

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

2006 DEC 20 PM 3:34

APPLICATION OF UA HOLDINGS  
1994-5 FOR NEW TPDES PERMIT  
NO. WQ 14468-001

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BEFORE THE STATE OFFICE  
CHIEF CLERKS OFFICE  
ADMINISTRATIVE HEARINGS

**DOUG JOSLYN'S REPLY TO THE APPLICANT'S EXCEPTIONS TO THE  
PROPOSAL FOR DECISION AND MOTION TO REOPEN THE RECORD**

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

COMES NOW, Doug Joslyn, Protestant in the above referenced matter, and files this his Reply to the Applicant UA Holdings' 1994-5 (Applicant or UA Holdings) Written Exceptions to the Proposal For Decision and Motion to Reopen the Record. In support of his position, Protestant Doug Joslyn would respectfully show the following:

**I. Protestant Supports Proposal For Decision and Executive Director Response**

Protestant supports and agrees with the Proposal For Decision ("PFD") filed by the Honorable Administrative Law Judge Tommy L. Broyles on November 10, 2006. Protestant agrees with the Administrative Law Judge ("ALJ") recommendation that a "finding be made that the 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 TAC § 80.17(a) and 80.117(b) the Applicant had the burden of proof on this issue. Applicant failed to meet its burden of proof, thus the application should be denied."<sup>1</sup>

Protestant also supports the Executive Director's Response to the Administrative Law Judge's Proposal For Decision. Mr. Anthony Tato, Staff Attorney representing the Executive Director ("ED") of the Texas Commission on Environmental Quality ("TCEQ"), agrees with the

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<sup>1</sup> PFD, p. 7.

ALJ's recommendation that the Commission deny the application because the Applicant failed to meet its burden of proof in this case.<sup>2</sup>

## **II. Protestant Opposes Applicant's Exceptions**

### **A. Exceptions Mischaracterize Facts**

Protestant strongly disagrees with UA Holdings' Exceptions to the Proposal For Decision and Motion to Reopen the Record. UA Holdings appears to have ignored certain facts that occurred prior to the hearing on the merits September 11, 2006. Indeed UA Holdings characterizes the recommendation in the Proposal For Decision ("PFD") as being based on "procedural deficiencies rather than the true merits of the application, and states that a denial without remand will further delay the issuance of a permit that is needed for more than 50 existing homes in the Sunrise Ranch Subdivision."<sup>3</sup> ... Failing to meet the burden of proof is a very serious "procedural deficiency."

The Applicant characterizes the reason for its failure to meet its burden of proof as the "mistaken impression" that it could rely solely on its rebuttal case.<sup>4</sup> This is an incorrect statement of the facts. The Applicant knew that he was responsible for providing prefiled testimony to prove his case. The Applicant's expert witness Mr. Patrick Aucoin submitted prefiled testimony, which referred to prefiled testimony of another expert witness for the "scientific, technical details."<sup>5</sup> This testimony was never filed. Accordingly, not only did the Applicant and his attorney know that additional prefiled testimony was required in this case, the Applicant failed to follow through with preparing his case. Even after Mr. Aucoin's deposition demonstrated that he was not qualified as an expert in the subject matter of TCEQ water quality

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<sup>2</sup> Executive Director's Response to the Administrative Law Judge's Proposal For Decision dated December 12, 2006.

<sup>3</sup> UA Holdings Exceptions, p. 3.

<sup>4</sup> UA Holdings Exceptions, p. 4.

<sup>5</sup> Aucoin Prefiled Testimony, p. 10, FN1; PFD, p. 11.

standards, nor was he qualified as an expert in water quality modeling, the Applicant failed to submit additional testimony. Protestant agrees with the ALJ that rather than this being a mistake on the part of the Applicant, this procedure was based on the Applicant incorrectly assuming it could meet its burden of proof by relying on the ED's technical experts.<sup>6</sup>

### **B. Remand Is Inappropriate**

The Applicant argues that remanding this matter back to the State Office of Administrative Hearings ("SOAH") and reopening the record would not constitute a duplication of effort. He further states that "at this stage in the proceedings, the parties have completed discovery and prepared for the hearing."<sup>7</sup> The Applicant's argument lacks merit. The parties have only completed discovery on Mr. Aucoin's testimony. No discovery has been completed on any "new evidence". The Applicant also failed to mention that during the prehearing conference held on August 30, 2006, the ED requested to change his prefiled testimony to include new modeling and to modify the draft permit. As memorialized in Order No. 8 dated September 5, 2006, "the ED notified the parties that he would be changing his testimony based on new modeling he recently ran. The ED further has new permit effluent limitations which he now believes are necessary changes to the proposed draft permit".<sup>8</sup> It should be noted that the ED's changes result from information presented by the Protestant in his prefiled testimony. This is not in any way a simple matter of returning to the hearing room and continuing a hearing already in progress as the Applicant suggests.<sup>9</sup>

Protestant also disagrees with the implication that this permit must be issued because it is a feasible alternative to the current pump and haul operation being utilized by the residents of the

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<sup>6</sup> PFD, p. 11.

<sup>7</sup> UA Holdings' Exceptions, p.5.

<sup>8</sup> PFD, p. 3.

<sup>9</sup> UA Holdings' Exceptions, p. 5.

50 homes already constructed. The one fact that Protestant agrees with is that it was premature to construct and sell homes without a discharge permit by which to dispose of treated effluent from those homes.<sup>10</sup> However, the pump and haul operation is working for the 50 constructed homes. There is no evidence that it is not working, and issuance of this permit, is far from assured.

### C. Fairness Issues

The ALJ noted that “the SOAH rules of procedure suggest that they be construed to insure 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 in the case. 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.”<sup>11</sup> The Applicant should not be allowed to present its case as a rebuttal case as it is clearly anticipating it would like to do. Failing to meet the burden of proof is not a trivial matter as the Applicant seems to imply. Protestant met the TCEQ and SOAH rules, the Applicant ignored the rules. In the interest of justice, the permit should be denied. The Applicant argues that the best environmental permitting decisions are to be based on a fully developed evidentiary record, not on omissions resulting from a failure to present qualified witnesses, particularly when so doing results in the continuation of an environmentally risky pump and haul program for existing residences.<sup>12</sup> The best environmental permitting decisions are not made by ignoring the rules when it suits the Applicant. The failure to present qualified witnesses and fully develop an evidentiary record rests on the Applicant’s shoulders alone. In terms of fairness, the Applicant

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<sup>10</sup> UA Holdings’ Exceptions, p.5.

<sup>11</sup> PFD, p. 8.

<sup>12</sup> UA Holdings’ Exceptions, p.6.

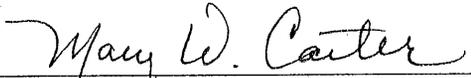
has no argument, because all the other parties to the hearing followed the procedural as well as the substantive rules for contested case hearings.

The ALJ noted in the PFD that "one of the key factors to review when considering a request to reopen the record is whether the moving party has been diligent."<sup>13</sup> The ALJ also noted that the Applicant failed to diligently address both its direct case deficiencies and Protestants Motion for Dismissal.<sup>14</sup> Applicant failed to modify its case and failed to present qualified witnesses. For these reasons the ALJ does not find that the "Applicant should be give another opportunity to present its case, nor should Applicant be given an opportunity to run a wastewater treatment plant."<sup>15</sup> Protestant agrees.

Protestant Doug Joslyn respectfully requests that the TCEQ approve the Proposal For Decision issued by the Honorable Administrative Law Judge Tommy L. Broyles dated November 10, 2006.

Respectfully submitted,

**BLACKBURN CARTER, P.C.**

by 

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<sup>13</sup> PFD, p. 10.

<sup>14</sup> PFD, p. 10.

<sup>15</sup> PFD, p. 11 and 12.

**CERTIFICATE OF SERVICE**

On this 19th day of December, 2006, a true and correct copy of the foregoing instrument was served on all parties by the undersigned via regular U.S. Mail, and/or Certified Mail/Return Receipt Requested, and/or hand delivery, and/or facsimile transmission, and/or Federal Express Overnight Mail.

  
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Mary W. Carter

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