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December 10, 2008

LaDonna Castanuela, Chief Clerk  
Texas Commission on Environmental Quality  
Office of Chief Clerk  
12100 Park Thirty-Five Circle  
Bldg. F, Room 1101  
Austin, Texas 78753

VIA HAND-DELIVERY

Re: Applicant Name: Hays County Water Control & Improvement District No. 1  
Facility Location: Hays County, Texas  
Permit Number: WQ0014293001

Dear Ms. Castanuela:

Enclosed please find Applicant's Exceptions to Proposal For Decision for filing in the above referenced matter.

Thank you for your service.

Sincerely,



Kim McBride, CLA  
Certified Legal Assistant

CHIEF CLERKS OFFICE

2008 DEC 10 PM 3:39

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

KLM  
Enclosure

cc: The Honorable Roy Scudday  
The Honorable Cassandra Church  
David O. Frederick  
Stuart Henry  
Robert M. O'Boyle  
Patricia Link  
Fred B. Werkenthin

Via Hand-delivery  
Via Hand-delivery  
Via Email and First Class Mail  
Via Email and First Class Mail



IN THE MATTER OF  
THE APPLICATION OF HAYS  
COUNTY WATER CONTROL &  
IMPROVEMENT DISTRICT NO. 1  
FOR AMENDMENT TO TEXAS  
POLLUTANT DISCHARGE  
ELIMINATION SYSTEM (TPDES)  
PERMIT NO. WQ0014293001

§ BEFORE THE STATE OFFICE  
§  
§  
§ OF  
§  
§  
§ ADMINISTRATIVE HEARINGS

**APPLICANT'S EXCEPTIONS TO PROPOSAL FOR DECISION**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES:

NOW COMES Hays County Water Control & Improvement District No. 1 ("Applicant") and, pursuant to 30 TEX. ADMIN. CODE 80.257, files the following exceptions to the Proposal for Decision.

**I. ERRONEOUS STANDARD APPLIED REGARDING NUTRIENTS**

Applicant respectfully excepts to the portions of the Proposal for Decision (e.g., second paragraph on page 28) stating that Applicant failed to show that a continuous discharge pursuant to the terms of the revised draft permit, without incorporating the terms of the Settlement Agreement, would not cause degradation of Bear Creek. This conclusion was primarily based on nutrient loadings, and the ALJs applied a standard that is unsupported by Texas law.

The only standard for nutrients employed by TCEQ is the narrative standard in 30 TEX. ADMIN. CODE § 307.4(e) which states in pertinent part: "[n]utrients from permitted discharges . . . shall not cause excessive growth of aquatic vegetation which impairs an existing, attainable, or designated use." While it is true that 30 TEX. ADMIN. CODE § 307.4(k) states that nothing in § 307.4 supersedes the anti-degradation regulation, the fact remains that the only usable standard for nutrients found in TCEQ regulations, statutes, or case law is the "no

excessive aquatic vegetation” standard. With respect to the “excessive vegetation” standard, Applicant *did* meet its burden through, among other things, the prefiled testimony of James Machin in which he stated there would not be excessive algal growth as a result of a 0.5 MGD continuous discharge and that there would be no degradation of the Bear Creek. (Machin Prefiled at 3, 7, 12, 14).

In the contested case hearing, Protestants led the ALJs far afield from the correct nutrient standard. They essentially argued at times that any algal growth above *de minimis* constitutes degradation requiring denial of the permit. Additionally, and more seriously, the ALJs adopted in the Proposal for Decision (“PFD”) an erroneous standard for nutrients that would only allow discharges that will not utilize more than 10% of the assimilative capacity of the receiving stream. This is error because the TCEQ Implementation Procedures Manual specifically states that the 10%-of-assimilative-capacity formula only applies to “constituents that have numerical criteria in the water quality standards” and therefore does not apply to nutrients. (ED Ex. 10 at 32). The 10% rule is not a workable standard for nutrients because it is impossible to calculate with reliability. The process of aquatic plant growth, uptake and decay are continual processes. The continually changing rate of nutrient uptake, assimilation, etc. is impossible to accurately quantify so the narrative standard for nutrients is a reasonable approach, and the only one recognized by TCEQ and Texas law. The “10%” approach pushed by the Protestants and used by the ALJ is not how the TCEQ’s antidegradation review or policy works. It interjects new policy and interpretations that are not in the TCEQ rules or Implementation Procedures. The Executive Director, as required, performed a Tier 1 and Tier 2 review and found that no degradation would occur.

On page 23 of the PFD, the ALJs accurately found that none of the “nutrient models” mentioned during the hearing are valid since Texas uses a narrative standard for nutrients as opposed to a numeric standard. All of the qualified water quality modelers who testified in the case agreed that modeling nutrients as non-conservative substances under QUALTX was questionable at best and essentially pseudo-science. This is another reason why it is impossible to reliably quantify the nutrient assimilative capacity of a stream or how much of that capacity any assumed discharge would utilize.

At the urging of Protestants, the ALJs erroneously relied on a recent Sixth Circuit Court of Appeals decision as authority for applying the “10% of assimilative capacity” concept to nutrients. This reliance was misplaced because the context of the decision in *Kentucky Waterways Alliance v. Johnson*, 2008 WL 4057140, makes it wholly inapplicable to nutrient standards in Texas. The portion of the opinion quoted by the ALJs was *dictum* discussing the EPA’s potential application of the “10% of assimilative capacity = *de minimis*” concept in the context of Tier II review in Kentucky generally, but does not even remotely suggest that one should attempt to apply the 10% formula to constituents to which there are no numeric water quality standards. *See, Kentucky Waterways Alliance v. Johnson*, 2008 WL 4057140 at 15. In fact, the approach discussed in the *Kentucky Waterways* case is essentially the same as the approach articulated in the TCEQ Implementation Manual (ED Ex. 10)—you can use the 10% of assimilative capacity formula as a benchmark for determining whether more than *de minimis* degradation will result, but only if there are numeric water quality standards for the constituent in question.

Applicant further excepts to the Proposal for Decision in this case because the ALJs erroneously attempted to apply the 10% rule to nutrients and then compounded the problem by

attempting to define assimilative capacity as a change in trophic status. *See, e.g.* PFD at 24. At the contested case hearing, Dr. Tischler opined that a change in trophic status of Bear Creek would equate to degradation. He offered no support or legal authority for this proposition because there is none. The ALJs have erred by essentially trying to adopt the trophic status boundaries as water quality standards for nutrients, but neither TCEQ nor the legislature has adopted those standards in Texas. This analysis is faulty and led to the erroneous conclusion that Applicant did not meet its burden of proving no degradation unless the terms of the Settlement Agreement are incorporated in the permit.

Utilizing the nutrient standard advocated by Protestants in this case is not only erroneous but unfeasible because it is doubtful that any discharge permit application could ever meet either the *de minimis* or the “10% of assimilative capacity” standard in terms of nutrients.

## **II. MAJOR AMENDMENT ISSUE IS NOT APPLICABLE**

Applicant respectfully excepts to those portions of the Proposal for Decision (*e.g.* parenthetical at the bottom of page 29 and top of page 30) wherein the ALJs raise the issue of whether incorporation of the terms of the Settlement Agreement into the permit, or considering Pond 6B as part of the wastewater treatment process, would constitute a major amendment under 30 TEX. ADMIN. CODE § 305.62(c)(1). There are four reasons why there is no major amendment issue present: 1) the undisputed testimony was that Pond 6B will not be part of the treatment unit; 2) it is unnecessary to put all of the terms of the Settlement Agreement into the permit; 3) the major Amendment rules have no applicability to this situation because no one is requesting an amendment to the permit; and 4) the terms of the Settlement Agreement would not constitute a major amendment because they have the effect of strengthening protective measures for the receiving stream.

**1. The undisputed testimony was that Pond 6B will not be part of the wastewater treatment unit or process.** (Vol. II, 113-114 Callegari; Vol. II, 130 Callegari; Vol. III, 141-142 Machin). Protestants erroneously argued that Pond 6B will be part of the treatment process after Mr. Machin opined that large quantities of nutrients from the discharge would be removed by natural processes in Pond 6B. However, this argument proves too much because Mr. Machin (and others) also testified that nutrients would be removed in Dry Pond, Davis Pond, other impoundments, and in fact all portions of Bear Creek downstream from the discharge. Under Protestants' logic, every receiving stream would have to be considered part of the treatment unit because nature removes nutrients from discharged effluent. The permit contains standards for treated effluent which are to be measured at the point of discharge, *which is above Pond 6B*, and therefore it is both factually and legally erroneous to consider Pond 6B as part of the treatment process.

**2. It is unnecessary to put all of the terms of the Settlement Agreement into the permit.** In an effort to alleviate the concerns of the Protestants and to avoid a protracted contested case hearing, Applicant entered into a Settlement Agreement which incorporated unprecedented protections for Bear Creek. A few of the Protestants declined to settle and forced a contested case hearing despite the settlement. Prior to the contested case hearing, it was agreed by the settling parties, the ALJs and the Executive Director that the only provisions of the Settlement Agreement to be included in the revised draft permit were the total nitrogen limit, the requirement of ultra-violet disinfection, and the requirement of having a Class A Operator. It was further agreed by all parties that none of these changes would constitute a major amendment requiring new notice and hearing. The settling parties, the Executive Director, and Applicant were all comfortable leaving the remaining settlement terms out of the permit and instead relying

on Applicant's contractual obligations under the Settlement Agreement. For these same reasons, Applicant excepts to those portions of the Proposal for Decision which recommend putting all of the terms of the Settlement Agreement into the permit.

**3. The major amendment rules have no applicability to this situation.** Because neither Applicant nor the Executive Director is requesting that the permit or the application be amended to include all of the terms of the Settlement Agreement, the provisions of 30 TEX. ADMIN. CODE § 305.62 and 30 TEX. ADMIN. CODE 281.23 do not apply. In the PFD, the ALJs recommend that the final permit be issued with modifications, *i.e.*, incorporating all of the terms of the Settlement Agreement. It is not uncommon in contested case matters for the ALJ to recommend a permit that differs from the application after hearing the evidence, and TCEQ, if it accepts the recommended change, will adopt that change without requiring new notice and hearing. *See Chocolate Bayou Water Company v. Texas Natural Resource Conservation Commission*, 124 S.W.3d 844 at 850-851 (Tex. App.—Austin 2003, pet. denied) (holding in a similar context that protestants had sufficient notice even though the final permit differed from what was applied for). If the law was otherwise, no ALJ could ever recommend a modification to a permit without triggering the need for new notice and hearing *ad infinitum*. It would be particularly unjust in this case for the non-settling Protestants to compel new notice and hearing based on the incorporation of the Settlement Agreement into the permit—a modification for which they advocated.

**4. Even if they were incorporated into the permit, none of the provisions of the Settlement Agreement would constitute a major amendment to the permit.** Each of the Settlement Agreement provisions would be minor amendments under TCEQ rules because they will “improve or maintain the permitted quality or method of disposal of waste” and will not

“relax a standard or criterion which may result in a potential deterioration of quality of water in the State.” 30 TEX. ADMIN. CODE 305.62(c). In fact, the Executive Director has already considered this issue and determined that the provisions of the Settlement Agreement would not constitute a major amendment to the permit. *See* Executive Director’s Response to Group C’s and D’s Motion to Require Applicant to File Application and Meet Other Procedural Requirements for a Major Amendment. The Executive Director correctly stated that, among other things, use of MBR treatment technology can be incorporated as a permit provision and the specific treatment process is typically reviewed *after* a permit is issued, additional notice would not be required for Applicant to continue use of the currently permitted drip irrigation field, and additional notice for the addition of an effluent storage pond is not required if the storage pond is used solely to hold treated effluent under a 30 TEX. ADMIN. CODE 210 Reuse Authorization, which is what the Settlement Agreement in this case calls for. *Id.*

### III. ALLOCATION OF TRANSCRIPTION COSTS

Finally, Applicant excepts to the recommended allocation of transcription costs of 75% to the Applicant and 25% to all Protestants combined. Such a division is inequitable in light of the facts. Applicant entered into a complex settlement agreement with most Protestants, but certain other Protestants refused to settle which required the hearing to go forward. The situation devolved into the non-settling parties challenging the entire application but having the benefit of the Settlement Agreement as a safety net. Under these circumstances, given that the terms of the Settlement Agreement were found to meet all regulatory requirements by the ALJs, a 50/50 split is a more reasonable division of transcription costs.

#### IV. CONCLUSION

Applicant respectfully requests the ALJs to amend the Proposal for Decision to delete the statements that Applicant failed to meet its anti-degradation burden of proof unless the terms of the Settlement Agreement are incorporated into the permit, to delete the references to a potential major amendment issue, and to change the allocation of transcription costs to 50% to the Applicant and 50% to be reimbursed by Protestants.

Respectfully submitted,

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By: 

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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the above and foregoing has been sent on this the 10th day of December, 2008, to the following counsel of record:

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A handwritten signature in black ink that reads "Ray Chester". The signature is written in a cursive style with a horizontal line extending from the end of the name.

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Ray Chester