

Kathleen Hartnett White, *Chairman*  
Larry R. Soward, *Commissioner*  
Martin A. Hubert, *Commissioner*  
Glenn Shankle, *Executive Director*



## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

November 16, 2006

VIA HAND DELIVERY

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

RE: Application of Sandy Creek Energy Associates, L.P., for TPDES Permit No. 04755;  
SOAH Docket No. 582-06-2038; TCEQ Docket No. 2006-0402-IWD

Dear Ms. Castañuela:

Enclosed for filing in the above styled application and docket numbers find an original "Executive Director's Reply to Protestants' and OPIC's Exceptions to the Proposal for Decision."

If you have any questions or comments, please call me at 239-0611. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Marc Friberg".

Marc Friberg, Staff Attorney  
Environmental Law Division MC 173

Enclosures

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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|-----------------------------------|---|------------------------------|
| Application of                    | § | Before the                   |
| <b>SANDY CREEK ENERGY</b>         | § | <b>TEXAS COMMISSION</b>      |
| <b>ASSOCIATES, L.P.</b>           | § | <b>ON</b>                    |
| for TPDES Permit No. WQ0004755000 | § | <b>ENVIRONMENTAL QUALITY</b> |

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**EXECUTIVE DIRECTOR'S REPLY TO PROTESTANTS' AND THE OFFICE OF  
PUBLIC INTEREST COUNSEL'S EXCEPTIONS TO THE PROPOSAL FOR  
DECISION**

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

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) files this reply to Protestants' and the Office of Public Interest Counsel's Exceptions to the Administrative Law Judge's proposal for decision in the above referenced case.

A. REPLY TO PROTESTANTS' EXCEPTIONS

I. ED Participation

In their Exceptions to the Proposal for Decision, the Protestants argue that the ED acted "contrary to Texas Water Code Section 5.228."<sup>1</sup> This statement is untrue. The Texas Water Code (TWC) states that "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

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<sup>1</sup> Protestants' Exceptions, p. 2.

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the State Office of Administrative Hearings . . . .”<sup>2</sup> The ED participated in this hearing, following 30 Texas Administrative Code §80.108.<sup>3</sup> He did not assist the Applicant in meeting its burden of proof. During the hearing, the ED only entered evidence into the record that related to the review process of the ED’s staff.<sup>4</sup> The TWC provisions that address the ED’s appearance at hearings do not preclude the ED from taking a position or forming an opinion on a particular matter. The Applicant took depositions on written questions from the ED’s staff, which is their legal right in a contested case hearing. As required by law, the ED staff responded to the depositions on written questions, and no other party opted to participate. The Applicant followed the Texas Rules of Civil Procedure and Evidence. It also obtained and entered the ED’s depositions into the evidentiary record.<sup>5</sup>

In addition, the Texas Administrative Code states, “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 [Administrative Record] or 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.”<sup>6</sup>

ED staff members participated in this hearing and properly testified as to their roles in the review process of the wastewater discharge permit application. They listened to the evidence

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<sup>2</sup> Texas Water Code §5.228(e).

<sup>3</sup> Stating how the ED shall consider certain aspects of an application when determining whether to participate as a party.

<sup>4</sup> ED Ex. 1-5.

<sup>5</sup> Tr. (July 27), p. 256, lines 8-23.

<sup>6</sup> 30 Texas Administrative Code §80.127(h).

presented and gave their professional conclusions. In fact, the ED originally concluded that the testimony of the ED staff, as it related to the ED's prefiled testimony, may have been unnecessary once the hearing was underway. The Protestants argued that they needed ED staff to testify so that they could be cross-examined, in regard to their depositions, even though the Protestants had failed to participate in the discovery process. Therefore, the Protestants should not be able to now argue that the ED should not have participated.<sup>7</sup>

## II. Thermal Degradation

Ms. Hamilton performed a proper antidegradation review for the Sandy Creek application. She followed the guidance for antidegradation contained in the Texas Surface Water Quality Standards and the Procedures to Implement the Texas Surface Water Quality Standards.<sup>8</sup> Ms. Hamilton's overall Tier 2 review consisted of an analysis and comparison of available data, expected effluent limitations, information on the Texas Surface Water Quality Inventory, and her general knowledge about the characteristics of a large river such as the Brazos.<sup>9</sup> She also observed the actual discharge point at the river.<sup>10</sup> This review included all potential impacts from the proposed discharge.<sup>11</sup> Ms. Hamilton made a preliminary determination that no significant degradation of water

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<sup>7</sup> Tr. (July 27), p. 258, lines 8-25, and pp. 259-265 (with specific emphasis on p. 263, line 18 through p. 265, line 25).

<sup>8</sup> Sandy Creek Ex. 46, p. 3, lines 39-43 and p.4, lines 43-44; ED Ex 5, p. 8, lines 11-12.

<sup>9</sup> Tr. (July 28), p. 77, lines 2-7.

<sup>10</sup> Tr. (July 28), p. 78, lines 15-25.

<sup>11</sup> Sandy Creek Ex. 21.

quality is expected and that existing uses in the segment will be maintained and protected.<sup>12</sup> This type of review is required by statute and must be performed, through the ED, by the State of Texas.

### III. Non-Final Order

When actual effluent data from a proposed discharge is unavailable, it is the current practice of the TCEQ to place an effluent analysis requirement in the proposed permit. This provision requires the permittee to sample and analyze their discharge for a specific list of pollutants within a prescribed time after the initial discharge from the facility. The results must be submitted to the TCEQ. The effluent data are compared against the water quality-based permit limits contained in the Statement of Basis/Technical Summary for the particular permit. If the effluent data show pollutants that have the potential to exceed the water quality criteria, the permit will be re-opened and additional monitoring, effluent limits, and/or other controls may be added. Under the current practice, the permittee knows what concentrations are necessary to protect water quality before their discharge begins. The permit requires an analysis of their discharge, and notifies them that permit limits may be added if it is determined that the discharge has the potential to exceed the applicable water quality criteria.

The Protestants argue that the granting of Sandy Creek's wastewater discharge permit would constitute a non-final order.<sup>13</sup> If this were true, then every permit that was granted would be a non-final order due to the fact that the ED is allowed to perform staff initiated amendments. "If good cause exists, the [ED] may initiate and the [Commission] may order a major amendment,

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<sup>12</sup> Id.

<sup>13</sup> Protestants' Exceptions, p. 3.

modification, or minor modification to a permit . . . .”<sup>14</sup>

## B. REPLY TO THE OFFICE OF PUBLIC INTEREST COUNCIL’S EXCEPTIONS

### I. Tier 2 Antidegradation Review

The evidence reflects that Ms. Hamilton performed a proper antidegradation review for the Sandy Creek application. She followed the guidance for antidegradation contained in the Texas Surface Water Quality Standards and the Procedures to Implement the Texas Surface Water Quality Standards (IP).<sup>15</sup> Ms. Hamilton’s overall Tier 2 review consisted of an analysis and comparison of available data, expected effluent limitations, information on the Texas Surface Water Quality Inventory, and her general knowledge about the characteristics of a large river such as the Brazos.<sup>16</sup> She also observed the actual discharge point at the river.<sup>17</sup> This review included all potential impacts from the proposed discharge.<sup>18</sup> Ms. Hamilton made a preliminary determination that no significant degradation of water quality is expected and that existing uses in the segment will be maintained and protected.<sup>19</sup>

In its Exceptions, the Office of Public Interest Council (OPIC) refers to Ms. Hamilton’s interoffice memorandum as “nothing more than mere conclusions for which the expert could not

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<sup>14</sup> 30 Texas Administrative Code §305.62(d).

<sup>15</sup> Sandy Creek Ex. 46, p. 3, lines 39-43 and p.4, lines 43-44; ED Ex 5, p. 8, lines 11-12.

<sup>16</sup> Tr. (July 28), p. 77, lines 2-7.

<sup>17</sup> Tr. (July 28), p. 78, lines 15-25.

<sup>18</sup> Sandy Creek Ex. 21.

<sup>19</sup> Id.

provide details.”<sup>20</sup> The memo is more than a “mere conclusion.” It is the culmination of Ms. Hamilton’s entire water quality review, of which she provided substantial details throughout the hearing process.

OPIC also discusses the difference between water quality criterion and antidegradation. Specifically, OPIC states that “water quality criteria and antidegradation are distinct legal requirements, and the Commission has established rules and guidance in which water quality reviewers must conduct separate reviews of an application . . . .”<sup>21</sup> OPIC continues its argument by stating, “The Commission’s rules and Implementation Procedures distinguish between water quality criterion, which provide standards which may be incorporated into a permit, and antidegradation implementation, which focuses on alternatives to the proposed discharge if the Commission anticipates any sort of degradation.”<sup>22</sup> The ED agrees that the two aspects of a water quality review are distinct, but they do not exist completely separate from each other; they are interrelated.<sup>23</sup> In addition, OPIC is misleading in its description of antidegradation implementation and in its description of what the Implementation Procedures actually say. Alternatives to the proposed discharge are elements of an antidegradation review, but these alternatives are only explored after a determination has been made by a water quality reviewer that a proposed discharge will cause degradation to the receiving stream. In the case of a Tier 2 review, the water quality reviewer must determine that high quality waters will be degraded before exploring alternatives to the proposed

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<sup>20</sup> OPIC’s Exceptions, p. 6.

<sup>21</sup> *Id.*, p. 5.

<sup>22</sup> *Id.*

<sup>23</sup> Tr. (July 28), p. 82, lines 4-18.

discharge.<sup>24</sup> OPIC states that alternatives are explored if “any sort of degradation is anticipated.”<sup>25</sup> What the Implementation Procedures actually say is that “when degradation is anticipated, the [TCEQ] reviews the preliminary determination of potential degradation, the evaluation of alternatives, and economic and social justification.”<sup>26</sup> The Texas Administrative Code defines degradation as “a lowering of water quality by more than a de minimis extent,”<sup>27</sup> Ms. Hamilton made a preliminary determination that no significant degradation of water quality is expected in Segment 1242 of the Brazos River, which has been identified as having high aquatic life uses;<sup>28</sup> therefore, there was no need, and no requirement, that alternatives to the proposed discharge be explored.

## II. Ms. Hamilton’s Testimony

Ms. Hamilton was asked, “Did you look at the proposed temperature discharge in your water quality review?” She responded, “I don’t recall. I did read through [the] proposed effluent analysis – that section [Sandy Creek] had on that, but that was two years ago. I don’t remember the specifics.”<sup>29</sup> As was stated in the Executive Director’s Reply to Closing Argument, Ms. Hamilton’s response was to the effect that she did not remember what specific numbers she reviewed, not that

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<sup>24</sup> TCEQ Implementation Procedures, p. 34-35.

<sup>25</sup> OPIC’s Exceptions, p. 5.

<sup>26</sup> Sandy Creek Ex. 10 (Implementation Plan), p. 35:

<sup>27</sup> 30 Texas Administrative Code §307.5(b)(2).

<sup>28</sup> Sandy Creek Ex. 21.

<sup>29</sup> Tr. (July 28), p. 83, lines 12-18.

she never took temperature into account.<sup>30</sup> The question also focuses on Ms. Hamilton's "water quality review," which is a large review, involving much more than antidegradation.<sup>31</sup> Ms. Hamilton testified that, for her antidegradation review, she looked at Sandy Creek's proposed effluent analysis,<sup>32</sup> and she previously testified that she reviews available information, such as the Texas Surface Water Quality Inventory and the characteristics of the water body and local aquatic communities when performing a Tier 2 review.<sup>33</sup> Ms. Hamilton never testified that she did not consider the heat portion of the Applicant's discharge in her water quality review or in her antidegradation review. OPIC argues that the above response demonstrates that "Ms. Hamilton could not answer any further questions on how she conducted her antidegradation review with respect to temperature, how she reached her conclusion that the Applicant's temperature discharge would comply with the Commission's Tier 2 antidegradation policy, and how she applied TCEQ Tier 2 antidegradation guidance to this particular application for temperature."<sup>34</sup> The only thing that the response demonstrates is that, while on the witness stand, Ms. Hamilton could not recall the specific numbers that she used during her water quality review. OPIC, on the other hand, views this response as a bar to it and to the Protestants' inquiries into the Tier 2 antidegradation review, stating, "No party was able to challenge the particular methodology underlying Ms. Hamilton's expert

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<sup>30</sup> Executive Director's Reply to Closing Argument, p. 7.

<sup>31</sup> Sandy Creek Ex. 21.

<sup>32</sup> Id., lines 15-16.

<sup>33</sup> ED Ex 5, p. 10, lines 4-6.

<sup>34</sup> OPIC's Exceptions, p. 4.

conclusions due to her forgetfulness and lack of preparation,”<sup>35</sup> and that “neither OPIC nor any other party could ask Ms. Hamilton how she determined that Sandy Creek’s discharge would not be significantly higher [than the instream criteria] because she could not recall the details of her antidegradation review.”<sup>36</sup> If OPIC was particularly interested in the temperature aspect of Ms. Hamilton’s antidegradation review, it should have explored the issue. OPIC chose not to. Both the Protestants and OPIC were afforded the opportunity to conduct discovery on the ED’s staff, and both parties declined to take advantage of that opportunity. The Applicant, on the other hand, took depositions on written questions from the ED’s staff, including Ms. Hamilton. Neither OPIC nor the Protestants participated in the depositions, where Ms. Hamilton was asked questions about her Tier 2 antidegradation review; neither took the opportunity to ask follow up questions; and neither requested to take their own depositions or filed any other forms of discovery whatsoever. In addition, Ms. Hamilton was called as a witness during the hearing on the merits, and both OPIC and the Protestants were allowed to cross-examine her. Mr. Stuart Henry, for the Protestants, did not ask Ms. Hamilton a single question about temperature, as it applies to her antidegradation review or anything else.<sup>37</sup> Ms. Collins, for OPIC, asked Ms. Hamilton a total of nine questions.<sup>38</sup> Only three of which dealt with temperature. They were as follows:

Q: Did your review – the Applicant’s temperature discharge – was that part of your review?

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<sup>35</sup> Id.

<sup>36</sup> Id.

<sup>37</sup> Tr (July 28), p. 59-81.

<sup>38</sup> Id., p. 81-83.

A: Any limits on temperature would be – the permit writer sets the limits.<sup>39</sup>

Q: But my question was did you look at the proposed temperature discharge in your water quality review?

A: I don't recall. I did read through [Sandy Creek's] proposed effluent analysis – that section they had on that, but that was two years ago. I don't remember the specifics.<sup>40</sup>

Q: So the equation that we were talking about yesterday in regards to their temperature was not something that you reviewed or worked out yourself?

A: No. The limit would be set by the permit writer.<sup>41</sup>

The third question in the above sequence was actually a question discussing an equation, supplied by Sandy Creek, that was designed to show that an alternative temperature effluent limit could be set.<sup>42</sup> The equation in question was for use in setting effluent limits. It was not an equation that Ms. Hamilton would have used in her antidegradation review, as she uses no mathematical manipulation in her antidegradation review.<sup>43</sup> Directly after the above question, OPIC concluded its cross-examination, asking no further questions of Ms. Hamilton and passing the witness.<sup>44</sup>

OPIC also states that “Ms. Hamilton’s broad conclusory statements that no significant

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<sup>39</sup> Tr. (July 28), p. 83, lines 8-11.

<sup>40</sup> Id., p. 83, lines 12-18.

<sup>41</sup> Id., 83, lines 19-23.

<sup>42</sup> Sandy Creek Ex. 14, p. 7, at the top of the page; Tr. (July 27) p. 139, lines 10-25 and p. 140, lines 1-4.

<sup>43</sup> Tr. (July 28), p75, lines 23-24.

<sup>44</sup> Id., p. 83, lines 24-25.

deterioration of water quality is expected in Segment 1242 of the Brazos fail to overcome her inability to answer detailed questions on how the temperature aspect of her Tier 2 antidegradation review ensures that Texas' high-quality water are not allowed to deteriorate to the level of water quality standards."<sup>45</sup> The ED questions where these "detailed questions" are in the record.

Further, OPIC fails to explain how the answer to one question out of nine was able to thwart all efforts of all parties to explore the details of Ms. Hamilton's Tier 2 antidegradation review. Ms. Hamilton came to the hearing on the merits prepared to testify as to her role in the review of the wastewater discharge permit application, to listen to the evidence presented, and to give her professional conclusions. In its Exceptions, OPIC accuses Ms. Hamilton of "either forgetfulness or lack of preparation."<sup>46</sup> Ms. Hamilton's review involved more than her antidegradation review. Her duties involved (1) evaluating the water quality criteria and uses of the receiving stream, ensuring that the proposed discharge will not violate surface water quality standards; (2) determining if the discharge goes into a receiving water that is classified or unclassified; (3) verifying the location of the proposed discharge point; (4) verifying the proposed discharge route down to the first classified segment; (5) giving the classified receiving waters their segment number, name, designated uses, and criteria; (6) determining the flow characteristics of the proposed receiving water; (7) recommending permit monitoring or limitations, if necessary, for total dissolved solids, chlorides, or sulfates; (8) assigning applicable toxic criteria; (9) performing an antidegradation review; (10) determining if aquatic or aquatic dependent federally endangered or threatened species may be present in the proposed receiving waters; and (11) determining any potential for adverse impact from the proposed

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<sup>45</sup> OPIC's Exceptions, p.6-7.

<sup>46</sup> Id., p. 6.

discharge to endangered or threatened species.<sup>47</sup> Ms. Hamilton was not unprepared as alleged by OPIC. She was prepared to testify as to her full review and testified for quite a long time, answering approximately 116 questions before OPIC asked its nine.<sup>48</sup> No exploration into specific details of Ms. Hamilton's antidegradation review, as it pertained to temperature, was performed by either OPIC or the Protestants. Ms. Hamilton answered all questions asked of her to the best of her ability.

### III. Claims of Assisting the Applicant

OPIC seems to suggest that the ED unlawfully assisted the Applicant in meeting its burden of proof when it states, "The ALJ's proposed holding allows the ED to establish his case (and in this case, the Applicant's case) . . . ." The ED had no case to establish in this contested case hearing and did not establish the Applicant's case. As a named party in the proceeding, the ED performed his role properly. ED staff is allowed to testify as to their review process and to the conclusions that they reach. As stated before, "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 [Administrative Record] or 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."<sup>49</sup> The State of Texas, through the ED, is required to perform an antidegradation review on all proposed discharge applications.<sup>50</sup> Ms. Hamilton testified as to her

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<sup>47</sup> ED Ex. 5, p.3, lines 13-21, and p. 4, lines 1-17.

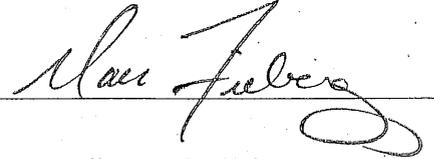
<sup>48</sup> Tr. (July 28), p. 59-81.

<sup>49</sup> 30 Texas Administrative Code §80.127(h).

<sup>50</sup> 40 Code of Federal Regulations §131.12.

analysis and review, stating that she performed the required review, and stating the conclusion that she reached.

Respectfully submitted,

A handwritten signature in cursive script, reading "Marc Friberg", is written over a horizontal line.

Marc Friberg, Staff Attorney

TCEQ Environmental Law Division

State Bar No. 24048472

Representing the EXECUTIVE

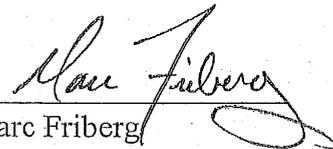
DIRECTOR of the TEXAS

COMMISSION ON

ENVIRONMENTAL QUALITY

CERTIFICATE OF SERVICE

I certify that a copy of "*Executive Director's Reply Protestants' and OPIC's Exceptions to the Proposal for Decision*" was sent to the parties listed on the following Mailing List via hand delivery or facsimile, with a hard copy to follow by First Class mail on November 16, 2006.



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SOAH Docket No. 582-06-2038

TCEQ Docket No. 2006-0402-IWD

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