

SOAH DOCKET NO. 582-06-2596  
TCEQ DOCKET NO. 2006-0688-MWD

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APPLICATION OF LAZY NINE § BEFORE THE STATE OFFICE CHIEF CLERKS OFFICE  
MUNICIPAL UTILITY DISTRICT AND §  
FOREST CITY SWEETWATER § OF  
LIMITED PARTNERSHIP FOR §  
PROPOSED PERMIT WQ0014629001 § ADMINISTRATIVE HEARINGS

**APPLICANTS' REPLY TO EXCEPTIONS OF OPIC AND PROTESTANTS**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

COMES NOW, Lazy Nine Municipal Utility District and Forest City Sweetwater Limited Partnership, the Applicants in the above cause, and present this their Reply to the Exceptions of OPIC and the Protestants.

**I.**

**BACKGROUND**

The Executive Director issued a draft permit, and made a finding that it meets all statutory and regulatory requirements.(See "Technical Summary and Executive Director's Preliminary Decision, dated March 31, 2006" attached as Exhibit 2 to Applicants' Exhibit No. "9," Oral Deposition of Julian Centeno at page 8, Exhibit No. "8," Oral Deposition of Firoj Vahora at page 17, and Applicants' Exhibit No. "9," and Oral Deposition of Julian Centeno at page 12).

This determination entitled the Applicants to issuance of the permit. However, the City of Austin and the LCRA wanted the Applicants to do more than the rules require. They wanted the Applicants to make an in-depth study of the soils at the irrigation site to verify that they are suitable for the intended irrigation, and that the site can be irrigated without contamination of surface or ground water. The City and the LCRA requested a hearing. (See letter of May 23, 2006 from City of Austin Law Department to TCEQ and letter of May 23, 2006 from the LCRA to the TCEQ in

Exhibit 3 to Applicants' Exhibit "3," Prefiled Testimony of James Miertschin).

In response, the Applicants retained two world renowned Texas A & M professors and a PhD geologist to perform an extensive investigation of the proposed irrigation site to evaluate its suitability for that purpose. Their work is described in their prefiled testimony. The geologist made a more intensive geological assessment of the site than the initial assessment. The two A & M soil scientists excavated nineteen (19) trenches on the site and conducted percolation and dye tests. At the end of this study they concluded that the requirements of the proposed permit adequately protect surface and groundwater from potential contamination due to any active geological processes that may occur on the irrigation site, and that there are no faults or sink holes on the irrigation site. They also concluded that, if the irrigation is operated pursuant to the requirement of the proposed permit, there is no danger of contamination of surface or groundwater. This work and the conclusions are described in more detail later in this Reply.

Following this study the Applicants entered into a Settlement Agreement with the City and the LCRA pursuant to which the City and the LCRA agreed to issuance of the permit, with certain modifications to its terms. A copy of that Settlement Agreement is attached hereto. It recommends changes that strengthen the draft permit. The Protestants declined to join in this Settlement Agreement, and required that the hearing proceed.

The Protestants' interest in the permit is tenuous at best. They located their property on the map accepted in evidence as Applicants' Exhibit "12." The map shows that John Patrick Hatchett owns land that is 3,500 feet upstream of the proposed irrigation site and 8,500 feet from the site of the proposed sewage treatment plant. (Tx. Pgs. 582-585).

Laura Grulke is the treasurer of Travis Settlement Home-Owners' Association. The HOA has a park with a swimming hole between the proposed wastewater treatment plant and Bee Creek Road. This is Lot 304 on the map. The HOA has another park at Lot 383. She located her land on Applicants' Exhibit "12." (Tx. Pgs. 604 and 605). Measurement shows that her land is 7,000 feet downstream of the proposed sewage treatment plant. Her land is in a different watershed from that of the proposed irrigation site. Examination of Applicants' Exhibit "12" shows that the HOA's Lot 304 is 5,500 feet downstream of the site of the proposed sewage treatment plant and the HOA's Lot 383 is 10,000 feet downstream of that site.

William H. Cahill located his lot on Applicant's Exhibit "12." Measurement shows that his land is 9,000 feet downstream of the proposed sewage treatment plant. His land is in a different watershed from that of the proposed irrigation site. (Tx. Pgs. 688 and 689).

The Protestants' primary concerns were that a power failure or catastrophe could cause raw sewage to overflow into Bee Creek and impair their property. To address these concerns the Settlement Agreement provides for strengthening Special Provision 18 of the draft permit.

## II.

### OPIC EXCEPTIONS

#### 1. Deletion of Special Provision 17.

Special Provision 17 addresses possible use of the irrigation area or athletic fields. One of the modifications to the permit agreed to in the Settlement Agreement was deletion of Special Provision 17. The ALJ recommends deletion of this provision, for the reasons stated at pages 26 through 27 of the PFD. In the interest of honoring their agreement with the City and the LCRA, the Applicants also recommend that this Special Provision be deleted. The Applicants consider it to be

superfluous, and the City of Austin affirmatively wants it deleted.

**2. Changes to Special Provision 18.**

The Settlement Agreement asks that the last sentence of Special Provision 18 be revised. This is the revision that is intended to address the concerns of the Protestants. In its Exceptions OPIC recommends that the language in Special Provision 18 remain unchanged, or, if it is to be changed, that it be changed to read differently than provided in the Settlement Agreement. The Settlement Agreement revises Special Provision 18 to read as follows:

The permittee shall submit a **Wastewater Treatment Plant (WWTP) Emergency Plan** with the “Plans and Specifications for the WWTP” with the summary transmittal letter required under Other Requirements Item 4 above. The Emergency Plan shall address how the facility will meet the 30 TAC 309 Subchapter B 309.12. **Site Selection to Protect Groundwater or Surface Water**, (3) separation distance from the facility to points of discharge to surface water. ~~The permittee shall consider the case of emergency storage of effluent and/or containment structures around the treatment plant, emergency power generators, or lift station stations in the case of emergency shutdown of the plant or failure of the effluent storage tanks. The Applicants will provide a spill containment system for the wastewater treatment plant that will contain at least one day’s volume of wastewater flows (700,000 gallons), spill containment devices for the lift stations that are in the Bee Creek Watershed, a backup power generator integrated into the electrical control system of the wastewater treatment plant, and backup power generators integrated into the electrical control systems of the lift stations in the Bee Creek Watershed, and will~~

*equip the electric control systems of the wastewater treatment plant and the lift stations in the Bee Creek Watershed with autodial equipment and with visual and auditory alarm systems that will activate in the event of a power outage.*

The Settlement Agreement strengthens the language of the draft permit, because instead of merely requiring the Applicants to “consider” certain measures, it requires the Applicant to provide these measures in quantifiable form. In the PFD, the ALJ recommends that the language of the Settlement Agreement be adopted, for the reasons stated at pages 27 through 28 of the PFD. The Applicants agree with the ALJ.

### **III.**

#### **PROTESTANTS’ EXCEPTIONS**

##### **I. Allegation that Draft Permit is in Violation of Finality Rule.**

- (a) Management and Operation of STP and System Used to Apply Effluent; and**
- (b) Preliminary Irrigation Management Plan only addresses the first phase of the System. There is no Plan, Preliminary or Otherwise, Concerning the Second phase and the Final Phase**

The Protestants complain that the Applicants have not submitted a Final Irrigation Management Plan. The Applicants are not aware of any rule that requires that a Final Irrigation Land Plan be submitted prior to issuance of the permit.

The first sentence of Special Provision 16 in the draft permit reads as follows: “The permittee shall submit a **Final Irrigation Management Plan** to the TCEQ Water Quality Assessment Team (MC-150) for approval and/or modification before any wastewater is applied to the permitted area.”

The Settlement Agreement provides that the first sentence of Special Provision 16 shall be revised to read as follows: “The permittee shall submit a **Final Irrigation Management Plan** to the TCEQ Water Quality Assessment Team (MC-150) for approval and/or modification *at least 120 days* before any wastewater is applied to the permitted area.”

Though not required to do so the Applicants submitted a Preliminary Irrigation Management Plan that was complete except for choice of the irrigation system. More importantly the Applicants submitted overwhelming evidence that the project will comply with the provision of the TCEQ rules requiring that the quality of ground or surface waters in the state will not be adversely affected

Firoj Vahora testified, by deposition, that he was the team leader for the Municipal Permitting Team. (Applicants’ Exhibit No. “8,” Oral Deposition of Firoj Vahora at page 6). This team processes applications for the discharge and reviews the permit applications for domestic wastewater. (Applicants’ Exhibit No. “8,” Oral Deposition of Firoj Vahora at page 6). He testified as to the review process, the public meeting process, and the fact that the Applicant requested direct referral direct to SOAH. (Applicants’ Exhibit No. “8,” Oral Deposition of Firoj Vahora at pages 6 through 12).

Mr. Vahora testified that the currently proposed permit, a copy of which is attached to his deposition as Exhibit No. 6, meets all statutory and regulatory requirements pertaining to these permits. (Applicants’ Exhibit No. “8,” Oral Deposition of Firoj Vahora at page 17).

The permit reviewer, and permit writer, Julien Centeno, testified to his education, training and experience. He estimated that he had previously viewed approximately 100 municipal waste treatment and disposal permits, about 50 of which were TLAPs. He testified as to the TCEQ’s careful review process. (Applicants’ Exhibit No. “9,” Oral Deposition of Julian Centeno at pages

5 through 12 ).

Mr. Centeno identified Exhibit 2 to his deposition as being the “Technical Summary and Executive Director’s Preliminary Decision, dated March 31, 2006.” (Applicants’ Exhibit No. “9,” Oral Deposition of Julian Centeno at page 8).

The first page of that document, under the heading “DESCRIPTION OF APPLICATION” lists as authority “Texas Water Code Sect. 26.027; 30 TAC Chapters 305, 309, 312, 319, and 30; and Commission policies.”

Also on the first page of that document, under the heading “EXECUTIVE DIRECTOR RECOMMENDATION,” the document states that “The Executive Director has made a preliminary decision that this permit, if issued, meets all statutory and regulatory requirements.”

Mr. Centeno testified that changes were made to the draft permit in response to comments. He identified Exhibit 6 to his deposition (which is Exhibit 7 to the Vahora deposition) as being the currently proposed permit. (Applicants’ Exhibit No. “9,” Oral Deposition of Julian Centeno at pages 11 and 12). He stated that, in his opinion, the proposed permit meets all the statutory and regulatory requirements applicable to this kind of permit. (Applicants’ Exhibit No. “9,” Oral Deposition of Julian Centeno at page 12).

To address concerns of the City of Austin and the LCRA, the Applicants retained three consultants identified earlier in this Reply to perform an extensive investigation of the proposed irrigation site to evaluate its suitability for that purpose. Their work is described in their prefiled testimony.

The geologist, Dr. Charles Woodruff, Jr., testified that the requirements of the proposed permit adequately protect surface and groundwater from potential contamination due to any active

geological processes that may occur on the irrigation site. He testified that he did not find any faults or sink holes on the irrigation site. (Applicants' Exhibit "6," Prefiled Testimony of Dr. Charles Woodruff, Jr. at page 12).

Dr. Larry Wilding, a retired Texas A & M professor with impressive credentials, testified as to his extensive work on the site. He testified that, assuming that the wastewater system is designed and operated pursuant to the requirements of the Special Provisions, whether in the Draft Permit, or in the Draft Permit as modified by the Settlement Agreement, and in accordance with the Preliminary Irrigation Management Plan, the wastewater system can be designed and operated to prevent a discharge from entering surface waters, and to prevent recharge of groundwater resources which supply or offer the potential of supplying domestic raw water, as required by TCEQ Rule 30 TAC 309.20(b)(2)(a). (Applicants' Exhibit "1," Prefiled Testimony of Dr. Larry Wilding at pages 42, 43, 46 and 47).

Dr. Miertschin testified to the same effect. (Applicants' Exhibit "3," Prefiled Testimony of James Miertschin at page 23).

Dr. Brad Wilcox, a current Texas A & M professor, also with impressive credentials, found the proposed irrigation site well suited for the application of effluent. (Applicants' Exhibit "10," Prefiled Testimony of Dr. Bradford P. Wilcox at page 12 and 13).

The Protestants offered no evidence to contradict the Executive Director's conclusions nor those of the Applicants' expert witnesses.

**(c) Contention that the Applicants have also failed to establish an Emergency plan to address operating practices necessary in the event of a catastrophic event.**

The Protestants complain that the Applicants have not submitted an emergency plan that is part of the proposed permit. The Applicants are not aware of any rule requiring submission of a **Wastewater Treatment Plant (WWTP) Emergency Plan** prior to issuance of the permit.

The Applicants engineer, Rick Wheeler, testified at length as to what the Applicants intend to do to address the Protestants' concerns. (Applicants' Exhibit "4," Prefiled Testimony of Rick Wheeler, P.E. at page 13). The improvements to Special Provision 18, addressed earlier, were made as a result of Mr. Wheeler's testimony..

**(d) Protestants' Contention of Conflicting evidence of Land Proposed to be Irrigated"**

The Protestants contend that there are less than the needed 285 acres of land available for irrigation. They base this contention on the fact that the Settlement Agreement provided that a 1.9 acre rocky tract will not be irrigated and there will be an increase in the buffer zones from the 200 feet set forth in the Application to 210 feet, and a new 150-foot buffer around the possible wetland. They incorrectly assume that when Dr. Miertschin testified that there are 285 acres available for irrigation, he was not accounting for the decrease in the acreage caused by the Settlement Agreement.

Dr. Miertschin, after the Settlement Agreement had been signed, testified that there are at least 285 acres of land available for irrigation. When he did so he was keenly aware of the details that were included in the Settlement Agreement, including the small increase in the buffer zones and the rock outcrop area. He prepared the map attached to his Rebuttal Testimony showing the 1.9 acre rock outcrop area to be excluded from irrigation and the slightly increased buffer zones called for by the Settlement Agreement. Therefore, when Dr. Miertschin testified that 285 acres will be available for irrigation after all the buffers are taken into account, he was making that statement with

full knowledge of the terms of the Settlement Agreement.

Miertschin Exhibit No. 2 to Applicants' Exhibit "3," Prefiled Testimony of James Miertschin, is a copy of the application for the TLAP Permit. Attachment B to that Exhibit is two USGS maps showing the area set aside for irrigation. This same area is shown on Attachment C, the SPIF map.

This same area is shown on Miertschin Rebuttal Exhibit No. "2" to Applicants' Exhibit "13," Prefiled Rebuttal Testimony of Dr. James Miertschin. This map shows the same irrigation area shown in the Application. It also shows the 1.9 acre rocky area in the northwest corner to be excluded, and the buffer zones. The increase in the buffer zones from the 200 feet set forth in the Application to 210 feet, and the 150-foot buffer around the possible wetland, and the exclusion of 1.9 acres of rocky area, is an insignificant area.

Miertschin Exhibit No. "5" to Applicants' Exhibit "3," Prefiled Testimony of James Miertschin consists of copies of additional correspondence between Dr. Miertschin and the TCEQ following filing of the initial application. (See Prefiled Testimony of Dr. James Miertschin, P.E. at pages 10 and 11). Miertschin Exhibit No. "5" includes a letter, dated July 21, 2005, to Ms. Adriane McClarron at the TCEQ. Attachment 2 to that letter is entitled "Technical Comments." In paragraph 14 on page A2-5, Mr. Miertschin explained as follows: "Approximately 285 acres of the total 374-acre irrigation tract are proposed to be used for irrigation. Preliminary analysis has indicated that approximately 300 acres of the tract can be used for irrigation. Some of the remaining tract acreage is not readily available for irrigation due to factors such as terrain slope greater than 12%, location within the 100-year flood plain, effluent pond site, and a proposed 50-foot buffer zone around the irrigation tract. As the irrigation site is designed, certain areas that are problematic may be improved

to facilitate irrigation, for example, localized grading improvements may be performed.”

The increased buffer zone agreed to in the Settlement Agreement, and the 1.9-acre rocky tract, do not come close to using the excess 15 acres available for irrigation. When Dr. Miertschin testified, on the second day of the hearing, that 285 acres will be available for irrigation after all the buffers are taken into account, he was not “confused.” He was fully aware of the slight deletion of areas provided in the Settlement Agreement.

## **II. Allegations as to Need, Capacity and Regionalization.**

### **(A) Need and Capacity**

The Protestants question whether Applicants will ever need 700,000 gpd. Protestants contend that application for a permit for 700,000 gpd., based on 2250 LUE’s for the third phase of the Lazy 9 development, at 300 gallons per day per LUE, is excessive. The Protestants note that, at the hearing, Mr. Wheeler and Gunn testified that the planned Sweetwater development will be approximately 1800 single-family lots, with approximately 20 to 25 acres of potential commercial development. The Protestants ignore the wastewater contribution from commercial development, the volume of which is not precisely known at the present time. They also ignore the capacity that will be needed to serve the 671.45 acre RGK Rentals tract described below, that is within Lazy Nine MUD, but is not a part of the Sweetwater Development.

Mr. Gunn testified that Forest City Sweetwater Limited Partnership took a deed to 2259.122 acres of land. It then conveyed 671.45 acres of that land to RGK Rentals, Ltd. Of the 1,587.672 acres remaining with Forest City Sweetwater Limited Partnership, approximately 1,200 acres is the proposed Sweetwater development within the boundaries of Lazy Nine Municipal Utility District. The other approximately 374 acres is outside the boundaries of Lazy Nine Municipal Utility District.

It will be used, amongst other things, for the irrigation system to dispose of effluent from the wastewater treatment plant. (Applicants' Exhibit "7," Prefiled Testimony of William T. Gunn, III at page 1). At some point the 671.45 acres within Lazy Nine MUD, currently owned by RGK Rentals, Ltd., will need sewer service.

The estimated wastewater flows in the permit application are intentionally conservative in order to avoid a situation in the future where flows exceed permitted capacity.

The Protestants also contend that the 700,000 gpd will not be needed until August of 2012. This comment ignores the timeline of construction when providing wastewater treatment capacity. The TCEQ's "70/90" rule for treatment plants, found at 30 TAC §305.126, requires that, when a plant reaches 70% of its permitted flow, the permit holder must plan for expansion, and when it reaches 90% of capacity, the permit holder must have the expansion under construction. In the Applicants' case, when the flows reach 90% of the Interim II phase (which equals 0.4 MGD), the next phase of 0.7 MGD must be under construction! The construction of capacity must always be substantially in advance of the actual need for capacity.

The Protestants also state that the application states that: "A new subdivision will be constructed upon approval of this permit application. *The initial phase will be sufficient to handle the wastewater loading.*" (Emphasis added.) This statement was contained in the permit application Domestic Technical Report 1.1, Paragraph 1.b. It is a written description of the need, to describe the numbers that are presented in a tabulation immediately above the question."

The Applicants admit that the sentence is poorly constructed. It is clear from the tabulated data that the sentence was intended to say that the initial phase was sufficient for the initial phase of the subdivision. The TCEQ permit staff was not confused by the sentence, and proceeded to

develop the draft permit for the requested 700,000 gpd.

The Applicants' procedure was the same as the procedure usually employed by other applicants for new municipal systems. TCEQ permitting staff was familiar with the procedure and accepted it. The anticipated flow contribution has to be safely sized. Inflow and infiltration are not precisely known in advance for any new wastewater collection system. Therefore, a substantial allowance is prudent. Even though inflow and infiltration are usually wet-weather phenomena, the effect of these two processes can substantially alter the average daily flow, which is a monthly average as defined by the permit. In other words, if a multi-day period of extremely high wastewater flow occurs because of prolonged wet weather and resulting inflow and infiltration, these several days of high flow can have a dramatic effect on the monthly average flow, which would relate directly to the flow contribution per capita that was originally assumed as the basis for sizing the system. Also, the wastewater flows from commercial area and the RGK Rentals tract must also be included somehow in the overall flow total. The flow estimates developed in the permit application were prepared by professional engineers with demonstrated expertise in this area. The flow estimates were fully reviewed by TCEQ staff, were determined by staff to be reasonable, and were incorporated in the draft permit.

**(b) Regionalization**

The Protestants contend that there are nearby wastewater service providers who may be able to provide service to Lazy Nine MUD.

The permit application form, under the heading DOMESTIC TECHNICAL REPORT 1.1, Question 1.c, requires the Applicants to report on the possibility of service from any wastewater treatment and/or collection located systems within three miles of the areas to be serviced by the

proposed facility. The Applicants provided letters from the only four systems within three miles. (See Miertschin Exhibit 2 to Applicants' Exhibit "3," Prefiled Testimony of James Miertschin). The Protestants criticize the contents of these letters.

The letters did not just arrive in the mail, without prior discussion between Lazy Nine's engineer, Rick Wheeler, and the owners of the four systems. Rick Wheeler is familiar with these and other systems. He testified that:

"On an individual and company basis, I have been involved in several public works, utility district, water supply corporation and private sector development projects in the general vicinity of Lazy Nine MUD and the Bee Cave and Lakeway areas. Those projects include the following:

Barton Creek West Water Supply Corporation; wastewater permit, design of wastewater treatment plant and effluent holding pond and design of wastewater collection system.

West Travis County MUDs 3 and 5 (LakePointe); design of first phase of wastewater treatment plant and design of wastewater collection system and lift stations.

Hurst Creek MUD (Hills of Lakeway); wastewater permit; design of first phase of wastewater treatment plant and design of wastewater collection system and lift stations for multiple sections of the Hills of Lakeway.

Lakeway MUD; design of wastewater collection systems and lift stations for multiple subdivisions developed by the Lakeway Company.

Travis County WCID No. 17; design of wastewater interceptor to provide wastewater service to Lake Travis High School and Middle School and other development areas along RR 620 South.

LCRA; design of major water and wastewater infrastructure for West Travis County Regional Water and Wastewater System to provide service throughout LCRA's CCN service area in Bee Cave along SH71 West, RM 2244, RR620 South and Hamilton Pool Rd.

Village of Bee Cave; Village Engineer from 1991 to 1999.

LCRA; design of water distribution system for the Homestead subdivision.”

(See Applicants’ Exhibit 4, Prefiled testimony of Rick Wheeler at Page 3 and 4).

Rick Wheeler obtained the letters from the only four systems within three miles. They were accepted by the TCEQ staff.

It is apparent that Applicants’ engineers, Rick Wheeler and James Miertschin, are very knowledgeable of the wastewater treatment plants and their capacities within a reasonable distance of the proposed development. The Applicants’ engineers are also well acquainted with the managers of these various treatment facilities. For example, Applicants’ engineers knew before the question was asked that LCRA does not have capacity in its Lakepointe wastewater treatment plant, and that WCID 17 does not have capacity in its treatment plant. However, to meet the TCEQ’s requirements, a letter stating such was requested from the various entities. This is not an effort by the Applicants’ engineers to “tell the District what the answer is” so much as it is an indication that the engineers have prior knowledge of the answer. The TCEQ does not dictate precisely how the letter should be written or how the question of capacity should be raised.

Protestants speculate that because the LCRA’s Lakepointe plant went through a permit expansion in the last two years, of unknown magnitude, the LCRA may have capacity. Presumably the LCRA knew about this permit expansion when it wrote its letter saying that it could not serve..

### **III. Protestants Contention that the Judge Improperly Relied on Testimony of the Executive Director’s Staff to Carry Applicants Burden of Proof**

At the hearing the Protestants objected to the admission of the depositions of TCEQ staff members Firoj Vahora and Julien Centeno, citing Sec. 5.228(e), Water Code. The objection was overruled (Tx. Pages 566-570).

Sec. 5.228(e), Water Code addresses the conduct of the executive director when the executive director appears as a party at a hearing. It does not address the testimony of the executive director as a witness. The Executive Director did not appear at the hearing to make an affirmative effort to assist the Applicants in meeting their burden of proof. Nothing in Sec. 5.288(e), Water Code suggests that TCEQ staff members are immune from testifying by deposition.

Protestants also cite 30 TAC §80.127(h). This rule expressly allows staff testimony on the administrative record and “any analysis, study, or review that the executive director is required by statute or rule to perform.” This rule explicitly allowed Mr. Vahora and Mr. Centeno to testify on their administrative and technical review of the application.

**IV. Protestants’ contention that The Change in Applicant Name is a Major Amendment to the Permit, and**

**V. Protestants’ Contention that the Record Reflects Only Contradictory Evidence to Support the Alleged Authority of William Gunn to Apply for the Permit on Behalf of Lazy 9 or Forest City Sweetwater Limited Partnership.**

It is true that, in the original application, the co-permittee was incorrectly identified as FC Sweetwater Partner, LLC. That entity is the general partner of the landowner, Forest City Sweetwater Limited Partnership, a Texas limited partnership. William T. Gunn, III is a limited partner of Forest City Sweetwater Limited Partnership. He is a member of the management committee of the general partner, FC Sweetwater Partner, LLC, that deals with development issues for the Sweetwater project. (Applicants’ Exhibit “7,” Prefiled Testimony of William T. Gunn, III at page 1).

Gunn & Whittington Sweetwater, Ltd. is the fee developer of the Sweetwater project. William T. Gunn, III is a limited partner of Gunn & Whittington Sweetwater, Ltd. The general partner of Gunn & Whittington Sweetwater, Ltd. is Gunn & Whittington Development II, L.L.C. Gunn & Whittington Development II, L.L.C. is a Texas limited liability company. William T. Gunn, III is a Manager of that company. (Applicants' Exhibit "7," Prefiled Testimony of William T. Gunn, III at page 1).

The early mistake was corrected. The Draft Permit is attached as Exhibit 6 to Applicants' Exhibit No. "8," Oral Deposition of Firoj Vahora. It correctly identifies the permittees as Lazy Nine Municipal Utility District and Forest City Sweetwater Limited Partnership. All notices after the first notice correctly identified the co-permittee as Forest City Sweetwater Limited Partnership. These include the Notice of Application and Preliminary Decision for Water Quality Land Application Permit from Municipal Wastewater New Proposed Permit No. WQ0014629001, the Notice of Public Meeting on an Application for Water Quality Land Application Permit for Municipal Wastewater - Proposed Permit No. WQ0014629001, and the Notice of the Preliminary Hearing that was received in evidence at the Preliminary Hearing held on August 7, 2006.

The Protestants' contention that a clerical error made in the initial application process, that was later corrected, should prevent issuance of the permit is not tenable. The error was harmless. Neither Protestants nor anyone else was affected by the error. The error was corrected before the draft permit was issued, and before the subsequent notices were published.

The declaration of administrative completeness was a determination that the application facially supplied all the information need to complete the application. The application went through the customary rigorous review process, during which changes were made. A public meeting was

held on this permit. When the Draft Permit was again revised, and issued, after the public meeting, it met all statutory and regulatory requirements. (Applicants' Exhibit No. "8," Oral Deposition of Firoj Vahora at page 17), (Applicants' Exhibit No. "9," Oral Deposition of Julian Centeno at pages 12 ) and (Applicants' Exhibit "3," Prefiled Testimony of James Miertschin at page 15).

The ALJ's thorough analysis of these contentions, at pages 6 through 15 of the PFD, properly disposes of this issue.

**VI. Protestants' Contention that the ALJ Erred in Determining that the Applicants Sufficiently Investigated the Geology of the Proposed Sewerage Treatment Plant (STP) and That There is no Evidence of a Fault at Either Site.**

One of the Protestants, John Patrick Hatchett, testified that geographical records indicate that a ground fault may connect the wastewater treatment plant site with the aquifer on which he relies. (Hatchett Prefiled Testimony at page 5). To address this concern the Applicants asked one of its geologists, Mike Thornhill to investigate the possibility of a fault at the plant site. In his rebuttal testimony Mr. Thornhill testified that he investigated the proposed wastewater treatment plant site and found no evidence of a fault at that site. (Tx. Pgs. 610 - 691 and 648). Mr. Thornhill's investigation and conclusions are accurately described by the ALJ in pages 34 through 38 of the PFD.

The Applicants investigation of the geology at the irrigation site, by its other geologist Dr. Charles Woodruff, is also accurately described by the ALJ in pages 34 through 38 of the PFD.

**VII. Apportionment of Transcript Costs.**

The ALJ's recommendation on apportionment of the transcript costs is more than fair. The Protestants unproductive prolongation of the hearing, and their failure to bring much of substance, is accurately described at pages 50 through 52 of the PFD.

A copy of the court reporter's \$3,730.00 bill for the transcript is attached. This is a small part of what it cost the Applicants to go through the hearing, but, allocation of one half of this amount to the Protestants does send a signal that parties are responsible for their choices.

### **III.**

#### **CONCLUSION**

The Applicants ask that the Draft Permit be issued. They also ask that the changes to the Draft Permit agreed to by the Applicants, City of Austin and the LCRA, and approved by the ALJ, be adopted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 24<sup>th</sup> day of May, 2007 a true and correct copy of the above was served on the following by the method shown:

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SIGNED this 24<sup>th</sup> day of May, 2007.

By: Mike Willatt  
Mike Willatt

SOAH DOCKET NO. 582-06-2596  
TCEQ DOCKET NO. 2006-0688-MWD

APPLICATION OF LAZY NINE	§	BEFORE THE STATE OFFICE
MUNICIPAL UTILITY DISTRICT AND	§	OF
FOREST CITY SWEETWATER	§	ADMINISTRATIVE HEARINGS
LIMITED PARTNERSHIP FOR	§	
PROPOSED PERMIT WQ0014629001	§	

SETTLEMENT AGREEMENT

This Agreement is by and between Lazy Nine Municipal Utility District, Forest City Sweetwater Limited Partnership, hereinafter called "Applicants," the City of Austin, Texas hereinafter called the "City," and the Lower Colorado River Authority, hereafter called "LCRA."

RECITALS

A. Applicants applied to the Texas Commission on Environmental Quality ("TCEQ") for a Texas land application permit. The TCEQ issued a draft permit, with cover letter from L'Oreal W. Stepney, Director, Water Quality Division, addressed to Mike Willatt, a copy of which letter and draft permit are attached hereto as Exhibit "A."

B. In the above-captioned Cause, the City, the LCRA and the Protestants are contesting the terms of the draft permit.

C. The parties have now agreed to issuance of the proposed draft permit, with certain changes more particularly set forth herein.

AGREEMENT

NOW THEREFORE, for and in consideration of the premises and the covenants and promises contained herein, the parties agree as follows:

ARTICLE I  
TERMS OF DRAFT PERMIT

The parties agree to issuance of the draft permit, with certain changes as follows:

1. Special Provision 16. The first sentence of Special Provision 16 shall be revised to read as follows: "The permittee shall submit a **Final Irrigation Management Plan** to the TCEQ Water Quality Assessment Team (MC-150) for approval and/or modification at least 120 days before any wastewater is applied to the permitted area."

2. Special Provision 17. Special Provision 17 will be deleted from the permit.

3. Special Provision 18. The last sentence of Special Provision 18 shall be revised to read as follows:

The Applicants will provide a spill containment system for the wastewater treatment plant that will contain at least one day's volume of wastewater flows (700,000 gallons), spill containment devices for the lift stations that are in the Bee Creek Watershed, a backup power generator integrated into the electrical control system of the wastewater treatment plant, and backup power generators integrated into the electrical control systems of the lift stations in the Bee Creek Watershed, and will equip the electric control systems of the wastewater treatment plant and the lift stations in the Bee Creek Watershed with autodial equipment and with visual and auditory alarm systems that will activate in the event of a power outage.

4. Special Provision 20. Special Provision 20 shall be revised to read as follows:

Vegetation shall be established and well maintained throughout all months of the year. The permittee shall plant a mix of tall and mid grasses, primarily but not wholly consisting of grasses and forbs that are native to the area, including by way of example, Big bluestem, switch grass, Indian grass, little bluestem, side oats gamma, Green Sprangletop, Texas winter grass and eastern gamma grass in the applicable areas to maintain an annual vegetative cover. Grasses will be cut at least annually. Grass cuttings shall be removed from the application areas. Any areas that will receive wastewater and contain surface rock fragments greater than 50% shall be irrigated in a manner that will prevent surface runoff from the permitted area.

5. Special Provision 22. Effluent shall not be applied on the following areas:

- (a) A 210-foot buffer between wastewater application and the centerline of Little Barton Creek or the width of the 100-year flood plain, whichever is greater;
- (b) A 50-foot buffer between wastewater application and the centerline of the two intermittent streams and valley area or the width of the 100-year flood plain, whichever is greater, except that, around the area identified on Exhibit "B" attached hereto as wetland just south of the ranch building, the buffer zone shall be 150 feet from the center of the wetland area.
- (c) An outcrop of bedrock/broken rock approximately 1.9 acres in size, located at the northwest corner of the permitted tract shall be excluded from effluent application.

ARTICLE II  
FLOOD PLAIN ASSURANCES

The Applicants will confirm, through their engineer, and under the seal of the engineer, that the location of the proposed wastewater treatment facility is outside the 100-year flood plain shown on the Federal Emergency Management Agency, FIRM Flood Insurance Rate Map, Travis County, Texas and Incorporated Areas, Panel 385 of 745, Map No. 48453CO385G, Map Revised PRELIMINARY FEB 24, 2006.

ARTICLE III  
COMPLIANCE WITH PERMIT

The Applicants agree to comply with the terms of the Permit issued by the TCEQ in TCEQ DOCKET NO. 2006-0688-MWD.

ARTICLE IV  
AGREED MOTION TO ALJ

The parties agree that they will file an agreed motion substantially in the form of that attached hereto as Exhibit "C" attached hereto.

Signed and agreed to on the dates shown below.

LAZY NINE MUNICIPAL UTILITY DISTRICT  
AND FOREST CITY SWEETWATER LIMITED  
PARTNERSHIP, BY AND THROUGH THEIR  
ATTORNEY, MIKE WILLATT

By: Mike Willatt  
Mike Willatt

CITY OF AUSTIN, TEXAS, BY AND THROUGH  
ITS ATTORNEY, HOLLY NOELKE

By: Signed on her behalf  
Holly Noelke

by Mike Willatt, as  
evidenced by the  
attached excerpt of  
an e-mail

LOWER COLORADO RIVER AUTHORITY, BY  
AND THROUGH ITS ATTORNEY, VIC RAMIREZ

By: \_\_\_\_\_

  
Vic Ramirez

**Willatt & Flickinger**

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From: "Noelke, Holly" <Holly.Noelke@ci.austin.tx.us>  
To: <mwillatt@wfaustin.com>; <Vic.Ramirez@lcra.org>; <stuarthentry@wildblue.net>  
Cc: "Cotton, Mitzi" <Mitzi.Cotton@ci.austin.tx.us>; "Noelke, Holly" <Holly.Noelke@ci.austin.tx.us>  
Sent: Friday, December 08, 2006 10:25 AM  
Attach: settlement-agreement.pdf  
Subject: FW: SETTLEMENT

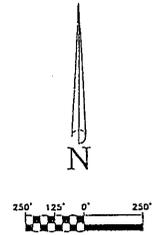
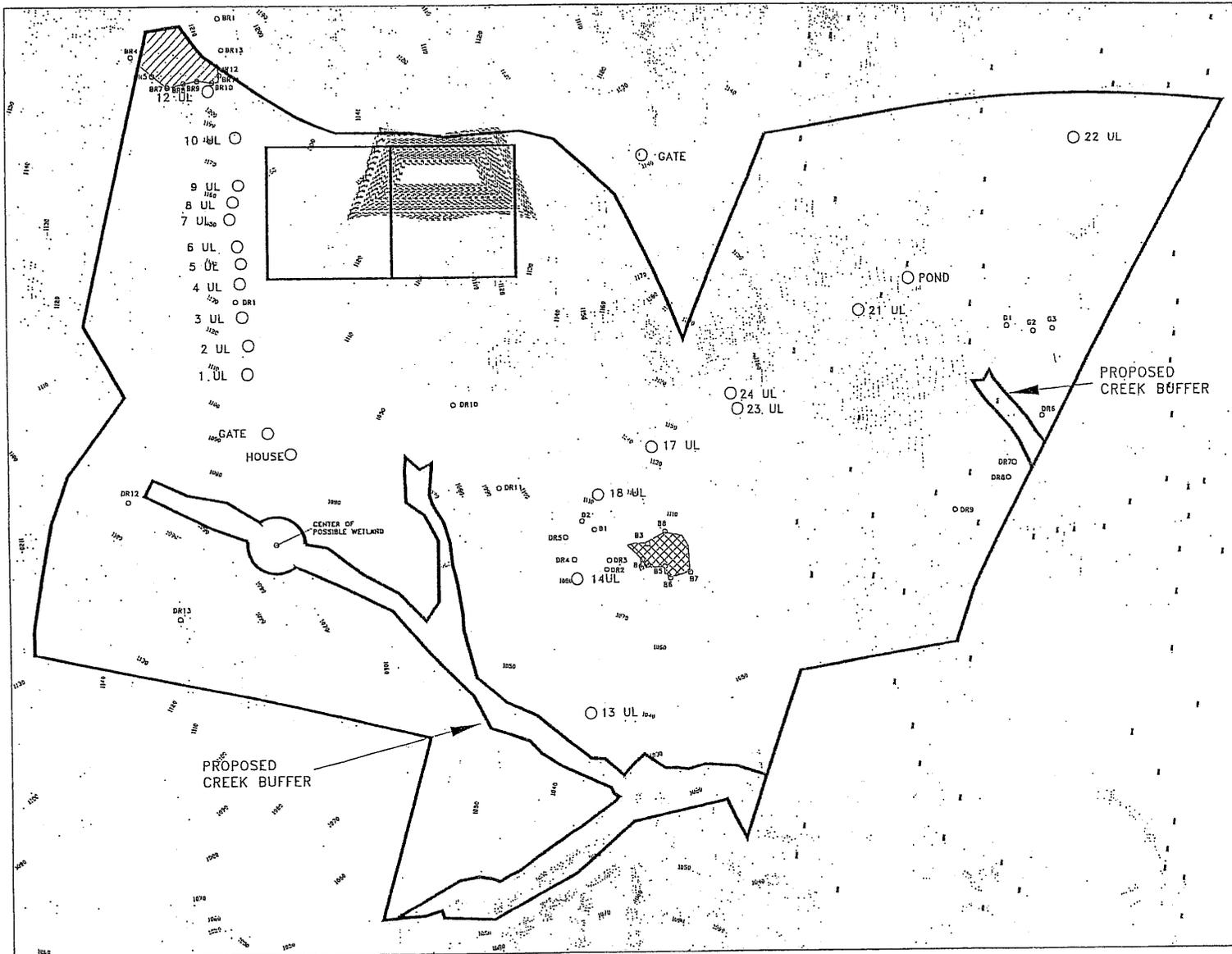
Mr. Willatt,

Please tell the ALJ that you have my authorization to sign my name on the attached settlement agreement. I am using an out of office computer which is acting up and I am not able to transmit a signed version. I will be at the hearing on Monday morning and will respond to any questions at that time. In addition at that time we can discuss the admission of testimony and the need for examination of the city witnesses.

Thank you. I can be reached by cell phone today at 799-8899.

Holly Noelke

EXHIBIT "A," A COPY OF THE DRAFT PERMIT, IS  
OMITTED BECAUSE IT APPEARS ELSEWHERE IN THE TRANSCRIPT



**LEGEND:**  
**ROCK CATEGORIES:**

-  **BR, BEDROCK:**  
bedrock and broken rock, extensive
-  **B, BROKEN ROCK:**  
broken rock with intervening bedrock
- DR, DISJOINTED ROCK:**  
flags, blocks of loose rock at surface
- G, GRAVEL:**  
gravel-sized rock fragments, limy soil

**NOTE:**  
Field-checked sites based on aerial photo review

**EXHIBIT "B"**  
**TO**  
**SETTLEMENT AGREEMENT**

**LAZY NINE M.U.D. EFFLUENT DISPOSAL AREA**  
**ROCKY AREA MAP**



The Seal appearing on this document was authorized by Dr. James D. Miertschin, P.E. 43900 on November 29, 2006.

**JAMES MIERTSCHIN & ASSOCIATES, INC**  
**ENVIRONMENTAL ENGINEERING**

EXHIBIT "C," A COPY OF THE AGREED MOTION, IS  
OMITTED BECAUSE IT APPEARS ELSEWHERE IN THE TRANSCRIPT

Elite Court Reporting Services, LLC  
 8500 N. Stemmons Freeway  
 Suite 3015  
 Dallas, Texas 75247  
 (214) 520-6868 Phone (214) 630-9200 Fax

Willatt & Filckinger  
 2001 N. Lamar  
 Austin, TX 78705

Mike Willatt

Hearing  
 SOAH No.582-06-2596;TCEQ No.2006-0688-MW  
 Jennifer Concienne

INVOICE NO. : 930870  
 INVOICE DATE: 12/01/2006  
 REPORTER:  
 Reporting Sunbelt

ID# 34-2045147

Date	Description	Amount
12/11/2006	O&1 (250 pages x \$5.00 each)	1,250.00
12/12/2006	O&1 (295 pages x \$5.00 each)	1,475.00
12/13/2006	O&1 (150 pages x \$5.00 each)	750.00
	Service Per Hour (7 hrs x \$30.00 per hour)	210.00
	Binding Fee (6 binders x \$5.00 each)	30.00
	Delivery Fee	15.00
	<b>Sub Total</b>	<b>3,730.00</b>
	<b>Paid</b>	<b>0.00</b>
	<b>Balance Due</b>	<b>3,730.00</b>

PAYMENT DUE UPON RECEIPT  
 THANK YOU