

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



TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY'S OFFICE

Protecting Texas by Reducing and Preventing Pollution

April 26, 2007

State Office of Administrative Hearings

Honorable Sharon Cloninger, Administrative Law Judge
William P. Clements Building
300 West 15th Street, Suite 502
Austin, Texas 78711-3025

Re: Application of the City of Midlothian to Amend Certificate of Convenience and Necessity No. 11706 and To Cancel Certificate of Convenience and Necessity No. 11966 in Ellis County, Texas; Response to Wax-Mid, Inc.'s Exceptions to the Proposal for Decision

Dear Honorable Sharon Cloninger:

The Executive Director of the Texas Commission on Environmental Quality files the following Response to Wax-Mid, Inc.'s Exceptions to the Proposal for Decision on the City of Midlothian's CCN Application.

Sincerely,

A handwritten signature in black ink, appearing to read "Gabriel Soto".

Gabriel Soto
Staff Attorney
Environmental Law Division
Texas Commission on Environmental Quality

SOAH Docket No. 582-06-1029
TCEQ Docket No. 2005-2007-UCR

2007 APR 26 PM 4: 37

APPLICATION OF CITY OF	§	
MIDLOTHIAN TO AMEND	§	BEFORE THE
CERTIFICATE OF CONVENIENCE	§	
AND NECESSITY (CCN) NO. 11706	§	TEXAS COMMISSION ON
AND TO CANCEL CCN NO. 11966,	§	
IN ELLIS COUNTY, TEXAS	§	ENVIRONMENTAL QUALITY

CHIEF CLERKS OFFICE

**EXECUTIVE DIRECTOR'S REPLY TO WAX-MID, INC.'S
EXCEPTIONS TO THE PROPOSAL FOR DECISION**

COMES NOW, the Executive Director ("ED") of the Texas Commission on Environmental Quality ("TCEQ" or "Commission"), by and through attorney representative of the TCEQ Environmental Law Division, in support of the Administrative Law Judge's Proposal for Decision and files the Executive Director's Reply to Wax-Mid, Inc.'s Exceptions to the Proposal for Decision, as follows:

A. Only the City of Midlothian having the Burden of Proof

Wax-Mid, Inc. does not go into detail to support their assertion that the City of Midlothian has failed to satisfy burden of proof requirements under 30 Texas Administrative Code § 80.17. However, the Executive Director does concur that 30 Texas Administrative Code § 80.17 requires the City of Midlothian to meet their burden of proof.

Further, the Executive Director was named as a designated statutory party pursuant to § 80.109 allowing the Executive Director to substantiate a case in order to provide a recommendation for the Commission's findings on the Proposal For Decision.¹

The Executive Director does not concur with Wax-Mid, Inc. that the record was

¹ 30 Texas Administrative Code §80.109 (a) - (b)(1)(A)(referring to the Executive Director's party status as a mandatory party for matters pursuant to the Texas Water Code as distinguished from the Executive Director's non-participatory party status in other Commission permit proceedings, pursuant to Texas Administrative Code § 80.108(a)(1-7)).

authenticated by matters outside of the record or evidence solely from TCEQ agency staff.

B. Whether the City Has Failed to Prove that it is Entitled to a CCN

Amendment.

In Order No. 8 issued by the Administrative Law Judge, both the City of Midlothian's Motion for Summary Disposition and Wax-Mid, Inc.'s Cross Motion for Summary Disposition were denied. The standard for such motions is specific and the movant must show, "...that there is no genuine issue as to any material fact..." 30 Texas Administrative Code § 80.137.² Wax-Mid, Inc.'s rational that the denial of summary disposition by the Administrative Law Judge for the City of Midlothian alone substantiates that the applicant has failed to meet their burden is flawed, since that finding was not predicated on cross-examination of witnesses and evidence elicited during the evidentiary hearing coupled with closing arguments on behalf of participating parties.

The Executive Director does not concur with Wax-Mid, Inc. that the need for service in the proposed area is wholly non-existent or has not been shown in this docket. The Executive Director reiterates that the need for service does not necessitate a formal request for service. *See* Proposal for Decision at 36. In deriving a recommendation on whether to grant or deny a Certificate of Convenience and Necessity ("CCN") amendment, the Executive Director relies on the factual determinations existent in the requested area. In this instance the requirement of necessity was determined to exist based on the three commercial water service connections in the requested area coupled

² *See also* 1 Texas Administrative Code § 155.57 (a) (referencing the standard for summary disposition under rules for the State Office of Administrative Hearings).

with a request on behalf of one of those entities that was previously made to the ECOM manager, associated with Wax-Mid, Inc. and not acknowledged. *See* Proposal for Decision at 36. Further, it has been shown that there are emerging activity centers within the corporate limits of Midlothian and evidence elicited by the City of Midlothian revealed that there is anticipated growth through future infrastructure to include a six-lane highway and four lane divided highway near the requested area. *See* Proposal for Decision at 36. In this instance Wax-Mid, Inc. assumes that the necessity requirement should be based solely on whether or not ECOM believes that the Wax-Mid, Inc. area is ripe for development and only then will there be a need for service within the corporate limits of Midlothian. *See* Proposal for Decision at 36. This notion asserted by Wax-Mid, Inc. fails to recognize relevant evidence introduced in this docket and the statutory criteria prescribed under Texas Water Code § 13.246 (c). For this reason, the Executive Director agrees that the applicant has proven that it is entitled to a CCN amendment, which is supported by the Administrative Law Judge's Proposal for Decision.

C. Testimony from the Executive Director cannot be Relied on to Meet the Burden of Proof

Although the Executive Director agrees that the City of Midlothian has the burden of proof to put forth their case, all relevant admissible evidence should be considered in the Proposal for Decision to enable the Commission to make an informed decision on the application. As previously noted, the Executive Director is a participating party to this proceeding and is not limited in making a final recommendation on whether to grant or deny the current application before the TCEQ. *See* 30 Texas Administrative Code §80.109 (a) - (b)(1)(A). Further, the Administration Law Judge is also not limited in

considering relevant evidence, which "...ha[s] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," Texas Rules of Evidence 401.³ Last, the Executive Director disagrees with Wax-Mid, Inc.'s analysis under 30 Texas Administrative Code §80.127(h) pertaining to the admissibility of the Executive Director's arguments in the Proposal for Decision. Staff testimony and evidence, during an evidentiary hearing in the form of "...any analysis, study, or review that the executive director is required by statute or rule to perform shall not constitute assistance to the permit applicant in meeting its burden of proof." Since the Executive Director is a statutorily prescribed party under 30 Texas Administrative Code § 80.109, the analysis in deriving the Executive Director's position is permissible evidence for consideration. Therefore, the Executive Director reaffirms all recommendations and evidence embodied in the Proposal for Decision and disagrees that any portion of the Executive Director's analysis in deriving a recommendation for the Commission should be stricken.

D. Wax-Mid Concurs with the ALJ's Decision to Address the 1986 Order

The Executive Director agrees with Wax-Mid, Inc. that the revocation of the 1986 Order is not the subject of this proceeding as notice and hearing requirements to commence a revocation proceeding have not been satisfied at this time. For this reason, the Executive Director will not address the 1986 Order held by Wax-Mid, Inc. in this proceeding.

³ See also Administrative Procedure Act, Texas Gov't Code §2001.081 at 68, "The rules of evidence as applied in a nonjury civil case in a district court of this state shall apply to a contested case except that evidence inadmissible under those rules may be admitted if the evidence is: (1) necessary to ascertain facts not reasonably susceptible of proof under those rules; (2) not precluded by statute; and (3) of a type on which a reasonably prudent person commonly relies in the conduct of the person's affairs."

E. Whether the Administrative Record in this Docket is Defective and Cannot Support the PFD

The Executive Director refers to 30 Texas Administrative Code § 80.23 in evaluating Wax-Mid, Inc.'s assertion that the referring agency was required to have a court reporter present. Under 30 Texas Administrative Code § 80.23 (a), "...the commission will provide a certified court reporter to make a verbatim record and transcript of any commission meeting, hearing, or other proceeding upon the timely request of any person...If the commission does not provide a court reporter a party may, at its own expense, furnish a certified court reporter...[.]” In this instance parties were aware that the previous consolidated cease and desist application filed by Wax-Mid, Inc., had been withdrawn, creating a hearing on the merits for a single application. Further, Wax-Mid, Inc. failed to timely request a court reporter to appear at the administrative proceeding. Last, the Executive Director was present along with all parties prior to the commencement of the hearing on the merits when the Administrative Law Judge offered Wax-Mid, Inc. the opportunity to seek a court reporter at its own expense prior to the commencement of the hearing, but chose not to do so at which point the proceeding began with a tape recording for the official record.

In addressing the result of the official recordings of the hearing on the merits the Executive Director does not believe that Wax-Mid, Inc. was prejudiced or harmed by the portions of audio that were inaudible. The Administrative Law Judge also considered a motion to strike testimony filed on behalf of Wax-Mid, Inc. and responses filed by the City of Midlothian, and made a finding that the motion was without merit and denied the relief sought by Wax-Mid, Inc., *See* SOAH Order No. 9. The current docketed case is

distinguished from the *Texas Dept. of Public Safety v. Story* case cited by Wax-Mid, Inc., since that proceeding involved the disappearance of videotape from the proceeding. In this case the recorded tapes of the proceeding are now part of the record for the hearing on the merits, and are available should Wax-Mid, Inc. seek to pursue the matter further. The Executive Director does not believe that evidence introduced and embodied in the Proposal for Decision rendered by the Administrative Law Judge prejudices the representative for Wax-Mid, Inc. as to require that the Proposal for Decision be withdrawn and reissued, and dismissing the current application filed the City of Midlothian.

CONCLUSION

The Executive Director supports the Proposal for Decision issued by the Administrative Law Judge, and denial of Wax-Mid, Inc.'s Exceptions to the Proposal for Decision.

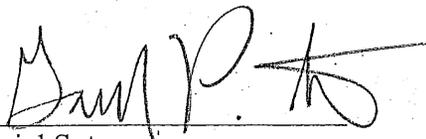
WHEREFORE, PREMISES CONSIDERED, the Executive Director respectfully requests that the Administrative Law Judge deny Wax-Mid Inc.'s Exceptions to the Proposal for Decision, so that the Commission may consider the final Proposal for Decision in rendering a decision on the application in this docketed case.

Respectfully submitted,

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Glenn W. Shankle,
Executive Director

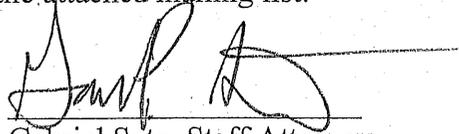
Robert Martinez, Director
Environmental Law Division

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of April, 2007, a true and correct copy of the foregoing document was delivered via facsimile, hand delivery, interagency mail, or deposited in the U.S. Mail to all persons on the attached mailing list.

A handwritten signature in black ink, appearing to read 'Gabriel Soto', is written over a horizontal line.

Gabriel Soto, Staff Attorney
Environmental Law Division
Texas Commission on
Environmental Quality

Mailing List
City of Midlothian Application
SOAH Docket No. 582-06-1029
TCEQ Docket No. 2005-2007-UCR

LaDonna Castañuela – Via Hand Delivery (Eleven copies and Original)

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