

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

January 15, 2009

CHIEF CLERKS OFFICE

2009 JAN 15 PM 3:24

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

Les Trobman, General Counsel  
Texas Commission on Environmental Quality  
PO Box 13087  
Austin Texas 78711-3087

Re: SOAH Docket No. 582-08-0203; TCEQ Docket No. 2006-1572-MWD; In Re:  
Application by Marlin Atlantis White, Ltd., for New TPDES Permit  
No. WQ0014570001

Dear Mr. Trobman:

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 February 4, 2009. Any replies to exceptions or briefs must be filed in the same manner no later than February 17, 2009.

This matter has been designated **TCEQ Docket No. 2006-1572-MWD; SOAH Docket No. 582-08-0203**. 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, appearing to read "Craig R. Bennett".

Craig R. Bennett

Administrative Law Judge

CRB/lr  
Enclosures  
xc: 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**

**AUSTIN OFFICE**

**300 West 15th Street Suite 502**

**Austin, Texas 78701**

**Phone: (512) 475-4993**

**Fax: (512) 475-4994**

**SERVICE LIST**

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

**STYLE/CASE:** MARLIN ATLANTIS WHITE LTD

**SOAH DOCKET NUMBER:** 582-08-0203

**REFERRING AGENCY CASE:** 2006-1572-MWD

---

**STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

**ADMINISTRATIVE LAW JUDGE  
ALJ CRAIG R. BENNETT**

---

**REPRESENTATIVE / ADDRESS**

**PARTIES**

SCOTT HUMPHREY  
ATTORNEY  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
OFFICE OF PUBLIC INTEREST COUNSEL  
P. O. BOX 13087, MC-103  
AUSTIN, X 78711-3087  
(512) 239-0574 (PH)  
(512) 239-6377 (FAX)  
shumphre@tceq.state.tx.us

TCEQ PUBLIC INTEREST COUNSEL

---

MARK ZEPPA  
ATTORNEY  
LAW OFFICE OF MARK H. ZEPPA, P.C.  
4833 SPICEWOOD SPRINGS RD., SUITE 202  
AUSTIN, TX 78759-8436  
(512) 346-4011 (PH)  
(512) 346-6847 (FAX)

CITY OF DICKINSON

---

TCEQ CHIEF CLERK  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
MC-173 P.O. BOX 13087  
AUSTIN, TX 78711-3087

(512) 239-3311 (FAX)

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

---

LES TROBMAN  
GENERAL COUNSEL  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
MC-101 P.O. BOX 13087  
AUSTIN, TX 78711-3087

(512) 239-5533 (FAX)

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

---

ARTHUR VAL PERKINS  
COATS, ROSE, YALE, RYMAN & LEE, P.C.  
3 EAST GREENWAY PLAZA, SUITE 2000  
HOUSTON, TX 77046  
(713) 651-0111 (PH)  
(713) 651-0220 (FAX)

MARLIN ATLANTIS WHITE, LTD.

---

ANGELA STEPHERSON  
COATS, ROSE, YALE, RYMAN & LEE, P.C.  
3 EAST GREENWAY PLAZA, SUITE 2000  
HOUSTON, TX 77046  
(972) 982-8455 (PH)  
(972) 982-8451 (FAX)

MARLIN ATLANTIS WHITE, LTD.

---

RICHARD R. MORRISON, IV  
LAW OFFICES OF RICHARD R. MORRISON, IV  
19901 SOUTHWEST FREEWAY  
SUGAR LAND, TX 77479  
(281) 207-1254 (PH)  
(281) 207-5401 (FAX)

BETTY GUTIERREZ

DAN WRIGHT

JAN CULBERTSON

LOUIS DECKER

TROPICAL GARDENS GROUP

B. C. SCHROEDER, JR., TRUST

PEGGY WRIGHT

---

D.A. CHRIS EKOH  
STAFF ATTORNEY  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
ENVIRONMENTAL LAW DIVISION, MC 173  
PO BOX 13087  
AUSTIN, TX 78711  
(512) 239-5487 (PH)  
(512) 239-0606 (FAX)  
dekoh@tceq.state.tx.us

TCEQ EXECUTIVE DIRECTOR

---

LAMOIN SCOTT  
DISTRICT DIRECTOR  
OFFICE OF MIKE JACKSON  
201 ENTERPRISE, SUITE 600-A  
LEAGUE CITY, TX 77573  
(281) 334-0011 (PH)  
(281) 334-3043 (FAX)

OFFICE OF MIKE JACKSON

(COURTESY COPY)

---

TERI GOODMAN  
DISTRICT DIRECTOR  
OFFICE OF LARRY TAYLOR  
174 CALDER ROAD, SUITE 116  
LEAGUE CITY, TX 77573  
(281) 338-0924 (PH)  
(281) 554-9240 (FAX)

(COURTESY COPY)

OFFICE OF LARRY TAYLOR

---

NAVELLA A. COLE  
CASEWORKER SPECIALIST  
OFFICE OF RON PAUL  
601 25TH STREET, SUITE 216  
GALVESTON, TX 77550  
(409) 766-7013 (PH)  
(409) 765-7036 (FAX)

OFFICE OF RON PAUL

(COURTESY COPY)

---

STEPHEN D. HOLMES  
GALVESTON COUNTY COMMISSIONER - PRECINCT  
THREE  
2516 TEXAS AVENUE  
TEXAS CITY, TX 77590  
(409) 770-5806 (PH)  
(409) 949-9144 (FAX)

GALVESTON COUNTY COMMISSIONER - PRECINCT  
THREE

(COURTESY COPY)

---

BOB STOKES  
GALVESTON BAY FOUNDATION  
17330 HIGHWAY 3  
WEBSTER, TX 77598-4133  
(281) 332-3381 (PH)  
(281) 332-3153 (FAX)

GALVESTON BAY FOUNDATION

---

SOAH DOCKET NO. 582-08-0203  
TCEQ DOCKET NO. 2006-1572-MWD

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

APPLICATION BY MARLIN  
ATLANTIS WHITE, LTD.,  
FOR NEW TPDES PERMIT  
NO. WQ0014570001

§  
§  
§  
§  
§

BEFORE THE STATE OFFICE

2009 JAN 15 PM 3:24

OF

CHIEF CLERKS OFFICE

ADMINISTRATIVE HEARINGS

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	PROCEDURAL HISTORY, NOTICE, AND JURISDICTION .....	2
III.	THE COMMISSION'S REFERRED ISSUES.....	3
IV.	DISCUSSION.....	4
A.	Summary.....	4
B.	Applicable Standards and the ED's Technical Review .....	5
C.	Is Gum Bayou Tidally Influenced at the Point of Discharge? .....	7
D.	Is the Data Provided by the Applicant and Used by the ED for Modeling Accurate? .....	7
E.	Did the Information Provided in the Application Cause the ED to Perform an Improper Evaluation? .....	12
F.	Will Dissolved Oxygen in the Impaired Region be Impacted? .....	13
G.	Is the Proposed Permit Protective of Aquatic Life and the Requesters' Health? .....	15
H.	Will the Permitted Discharge Negatively Impact the Waterbody? .....	19
I.	Will Fish and Wildlife be Negatively Impacted by the Facility? .....	19
J.	Were Applicant's Queries into Potential Service from Wastewater Plants Contained Within the Required Three-mile Survey Adequate? .....	20
K.	Applicant's Reliance on Data and Testimony Presented by the ED .....	25
L.	Assessment of Transcript Costs .....	26
V.	CONCLUSION .....	29

**SOAH DOCKET NO. 582-08-0203**  
**TCEQ DOCKET NO. 2006-1572-MWD**

2009 JAN 15 PM 3: 25

**APPLICATION BY MARLIN  
ATLANTIS WHITE, LTD.,  
FOR NEW TPDES PERMIT  
NO. WQ0014570001**

§  
§  
§  
§  
§

**BEFORE THE STATE OFFICE**  
**OF**  
**ADMINISTRATIVE HEARINGS**  
CHIEF CLERKS OFFICE

**PROPOSAL FOR DECISION**

**I. INTRODUCTION**

Marlin Atlantis White, Ltd. (Applicant) has applied to the Texas Commission on Environmental Quality (TCEQ or Commission) for a new Texas Pollutant Discharge Elimination System (TPDES) permit authorizing the discharge of treated domestic wastewater at a daily average flow not to exceed 0.125 million gallons per day (MGD) in the first phase, 0.250 MGD in the second phase, and 0.500 MGD in the final phase. The treated effluent is proposed to be discharged into Gum Bayou, which would then flow into Dickinson Bayou, in Galveston County, Texas.

The Executive Director (ED) of the Commission supports issuance of the permit. The City of Dickinson (Dickinson), the Tropical Gardens Group (TGG),<sup>1</sup> the Galveston Bay Foundation (GBF), and the B.C. Schroeder, Jr., Marital Trust (Schroeder) oppose the permit or, alternatively, request that additional limitations or provisions be added to the permit (collectively, Dickinson, TGG, GBF, and Schroeder are referred to as "Protestants").<sup>2</sup> The Office of Public Interest Counsel (OPIC) does not oppose the issuance of the permit, but requests that the permit contain a provision indicating the permit will expire by its own terms once Applicant is able to connect to a regional wastewater facility. Based on the evidence presented at hearing, the Administrative Law Judge (ALJ) recommends that the Commission approve the application and issue the permit.

---

<sup>1</sup> Prior to the referral for a contested case hearing, the Commission admitted two citizens groups: the Senior Citizens of Tropical Gardens and the Citizens of Tropical Gardens. At the preliminary hearing, those groups were represented by attorney Mary Carter, who advised that the two groups had been joined together into one group. This joined group is hereby referred to as the Tropical Gardens Group.

<sup>2</sup> Betty Gutierrez, Louis Decker, Dan Wright, and Jan Culbertson are also protestants to this action, but they did not appear at the hearing. Rather, they previously agreed to be aligned with and represented by TGG.

## II. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

On October 24, 2004, Applicant filed its initial application for the wastewater discharge permit that is the subject of this proceeding. The application seeks a new permit for a wastewater treatment plant that will be located in Galveston County adjacent to Gum Bayou, approximately 2.14 miles east of State Highway 3 and 600 feet north of FM 517.

The application was declared administratively complete on February 22, 2005. Notice of the receipt of the application and intent to obtain a water quality permit was mailed and also published in the Houston Chronicle on February 24, 2005. The ED recommended approval of a draft permit, and notice of the application and the ED's preliminary decision on the permit was mailed and published in the Houston Chronicle on July 27, 2005. A public meeting on the application was held on October 6, 2005, in Dickinson, Texas. Subsequently, there was a change in the 303(d) listing for a portion of Dickinson Bayou upstream from Gum Bayou.<sup>3</sup> Therefore, the ED issued a revised draft permit that contained more stringent effluent limits than those contained in the initial draft permit.

On July 25, 2007, the Commission considered hearing requests and requests for reconsideration regarding the permit application. Several hearing requests were granted and, on August 2, 2007, the Commission referred this matter to the State Office of Administrative Hearings (SOAH) for a contested case hearing. The preliminary hearing in this case was conducted on November 13, 2007, in Galveston. At that time, numerous persons or entities appeared and sought party status. By agreement of the parties, the hearing on the merits was held on September 8-10, 2008, in Galveston.<sup>4</sup> The record closed on November 17, 2008, after the parties submitted written closing arguments and reply briefs.

---

<sup>3</sup> Section 303(d) of the federal Clean Water Act requires a listing of streams or lakes that are impaired for one or more pollutants.

<sup>4</sup> The Commission originally placed a six-month deadline on this case. However, all parties agreed that a longer procedural schedule was necessary. 30 TEX. ADMIN. CODE § 80.4(c)(17)(B). Moreover, the case was abated for a period of time when outside circumstances caused the Applicant's desire to proceed with the hearing to be in question.

There are no contested issues of notice or jurisdiction, so those matters are set forth in the findings of fact and conclusions of law in the proposed order attached to this PFD.

### III. THE COMMISSION'S REFERRED ISSUES

In granting hearing requests in this case and referring the matter to SOAH, the Commission identified the specific issues it wanted the ALJ to address. Those issues are as follows:

1. Is the proposed permit protective of aquatic life and the requesters' health;
2. Whether the data provided by the Applicant and used by the ED for modeling was accurate;
3. Whether the dissolved oxygen in the impaired region would be impacted;
4. Whether the information provided in the application caused the ED to perform an improper evaluation;
5. Whether Gum Bayou is tidally influenced at the point of discharge;
6. Whether the Applicant's queries into potential service from wastewater plants contained within the required three-mile survey were adequate;
7. Whether the permitted discharge will negatively impact the waterbody; and
8. Whether fish and wildlife will be negatively impacted by the facility.

Each of the referred issues is addressed below as directed by the Commission. Because many issues overlap, the ALJ may discuss them together at times.<sup>5</sup> Moreover, the ALJ discusses the issues in the order most logical based upon the evidence presented, and not necessarily the order they were listed by the Commission.

---

<sup>5</sup> For example, in light of the arguments presented by the parties, issues 7 and 8 above are essentially subsumed within issues 1 and 3. Thus, the ALJ provides very little independent discussion of issues 7 and 8.

#### IV. DISCUSSION

##### A. Summary

This is not a case of dueling experts, who disagree on the modeling and then reach different conclusions on the environmental impact of the permit. For the most part, the experts generally agree on the modeling and what it indicates is the likely impact of the proposed permit. In fact, not a single expert has testified that he expects the proposed permit to actually harm the environment or human health.

Rather, the Protestants make three main arguments: (1) the Applicant improperly relied upon data from the ED rather than doing its own full environmental impact analysis; (2) the data relied upon by the Applicant and the ED is not complete or accurate, thus rendering the expert conclusions unreliable; and (3) there is no need for the permit (*i.e.*, the Applicant has access to other sources for wastewater treatment that negates the need for a new facility to be built by it). These arguments are discussed in greater detail below. However, the ALJ briefly addresses them now.

First, the ALJ concludes that the Applicant did not improperly rely upon the ED to meet its burden of proof in this case. Rather, Applicant retained experts who did conduct a proper analysis of the projected impacts from the proposed facility. Although these experts relied upon ED-approved standards and modeling inputs, they did their own analysis and their testimony is sufficient for the Applicant's burden of proof. All experts relied upon the QUAL-TX water quality model, which is a TCEQ-utilized model for analyzing impacts to water quality in rivers and streams. This is the standard model used by TCEQ in analyzing wastewater permits involving discharge into rivers and streams.<sup>6</sup> The ALJ does not believe that the data actually relied upon was inaccurate or contains errors that render the application deficient or raise questions about the potential impact of the permit being granted. Finally, while the issue of need is closely debated—and it is possible that the permit

---

<sup>6</sup> Applicant Ex. 36, at 8-9. A different model is used when the discharge is into a closed body of water, such as a lake.

may not be fully needed at this time—there is a justifiable expected future need for the discharge allowed under the permit that cannot be met sufficiently by currently available sources. Thus, the ALJ finds the permit to be warranted, especially with the additional permit provision recommended herein.

With that brief summary, the ALJ now turns to a discussion of the technical review of the proposed permit and the Commission's referred issues.

#### **B. Applicable Standards and the ED's Technical Review**

The facility proposed to be permitted in this case will discharge treated effluent into Gum Bayou, where it will then flow into Segment 1103 of Dickinson Bayou. Gum Bayou is not a classified water body, so it is presumed to have high aquatic life use.<sup>7</sup> Segment 1103 of Dickinson Bayou has the designated uses of contact recreation and high aquatic life use.<sup>8</sup> However, portions of Dickinson Bayou near the confluence with Gum Bayou are currently considered "impaired" by the TCEQ, meaning they are not currently meeting applicable water quality standards. The impairment is in relation to bacteria (higher than optimal) and dissolved oxygen (DO) (which is below optimal levels for aquatic life).<sup>9</sup> The impaired portions are not downstream from Gum Bayou, but rather are upstream. Thus, any discharge into Gum Bayou will not flow into the impaired portions of Dickinson Bayou, except through tidal influences.

The ED's staff has analyzed the proposed permit to ensure that it will not cause a degradation of water quality. The state's anti-degradation policies set forth both numerical criteria and narrative criteria for maintaining water quality. These standards are designed to ensure that no degradation occurs from permitted activities, and degradation is defined as "the lowering of water quality by

---

<sup>7</sup> 30 TEX. ADMIN. CODE § 307.4(h)(3).

<sup>8</sup> ED Exs. 5 and 6.

<sup>9</sup> ED Exs. 13 and 13A.

more than a *de minimis* extent, but not to the extent that an existing use is impaired.”<sup>10</sup> Under the state’s anti-degradation policy (set forth in Section 307 of the TCEQ’s rules),<sup>11</sup> DO concentrations must be sufficient “to support existing, designated, and attainable aquatic life uses.”<sup>12</sup>

For both Gum Bayou and Dickinson Bayou, the TCEQ rules require that the DO criteria be maintained at 4.0 milligrams per liter (mg/L) or higher to ensure no degradation. The draft permit currently proposed requires that effluent from the facility have a DO level of at least 4.0 mg/L in the first two phases, and 6.0 mg/L in the final phase.<sup>13</sup> After analyzing the effluent limits and the characteristics of Gum Bayou and Dickinson Bayou—and conducting appropriate modeling as part of this analysis—the ED’s technical staff concluded that the proposed permit would not result in any degradation of water quality and that existing uses in both bayous would be maintained and protected.<sup>14</sup> In conducting this analysis, the ED’s technical staff considered the impairment on Dickinson Bayou and concluded that the proposed permit would not add to any existing impairment.<sup>15</sup>

There is no dispute by the different experts involved in this case that the ED’s technical analysis and evaluation was properly done under the applicable TCEQ rules. Even Protestant’s primary expert has conceded that the modeling done by Applicant and the ED’s technical staff was done consistent with the applicable rules and customary practices and that it shows no negative impact upon either Gum Bayou or Dickinson Bayou.<sup>16</sup> With that background in mind, the ALJ now addresses the Commission’s referred issues.

---

<sup>10</sup> 30 TEX. ADMIN. CODE § 307.5(b)(2).

<sup>11</sup> 30 TEX. ADMIN. CODE § 307.5.

<sup>12</sup> 30 TEX. ADMIN. CODE § 307.4(h)(1).

<sup>13</sup> ED Ex. 11, at 9. The draft permit also contains limits for Carbonaceous Biochemical Oxygen Demand (5-Day)(CBOD<sub>5</sub>), Ammonia Nitrogen (NH<sub>3</sub>-N), and suspended solids, but those are not in issue in this case.

<sup>14</sup> ED Ex. 10; Tr. at 544; ED Ex. 11, at 9; ED Exs. 15 and 16.

<sup>15</sup> ED Ex. 11, at 7-9

<sup>16</sup> Dickinson Ex. 4, at 14-16; Tr. at 391.

**C. Is Gum Bayou Tidally Influenced at the Point of Discharge?**

All parties agree that Gum Bayou is tidally influenced at the point of discharge. Therefore, this issue is not disputed.<sup>17</sup> This tidal influence is the primary basis for many of Protestants' concerns. Namely, many Protestants are concerned that the inconsistent and frequently changing depth of Gum Bayou makes it an unsuitable location for a wastewater discharge point. Further, because Gum Bayou flows into Dickinson Bayou, Protestants are concerned that the tidal influence will create the possibility that any discharges into Gum Bayou will negatively impact the impaired upstream portions of Dickinson Bayou. These potential impact issues are discussed in greater detail in the sections below. But, at the outset, the ALJ notes that it is clear that Gum Bayou is tidally influenced and this tidal influence is a backdrop to the other issues.

**D. Is the Data Provided by the Applicant and Used by the ED for Modeling Accurate?**

Protestants have not presented any expert witnesses who have concluded the permit will be harmful to human health or the environment. Instead, they argue that the data relied upon by the ED and the Applicant was not accurate or complete. Specifically, Protestants argue that the following information relied upon by Applicant and the ED is incorrect: the width, depth, number of bends, and transects for Gum Bayou, and the GPS location of the proposed discharge point. In support of this contention, Protestants presented the testimony of Bert Schroeder, a local resident.

Mr. Schroeder testified that he personally went out and measured the parameters of Gum Bayou to compare them to the information found in the permit application in this case. He concluded that the information in the application was not accurate. Specifically, he noted the following discrepancies:

---

<sup>17</sup> Applicant Ex. 33 at 16; Dickinson Ex. 2 at 8; Tr. at 167, 215, 242-243, 480-482, and 551.

- The application identified only one well-defined bend and one moderately-defined bend between the discharge point and the confluence with Dickinson Bayou;<sup>18</sup> in contrast, Mr. Schroeder testified there are three well-defined bends and one moderately-defined bend in that segment;<sup>19</sup>
- The application indicates the width of Gum Bayou 1,700 feet downstream from the discharge point is 475 feet; in contrast, Mr. Schroeder measured it at only 290 feet (using a straight line of 1,700 feet) or 210 feet (at 1,700 feet following the path of the stream);<sup>20</sup>
- The application indicates the width and depth of Gum Bayou 200 feet upstream from the discharge point is 200 feet wide and 13 feet deep; in contrast, Mr. Schroeder testified that, per his observations and measurements, there is no point upstream where Gum Bayou is 200 feet wide and 13 feet deep. According to his measurements, at 200 feet upstream from the discharge point, Gum Bayou is less than 90 feet wide and no deeper than six feet;<sup>21</sup>

Protestants note that no actual survey was conducted of Gum Bayou, but rather only TCEQ data was relied upon for the water body. Protestants argue that, in addition to the application containing incorrect data, TCEQ's own data does not accurately reflect the conditions of Gum Bayou. Protestants presented photographs of Gum Bayou at different points—either very low or, alternately, overflowing and flooding local residents.<sup>22</sup> They contend these pictures present a reality of Gum Bayou that is different from that contained in the modeling relied upon by the ED and the Applicant.

Further, Protestants assert the Applicant did not take into consideration that a segment of Dickinson Bayou, at its confluence with Gum Bayou, is impaired. Dr. James Miertschin, an expert offered by Dickinson, opined that Applicant and the ED should have taken more historical samples

---

<sup>18</sup> Applicant Ex. 1, p. 10 of 31.

<sup>19</sup> Schroeder Ex. 5, at 2.

<sup>20</sup> Schroeder Ex. 5, at 2.

<sup>21</sup> Schroeder Ex. 5, at 2-3.

<sup>22</sup> Schroeder Exs. 1C – 1F; TGG Exs. 1A – 1D, and 3.

of DO in Dickinson Bayou, and should have revised the starting point of DO downward from the 6.0 mg/L used in the modeling. While Dr. Miertschin acknowledged that the Applicant and ED's methodology was consistent with the accepted practices for such modeling, he felt that more consideration should have been given to the fact that parts of Dickinson Bayou are already impaired and on the 303(d) list. After reviewing historical data, Dr. Miertschin found that there were many times where the DO in Dickinson Bayou was much lower than 6.0 mg/L.<sup>23</sup> Accordingly, he thought it would have been more prudent for Applicant and the ED to consider using something less than 6.0 mg/L as the starting point for DO in the modeling.

Applicant disagrees with many of Protestant's challenges to the accuracy of the data in the Application and contends that it does not matter anyway, because none of the alleged inaccuracies are material or significant. Applicant points out that the number of stream bends is not a factor used in the modeling process.<sup>24</sup> While the stream bend information is contained in the application, even the ED's staff indicated that they perform their own assessment and do not just rely upon the information identified in the application.<sup>25</sup> Similarly, the GPS coordinates are not relied upon for the site information. Rather, the description contained in the application and on the permit defines the authorized location. That description indicates the facility will be "adjacent to Gum Bayou, approximately 2.14 miles east of State Highway 3 and 600 feet north of Farm-to-Market Road 517 in Galveston County, Texas."<sup>26</sup>

As to the width and depth data from the application and its supplements, the Applicant points out that it was not used in the modeling—by either the ED or the Applicant's experts. Both Mark Rudolph (of the TCEQ) and Dr. David Harkins (one of Applicant's experts) testified that the

---

<sup>23</sup> Dickinson Ex. 4, at 16.

<sup>24</sup> Tr. at 550, 569-570, and 588.

<sup>25</sup> Tr. at 160 and 588.

<sup>26</sup> ED Ex. 4, at 1.

transect data from the application was not used in the modeling.<sup>27</sup> Rather, both Mr. Rudolph and Dr. Harkins used data prepared by Mr. Rudolph in conducting the modeling.<sup>28</sup> That data was prepared based upon aerial photographs and the professional experience of Mr. Rudolph—a TCEQ staff person who had looked at roughly 2,500 permit applications in his 19 years with the TCEQ.<sup>29</sup>

Moreover, Applicant points out that even when Mr. Schroeder's own data was used in the modeling, it actually resulted in less of an impact than that shown by the modeling based upon the Mr. Rudolph's data.<sup>30</sup> Thus, even if Mr. Schroeder's data was correct and Mr. Rudolph's estimates were incorrect—which the Applicant disputes—it would be of no effect.

Finally, Applicant disagrees with Dr. Miertschin's assertion that the modeling did not properly account for the impairment on Dickinson Bayou or its historical DO levels. Applicant points out that Mr. Rudolph specifically testified that he considered Dickinson Bayou's impairment and adjusted the permit effluent limits because of that.<sup>31</sup> Moreover, Applicant points out that Dr. Miertschin relied on data from 2000 and 2001 for his conclusion that historical DO levels in Dickinson Bayou were below 6.0 mg/L at times, thus necessitating a possible downward adjustment of the 6.0 mg/L starting point for DO used by Mr. Rudolph for Dickinson Bayou. At the hearing, Applicant offered additional data through 2007 from a measuring station on Dickinson Bayou close to Gum Bayou that indicated that DO levels were averaging higher than 7.0 mg/L for that portion of Dickinson Bayou.<sup>32</sup> And, Dr. Miertschin conceded that the overall average of DO on Dickinson Bayou from his 2000-2001 data could be 6.2 mg/L, which is higher than the 6.0 mg/L starting point

---

<sup>27</sup> Tr. at 161, 166, and 597.

<sup>28</sup> Tr. at 166 and 608.

<sup>29</sup> Tr. at 608-610.

<sup>30</sup> Tr. at 628-629.

<sup>31</sup> ED Ex. 11, at 7-9.

<sup>32</sup> Applicant Ex. 51.

used by Mr. Rudolph for his modeling.<sup>33</sup> Thus, Applicant contends Mr. Rudolph did not err in using the 6.0 mg/L criteria for DO in modeling the impact of the proposed permit on Dickinson Bayou.

After considering the evidence, the ALJ concludes that, although some of the data provided by the Applicant does appear to be incorrect (*e.g.*, width measurements, GPS coordinates, number of stream bends),<sup>34</sup> that data was not relied upon in the expert's modeling in this case. Rather, the ED and the Applicant's own experts used data that was different from some of that contained in the application and its supplements. The actual data that was used by the ED and the Applicant's experts in evaluating the application and the potential impact of the proposed permit appears to be accurate and reliable.

When attempting to conduct modeling on a water body that is tidally influenced and constantly changing, there is not one set of fixed numbers that reflects the water body's regular state. Instead, modelers will use estimates of width and depth in complex modeling to determine expected impacts. Mr. Rudolph—with over 19 years of experience with the TCEQ involving the analysis of approximately 2,500 applications—has been shown to have the most reliable qualifications for determining the best data to utilize in the modeling in this case. It was his determinations, derived from aerial photography and his experience, of the parameters of Gum Bayou that were relied upon in the modeling. In contrast, the only actual challenge to the data used by Mr. Rudolph came from Mr. Schroeder, one of the Protestants in this case who has not been shown to have any past experience in this area. Even Dr. Miertschin, an expert retained by Protestant Dickinson, acknowledged that Mr. Rudolph's modeling was done appropriately and based upon customarily proper data. Therefore, based on the evidence presented, the ALJ concludes that the data relied upon in the modeling was accurate.

---

<sup>33</sup> Tr. at 397-398.

<sup>34</sup> Based upon the evidence in the record, the ALJ is persuaded that some of the information on the application was incorrect. For example, it is clear from topographical maps and aerial pictures that Gum Bayou has more stream bends than listed on the application. Similarly, the evidence indicates the GPS information and transect information in the application is incorrect at times.

Moreover, some of the incorrect information has no impact upon the modeling or the ED's evaluation. This is true for the number of stream bends or the GPS coordinates of the facility.<sup>35</sup> Finally, for that information that is pertinent to the modeling, the evidence indicates that even if Mr. Schroeder's data was used, the modeling would indicate greater protection (*i.e.*, less of an impact) to the water bodies in issue. In particular, Mr. Rudolph (of the ED's technical staff) did modeling using the transect data (width and depth) provided by Mr. Schroeder of his actual observations of Gum Bayou. That modeling produced a more optimistic DO prediction under the proposed permit than that done previously by Mr. Rudolph using his own calculations.<sup>36</sup> Thus, Mr. Schroeder's challenges to the data relied upon are of no consequence, as the allegedly incorrect data is either irrelevant or results in a less optimistic prediction than the allegedly correct data supplied by Mr. Schroeder.

**E. Did the Information Provided in the Application Cause the ED to Perform an Improper Evaluation?**

The ALJ concludes that the ED's evaluation of the anticipated impact of the proposed permit in this case was proper. Therefore, there has not been an "improper evaluation" as addressed by this referred issue. As noted above under Section D, the ALJ concludes that the data provided by the Applicant for modeling was either accurate or did not have any negative impact upon the ED's evaluation of the application. While there are some pieces of information that are incorrect in the application, the ALJ finds that those incorrect items have not caused any errors in the ED's evaluation of the proposed permit in this case, because they were not relied upon by the ED in evaluating the application. Rather, the ED's staff performed their own evaluations based upon data they compiled. Therefore, information provided in the application did not cause the ED to perform an improper evaluation.

---

<sup>35</sup> Tr. at 160, 550, 569-570, and 588.

<sup>36</sup> Tr. at 629.

**F. Will Dissolved Oxygen in the Impaired Region be Impacted?**

The evidence indicates that DO in the impaired region will not be impacted by the proposed permit. Although Protestants raise many possible “concerns,” the weight of the evidence indicates that none of those concerns are scientifically justified.

First, it is important to note that no part of the actual receiving body—Gum Bayou—is impaired. Although it was impaired as recently as 2006 in regard to bacteria, it currently meets all applicable standards. However, Dickinson Bayou does have certain segments that are impaired in regard to DO, and Gum Bayou flows into Dickinson Bayou. The portions of Dickinson Bayou that are impaired are actually upstream from Gum Bayou. Therefore, discharges into Gum Bayou would not flow into the impaired portions of Dickinson Bayou—except as the result of the tidal influence upon the two bayous. Thus, when evaluating the impact upon the impaired region, we are focusing only on those portions of Dickinson Bayou that have been designated as being impaired.

Protestants do not present any direct evidence showing that DO will be impacted in the impaired region. Rather, they argue there is a possibility for it to occur and that an insufficient analysis has been done of the impact from the discharge into Gum Bayou. However, even Dr. Miertschin, the only expert presented by any of the Protestants, conceded that the modeling used by Applicant and the ED: (1) was consistent with standard practices for that type of modeling; and (2) indicates that existing water quality standards will be maintained under the proposed permit.<sup>37</sup>

The modeling shows that DO in Dickinson Bayou will change by only 0.05 mg/L at most under the proposed permit.<sup>38</sup> This amount is “insignificant” because a “change of 0.05 mg/L in the two modeling scenarios is considered equivalent.”<sup>39</sup> In other words, the amount of 0.05 mg/L is not

---

<sup>37</sup> Dickinson Ex. 4, at 15-16.

<sup>38</sup> Applicant Ex. 36, at 12 and 14; Tr. at 179-180.

<sup>39</sup> Applicant Ex. 36, at 12 and 14.

a statistically significant difference, because it is within the model's own natural variability range. Thus, the evidence indicates the proposed permit will have no statistically significant impact on the impaired region—*i.e.*, the equivalent of no change whatsoever. This conclusion is supported by the testimony of Dr. David Harkins, Dr. Calvin Ward, and Mark Rudolph—all experts in fields related to water quality.<sup>40</sup>

Although Dr. Miertschin opined that it would have been prudent for more detailed analysis to have been done of Dickinson Bayou, he stopped short of clearly disagreeing with the modeling, always couching his opinions in uncertainty. For example, he stated that “perhaps” 6.0 mg/L was not a prudent starting point for DO in the modeling and that, if the historical DO data had been looked at, the conclusion “might be” that DO criteria would not be maintained under the permit.<sup>41</sup> Similarly, he testified that additional nutrient loading under the permit “may” stimulate algal growth, which “could” lead to increased variation of the DO concentration and result in additional impairment.<sup>42</sup>

Further, when questioned at the hearing about the impact of using a starting DO level lower than 6.0 mg/L, Dr. Miertschin conceded that he did not know whether it would change the outcome of the modeling. Specifically, he answered that it “could” affect the outcome but that, because he did not run any models himself, he was not sure how much effect it might have.<sup>43</sup> Further, on cross-examination, Dr. Miertschin also admitted that the data points he looked at that had DO levels lower than the 6.0 mg/L were not on Gum Bayou (which is the discharge point), but were on Dickinson Bayou within one to two miles upstream from Gum Bayou. Further, he acknowledged that the actual DO averages for the data points closest to Gum Bayou may reflect DO levels higher than 6.0, even based upon his own data compilations.<sup>44</sup>

---

<sup>40</sup> Applicant Ex. 36, at 12 and 14; Applicant Ex. 34, at 8-9; Tr. at 189-190; ED. Ex. 11, at 9.

<sup>41</sup> Dickinson Ex. 4, at 16.

<sup>42</sup> Dickinson Ex. 4, at 17.

<sup>43</sup> Tr. at 358.

<sup>44</sup> Tr. at 397-398.

Therefore, what is clear from Dr. Miertschin's testimony is that he is not claiming that the proposed permit will impact DO levels in the impaired region. Rather, he simply opines that additional analyses might impact the results of the modeling, which might indicate that the proposed permit could impact DO levels in the impaired region. In light of the clear and unequivocal testimony from other experts that DO in the impaired region will not be impacted, Dr. Miertschin's cautious and uncertain testimony is not enough to conclude otherwise. Therefore, based upon the evidence in the record, the ALJ concludes that DO in the impaired region will not be impacted.<sup>45</sup>

**G. Is the Proposed Permit Protective of Aquatic Life and the Requesters' Health?**

The Protestants argue that the proposed permit is not protective of aquatic life and the requesters' health for a number of reasons. First, Dickinson contends that the proposed permit needs additional requirements in order to be protective of aquatic life and human health. Specifically, Dickinson proposes two requirements that it believes are necessary to ensure the permit is properly protective: (1) the permit must require the Applicant (or its contractors) to respond to any notice of problems at the facility within 15 minutes; and (2) the Applicant must acquire and maintain equipment at the facility to contain sewage spills or washouts (an example of such might include a floating boom to contain washed-out solids). Other than arguing for these two additional permit requirements, Dickinson does not dispute the sufficiency of the effluent parameters of the proposed permit.

The other Protestants argue that the inconsistent water level of Gum Bayou (due to it being tidally influenced) presents a number of environmental and health concerns about effluent being discharged into it. Accordingly, they argue it is an unsuitable location for the discharge of treated waste. Further, the Protestants (excluding Dickinson) argue that additional monitoring for bacteria

---

<sup>45</sup> Because Gum Bayou is not impaired, the ALJ did not discuss it under this issue, which asked only for impacts in the "impaired region." However, the modeling shows that DO in Gum Bayou will change by only 0.37 mg/L at most under the proposed permit. Applicant Ex. 36, at 12. This is not considered significant and does not lead to any impairment. Tr. at 167-168, and 180.

and DO is needed to ensure the permit will be protective of the environment and human health. Protestants note that high levels of bacteria can cause illness to local residents and those using the bayou for recreational purposes. In fact, Protestant witness Peggy Wright suffered an infection in both legs, allegedly due to exposure to contaminated water that had overflowed the banks of Dickinson Bayou. Protestants argue that this shows the potential danger from allowing waste to be discharged into Gum Bayou. Thus, Protestants argue that the permit would need to require monitoring of bacteria to ensure that human health is protected. Protestants argue that such monitoring of DO is also necessary, and that the permit's proposed weekly monitoring is insufficient.

In response, OPIC, the ED, and the Applicant all conclude that the proposed permit will be protective of aquatic life and the requesters' health. They note that all evidence from experts supports this conclusion, and that not a single expert has offered any data or modeling to suggest otherwise. In regard to the additional limitations proposed by Dickinson (*i.e.*, a 15-minute response time and additional equipment to control wash-outs), Applicant notes that such requirements exceed those set out in the TCEQ's rules, would be more stringent than those placed upon other wastewater facilities in the state, and are not supported by any qualified testimony in the record. In fact, none of Dickinson's wastewater or water quality experts recommended the additional limitations; rather, it was Julie Johnston, the city manager for Dickinson, who testified she thought they would be beneficial. But, she has no background in wastewater management and, upon cross-examination, indicated that she was not entirely familiar with how additional controls for containing washouts might work.<sup>46</sup>

In regard to the other Protestants' concerns regarding bacteria and proposing additional monitoring, Applicant argues that there is no basis for such concerns or additional monitoring. Although Gum Bayou previously was impaired in regard to bacteria, it no longer is. Because Gum Bayou is not currently an impaired water body and is unclassified, it is presumed to have high

---

<sup>46</sup> Tr. at 302-303.

aquatic life under the TCEQ's rules.<sup>47</sup> The proposed permit does not have any effluent limits of concern that would justify bacteria concerns or additional monitoring. Applicant notes that Peggy Wright's leg infection came not long after a different wastewater facility had a raw sewage spill of approximately 100,000 gallons that contaminated the water in Dickinson Bayou.<sup>48</sup> Therefore, concerns about bacteria can be traced to a serious failure by another wastewater treatment facility, and not any inherently sensitive qualities of Gum Bayou or Dickinson Bayou. Given this, Applicant argues that no additional requirements should be imposed in the permit regarding the monitoring of bacteria.

Ultimately, the ALJ finds that Protestants' concerns regarding bacteria and requests for additional permit conditions or requirements are unfounded. The only basis for bacteria concerns are (1) the fact that Gum Bayou was previously classified as impaired in regard to bacteria; (2) Dickinson Bayou is impaired in regard to bacteria; and (3) Ms. Wright's leg infections. However, Gum Bayou is not currently classified as impaired, and has not been for at least two years. The impairment to Dickinson Bayou is upstream from Gum Bayou and, thus, will be impacted only by tidal influences. More importantly, all of the expert testimony establishes that the discharged effluent under the proposed permit is not projected to negatively impact the impaired regions of Dickinson Bayou. Finally, while there is no evidence that Ms. Wright's leg infection was attributable to the water in Dickinson Bayou, the ALJ will assume it was. However, her infection occurred within two weeks after a major raw sewage spill by Galveston County Water Control and Improvement District No. 1. Accordingly, assuming *arguendo* that her infection was caused by the water in Dickinson Bayou, it is likely attributable to the fact that raw sewage had been dumped into the bayou less than two weeks previously. Thus, her leg infection is not a basis for concluding that either Dickinson Bayou or Gum Bayou are in need of additional protections regarding the proposed facility or that the discharge of treated effluent will be problematic in regard to bacteria.

---

<sup>47</sup> 30 TEX. ADMIN. CODE § 307.4(h)(3).

<sup>48</sup> Tr. at 431-433.

Moreover, the experts in this case have testified that the permit effluent limitations are protective of aquatic life and the requestors' health. This includes testimony from Dr. Calvin Ward,<sup>49</sup> Mark Rudolph,<sup>50</sup> Lili Murphy,<sup>51</sup> and Thomas King.<sup>52</sup> No expert has offered an opinion to the contrary, although Dr. Miertschin did express concerns that additional modeling would have been "prudent." But, even he did not go so far as to indicate that the proposed permit would not protect aquatic life or requestors' health. Even Malcom Bailey, another of Dickinson's experts, testified that he did not think the proposed facility, if it were operated according to the parameters of the draft permit, would have a negative impact on the watershed.<sup>53</sup> In fact, when asked whether the effluent limits in the proposed permit were reasonable and restrictive, Mr. Bailey responded "very much – yes."<sup>54</sup> Therefore, given the clear weight of the evidence, the ALJ finds that the proposed permit will be protective of aquatic life and the requestors' health.

As for the additional requirements proposed by Dickinson, the ALJ concludes there is no evidentiary basis to recommend them. The 15-minute response requirement would practically require constant staffing at the facility, which is generally unheard of in Texas for a facility of this size.<sup>55</sup> Even Ms. Johnston—who proposed the requirement—acknowledged that she was not aware of any other facility that had such a requirement.<sup>56</sup> Under the permit and TCEQ rules, Applicant is required to have a properly licensed operator for the facility and is required to respond to and correct failures and/or operational problems. Adding a 15-minute time requirement to respond to concerns seems both excessive and likely unworkable.

---

<sup>49</sup> Applicant Ex. 34, at 9-12; Tr. at 189-190.

<sup>50</sup> ED Ex. 11, at 7-10.

<sup>51</sup> ED Ex. 7, at 6-9; ED Ex. 10; Tr. at 544.

<sup>52</sup> Applicant Ex. 33, at 12-16.

<sup>53</sup> Tr. at 346-347.

<sup>54</sup> Tr. at 327. Again, Mr. Bailey was protestant Dickinson's expert and he has more than 30 years experience in wastewater permitting.

<sup>55</sup> Tr. at 348.

<sup>56</sup> Tr. at 273-274.

Similarly, the requirement for a floating boom or other wash-out prevention equipment appears excessive. The draft permit already prohibits the “unauthorized discharge of wastewater or any other waste” and requires the Applicant to “take all reasonable steps to minimize or prevent any discharge . . . or other permit violation which has a reasonable likelihood of adversely affecting human health or the environment.”<sup>57</sup> In the absence of problems with the proposed operator or other special circumstances, the ALJ does not believe it appropriate to include additional permit conditions or restrictions in this case, particularly when they are not proposed nor supported by any water quality or wastewater permitting expert.

Therefore, the ALJ concludes that the proposed permit is protective of aquatic life and the requesters’ health without any additional restrictions or conditions and that no proposed additional conditions be required.

**H. Will the Permitted Discharge Negatively Impact the Waterbody?**

No parties raised any additional concerns regarding a potentially negative impact to Gum Bayou or Dickinson Bayou, other than those raised and addressed in regard to the prior issues. Therefore, the ALJ does not address this issue separately. As discussed previously, there is no evidence of any negative impact upon the water body into which the facility will discharge (Gum Bayou) or any other bodies of water.

**I. Will Fish and Wildlife be Negatively Impacted by the Facility?**

This issue is also subsumed within the previously-addressed issues. No parties raised any additional concerns that would be different than those addressed in the prior issues. Therefore, the ALJ does not address this issue in detail, other than to note that the evidence establishes there is no expected negative impact upon fish and wildlife in the area of the proposed facility.

---

<sup>57</sup> ED Ex. 4, at 7.

**J. Were Applicant's Queries into Potential Service from Wastewater Plants Contained Within the Required Three-mile Survey Adequate?**

The TCEQ requires applicants for new wastewater discharge permits to determine whether there are alternative regional sources available for providing service that would obviate the need for the requested permit. In particular, the TCEQ requires applicants to evaluate possible alternate sources of service located within three miles of the proposed facility.

In this case, Applicant identified three other wastewater treatment plants within three miles of its proposed facility. These plants are operated by: (1) Galveston County Water Control and Improvement District No. 1 (Galveston County WCID No. 1); (2) Via Bayou, Inc. (VBI); and (3) Bacliff Municipal Utility District (Bacliff MUD).<sup>58</sup> Applicant sent capacity requests to these three providers, and both VBI and Bacliff MUD responded that they did not have the necessary capacity available.<sup>59</sup> Galveston County WCID No. 1 initially declined to provide service, but later agreed to attempt to negotiate the possibility of providing service. Ultimately, though, the Board of Galveston County WCID No. 1 voted unanimously to reject Applicant's request for service.<sup>60</sup>

Applicant also considered San Leon Municipal Utility District (San Leon MUD) in regard to the possibility of receiving service from it. San Leon MUD has a treatment plant that is approximately three miles from the proposed facility. Protestants contend that it is less than three miles from the facility and, therefore, Applicant was required to diligently ascertain its ability to provide service. Applicant disagrees, arguing that San Leon MUD's plant is slightly more than three miles from its proposed facility and, therefore, it was not required to attempt to obtain service from it.

---

<sup>58</sup> Applicant Ex. 16.

<sup>59</sup> Applicant Exs. 12-16.

<sup>60</sup> Applicant Ex. 17; Applicant Ex. 33, at 19.

The dispute about distance appears to hinge primarily upon where the measurements are taken. Protestants measure from Applicant's property line at the location of the proposed facility to the property line of San Leon MUD's facility. In contrast, Applicant measures from the actual location of the proposed treatment plant on the property. The distance is allegedly either slightly less or slightly more than three miles depending upon the selected starting point for measurement. However, the record evidence is unclear on whether, even measuring from the property line rather than the proposed facility location, San Leon MUD's treatment plant is within three miles of the proposed facility.<sup>61</sup>

Although the parties argue significantly over the distance between the proposed facility and San Leon MUD's treatment plant, the ALJ ultimately finds that it does not matter. It is undisputed that the area to be served by Applicant's proposed facility is located within the city limits of the City of Texas City. Under state law, a district like San Leon MUD is not allowed to provide "services or facilities to serve areas outside the district that are also within the corporate limits of a city" unless the district has obtained "a resolution or ordinance of the city granting consent for the district to serve the area within the city."<sup>62</sup>

In this case, the parties argue over whether San Leon MUD could serve the households intended to be served by Applicant's proposed facility. Applicant presented evidence reflecting its understanding that there had been prior negotiations between San Leon MUD and Texas City, but those negotiations had proven fruitless and the two parties were unable to reach an agreement allowing San Leon MUD to provide service within the city limits of Texas City.<sup>63</sup> In fact, one of Applicant's witnesses testified that he had been informed by Texas City officials that Applicant

---

<sup>61</sup> One of Protestants' attorneys conceded that the distance on a map between the closest points of the two property lines appeared to be slightly less than 16,000 feet. Three miles is 15,840 feet, so the distance between the two property lines is either slightly more or slightly less than three miles. Tr. at 237-239. Protestants claim the distance is only 2.9 miles.

<sup>62</sup> TEX. WATER CODE § 49.215(a).

<sup>63</sup> Tr. at 239-240 and 253-254.

could not obtain service from anyone other than Texas City if Applicant chose not to provide the service itself through its proposed facility.<sup>64</sup> In contrast, the City Manager for Dickinson testified her belief—based upon conversations with San Leon MUD officials—that San Leon MUD would be willing to provide the alternate service necessary to avoid the need for Applicant’s proposed facility.<sup>65</sup>

Unfortunately, neither San Leon MUD nor Texas City participated officially in this case, and there is no conclusive evidence in the record on whether Texas City would allow San Leon MUD to provide alternative service. However, the City Engineer for Texas City did testify, and he indicated that Texas City supported the proposed permit and wanted to see it approved.<sup>66</sup> His testimony was also corroborated by his predecessor, the City Engineer for Texas City at the time the application was filed.<sup>67</sup>

Protestants’ evidence merely indicates that San Leon MUD might be willing to provide service. But that is not the issue. Rather, the issue is whether Texas City would allow it to provide service within the city limits. On this point, the only evidence in the record tends to indicate that Texas City would not allow it.

Given that state law precludes San Leon MUD from providing service to the area in issue unless Texas City agrees to allow it (and there is currently no indication that Texas City would allow it), the ALJ does not find that the mere possibility of service from San Leon MUD is a sufficient basis to find Applicant’s efforts at locating alternate service to be inadequate. Whether Applicant’s belief is actually proven correct or not, the evidence indicates it was at least justified in its belief that Texas City would not allow San Leon MUD to provide alternate service.

---

<sup>64</sup> Tr. at 235-236.

<sup>65</sup> Dickinson Ex. 2, at 10; Tr. at 305-306.

<sup>66</sup> Tr. at 41-43; Applicant Ex. 40, at 6-7.

<sup>67</sup> Applicant Ex. 35, at 6.

Moreover, the evidence tends to indicate that San Leon MUD does not have the capacity to provide the needed service anyway. At the hearing, one of Protestants' witnesses indicated that he had recently inquired about service from San Leon MUD for a wastewater treatment project he was pursuing (the Dolphin Cove project). In response to his inquiry, San Leon MUD indicated that its maximum excess treatment capacity was 200,000 gallons per day.<sup>68</sup> This amount was not enough for the Dolphin Cove project, and it is not enough to provide for either the second or third phase of the proposed permit in this case.<sup>69</sup>

The evidence indicates that Applicant needs a guarantee of enough capacity for all three phases in order to actually obtain the necessary financing for the development project that would be served by the treatment plant.<sup>70</sup> Thus, interim service that does not provide enough capacity for either the second or third phase is insufficient for it to proceed. Accordingly, given that (1) there is no evidence that Texas City would allow San Leon MUD to serve within its city limits; (2) San Leon MUD does not have the excess capacity to accommodate the amounts needed in the second or third phases of the proposed permit; and (3) it is questionable whether San Leon MUD is within three miles of the proposed facility, the ALJ concludes that Applicant was not required to undertake any further efforts to obtain alternate service from San Leon MUD.

Protestants also argue that there is not a sufficient need for the proposed permit because it could be served ultimately by a regional wastewater facility, the planning of which is allegedly ongoing. However, there currently is no existing regional treatment facility from which Applicant could acquire service, and there has been no regulatory approval given for any regional facility to be built. Thus, Protestants' arguments are based upon speculation and uncertain future actions. The ALJ does not believe it is appropriate to deny the permit on the basis that there is a possibility that a

---

<sup>68</sup> Tr. at 342-343.

<sup>69</sup> Under the proposed permit, capacity in the first phase is 125,000 gallons per day; in the second phase, it is 250,000 gallons per day; and, in the third phase, it is 500,000 gallons per day.

<sup>70</sup> Tr. at 94-95, and 101.

regional treatment facility might be developed later. OPIC agrees that it would not be appropriate to deny the permit on this basis and, in fact, recommends that the permit be issued. However, OPIC also recommends that the permit contain a provision indicating that it will expire when Applicant has the opportunity to “tie in” to a regional facility.

The ED opposes OPIC’s proposed permit provision, arguing it would potentially conflict with other permit terms requiring Applicant to submit a closure plan for review and approval prior to any closure activity. The ED argues that a provision that allows the permit to expire on its own terms could allow Applicant to ignore the closure plan requirements of the permit, because the permit and those terms would “expire” once Applicant ties into a regional system.

Applicant does not oppose OPIC’s proposal but, like the ED, opposes the specific provision offered by OPIC. To accomplish OPIC’s general goal, Applicant suggests different additional permit language that would require Applicant to submit a closure plan once it will be feasible for it to connect to a regional facility. Specifically, Applicant proposes that the following provision be used:

The permittee shall submit a closure plan as required herein at such time as the City of Texas City makes a final determination that service to the property being served by the facilities described in the permit is available from a regional wastewater treatment facility, such a regional facility has the capacity to provide full service to the property being served by the facilities, all necessary easements for transmission lines to connect the property to the regional facility have been obtained, and all required transmission lines and connections from the property to the regional facility have been constructed and placed in service.<sup>71</sup>

The ALJ finds Applicant’s proposed language is better suited for the permit, and recommends that the draft permit be modified to include that language instead of the language proposed by OPIC. In this way, the Commission’s regionalization goals will be furthered in this permit without the possibility of inconsistent permit provisions.

---

<sup>71</sup> Applicant’s Reply Brief, at 10.

**K. Applicant's Reliance on Data and Testimony Presented by the ED**

As mentioned previously, some of the Protestants contend that Applicant improperly relied upon the ED to meet its burden of proof in this case, in violation of TEX. WATER CODE § 5.228(e). In particular, that section 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.

Protestants note that Applicant relies heavily on the data, modeling, and opinions of various technical staff of the ED in arguing that the permit should be approved. Protestants argue that this reliance on the ED is barred by the statutory section above, and that without such evidence from the ED the Applicant would not be able to meet its burden of proof in this case.

The ALJ concludes that Protestants' contention is without merit. Applicant presented numerous expert witnesses who testified to the water quality and other issues referred by the Commission in this case.<sup>72</sup> While it is true that those witnesses relied upon data and modeling prepared initially by the ED's technical staff, the witnesses indicated that they did so because such data and modeling was customary for all applications of this type. This was confirmed by the testimony of Dickinson's expert as well. However, Applicant's experts conducted their own modeling and analyses and offered their own independent opinions.<sup>73</sup> By themselves, these opinions are sufficient to meet Applicant's burden of proof.

---

<sup>72</sup> See, e.g., Applicant Exs. 33, 34, and 36.

<sup>73</sup> See, e.g., Applicant Ex. 36, at 11-12.

However, the evidence and opinions of the ED's technical staff is not without value in this case. Although the Applicant presented ample evidence to meet its burden of proof, the testimony of the ED's technical staff is essential for completing the record and for serving as a neutral verification of other evidence in the record. The Commission can and should consider the evidence from the ED's technical staff when attempting to address issues raised in proceedings such as this and determining whether it is appropriate to issue a permit. The statutory provision prohibits the ED from affirmatively attempting to assist applicants, but it does not prevent the ALJ or the Commission from considering the opinions and testimony of the ED's technical staff, nor does it prohibit the Applicant from citing to such evidence when it is in the record and happens to support the Applicant's position.

In this case, the ED's technical staff did not attempt to bolster or assist the Applicant. The ED's witnesses were presented last in the hearing (except for rebuttal), and their testimony related to the analyses they were required by law to perform as part of their job functions with the TCEQ. It just so happens that their testimony does support issuance of the permit. But, that alone—in light of the fact that Applicant's case is supported by numerous of its own expert witnesses—is not a basis for concluding that either the ED or the Applicant violated TEX. WATER CODE § 5.228(e).

#### **L. Assessment of Transcript Costs**

The ALJ required the Applicant to pay for the transcript costs in this case, subject to a possible allocation of these costs at the end of the case. Along with its closing briefing, Applicant submitted a copy of the invoice from the court reporter, which included all costs associated with the preparation of the transcript. The total amount billed was \$5,649.88,<sup>74</sup> and no parties have disputed this amount.

---

<sup>74</sup> Exhibit A to Applicant's Closing Argument.

The Commission's rules provide that transcript costs cannot be assessed against the ED or OPIC.<sup>75</sup> As among the other parties, though, the Commission's rules provide a list of factors to be considered when determining a proper allocation of transcript costs.<sup>76</sup> Those factors and the ALJ's conclusions regarding them are presented below:<sup>77</sup>

CRITERIA FROM SECTION 80.23(d)(1)	ALJ'S ANALYSIS
The party who requested the transcript	Not Applicable. The ALJ required the court reporter and transcript, so no specific party actually requested it.
The financial ability of the party to pay the costs	There is no specific evidence on the financial status of the various parties, although it is expected that Applicant and Dickinson have greater financial ability to pay than the individual Protestants do.
The extent to which the party participated in the hearing	All of the parties actively participated in the hearing to an equal extent.
The relative benefits to the various parties of having a transcript	Of the parties who can be assessed transcript costs, only TGG, Schroeder, Dickinson, and the Applicant relied upon the transcript significantly in their closing briefing.
Budgetary constraints of a state or federal administrative agency participating in the proceeding	Not Applicable. None of the parties involved against whom costs could be assessed is a state or federal agency.
In rate proceedings, the extent to which the expense of the rate proceeding is included in the utility's allowable expenses	Not Applicable. This is not a rate case.
Any other factor which is relevant to a just and reasonable assessment of costs	See discussion below in body of PFD.

<sup>75</sup> 30 TEX. ADMIN. CODE § 80.23 (d)(2).

<sup>76</sup> 30 TEX. ADMIN. CODE § 80.23(d).

<sup>77</sup> 30 TEX. ADMIN. CODE § 80.23 (d)(1).

As can be seen in the chart above, the identified factors do not generally establish a clear apportionment of costs. The financial ability and reliance on the transcript factors slightly favor apportioning more of the transcript costs among Applicant and Dickinson. Ultimately, though, it would appear to come down to the last, "catch-all" factor regarding what is just and reasonable.

After considering the factors and what is just and reasonable, the ALJ recommends that the Commission assess \$500 of the transcript costs against Dickinson, \$200 against Schroeder, \$200 against TGG, and the remaining balance against the Applicant. Dickinson participated in the hearing, presented the only experts offered by any of the Protestants, used the transcript in its briefing, and, as a municipality, likely has the financial resources to be able to bear a portion of the costs. As such, \$500 (or slightly less than 10%) appears to be a fair allocation to Dickinson.

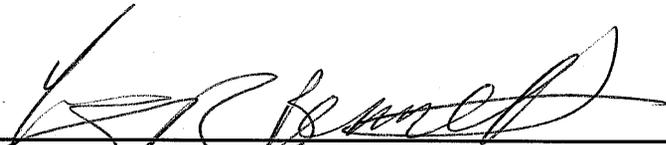
Both TGG and Schroeder also participated extensively in the hearing and used the transcript significantly in their closing briefing. However, they did not present any expert witnesses and, as individuals or groups of individual homeowners, do not necessarily have the same financial ability to pay for the transcript costs as do the Applicant or Dickinson. Thus, \$200 assessed to each of them (or less than 4% each) appears appropriate.

Applicant participated in the hearing extensively, presented the most witnesses of any party, used the transcript significantly in its briefing, has the financial resources to bear the costs, and has arguably benefitted most from the transcript as evidenced by the fact the ALJ is recommending its application be granted. Further, Applicant was the only party that requested that the transcript be expedited, which increased the cost. Accordingly, apportioning the remaining balance (approximately 84%) to Applicant appears to be a fair allocation of costs.

## V. CONCLUSION

In conclusion, the ALJ finds that none of the concerns raised by the issues referred by the Commission warrant denial of the application or a refusal to issue the requested permit. However, if the Commission issues the requested permit, it should include the provision recommended in this PFD indicating that the Applicant is required to close the permitted facility once a regional wastewater option is available and in place for the areas served by the requested permit. The findings of fact and conclusions of law supporting the ALJ's recommendations herein are set out in a separate proposed final order that is being sent to the Commission along with this PFD.

**SIGNED January 15, 2009.**

  
\_\_\_\_\_  
**CRAIG R. BENNETT**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**



**ORDER  
GRANTING THE APPLICATION BY  
MARLIN ATLANTIS WHITE, LTD.  
FOR TPDES PERMIT NO. WQ0014570001  
TCEQ DOCKET NO. 2006-1572-MWD  
SOAH DOCKET NO. 582-08-0203**

On \_\_\_\_\_, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the application of Marlin Atlantis White, Ltd., (Applicant) for a new permit to authorize the discharge of treated wastewater effluent into Gum Bayou, a tributary of Dickinson Bayou Tidal, Segment 1103, in Galveston County, Texas. A Proposal for Decision (PFD) was presented by Administrative Law Judge (ALJ) Craig R. Bennett of the State Office of Administrative Hearings (SOAH), who conducted a hearing in this matter on September 8-10, 2008, in Galveston, Texas. The record closed on November 17, 2008.

After considering the Proposal for Decision, the Commission makes the following Findings of Fact and Conclusions of Law.

**I. FINDINGS OF FACT**

1. Marlin Atlantis White, Ltd. ("MAW" or "Applicant") filed its application with the Texas Commission on Environmental Quality ("Commission" or "TCEQ") on October 21, 2004, and provided additional information on November 22, 2004, and February 9, 2005.

2. The application requests a new permit for a wastewater treatment plant that will use an activated sludge process operated in a complete mix aeration mode. Treatment units will include bar screens, a splitter box, aeration basins, final clarifiers, sludge digesters, and chlorine contact chambers.
3. The facility will be located in Galveston County, Texas, adjacent to Gum Bayou, approximately 2.14 miles east of State Highway 3 and 600 feet north of F.M. 517. The discharge will be to Gum Bayou; thence to Dickinson Bayou Tidal in Segment No. 1103 of the San Jacinto-Brazos Coastal Basin.
4. Treated effluent is proposed to be discharged at a daily average flow not to exceed 0.125 million gallons per day ("MGD") in the first phase, not to exceed 0.250 MGD in the second phase, and not to exceed 0.500 MGD in the final phase.
5. The Executive Director of the TCEQ declared the application administratively complete on February 22, 2005.
6. On February 24, 2005, the Notice of Receipt of Application and Intent to Obtain a Water Quality Permit was published in the Houston Chronicle, a newspaper that is regularly published or circulated in Galveston County.
7. The Executive Director, after completing the technical review of the application, originally recommended approval of a draft permit with effluent limits in the final phase of 10 milligrams/liter ("mg/l") carbonaceous biochemical oxygen demand (5-day) ("CBOD5"), 15 mg/l total suspended solids, 2 mg/l ammonia nitrogen, and 4.0 mg/l dissolved oxygen.
8. On July 27, 2005, the Notice of Application and Preliminary Decision for Water Quality TPDES Permit for Municipal Wastewater was published in the Houston Chronicle.

9. A public meeting on the application was held October 6, 2005, in Dickinson, Texas. Notice of the public meeting was published on September 4, 2005, in the Houston Chronicle.
10. Additional notices of the application were sent to upstream landowners on February 2, 2007.
11. On January 29, 2008, due to a change in the 303(d) listing under the federal Clean Water Act for a portion of Dickinson Bayou upstream from the confluence of Dickinson Bayou and Gum Bayou, the Executive Director issued a revised draft permit recommending effluent limits in the final phase of 5 mg/l CBOD5, 5 mg/l total suspended solids, 2 mg/l ammonia nitrogen, and 6 mg/l dissolved oxygen.
12. By order dated August 2, 2007, the Commission referred the following issues to the State Office of Administrative Hearings ("SOAH") for hearing:
  - a. Is the proposed permit protective of aquatic life and the requesters' health;
  - b. Whether the data provided by the Applicant and used by the Executive Director for modeling was accurate;
  - c. Whether the dissolved oxygen in the impaired region would be impacted;
  - d. Whether the information provided in the application caused the Executive Director to perform an improper evaluation;
  - e. Whether Gum Bayou is tidally influenced at the point of discharge;
  - f. Whether the Applicant's queries into potential service from wastewater plants contained within the required three-mile survey were adequate;
  - g. Whether the permitted discharge will negatively impact the waterbody; and
  - h. Whether fish and wildlife will be negatively impacted by the facility.

13. On October 3, 2007, the Chief Clerk mailed notice of the preliminary hearing. On October 11, 2007, notice of the preliminary hearing was published in the Galveston County Daily News, a newspaper that is regularly published or circulated in Galveston County.
14. The preliminary hearing was held on November 13, 2007, in Galveston. At the preliminary hearing, the following were admitted as parties: Applicant, the Executive Director, the Office of Public Interest Counsel, the City of Dickinson, the Tropical Gardens Group, the Galveston Bay Foundation, the B.C. Schroeder, Jr. Marital Trust, Betty Gutierrez, Louis Decker, Dan Wright, and Jan Culbertson.
15. The hearing on the merits was held on September 8-10, 2008, in Galveston. The record closed November 17, 2008, after the submission of written closing arguments and replies.
16. The draft permit requires that the treated effluent be disinfected by containing a chlorine residual of at least 1.0 mg/l and not more than 4.0 mg/l after a detention time of at least 20 minutes (based on peak flow), and chlorine shall be monitored five times each week by grab sample.
17. Under the Texas Surface Water Quality Standards, the designated use for Gum Bayou is high aquatic life use, and the dissolved oxygen criterion is set at 4.0 mg/l.
18. Dickinson Bayou Tidal in Segment 1103 of the San Jacinto Brazos Coast Basin has designated uses of contact recreation and high aquatic life, and the dissolved oxygen criterion is set at 4.0 mg/l.
19. Gum Bayou is not currently included on the State 303(d) list of impaired waterbodies.
20. Dickinson Bayou Tidal is considered impaired, for dissolved oxygen and bacteria, but only upstream from its confluence with Gum Bayou.

21. The Executive Director conducted Tier 1 and Tier 2 antidegradation reviews of Applicant's proposed discharge in accordance with 30 TEX. ADMIN. CODE § 307.
22. Applicant's discharge in accordance with the revised draft permit will not interfere with existing uses of Gum Bayou and Dickinson Bayou and will maintain water quality sufficient to protect those uses. Applicant's discharge in accordance with the draft permit will not degrade waters that exceed fishable/swimmable quality.
23. The Executive Director's processing of MAW's application followed the same procedures and used the same type of data—both provided by the Applicant and otherwise obtained by the Executive Director—that are used by the TCEQ to process all similar applications.
24. The information provided in the application and the supplement to the application did not cause the Executive Director to perform an improper evaluation.
25. The modeling conducted by Applicant and the Executive Director complied with all applicable TCEQ rules and policies.
26. The data which was used by the Executive Director for modeling was accurate.
27. Modeling by Applicant and the Executive Director shows that Applicant's discharge in accordance with the draft permit will not significantly impact dissolved oxygen in Gum Bayou or Dickinson Bayou, and will maintain dissolved oxygen above the required levels.
28. The draft permit provides that the permit may be reviewed when the Total Maximum Daily Load study for Dickinson Bayou Segments 1103 and 1104 is finalized, and the permit may be amended as a result.

29. Gum Bayou is tidally influenced at the point of discharge. The Executive Director fully considered the tidal influence on Gum Bayou in the review of the application, and the modeling conducted by Applicant and the Executive Director accounted for the tidal influence.
30. TCEQ requires that an applicant for a wastewater permit contact all existing wastewater treatment facilities within three miles of the proposed facility to determine whether they can provide wastewater treatment service.
31. Galveston County Water Control and Improvement District No. 1, Via Bayou, Inc., and Bacliff Municipal Utility District are entities with existing wastewater treatment plants within three miles of Applicant's proposed facility.
32. Applicant sent capacity requests to Galveston County Water Control and Improvement District No. 1, Via Bayou, Inc., and Bacliff Municipal Utility District, and all three entities were unwilling or unable to provide service to Applicant.
33. The area to be served by Applicant's plant is within the corporate limits of the City of Texas City.
34. There is no agreement between the City of Texas City and San Leon Municipal Utility District that would allow San Leon Municipal Utility District to provide service within the city limits of Texas City.
35. San Leon Municipal Utility District does not have sufficient capacity to serve the area that will be served by Applicant's wastewater treatment plant.
36. Applicant's queries into potential service from wastewater plants within three miles of Applicant's proposed wastewater treatment plant were adequate.

37. Applicant's discharge in accordance with the revised draft permit will have no significant impact on water quality in Gum Bayou or Dickinson Bayou and will not negatively impact the water body, human health, aquatic life, or wildlife.
38. The draft permit requires that the wastewater treatment plant be supervised by a licensed operator in compliance with applicable TCEQ rules.
39. The draft permit prohibits any unauthorized discharge of wastewater or any other waste and requires that Applicant take all reasonable steps to minimize or prevent any discharge or other permit violation which has a reasonable likelihood of adversely affecting human health or the environment.
40. The draft permit requires that the plant have safeguards to prevent the discharge of untreated or inadequately treated wastes during power outages by providing alternate power sources, standby generators, and/or retention of inadequately treated wastewater.
41. The expiration date in the draft permit should be revised to reflect a five-year term from the actual issuance date.
42. The Administrative Law Judge required a transcript in this case.
43. Reporting and transcription costs for the hearing in this case totaled \$5,649.88. Of that total amount, the City of Dickinson should be assessed \$500, the Tropical Gardens Group should be assessed \$200, and the B.C. Schroeder, Jr. Marital Trust should be assessed \$200. The remaining balance should be borne by the Applicant.
44. A provision requiring Applicant to close the proposed treatment plant once a regional wastewater treatment option is available is reasonable and serves regionalization goals.

## II. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Texas Water Code Chapter 26.
2. SOAH has jurisdiction over all matters relating to the conduct of a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to Texas Government Code Chapter 2003.
3. Applicant and TCEQ have satisfied all applicable public notice requirements.
4. In accordance with TEX. WATER CODE ANN. § 26.041, Applicant's discharge under the terms of the revised draft permit will not be injurious to public health.
5. In accordance with TEX. WATER CODE ANN. § 26.003, Applicant's discharge under the terms of the draft permit will maintain water quality consistent with the propagation and protection of terrestrial and aquatic life.
6. Applicant's discharge under the terms of the draft permit will maintain dissolved oxygen in Gum Bayou and Dickinson Bayou in accordance with the requirements of 30 TEX. ADMIN. CODE § 307.
7. In accordance with TEX. WATER CODE ANN. § 26.003, it is the policy of the State to encourage and promote the development and use of regional and area-wide waste collection, treatment, and disposal systems and to require the use of all reasonable methods to implement this policy.
8. The permit in this case should require Applicant to submit a closure plan once all necessary steps have been taken that will allow it to connect to a regional wastewater treatment option.

9. Applicant's inquiries into potential service from wastewater plants contained within the required three-mile survey were adequate and confirmed that no sufficient source of wastewater treatment service is available to serve the area that will be served by Applicant's facility; therefore, issuance of Applicant's permit is consistent with State policy regarding regionalization.
10. Applicant's permit application meets all requirements for Commission approval as set out in the Texas Water Code, the Texas Government Code, and the relevant requirements of the Commission's implementing regulations.
11. Applicant's application should be granted, and Permit No. WQ0014570001 should be issued, with the expiration date revised to reflect a five-year term from the date of actual issuance, and with the additional permit provision contained in the ordering provisions below.

**NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:**

1. In accordance with 30 TEX. ADMIN. CODE (TAC) § 50.117, the Commission issues this Order granting TPDES Permit No. WQ0014570001 to Marlin Atlantis White, Ltd.
2. The current draft permit is modified to include the following provision: "The permittee shall submit a closure plan as required herein at such time as the City of Texas City makes a final determination that service to the property being served by the facilities described in the permit is available from a regional wastewater treatment facility, such a regional facility has the capacity to provide full service to the property being served by the facilities, all necessary easements for transmission lines to connect the property to the regional facility have been obtained, and all required transmission lines and connections from the property to the regional facility have been constructed and placed in service."

3. The Commission adopts the Executive Director's Response to Public Comment in accordance with 30 TAC § 50.117. Also in accordance with Section 50.117, the Commission issues this Order and the attached permit as its single decision on the permit application. Information in the agency record of this matter, which includes evidence admitted at the hearing and part of the evidentiary record, document the Executive Director's review of the permit amendment application, including that part not subject to a contested case hearing, and establishes that the terms of the attached permit are appropriate and satisfy all applicable federal and state requirements.
4. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
5. The effective date of this Order is the date the Order is final, as provided by TEX. GOV'T CODE ANN. § 2001.144 and 30 TAC § 80.273.
6. The Commission's Chief Clerk shall forward a copy of this Order to all parties.
7. If any provision, sentence, clause, or phase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

---

Buddy Garcia, Chairman  
For the Commission