

Kathleen Hartnett White, *Chairman*  
Larry R. Soward, *Commissioner*  
H. S. Buddy Garcia, *Commissioner*  
Glenn Shankle, *Executive Director*



## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

May 25, 2007

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

CHIEF CLERKS OFFICE

2007 MAY 25 PM 2:34

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

Re: TCEQ Docket No. 2006-0056-MIS  
Gem Seal of Texas, Inc. v. City of Austin  
Petition for Review of City of Austin's Ordinance No. 20051117-070; Before the Texas  
Commission on Environmental Quality

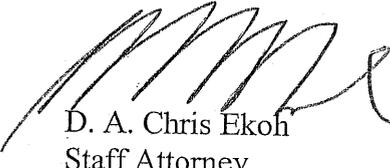
Dear Ms. Castañuela:

Enclosed for filing, please find one original and 11 copies of the "*Executive Director's Reply Brief in Response to Gem Seal of Texas, Inc.'s Original Brief.*"

Please file stamp these documents and return a file-stamped copy to D. A. Chris Ekoh, Staff Attorney, Environmental Law Division, MC 173.

If you have any questions, please do not hesitate to contact me at (512) 239-5487.

Sincerely,



D. A. Chris Ekoh  
Staff Attorney  
Environmental Law Division

CC: Mailing List

TCEQ DOCKET NO. 2006-0056-MIS

GEM SEAL OF TEXAS, INC.

Petitioner,

v.

CITY OF AUSTIN

Respondent

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BEFORE THE TEXAS

COMMISSION ON

ENVIRONMENTAL QUALITY

**EXECUTIVE DIRECTOR'S REPLY BRIEF IN RESPONSE TO  
GEM SEAL OF TEXAS, INC.'S ORIGINAL BRIEF**

The Executive Director of the Texas Commission on Environmental Quality (TCEQ or the Commission) files this reply brief in response to Gem Seal of Texas, Inc.'s (Gem Seal) original brief.

1.

**No Purpose will be Served by Referring this Case to the  
State Office of Administrative Hearing (SOAH)**

Gem Seal requested in its original brief that the Commission refer this case to SOAH for further consideration of the factual, technical and legal questions raised by the City of Austin's (City) ordinance at issue in this case. No purpose will be served by referring this case to SOAH as there is no material dispute regarding the essential facts underlying the enactment of the ordinance. Gem Seal has not alleged any facts to contradict the following:

- Polycyclic aromatic hydrocarbon (PAH) is a pollutant.
- Coal tar sealant contains PAHs.
- The concentration of PAHs in coal tar-based sealants is substantially higher than the concentration in non-coal tar-based sealants.
- PAHs are present in the City's lakes and creeks largely as a result of rain runoff into the lakes and creeks.

- PAHs are present in the City's creeks, particularly Barton Springs Pool and Barton Creek.
- There is a link between PAHs present in Barton Springs Pool and Barton Creek to parking lots and pavements sealed with coal tar sealants.
- Coal tar sealant is a source of PAH contamination in the City's lakes and creeks.
- PAHs present in Barton Springs Pool and Barton Creek posed no health risks to humans.
- PAHs present in Barton Springs Pool and Barton Creek posed health risks to aquatic organisms.
- The City is authorized to adopt ordinances to protect water quality.
- The City considered alternatives to the use and sale ban of coal tar sealants. The alternatives included "retrofitting parking lots and driveways with runoff controls" and "voluntary ban on coal tar sealants." Runoff controls were considered to be ineffective by the City and the producers of coal tar sealant resumed production following initial cooperation with the voluntary ban effort.

These recited facts are not in dispute and they are the significant facts upon which the Commission must base its decision. Gem Seal has failed to allege any facts to contradict these essential facts. Gem Seal does not deny (1) that PAH is a pollutant which is present in Barton Springs Pool and Barton Creek; (2) that a source of PAH contamination in the City is coal tar sealant; (3) that non coal tar sealants have substantially less PAH concentrations than coal tar-based sealants; (4) that the City considered alternatives to the sale and use ordinance such as runoff controls and voluntary ban of coal tar sealants; and (5) that the City has the authority to regulate water pollution attributable to runoff.

If PAH is a known pollutant, and the City is authorized to regulate pollution resulting from storm water runoff, the ordinance in this case must be affirmed as a valid exercise of the legislative authority delegated to the City. "Rush to judgment" as asserted by the petitioner is not a legal basis to overturn a City's water quality pollution control ordinance.

**The Only Legal Question Presented in this Case was Resolved by the  
Texas Supreme Court in Quick v. City of Austin and the  
Commission Should Follow the Decision in Quick**

The only legal question involved in this case has been answered by the Texas Supreme Court and the Commission should decide this case consistent with the Court's opinion. Gem Seal argues in its original brief that the standard of review articulated by the Texas Supreme Court in Quick v. City of Austin, 7 S.W.3d 109 (1999), is inapplicable to this case. Gem Seal has cited no constitutional, statutory, or judicial authority as to why the Commission should not follow the interpretation of Section 26.177(d) rendered by the Supreme Court. The statutory presumption of the validity of an ordinance upheld in Quick is a long standing doctrine in Texas jurisprudence. See, City of Brookside Village v. Comeau, 633 S.W.2d 790, 792-793 (Tex. 1982) (a city ordinance is presumed to be valid and a person challenging the "ordinance bears an 'extraordinary burden' to show 'that no conclusive or even controversial or issuable fact or condition existed' which would authorize" the enactment of the ordinance); and McKenna v. City of Galveston, 113 S.W.2d 606, 610 (Tex. Civ. App. 1938, writ dismissed) (an ordinance emanating from a municipal legislature must be viewed as prima facie valid, and to justify the court in setting it aside or declaring it as an illegal exercise of power by a city, its unreasonableness and necessity as a health protection measure "must be clear, manifest, and undoubted, so as to amount, not to a fair exercise, but an abuse of discretion, or a mere arbitrary exercise of power").

Gem Seal has not presented a compelling reason for the Commission to disregard this well settled legal doctrine. In implementing Section 26.177(d) of the Texas Water Code, the

Commission is not barred from reviewing and following judicial opinions interpreting the Code. Reliance on judicial opinion for guidance does not violate the principle of separation of power as Gem Seal seems to suggest.

Finally, in Quick, the court was cognizant of the fact that an appeal under Section 26.177(d) could be to one of two tribunals, the Commission or the district court. It is therefore not a coincidence that the court used the word “tribunal” instead of “court” in elucidating the standard of review applicable to Section 26.177(d). The court stated in Quick, that the “key to determining whether Section 26.177(d) authorizes a de novo review is . . . the amount of deference the statute requires the reviewing **tribunal** to give to the original **tribunal’s** decision.” *Id.* at 116 (emphasis added). The court used the term “tribunal” to refer to both the entity reviewing the ordinance and the city enacting the ordinance. The selective use of the word “tribunal” by the court is a clear indication that the court was conscious of the fact that the standard of review it articulated is applicable to both tribunals authorized to hear an appeal under Section 26.177(d) of the Texas Water Code. The holding in Quick was not limited to the judiciary.

### 3.

#### **Conclusion**

The Executive Director is therefore recommending that the Commission deny Gem Seal’s petition for review and affirm the City of Austin’s Ordinance No. 20051117-070 for the following additional reasons:

1. The standard of review articulated in the Texas Supreme Court’s decision in Quick is applicable to the instant case and dispositive of all the issues presented by Gem Seal.
2. No purpose will be served by referring this case to SOAH as there are no material disputes regarding the essential scientific facts underlying the enactment of the ordinance.

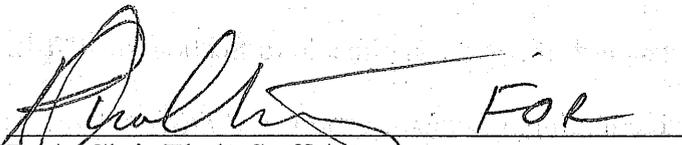
Respectfully Submitted,

Texas Commission on Environmental Quality

Glenn Shankle, Executive Director

Robert Martinez, Director  
Environmental Law Division

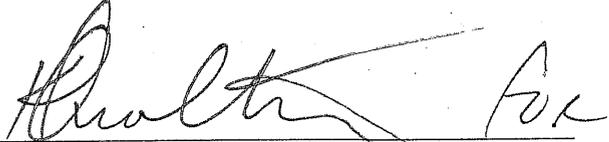
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CERTIFICATE OF SERVICE

I certify that on May 24, 2007, the original and 11 copies of the Executive Director's Reply Brief in Response to Gem Seal of Texas, Inc.'s Original Brief was filed with the Office of the Chief Clerk, Texas Commission on Environmental Quality, and served by first-class mail, agency mail, or facsimile to all persons on the attached mailing list.

A handwritten signature in black ink, appearing to read "D. A. Ekoh", written over a horizontal line.

D. A. Chris Ekoh, Staff Attorney  
Environmental Law Division  
Texas Commission on Environmental Quality

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**TCEQ Docket No. 2006-0056-MIS**

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