

June 12, 2007

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

Re: **SOAH Docket No. 582-06-2596; TCEQ Docket No. 2006-0688-MWD;
Application of Lazy Nine Municipal Utility District and Forest City Sweetwater
Limited Partnership for Proposed Permit WQ0014629001**

Dear Mr. Seal:

These are my recommendations concerning the exceptions filed by Hazel A. Sanchez, William H. Cahill, John Hatchett, and Travis Settlement Home Owners Association (collectively Protestants) and the Public Interest Counsel (PIC) to my Proposal for Decision (PFD) in the above case. No other Party filed exceptions.

I recommend that the Commission overrule the exceptions. Most are arguments with minor variations that I addressed in the PFD. A few raise slightly different points, which I address below.

Lack of Finality Arguments

The Protestants argue that issuing the permit as proposed by the PFD would not be a final action, hence it would be legally forbidden. A Commission order, which would include an incorporated permit, would be non-final if it deferred a decision that the Commission was required to make in the case.¹ But the Protestants do not point to a required decision that would not be made if the Commission adopts the proposed order and issues the permit.

¹*Coalition of Cities for Affordable Utility Rates v. Public Utility Com.*, 798 S.W.2d 560, 564 (Tex. 1990). *Gulf States Utils. Co. v. PUC*, 947 S.W.2d 887, 891 (Tex. 1997). *BFI Waste Systems of North America v. Martinez Environmental Group*, 93 S.W.3d 570, 580 (Texas App.—Austin 2002, rev. denied).

Instead, the Protestants mostly argue that there is insufficient evidence for the Commission to make the most important required decision, that the proposed site and land disposal of treated wastewater will not adversely affect surface water or groundwater in the state. As discussed in the PFD, I believe that there is ample evidence to show that water will not be contaminated. Moreover, the proposed order includes a final decision on that point, hence there will be no lack of finality if the Commission issues the order.

Yet the Protestants also argue that final irrigation, management, operation, and emergency plans must be submitted and approved in this case before the permit may be issued. If review and approval of those plans were legally required before the permit could be issued, granting a permit without those final plans being submitted might be a non-final order. But there is no such requirement to submit those final plans.² The Protestants cite a rule³ that they apparently believe stands for that point, but it is not applicable to the Application in this case. It concerns the land disposal of primary effluent, but the Applicants propose the land disposal of far cleaner advanced secondary effluent.⁴

Sweetwater LP as a Co-applicant

The Protestants argue that the PFD missed their point concerning the substitution of Sweetwater LP for Sweetwater LLC as the co-applicant. They contend that the change was a major amendment, rather than a clerical error, and that the change requires the permitting process to begin anew.

The change of co-applicant was very significant, but no applicable law supports the Protestants' make-them-start-over-again argument. I cannot see how the principles of contract and business-organization law that the Protestants discuss are applicable, either directly or by analogy. The only Commission rule the Protestants cite is 30 TAC § 281.23(a), which provides:

No amendments to an application which would constitute a major amendment under the terms of §305.62 of this title (relating to Amendment) can be made by the applicant **after the chief clerk has issued notice of the application and draft permit**, unless new notice is issued which includes a description of the proposed amendments to the application. For purposes of this section, an attempted transfer of an application shall constitute an amendment requiring additional notice. (Emphasis added.)

²See 30 TAC § 309.20, which contains no requirement for submission of final plans of these types.

³30 TAC § 309.20(b)(2)(A).

⁴30 TAC §309.4, Table 1 and Draft Permit, p. 2.

As discussed in the PFD, the amendment making Sweetwater LP the co-applicant was submitted on July 21, 2005.⁵ The notice of the application and draft permit was mailed on April 12, 2006,⁶ published on April 23, 2006,⁷ and correctly named Sweetwater LP as the co-applicant. Thus, the amendment occurred before the “notice of application and draft permit,” and section 281.23(a), strictly speaking, does not appear applicable.

It is worth noting, however, that even if section 281.23(a) were applicable, it does not require the Application to be refiled. Instead, it requires additional public notice of the application as changed. It even specifies that transfer of an application to a different applicant is such an amendment; meaning that new notice disclosing the transfer is required, not dismissal and refileing. I cannot see why a pre-draft permit amendment would require more than providing notice of the change of co-applicant.

It is true that the notice naming Sweetwater LP as the co-applicant was not issued within 30-days of the application being declared administratively complete. If section 281.23(a) were applicable, it would require a description of the amendment changing the co-applicant. But I still recommend that you conclude that such deviations are harmless errors.

Transcript Costs

I still conclude that equally dividing the transcription costs between the Applicants and the Protestants is a reasonable allocation based on 30 TAC § 80.23 (d)(1). The Protestants contend that requiring them to pay any transcription costs would improperly penalize them for exercising their rights to due process. However, the Commission’s rules specifically call for an allocation of the cost among the parties with a right to appeal, which would include the Protestants. I made the recommendation in accordance with those rules.

It is true that there was no separate phase of the hearing specifically devoted to allocation of transcription costs and no party specifically offered evidence concerning the proper allocation of those costs. But in my experience there has almost never been a separate hearing for that purpose. Instead, Order No. 1, issued on August 9, 2006, specifically stated, “The Applicants shall pay the

⁵Applicant Ex. 3, subex. Miertschin Ex. 2, Supplemental tab, letter of July 21, 2005, Miertschin to McClarron.

⁶App. Ex.3, subex. Miertschin Ex. 3, memo of notice tech HMCVEA and attachment.

⁷App. Ex.3, subex. Miertschin Ex. 3, April 23, 2006, affidavit of publisher and attachment.

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cost of that recording and transcription subject to an allocation of those costs among all the parties at the end of the case. 30 TAC § 80.23.” I think that was sufficient to put the parties on notice that they should address the allocation in their direct cases, hence no separate hearing was required.

Sincerely,

William G. Newchurch
Administrative Law Judge

WGN:nl
cc: Mailing List