TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

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CHIEF CLERKS OFFICE

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

APPLICATION OF	§	BEFORE THE STATE
MARLIN ATLANTIS WHITE, LTD.	§	OFFICE OF
FOR TPDES PERMIT NO.	§	ADMINISTRATIVE
WQ0014570001	§	HEARINGS

CITY OF DICKINSON'S EXCEPTIONS TO THE PROPOSAL FOR DECISION

Marlin Atlantis White, Ltd. (MAW) has applied for a wastewater discharge permit (TPDES) to construct and operate a wastewater treatment plant (WWTP) along the banks of Gum Bayou immediately upstream from the confluence of Dickinson Bayou. Effluent from the WWTP will be discharged into Gum Bayou and carried into Dickinson Bayou adjacent to the City of Dickinson (City). Thus, as the Texas Commission on Environmental Quality (TCEQ) determined when this application was referred to the State Office of Administrative Hearings (SOAH), the City and its citizens are directly affected by the proposed TPDES.

For the reasons set forth below, the City believes that MAW's TPDES application must be denied. The proposal for decision (PFD) of presiding administrative law judge Craig Bennett (ALJ) is incorrect as a matter of fact and law when it suggests that the permit be issued. In the alternative, should the TCEQ/SOAH find that the TPDES is currently needed; the permit should be issued subject to special conditions for a limited term. This is important because MAW claims it only needs an "interim" WWTP yet nothing in the PFD makes it temporary. If issued as currently written, the TPDES could be renewed indefinitely under current TCEQ practices. In fact, the ALJ proposes to violate TCEQ policy and give the TPDES a full five-year term (FoF No. 41) even though such a term would not coincide with the basin term.

CERTIFIED QUESTION NO. 7. Whether the Applicant's Queries into Potential Service from Wastewater Plants Contained within the Three-mile Survey were Adequate?

This is where the City takes its greatest issue with Judge Bennett's findings in the PFD. He found that there was no problem with the applicant's requests for service from neighboring utilities. This is factually and legally incorrect. The PFD sets poor public policy when its does not require the new producer of municipal-

grade waste to optimize the available capacity in existing wastewater treatment plants (WWTPs) before it is allowed to build a new WWTP.

The subdivision to be served by the MAW WWTP will be developed and built out in phases. The WWTP is proposed to be built in phases. Yet, when MAW's engineers queried neighboring utilities on whether they could provide alternative service, MAW only asked if service to its final, built out development was available. This, despite the fact that MAW purportedly is only proposing an interim plant.[1] No consideration was given to interim service from other existing utilities to replace what MAW itself characterized as an "interim" WWTP. It is, therefore, disingenuous to state that interim service to the MAW tract is not available because an existing sewer service provider does not have 0.5 mgd idle capacity today. This is especially true if MAW's service need is only interim until Texas City builds a new regional plant.[2]

The ALJ find not find any fault with this practice. In doing so he was following long-standing TCEQ precedent. However, that agency practice ignores the mandate of Chapter 26 of the Water Code to maximize existing regional WWTPs before allowing new discharges into state waters.

City witness Julie Johnston testified on this issue that San Leon Municipal Utility District (SLMUD) will serve the MAW property. Her testimony that SLMUD had the capacity to serve the first phase or two of the MAW development was uncontroverted. However, the SLMUD is not going to fund the construction needed to serve the MAW tract. It will take an extended sewer transmission main to transport MAW sewage to the SLMUD WWTP. Impact fees and other charges may be necessary to obtain SLMUD service. Developers are required to pay their own way to get utility services to their property. SLMUD's existing idle capacity can be used to meet the early demands of the MAW development while upgrades are made for future service demands.[3] Why would MAW not pursue the SLMUD alternative? MAW simply wants its municipal utility district to build a WWTP so that the construction costs can be reimbursed from MUD bond proceeds. The PFD allows MAW to achieve this non-statutory goal at the expense of a statutory mandate.

MAW claims and the ALJ accepted that SLMUD cannot serve inside Texas City, where the MAW project is located, without Texas City's consent. This belief apparently comes from their reading of Water Code §49.215(a). However, they have overlooked the fact this statute only applies to retail service to "household users". It does not bar SLMUD (or anyone else) from providing MAW's utility district with wholesale sewer treatment services.

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[1] Applicant Exh. 33, pg 8 L 2-3
[2] Applicant Exh. 38, pg 4, L 10-14
[3] Dickinson Exh. 2, pg 10, L 8 - 15

It is strictly a dollars and sense game to MAW. This was proven by the live testimony of MAW witness Joe Goggans. Mr. Goggans admitted to the planned phased development and the planned growth in sewer demand.[4] He admitted that development financing was the primary force behind the decision to seek a TPDES. MAW needed a sewer service commitment to match its development loan. While phased development loans were obtainable, MAW only wanted to go to the money well once; therefore, it needed a service commitment to match the built out development.

Mr. Goggans was quite candid in his testimony on the need for the WWTP. His testimony just as candidly belies the claim that MAW only seeks an interim permit until the Texas City regional plant is available.[5] If MAW is really willing to make the financial commitment to transport sewage three miles to the east to a Texas City regional plant at Dolphin Cove, why would it not save the expense of constructing and operating a WWTP and extend a transmission line north to SLMUD? If the MAW WWTP is to be interim only, why does MAW not tap into the uncontroverted additional capacity Texas City is receiving from League City? The why was obvious when Mr. Goggans admitted that MAW did not want to be committed to having to make any specific expenditure on a Texas City sewer alternative.

Mr. Malcolm Bailey, president of the TPDES applicant for the Texas City regional plant, testified that this service alternative would be permitted and constructed. MAW claims it intends to receive service from this WWTP. That TPDES permit is now before SOAH on a two-issue referral by a single protestant.

It is clear that MAW has alternative service suppliers for the early phases of its development. Therefore, there is no need for the MAW WWTP. The PFD is incorrect and the findings contained therein should be amended accordingly.

Certified Question No. 2. Is The Proposed Permit Protective of Aquatic Life and Requesters' Health?

Again, the City respectfully takes issue with the PFD and respectfully submits that the answer to this question is "No." While the City does not quibble about the adequacy of the proposed effluent, the City submits that the safeguards to public health and state waters in the draft permit are woefully inadequate. It is an undisputable maxim that anything built by man will ultimately fail over time.

During the trial, MAW made great sport of the pipeline failure of Galveston County WCID No. 1 (WCID) and its spilling untreated human waste into Dickinson Bayou. This was repeatedly held up as an example as to why WCID is not a viable alternative to the MAW WWTP. MAW claims the same cannot happen to it because it will be a new sewer system made with new materials and

[4] TR pg 94, L 12 – pg 95, L 10
[5] Applicant Exh. 38, pg 4, L 1 - 14

equipment. While this may be initially true, the MAW system (like the WCID facilities) will deteriorate with use over time. They will ultimately fail and imperil the City and its citizens.

To address the inevitable failure of MAW's sewer system, City Administrator Julie Johnston, the former chief executive officer of a municipal sewer utility, presented two simple recommendations.[6] First, while the draft permit requires the WWTP to be operated by a TCEQ-licensed operator, there are no requirements imposing an objective standard as to how soon the operator must respond to a problem. MAW may employ a contract operations company to man the WWTP, which is not necessarily a bad thing. The harm to aquatic life and human health will arise when the operator is faced with a number of simultaneous WWTP problems or widespread power outages and is unable to get to the MAW WWTP for hours. To address this problem in the permit, Ms. Johnston proposed the inclusion of a provision that MAW must employ or contract with an operator(s) that guarantees fifteen (15) minute response to a notice of a problem at the plant. This "notice" should be defined broadly enough to include mechanical warning devices, phone calls from neighbors and/or the general public as well as communications from the TCEQ and/or regional health and environmental agencies.

The ALJ took issue with a 15-minute response time on a WWTP that does not require a full-time operator. However, Judge Bennett did not identify the part of the hearing record that supports the unfettered flow of waste into state waters between the daily visits of a contract operator. If 15-minutes is too short a period, 24-hours is too long. The Chapter 291 Customer Service rules require a non-functioning utility to report outages of four hours or more. This standard should be incorporated into this TPDES. MAW should be required to contract with an operator(s) who guarantees four hours or less response time to any service complaint or notice of equipment failure.

Cost of Transcript

The allocation of the cost of the transcript is a contested issue in this cause. For the reasons stated herein, the TPDES application should be denied. The City believes that MAW should bear all costs of its failed attempts to get this interim permit.

Findings and Conclusions:

The following Findings of Fact and Conclusions of Law in the PFD must be revised:

[6] Dickinson Exh. 2, pg 7, L 6 – pg 8. L 4

1. FoF No. 2. Change the first sentence to, "The application requests a new interim permit for a wastewater treatment plant that will use an activated sludge process operated in a complete mix aeration mode."

2. FoF No. 31 Change to, "Galveston County Water Control and Improvement District No. 1, Via Bayou, Inc., San Leon Municipal Utility District, the City of Texas City and Bacliff Municipal Utility District are entities with existing wastewater treatment plants within three miles of Applicant's proposed facility.

3. FoF No. 32. Change to, "Applicant sent capacity requests suitable for full build-out 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 at that level. Applicant did not send capacity requests to San Leon Municipal Utility District or Texas City, and they have capacity to serve the initial phase(s) of applicant's development."

4. FoF No. 34 Delete finding as unnecessary.

5. FoF No. 35 Change to, "San Leon Municipal Utility, District and Texas City, individually or together, have sufficient capacity to serve the initial development phases that will be served by Applicant's wastewater treatment plant."

6. FOF No. 36 Change to, "Applicant's queries into potential service from wastewater plants within three miles of Applicant's proposed wastewater treatment plant were inadequate."

7. FOF No. 41. Change to, "The application for a TPDES should be denied."

8. FoF No. 43. Change to, "The Applicant should bear all transcription costs because it did not meet its burden of proof on certified questions and establish that a TPDES should be issued."

9. CoL Nos. 4 through 6. Delete

10. CoL Nos. 8 though 10. Delete

11. CoL No. 11. Change to, "Applicant's application should be denied."

12. Decretal No. 1. Change to, "In accordance with 30 TEX. ADMIN. CODE (TAC) § 50.117, the Commission issues this Order denying TPDES Permit No. WQ0014570001 to Marlin Atlantis White, Ltd."

13. Decretal No. 2. Delete.

14. Decretal No. 3. Change to, "Applicant is assessed all transcription costs arising in this docket."

Summary:

MAW only needs phased in sewer service to meet its phased development. Alternate service exists until the end of the development when MAW claims it will use the Texas City regional plant.

MAW did not submit valid service requests to neighboring sewer service providers because its requests did not indicate phased service. Therefore, the TPDES application must be denied.

The MAW TPDES must have a specific term limit to match the purported interim nature of the need for the plant. This can be done by: (1) fixing the term of the TPDES and/or any renewal to three years (expiring in 2011), (2) requiring the permittee to file a complete TPDES application in lieu of a simple renewal in 2010 or (3) deleting the final phase of the permit.

If built, the TPDES for the MAW WWTP requires a special condition. The permittee must contract for 4-hour or less response to any outage or failure at the WWTP.

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I, Mark H. Zeppa, attorney for the City of Dickinson, certify that true copies of the foregoing brief were served on SOAH, the TCEQ Docket Clerk and all parties of record on February 4th, 2009 by fax, hand delivery, email and USPS mail.

Mark H. Zeppa

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