

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

January 6, 2009

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CHIEF CLERKS OFFICE
TEXAS COMMISSION
ON ENVIRONMENTAL
QUALITY

VIA FACSIMILE 512/239-5533

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

Re: SOAH Docket No. 582-08-0202; TCEQ Docket No. 2007-1426-MWD; In Re: Application by Hays County Water Control & Improvement District No. 1 for an Amendment to Texas Pollutant Discharge Elimination System Permit (TPDES) Permit No. WQ0014293001

Dear Mr. Trobman:

On December 10, 2008, all parties filed Exceptions to the Proposal For Decision (PFD) issued November 19, 2008. On December 22, 2008, all parties except the Executive Director (ED) and the Office of Public Interest (OPIC) filed Responses. The Administrative Law Judges (ALJs) have reviewed the Exceptions and Responses and this letter is the result of that review. In general, the ALJs recommend no changes to the PFD and Proposed Order, except for changes to correct minor errors.

Applicant and ED seek to modify the PFD by deleting the discussion of the application of the "10 per cent of assimilative capacity" concept as set forth in *Kentucky Waterways Alliance v. Johnson*, 2008 U.S. App., LEXIS 18802, to the analysis of *de minimus* degradation. They argue that the concept can only be used as a benchmark for determining whether more than *de minimus* degradation will result if there are numeric water quality standards for the constituent in question, and, because there are no such numeric standards for nutrients, the concept is not applicable to this case. Applicant and ED also seek to modify the PFD by deleting the discussion of the relationship of assimilative capacity and change in trophic status.

As pointed out in the Response of Hays County, the PFD did not adopt the 10 per cent assimilative capacity concept, but merely used it as a guideline. Likewise, the relationship of assimilative capacity and change in trophic status was also used as a guideline, not adopted as a standard. The ALJs are of the opinion that their analysis of the issue of *de minimus* degradation was supported by the evidence and does not need modification.

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Applicant and ED except to the recommendation that all the terms of the Partial Settlement Agreement be incorporated into the Permit. OPIC and Protestant Hays County agreed that all the terms of the Partial Settlement Agreement should be incorporated into the Permit, but suggested modification of those terms to make them more enforceable. The ALJs are of the opinion that all the terms of the Partial Settlement Agreement should be incorporated into the Permit.

The additional Findings suggested by OPIC are based on the evidence in the record and can be added to the order if the Commission desires to do so. As for the modifications sought by OPIC to the proposed Finding of Fact No. 25 on pages 6-7 of the Proposed Order, those modifications can be added to the order if the Commission desires to do so.

Applicant excepts to the recommended allocation of the transcription costs, arguing that it should only bear 50 per cent, not 75 percent, of the costs. The ALJs are of the opinion that the recommended allocation is fair and weighed appropriately the factors in 30 TEX. ADMIN CODE. § 80.23.

Protestant City of Austin excepts to the discussion in the PFD, and related Findings of Fact, that there will be *de minimus* degradation of Barton Springs and no impact on the Barton Springs Salamander under the terms of the Partial Settlement Agreement. The ALJs are of the opinion that their analysis of the question of *de minimus* degradation and impact on the salamander was supported by the evidence and that their findings and conclusions based on that analysis are correct.

Protestant Group C Landowners and Protestant Group D Landowners both except to the issuance of the permit without requiring a notice that allows review of all the proposed terms that they contend, constitute a major amendment to what was included in the original hearing notice. In the alternative, they suggest that, if the permit is granted, it be further modified to forbid a discharge into Bear Creek at any time except when the creek flow is 14 cubic feet per second (cfs) or greater.

The question of whether the addition of the terms of the Partial Settlement Agreement would constitute a major amendment is one ultimately to be answered by the Commission. The ALJs heard the evidence regarding those terms, including the discussion of whether Pond 6B was part of the treatment system, and are of the opinion that additional notice is not required. As for the additional limitation on when a discharge could be made, the ALJs are of the opinion that the terms of the Partial Settlement Agreement are sufficient to be protective of the environment.

The parties noted language or factual errors in some of the findings. The ALJs agree that the following errors should be corrected and/or modifications made, as shown by the amendments shown in boldface type:

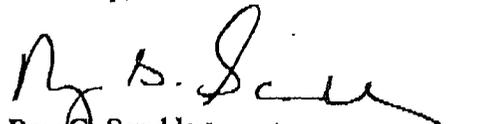
- Finding of Fact No. 18: Segment 1427 was listed on the State's inventory of impaired and threatened waters, *i.e.*, the Clean Water Act Section 303(d) list, specifically for the depressed

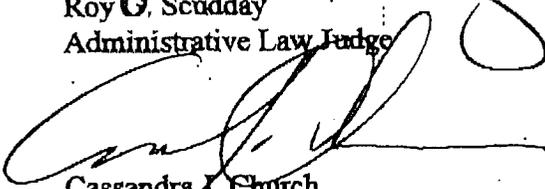
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Dissolved Oxygen (DO) concentrations from the end of the segment to U.S. Hwy. 183, but was removed from the list in 2006.

- Finding of Fact No. 21: In accordance with 30 TEX. ADMIN. CODE (TAC) § 307.5 and the TCEQ implementation procedures for the *Texas Surface Water Quality Standards*, the TCEQ performed an antidegradation review of the receiving waters under the terms of the Draft Permit.
- Finding of Fact No. 41: An increased concentration of a limiting nutrient in a stream may, along with other factors, increase the growth of algae; the growth of algae will lower the DO levels of the stream.
- Finding of Fact No. 46: The most credible estimate of background total phosphorus concentrations in Bear Creek is 0.03 mg/L (baseline concentration).
- Conclusion of Law No. 11: Under the facts in this record, WCID has no legal obligation under existing Texas law to monitor or treat its effluent for pharmaceutical and personal care products (PPCPs) that may enter its treatment facility.
- First sentence of Ordering Provision No. 2: The Commission adopts the Executive Director's Response to Public Comment not in conflict with the Findings of Fact and Conclusions of Law in this Order in accordance with 30 TEX. ADMIN. CODE § 50.117.

Sincerely,


Roy G. Scudday
Administrative Law Judge


Cassandra J. Church
Administrative Law Judge

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STYLE/CASE: HAYS COUNTY WATER CONTROL & IMPROVEMENT DISTRICT NO 1

SOAH DOCKET NUMBER: 582-08-0202

REFERRING AGENCY CASE: 2007-1426-MWD

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EXCEPTIONS LETTER (BY ALJ)

582-08-0202

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