

# State Office of Administrative Hearings



Shelia Bailey Taylor  
Chief Administrative Law Judge

April 23, 2007

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TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

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:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the original documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than **May 14, 2007**. Any replies to exceptions or briefs must be filed in the same manner no later than **May 24, 2007**.

This matter has been designated **TCEQ Docket No. 2006-0688-MWD; SOAH Docket No. 582-06-2596**. All documents to be filed must clearly reference these assigned docket numbers. Copies of all exceptions, briefs and replies must be served promptly on the State Office of Administrative Hearings and all parties. Certification of service to the above parties and an **original and eleven copies** shall be furnished to the Chief Clerk of the Commission. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in black ink that reads "William G. Newchurch".

William G. Newchurch  
Administrative Law Judge

WGN:nl  
Enclosures  
cc: Mailing List

William P. Clements Building  
Post Office Box 13025 ♦ 300 West 15th Street, Suite 502 ♦ Austin Texas 78711-3025  
(512) 475-4993 Docket (512) 475-3445 Fax (512) 475-4994  
<http://www.soah.state.tx.us>

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: LAZY NINE MUNICIPAL UTILITY DISTRICT AND FOREST  
CITY SWEETWATER LIMITED PARTNERSHIP  
SOAH DOCKET NUMBER: 582-06-2596  
REFERRING AGENCY CASE: 2006-0688-MWD

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STATE OFFICE OF ADMINISTRATIVE  
HEARINGS

ADMINISTRATIVE LAW JUDGE  
ALJ WILLIAM G. NEWCHURCH

---

REPRESENTATIVE / ADDRESS

PARTIES

DOCKET CLERK  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
OFFICE OF THE CHIEF CLERK  
PO BOX 13087  
AUSTIN, TX 78711  
(512) 239-3300 (PH)  
(512) 239-3311 (FAX)

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

---

EMILY COLLINS  
ATTORNEY  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
OFFICE OF PUBLIC INTEREST COUNSEL  
MC-103 P.O. BOX 13087  
AUSTIN, TX 78711-3087  
(512) 239-6823 (PH)  
(512) 239-6377 (FAX)

OFFICE OF PUBLIC INTEREST COUNSEL

---

VICTOR RAMIREZ  
ASSOCIATE GENERAL COUNSEL  
LOWER COLORADO RIVER AUTHORITY  
LEGAL SERVICES-ELECTRIC  
P.O. BOX 220  
AUSTIN, TX 78767-0220  
(512) 473-3530 (PH)  
(512) 473-4010 (FAX)

LOWER COLORADO RIVER AUTHORITY

---

STUART HENRY  
HENRY & POPLIN  
1350 INDIAN SPRINGS  
DRIPPING SPRINGS, TX 78620  
(512) 858-0385 (PH)  
(512) 708-1297 (FAX)  
stuarthentry@wildblue.net

MR. AND MRS. MICHAEL PFLUGER  
TRAVIS SETTLEMENT ALIGNMENT  
STUART AND ALANYA BERTHIAUME

---

MICHAEL NORTHCUTT  
STAFF ATTORNEY  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
MC-175 P.O. BOX 13087  
AUSTIN, TX 78711-3087  
(512) 239-6994 (PH)  
(512) 239-0606 (FAX)

(COURTESY COPY)  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

---

HOLLY C. NOELKE  
ASSISTANT CITY ATTORNEY  
CITY OF AUSTIN LAW DEPARTMENT  
P.O. BOX 1088  
AUSTIN, TX 78767  
(512) 972-2182 (PH)  
(512) 974-6490 (FAX)

CITY OF AUSTIN

---

MIKE WILLATT  
ATTORNEY AT LAW  
2001 N. LAMAR  
AUSTIN, TX 78705  
(512) 476-6604 (PH)  
(512) 469-9148 (FAX)

FOREST CITY SWEETWATER LIMITED PARTNERSHIP  
LAZY NINE MUNICIPAL UTILITY

---

JOHN HATCHETT  
MANAGER  
P.O. BOX 340878  
AUSTIN, TX 78734  
(512) 963-9001 (PH)  
JOHN\_HATCHETT@HOTMAIL.COM

JOHN HATCHETT

---

HAZEL A SANCHEZ  
3409 BEE CREEK RD.  
SPICEWOOD, TX 78669  
(512) 264-3072 (PH)  
(512) 264-3078 (FAX)  
hsanchez@lawoffices.newsouth.net

WILLIAM CAHILL  
HAZEL A SANCHEZ

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

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

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

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

**PROPOSAL FOR DECISION**

**I. INTRODUCTION**

Lazy Nine Municipal Utility District (Lazy Nine) and Forest City Sweetwater Limited Partnership (Sweetwater LP)<sup>1</sup> (collectively Applicants) have applied to the Texas Commission on Environmental Quality (Commission or TCEQ) for a permit. They seek to treat and dispose of domestic wastewater, as an irrigant, on a tract of land lying south of State Highway 71 approximately three miles west of the Village of Bee Cave, Travis County, Texas. Lazy Nine would own the treatment plant, and Sweetwater LP owns the land on which the treatment plant and irrigation facilities would be built. The Administrative Law Judge (ALJ) recommends that the Commission issue the requested permit.

**II. OVERVIEW**

The Executive Director (ED) of the TCEQ chose not to be a party in this case. However, he reviewed the Application, suggested some changes which the Applicants incorporated, and prepared the current version of a draft permit (Draft Permit)<sup>2</sup> to govern the proposed treatment and disposal. The ED preliminarily concluded that Draft Permit, if issued, would meet all statutory and regulatory requirements.

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<sup>1</sup> To ease reading, the ALJ generally refers to Forrest City Sweetwater Limited Partnership as Sweetwater LP. However, there are several entities with very similar names. When a distinction is critical, he uses the limited partnership's full name.

<sup>2</sup> App. Ex. 8, attach. 6.

The Applicants also claim that their proposal and the Draft Permit comply with all applicable law. Most importantly they contend that the treatment plant and disposal, when operated according to the Application and Draft Permit, will not adversely affect surface water or groundwater.

The Lower Colorado River Authority (LCRA) and the City of Austin (Austin) are parties to this case. They have entered into a non-unanimous settlement agreement with the Applicants. The agreement calls for certain changes to the Draft Permit. The Applicants, LCRA, and Austin (collectively Settling Parties) ask the Commission to issue the permit with those changes.

The Office of Public Interest Counsel (OPIC) neither opposes nor recommends issuance of the permit. It does disagree with some of the changes proposed in the non-unanimous settlement. OPIC proposes modifications to some of those changes. Moreover, according to OPIC, one of those changes, which further limits the land that can be irrigated, might leave insufficient land available for the proposed irrigation. OPIC asks the Commission not to make that change or to reopen the record to take further evidence on the sufficiency-of-land issue.

The Travis Settlement Home Owners Association and several individuals who own land near the proposed facilities (collectively Protestants) oppose the Application. They claim that Sweetwater LP has not properly co-applied for a permit or, if it did, that required public notice was not properly given that it was a co-applicant. For those reasons, the Protestants contend that the Commission does not have jurisdiction to approve the Application.

Even assuming that the Commission has jurisdiction, the Protestants argue that the Applicants have failed to carry their burden of proving certain key points. Most importantly, they argue that the Applicants have not shown that the proposed facilities, irrigation, and operation would not adversely affect water quality. They also claim that the Applicants failed to prove that the facilities are needed or that another facility could not satisfy the need, if there is one. That leads

them to claim that approval of the Application would be incompatible with the state's goal of regional wastewater facilities.

As set out below, the ALJ finds that Commission has jurisdiction, the Applicants have carried their burden of proof on all issues, and issuing the permit would modestly encourage regionalization. He recommends that the Commission approve the Application and issue the Draft Permit with the changes called for in the non-unanimous settlement.

### III. PARTIES

The following is a full list of the parties and their representatives:

<b>PARTY</b>	<b>REPRESENTATIVE</b>
Applicants	Mike Willatt
OPIC	Emily Collins
LCRA	Vic Ramirez
Austin	Holly Noelke
Travis Settlement Home Owners Association, Mr. and Mrs. Michael Pfluger, and Stuart and Alanya Berthiaume (collectively Travis Settlement)	Stuart Henry
John Hatchett	self
Hazel A. Sanchez and William H. Cahill	Hazel A. Sanchez

Travis Settlement, Mr. Hatchett, Ms. Sanchez and Mr. Cahill (collectively Protestants) were aligned for all purposes but settlement.

#### IV. PROCEDURAL HISTORY

The following were the most significant events in the case:

DATE	EVENT
June 8, 2005	Application filed
July 29, 2005	Application declared administratively complete by the ED <sup>3</sup>
August 4, 2005	Notice of Application published <sup>4</sup>
August 11, 2005	Notice of Application mailed by the Chief Clerk to interested parties, legislators, LCRA, and others <sup>5</sup>
March 31, 2006	Issuance of initial Draft Permit by ED <sup>6</sup>
April 12, 2006	Revised notice of the application was mailed to interested persons, legislators, etc. <sup>7</sup>
April 23, 2006	Revised notice of the application published <sup>8</sup>
May 15, 2006	Applicants request to directly refer application to the State Office of Administrative Hearings (SOAH) for hearing
June 20, 2006	Notice of hearing mailed <sup>9</sup>

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<sup>3</sup> App. Ex. 3, p. 10.

<sup>4</sup> App. Ex.3, p. 11 and subex. Miertschin Ex. 4.

<sup>5</sup> App. Ex.3, p. 11 and subex. Miertschin Ex. 3, memo of notice tech BGURLEY and attachment.

<sup>6</sup> App. Ex. 8, subex. 2.

<sup>7</sup> App. Ex.3, subex. Miertschin Ex. 3, memo of notice tech HMCVEA and attachment.

<sup>8</sup> App. Ex.3, subex. Miertschin Ex. 3, April 23, 2006, affidavit of publisher and attachment.

<sup>9</sup> App. Ex. A.

June 26, 2006	Notice of hearing published <sup>10</sup>
July 25, 2006	Public meeting on Application.
August 1, 2006	Issuance of current Draft Permit with changes in response to comments <sup>11</sup>
August 7, 2006	Preliminary hearing
September 22, 2006	Executive Director's Response to Comments <sup>12</sup>
December 8, 2006	Non-unanimous settlement reached among the Applicants, Austin, and LCRA
December 11, 2006	Hearing on the merits begins
December 13, 2006	Hearing on the merits ends
January 29, 2007	Deadline to file written closing arguments
February 20, 2007	Deadline to file written replies to closing arguments
April 23, 2007	Deadline for issuance of the Proposal for Decision (PFD)

## V. JURISDICTION

The Commission has jurisdiction to issue permits for the discharge of waste into or adjacent to water in the state.<sup>13</sup> No party objects to the Commission's authority to consider an application like the one at issue in this case or the ALJ's authority to preside over the hearing and prepare a PFD concerning such an application. However, the Protestants claim that the Applicants have not shown that the person who signed and filed the application on behalf of Sweetwater LP had authority to do

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<sup>10</sup> App. Ex. B.

<sup>11</sup> App. Ex. 8, attach. 5 and 6.

<sup>12</sup> App. Ex. 3, subex. Miertschin Ex. 7.

<sup>13</sup> TEX. WATER CODE ANN. (Water Code) § 26.027(a) (West 2006).

so. They contend this makes the Application incomplete, hence the Commission has no jurisdiction to approve it.

The Protestants also argue that the notice of intent to obtain a permit and the notice of receipt of the Application were legally insufficient because they did not properly identify one of the Applicants, Sweetwater LP. They believe that this also means that the Commission has no jurisdiction to consider the Application.

The Applicants<sup>14</sup> disagree. They concede that the original Application, due to a clerical error, improperly named a related company, FC Sweetwater Partner L.L.C. (Sweetwater LLC)<sup>15</sup>, as the co-applicant with Lazy Nine. But they argue that the this error was corrected during the application review process, when they clarified that Sweetwater LP was the proper co-applicant. They note that all notices properly named Lazy Nine as a co-applicant. They also maintain the William T. Gunn, III, has amply shown that he was authorized to file the Application on behalf of Sweetwater LP.

#### **A. Is Sweetwater LP a Co-applicant?**

A person desiring to obtain a permit must submit an application to the Commission containing all information reasonably required by the Commission.<sup>16</sup> To understand the dispute over whether Sweetwater LP co-applied for the permit, one must first understand the relationships among several business entities with similar names and Mr. Gunn. Between them, Mr. Gunn and the Applicants' engineering consultant, Rick Wheeler, P.E., testified that:

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<sup>14</sup> Although the Protestants dispute Sweetwater LP status as a co-applicant, the ALJ consistently uses the term "Applicants" to collectively refer to Sweetwater LP and Lazy Nine.

<sup>15</sup> To ease reading, the ALJ generally refers to FC Sweetwater L.L.C. as Sweetwater LLC. However, there are several entities with very similar names. When a distinction is critical, he uses the full name.

<sup>16</sup> Water Code § 26.027(b).

1. Sweetwater LP:
  - a. is a Texas limited partnership;
  - b. owns the land where the proposed treatment facility, holding pond, and irrigation system would be located; and
  - c. also owns an adjacent 1,200-acre tract of land where a residential and commercial development, the Sweetwater Project, would be built;
2. Lazy Nine's boundaries include the 1,200 Sweetwater Project tract.
3. Sweetwater LLC is the general partner in Sweetwater LP.
4. Mr. Gunn is:
  - a. the limited partner in Sweetwater LP;
  - b. on the management committee of Sweetwater LLC;
  - c. a limited partner in another limited partnership that is developing the Sweetwater Project; and
  - d. the manager of another LLC that is the general partner in the other limited partnership that is developing the Sweetwater Project.<sup>17</sup>

When the application was originally filed, it named Lazy Nine and "FC Sweetwater Partner LLC" as co-applicants.<sup>18</sup> It also named "Forrest City Sweetwater Limited Partnership" as owner of the land where the treatment plant and effluent disposal site would be located.<sup>19</sup>

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<sup>17</sup> App. Ex. 7, p. 2 *et seq.*; App. Ex. 4, p. 4 *et seq.*; and Tr. 556 *et seq.*

<sup>18</sup> App. Ex. 3, subex. Miertschin Ex. 2, Admin. Report tab, p. 2.

<sup>19</sup> App. Ex. 3, subex. Miertschin Ex. 2, Admin. Report tab, p. 5.

An application amendment was submitted on July 21, 2005.<sup>20</sup> Among many other things, the transmittal letter for the amendment indicated that the landowner would now be identified as the co-permittee.<sup>21</sup> An amended application page was also submitted that named “Forest City Sweetwater, L.P.” as the “co-permittee,” while retaining Lazy Nine as the other co-applicant.<sup>22</sup> An additional application signature page was submitted, which was signed by “William T. Gunn,” gave his title as “Partner,” and dated July 20, 2005.<sup>23</sup> But that signature page only listed Lazy Nine, which as a municipal utility district (MUD) has no partners, as the applicant.<sup>24</sup>

For several months, correspondence was exchanged between the ED and the Applicants’ representatives that referred to “FC Sweetwater Partner L.L.C.” as either the co-permittee or the co-applicant. Finally, on February 28, 2006, the Applicants’ attorney, Mr. Willatt, filed a response to an early draft permit, indicated that the correct name of the co-permittee was “Forrest City Sweetwater, L.P.,” and asked the ED to make that change throughout the draft permit.<sup>25</sup> He included no revised signature page or other amended application pages. Thereafter, as far as the ALJ can tell, all correspondence, notices and the current Draft Permit refer to “Forrest City Sweetwater, Limited Partnership” as the co-permittee or co-applicant.

The Applicants contend that Sweetwater LP is the co-applicant and at some point someone simply made a clerical error, which was later corrected. But the Protestants claim that there has been

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<sup>20</sup> Applicant Ex. 3, subex. Miertschin Ex. 2, Supplemental tab, letter of July 21, 2005, Miertschin to McClarron.

<sup>21</sup> App. Ex. 3, subex. Miertschin Ex. 2, Supplemental tab, p. A1-1.

<sup>22</sup> Applicant Ex. 3, subex. Miertschin Ex. 3, Supplemental tab, attach. 3, p. 2 of 11.

<sup>23</sup> App. Ex. 3, subex. Miertschin Ex. 2, Supplemental tab, attach. 3, p. 8 of 11.

<sup>24</sup> Applicant Ex. 3, subex. Miertschin Ex. 2, Supplemental tab, letter of July 21, 2005, Miertschin to McClarron, attach. 3, p. 8.

<sup>25</sup> Applicant Ex. 3, subex. Miertschin Ex. 3, letter of February 28, 2006, Willatt to Centeno.

no showing that Sweetwater LP can stand in the shoes of Sweetwater LLC, which was once the co-applicant. The ALJ agrees with the Applicants. He, too, sees an error that was corrected to name Sweetwater LP as the co-applicant.

Even if Sweetwater LP is supposed to be the co-applicant, the Protestants claim that there is insufficient evidence to show that Mr. Gunn had authority to sign or submit an application on behalf of that entity. They note that he is a limited partner in Sweetwater LP and 30 Tex. Administrative Code (TAC) §305.44(a)(2) (2007) provides: “For a partnership . . . , the application shall be signed by a general partner . . . .”

The Applicants do not argue that Mr. Gunn’s authority comes from his status as a limited partner in Sweetwater LP. Instead, they claim that he wears another hat. They argue that Mr. Gunn had authority to sign and file the application of Sweetwater LP because he was an authorized member of the management committee of Sweetwater LLC, which is Sweetwater LP’s general partner.

Mr. Gunn testified that he was “a member of the management committee of FC Sweetwater Partner, L.L.C. that deals with development issues for the Sweetwater Project.”<sup>26</sup> He also testified that his authorization to speak for the Sweetwater LLC “would come under the general authorization I have to, to be the managing partner of the project here in town.”<sup>27</sup> He admitted that the corporation had not adopted a written resolution to give him that authority but claimed that he could have one adopted by the end of the day if that were necessary.<sup>28</sup> There is no evidence to contradict Mr. Gunn’s claim of authority.

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<sup>26</sup> App. Ex. 7, p. 2.

<sup>27</sup> Tr. 558 *et seq.*

<sup>28</sup> Tr. 559.

Yet the Protestants argue that Mr. Gunn must be authorized in writing. They point to 30 TAC §305.128 (a), which requires all reports requested by permits and other information requested by the ED to be signed by a person described in §305.44(a) or by a duly authorized representative of that person. Section 305.128 (a) goes on to provide that a person is a duly authorized representative only if that authorization is made in writing by a person described in 30 TAC §305.44(a).

The ALJ cannot find that 30 TAC § §305.128 (a) is applicable. That rule deals with reports required after a permit is issued and other information requested by the ED. It is true that the ED noted that Sweetwater LP had not co-applied for the permit, which led to Mr. Gunn signing the application. But another more specific rule more clearly states who may sign an application for a corporation.

As the Protestants correctly note, 30 TAC §305.44(a)(2) requires a general partner to sign an application for a partnership. In this case, however, the general partner is a corporation. Who may sign for that corporate partner? 30 TAC §305.44(a)(1) provides:

For a corporation, the application shall be signed by a responsible corporate officer. For purposes of this paragraph, a responsible corporate officer means a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation; or the manager of one or more manufacturing, production, or operating facilities employing more than 250 persons or having gross annual sales or expenditures exceeding \$25 million (in second-quarter 1980 dollars), if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures. Corporate procedures governing authority to sign permit or post-closure order applications may provide for assignment or delegation to applicable corporate positions rather than to specific individuals.

Based on his testimony that he is a member of the management committee and generally authorized to act regarding the Sweetwater Project, the ALJ concludes that Mr. Gunn is a “person

who performs similar policy or decision-making functions for” Sweetwater LLC. As such, he may sign an application for Sweetwater LLC. The ALJ further concludes that authority would extend to signing for the corporation as the general partner of a limited partnership, as in this case. Written authorization would be better evidence, but the ALJ sees nothing in 30 TAC §305.44(a)(1) that requires it for a person who performs “decision-making functions.”

The ALJ agrees that it would have been better if Sweetwater LP had indicated earlier and more clearly that it was the co-applicant. He also agrees that it would have been better if Mr. Gunn’s authority had been set out in writing. But he cannot agree with the Protestants that it is uncertain whether Sweetwater LP has co-applied for the permit. Instead, the ALJ finds that Sweetwater LP is a co-applicant.

**B. Were the Required Public Notices Given That Sweetwater LP had Co-applied for the Permit?**

As an application moves its way through the process, several public notices must be given. There is no dispute that notice of the contested case hearing was properly given in this case and named Lazy Nine and “Forrest City Sweetwater, Limited Partnership” as the co-applicants for the permit.<sup>29</sup> Nor is there dispute that, after the ED completed his review, notice of the application and the ED’s preliminary decision were properly given or that notice of a public meeting to receive comments on the draft permit was properly given. Because the Applicants requested direct referral to SOAH for a contested case hearing<sup>30</sup>, as allowed by Water Code § 5.557, no public notice of the opportunity to request a hearing was necessary or given.

The Protestants cite 30 TAC § 281.17 and incorrectly argue that it sets out notice requirements that were not complied with in this case. That rule does not apply to this case. It sets

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<sup>29</sup> App. Ex. A and B.

<sup>30</sup> App. Ex. 3, subex. Miertschin Ex. 3, letter of May 15, 2006, Willatt to Chief Clerk.

out requirements for notice of applications for Commission approvals other than the permit that the Applicants seek in this case.

Additionally, the Protestants argue that the earliest required public notice, indicating that an application for a permit had been file, was inadequate. Neither they nor any other party disputes that a notice of the application was published on August 4, 2005<sup>31</sup>, and mailed on August 11, 2005, by the Chief Clerk to interested parties, legislators, LCRA, and others.<sup>32</sup> The notice correctly named Lazy Nine as an applicant, but it incorrectly named “FC Sweetwater Partner, LLC”, rather than Sweetwater LP, as the co-applicant. The Protestants claim that this notice error means the Commission has no jurisdiction to consider the Application. The ALJ does not agree.

With exceptions not applicable to this case, Water Code § 26.028(a) requires notice of an application for a permit to be given to the persons who in the judgment of the Commission may be affected by the application. The Commission has put flesh on those legal bones. 30 TAC §39.418(b), which applies to applications for wastewater discharge permits<sup>33</sup>, provides:

Not later than 30 days after the executive director declares an application administratively complete:

(1) the applicant shall publish Notice of Receipt of Application and Intent to Obtain Permit . . .

(2) the chief clerk shall mail Notice of Receipt of Application and Intent to Obtain Permit to those listed in §39.413 of this title (relating to Mailed Notice), and to:

(A) the state senator and representative who represent the general area in which the facility is located or proposed to be located; and

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<sup>31</sup> App. Ex. 3, p. 11 and subex. Miertschin Ex. 4.

<sup>32</sup> App. Ex. 3, p. 11 and subex. Miertschin Ex. 3, memo of notice tech BGURLEY and attachment.

<sup>33</sup> See 30 TAC §39.551(a) and (b)(1).

(B) the river authority in which the facility is located or proposed to be located if the application is under Texas Water Code, Chapter 26;

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(4) the notice must include the applicable information required by §39.411(b) of this title (relating to Text of Public Notice).

Rule 30 TAC §39.411 (b)(2) specifies:

the text of the notice must include the following information:

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(2) the name, address, and telephone number of the applicant and a description of the manner in which a person may contact the applicant for further information;

The Protestants argue that the notice of the application published on August 4, 2005, and mailed on August 11, 2005, did not comply with these requirements because it did not name Sweetwater LP, as the co-applicant or give its address and telephone number. Because a fully correct notice was not given within 30 days of the ED's declaration that the application was administratively complete, which occurred on July 29, 2005,<sup>34</sup> they argue that the defective notice was jurisdictionally fatal to the Application.

The Applicants respond that this early error was corrected in subsequent notices, hence the error was harmless and is not grounds for denying the Application. The ALJ agrees with the Applicants.

First, a notice of the Application was properly published and mailed within 30 days after the ED determined that the Application was complete. It properly named one of the current applicants, Lazy Nine, and included the address and telephone number of its attorney, Mr. Willatt, where it could be contacted. Thus, at least as to Lazy Nine, the notice of the application was properly given, and there is no basis for dismissing Lazy Nine's application.

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<sup>34</sup> App. Ex. 3, p. 10.

Moreover, after the ED completed his technical review and prepared a draft permit, another notice of the application was mailed on April 12, 2006, to interested persons, legislators, etc.<sup>35</sup> and published on April 23, 2006.<sup>36</sup> Those notices differed from the August 4 and August 11, 2005, notices and other matters were addressed. But the 2006 notices stated that Lazy Nine and “Forrest City Sweetwater, Limited Partnership” had applied for the permit and gave an address and telephone number where the co-applicants could be reached, through their attorney, Mike Willatt.

In short, the April 12, 2006, and April 23, 2006, notices named both Lazy Nine and Sweetwater LP as co-applicants and complied with every provision of 30 TAC §§ 39.411 (b) and 39.418(b) except one: they were not given within 30 days of the declaration of administrative completeness. Does that require denial as the Protestants argue? The ALJ concludes that it does not.

No statute or rule requires denial of an application if the initial notices of the application are not given within 30 days of the declaration of administrative completeness. The ALJ would not anticipate such a harsh result. Instead, the far more reasonable course of action would be to issue a corrected notice of the application and proceed with its review.

The April 12 and 23, 2006, notices made that correction. Granted, they were required to be given to announce a later development. Nevertheless, they contained all of the information that was required to be in the initial notices of the application.

Moreover, neither the Protestants nor anyone else has been deprived of an opportunity to comment on the application, ask for a contested case hearing, be admitted as a party in the hearing, or prepare for or participate in that hearing. The fact that the notice was given more than 30 days after the declaration of administrative completeness was harmless error.

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<sup>35</sup> App. Ex.3, subex. Miertschin Ex. 3, memo of notice tech HMCVEA and attachment.

<sup>36</sup> App. Ex.3, subex. Miertschin Ex. 3, April 23, 2006, affidavit of publisher and attachment.

The ALJ concludes that all required notices of the application, draft permit, and hearing were given in substantial compliance with the applicable rule and that any deviation was harmless error. He also concludes that the Commission has jurisdiction to consider and, if warranted, approve the application.

## VI. NEED, CAPACITY, AND REGIONALIZATION

The Protestants claim that the Applicants were required but failed to show that issuing the permit would further the state's policy of encouraging and promoting regional wastewater facilities. They contend that the Applicants have not shown that there is a need for the proposed facility in the near future or, if there is a need, that another facility in the region could not satisfy it. For these reasons, the Protestants contend that the permit should be denied.

The Applicants maintain that the facility they propose will be needed and that there is no reasonable regional alternative. No other party questions the need for the permit.

The state's policy is to encourage regional wastewater facilities. Water Code § 26.003 states:

It is the policy of this state . . . to . . . encourage and promote the development and use of regional and areawide waste collection, treatment, and disposal systems to serve the waste disposal needs of the citizens of the state; and to require the use of all reasonable methods to implement this policy.

In effect, Water Code § 26.0282 allows the Commission to implement the regionalization goal in an individual permitting case. It provides:

In considering the issuance . . . of a permit to discharge waste, the commission may deny or alter the terms and conditions of the proposed permit . . . based on consideration of need, including the expected volume and quality of the influent and the availability of existing or proposed areawide or regional waste collection, treatment, and disposal systems not designated as such by commission order . . .

There is no evidence or argument that the Commission has adopted rules or policies to guide its consideration of need and regionalization in a permitting case.

The Protestants read things into Water Code §§ 26.003 and 26.0282 that they do not say. They do not require the Applicants to prove that there is a need, in the near future or ever, for the full discharge capacity that the Application seeks. Nor do they require the Applicants to show that no facility in the region can treat the anticipated waste volumes. Instead, these statutes give the Commission options in a particular permitting case based on the need and capacity evidence that is submitted.

Assuming certain facts were shown, the Commission could, as the Protestants advocate, choose to give the Applicants less than they ask for. For example, it could deny the permit if it determined that there was no need for wastewater capacity in the near future or if it determined that a nearby facility could satisfy the need. The Commission could also alter the proposed permit by reducing the requested discharge flow rate if it found there was no near term need for the requested rate. But the Commission is not required to do such things; it “**may** deny or alter the terms and conditions of the proposed permit.” (Emphasis added.)

Moreover, instead of the restrictive view that the Protestants advocate, the Commission could take an expansive view when exercising its options. Sections 26.003 and 26.0282 do not limit the consideration of need to a particular time frame or even the need that the applicant currently wishes to satisfy. For example, the Commission could consider the need for wastewater disposal service on all property within a three mile radius over the next thirty years. It could conclude that the proposed permit flow should be increased to create additional capacity in the region.

In short, the Commission has a very flexible planning tool that it can use to encourage and promote regionalization.

**A. Will There Be a Need in the near Future for Wastewater Treatment and Disposal in the Region Where the Applicants Propose to Build a Facility?**

The Applicants want to treat and dispose of wastewater from the Sweetwater Project, which will be built on a 1,200-acre tract of land on the south side of State Highway 71 at its intersection with Bee Creek Road in southwest Travis County, Texas. The land is located within the boundaries of Lazy Nine. The project would consist of a 1,800-lot single family residential subdivision and possibly 20 to 25 acres of commercial development.<sup>37</sup>

Development of the Sweetwater Project has proceeded beyond the conceptual stage. The Travis County Commissioner's Court has approved preliminary plans for it and final plats for at least a portion of the land. Additionally, LCRA has approved a non-point source pollution control master plan for the project. Lazy Nine and LCRA have also entered into a wholesale water service contract under which potable water from LCRA's West Travis County Regional Water System will be provided to the project. A three-mile long water transmission main to deliver that water has been designed and approved and permitted by agencies with jurisdiction and is under construction. Necessary turn lanes from Highway 71 have been designed, approved, and are under construction. Construction plans for the subdivision infrastructure have been prepared.<sup>38</sup>

The Protestants dispute none of that. Instead, they claim that the proposed final discharge volume, 700,000 gallons per day (gpd), will not be needed to serve the project until at least 2012.<sup>39</sup> They argue that this means that a permit for a 700,000-gpd flow is not needed now. The ALJ cannot agree that 2012 is so far in the future that there is no need for wastewater facilities to treat a flow volume reasonably anticipated by that year.

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<sup>37</sup> App. Ex. 4, p. 5 *et seq.* and Ex. 7, p. 2 *et seq.*

<sup>38</sup> App. Ex. 4, p. 5 *et seq.* and Ex. 7, p. 2 *et seq.*

<sup>39</sup> App. Ex.3, subex. Miertschin Ex. 2, Tech. Report Tab, p. 1.

The Application was filed on June 8, 2005, meaning that it will take at least two years for the Applicants to obtain a decision on their Application. There is no evidence showing how long construction will take after a permit is issued, but it surely will take many months. Additionally, as the Applicants note, a Commission rule requires a wastewater treatment plant permit holder to plan for expansion when a plant reaches 70 percent of its permitted capacity and to obtain construction authorization for the expansion by the time that flow equals 90 percent of capacity.<sup>40</sup> Given those advance planning and authorization requirements, the length of time needed to obtain permit approval if a hearing is requested, and the uncertain but obviously considerable length of time needed to construct facilities, obtaining permitted capacity now for a wastewater flow anticipated in 2012 is not unreasonably or speculatively early.

But the Protestants also claim that the Applicants have not shown that they will ever reasonably need the full requested capacity to serve the planned development. They particularly quarrel with the Applicants' assumption that it will need capacity to handle a 300-gallon-per-day-per-residential-connection flow. In a letter to the ED during technical review, Dr. James Miertschin, P.E., the Applicants' engineering consultant, explained the 300-gpd assumption by noting that Austin's criteria assumes a 245-gpd flow and that the Applicants wanted to add a safety factor.<sup>41</sup>

The Protestants note that 30 TAC § 317.4(a) directs an applicant to consider flows at nearby plants that are the same or similar when designing its facility. They argue that Austin is too far away, large, and different to be used as a point of reference. But as the Applicants point out, section 317.4(a) also states that, in the absence of existing data, a 100 gallons per person per day flow is a generally acceptable parameter to assume. The ALJ sees no reason to second-guess a default assumption set out in the Commission's own rules. He also agrees that it is very reasonable to

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<sup>40</sup> 30 TAC § 305.126(a).

<sup>41</sup> App. Ex. 3, subex. Miertschin Ex. 3, letter of June 23, 2006.

assume that an average of three people will live in each planned single family residence. Hence, a 300-gpd per residence daily average flow assumption is quite reasonable.

In the Application, the Applicants estimated that they would receive wastewater flowing from a total of 2,250 connections.<sup>42</sup> When the Commission Staff reviewed the Application, they asked for “population estimates and/or projections and unit wastewater generation rates used to derive the flow estimate and anticipated growth rates for the development.” Dr. Miertschin replied with a table showing that 2,250 living unit equivalents (LUEs) would serve a total population of 7,875 and each LUE would generate 300 gpd per LUE in the final phase.<sup>43</sup> That would result in a flow of 675,000 gpd, which Dr. Miertschin rounded up to 700,000 gpd, the final discharge volume for which the Applicants seek a permit.

The Applicants argue that their consultants used their unquestioned expertise to estimate that there would be a total of 2,250 connections to be served. They contend that this uncontradicted expert estimate should be accepted as correct. This is an area where expert opinions are certainly helpful if not essential. But Mr. Gunn, who is managing the development of the Sweetwater Project and is presumably the person who would know best, testified that the project would include approximately 1,800 residences, not 2,250.<sup>44</sup> Mr. Gunn also testified that the project is as described in the prefiled testimony of Mr. Wheeler, the Applicants’ other engineering consultant. Mr. Wheeler also testified that the Sweetwater Project was projected to include 1,800 residences.<sup>45</sup> There is nothing to explain how Mr. Miertschin assumed or estimated 2,250 LUEs, or residences.

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<sup>42</sup> App. Ex. 3, subex. Miertschin Ex. 2, Attach F, p. 1 and Supplement tab, letter from Miertschin to McClarron, Attach. 2, p. A2-1.

<sup>43</sup> App. Ex. 3, subex. Miertschin Ex. 2, Supplement tab, letter from Miertschin to McClarron, Attach. 2, p. A2-1.

<sup>44</sup> App. Ex. 7, p. 2.

<sup>45</sup> App. Ex. 4, p. 4.

Assuming 300 gpd per residence, a total average daily flow of 540,000 gpd from 1,800 residences is a reasonable estimate. That would show a need for more capacity than would be supplied by the first two phases of the operation, a total of 440,000 gpd, as sought by the Applicants and included in the Draft Permit. However, it would still be 160,000 gpd short of the 700,000 gpd final phase flow that the Applicants seek.<sup>46</sup>

The Applicants note that the projected 1,800 residential connections do not include any connections in the commercial development planned on 20 to 25 acres of the Sweetwater Project. Mr. Gunn testified that area could potentially be developed for local retail and services.<sup>47</sup> It is certainly reasonable to expect some commercial development generating wastewater would occur on land adjacent to an 1,800 residential development and along a major highway. But the commercial development plans are uncertain, and there is no evidence to quantify that flow.

The ALJ concludes that Lazy Nine will need at least 540,000 gpd of domestic wastewater treatment capacity over the next few years to serve customers within its service area.

**B. Is There an Existing or Proposed Facility in the Region That Could Treat and Dispose of Wastewater from the Lazy Nine's Service Area?**

There is no evidence that an existing wastewater treatment and disposal facility in the region or a proposed one, other than the Applicants', could and would accept, treat, and dispose of at least 540,000 gpd of domestic wastewater from Lazy Nine's service area.

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<sup>46</sup> App. Ex. 8, attach. 6, p. 1; App. Ex. 3, subex. Miertschin Ex. 2, Tech. Report tab, p. 1.

<sup>47</sup> App. Ex. 7, p. 2.

The TCEQ application form asks for information concerning other systems within three miles of the proposed facility.<sup>48</sup> The Applicants contacted each of the four permitted entities within that radius to determine if they could serve the Lazy Nine service area.<sup>49</sup> None indicated that it could.

Lakeway MUD declined to provide service. It noted that it and Lazy Nine were relatively proximate to one another, but the topographic conditions and construction constraints were prohibitively difficult and expensive to overcome. Lakeway MUD also indicated that it would need to significantly expand its facilities to provide the service. It stated that it had no desire or interest in providing either retail or wholesale service to Lazy Nine and that it supported Lazy Nine's application.<sup>50</sup> The Protestants do not argue that Lakeway MUD has capacity to serve Lazy Nine's service area.

Hurst Creek MUD also declined to provide services. It, too, indicated that the topographic conditions and construction constraints were prohibitively difficult and expensive to overcome and that it would need to significantly expand its facilities if it were to serve Lazy Nine.<sup>51</sup>

The Protestants claim that Hurst Creek MUD now has a second treatment plant, Rough Hollow, within three miles of Lazy Nine's territory. They contend that the Applicants have not attempted to determine if that facility could provide service. The only evidence concerning Rough Hollow was in the testimony of Mr. Wheeler, who also designed that plant, but for Lakeway MUD not Hurst Creek MUD.<sup>52</sup> Nevertheless, both of those MUDs definitively stated that they could not

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<sup>48</sup> App. Ex. 3, subex. Miertschin Ex. 2, Tech. Report tab, p. 5.

<sup>49</sup> App. Ex. 3, subex. Miertschin Ex. 2, Attach. I.

<sup>50</sup> App. Ex. 3, subex. Miertschin Ex. 2, Attach. I, letter of December 9, 2004, from Eason to Abrams.

<sup>51</sup> App. Ex. 3, subex. Miertschin Ex. 2, Attach. I, letter of April 13, 2005, from Roark to Elder.

<sup>52</sup> Tr. 500 *et seq.*

provide service for several non-capacity reasons that were not peculiar to a specific facility. The ALJ finds that neither Lakeway MUD nor Hurst Creek MUD could reasonably treat and dispose of wastewater from the Lazy Nine's service area.

LCRA told the Applicants that it did not have capacity to serve Lazy Nine's requested "900,000 gallons per day" flow. LCRA stated that its only facility in the area was its Lake Point Plant. In May 2005, that plant had a capacity of 575,000 gpd but LCRA was seeking an amendment to increase the capacity to one million gpd. At that time, the daily flow to the Lake Creek Plant was 200,000, which would have left LCRA with a remaining capacity of 800,000 gpd if its permit amendment was granted.<sup>53</sup>

It is not clear why LCRA thought the flow would be 900,000 gpd rather than the 700,000 gpd final-phase flow for which the Applicants seek a permit. The Protestants claim that LCRA's statement is not sufficient to show that it does not have capacity because it was based on an incorrect premise.

Despite that inconsistency, the ALJ cannot conclude that LCRA could accept the flow for which a permit is sought in this case. There is no evidence that LCRA ever obtained the amendment to increase its capacity or to indicate what uncommitted capacity LCRA now has at Lakepoint. Moreover, LCRA is a party to this case, does not argue that it could take the flow from Lazy Nine, and supports the issuance of a permit, assuming it conforms with the non-unanimous settlement.

Travis County Water Control & Improvement District 17 (WCID 17) also looked into the possibility of providing service to Lazy Nine, since it was in proximity. However, it concluded that

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<sup>53</sup> App. Ex. 3, subex. Miertschin Ex. 2, Attach. I, letter of May 10, 2005, from Stephenson to Miller.

it did not have capacity without significantly expanding its systems, which it did not believe was feasible.<sup>54</sup>

The Protestants argue the WCID 17's determination is not convincing because the Applicants' representative asked WCID 17 to confirm that it did not have capacity rather than neutrally asking WCID 17 if it could provide service. The ALJ does not agree that WCID 17 was confused or manipulated by being asked a leading question. WCID 17 clearly stated why it could not reasonably provide service.

Lastly, the Protestants contend that Barton Creek West Water Supply Corporation (Barton Creek West) has a treatment plant within three miles of the proposed Lazy Nine facility. They claim that the law requires the Applicants to prove that entity was contacted in good faith to determine if it could treat and dispose of the waste from the Sweetwater Project, but the Applicants failed to do so.

As previously discussed, Water Code §§ 26.003 and 26.0282 do not require the Applicants to prove that no existing facility could treat the waste that the Lazy Nine facility would treat. Nor do the Protestants cite any other law for that proposition.

The only evidence concerning the Barton Creek West facility was in Mr. Wheeler's testimony during cross examination by the Protestants. Mr. Wheeler also served as an engineering consultant for Barton Creek West. Its plant is on Bee Cave Road, a.k.a. FM 2244, and north of Highway 71. As the crow flies, that is at least 4.5 miles east of the nearest point in Lazy Nine's service area, well outside the three-mile radius for which the application form seeks information.<sup>55</sup> Moreover, the

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<sup>54</sup> App. Ex. 3, subex. Miertschin Ex. 2, Supplemental tab, letter of July 20, 2005, from Gernes to Wheeler.

<sup>55</sup> App. Ex. 3, subex. Miertschin Ex. 2, attach. B. The Applicants argue that the Barton Creek West plant is even further away, 7.5 miles from the proposed Lazy Nine plant. That might be true, but the ALJ cannot find evidence of that greater distance in the record.

roads in between wind extensively, and there are numerous changes in contour. The ALJ concludes that the Barton Creek West facility could not reasonably treat wastewater from Lazy Nine's service area.

Aside from the planned expansions discussed above, there is no evidence that a facility other than the Applicants' has been proposed within a three-mile radius of the Applicants'.

The ALJ cannot conclude that another existing or proposed facility could treat and dispose of wastewater from Lazy Nine's service area. While the evidence would not be sufficient to eliminate any reasonable doubt, the ALJ also finds it more likely than not that there is a lack of undedicated wastewater treatment capacity in the immediate region.

**C. Would Issuance of a Permit to the Applicants Encourage and Promote or Frustrate the Development and Use of Regional and Areawide Waste Collection, Treatment, and Disposal Systems?**

The ALJ concludes that issuing the permit to Lazy Nine as requested would modestly encourage and promote regional wastewater collection, treatment, and disposal. He recommends that the Commission issue the requested permit to further those goals.

If the permit is issued as requested, the Applicants will have 700,000 gpd of capacity when the final phase of their facilities is built. Their plant would have 70 percent of the capacity of the largest system planned and possibly permitted in the immediate area according to the evidence, LCRA's one million gpd system. The Applicants are hardly proposing a tiny package plant, lacking economies of scale and the prospect of a sufficient cash flow needed for sophisticated management, which the state clearly seeks to discourage.

In fact, approving the full 700,000 gpd capacity that the Applicants' seek would modestly help to prevent the proliferation of tiny, prone-to-fail plants. If the residential development planned

as part of the Sweetwater Project is built, 540,000 gpd of capacity will be needed to serve those residential connections. That would leave 160,000 gpd of excess capacity. That excess capacity could serve the possible, but uncertain, commercial development at the Sweetwater Project or other needs along the Highway 71 corridor. For example, it could serve approximately 500 additional single family homes. In short, it would be a significant regional facility, which state policy encourages.

## VII. CHANGES TO SPECIAL PROVISIONS IN THE DRAFT PERMIT

In their settlement agreement, the Settling Parties call for certain changes to Special Provisions (SPs) that the ED included in the Draft Permit. During the hearing, other changes to SPs were also proposed.

Some of these SP changes would impact more complex substantive issues, *e.g.* minimizing contamination of water. For that reason, the ALJ addresses the SP changes first before considering the more complex issues.

### A. SP 16

The Settling Parties agree that the first sentence of SP 16 should 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.

Austin claims, with support from experts who testified, that the ED will need at least 120 days to review the final irrigation plan. OPIC objects to the change, arguing that it will drain the Commission's resources and that there has been no evidence to justify that additional expense.

The ALJ recommends the change. He cannot see how requiring the Applicant to file a final plan 120 days before proceeding would cost additional state resources. Instead, it would avoid rushing the ED's review. The only burden would be on the Applicants, who would need to wait at least 120 days before irrigating. Because they have agreed to that additional burden, the ALJ sees no reason to not include the 120-days-before provision in SP 16.

**B. SP 17**

The Settling Parties agree that SP 17 should be deleted from the permit, which begins:

Should the permittee develop athletic fields using wastewater, the permittee shall revise the permit, in a major amendment application, to indicate irrigation on public access land and include the athletic fields as part of the area to be irrigated with the effluent. [SP 17 goes on to specify what the major amendment would be required to contain, should it be filed.]

All parties agree that the Draft Permit, if issued, would not authorize the irrigation of any public access land. Austin seeks the deletion of SP 17, arguing that it is unnecessary and gives the false impression that the ED has already reviewed some sort of subsurface irrigation system.

OPIC concedes that nothing in the permit would authorize irrigation of athletic fields or other public access land but claims that it is not necessary to delete SP17. OPIC does not agree that SP 17 implies that a review of subsurface irrigation has already occurred. Moreover, it argues that SP 17 enhances regulatory certainty by outlining exactly what must happen if athletic fields are to be irrigated in the future with wastewater.

The ALJ agrees that SP 17 should be deleted from the final permit. The SP is neither needed nor desirable. Irrigation of public access land, including athletic fields, is not being authorized, so it does not need to be addressed. The ALJ does not agree that SP 17 enhances regulatory certainty or provides clarity. Applicable statutes and the Commission's rules are constantly in flux. Should

the Applicants wish one day to irrigate athletic fields, they will need to follow the laws that are in place at that time. SP 17 could needlessly lead to an argument in the future over whether the then-current laws or SP 17's provisions apply.

**C. SP 18**

The Draft Permit's SP 18 would require the Applicants to submit a wastewater treatment plant emergency plan to address 30 TAC § 309.12, regarding site selection to protect groundwater or surface water. It also directs the Applicants to consider emergency effluent storage and containment structures.

Rather than simply requiring the Applicants to consider emergency storage and containment, the non-unanimous settlement would require specific emergency plan provisions. The Settling Parties ask that the last sentence of SP 18, requiring mere consideration, be replaced with the following language:

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.

OPIC objects to the proposed change to SP 18. Its is concerned that the specific requirements, which will need to be included in the final design of the facility, would limit the ED's

authority when the final design is submitted to the ED for review and approval under the Commission's design criteria rules.<sup>56</sup> OPIC objects to placing limits on the ED's discretion.

The ALJ does not share OPIC's concern. The Applicants would still need to submit a final design that complies with the Commission's rules setting design criteria for sewerage systems.<sup>57</sup> The ED's review is to assure compliance with those rules. OPIC does not even argue that the agreed additional provisions of SP 18 would conflict with those rules. Nor does the ALJ see any obvious conflict with those rule. Instead, the agreed language would seem to impose more protective requirements that would exceed anything required by the rules. The ALJ recommends that the permit, if issued, included SP 18 with the modification to which the Settling Parties have agreed.

#### **D. SP 20**

The Settling Parties proposed that SP 20 be revised to read as follows, if the permit is issued:

Vegetation shall be established and well maintained throughout all months of the year. The permittee shall ~~establish and maintain Common Bermuda grass or other managed cover grasses in the application areas and over-seed with rye grass~~ 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. ~~Common Bermuda grass will be cut to maintain a maximum grass height of 10 inches and a minimum grass height of 4 inches. 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 amended with fill soil to support and maintain vegetation cover throughout the year irrigated in a manner that will prevent surface runoff from the permitted area.

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<sup>56</sup> 30 TAC § 317.1(a)(3)(D) and (E) and (4).

<sup>57</sup> 30 TAC Chapter 317.

The Applicants' rangeland ecology and management consultant, Dr. Bradford P. Wilcox, testified that this approach would provide sufficient uptake for the water and nitrogen from the applied effluent, minimize runoff, and generally result in an environmentally healthier irrigation area.<sup>58</sup> As discussed below in the PFD, the Protestants do not agree that water and nitrogen uptake would be sufficient or that runoff would be controlled, whether SP 20 is revised or not. However, neither the Protestants nor any other party objects to the proposed changes to SP 20, if the permit is issued. The ALJ recommends that any permit issued include SP 20 as proposed by the Settling Parties.

#### **E. SP 21**

Applicants' soil science expert, Lawrence P. Wilding, Ph. D, testified that the soil sampling procedures set out in SP 21 of the Draft Permit are inappropriately lax. SP 21 would require the Applicants to take sample within ranges of depth below the surface and composit them for analysis. Dr. Wilding testified that there are genetic horizons of different soil types below the site that do not correspond to depth below the surface. The soils in each genetic horizon are remarkably different. He testified that sampling and compositing the samples based solely on depth would mix materials from these different horizons and confound the sampling strategy. He recommended that samples instead be separately taken from the first three genetic horizons (A, B, and C) and separately composited for analysis.<sup>59</sup>

To implement Dr. Wilding's recommendation, OPIC proposes to amend the first paragraph of SP21 of the Draft Permit as follows:

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<sup>58</sup> App. Ex. 10, p. 15 *et seq.*

<sup>59</sup> App. Ex. 1, p. 48.

Subsequent to the initiation of land application and annually thereafter, the permittee shall obtain representative soil samples from the ~~root zones of the land application area~~ A horizon and upper B horizon of the same genetic type as far as a total depth of 24 inches. Composite sampling techniques shall be used. Each composite sample shall represent no more than 80 acres with no less than 15 subsamples representing each composite sample. Subsamples shall then be composited by ~~like sampling depth genetic horizon~~ and soil type for analysis and reporting. ~~Soil types are soils that have like topsoil or plow layer textures. These soils shall be sampled individually from 0 to 6 inches, 6 to 18 inches, and 18 to 30 inches below ground level.~~ The permittee shall sample and analyze soils in-between December ~~to and~~ February of each year. Samples shall be taken within the same 45-day time-frame each year.

No party opposes a requirement for sampling by genetic horizon rather than depth intervals. However, Austin recommends sampling all genetic horizons to a depth of 30, rather than 24, inches, which in some locations would include the C horizon of soil. Austin cites testimony by Dr. Wilding, which Austin contends indicates that soil samples are taken to determine if there are adequate plant nutrients within the root zone and if effluent is leaching below the root zone into the groundwater. Austin claims that sampling down to 30 inches would ensure samples came from below the root zone, including the C horizon, if present.

The Applicants do not object to sampling down to 30 inches. Accordingly, the ALJ recommends that the permit, if issued, contain a revised SP 21 to read as follows:

Subsequent to the initiation of land application and annually thereafter, the permittee shall obtain representative soil samples from the ~~root zones of the land application area~~ A, B, and C horizons of the same genetic type as far as a total depth of 30 inches. Composite sampling techniques shall be used. Each composite sample shall represent no more than 80 acres with no less than 15 subsamples representing each composite sample. Subsamples shall then be composited by ~~like sampling depth genetic horizon~~ and soil type for analysis and reporting. ~~Soil types are soils that have like topsoil or plow layer textures. These soils shall be sampled individually from 0 to 6 inches, 6 to 18 inches, and 18 to 30 inches below ground level.~~ The permittee shall sample and analyze soils in-between December ~~to and~~ February of each year. Samples shall be taken within the same 45-day time-frame each year.

**F. SP 22**

The Settling Parties agree that SP 22 of the Draft Permit should be changed as follows:

Effluent shall not be applied on the following areas:

(a) A ~~200~~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.

Only OPIC objects to the revised version of SP 22, and its objection is contingent. OPIC does not quarrel with the substance of the changes and agrees that they likely would reduce the potential for any water contamination. But OPIC is concerned that the changes, which reduce the land available for irrigation, might leave insufficient acreage to apply all of the effluent as proposed. OPIC asks either that SP 22 not be changed or the record be reopened for additional evidence to show that sufficient irrigation acreage will be available.

As discussed below, the ALJ concludes that the evidence shows that there will be sufficient land for the proposed irrigation. Hence he see no need to reopen the record. Because no party objects to the substance of revised SP 22, the ALJ recommends it inclusion in the permit, if issued.

**G. Additional SP Regarding the 100-year Flood Plain**

The Settling Parties also agree that the following SP should be added to the permit:

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, Teas, and Incorporated Areas, Panel 385 of 745, Map No. 48453CO385G, REVISED PRELIMINARY FEB 24, 2006.

No one objects to the inclusion of this additional Special Provision. Moreover, one of the Applicants' engineering consultants, Mr. Wheeler, testified that he had already examined the Federal Emergency Management Agency (FEMA) maps and concluded that the proposed facility lies outside the 100-year flood plain shown on the FEMA map. He further stated that he had already prepared maps to document that conclusion and, though he had not yet done so, was prepared to apply his engineering seal to those maps to confirm his conclusion.<sup>60</sup> There is no evidence to contradict Mr. Wheeler.

The ALJ concludes that the proposed facility site lies outside the 100-year floodplain. He also concludes that this SP proposed by the Settling Parties should be included in the permit, if issued.

**VIII. WOULD THE PROPOSED TREATMENT PLANT AND  
DISPOSAL ADVERSELY AFFECT SURFACE  
WATER OR GROUNDWATER?**

The Protestants argue that 30 TAC §309.13 requires denial of a permit unless the proposed site minimizes the possibility of water contamination. That is not quite correct. Instead, section 309.13 contains a list of specific unsuitable site characteristics. For example, a wastewater treatment

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<sup>60</sup> App. Ex. 4, p. 10 *et seq.*; Tr. 481, *et seq.*

plant unit may not be located in wetlands. There is no evidence that the treatment plant would be located in any of those prohibited locations.

Nevertheless, the Applicants must show that the proposed treatment plant and land disposal will not adversely affect water quality. 30 TAC § 309.3(f) provides that the Commission may authorize land disposal of treated effluent when an applicant demonstrates that the quality of ground or surface waters in the state will not be adversely affected. Similarly, 30 TAC §309.12 provides:

The commission may not issue a permit for a new facility . . . unless it finds that the proposed site, when evaluated in light of the proposed design, construction or operational features, minimizes possible contamination of surface water and groundwater. In making this determination, the commission may consider the following factors:

- (1) active geologic processes;
- (2) groundwater conditions such as groundwater flow rate, groundwater quality, length of flow path to points of discharge and aquifer recharge or discharge conditions;
- (3) soil conditions such as stratigraphic profile and complexity, hydraulic conductivity of strata, and separation distance from the facility to the aquifer and points of discharge to surface water; and
- (4) climatological conditions.

Does 30 TAC § 309.12, which sets a standard of review for a “new facility,” apply to the irrigation area, the treatment plant, or both proposed in this case? For purposes of that rule, “new facility” is defined as: “Any domestic wastewater treatment facility which is not an existing facility.”<sup>61</sup> But what does a “wastewater treatment facility” consist of? The Commission’s rules

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<sup>61</sup> 30 TAC § 309.11(5).

adopted under the Water Code must be interpreted in context.<sup>62</sup> The immediately preceding rule defines “Existing facility” as: “Any facility used for the storage, processing, or disposal of domestic wastewater and which has obtained approval of construction plans and specifications as of March 1, 1990.”<sup>63</sup> Hence, from the context of chapter 309, the ALJ concludes that a new facility, though approved at a later date, would also include storage, processing, or disposal components used to process domestic wastewater. In this case, that would include both the proposed treatment plant and the proposed irrigation area.

**A. Has the Subsurface Geology, and Particularly Faulting, Been Adequately Investigated?**

The Applicants presented extensive evidence concerning the geology below the proposed treatment plant and irrigation field. The Protestants suggest only one gap in the geologic evidence. They claim that the Applicants have not properly investigated faults below the proposed sewerage treatment plant. The Applicants respond that they have adequately investigated the geology and faulting is not a problem below either the proposed irrigation site or treatment plant.

Commission rule 30 TAC §309.12 allows but does not require consideration of active geologic processes to determine if the site will minimize possible water contamination. However, 30 TAC §309.20, regarding land disposal of sewage effluent, goes further and requires an applicant to submit a technical report that focuses on unusual geologic formations, including faults. It provides:

(a) Technical Report. Each project shall be accompanied by a preliminary engineering report outlining the design of the wastewater disposal system. The report shall include maps, diagrams, basis of design, calculations, and other pertinent data as described in this section.

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<sup>62</sup> TEX. GOV'T CODE ANN. (Gov't Code) §§ 311.002(4) and 311.011(a).

<sup>63</sup> 30 TAC § 309.11(4).

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(2) Geology. The existence of any unusual geological formations such as faults or sink holes on the waste disposal site shall be noted in the technical report and identified on the site map. The conceptual design of the waste disposal system shall include appropriate engineering considerations with respect to limitations presented by these features.

The Application does not include a report on unusual geologic features below the irrigation site because there are none. Applicants' geology consultant, Dr. Charles Woodruff, testified that there are no faults or sinkholes and the numerous bedrock fractures do not extend to a significant depth.<sup>64</sup> As to the treatment plant, both 30 TAC § 309.12(a)(2) and the subchapter in which it is contained are entitled: "Land Disposal of Sewage Effluent." For that reason, the ALJ does not interpret the rule as requiring an application to include a report concerning faulting below the pre-disposal treatment plant.

While a report was not submitted with the Application, Dr. Woodruff testified that much of the hillside where the irrigation would occur is a rock unit, generally called the Walnut Formation, which is an aquitard. The upper part of the Upper Glen Rose underlies the lower reaches of the site, but it is an aquifer of low importance and significance. Dr. Woodruff concluded that most of the incident water, basically the treated effluent, will be retained in the near-surface zones of enhanced porosity where it will be available to plants and directly evaporate from unconsolidated materials.<sup>65</sup> Assuming that the non-unanimous settlement provisions are included in the permit, there is no evidence to contradict Dr. Woodruff's geological conclusions concerning the proposed irrigation field.

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<sup>64</sup> App. Ex. 6, p. 12.

<sup>65</sup> App. Ex. 6, p. 14; Tr. 240.

In his prefiled testimony, Dr. Woodruff stated his overall conclusion that “the treatment plant and irrigation activities . . . would not adversely affect any usable groundwater.”<sup>66</sup> At times, he specifically referred to the “irrigation area.”<sup>67</sup> But he also referred to the “treatment facilities” and included both in the proposed site.<sup>68</sup> On cross-examination, however, he clarified that when he referred to the wastewater treatment plant in his pre-filed, he was referring to the irrigation area. He explained that he incidentally reviewed the geology below the treatment plant but never focused on it.<sup>69</sup>

That leads the Protestants to argue that Dr. Woodruff did not review the geologic features below the treatment plant. But the ALJ does not conclude from his lack of focus that Dr. Woodruff’s conclusions have no relevance to the treatment plant site. Dr. Woodruff generally reviewed the geology in the entire region.<sup>70</sup> The irrigation areas lies from 6,000 to 12,000 feet from the treatment plant.<sup>71</sup> Absent evidence of a unique geologic feature below the sewerage plant site, his testimony that the Walnut Formation would act as an aquitard, the upper part of the Upper Glen Rose is an aquifer of low importance and significance, and most of the incident water would be retained in the near-surface zones remains relevant to the treatment plant site.

Is there a unique feature below the plant? The Protestant contend that there is a geologic fault below the plant, but the evidence does not support that. Only an expert geologist could

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<sup>66</sup> App. Ex. 6, p. 12.

<sup>67</sup> App. Ex. 6, p. 6.

<sup>68</sup> App. Ex. 6, p. 4.

<sup>69</sup> Tr. 212, 238 *et seq.*, and 245.

<sup>70</sup> App. Ex. 6, p. 5 *et seq.*

<sup>71</sup> App. Ex. 3, subex. Miertschin Ex. 2, attach. H.

determine if a fault were present. The Protestants did not offer expert testimony to prove that a fault exists below the plant.

LCRA's geology consultant, Dr. Bobby L. Carlisle, testified that there was evidence of a fault west of, not under, the treatment plant.<sup>72</sup> The only other geologist to testify was the Applicants' consultant, Michael R. Thornhill. He reviewed the available literature, including authoritative geological maps, and repeatedly visited the site to perform field investigations.<sup>73</sup> He found no fault below the treatment plant site.<sup>74</sup>

Mr. Thornhill noted that the Bureau of Economic Geology had mapped an inferred fault west of Bee Creek and approximately 500 feet west of the treatment plant.<sup>75</sup> He testified that an inferred fault is one deduced from deeper data when there is no evidence on the surface. Between his direct and rebuttal testimony, Mr. Thornhill again visited the treatment plant site but saw no surface evidence of faulting.<sup>76</sup> He saw no evidence of significantly displaced rock types. Moreover, the fault was inferred to exist at an elevation thirty feet higher than the treatment plant. Mr. Thornhill could see no way that water from the treatment plant could move toward that possible fault at a higher elevation.

The ALJ concludes that the Applicants sufficiently investigated the geology at the proposed irrigation field and treatment plant site. There is no evidence that a fault exists under either site. The

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<sup>72</sup> Tr. 650.

<sup>73</sup> App. Ex. 5, p. 2 *et seq.*; Tr. 610 *et seq.*

<sup>74</sup> Tr. 177 and 628.

<sup>75</sup> Tr. 610 *et seq.*; App. Exs. 14 and 15.

<sup>76</sup> Tr. 619 *et seq.*

ALJ also concludes the geologic features of both sites minimize the possibility of contamination of surface water and groundwater.

**B. In the Absence of a Final Irrigation Plan, Is There Sufficient Evidence to Show That Waters in the State Will Not Be Contaminated?**

The Applicants offered evidence of their preliminary, but not their final, irrigation plan. The Draft Permit requires the submission of a final plan to the ED before any wastewater is applied to the irrigation area.<sup>77</sup> The Protestants claim that a preliminary plan provides insufficient evidence to allow the Commission to reach several legally required conclusions. They argue that the Plan must be final. No other party claims that the irrigation plan must be finalized for the permit to be issued.

The Protestants cite the *BFI v. Martinez* case<sup>78</sup> as holding that an irrigation management plan must be final and more detailed than the general rules it implements and contain enforceable procedures. But that case had nothing to do with irrigation management plans or wastewater permits. Instead, it concerned a site operating plan submitted with a landfill permit application. A former Commission rule,<sup>79</sup> specifically required an applicant for a landfill permit to submit a site operating plan that provided operating procedures for site management and site operating personnel in sufficient detail to enable them to conduct the day-to-day operations of the facility. The Austin Court of Appeals found that the applicant's plan, which merely mimicked the broad language of the rule without stating specific, enforceable procedures to govern the daily operation of the landfill, failed to comply with the requirements of that rule.

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<sup>77</sup> App. Ex. 8, attach. 6, SP 16.

<sup>78</sup> *BFI Waste Systems of North America v. Martinez Environmental Group*, 93 S.W.3d 570 (Texas App.—Austin 2002, rev. denied).

<sup>79</sup> 30 TAC § 330.114 (2002).

There is no similar rule requiring an irrigation management plan for a permit like the one the Applicants seek in the present case. There are not even Commission guidelines for irrigation management plans.<sup>80</sup> Hence the Applicants were under no strict legal obligation to provide an irrigation plan.

There is, however, a related evidentiary issue. In the absence of a final irrigation plan, is there sufficient evidence to show that waters in the state will not be contaminated? The ALJ concludes that the absence of a final plan does not leave an evidentiary gap.

Dr. Miertschin testified that the preliminary irrigation plan was final except the Applicants had not decided whether to use a fixed riser distribution system or a center pivot system.<sup>81</sup> A pivot system would rotate around a center axis. The other would be a fixed head, aerated pipe system that would not move.<sup>82</sup> With the pivot system, there would have to be more clearing of trees and shrubs, since the pivot system would move above the land surface.<sup>83</sup> With a fixed or a buried system, much more of the current tree and shrub cover could be left, but there would be more site disturbance to initially bury the system.<sup>84</sup> A fixed system, though more expensive, would give a greater degree of flexibility and control.<sup>85</sup>

LCRA's soils and agronomy consultant, Dr. Robert Carlisle, testified that either type of irrigation system, though they function differently, could be designed to apply the same amount of

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<sup>80</sup> Tr. 377.

<sup>81</sup> App. Ex. 3, p. 21; Tr. 370.

<sup>82</sup> Tr. 355.

<sup>83</sup> Tr. 362.

<sup>84</sup> Tr. 363.

<sup>85</sup> Tr. 359 *et seq.*

water to an area of land. The outer portion of a pivot system travels much faster than the inner portion. But the outer nozzles are larger and emit a larger amount of water per unit of time than the inner nozzles, which emit a fine spray. Hence, if the system and nozzles are properly designed, the pivot system would apply the same amount of water per area of land.<sup>86</sup> Dr. Miertschin explained that he developed a dosing schedule that was suitable for even the poorest areas without over applying effluent to the higher quality areas.<sup>87</sup>

Dr. Miertschin and Dr. Carlisle agreed that the fixed riser system is a better overall choice, but that is not the point. There is no evidence to contradict their testimony that either type of system could be designed to apply not more than the maximum allowed dosing of effluent per area of land. Given that, the Applicants' lack of a final decision on which system to use has no relevance.

Dr. Miertschin also noted that the type of vegetative cover that would be used, basically either native plants or Coastal Bermuda, was not finalized in the Preliminary Irrigation Plan.<sup>88</sup> As discussed above concerning SP 20, however, the permit would specify the required cover. Moreover, no party objects to the native-plant alternative. Hence, that item will also be finalized, if the permit is issued.

The Protestants correctly note that the Preliminary Plan only addresses the first phase of the irrigation system, up to 180,000 gpd. The plan indicates that subsequent phases of system development may differ based on site conditions and operational data gathered during the first phase.<sup>89</sup> That would give the Applicants' room to make adjustments, but it does not mean that they

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<sup>86</sup> Tr. 671 *et seq.*

<sup>87</sup> Tr. 370 *et seq.*

<sup>88</sup> Tr. 376 and 599.

<sup>89</sup> App. Ex. 1, subex. Wilding Ex. 8, p. 1

would have free rein to change important parameters. Nor do the Applicants' seek a permit without constraints.

Among, the critical constraints that the Applicants' propose and which are included in the Application and the Draft Permit are:

- An annual application rate of a 2.75 acre-feet per acre per year;<sup>90</sup> and
- Daily average effluent concentrations of 10 milligrams per liter (mg/L) five-day biochemical oxygen demand (BOD<sub>5</sub>) and 15 mg/L of total suspended solids (TSS).<sup>91</sup>

There is also expert testimony in the record concerning other expected characteristics of the effluent. For example, Dr. Miertschin very conservatively assumed a total nitrogen concentration of 10 mg/L in the effluent, which is actually substantially higher than the 5.74 to 6.2 mg/L concentrations he measured in effluent at two nearby similar effluent storage ponds.<sup>92</sup> There is no evidence to contradict his estimate.

Whether the irrigation site is capable of processing applied effluent with the qualities that were predicted or would be set by the permit without contaminating surface water or groundwater remains to be considered below. But the fact that the irrigation plan is preliminary does not automatically mean there is a lack of evidence to determine whether the water will be protected.

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<sup>90</sup> App. Ex. 3, subex. Miertschin Ex. 2 (Application), Tab Worksheet 3.0, p. 15 and App. Ex. 8, attach. 6, p. 1.

<sup>91</sup> App. Ex. 3, subex. Miertschin Ex. 2, Attachment F, p. 2; App. Ex. 8, attach. 6., p. 2.

<sup>92</sup> App. Ex. 3, subex. Miertschin Ex. 2, Supplemental tab, p. A2-4, *et seq.*

**C. Is There a Sufficient Amount of Land on Which to Apply Irrigant as Proposed?**

The Application proposes and the Draft Permit would authorize 700,000 gpd of effluent to be applied as irrigant to 285 acres in Phase 3.<sup>93</sup> No party questions that calculation. They also agree that the preliminary irrigation plan identifies 374 acres at the site, and no one disputes that total. The parties also agree that not all of the 327 acres are irrigable.

The Protestants and OPIC argue that the Applicants have not shown that a minimum of 285 acres out of the 374 would actually be available for irrigation. OPIC is less insistent than the Protestants. OPIC thinks that the only uncertainty is due to the agreement among the Applicants, LCRA, and Austin concerning SP 22, which would further limit the area that could be irrigated. OPIC suggests reopening the record for additional evidence that might show that there would still be 285 acres available for irrigation.

The Applicants claim that reopening the record is unnecessary and that the evidence is sufficiently clear to show that at least 285 acres are available for irrigation. The ALJ agrees.

The Protestants note that the Applicants have indicated since 2005 that 285 acres would be irrigated. They question how that same number of acres can still be available when later changes to the proposal have reduced the number of acres that can be irrigated. But that incorrectly assumes that a maximum of 285 acres were available in 2005. Instead, a maximum of 374 acres were available, at least in theory. Of that total, 285 acres are needed for the proposed irrigation.

In a July 21, 2005, letter to the ED, before the agreement with LCRA and Austin, the Applicants' engineering consultant, Dr. Miertschin, indicated that approximately 300 acres were

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<sup>93</sup> App. Ex. 3, subex. Miertschin Ex. 2, Tab Worksheet 3.0, p. 13.

available for irrigation after deducting lands not suitable for irrigation, *i.e.*, those too steeply sloped, in the 100-year floodplain, etc.<sup>94</sup> That would leave at least 15 extra acres.

The non-unanimous settlement requires the Applicants not to irrigate some additional land.<sup>95</sup> As discussed concerning SP 22 above, that includes larger buffer zones around watercourses on the site and a 1.9-acre rock outcropping. Deducting 1.9 acres, would leave 298.1 acres available, 13.1 more than the required 285. The additional area in the agreed water course buffer zones was never specifically quantified in the record.

Yet when he testified on December 12, 2006, Dr. Miertschin, confirmed that 285 acres would be required and more than that number of acres were available.<sup>96</sup> He specifically stated that he had taken into account all of the unsuitable areas, e.g., those that had a slope greater than 12 percent, as well as the areas that the Applicants, Austin, and LCRA had agreed would not be irrigated. Dr. Miertschin explained that he had prepared a map, which is not in evidence, to subtract those areas, recalculated, and confirmed that more than 285 acres would still be available.

There is no evidence contradicting Dr. Miertschin that at least 285 acres will be available. The ALJ found Dr. Miertschin credible in demeanor and responsiveness. Moreover, he had ample expertise to reach his conclusion. OPIC and Protestants do not question his personal credibility or expertise. Instead, OPIC suggests that he may have been confused and the Protestants argue his testimony is insufficient evidence to prove the point.

The Protestants and OPIC question how Dr. Miertschin could have reached his conclusion when the agreement with Austin and LCRA was reached only eight days before he testified.

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<sup>94</sup> App. Ex. 3, subex. Miertschin Ex. 5, letter from Miertschin to McClarron, attach, 2. p. A2-5.

<sup>95</sup> Settlement Agreement, Ex. A, p. 25 (revised Special Provision 22).

<sup>96</sup> Tr. 448 *et seq.* and 474 *et seq.*,

However, Dr. Miertschin was specifically asked about that late agreement and testified that he had accounted for it.<sup>97</sup> The ALJ cannot find that Dr. Miertschin was confused. Nor does the ALJ find it difficult to believe that such a calculation could be made within eight days.

Nor does the ALJ find the evidence on this point is insufficient. It would be better evidence to have a specific calculation in the record, but given Dr. Miertschin's expertise, credibility, assumptions, and stated methodology, his uncontradicted testimony is sufficient to show that at least 285 acres more likely than not will be available for irrigation.

**D. Will Soils and Vegetation at the Irrigation Site Absorb and Process Nutrients in the Wastewater Without Runoff into Surface Waters?**

The Protestants also argue that the Applicants failed to show that the proposed irrigation area can absorb and process the proposed irrigant without nutrient runoff into and contamination of adjacent surface waters. They claim that portions of the site are too steep and there is too little vegetation on the site to ensure that nutrients will be taken up and biologically processed. The Protestants also contend that the Applicants' have not taken non-point source runoff into account. No other party shares these concerns if the provisions of the non-unanimous settlement are incorporated into the permit.

The Applicants do not propose to apply effluent to the portions of the irrigation field with slopes of 12 percent or greater, from which runoff would be expected. Mr. Miertschin indicated this when the ED requested additional information during technical review of the Application.<sup>98</sup> There is no evidence that runoff from less steep slopes would be likely. Protestants' claim that the Applicants will irrigate overly steep slopes is incorrect.

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<sup>97</sup> Tr. 448 *et seq.*

<sup>98</sup> App. Ex. 3, subex. Miertschin Ex. 5, letter from Miertschin to McClarron, July 21, 2005, p. A2-5.

The Applicants' rangeland ecology and management consultant, Dr. Wilcox, is a professor in that field at Texas A&M University. He specializes in understanding the water cycle on range and forest lands. For six years, he has specifically investigated the Edwards Plateau and the Texas Hill Country. He conducted an extensive evaluation of the proposed irrigation site, performing 50 infiltration experiments, opening 19 trenches to assess the soils and their characteristics, and noting vegetation and root distribution.<sup>99</sup>

Dr. Wilcox concluded that soil infiltration rates are quite high in both dry and wet conditions and vary with the amount of herbaceous vegetative cover. He also found that the soils have a high ability to absorb water and could easily absorb the proposed maximum effluent application rates. Given those characteristics, he would expect no runoff, even when soils are wet. He also testified that the native soils would produce vigorous plant growth and that importing soils would be counterproductive.<sup>100</sup>

As discussed above concerning SP 20, Dr. Wilcox recommended maintaining a productive stand of King Ranch Bluestem on the irrigation site, thinning the extensive Cedar trees, and overseeding with a mix of native grasses and forbs. He testified that this approach would provide sufficient uptake for the water and nitrogen from the applied effluent, minimize runoff, and result in an environmentally healthier and regionally more appropriate irrigation area.<sup>101</sup> He estimated that this vegetative cover would uptake 100 pounds of nitrogen per acre per year.<sup>102</sup> That would exceed the amount of nitrogen that would be applied. The Applicants' environmental engineering

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<sup>99</sup> App. Ex. 10, p. 2 *et seq.*

<sup>100</sup> App. Ex. 10, p. 12 *et seq.*

<sup>101</sup> App. Ex. 10, p. 15 *et seq.*

<sup>102</sup> App. Ex. 10, p. 19.

consultant, Dr. Miertschin, prepared a nitrogen balance analysis, showing his calculation that only 63 pounds of nitrogen would be applied per acre per year.<sup>103</sup>

The other major nutrient associated with the effluent is phosphorus. The Applicants' soil consultant, Dr. Larry Wilding, testified that the high carbonate content of the soils would result in quick and strong bonds between the carbonates and phosphorous, immobilizing the phosphorus.<sup>104</sup>

There is no evidence to support the Protestants' theory that the vegetation on site would be inadequate to accept and process the proposed effluent. They called no expert witness on this point and no other witness agreed with their theory.

As to nonpoint source runoff, Dr. Wilcox testified that he did not take it into account because he did not anticipate such runoff. He later clarified that there would be sediment and nutrients from nonpoint sources, but the robust ground cover would reduce that as well. The ALJ concludes that is a totally reasonable conclusion, since the applied nitrogen rate is only 63 percent of the estimated vegetative absorption rate and phosphorus bonding will occur.

The ALJ concludes that the irrigation area will be able to absorb and process contaminants in the treated wastewater that the Applicants propose to dispose there. Thus surface water and groundwater quality will not be adversely affected by that disposal.

**E. Will the Proposed Use of Grinder Pumps Create a Significant Risk of Water Pollution?**

The Applicants propose to install a low head, grinder pump at each residence in the Sweetwater Project. Each grinder pump installation will have a vent and storage capacity that

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<sup>103</sup> App. Ex. 3, subex. Miertschin Ex. 9.

<sup>104</sup> App. Ex. 1, p. 35.

generally corresponds to the size of the housing unit it serves. Once raw sewage in the storage tank reaches a certain level, electricity will activate the pump, which will send the sewage to the exit pipe then to the treatment plant. Use of grinder pumps will eliminate the need for ten lift stations to move the wastewater from the residences to the treatment plant. Grinder pump systems have been used in other subdivisions in this general region of the state, though not in the immediate area.<sup>105</sup>

The Protestants argue that the use of grinder pumps will present a distinct threat to water quality if there is an electricity outage. If sewage continued to come into the pump once the capacity of its associated storage tank was exceeded, the sewage could flow out through the pump's vent. Applicants' witness, Rick Wheeler, admitted that overflow through the vent in the event of a power outage to a grinder pump was a possibility.<sup>106</sup> But when all of his testimony on the subject is considered, that possibility of substantial discharges of wastewater seems minimal.

First, a battery-operated alarm would sound in the event of a power outage, alerting the residents of the home that the grinder pump was not working. Second, the residents would have to ignore the alarm and continue to use the facilities in the home, sending sewage to the pump. Third, the electricity outage and wastewater generation would have to continue until the storage capacity associated with the pump was exceeded. Fourth, the use would have to continue despite the accumulation of sewage on the residents' lot.<sup>107</sup>

It is not impossible for all of those things to happen, but the ALJ concludes that they are unlikely to happen frequently or for significant durations. The ALJ conclude that the proposed use of grinder pumps presents no significant threat of water contamination.

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<sup>105</sup> App. Ex. 4, p. 8 *et seq.*; Tr. 479 *et seq.*, 510 *et seq.* and 517 *et seq.*

<sup>106</sup> Tr. 520.

<sup>107</sup> Tr. 518 *et seq.* and 538 *et seq.*

## F. ALJ's Water Quality Conclusion

The ALJ concludes that the proposed treatment plant and irrigation sites, when evaluated in light of the proposed design, construction and operational features, will minimize the possibility of contamination of surface water and groundwater. He also concludes that the proposed land disposal of treated wastewater will not adversely affect surface water or groundwater in the state.

## IX. USE OF DEPOSITION GIVEN BY ED'S STAFF MEMBER

The Protestants correctly note that Water Code § 5.228(e) provides:

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 the State Office of Administrative Hearings unless the permit applicant fits a category of permit applicant that the commission by rule has designated as eligible to receive assistance. The commission shall adopt rules establishing categories of permit applicants eligible to receive assistance.

This led the Protestants to object when the Applicants offered the depositions of Commission employees Firoj Vahora and Julian Centeno as evidence.<sup>108</sup> The ALJ overruled that objection and the depositions were admitted. In post-hearing brief, the Protestants reurge their objection and ask that the depositions be disregarded, except to complete the administrative record.

The Applicants argue that admission of the depositions of the Staff members was not prohibited and that there is no basis for ignoring that evidence. The ALJ agrees with the Applicants.

In this case, the ED chose not to be a party. Thus, the ED did not call Mr. Vahora or Mr. Centeno as witnesses, take their depositions, or offer their depositions as evidence. Instead the

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<sup>108</sup> App. Exs. 8 and 9.

Applicants took the depositions, with prior notice to and participation by the Protestants' attorney, and offered the depositions as evidence. Water Code § 5.228(e) does not prohibit that.

Provisions of the Water Code must be interpreted in context.<sup>109</sup> Read as a whole, Water Code § 5.228 addresses the participation by the ED as a party in a contested case. It limits his participation to certain cases and limits the scope of his participation within those cases. It also requires the Commission to adopt rules to guide the ED in determining whether to become a party.

Thus, when read in context, Water Code § 5.228(e) restricts only the ED as a party. It does not prohibit another party from calling a Commission employee as a witness, taking such an employee's deposition, or using that deposition as evidence. In fact, the Commission has adopted 30 TAC §80.127(h) to make that point clear. It provides:

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 documents listed in §80.118 of this title (relating to 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.

The Protestants cite that rule and argue that it only allows staff testimony, live or by deposition, to complete the administrative record. It is true that the rule makes it clear that staff testimony to complete the administrative record is not prohibited assistance. But the rule goes further to state that any analysis, etc., that the ED is required to perform, which would include Mr. Vahora or Mr. Centeno's administrative and technical review of Application, is not prohibited assistance when offered as evidence.

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<sup>109</sup> Gov't Code § § 311.011(a).

The ALJ still concludes that there is no legal requirement to disregard the depositions of the two Commission staff members.

## X. TRANSCRIPT COSTS

The Commission's rules provide that the Commission will not assess transcript costs against the ED or the PIC<sup>110</sup> and that it will consider the following relevant factors in allocating reporting and transcription costs among the other parties<sup>111</sup>:

- the party who requested the transcript;
- the financial ability of the party to pay the costs;
- the extent to which the party participated in the hearing;
- the relative benefits to the various parties of having a transcript;
- the budgetary constraints of a state or federal administrative agency participating in the proceeding;
- in rate proceedings, the extent to which the expense of the rate proceeding is included in the utility's allowable expenses; and
- any other factor which is relevant to a just and reasonable assessment of costs.

Subject to an allocation at the conclusion of the case, the ALJ ordered the Applicants to pay for transcripts of the hearing for the ALJ's and the Commission's use and for the Commission's record. No party specifically offered evidence concerning the cost of the transcript or the proper allocation of that cost or addressed the allocation issue in post-hearing briefs.

Several of the allocation factors do not apply. Since the ALJs ordered it, no party requested the transcript. This is not a rate case, and none of the parties who is potentially liable is a state or federal agency.

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<sup>110</sup> 30 TAC § 80.23 (d)(2).

<sup>111</sup> 30 TAC § 80.23 (d)(1).

There is no specific evidence concerning the ability of any party to pay for the transcript. It is, however, reasonable to infer that Lazy Nine, as a municipal utility district, can raise revenue to cover this expense. Sweetwater LP, which owns enough land to build 1,800 residences and 20 to 25 acres of commercial development, also has sufficient resources to pay.

Each party used the transcript to prepare its briefs. The Applicants, which have the burden of proof, cited it the most followed by the Protestants. LCRA's and Austin's briefs were short, mostly advocating for the inclusion of the SP changes and additions agreed to when they settled with the Applicants.

Each party participated in the hearing, but the Protestants participated far more than any other party. The number of pages of the transcript devoted to each party's direct and redirect examination of its own witnesses and cross and recross examination of other parties' witnesses is shown below:

Party	Applicants	Protestants	LCRA	Austin	OPIC
Pages	53	543	22	7	31

This disparity was mostly due to the fact that the Protestants called no expert witnesses and relied almost entirely on their cross-examination to attempt to prove points they hoped to make and to attempt to find gaps in the Applicants' case. As revealed by the discussion of the issues above, the Protestants proved little and found no significant holes.

LCRA's and Austin's participation was defensive. They simply tried to ensure that their settlement with the Applicants was adopted.

The ALJ will not cite specific precedent but notes that in the past the Commission has nearly always allocated most, if not all, transcript costs to applicants, whether they prevailed or not. This seems to stem from the Commission's conclusion that it would be unjust and unreasonable to

discourage individual affected citizens from participating in a contested case hearing by requiring them to pay the full cost of the transcript. It also seems to reflect a conclusion that it is just and reasonable to require an applicant to pay, since it will financially benefit from approval of the permit.

The evidence shows that the Applicants have a solid, well-thought-out proposal that will not harm water quality. The Applicants have born many months of delay and much expense due to the Protestants' request for a hearing at which the Protestants showed very little of substance.

Loosely weighing these factors, the ALJ concludes that LCRA and Austin should not pay any of the cost of the transcript. Instead, the Applicants and the Protestants should each pay one-half of the cost.

## **XI. ALJ'S RECOMMENDATION**

The ALJ concludes that the Applicants have met their burden of proof on all issues. He also finds that issuance of the permit would modestly encourage and promote regional wastewater collection, treatment, and disposal. The ALJ recommends that the Commission adopt the attached proposed order and issue the Draft Permit to the Applicants with the modifications recommended above.

The proposed order includes findings and conclusions that are not discussed above but which were proven by the evidence and not disputed.

**SIGNED April 23, 2007.**

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**WILLIAM G. NEWCHURCH  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER** granting the Application of Lazy Nine Municipal Utility District and Forest City Sweetwater Limited Partnership for Proposed Permit WQ0014629001, TCEQ Docket No. 2006-0688-MWD, SOAH Docket No. 582-06-2596

On \_\_\_\_\_, 2007, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the application of Lazy Nine Municipal Utility District (Lazy Nine) and Forest City Sweetwater Limited Partnership (Sweetwater LP) (collectively Applicants) for a permit to treat and dispose of domestic wastewater, as an irrigant, on a tract of land lying south of State Highway 71 approximately three miles west of the Village of Bee Cave, Travis County, Texas.

William G. Newchurch, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted a preliminary hearing and a contested case hearing on the merits of the Application and prepared a proposal for decision (PFD), which recommended that the Commission approve the Application.

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

## FINDINGS OF FACT

### Parties

1. The following are the parties in this case:

<b>PARTY</b>	<b>REPRESENTATIVE</b>
Applicants	Mike Willatt
Office of Public Interest Counsel (OPIC)	Emily Collins
Lower Colorado River Authority (LCRA)	Vic Ramirez
City of Austin (Austin)	Holly Noelke
Travis Settlement Home Owners Association, Mr. and Mrs. Michael Pfluger, and Stuart and Alanya Berthiaume (collectively Travis Settlement)	Stuart Henry
John Hatchett	self
Hazel A. Sanchez and William H. Cahill	Hazel A. Sanchez

2. Mr. and Mrs. Pfluger, Stuart and Alanya Berthiaume, Mr. Hatchett, Ms. Sanchez, and Mr. Cahill own homes near the proposed facilities.
3. Members of the Travis Settlement Home Owners Association own land near the proposed facilities.
4. Travis Settlement, Mr. Hatchett, Ms. Sanchez and Mr. Cahill (collectively Protestants) were aligned for all purposes but settlement.

5. The Executive Director (ED) of the TCEQ chose not to be a party in this case.
  
6. The ED reviewed the Application, suggested some changes which the Applicants incorporated, and prepared the current version of a draft permit (Draft Permit) to govern the proposed treatment and disposal.
  
7. The ED preliminarily concluded that Draft Permit, if issued, would meet all statutory and regulatory requirements.
  
8. LCRA and Austin have entered into a non-unanimous settlement agreement with the Applicants. The agreement calls for certain changes to the Draft Permit. The Applicants, LCRA, and Austin (collectively Settling Parties) ask the Commission to issue the permit with those changes.

**Procedural History**

9. The following were the most significant events in the case:

<b>DATE</b>	<b>EVENT</b>
June 8, 2005	Application filed
July 29, 2005	Application declared administratively complete by the ED
August 4, 2005	Notice of Application published

August 11, 2005	Notice of Application mailed by the Chief Clerk to interested parties, legislators, LCRA, and others
March 31, 2006	Issuance of initial Draft Permit by ED
April 12, 2006	Revised notice of the application was mailed to interested persons, legislators, <i>etc.</i>
April 23, 2006	Revised notice of the application published
May 15, 2006	Applicants request to directly refer application to the State Office of Administrative Hearings (SOAH) for hearing
June 19, 2006	Chief Clerk refers case to SOAH for hearing
June 20, 2006	Notice of hearing mailed
June 26, 2006	Notice of hearing published
July 25, 2006	Public meeting on Application
August 1, 2006	Issuance of current Draft Permit with changes in response to comments
August 7, 2006	Preliminary hearing
September 22, 2006	Executive Director's Response to Comments
December 8, 2006	Non-unanimous settlement reached among the Applicants, Austin, and LCRA
December 11, 2006	Hearing on the merits begins
December 13, 2006	Hearing on the merits ends
January 29, 2007	Deadline to file written closing arguments
February 20, 2007	Deadline to file written replies to closing arguments
April 23, 2007	Deadline for issuance of the PFD

## **Jurisdiction**

10. Sweetwater LP:
  - a. is a Texas limited partnership;

- b. owns the land where the proposed treatment facility, holding pond, and irrigation system would be located; and
  - c. also owns an adjacent 1,200-acre tract of land where a residential and commercial development, the Sweetwater Project, would be built.
- 11. Lazy Nine's boundaries, as a municipal utility district, include the 1,200 Sweetwater Project tract.
- 12. Sweetwater LLC is the general partner in Sweetwater LP.
- 13. William T. Gunn, III, is:
  - a. the limited partner in Sweetwater LP;
  - b. a member of the management committee of Sweetwater LLC that deals with development issues for the Sweetwater Project and in that role has general authorization to be the managing partner of the project;
  - c. a limited partner in another limited partnership that is developing the Sweetwater Project; and
  - d. the manager of another LLC that is the general partner in the other limited partnership that is developing the Sweetwater Project.
- 14. Lazy Nine would own the treatment plant, and Sweetwater LP owns the land on which the treatment plant and irrigation facilities would be built.
- 15. When the application was originally filed, it named Lazy Nine and "FC Sweetwater Partner LLC" as co-applicants. It also named "Forrest City Sweetwater Limited Partnership" as owner of the land where the treatment plant and effluent disposal site would be located.

16. An application amendment was submitted on July 21, 2005. The amendment:
  - a. indicated that the landowner would now be identified as the co-permittee;
  - b. included an amended application page that named “Forest City Sweetwater, L.P.” as the “co-permittee,” while retaining Lazy Nine as the other co-applicant;
  - c. included an additional application signature page, which was signed by “William T. Gunn,” gave his title as “Partner,” was dated July 20, 2005, and listed only Lazy Nine, which as a municipal utility district (MUD) has no partners, as the applicant.
  
17. Mr. Gunn had authority to sign and file the application of Sweetwater LP because he was an authorized member of the management committee of Sweetwater LLC, which is Sweetwater LP’s general partner.
  
18. For several months after the July 21, 2005, amendment was filed, correspondence was exchanged between the ED and the Applicants’ representatives that referred to “FC Sweetwater Partner L.L.C.” as either the co-permittee or the co-applicant.
  
19. On February 28, 2006, the Applicants’ attorney, Mr. Willatt, filed a response to an early draft permit, indicated that the correct name of the co-permittee was “Forrest City Sweetwater, L.P.,” and asked the ED to make that change throughout the draft permit.
  
20. Thereafter, all correspondence, notices and the current Draft Permit referred to “Forrest City Sweetwater, Limited Partnership” as the co-permittee or co-applicant.

21. Sweetwater LP is the co-applicant and at some point someone simply made a clerical error, which was later corrected.
22. A notice of the application was published in the *Austin American Statesman* on August 4, 2005, and mailed on August 11, 2005, by the Commission's Chief Clerk to interested parties, legislators, LCRA, and others. The notice correctly named Lazy Nine as an applicant, but it incorrectly named "FC Sweetwater Partner, LLC", rather than Sweetwater LP, as the co-applicant.
23. After the ED completed his technical review and prepared a draft permit, another notice of the application and the ED's preliminary decision was mailed on April 12, 2006, to interested persons, legislators, *etc.* and published in the *Austin American Statesman* on April 23, 2006. The notice stated that Lazy Nine and "Forrest City Sweetwater, Limited Partnership" had applied for the permit and gave an address and telephone number where the co-applicants could be reached, through their attorney, Mike Willatt.
24. On June 23, 2006, notice of a public meeting, on July 25, 2006, to receive comments on the draft permit was published in the *Austin American Statesman* and named Lazy Nine and "Forrest City Sweetwater, Limited Partnership" as the co-applicants for the permit.
25. The public meeting was held as indicated in the notice.

26. On June 20, 2006, the Commission's Chief Clerk mailed notice of an August 7, 2006, contested case hearing on the Application to interested parties, legislators, LCRA, and others. The notice correctly named Lazy Nine and Sweetwater LP, as the co-applicants.
27. On June 26, 2006, the *Austin American Statesman* published notice of an August 7, 2006, contested case hearing on the Application. The notice correctly named Lazy Nine and Sweetwater LP, as the co-applicants.
28. The notice of the hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
29. On August 7, 2006, ALJ Newchurch held the preliminary hearing as indicated in the notice, admitted parties, and set a schedule for prehearing activities and the hearing on the merits of the Application.
30. On December 11, 12, and 13, 2006, ALJ Newchurch held the hearing as indicated in prior orders, which were sent to all parties more than ten days earlier, and all parties attended the hearing, through their representatives.

31. Neither the Protestants nor anyone else has been deprived of an opportunity to comment on the application, ask for a contested case hearing, be admitted as a party in the hearing, or prepare for or participate in that hearing.

### **Need, Capacity, and Regionalization**

32. The Applicants plan to treat and dispose of wastewater from the Sweetwater Project.
33. The Sweetwater Project will consist of a 1,800-lot, single family residential subdivision and possibly 20 to 25 acres of commercial development.
34. Development of the Sweetwater Project has proceeded beyond the conceptual stage.
35. The Travis County Commissioners Court has approved preliminary plans for all and final plats for at least a portion of the Sweetwater Project.
36. LCRA has also approved a non-point source pollution control master plan for the Sweetwater Project.
37. Lazy Nine and LCRA have also entered into a wholesale water service contract under which potable water from LCRA's West Travis County Regional Water System will be provided to the Sweetwater Project.

38. A three-mile long water transmission main to deliver that water has been designed and approved and permitted by agencies with jurisdiction and is under construction.
39. Necessary turn lanes from Highway 71 have been designed, approved, and are under construction.
40. Construction plans for the subdivision infrastructure have been prepared.
41. The Applicants seek a permit for a final discharge volume of 700,000 gallons per day (gpd), which they predict they will need by 2012.
42. The Application was filed on June 8, 2005, and it has taken more than two years for the Applicants to obtain a decision on their Application.
43. Commission rule 30 TAC § 305.126(a) requires a wastewater treatment plant permit holder to plan for expansion when a plant reaches 70 percent of its permitted capacity and to obtain construction authorization for the expansion by the time the flow equals 90 percent of capacity.
44. Given the advance planning and authorization requirements, the length of time needed to obtain permit approval if a hearing is requested, and the considerable length of time needed

to construct facilities, obtaining permitted capacity now for a wastewater flow anticipated in 2012 is not unreasonably or speculatively early.

45. In the absence of existing data, a 100 gallons per person per day flow is a generally acceptable parameter to assume for design of a wastewater treatment facility. 30 Texas Administrative Code (TAC) § 317.4(a) (2007).
46. It is reasonable to assume that an average of three people will live in each planned single family residence.
47. It is reasonable to assume a 300-gpd per single family residence daily average flow.
48. In the Application, the Applicants estimated that they would receive wastewater flowing from a total of 2,250 connections.
49. Assuming 300 gpd per residence, a total average daily flow of 540,000 gpd from 1,800 residences is a reasonable estimate.
50. The 1,800 residential connections projected for the Sweetwater Project do not include any connections in the commercial development planned on 20 to 25 acres.

51. That area could potentially be developed for local retail and services, but the commercial development plans are uncertain.
52. It is reasonable to expect some commercial development generating wastewater would occur on land adjacent to an 1,800 residential development and along a major highway.
53. Lazy Nine will need at least 540,000 gpd of domestic wastewater treatment capacity over the next few years to serve customers within its service area.
54. The TCEQ application form asks for information concerning other systems within three miles of a proposed wastewater treatment facility.
55. The Applicants contacted each of the four permitted entities within a three-mile radius to determine if they could serve the Lazy Nine service area. None indicated that it could.
56. Lakeway MUD declined to provide service. It stated that it had no desire or interest in providing either retail or wholesale service to Lazy Nine and that it supported Lazy Nine's application.
57. Lakeway MUD and Lazy Nine were relatively proximate to one another, but the topographic conditions and construction constraints would be prohibitively difficult and expensive to

overcome. Lakeway MUD would need to significantly expand its facilities to provide the service.

58. Hurst Creek MUD also declined to provide services. The topographic conditions and construction constraints would be prohibitively difficult and expensive to overcome, and Hurst Creek MUD would need to significantly expand its facilities if it were to serve Lazy Nine.
59. LCRA has declined to serve Lazy Nine, is a party to this case, does not argue that it could take the flow from Lazy Nine, and supports the issuance of a permit, assuming it conforms with the non-unanimous settlement.
60. LCRA stated that its only facility in the area was its Lake Point Plant.
61. In May 2005, the Lake Point Plant had a capacity of 575,000 gpd but LCRA was seeking an amendment to increase the capacity to one million gpd.
62. In May 2005, the daily flow to the Lake Creek Plant was 200,000.
63. Travis County Water Control & Improvement District 17 (WCID 17) also looked into the possibility of providing service to Lazy Nine, since it was in proximity. However, it

concluded that it did not have capacity without significantly expanding its systems, which it did not believe was feasible.

64. Barton Creek West Water Supply Corporation (Barton Creek West) has a treatment plant that is at least 4.5 miles east of the nearest point in Lazy Nine's service area, well outside the three-mile radius for which the application form seeks information. Moreover, the roads in between wind extensively, and there are numerous changes in contour.
65. Barton Creek West's facility could not reasonably treat wastewater from Lazy Nine's service area.
66. There is no evidence that anyone other than those who have declined to serve Lazy Nine's service area has proposed a wastewater treatment facility within a three-mile radius of that area.
67. There is a lack of undedicated wastewater treatment capacity in the immediate region where the Applicants' propose to build a facility if the permit is issued.
68. If the permit is issued as requested, the Applicants will have 700,000 gpd of wastewater treatment and disposal capacity when the final phase of their facility is built. Their plant would have 70 percent of the capacity of the largest system proposed in the immediate area, LCRA's one million gpd system.

69. The Applicants are not proposing a tiny wastewater treatment plant, lacking economies of scale and the prospect of a sufficient cash flow needed for sophisticated management, which the state clearly seeks to discourage.
70. If the residential development planned as part of the Sweetwater Project is built, 540,000 gpd of capacity will be needed to serve those residential connections. That would leave 160,000 gpd of excess capacity.
71. That excess capacity could serve the possible, but uncertain, commercial development at the Sweetwater Project or other needs along the Highway 71 corridor.
72. Approving the full 700,000 gpd capacity that the Applicants' seek would modestly help to prevent the proliferation of tiny, prone-to-fail wastewater treatment plants.
73. Issuing the permit to Lazy Nine as requested would modestly encourage and promote regional wastewater collection, treatment, and disposal.

#### **Changes to Special Provisions in the Draft Permit**

74. In their settlement agreement, the Settling Parties call for certain changes to Special Provisions (SPs) that the ED included in the Draft Permit. During the hearing, other changes to SPs were also proposed.

75. The first sentence of SP 16 should 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.

76. SP 17 should be deleted from the permit. This SP is neither needed nor desirable. Irrigation of public access land, including athletic fields, is not being authorized, so it does not need to be addressed.

77. The last sentence of SP 18 should be replaced with the following language:

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.

78. SP 20 should be revised to read as follows:

Vegetation shall be established and well maintained throughout all months of the year. The permittee shall ~~establish and maintain Common Bermuda grass or other managed cover grasses in the application areas and over-seed with rye grass~~ 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. ~~Common Bermuda grass will be cut to maintain a maximum grass height of 10 inches and a minimum grass height of 4 inches. 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 amended with fill soil to support and maintain vegetation cover throughout the year irrigated in a manner that will prevent surface runoff from the permitted area.

79. SP 21 should be revised to read as follows:

Subsequent to the initiation of land application and annually thereafter, the permittee shall obtain representative soil samples from the ~~root zones of the land application area~~ A, B, and C horizons of the same genetic type as far as a total depth of 30 inches. Composite sampling techniques shall be used. Each composite sample shall represent no more than 80 acres with no less than 15 subsamples representing each composite sample. Subsamples shall then be composited by ~~like sampling depth genetic horizon~~ and soil type for analysis and reporting. ~~Soil types are soils that have like topsoil or plow layer textures. These soils shall be sampled individually from 0 to 6 inches, 6 to 18 inches, and 18 to 30 inches below ground level. The permittee shall sample and analyze soils in-between December to and February of each year. Samples shall be taken within the same 45-day time-frame each year.~~

80. SP 22 of the Draft Permit should be changed as follows:

Effluent shall not be applied on the following areas:

(a) A ~~200~~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.

81. The following SP should be added to the permit:

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, Teas, and Incorporated Areas, Panel 385 of 745, Map No. 48453CO385G, REVISED PRELIMINARY FEB 24, 2006.

**No Effect On Surface Water and Groundwater?**

82. The proposed facility site lies outside the 100-year floodplain.
83. The treatment plant would not be located in any of the locations with unsuitable site characteristics listed in 30 TAC § 309.13.
84. There are no unusual geologic features below the proposed irrigation site. There are no faults or sinkholes and the numerous bedrock fractures do not extend to a significant depth.
85. Much of the hillside where the irrigation would occur is a rock unit, generally called the Walnut Formation, which is an aquitard.

86. The upper part of the Upper Glen Rose underlies the lower reaches of the site, but it is an aquifer of low importance and significance.
87. Most of the incident water, basically the treated effluent, will be retained in the near-surface zones of enhanced porosity where it will be available to plants and directly evaporate from unconsolidated materials.
88. The Applicants sufficiently investigated the geology at the proposed irrigation field and treatment plant site.
89. There is no fault below the treatment plant site.
90. An inferred fault is one deduced from deeper data when there is no evidence on the surface.
91. The Bureau of Economic Geology has mapped an inferred fault west of Bee Creek and approximately 500 feet west of the treatment plant.
92. The fault is inferred to exist at an elevation thirty feet higher than the proposed treatment plant.
93. Water from the treatment plant could not move toward that inferred fault at a higher elevation.

94. The geologic features of both the treatment plant and irrigation sites minimize the possibility of contamination of surface water and groundwater.
95. The Draft Permit requires the submission of a final plan to the ED before any wastewater is applied to the irrigation area.
96. The Applicants have prepared a preliminary, but not a final, irrigation plan.
97. The preliminary irrigation plan is final except the Applicants have not decided whether to use a fixed riser distribution system or a center pivot system and the Applicants propose a vegetative cover different from that which the ED included in SP 20.
98. A pivot system would rotate around a center axis, but a fixed riser system would not move.
99. Using a pivot system would require more clearing of trees and shrubs, since the pivot system would move above the land surface.
100. A fixed system would be buried, and much more of the current tree and shrub cover could be left; but there would be more site disturbance to initially bury the system.
101. A fixed system, though more expensive, would give a greater degree of flexibility and control.

102. Either type of irrigation system, though they function differently, could be designed to apply the same amount of water to an area of land.
103. The outer portion of a pivot system travels much faster than the inner portion. But the outer nozzles are larger and emit a larger amount of water per unit of time than the inner nozzles, which emit a fine spray.
104. Hence, if the system and nozzles are properly designed, the pivot system would apply the same amount of water per area of land.
105. The Applicants have developed a dosing schedule that is suitable for even the poorest areas without over applying effluent to the higher quality areas.
106. Because either type of system can be designed to apply not more than the maximum allowed dosing of effluent per area of land, the Applicants' lack of a final decision on which irrigation system to use has no relevance.
107. The type of vegetative cover that would be used is not finalized in the Preliminary Irrigation Plan, but SP 20 would specify the required cover.

108. The Preliminary Plan only addresses the first phase of the irrigation system, up to 180,000 gpd, and indicates that subsequent phases of system development may differ based on site conditions and operational data gathered during the first phase.
109. While the Applicants would have room to make adjustments to their irrigation after the first phase, they would not have free rein to change important parameters.
110. Among, the critical constraints that the Applicants propose and which are included in the Application and the Draft Permit are:
  - a. An annual application rate of a 2.75 acre-feet per acre per year; and
  - b. Daily average effluent concentrations of 10 milligrams per liter (mg/L) of five-day biochemical oxygen demand (BOD<sub>5</sub>) and 15 mg/L of total suspended solids (TSS).
111. The dosing schedule and water balance very conservatively assume a total nitrogen concentration of 10 mg/L in the effluent, which is actually substantially higher than the 5.74 to 6.2 mg/L concentrations measured in effluent at two nearby similar effluent storage ponds.
112. The Application proposes and the Draft Permit would authorize 700,000 gpd of effluent to be applied as irrigant to 285 acres in Phase 3.
113. The preliminary irrigation plan identifies 374 acres at the irrigation site, but not all of the 374 acres are irrigable.

114. Approximately 300 acres are available for irrigation after deducting lands not suitable for irrigation, *i.e.* those too steeply sloped, in the 100-year floodplain, *etc.*
115. SP 22 would further restrict the acres available for irrigation by requiring larger buffer zones around watercourses on the site and not allowing irrigation on a 1.9-acre rock outcropping.
116. Even with those deductions, at least 285 acres would be available for irrigation.
117. The Applicant does not propose to apply effluent to the portions of the irrigation field with slopes of 12 percent or greater, from which runoff would be expected.
118. At the irrigation site, soil infiltration rates are quite high in both dry and wet conditions and vary with the amount of herbaceous vegetative cover.
119. The soils have a high ability to absorb water and could easily absorb the proposed maximum effluent application rates.
120. No runoff is reasonably anticipated, even when soils are wet.
121. The native soils would produce vigorous plant growth and importing soils would be counterproductive.

122. Maintaining a productive stand of King Ranch Bluestem on the irrigation site, thinning the extensive Cedar trees, and overseeding with a mix of native grasses and forbs, in accordance with SP 20, will provide sufficient uptake for the water and nitrogen from the applied effluent, minimize runoff, and result in an environmentally healthy and regionally appropriate irrigation area.
123. This vegetative cover would uptake 100 pounds of nitrogen per acre per year, which would exceed the 63 pounds of nitrogen that would be applied per acre per year.
124. The other major nutrient associated with the effluent is phosphorus.
125. The high carbonate content of the soils would result in quick and strong bonds between the carbonates and phosphorous, immobilizing the phosphorus.
126. There will be sediment and nutrients from nonpoint sources, but the robust ground cover will reduce that as well, especially since the applied nitrogen rate will only be 63 percent of the estimated vegetative absorption rate and phosphorus bonding will occur.
127. The irrigation area will be able to absorb and process contaminants in the treated wastewater that the Applicants propose to dispose there.

128. Surface water and groundwater quality will not be adversely affected by the proposed disposal.
129. The Applicants propose to install a low head, grinder pump at each residence in the Sweetwater Project.
130. Each grinder pump installation will have a vent and storage capacity that generally corresponds to the size of the housing unit it serves.
131. Once raw sewage in the storage tank reached a certain level, electricity will activate the pump, which will send the sewage to the exit pipe then to the treatment plant.
132. Use of grinder pumps will eliminate the need for ten lift stations to move the wastewater from the residences to the treatment plant.
133. Grinder pump systems have been used in other subdivisions in this general region of the state, though not in the immediate area.
134. A battery-operated alarm would sound in the event of a power outage, alerting the residents of the home that the grinder pump was not working.

135. In the event of a power outage, a significant amount of sewage could flow out through the pump's vent only if:
- a. The residents ignored the alarm and continued to use the facilities in the home, sending sewage to the pump;
  - b. The electricity outage and wastewater generation continued until the storage capacity associated with the pump was exceeded; and
  - c. The use continued despite the accumulation of sewage on the residents' lot.
136. It is not impossible for all of those things to happen, but their happening together for a significant duration is unlikely.
137. The proposed use of grinder pumps presents no significant threat of water contamination.

**Use of Deposition Given by ED's Staff Member**

138. The Applicants offered the depositions of Commission employees Firoj Vahora and Julian Centeno as evidence.
139. The depositions were admitted.
140. In this case, the ED chose not to be a party. Thus, the ED did not call Mr. Vahora or Mr. Centeno as witnesses, take their depositions, or offer their depositions as evidence.

141. Instead the Applicants took the depositions, with prior notice to and participation by the Protestants' attorney, and offered the depositions as evidence.

### **Transcript Costs**

142. Subject to an allocation at the conclusion of the case, the ALJs ordered the Applicants to pay for transcripts of the hearing for the ALJ's and the Commission's use and for the Commission's record.

143. Since the ALJs ordered it, no party requested the transcript.

144. This is not a rate case, and none of the parties who is potentially liable is a state or federal agency.

145. Lazy Nine, as a municipal utility district, can raise revenue to pay for the transcript.

146. Sweetwater LP, which own enough land to build 1,800 residences and 20 to 25 acres of commercial development, has sufficient resources to pay for the transcript.

147. Each party used the transcript to prepare their briefs.

148. The Applicants, which have the burden of proof, cited the transcript the most, followed by the Protestants.
149. LCRA and Austin’s briefs were short, mostly advocating for the inclusion of the SP changes and additions agreed to when they settled with the Applicants.
150. Each party participated in the hearing, but Protestants participated far more in the live portion of the hearing than any other party. Testimony was prefiled. The number of page of the transcript devoted to each party’s direct and redirect examination of its own witnesses and cross and recross examination of other parties’ witnesses is shown below:

Party	Applicants	Protestants	LCRA	Austin	OPIC
Pages	53	543	22	7	31

151. This disparity was mostly due to the fact that the Protestants called no expert witnesses and relied almost entirely on their cross-examination to prove points that they hoped to make and to attempt to find gaps in the Applicants’ case. The Protestants proved little and found no evidentiary gaps.
152. LCRA’s and Austin’s participation was defensive. They simply tried to ensure that their settlement with the Applicants was adopted.

153. The Protestants had no case of substance. They simply tried to find evidentiary gaps that the Applicants had left or mistakes that they made.
154. The Applicants presented a solid, well thought out proposal that will not harm water quality.
155. The Applicants have born many months of delay and much expense due to the Protestants' request for a hearing at which the Protestants offered no case of substance.

### **CONCLUSIONS OF LAW**

1. The Commission has jurisdiction to issue permits for the discharge of waste into or adjacent to water in the state. TEX. WATER CODE ANN. (Water Code) § 26.027(a) (West 2006).
2. SOAH has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T. CODE ANN. (Gov't Code) § 2003.047 (West 2007).
3. A person desiring to obtain a permit must submit an application to the Commission containing all information reasonably required by the Commission. Water Code § 26.027(b).
4. For a partnership, a permit application must be signed by a general partner. 30 TAC § 305.44(a)(2) (2007).

5. For a corporation, any person who performs policy or decision-making functions for the corporation may sign an application for the corporation, including when that corporation is a general partner of the applicant. 30 TAC § 305.44(a)(1).
6. Based on the above Findings of Fact and Conclusions of Law, Mr. William T. Gunn, III, is a person who performs policy or decision-making functions for Sweetwater LLC, and, as such, he was authorized to sign the Application for Sweetwater LLC as the general partner of Sweetwater LP.
7. Based on the above Findings of Fact and Conclusions of Law, Sweetwater LP is a co-applicant with Lazy Nine.
8. With exceptions not applicable to this case, Water Code § 26.028(a) requires notice of an application for a permit to be given to the persons who in the judgment of the commission may be affected by the application.
9. Not later than 30 days after the ED declares an application administratively complete, 30 TAC §39.418(b) requires the applicant to publish notice of the filing of the application and intent to obtain a permit and the Commission's Chief Clerk to mail that notice to certain persons and entities.

10. Among other things, the text of the notice must include the name, address, and telephone number of the applicant and a description of the manner in which a person may contact the applicant for further information. 30 TAC §39.411.
11. No statute or rule requires denial of an application if the initial notices of the application were not given within 30 days of the declaration of administrative completeness. Instead, the appropriate course of action is to issue a corrected notice of the application and proceed with its review.
12. Based on the above Findings of Fact and Conclusions of Law, the notices of the filing of the Application were given in substantial compliance with the legal requirements and any deviation from those requirements harmed no one.
13. After technical review is complete and the ED files the draft permit with the Chief Clerk, the Chief Clerk must mail notice of the preliminary decision and the applicant must publish notice of application and the preliminary decision. 30 TAC § 39.419.
14. Based on the above Findings of Fact and Conclusions of Law, notice of the application and the ED's preliminary decision was given as required.

15. Because the Applicants requested direct referral to SOAH for a contested case hearing, as allowed by Water Code § 5.557, no public notice of the opportunity to request a hearing was necessary or given.
16. Based on the above Findings of Fact and Conclusions of Law, notice of the public meeting was provided as required by 30 TAC § 55.210(c)(3).
17. Based on the above Findings of Fact and Conclusions of Law, all public notices were given in substantial compliance with the requirements of 30 TAC § 39.551 and any deviation was harmless.
18. Based on the above Findings of Fact and Conclusions of Law, notice of the contested case hearing was given as required by Water Code § 26.022 and Gov't Code §§ 2001.051 and 2001.052.
19. Based on the above Findings of Fact and Conclusions of Law, the Commission has jurisdiction to consider and, if warranted, approve the Application.
20. Commission rule 30 TAC §309.20 requires an applicant to submit a technical report that focuses on unusual geologic formations, including faults, where the applicant proposes to land dispose sewage effluent.

21. Based on the above Findings of Fact and Conclusions of Law, no technical report was required because there are no unusual geologic formations, including faults, below the proposed land disposal area.
22. No rule requires an irrigation management plan for a permit like the one the Applicants seek in this case.
23. Commission rule 30 TAC § 309.20(b) sets out standards for irrigation disposal systems that utilize effluent to supply the growth needs of a cover crop.
24. Based on the above Findings of Fact and Conclusions of Law, the Application, with the modification to the SPs discussed in the Findings of Fact, will comply with the requirements of 30 TAC § 309.20(b).
25. The Commission may not issue a permit for a new domestic wastewater treatment facility unless it finds that the proposed site, when evaluated in light of the proposed design, construction or operational features, minimizes possible contamination of surface water and groundwater. 30 TAC §309.12.
26. Based on the above Findings of Fact and Conclusions of Law, the proposed treatment plant and irrigation sites, when evaluated in light of the proposed design, construction and

operational features, will minimize the possibility of contamination of surface water and groundwater.

27. The Applicants must show that the proposed land disposal will not adversely affect water quality. 30 TAC §§ 309.3(f).
28. Based on the above Findings of Fact and Conclusions of Law, the proposed land disposal of treated wastewater will not adversely affect surface water or groundwater in the state.
29. Provisions of the Water Code must be interpreted in context. Gov't Code § § 311.011(a).
30. Read as a whole, Water Code § 5.228 addresses the participation by the ED as a party in a contested case. It limits his participation to certain cases and limits the scope of his participation within those cases. It also requires the Commission to adopt rules to guide the ED in determining whether to become a party.
31. When read in context, Water Code § 5.228(e) restricts only the ED as a party. It does not prohibit another party from calling a Commission employee as a witness, taking such an employee's deposition, or using that deposition as evidence. Moreover, the Commission has adopted 30 TAC §80.127(h) to make that point clear.

32. Based on the above Findings of Fact and Conclusions of Law, Water Code § 5.228(e) does not prohibit the admission into evidence of the depositions of Staff employees Firoj Vahora or Julian D. Centeno, Jr., and the Protestants objections to their admission should be overruled.
33. The Commission will not assess transcript costs against the ED or the PIC. 30 TAC § 80.23 (d)(2).
34. Under 30 TAC § 80.23 (d)(1), the Commission will consider the following relevant factors in allocating reporting and transcription costs among the other parties:
  - a. the party who requested the transcript;
  - b. the financial ability of the party to pay the costs;
  - c. the extent to which the party participated in the hearing;
  - d. the relative benefits to the various parties of having a transcript;
  - e. the budgetary constraints of a state or federal administrative agency participating in the proceeding;
  - f. in rate proceedings, the extent to which the expense of the rate proceeding is included in the utility's allowable expenses; and
  - g. any other factor which is relevant to a just and reasonable assessment of costs.
35. It would be unjust and unreasonable to discourage individual affected citizens from participating in a contested case hearing by requiring them to pay the full cost of the transcript.
36. It is just and reasonable to require an applicant to pay much of the cost of the transcript, since the applicant will financially benefit from approval of the permit.

37. Based on the above Findings of Fact and Conclusions of Law, LCRA and Austin should not pay any of the cost of the transcript. Instead, the Applicants and the Protestants should each pay one-half of the cost.
38. Based on the above Findings of Fact and Conclusions of Law, the Applicants have met their burden of proof on all issues.
39. The state's policy is to encourage and promote regional wastewater facilities. Water Code § 26.003.
40. Based on the above Findings of Fact and Conclusions of Law, issuance of the permit would modestly encourage and promote regional wastewater collection, treatment, and disposal.
41. Based on the above Findings of Fact and Conclusions of Law, the Application should be approved.
42. The attached Draft Permit with the changes and additions to the SPs set out in the Findings of Fact will comply with all applicable law and should be issued.

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

1. The Application of Lazy Nine Municipal Utility District and Forest City Sweetwater Limited Partnership for Proposed Permit WQ0014629001 is granted as set out in the attached Draft Permit with the changes and additions to the Special Provisions set out in the Findings of Fact, which include the attached Exhibit B.
2. The Executive Director of the Texas Commission on Environmental Quality shall issue a permit to Lazy Nine and Forest City Sweetwater Limited Partnership that conforms with this Order.
3. The Chief Clerk of the Texas Commission on Environmental Quality shall forward a copy of this Order to all parties.
4. If any provisions, sentence, clause or phrase of this Order is for any reason held to be invalid, the invalidity of any portion shall not affect the validity of the remaining portions of the Order.

5. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and other requests for general or specific relief, if not expressly granted herein, are hereby denied for want of merit.

**ISSUED:**

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

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**Kathleen Hartnett White, Chairman**