

LAW OFFICES
McGINNIS, LOCHRIDGE & KILGORE, L.L.P.

600 CONGRESS AVENUE
SUITE 2100
AUSTIN, TEXAS 78701

HOUSTON, TEXAS OFFICE
3200 ONE HOUSTON CENTER
1221 MCKINNEY STREET
HOUSTON, TEXAS 77010
(713) 615-8500
FAX (713) 615-8585

AUSTIN, TEXAS OFFICE
(512) 495-6000
FAX (512) 495-6093

WRITER'S DIRECT DIAL NUMBER:
(512) 495-6117
kmcbride@mcginnislaw.com
Fax: (512) 505-6338

December 22, 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

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2008 DEC 22 PM 3:53
CHIEF CLERKS OFFICE

Re: Applicant Name: Hays County Water Control & Improvement District No. 1
Facility Location: Hays County, Texas
Permit Number: WQ0014293001
TCEQ Docket No: 2007-0426-MWD
SOAH Docket No: 582-08-0202

Dear Ms. Castanuela:

Enclosed please find the original and 11 copies of Applicant's Responses to Exceptions to Proposal For Decision for filing in the above referenced matter.

Thank you for your service.

Sincerely,



Kim McBride, CLA
Certified Legal Assistant

KLM
Enclosure

cc: The Honorable Roy Scudday
The Honorable Cassandra Church
David O. Frederick
Stuart Henry
Robert M. O'Boyle

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

SOAH Docket No. 582-08-0202
TCEQ Docket No. 2007-1426-MWD

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

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2008 DEC 22 PM 3:43
CHIEF CLERK'S OFFICE

APPLICANT'S RESPONSES TO 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 Responses to Exceptions to Proposal for Decision.

I. PROTESTANT LANDOWNERS AND PROTESTANT GROUP C

The Protestant landowners continue to advocate a minimum creek flow requirement as a condition of discharge. This should again be rejected due to its impracticality. On those rare occasions when the ground is too saturated to irrigate and the storage pond is full, reality dictates that discharge will be necessary. Dr. Blair's study shows that Bear Creek will be flowing at least 9 cfs during the vast majority of those occasions, but not always. The settling parties, who represented a majority of the Protestants, recognized this reality and the Settlement Agreement was crafted to be as protective of Bear Creek as possible given the practicalities of the situation. Also, the way the Settlement Agreement is drafted is more consistent with Applicant's goal of utilizing as much of the treated effluent as possible for irrigation and only discharging as a last resort. If the permit was written to condition discharge only on a minimum creek flow, that could have the effect of encouraging discharge when it is not necessary.

Both the Landowners and Group C raise the issue of a potential major amendment as a result of the proposal for decision. This argument continues their longstanding strategy of delay for the sake of delay. Additionally, raising a major amendment issue at this point is hypocritical. First, these two groups fully participated in the settlement negotiations and accepted all concessions by Applicant but then refused to sign and forced a contested case hearing. During the contested case hearing, Applicant made clear that it would only be discharging under the terms allowed by the Settlement Agreement, and all parties and experts joined issue on the protectiveness of the Settlement Agreement. Indeed, Stuart Henry, lead counsel for the Landowners, advocated putting all of the terms of the Settlement Agreement into the permit which is exactly what the ALJs recommended in the PFD. To now argue that new notice and hearing is required because the ALJs recommend putting the Settlement Agreement terms into the permit demonstrates the bad faith of this position.

II. PROTESTANT HAYS COUNTY

Hays County admits on page 2 of their exceptions to the PFD that the methodology utilized by the ALJs in evaluating nutrients under a Tier 2 degradation analysis is unique and unprecedented. The lack of precedent or legal support for this methodology was never mentioned by Protestants including Hays County during the contested case hearing. This further underscores the fallacy of utilizing the “10% of assimilative capacity” approach with regard to degradation analysis of nutrients when the applicable law only contains a narrative standard of “no excessive aquatic plant growth.” (See also ED’s Exceptions to PFD).

III. OFFICE OF PUBLIC INTEREST COUNSEL

The Office of Public Interest Counsel’s exceptions to the PFD demonstrate why well intentioned people without expertise should proceed with caution in such matters. The

Settlement Agreement as drafted does not require Applicant to meet a treatment limit of 0.1 mg/L for phosphorus except when discharging. Applicant's experts and those of the settling parties agreed that a higher phosphorus content was actually beneficial for irrigation purposes, and there was no real dispute about that among the experts. Office of Public Interest Counsel's suggestion that all of the effluent should be treated down to 0.1 mg/L lacks rational basis and should be rejected.

IV. CITY OF AUSTIN

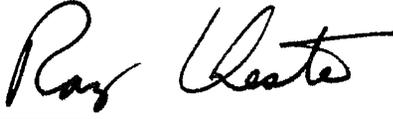
When considering the City of Austin's Exceptions to the Proposal for Decision, the ALJs should remember that the City of Austin staff recommended the Settlement Agreement to the City Council, and the City Council actually voted to approve the Settlement Agreement. (That approval disappeared later when Hays County backed out). (Rule 11 Agreement dated July 7, 2008; Vol. V, 17 McClintock). The permit recommended by the ALJs is exactly what the City of Austin staff agreed to, and the City's exceptions should be viewed with that in mind.

WHEREFORE, Applicant respectfully prays that the Proposal for Decision be amended as requested in Applicant's exceptions and that the amendments requested by Protestants be denied.

Respectfully submitted,

MCGINNIS, LOCHRIDGE & KILGORE, LLP
Ray Chester
Jessica Palvino
600 Congress Avenue, Suite 2100
Austin, Texas 78701
(512) 495-6000
Fax (512) 495-6093

BARRETT & SMITH, PLLC
505 West 14th Street
Austin, Texas 78701
(512) 439-1236
Fax (512) 472-6463

By: 
Ray Chester
State Bar No. 04189065

ATTORNEYS FOR THE APPLICANT

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the above and foregoing has been sent on this the 22nd day of December, 2008, to the following counsel of record:

VIA EMAIL and FIRST CLASS MAIL

Mr. Stuart N. Henry
1350 Indian Springs Trace
Dripping Springs, Texas 78620
(512) 858-0385

VIA EMAIL and FIRST CLASS MAIL

Mr. David Frederick
Lowerre, Frederick, Perales, Allmon & Rockwell
707 Rio Grande, Suite 200
Austin, Texas 78701
(512) 469-6000
(512) 469-9346 FAX

VIA EMAIL and FIRST CLASS MAIL

Ms. Patricia Link
Assistant City Attorney
City of Austin Law Department
301 W. 2nd Street, Box 1088
Austin, Texas 78767
(512) 974-2173
(512) 974-1311 FAX

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2008 DEC 22 PM 3:53
CHIEF CLERKS OFFICE

VIA EMAIL and FIRST CLASS MAIL

Mr. Robert M. O'Boyle
Strasburger & Price, LLP
600 Congress Avenue, Suite 1600
Austin, Texas 78701-2974
(512) 499-3691
(512) 499-3660 FAX

VIA EMAIL and FIRST CLASS MAIL

Mr. Fred B. Werkenthin, Jr.
Booth, Ahrens & Werkenthin, P.C.
515 Congress Avenue, Suite 1515
Austin, Texas 78701-3503
(512) 472-3263
(512) 473-2609 FAX

VIA EMAIL and FIRST CLASS MAIL

Ms. Christina L. Mann
Office of Public Interest Counsel
12100 Park 35 Circle, Bldg. F
Austin, Texas 78753
(512) 239-6363
(512) 239-6377 FAX

VIA EMAIL and FIRST CLASS MAIL

Ms. Kathy Humphreys
Texas Commission on Environmental Quality
P. O. Box 13087
Austin, Texas 78711-3087
(512) 239-3417
(512) 239-0606 FAX

VIA EMAIL and FIRST CLASS MAIL

Mr. William D. Dugat, III
Bickerstaff, Heath, Delgado & Acosta, LLP
816 Congress Avenue, Suite 1700
Austin, Texas 78701-2443

VIA EMAIL and FIRST CLASS MAIL

Ms. Susan Zachos
Law Offices of Susan G. Zachos
P. O. Box 157
Austin, Texas 78767

VIA EMAIL and FIRST CLASS MAIL

Mr. Vic Ramirez
Lower Colorado River Authority
3700 Lake Austin Blvd.
Austin, Texas 78703

VIA EMAIL and FIRST CLASS MAIL

Mr. Andrew Backus
Hays Trinity Groundwater Conservation District
P. O. Box 1648
Dripping Springs, Texas 78620

VIA HAND-DELIVERY

The Honorable Roy Scudday
State Office of Administrative Hearings
300 West 15th Street, Suite 504
Austin, Texas 78701

VIA HAND-DELIVERY

The Honorable Cassandra Church
State Office of Administrative Hearings
300 West 15th Street, Suite 504
Austin, Texas 78701



Ray Chester