h)(4)(iii), the requirements of which are addressed in §305.126(e) of this title (relating to Additional Standard Permit Conditions for Waste Discharge Permits).

(3) Subpart B - Permit Applications and Special NPDES Program Requirements, §122.21(i), providing application requirements for new and existing concentrated animal feeding operations and aquatic animal production facilities.

(4) Subpart B - Permit Applications and Special NPDES Program Requirements, §122.21(r), providing application requirements for new facilities with new or modified cooling water intake structures.

(c) In addition to the information required by §305.45 of this title (relating to Contents of Application for Permit), an application by an individual for a waste discharge permit shall contain:

(1) the individual's full legal name and date of birth;

(2) the street address of the individual's place of residence;

(3) the identifying number from the individual's driver's license or personal identification certificate issued by the state or country in which the individual resides;

(4) the individual's sex; and

(5) any assumed business or professional name of the individual filed under Business and Commerce Code, Chapter 36.

[END OF EXHIBIT A]