

Kathleen Hartnett White, *Chairman*
Larry R. Soward, *Commissioner*
Martin A. Hubert, *Commissioner*
Glenn Shankle, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

October 31, 2006

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

CHIEF CLERKS OFFICE

2006 OCT 31 PM 4:31

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

RE: TCEQ Docket No. 2006-1778-UCR (Related SOAH Docket No. 582-02-0431; and
TNRCC/TCEQ Docket Nos. 2001-1045-UCR and 2001-1046-UCR)

Dear Ms. Castañuela

Enclosed for filing is the Executive Director's Response to City of Lindsay's Motion for Judgment *Nunc Pro Tunc* in the above referenced matter. If you have comments or questions, please call me at (512) 239-6257.

Sincerely,

A handwritten signature in black ink, appearing to read "Ross W. Henderson".

Ross W. Henderson
Staff Attorney
Environmental Law Division

cc: Mailing List

TCEQ DOCKET NO. 2006-1778-UCR
(RELATED SOAH DOCKET NO. 582-02-0431; and TNRCC/TCEQ DOCKET NOS. 2001-1045-UCR and 2001-1046-UCR)

**CITY OF LINDSAY'S MOTION FOR
JUDGMENT *NUNC PRO TUNC*
UNDER TEXAS RULE OF CIVIL
PROCEDURE 316**

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**BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL QUALITY**

CHIEF CLERK'S OFFICE

2006 OCT 31 PM 4:31

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

**THE EXECUTIVE DIRECTOR'S RESPONSE TO CITY OF LINDSAY'S
MOTION FOR JUDGMENT *NUNC PRO TUNC***

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

COMES NOW, the Executive Director of the Texas Commission on Environmental Quality ("TCEQ" or "Commission") and files this response to City of Lindsay's ("the City") Motion for Judgment *Nunc Pro Tunc* under Texas Rule of Civil Procedure ("TRCP") 316.

I. BACKGROUND

On January 31, 2001, the City filed an application to obtain a water certificate of convenience and necessity ("CCN") to provide water service in Cooke County, Texas. The application for a water CCN was protested and a preliminary hearing was held on November 27, 2001 at the State Office of Administrative Hearings ("SOAH"). The City entered into settlement agreements with each of the protestants and the Administrative Law Judge ("ALJ") subsequently approved the withdrawal of protests and abated the contested hearing to allow the City and the Executive Director time to negotiate a CCN area that the ED could approve.

**City of Lindsay's Motion for Judgment *Nunc Pro Tunc*
TCEQ Docket No. 2006-1778-UCR**

On May 15, 2002, the City filed a motion to remand the application to the Executive Director for uncontested processing. On July 19, 2002, the ALJ granted the motion and the matter was remanded to the ED, and the contested case was dismissed from the docket of SOAH.

On May 16, 2003, the Executive Director issued an Order approving the City's application for a water CCN. The Order stated that approval was reflected in the copy of the official water service area map for Cooke County, Texas, which was attached to the Order.

On September 1, 2006, the Chief Clerk of the Commission received the City's *Motion for Judgment Nunc Pro Tunc*. The City claimed that the water CCN map approved in the Order was a clerical mistake and requested that the Commission correct the purported error by substituting that map with maps attached to the City's settlement agreements with the protestants.

II. ARGUMENT AND AUTHORITIES

The City's request for an amendment to the Order issued by the Executive Director should be denied for the following reasons:

A. TRCP 316 is not applicable to a decision by the Commission

The application was dismissed from the docket of SOAH and remanded to the Executive Director for uncontested processing. Accordingly, the Commission's rules govern whatever relief or procedural remedy can be sought by the City at the Commission. The Commission has adopted by reference several portions of the Texas Rules of Civil Procedure for limited purposes, however, this particular motion is not one of the portions which has been adopted by the

Commission. See 30 TEXAS ADMIN. CODE § 80.127 (Invoking the Rule); See also 30 TEXAS ADMIN. CODE §§ 80.151-152 (Discovery).

In lieu of TRCP 316, the Commission has adopted Title 30, Section 50.145 of the Texas Administrative Code which has its own unique procedural mechanisms that vary substantially from TRCP 316. 30 TEXAS ADMIN. CODE § 50.145 (Correction to Permits). Therefore, the City cannot broadly interpret TRCP 316 to avoid the procedural hurdles contained in Section 50.145, which requires the Executive Director to act on the permit at its own discretion, and not as the City has sought, to seek its remedy with the Commissioners directly.

B. The Executive Director is not obligated to make the requested change or to forward the request to the Commissioners for consideration.

The Executive Director *may* make nonsubstantive corrections to a permit under Title 30, Section 50.145 of the Texas Administrative Code, however, the ED chooses not to make the City's requested changes to the CCN service area because the City has not shown the request to be a nonsubstantive correction under the rule.

When an applicant requests that its application be remanded to the Executive Director, as the City did in this matter, the application shall be processed as uncontested "and the applicant is deemed to have agreed to the action of the executive director. The executive director may act on the application or set it for a commission meeting." 30 TEXAS ADMIN. CODE § 80.101 (Remand to the Executive Director).

If an applicant disagrees with a final permit decision by the Executive Director, the applicant may file a Motion to Overturn under Title 30, Section 50.139 of the Texas

Administrative Code. The motion must be filed within twenty-three days of the Commission mailing notice of the signed permit. After the applicant has exhausted its administrative remedies with the Commission, the applicant may petition for judicial review within thirty days after the decision is final and appealable. 30 TEXAS ADMIN. CODE § 80.275.

Despite its failure to exhaust the above administrative remedies, the City seeks to reopen consideration of the certificate more than three years after it was issued. The certificate was issued May 16, 2003 and had a map attached to the Order which clearly indicated the service area approved by the Executive Director. The City now claims that the Executive Director made a clerical mistake by not approving the service area reflected in maps that the City used in settlement agreements with the protestants. The maps attached to settlement agreements with the protestants have no bearing on the Executive Director's position on the matter. Those agreements only show that the City would no longer seek approval of certain service areas in exchange for the removal of protests. These maps do not bind the Executive Director to settlements with the protestants. Even if it could be shown that the Executive Director's staff agreed to these maps, the fact could not bind the Commission, because an applicant submits itself to the decision of the Executive Director when a case is dismissed from SOAH and remanded back to the Executive Director. 30 TEXAS ADMIN. CODE § 80.101.

Regardless, the City has offered no conclusive proof that the Executive Director agreed to anything other than what was finally approved. A careful reading of the Order shows the applicant filed a motion to remand the application to the ED representing that all issues between the parties were resolved. However, it does not state in the Order that the ED consented to bind itself to the City's settlements with the protestants. Clearly, the ED would have supported a

City of Lindsay's Motion for Judgment *Nunc Pro Tunc*
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Commission action to overturn the Order if the City had shown in a timely manner that the Executive Director had made a mistake. However, it is now impossible to completely know all of the facts surrounding the discussions the City had with the ED's staff. The Executive Director must assume that the final Order represents the service area that the City assented to.

C. The requested change is an impermissible substantive amendment to the CCN.

On its face the requested change appears to be a substantive amendment, rather than a permissible nonsubstantive correction to a permit under Title 30, Section 50.145 of the Texas Administrative Code. The service area that the City argues should have been approved is roughly four times the service area that was ultimately approved. This fact alone casts substantial doubt that the map ultimately approved by the Executive Director in its final order was a 'clerical mistake'. The map is scaled to such an extent that the disputed area is not even depicted on the map. The City has not claimed that it did not get notice of the Final Order. The City was clearly on notice what the Final Order represented. The fact that neither the Executive Director, the City, or the City's attorney made mention of the purported error during the period to file a motion to overturn which passed more than three years ago also calls into question whether the map was a clerical error. The final map identifying the water service area is clearly identified as such. The City should have timely exhausted its administrative remedies.

It would not be appropriate to change a map that has been part of the official Commission records for more than three years without notice to the public that may have relied on the Commission maps in the past. The City failed to raise its concerns about the certificate in a timely fashion, therefore, the only appropriate method for amending the water service maps

would now be for City of Lindsay to file a new application to amend its CCN so that all persons who may have concerns about notice and the propriety of the changes are allowed to participate.

Additionally, the remedy requested is only available if there is a clerical error in the issuance of the final decision. The Court's decisions regarding TRCP 316 in *Escobar v. Escobar* and *Andrews v. Koch* are instructive in this matter. *Escobar v. Escobar*, 711 S.W.2d 230, 231 (Tex. 1986); *Andrews v. Koch*, 702 S.W.2d 584, 585 (Tex. 1986). From those cases it is clear that a clerical error is only an error which is made in the *entering* of the judgment and not an error in the *rendering* of the judgment. While those holdings are not binding on the Commission for this case since they are in reference to TRCP 316, they are certainly instructive on how the Commission should interpret Title 30, Section 50.145 of the Texas Administrative Code which also deals with clerical errors.

The purported error on this application, if any occurred, would be an error in judgment and not a clerical error in the issuance of the judgment. The final decision maker for this application was the Executive Director, not the Executive Director's staff. The package before the Executive Director included the map that was attached to the Final Order. This was the service area that was considered and ultimately approved by the Executive Director in the Final Order. Even if the map provided to the Executive Director was not the correct map, the resulting error would not be a clerical error because the Executive Director issued the order based upon the facts as they were presented. If the incorrect map was considered by the Executive Director, then the result would be a judgment or decision based upon incorrect information and not a clerical correction that is contemplated in the Commission rules. Simply put, to constitute a clerical error, the Executive Director must intend one result, but effectuate a different result by

some error or omission in the rendering of the decision. Here, the alleged error was that the ED was given incorrect information to consider. Therefore, the change would be an amendment of the judgment and not a nonsubstantive change to the permit.

III. CONCLUSION

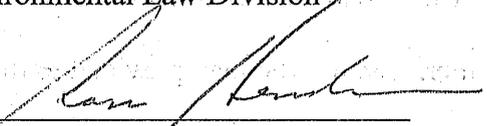
This motion should be denied on the basis that it does not conform to the procedural requirements set forth in the Commission rules. The City cannot bypass the requirement that the Executive Director must agree to make this type of correction to a permit. Furthermore, the City has not demonstrated a clerical error was made in the issuance of the water CCN more than three years ago. Therefore, the Executive Director will not recommend the changes to the CCN.

Respectfully submitted,

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Glenn W. Shankle, Executive Director

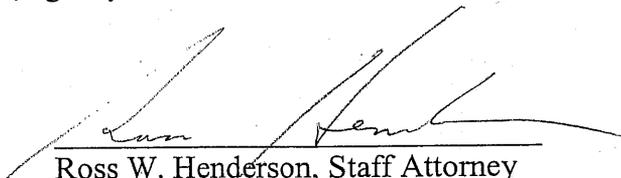
Robert Martinez, Director
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City of Lindsay's Motion for Judgment *Nunc Pro Tunc*
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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of October, 2006, a true and correct copy of the foregoing document was sent by first class, agency mail and/or facsimile to the persons on the attached Mailing List.



Ross W. Henderson, Staff Attorney
Environmental Law Division

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City of Linday's Motion for Judgment Nunc Pro Tunc
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TNRCC/TCEQ Docket Nos. 2001-1045-UCR and 2001-1046-UCR

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