

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge
November 10, 2006

CHIEF CLERKS OFFICE

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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

Derek Seal
General Counsel
Texas Commission on Environmental Quality
PO Box 13087
Austin Texas 78711-3087

Re: SOAH Docket No. 582-06-0393; TCEQ Docket No. 2005-1184-MWD; In Re:
Application of UA Holdings, 1994-95, Inc., for a New TPDES Permit
No. WQ-14468-001

Dear Mr. Seal:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the original documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than November 30, 2006. Any replies to exceptions or briefs must be filed in the same manner no later than December 11, 2006.

This matter has been designated **TCEQ Docket No. 2005-1184-MWD; SOAH Docket No. 582-06-0393**. All documents to be filed must clearly reference these assigned docket numbers. Copies of all exceptions, briefs and replies must be served promptly on the State Office of Administrative Hearings and all parties. Certification of service to the above parties and an **original and eleven copies** shall be furnished to the Chief Clerk of the Commission. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in black ink, appearing to read "Tommy L. Broyles".

Tommy L. Broyles
Administrative Law Judge

TLB/lis
Enclosures
cc: Mailing List

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STYLE/CASE: UA HOLDINGS 1994-5

SOAH DOCKET NUMBER: 582-06-0393

REFERRING AGENCY CASE: 2005-1184-MWD

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ TOMMY L. BROYLES**

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SOAH DOCKET NO. 582-06-0393
TCEQ DOCKET NO. 2005-1184-MWD

APPLICATION OF UA HOLDINGS, 1994- § BEFORE THE STATE OFFICE
95, INC., FOR A NEW TPDES PERMIT § OF
NO. WQ 14468-001 § ADMINISTRATIVE HEARINGS

TEXAS
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PROPOSAL FOR DECISION

I. INTRODUCTION AND OVERVIEW

UA Holdings 1994-95, Inc., (Applicant) filed an application with the Texas Commission on Environmental Quality (TCEQ or Commission) seeking authorization to discharge treated domestic wastewater at a daily average flow not to exceed 180,000 gallons per day in the interim phase and a daily average flow not to exceed 360,000 gallons per day in the final phase. The facility would be located in Montgomery County, Texas. The application was protested by Phil Berthelot, Doug Joslyn, and Michael & Wendy Thornton, who the Commission found were affected persons and who were granted party status. Blue Heron Bay Property Owner's Association also sought party status, but its request was denied. All protesting parties were aligned as Protestants. In addition to the Applicant and Protestants, the Executive Director (ED) and Office of the Public Interest Counsel (PIC) of the TCEQ participated in the proceeding.

The Commission referred the following disputed, relevant and material issues of fact to the State Office of Administrative Hearings (SOAH) for consideration:

- (1) Whether the effluent limitations in the draft permit are designed to maintain and protect the existing instream uses and are they consistent with the Texas Surface Water Quality Standards;
- (2) Will the permitted discharge adversely impact the use of Mr. Joslyn's property; and
- (3) Whether issuing the permit is consistent with the Commission's regionalization policy.¹

¹ October 17, 2005 Interim Order of the Commission, p. 2.

The evidentiary hearing convened on September 11, 2006. At the conclusion of Applicant's direct case, Protestants moved for dismissal, arguing that Applicant failed to present evidence necessary to meet its burden of proof. The PIC agreed with the motion; the ED did not take a position. Applicant opposed the motion stating that whether it met its burden of proof may only be determined at the end of the proceeding. The Administrative Law Judge (ALJ) found merit in the motion and advised the parties that a Proposal for Decision (PFD) would be issued recommending that the permit application be denied. This recommendation is based solely on Applicant's failure to offer evidence and meet its burden of proof during its direct case on issue No. 1 above, the water quality issue. Because of this deficiency, the ALJ determined that continuing the hearing to take evidence from the other parties was a waste of resources—it was clear Applicant could not prove up at least one of the elements of its case (water quality). In accordance with this decision, the two non-water quality issues, regionalization and Mr. Joslyn's property, are not discussed in this PFD.

II. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

This case was found to be technically complete by the ED and was referred to SOAH by the Commission on October 17, 2005. The notice of hearing was issued on October 31, 2005, informing interested persons that the hearing would address the issues identified in the TCEQ *Order of Referral*. No party objected to notice or jurisdiction so further discussion of these issues is included only in the proposed order.

By agreement of the parties, the evidentiary hearing was twice continued and eventually set for September 11, 2006. A prehearing conference was held on August 30, 2006. During the prehearing conference, the ALJ noted that Applicant's only witness to prefile testimony, Patrick Aucoin, admitted in his deposition that he did not know about instream uses and could not identify water quality standards. Accordingly, his testimony concerning these issues was struck. His testimony on the two remaining issues, regionalization and impacts to Mr. Joslyn's property, was limited to his factual knowledge as he was not shown to be an expert in these areas either. Nevertheless, Applicant stated at the prehearing conference that it had the ability to go forward with

the hearing, specifically noting that it did not need additional time to name another expert. No continuance of the evidentiary hearing was sought by any party, so it was convened on September 11, 2006.

In order to provide the Commission with a more complete understanding of the occurrences in this case and of the ALJ's interpretation of the rules, a digression is necessary to provide additional background information. During the prehearing conference, the ED advised that it would be seeking leave of the court to amend the draft permit with new provisions. The ED explained that after prefiling his direct case, he had decided that the present draft permit was insufficient and needed to be amended, as did his prefiled testimony. Protestants objected, noting that the ED filed his prefiled testimony weeks after the Protestants had filed their testimony and gave no indication that a change in the permit was necessary. Moreover, Protestants objected that the ED effectively was rehabilitating Applicant's entire case after the Protestants presented their case and urged that this was in violation of Section 5.228(e) of the Texas Water Code.

The ALJ interprets the rules to always allow staff to testify and to offer evidence related to the ED's statutory duties as reflected during his administrative and technical review of the application.² These duties include presentation of a draft permit, reviewing the applicant's compliance summary, and performance of other duties while the application was in technical review.³ These duties do not include actions taken to amend the draft permit once a contested case has begun and the ED is serving as a contested case participant.

² 30 TEX. ADMIN. CODE § 80.127(h); "Testimony or evidence given in a contested case permit hearing by agency staff regardless of which party called the staff witness or introduced the evidence relating to the documents listed in §80.118 of this title (relating to Administrative Record) or any analysis, study, or review that the executive direct is required by statute or rule to perform shall not constitute assistance to the permit applicant in meeting its burden of proof."

³ The rule lists these documents as the final draft permit, the ED's decision or preliminary decision, the technical review of the permit application, the Applicant's compliance summary, copies of the public notices relating to the application, and any agency document determined by the ED to be necessary to reflect the administrative and technical review of the application. 30 TEX. ADMIN. CODE §§ 80.118.

For this reason, the ALJ theoretically agreed with Protestants but noted that, as a matter of practice, the applicant, PIC, or protestants may subpoena or otherwise call staff to testify in their direct or rebuttal cases. The ALJ reasoned that in all likelihood, Applicant would be able to call the ED's witnesses on rebuttal and get the modified draft permit into the record. It would therefore be to Protestants' advantage to allow the modifications of the draft permit as soon as possible, providing time for them to be reviewed and properly addressed. Protestants agreed.⁴ However, this became a nonissue when Applicant failed to meet its burden of proof in its direct case on the water quality issue.

The ALJ notes that the ED is certainly not generally prohibited from offering opinions and evidence on the issues, even if his evidence will help the Applicant prove up its case by the greater weight of evidence. Also, Staff witnesses may testify about any and all relevant matters when called by another party; however, the ALJ understands the rules prohibit the ED from calling his own witnesses and proving up Applicant's case with evidence other than that allowed by § 80.127(h) or by otherwise carrying the Applicant's entire burden of proof. An applicant obviously is the party moving for approval of the application. As such, it has the burden of proof by a preponderance of the evidence. 30 TEX. ADMIN. CODE § 80.17(a) Moreover, the ED is specifically prohibited, with exceptions not applicable to this case, from assisting a permit applicant in meeting its burden of proof. 30 TEX. ADMIN. CODE §§80.17(e) and 80.108(e). Because of these rules and the Texas Water Code's similar provision, the ALJ concludes below that the ED is prohibited from presenting its evidence and entirely meeting Applicant's burden of proof on the water quality issue.

III. BACKGROUND

All parties were required to prefile their direct testimony. Applicant prefiled only the testimony of Patrick Aucoin, the applicant and proposed operator of the wastewater facility. His

⁴ Upon reviewing his orders, the ALJ notes that Order No. 8 presented the rationale for not allowing the ED to modify the draft permit but failed to note the agreement and other discussions during the preliminary by which the parties agreed to allow the ED's permit modifications.

testimony addressed all three issues referred by the Commission. On August 1, 2006, Protestants deposed Mr. Aucoin and he essentially admitted that he did not have the technical expertise necessary to testify about water quality issues:⁵

Q. Now, with regard to water quality analysis, does computer modeling have a role in water quality analysis impact?

A. I wouldn't have an answer for that. I've never thought of that.

Q. Are you familiar with something called the Streeter-Phelps Formulation?

A. No, I'm not. . . .

Q. Do you know what a first order decay rate is?

A. No, I do not.

Q. Do you know what an exponential decay rate is?

A. No.

Q. Are you familiar with QualTex models used by TCEQ?

A. No. I guess that's why I hired an engineering firm to take care of that for us. I could not debate those issues whatsoever.

Q. Would it be fair to say those issues are issues beyond your expertise?

A. That would be a very fair statement.

Q. And that would be true with regard to the use of any type of computer model to make determinations of compliance of water quality standards?

A. Yes

Q. Are you familiar with the water quality standard rules?

A. I'm familiar with the rules. I'm not up to date on all of them.

Q. Do you know how to determine compliance with the rules?

A. In regards to a treatment of the sewage treatment plant, I do.

Q. Right. So, anything dealing with operation of the plant you feel comfortable with?

A. Yes I do.

Q. But I'm talking about the impact of the discharge on the receiving water stream. Are you familiar with the rules associated with that?

A. I'm not really very familiar with that.⁶

Moreover, Mr. Aucoin was not familiar with the rules under the water quality standards as they refer to instream uses; did not undertake any of the studies necessary to show whether the proposed 10/15/2 permit parameters were sufficient to meet regulatory requirements; could not state whether

⁵ He does have a Class B state-issued water and sewer operator's license and significant experience and training on operating wastewater facilities.

⁶ Aucoin Deposition, pp. 49-51.

or not his engineer performed computer modeling to support the proposed standards; and demonstrated a complete lack of understanding regarding the draft permit's proposed parameters.⁷ Ultimately, Mr. Aucoin stated that it was fair to say his opinion regarding the application meeting the water quality standards was based on what his engineer told him.⁸ For these reasons, Mr. Aucoin's "expert opinions" about the potential impacts of the proposed discharges on the receiving water were stricken. This ruling was issued during the August 30, 2006 prehearing conference, 12 days prior to the evidentiary hearing.

During the same prehearing conference, the ALJ suggested that, because he struck portions of Mr. Aucoin's testimony, Applicant had good cause for a continuance to find and prefile an expert's opinion on the water quality matters. Applicant declined this invitation, informed the ALJ that it had already identified an expert, and reiterated its desire to proceed to hearing as scheduled.

At the evidentiary hearing, Mr. Aucoin presented his prefiled testimony and offered clarifications of some of the testimony that was previously struck. Based upon his clarifications, some additional testimony was admitted.⁹ However, Mr. Aucoin remained unqualified to testify as an expert concerning the water quality issue. After Mr. Aucoin's testimony, Applicant rested its case.

Before presenting their evidence, Protestants filed a motion to dismiss the case and argued that, pursuant to Commission rules, Applicant bears the burden of proof and must meet this burden

⁷ Mr. Aucoin revised his testimony while at the hearing to contradict the permit parameters he testified to when deposed. During his deposition, Mr. Aucoin was questioned at length about each of the parameters of the 5/5/2/1 proposed standards that were included in his prefiled testimony. Not once did Mr. Aucoin question the accuracy of the 5/5/2/1 standard. However, when presented as a witness during the hearing, he changed his testimony to reflect a 5/15/2/6 standard. Given the number of times this issue was addressed during his deposition and in his prefiled testimony, Mr. Aucoin should have caught this critical mistake, if he were a water quality expert.

⁸ Aucoin Deposition, p. 55.

⁹ The additional testimony generally concerned issues of fact related to Mr. Joslyn's property and regionalization.

in its direct case.¹⁰ Protestants urged that no rule allows Applicant or any other party to meet Applicant's burden of proof after the close of Applicant's direct case. Accordingly, Protestants moved for dismissal. The PIC agreed with Protestants, noting that applicants must put on their evidence first, thereby allowing the other parties an opportunity to address that evidence when presenting their subsequent cases.

Applicant responded that there is no applicable rule requiring it to meet its burden of proof in its direct case. Rather, Applicant argued that it is entitled to meet its burden of proof based on evidence gathered from the first witness to the last, and regardless of whether the witness is presented by Applicant, the ED, or even by the Protestants. According to Applicant, not until after its rebuttal case is the record evaluated to determine whether it met its burden of proof. Applicant opined that only in criminal cases is a directed verdict, or a similar motion such as that presently sought by Protestants, applicable. The Executive Director did not take a position on this matter.

IV. RECOMMENDATION

The ALJ recommends a decision be issued in favor of Protestants, finding that Applicant failed to prove whether effluent limitations in the draft permit are designed to maintain and protect the existing instream uses and whether they are consistent with the Texas Surface Water Quality Standards. Pursuant to 30 TEX. ADMIN. CODE §§ 80.17(a) and 80.117(b), Applicant had the burden of proof on this issue. Applicant failed to meet its burden of proof, thus, the application should be denied. Essentially, the analysis of this entire case rest on this failure by Applicant. However, because of the curious arguments made by Applicant and the unique evidentiary ruling issued by the ALJ, a more in-depth discussion of the ALJ's rationale follows.

¹⁰ 30 TEX. ADMIN. CODE §§ 80.17(a) and 80.117(b). Section 80.117(b) states that applicants shall present evidence to meet their burden of proof on the application, followed by the protesting parties.

It is well-settled law that when a moving party rests its case, that party has indicated it has fully developed its case and it does not desire to put on further evidence, except by rebuttal.¹¹ Likewise, the Texas Supreme Court has found directed judgment against the party with the burden of proof appropriate when that party has rested its case without proving the necessary elements:

The defendant should not be forced to put on a defense on the chance that he will prove the plaintiff's claim. No useful result obtains by having the court hear the defendant's evidence when the judge, as the trier of fact, is unpersuaded by the plaintiff's case. A more judicially efficient and economical procedure is to allow the trial judge, sitting as trier of fact and law, to rule on both the factual and legal issues at the close of the plaintiff's case and to make factual findings at that time if requested by a party.¹²

The court added that its decision is in line with the purpose and spirit of TEX. R. CIV. P. 1, which provides:

The proper objective of the rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great *expedition and dispatch and at the least expense* both to the litigant and the state as may be practicable, these rules shall be given liberal construction. [emphasis included in the case, *Qantel Bus. Sys. v. Custom Controls Co.*, 761 S.W.2d 302, 304 (Tex. 1988)].

Similarly, the SOAH Rules of Procedure suggest they be construed to ensure the just and expeditious determination of every matter referred to SOAH and indicate that in making decisions, the ALJ will consider the Texas Rules of Civil Procedure as interpreted and construed by Texas case law in order to issue orders and rulings that are just in the circumstances of the case.¹³ Based upon these rules and case law, the ALJ concluded that the administrative equivalent of directed judgment was an appropriate remedy in this administrative hearing.

¹¹ *Qantel Bus. Sys. v. Custom Controls Co.*, 761 S.W.2d 302, 304 (Tex. 1988).

¹² *Qantel* at 304.

¹³ 1 TEX. ADMIN. CODE §155.3(g)

Applicant essentially offered two explanations for its failure to offer evidence in support of its application concerning water quality issues. First, Applicant suggested it could present its water quality evidence “at first blush” on rebuttal. In the alternative, Applicant asserted it could rely on the other parties, including the ED, to meet its burden of proof on the water quality issue. Applicant is mistaken on both accounts. In regard to the first argument, Applicant would ignore well-established courtroom procedure and throw the contested case into disorder by “lying behind the log” and present its evidence on water quality for the first time after the other parties have addressed the issue. In regard to Applicant’s alternative argument, Applicant would ignore mandates found in Commission rules and the Texas Water Code prohibiting the ED from assisting the Applicant in meeting its burden of proof.¹⁴ Neither of Applicant’s justifications is supported legally, or even in equity.

Addressing the legalities first, the ALJ is persuaded that Applicant’s primary intent in this case was to rely on the ED to meet its (Applicant’s) burden of proof. To suggest that Applicant thought it could simply wait until rebuttal to present evidence supporting its case in chief is untenable. Rebuttal evidence is defined in *Blacks Law Dictionary* as “evidence which is offered by a party after he has rested his case and after the opponent has rested in order to contradict the opponent’s evidence.”¹⁵ Since Applicant failed to present any evidence concerning water quality on direct, Protestants would be under no obligation to present any evidence concerning this issue in order to prevail. Rather, Protestants need only rest their case, thereby denying Applicant the opportunity to present additional evidence in its rebuttal case (obviously, there would be no evidence to rebut). At that point in the process, this case would be exactly where it is now, without any evidence supporting the application concerning the water quality issue. Given this scenario, it was more efficient for the parties and the state, and more in line with the above rules and case law, to grant the administrative equivalent of directed judgement for Protestants after Applicant rested its direct case.

¹⁴ TEX. WATER. CODE § 5.228(e)

¹⁵ *Blacks Law Dictionary* Fifth Edition, p. 1139.

Turning to the more likely scenario, the ALJ addresses Applicant's intention to rely on the ED's expert witnesses to meet Applicant's burden of proof. This, too, is a very curious position. During the prehearing conference and in a subsequent order, the parties examined and the ALJ detailed his understanding of §5.228(e) of the Texas Water Code and its prohibition against the ED assisting a permit applicant in meeting its burden of proof.¹⁶ Further, Applicant was made aware that Commission rules restate this prohibition, adding that the ED shall not rehabilitate the testimony of a witness other than his own witness testifying for the sole purpose of providing information to complete the administrative record.¹⁷ Clearly, Applicant's intention here is prohibited by law.

As a final matter and in all fairness to Applicant, the ALJ addresses the equities in this case to see if despite the applicable statute and rules, Applicant's request to deny Protestants motion and to allow the case to continue should have been granted. The only way the ALJ finds Applicant could have obtained its objective was pursuant to TEX. R. CIV. P. 270, allowing the ALJ to permit additional evidence be offered into the record when it appears to be necessary for the administration of justice.¹⁸ When faced with a motion for directed judgment based on a lack of evidence to establish an essential element, the proper response is a motion to reopen the record.¹⁹ To date, no such motion has been filed by Applicant and, at this late date, the ALJ would not be inclined to entertain such a motion. One of the key factors to review when considering a request to reopen the record is whether the moving party has been diligent.²⁰ In this instance, Applicant has failed to diligently address both its direct case deficiencies and Protestants' motion for dismissal.

¹⁶ "The executive director or the executive director's designated representative may not assist a permit applicant in meeting its burden of proof in a hearing before the commission or the State Office of Administrative Hearings unless the permit applicant fits a category of permit applicant that the commission by rule has designated as eligible." It is undisputed that Applicant does not fit the criteria for an applicant who may receive assistance from the ED.

¹⁷ 30 TEX. ADMIN. CODE § 80.127(a)(4)

¹⁸ TRCP 270

¹⁹ *MCI Telecomm. Corp. v. Tarrant Cty. Appr. Dist.*, 723 S.W. 2d 350, 353 (Tex. App.—Fort Worth 1987, no writ).

²⁰ *In re H.W.* 85 S.W.3d 348, 357-58 (Tex. App.—Tyler 2002, no pet.).

As the aforementioned quotes from and discussions about Mr. Aucoin's deposition establish, Applicant knew or should have known by the date of Mr. Aucoin's deposition, August 1, 2006, that it needed another expert to address the water quality issues. But worse than that, Mr. Aucoin's deposition demonstrated that he lacked sufficient knowledge about his application, his prefiled testimony, and the ED's draft permit to testify on these matters. Mr. Aucoin opined that he was not qualified to verify the application because it had to be verified by an engineer. He thought that his engineer, George Chandlee, had signed the Application. Later it was revealed that, in fact, Mr. Aucoin had signed the application. Mr. Aucoin stated that he did not know whether his engineer undertook modeling, undercutting his prefiled testimony that referred to all of the modeling SES did in preparing the application.²¹ Mr. Aucoin stated that he did not know whether Mr. Chandlee was expected to prefile testimony, only to later admit that in his own prefiled testimony, he stated that, "Dr. George Chandlee presents a more detailed discussion on the TCEQ rules related to a 5/5/2/1 permit and I refer the Court to his prefiled testimony as the best witness on these scientific technical details." Ultimately, Mr. Aucoin denied writing this portion of his prefiled testimony, presuming it was his attorney who wrote it.²² Unfortunately, this was not an isolated incident. On no less than four other occasions, Mr. Aucoin admitted that he did not write the portions of his prefiled testimony at issue but instead usually assumed his attorney wrote it.²³

It is apparent that Mr. Aucoin lacked the knowledge to support many of the factual questions addressed in his prefiled testimony, much less the technical qualifications necessary to opine on the water quality issues. It is equally apparent that none of this was due to mistake or surprise. Rather, the greater weight of evidence suggests that Applicant calculated incorrectly, assuming that it could get through the hearing and meet its burden of proof by relying on the ED's technical experts. Even after glaring deficiencies in Mr. Aucoin's qualifications were revealed, Applicant failed to modify

²¹ Aucoin Deposition, pp. 52 and 56.

²² The ALJ notes these discrepancies not to disparage the character of Mr. Aucoin nor his attorney. Rather, they establish that Applicant was aware of the shortcomings in its direct case at least by the date of the deposition but choose not to present a qualified expert witness.

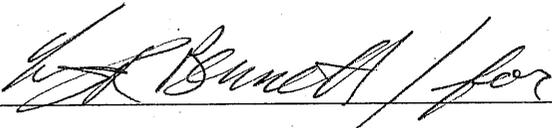
²³ Aucoin Deposition, pp. 71, 74, 78, 81,

its case and failed to present qualified witnesses. For these reasons, the ALJ does not find that Applicant should be given another opportunity to present its case, nor should Applicant be given an opportunity to run a wastewater treatment plant.

V. CONCLUSION

Pursuant to the above discussions, the ALJ recommends that the Commission deny the application, because Applicant failed to present admissible evidence regarding whether the effluent limitations in the draft permit are designed to maintain and protect the existing instream uses and whether they are consistent with the Texas Surface Water Quality Standards. As such, Applicant failed to meet its burden of proof on this issue.

Signed November 10, 2006.



TOMMY L. BROYLES
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN ORDER

**Denying the application of UA Holdings 1994-95, Inc.
for a new TPDES Permit No. WQ14468-001;
TCEQ Docket No. 2005-1184-MWD;
SOAH Docket No. 582-06-0393**

On _____, the Texas Commission on Environmental Quality (the TCEQ or Commission) considered the application of UA Holdings 1994-95, Inc. (UA) for a new TPDES Permit No. WQ14468-001 for a wastewater treatment plant in Montgomery County. The application was presented to the Commission with a Proposal for Decision by Tommy L. Broyles, Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH). After considering the ALJ's Proposal for Decision and the evidence and arguments presented, the Commission makes the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

Procedural History and Parties

1. In July 2003, UA filed an application to discharge treated domestic wastewater from a treatment plant with the TCEQ.
2. UA's application was found to be technically complete by the Executive Director (ED) of the TCEQ and subsequently referred to SOAH by Commission Order on October 17, 2005.
3. After an agreed motion for continuance of the initial preliminary hearing was granted, the preliminary hearing was held on February 15, 2006, in Conroe, Texas.

4. The Office of Public Interest Counsel (OPIC) and the ED of the Commission elected to participate in the proceeding.
5. The application was protested by Phil Berthelot, Doug Joslyn, and Maria Brasher, who were found to be affected persons and granted party status.
6. Blue Heron Bay Property Owner's Association also sought party status, but its request was denied.
7. After the evidentiary hearing was continued, at the request of Mr. Joslyn and without objection from the other parties, the hearing convened on September 11, 2006, in Austin, Texas, and ended that same day.
8. The record closed on the day of the hearing.

Notice

9. On or about August 6, 2004, UA placed a copy of the application in the Montgomery County Central Library for public inspection and copying.
10. UA published a Notice of Receipt and Intent to Obtain a Permit in *The Courier* on September 15, 2003. This newspaper is published and regularly circulated in Montgomery County. The TCEQ Chief Clerk also mailed copies of the notice to interested persons, other agencies, elected officials and others.
11. UA published a Notice of Application and Preliminary Decision in *The Courier* on November 26, 2003, and then again on August 18, 2004. The TCEQ Chief Clerk also mailed copies of the notice to interested persons, other agencies, elected officials and others.

12. Notice was provided and a public meeting was held on February 15, 2006, at the Montgomery County Commissioner's Courtroom.
13. UA published a Notice of Hearing in *The Courier* on January 8, 2006. This newspaper is published and regularly circulated in Montgomery County. The TCEQ Chief Clerk also mailed copies of the notice to interested persons, other agencies, elected officials and others.

Whether the Applicant Proved Compliance with the Legal Standards

14. The Commission referred the following disputed, relevant and material issues of fact to SOAH for consideration:
 - a. Whether the effluent limitations in the draft permit are designed to maintain and protect the existing instream uses and are they consistent with the Texas Surface Water Quality Standards;
 - b. Will the permitted discharge adversely impact the use of Mr. Josyln's property; and
 - c. Whether issuing the permit is consistent with the Commission's regionalization policy.
15. Applicant rested its direct case without offering sufficient and admissible evidence to prove that the effluent limitations in the draft permit are designed to maintain and protect the existing instream uses and to prove that they are consistent with the Texas Surface Water Quality Standards.

II. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over water quality in Texas and to issue a permit to discharge waste into or adjacent to water in the state under TEX. WATER CODE §§ 5.013, 26.003, 26.011 and 26.027.

2. SOAH has jurisdiction over all matters relating to the conduct of a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law under TEX. GOVT. CODE §§ 2001.058 and 2003.047 and TEX. WATER CODE § 5.557.
3. At the request of UA, the TCEQ properly referred this case to SOAH for a contested case hearing under TEX. WATER CODE § 5.557 and 30 T.A.C. §§ 55.210.
4. The proceedings herein described were conducted in accordance with applicable law and regulations, specifically TEX. WATER CODE Chapters 5 and 26, TEX. GOVT. CODE Chapter 2001 and § 2003.047, the Commission's rules, and SOAH's procedural rules.
5. UA and TCEQ satisfied all public notice requirements set forth in TEX. GOVT. CODE § 2001.051 and § 2001.052, TEX. WATER CODE §§ 5.552, 5.553, 5.555, 26.022 and 26.028 and 30 T.A.C. §§ 39.551, *et seq.*
6. The Texas Surface Water Quality Standards, Title 30, Chapter 307 of the Texas Administrative Code are developed and adopted by TCEQ with the authority of Section 303(c) of the Federal Clean Water Act and Section 26.023 of the TEXAS WATER CODE. Under 30 T.A.C. § 307.1, the purpose of the Standards is to "maintain the quality of water in the state consistent with public health and enjoyment, propagation and protection of terrestrial and aquatic life, operation of existing industries, and economic development of the state."
7. Pursuant to 30 TEX. ADMIN. CODE §§ 80.17(a) and 80.117(b), Applicant had the burden of proof on all issues in controversy.
8. UA failed to offer sufficient and admissible evidence proving that, in accordance with TEX. WATER CODE §§ 26.023 and 26.027, UA's proposed wastewater treatment plant under the terms of the draft permit would maintain and protect the existing instream uses and Texas Surface Water Quality Standards of the receiving waters.

9. UA failed to offer sufficient and admissible evidence to meet its burden of proving that, in accordance with TEX. WATER CODE § 26.041, UA's wastewater treatment plants discharge under the terms of the draft permit would not be injurious to public health and are consistent with the Texas Surface Water Quality Standards.
10. UA failed to offer sufficient and admissible evidence to meet its burden of proving that, in accordance with the policy of the State of Texas as set forth at TEX. WATER CODE § 26.003, discharges pursuant to the draft permit would allow the state 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.
11. UA's application should be denied and TPDES Permit No. WQ14468-001 should not be issued.

NOW, THEREFORE, IT IS ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENT QUALITY THAT:

1. The application of UA Holdings 1994-95, Inc. for TPDES Permit No. WQ14468-001 is denied.
2. UA shall pay all transcription and reporting costs.
3. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
4. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and Gov't Code § 2001.144.

5. The Commission's Chief Clerk shall forward a copy of this Order to all parties.
6. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
Kathleen Hartnett White, Chairman
For the Commission