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Gem Seal of Texas, Inc.,

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Petitioner,

BEFORE THE TEXAS CASE FILE CLERKS OFFICE

v.

COMMISSION ON

City of Austin

ENVIRONMENTAL QUALITY

Respondent.

RESPONDENT CITY OF AUSTIN'S BRIEF

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

COMES NOW the City of Austin, Respondent herein, and files this reply brief in response to the brief filed by Petitioner regarding the above referenced docket number.

I.

In its brief Petitioner Gem Seal attempts to bolster its case for overturning the City's Ordinance regulating coal tar-containing sealants by suggesting that neither science nor law supports it. Gem Seal's efforts include gross mischaracterizations of events/facts, attribution errors and even a tortured reading of Supreme Court caselaw. Despite these flawed attempts to undermine it, the City's Ordinance clearly rests on demonstrably reliable science and sound public policy, and should be upheld by the Commission.

II.

The Law

Gem Seal advances a novel proposition to the Commission. According to Petitioner, the City's Ordinance should be subject to strict scrutiny, requiring the City to face a presumption of *invalidity* as well as meet the burden of establishing the reasonableness, effectiveness and

efficiency of the Ordinance. This *de novo* review urged by Petitioner would mandate that the Commission exercise its own judgment and redetermine each issue of law and fact originally addressed by the City of Austin in enacting its ordinance. This approach, however, finds no support in the law, and certainly is not one authorized by *Quick v. City of Austin*, the sole case dealing with the standard of review set out by Water Code Section 26.177(d).

Petitioner misconstrues *Quick* insofar as it urges that its holding is limited to an ordinance review by the courts. The issue before the Court in the *Quick* case was whether or not the language of 26.177(d) unconstitutionally mandated a de-novo review of a legislative act; the question was presented because such a de-novo review would violate the constitutional separation of powers provision. To resolve the issue, the Court proceeded to analyze the words of the statute, and more specifically, the legislature's choice of words in describing the standard of review. That analysis led to the conclusion that the words used in Section 26.177(d) - *invalid, arbitrary, unreasonable, inefficient, or ineffective* - did not mandate the constitutionally impermissible de novo review. Rather, the Court held that the review called for by the statute was one affording great deference to the municipality's judgment. The Court's focus in making this determination was on the words describing the standard of review, not on the character of the tribunal to be reviewing. That one of the three branches of government - the judiciary in this case - was reviewing an act of another was what posed the question for the Court.

Petitioner Gem Seal is simply incorrect in claiming that the Court's holding should be limited to ordinance reviews by courts. Nothing in the opinion remotely suggests that the Court was determining the issue before it with respect to only one of the other two branches of government. "A legislative function cannot, under the separation of powers doctrine, be reviewed de novo by any other branch of government." *Quick* at pp. 115, 116. The proper

conclusion to be drawn from *Quick* is that a de novo review of a legislative act by either the executive or judicial branches of government is impermissible due to the separation of powers provisions of the Article II, Section 1 of the Texas Constitution.

Petitioners claim that the Commission's review of the City of Austin's ordinance presents no separation of powers concerns, characterizing the TCEQ as "the State's delegated environmental legislator." Regardless of whether the Commission on occasion performs functions that are legislative in nature, when performing the review called for in Section 26.177(d), the Commission is performing a quasi-judicial function. Language in Section 26.177(d) supports this view of the Commission's role: the review is precipitated by an "appeal"; the Commission "may overturn or modify" the action; the Commission decision is characterized as a "ruling". TAC rules governing these appeals provide specifics about "service of pleadings", "filing fee" and a "hearing", all indications of the quasi-judicial nature proceedings. (See TAC, Rule Section 86.54). The parties are briefing the issues for the decision-making body in the same way as would be done before a court. Clearly, a de novo review as proposed by Petitioner would violate the Texas Constitution, is not authorized by *Quick* and in fact finds no support in other caselaw. The Commission is legally prohibited from re-weighing the facts and circumstances considered by the City of Austin in enacting the ordinance regulating coal tar-based sealants. The law mandates placement of an "extraordinary burden" on Gem Seal in this appeal, one that cannot be met with respect to this ordinance.

III. The Science

The claims made in Petitioner's brief are exaggerated, inflammatory, misleading and scientifically unfounded. Presumably because scientific evidence to support its position does not exist, Petitioner has chosen the route of smoke and mirrors. Conspicuously absent from Gem

Seal's presentation is any attempt to demonstrate that PAH's from coal tar sealed parking lots do not wear off and do not enter our streams. The City's investigation and analysis convincingly established the link between elevated PAH levels and coal tar sealed parking lots. The City regulates runoff pollution from a variety of sources. That a particular source may not contribute a majority of the pollution to a watershed is no reason to refuse to address it. In this case, the City, as a legislative body, made a decision to regulate a pollutant of concern from a particular source. In doing so, the City was not required to determine the overall loading factor of the pollutant.

As is demonstrated below, none of the propositions urged in Petitioner's brief raises any question about the basic facts in support of the challenged Ordinance.

Overstatements by City Staff

Offering a newspaper article as proof, Petitioner claims that the Ordinance was based upon City staff overstatements. The allegedly most egregious overstatement –the gist of which is repeated five times in Petitioner's brief – is that “sealants containing coal tar derivatives could be responsible for ninety-five percent of total PAH loading into Austin-area waters.” Should the Commission be inclined to consider this dubious source and examine the article, it will be readily apparent that the article attributes no such statement to City staff. Neither is the ‘overstatement’ attributed to USGS researchers. Rather, the author of the article appears to have drawn his own conclusion from the referenced Environmental Science and Technology article on the study. That 7-page scientific article contains the following statement, possibly the source of the newspaper article's confusion: “We estimate that the PAH load *from parking lots* [emphasis added] in these watersheds would be reduced to 5 to 11% of the current loading if all lots were unsealed.” (see *Parking Lot Sealcoat: An Unrecognized Source of Urban Polycyclic Aromatic Hydrocarbons*, in Environmental Science & Technology Vol. 39, No. 15, p. 5565). The study

itself does not assert that 90% of the urban PAH load is from pavement sealants, and the City's ban on coal tar containing pavement sealants was not passed in reliance on any such statement. Instead, the Ordinance was based on years of research by City staff and other scientists, and Petitioner's claims to the contrary are without merit.

City's Preconceived Conclusion

Petitioner also claims that City staff was attempting to verify a preconceived idea about the source of PAH contamination in Austin. As set out in summary in the City's initial brief, the work leading to the conclusion on this issue began as early as 1993; only after 10 years was a hypothesis developed which implicated coal tar based sealants. Through local, state and national dialog, the City has been shown to be open-minded to the problem of PAH contamination in our streams.

Ban Unsupported by Science

The City has taken nearly 15,000 environmental samples in its effort to understand PAH contamination in Austin. By contrast, the Environ study which Petitioner relies on presents only 24 samples, none of which contradict the findings in support of the City's ban. The conclusions derived from the City's research were sound and provide ample support for the Ordinance, as outlined in the City's initial brief.

Flawed Study

The Ordinance challenged by Gem Seal in this proceeding was based on more than the one study hi-lited in Petitioner's brief. Regardless, the Commission should not be swayed by Petitioner's exaggerated claims of 'flaws' in the USGS study. The Federal Data Quality Act challenge to this study submitted in November 2006 by sealant manufacturers can be appropriately characterized as heavy on quantity and light on quality. The objections raised

issues primarily with the presentation of the information, as opposed to the substance. The authors addressed the objections, made minor modifications to the report and provided the following press release explaining:

"The U.S. Geological Survey (USGS) has responded to official inquiries raised by industry representatives about a 2004 data report, and agreed to make changes to improve clarity. The revisions do not change the scientific results of the study or the data presented.

"No data were changed, and none of the additions or revisions have any effect on the scientific conclusions of the study," explained Dr. Barbara Mahler, lead author of the report."

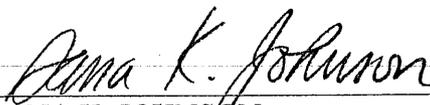
-- News Release-April 6, 2007
U.S. Department of the Interior
U.S. Geologic Survey

IV.
CONCLUSION AND PRAYER

Petitioner Gem Seal has articulated no valid bases for challenge, and has identified no issues with the Ordinance which warrant further development of facts. An appropriate application of the properly deferential standard in this review can result in but one course of action. Respondent City of Austin respectfully requests that the Commission affirm the Ordinance without referral to SOAH, and for such other and further relief to which it may show itself justly entitled.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of *Respondent City of Austin's Reply Brief* was served by hand delivery on the following on this 25th day of May, 2007.

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