

# State Office of Administrative Hearings



Shelia Bailey Taylor  
Chief Administrative Law Judge

May 30, 2007

CHIEF CLERKS OFFICE

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TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

Derek Seal  
General Counsel  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

**Re: SOAH Docket No. 582-06-2770; TCEQ Docket No. 2006-0199-MWD; *The Application of the City of Weston for Domestic Wastewater Permit No. WQ0014602001***

Dear Mr. Seal:

I have reviewed the exceptions and replies filed in this case. Although no recommendations are changed, I submit this Amended Order for the Commissioner's consideration.

Finding No. 15 has been changed to include the term "treated effluent," and Finding No. 16 has been changed to more precisely track the wording in the draft permit.

The ALJ disagrees with Applicant that it was error to base Findings Nos. 18-28 upon lay witness testimony.<sup>1</sup> The findings were based on the witnesses' actual observations. Some witnesses were very familiar with conditions on and near the proposed facility site, and their testimony was credible. To assist the Commissioners in deciding whether to adopt these findings, the ALJ has listed the Findings with citations to the record.<sup>2</sup>

18. Significant floods have inundated the proposed facility site and adjacent acreage. (This is a summary finding based on those that follow.)
19. The facility site is surrounded by four flood control lakes that were built by the U.S. Department of Soil and Water Conservation in the 1940's and 1950's. Tr. 319-320 (Mr. Gidney).

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<sup>1</sup> The ALJ has deleted what was previously submitted as Finding No. 25 because the property mentioned in it was more than a mile from the proposed plant. Other findings have been renumbered accordingly.

<sup>2</sup> The ALJ has also made slight changes to these findings.

20. The flood control lakes have become silted in, and no longer have the capacity to hold as much water as they did in the past. Tr. 312 (Mr. Bean); Tr. 355, 369 (Mr. Town).
21. One of the flood control lakes is on Applicant's site. App. Exs. 15 and 16.
22. The 14.9-acre lake will cover 43.8 acres at flood stage. Tr. 412, 413 (Ms. McKee).
23. During a 1990 flood, on one site that adjoins Applicant's property, a flood control lake, which usually covers 18 acres, expanded to 40 acres, and an area that had no erosion before the flood eroded in one night to a level that was four feet deep and 200 yards wide. Tr. 268 (Mr. Minshew).
24. Applicant's proposed site flooded in 1987, and two cattle that did not belong on the property were washed there by flood waters. Tr. 321, 324 (Mr. Gidney, who was then leasing the property.)
25. During floods in 1982 and 1990, water swelled out of Honey Creek's banks and over FM 170, so that people could not pass the road or cross its bridges. Tr. 474 (Mr. Ringley); Tr. 575 (Ms. Ringley).
26. FM 170 is less than 75 yards south of the proposed facility. Tr. 536 (Ms. Ringley).
27. The road and bridge on FM 170 nearest to Applicant's site recently have been raised, but these changes have caused the water to back up even more onto adjoining land. Tr. 341, 344, 530 (Mr. Gidney).
28. The facility site would be about 160 feet to the east of Honey Creek, and water has flooded out of the creek's banks that far to the west. Tr. 274-275 (Mr. Minshew).

Applicant further objected to these findings, asserting they are irrelevant to the issue of whether the proposed facility is located in the 100-year floodplain, and if so, whether the draft permit contains adequate provisions to protect the facility from inundation by such a flood event. The ALJ disagrees. Applicant acknowledged that the facility site is a low point in the drainage basin, and a storage pond is bisected by a FEMA floodplain. The lay witness testimony established where the flooding has occurred and what effect floods have had on Applicant's property and sites adjacent to, and even higher, than Applicant's property. This evidence directly relates to the issue of whether the draft permit's provisions would adequately protect the facility (particularly the storage pond that is in the flood plain) during a flood event.

Applicant argued that Finding No. 22 should be deleted because it is based on Ms. McKee's

testimony as she read from a document that was later denied admission as an exhibit.<sup>3</sup> After Ms. McKee read from the document, Applicant did not object. In fact, Applicant did not object until Ms. McKee had answered questions about two other documents and was testifying about a different flood control lake. Then, Applicant objected to, "this line of testimony," asserting that the testimony was based on documents that contained hearsay and also that the documents were neither produced in discovery nor prefiled in accordance with the ALJ's order.<sup>4</sup> The ALJ sustained the objection to documents, but Applicant did not move to strike Ms. McKee's earlier testimony.

Nevertheless, even without this Finding, the preponderant evidence proves the scope of flooding that can be expected on Applicant's property. Therefore, since the exhibit from which Ms. McKee read was neither prefiled nor admitted, the ALJ has deleted this finding in the enclosed Amended Order.

Applicant excepted to Finding No. 23. However, that finding was not based on Ms. McKee's testimony; it was based on Mr. Minshew's testimony. Mr. Minshew has lived adjacent to Applicant's site since 1984 on land that has been in his family since 1939. The ALJ found him to be a credible witness and recommends no change to the finding.

Applicant asked for what is now numbered as Finding 30 in the Amended Order to be deleted because the address of the McKee's well was not correct on the state well report. The Finding, as stated, is correct, and no changes are recommended.<sup>5</sup> The PFD clearly explains that the address of the well was not correctly listed on the state well report.

In regard to Applicant's exceptions to the Findings that have been renumbered as 31-34 and to Conclusion No. 8, the ALJ agrees with the points OPIC raised in its reply and offers these additional responses to Applicant's exceptions. Applicant excepted to Finding No. 33, asserting that it was inaccurate to state that the source of water in the flood control lake is not known. By its very designation, Applicant argues, the flood control lake must have rainwater as its source. Obviously, that may be true. But what is not clear is whether there are any other sources of water in the lake, such as underground seeps or springs. Therefore, no change is recommended.

In response to Applicant's exception to Finding No. 35, the ALJ notes that Ms. Ringley testified as follows:

Q: Could you tell me, are there any underwater natural springs along Honey Creek close to the bridge and the . . . proposed facility . . . ?

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<sup>3</sup> P. Ex. 18; Tr. 412.

<sup>4</sup> Tr. 413-414.

<sup>5</sup> Tr. 422 (Ms. McKee).

A: Yes, there's springs all along the creek. . . .

Q: . . . Could you describe what you mean by springs?

A: . . . two or three places right there above where the water is in the creek, and they're wet and coming out of the sides. They're springs, you know, water coming out.

Q: So there's water seeping out of the side of the banks; is that correct?

A: Yes. That's what I feel springs are. And then on down there's more.<sup>6</sup>

Ms. Ringley was not an expert witness, and the ALJ has re-written Finding 35 to more closely reflect the lay nature of Ms. Ringley's testimony.

The ALJ found that the water balance calculations made by Applicant's engineer were reasonable and supported a determination that the *amount* of treated effluent disposed of by irrigation would not saturate the soil to create a health hazard. The ALJ also determined that Applicant had not adequately evaluated the surface water and shallow water table features and, thus, had not proven whether the treated wastewater would seep into the shallow water table and the spring-fed ponds. The Applicant argued that these positions were inconsistent. In response, the ALJ re-emphasizes the reservation mentioned in the PFD.

In considering the water balance calculations, the ALJ focused particularly on the volume of effluent to be dispersed as related to the proposed cover crop's ability to absorb the liquid and nutrients. The ALJ also assumed, again to determine the particular referred issue, that the storage ponds would be adequately bermed against flooding. To make these assumptions and find the water balance calculations were reasonable does not require an affirmative finding on the issue of whether the impact to surface waters was adequately evaluated. In the ALJ's opinion, it was not inconsistent to make both determinations.

Sincerely,



Sarah G. Ramos  
Administrative Law Judge

SGR/ed  
Enclosure  
cc: Mailing List

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<sup>6</sup> Tr. 573-574.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN AMENDED ORDER** denying the application of Domestic Wastewater Permit No. WQ0014602001; TCEQ Docket No. 2006-0199MWD; SOAH Docket No. 582-06-2770

On \_\_\_\_\_, 2007, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the application of the City of Weston (Applicant) for proposed Domestic Wastewater Permit No. WQ0014602001. The application was presented to the Commission with a Proposal for Decision (PFD) by Sarah G. Ramos, Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH).

After considering the ALJ's PFD and the evidence and arguments presented, the Commission makes the following Findings of Fact and Conclusions of Law:

**I. FINDINGS OF FACT**

1. Applicant filed its domestic wastewater permit application with the TCEQ in February 2005.
2. Applicant seeks a permit for a new wastewater treatment facility to be located at the intersection of Honey Creek and Farm-to-Market Road (FM) 170 in Collin County, Texas, which lies approximately 1.6 miles east of the intersection of FM 2478 and FM 170.

3. The Executive Director declared the application administratively complete on March 31, 2005, and subsequently issued a draft permit.
4. In accordance with the applicable TCEQ requirements, the Notice of Receipt of Application and Intent to Obtain a Water Quality Permit was mailed on April 8, 2005, and was published in the *McKinney Courier-Gazette* on April 12, 2005.
5. In accordance with the applicable TCEQ requirements, the Notice of Application and Preliminary Decision for Water Quality Land Application Permit of Municipal Wastewater was mailed on June 30, 2005, and was published in the *McKinney Courier-Gazette* on August 11, 2005.
6. The Commission issued an interim order on June 20, 2006, referring the application to SOAH for a contested case hearing.
7. Copies of the application, the draft permit, and the TCEQ Executive Director's preliminary decision were made available for review and copying at the Weston City Hall, a public place in Collin County.
8. Notice of the preliminary hearing was mailed on July 20, 2006, and was published in the *McKinney Courier-Gazette* on August 7, 2006.
9. The preliminary hearing was held September 13, 2006, at the Collin County Courthouse, 210 South McDonald Street, McKinney, Texas.
10. The following were named or recognized as parties at the preliminary hearing:

<b>Party</b>	<b>Represented by:</b>
Applicant	Angela Stepherson, attorney, and Patti Harrington, Mayor
Lawrence H. and Nina Dowell Ringley, John and Irene Dowell	Mr. and Ms. Ringley
Thomas B. and Susie D. Crossland, Sr.	Mr. Crossland
Mike and Eleanor S. McKee	Mr. and Ms. McKee
Edward A. Town	Mr. Town
Office of Public Interest Counsel (OPIC)	Emily Collins, attorney

11. By Order issued November 13, 2006, the ALJ notified all parties of the time, date, and location of the hearing on the merits.
12. The hearing on the merits was held on January 10-12, 2007, at the Collin County Courthouse.
13. Applicant's proposed facility site is at the low point in Weston's drainage basin.
14. Part of one of Applicant's three proposed storage ponds lies in a 100-year flood plain.
15. The draft permit requires Applicant to re-chlorinate treated effluent held in the storage ponds before that treated effluent is dispersed.
16. The draft permit requires Applicant, prior to the construction, to submit a summary submittal letter in accordance with the requirements of 30 TAC § 317.1; however, the draft permit requires Applicant to submit detailed plans, specifications, and a final engineering design report only if TCEQ's Wastewater Permitting Section requires one.
17. Although the draft permit requires Applicant to provide facilities for the protection of its wastewater treatment facilities from a 100-year flood, neither the application nor the draft permit specify what those protective facilities will include.

18. Significant floods have inundated the proposed facility site and adjacent acreage.
19. The facility site is surrounded by four flood control lakes that were built by the U.S. Department of Soil and Water Conservation in the 1940's and 1950's.
20. The flood control lakes have become silted in, and no longer have the capacity to hold as much water as they did in the past.
21. One of the flood control lakes is on Applicant's site.
22. During a 1990 flood, on one site that adjoins Applicant's property, the flood control lake, which usually covers 18 acres, expanded to 40 acres, and an area that had no erosion before the flood eroded in one night to a level that was four feet deep and 200 yards wide.
23. Applicant's proposed site flooded in 1987, and two cattle that did not belong on the property were washed there by flood waters.
24. During floods in 1982 and 1990, water swelled out of Honey Creek's banks and over FM 170, so that people could not pass the road or cross its bridges.
25. FM 170 is less than 75 yards south of the proposed facility.
26. The road and bridge on FM 170 nearest to Applicant's site recently have been raised, but these changes have caused the water to back up even more onto adjoining land.
27. The facility site would be about 160 feet to the east of Honey Creek, and water has flooded out of the creek's banks that far to the west.
28. Applicant identified four wells on its water well map and included well reports for those wells.
29. The well closest to Applicant's property has a static level of 20 feet below land surface; the other wells vary in depth from eight to 350 feet below land surface, and their yields range from 18 to 600 gallons per minute.

30. Applicant did not include on its water well map at least one well used for human consumption that is within a half-mile of the proposed facility.
31. Applicant did not identify any characteristics of springs, seeps, or surface waters on the facility site, and there was evidence that those features exist on the property.
32. On Applicant's site map, a blue line indicates that water sits or travels between the flood control lake and Honey Creek.
33. It is unclear what serves as the source of water in the flood control lake.
34. Along Honey Creek and above its stream flow, water seeps out of the sides of creek banks.

## **II. CONCLUSIONS OF LAW**

1. The Commission has jurisdiction over this matter, pursuant to TEX. WATER CODE ANN. (Code) Ch. 26.
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, pursuant to TEX. GOV'T CODE Ch. 2003.
3. Applicant failed to provide sufficient evidence to demonstrate that the proposed facility, if approved and constructed, will maintain the quality of water in the state consistent with the public health and enjoyment. Code § 26.003.
4. A facility may not be located in an unsuitable or inappropriate area unless the facility's features will mitigate unsuitable site characteristics. 30 TEX. ADMIN. CODE (TAC) §§ 309.10(b); 309.12.

5. If a facility's treatment units are to be located within the 100-year flood plain, the project design must have satisfactory protective measures, such as levees or elevated treatment units, to protect against flooding. 30 TAC § 317.1(b)(4)(E)(i).
6. A wastewater treatment plant unit is any apparatus necessary for the purpose of providing treatment of wastewater. 30 TAC §309.11(9).
7. There was insufficient evidence to show that Applicant's facility would have design, construction, and operational features to mitigate the unsuitable site characteristics, such as the storage pond being in the 100-year flood plain. 30 TAC § 309.10(b).
8. Applicant has not demonstrated that the site it has selected for the facility will minimize possible contamination of ground and surface waters. 30 TAC § 309.10(b).
9. An applicant for a wastewater permit must provide information regarding all water wells and ponds within a half-mile radius of the disposal site, and if the information is available, the water uses for those wells. 30 TAC § 309.20(a)(4).
10. Based on the above findings of fact and conclusions of law, the application should be denied.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, THAT:

1. The application of the City of Weston for a domestic wastewater permit is DENIED.
2. Applicant shall pay 90 percent of the total transcription costs of \$5,293.20; the Dowells, Ringleys, and McKees shall pay five percent, and Mr. Town shall pay five percent.
3. All other motions, requests for entry of specific findings of fact or conclusions of law

submitted by any party and any other request for general or specific relief not expressly granted or adopted herein are denied for want of merit.

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

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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Kathleen Hartnett White, Chairman  
For the Commission

**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

**WILLIAM P. CLEMENTS BUILDING, Jr.**

**300 West Fifteenth Street**

**Austin, Texas 78701**

**Phone (512) 475-4993**

**Facsimile (512) 475-4994**

**SERVICE LIST**

**AGENCY:** Environmental Quality, Texas Commission on (TCEQ)

**STYLE/CASE:** CITY OF WESTON

**SOAH DOCKET NUMBER:** 582-06-2770

**REFERRING AGENCY CASE:** 2006-0199-MWD

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**STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

**ADMINISTRATIVE LAW JUDGE  
ALJ SARAH G. RAMOS**

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**REPRESENTATIVE / ADDRESS**

**PARTIES**

ANGELA M STEPHERSON  
LAW OFFICE OF CLAY E CRAWFORD  
3100 MCKINNON STREET, 950  
DALLAS, TX 75201  
(214) 981-9090 (PH)  
(214) 981-9071 (FAX)

CITY OF WESTON

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EMILY COLLINS  
ATTORNEY  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
OFFICE OF PUBLIC INTEREST COUNSEL  
MC-175 P.O. BOX 13087  
AUSTIN, TX 78711-3087  
(512) 239-6823 (PH)  
(512) 239-6377 (FAX)

TCEQ PUBLIC INTEREST COUNSEL

---

SCOTT RAMSEY SHOEMAKER  
STAFF ATTORNEY  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
MC-173 P.O. BOX 13087  
AUSTIN, TX 78711-3087  
(512) 239-2679 (PH)  
(512) 239-0606 (FAX)

TCEQ EXECUTIVE DIRECTOR

---

EDWARD A TOWN  
7997 QUEENS WAY  
CELINA, TX 75009  
(972) 837-2544 (PH)  
(972) 837-2545 (FAX)  
TOWNGUNN@MSN.COM

EDWARD A TOWN

---

MIKE & ELEANOR MCKEE  
5065 CR 170  
CELINA, TX 75009

MCKEE@MIKEMCKEE.COM

MIKE & ELEANOR MCKEE

---

LAWRENCE & NINA RINGLEY  
313 N. BENGE ST  
MC KINNEY, TX 75069  
(972) 562-6111 (PH)  
LHR@RINGLEY.COM

JOHN & IRENE DOWELL  
LAWRENCE & NINA RINGLEY

---

THOMAS & SUSIE CROSSLAND  
7006 WELLINGTON POINT  
MC KINNEY, TX 75070  
(972) 540-6436 (PH)  
(972) 658-8765 (CELL)

THOMAS & SUSIE CROSSLAND

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xc: Docket Clerk, State Office of Administrative Hearings