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Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*
Mark R. Vickery, P.G., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

CHIEF CLERKS OFFICE

2008 DEC 10 PM 4: 24

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

December 10, 2008

LaDonna Castañuela
Texas Commission on Environmental Quality
Attention: Docket Clerk, MC 105
P.O. Box 13087
Austin, Texas 78711-3087

Re: **Executive Director's Exceptions to the Proposal for Decision;**
Application by Hays County Water Control & Improvement District No. 1;
TPDES Permit No. WQ0014293001;
SOAH Docket No. 582-08-0202; TCEQ Docket No. 2007-1426-MWD

Dear Ms. Castañuela:

Enclosed is the original of the Executive Director's Exceptions to the Proposal for Decision in the above referenced matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Kathy J. Humphreys".

Kathy J. Humphreys
Staff Attorney
Environmental Law Division

Enclosure

cc: Service List

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

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARING

CHIEF CLERK'S OFFICE

2008 DEC 10 AM 4: 24

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

EXECUTIVE DIRECTOR' S EXCEPTIONS
TO THE PROPOSAL FOR DECISION

TO THE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ) submits the following specific exceptions (Exceptions) to the Proposal for Decision (PFD) filed by the Administrative Law Judges (ALJs) relating to the application by Hays County Water Control and Improvement District No. 1 (HCWCID) for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014293001 in Hays County (draft permit).

I. Introduction

The ED excepts to the findings of degradation if the Draft Permit as drafted and modified by the ED is issued. After performing both a Tier I and a Tier II anti-degradation review, the ED determined that with the addition of an effluent limit for total phosphorus and requiring the effluent be dechlorinated before being discharged, the discharge would not cause degradation of the receiving waters. The addition of requirements for a Class A operator, UV disinfection and effluent limits for Total Nitrogen adds further environmental protections. Additionally, if the Commission agrees with the ED that Bear Creek would

not be degraded, it is not necessary to include all of the partial settlement provisions in the TPDES permit. The ED supports all of the ALJs' findings of fact and conclusions of law not specifically excepted to in these Exceptions.

II. Standard of Review

The ALJs have the regulatory authority to amend the PFD in response to exceptions, replies or briefs filed by the parties.¹ Should the ALJs decide not to amend the PFD, the Commission may amend the proposed PFD, including any proposed findings of fact.² Such an order is proposed by the ED in these Exceptions. The law is clear that the Commission may reject the ALJs' proposed order and approve its own order, but the Commission's order must be based solely on the record made before the ALJs, and the Commission must explain the basis of its order.³

III. Exceptions to Findings of Fact and Conclusions of Law

A. Exceptions Relating to an Increase in Algal Growth Downstream of HCWCID

Finding 41. An increased concentration of a limiting nutrient in a stream will increase the growth of algae; the growth of algae will lower the DO levels in the stream.

As Ms. Murphy testified, an increase in algae in the receiving water does not necessarily mean that the receiving water has been degraded.⁴ As the Protestants themselves demonstrated, an increase in nutrients does not always result in excessive algal growth.

Because an increase in nutrient concentration does not mean a corresponding increase in algal growth, the ED respectfully requests that the ALJs either delete Finding

¹ 30 TEX. ADMIN. CODE § 80.259.

² TEX. GOV'T CODE 2003.047(m).

³ TEX. GOV'T CODE 2003.047(m).

⁴ ED-8 (Prefiled Testimony of Lili Murphy), p. 8, line 18.

41 in its entirety or modify it to read “An increased concentration of a limiting nutrient in a stream may, along with other factors, ~~will~~ increase the growth of algae; the growth of algae may ~~will~~ lower the DO levels in the stream.”

B. Exceptions Relating to the Use of Assimilative Capacity in the Analysis of *de minimis*

Finding 48: The assimilative capacity of a stream regarding nutrient loadings is based on the difference between the baseline concentration and the trophic boundary.

Finding 49: The assimilative capacity regarding total phosphorus of Bear Creek at Davis Pond is 0.045 mg/L, and the proposed discharge pursuant to the revised Draft Permit will increase the phosphorus concentration at Davis Pond to 0.06 mg/L, or 150 percent of the assimilative capacity.

Finding 50: The assimilative capacity regarding total nitrogen of Bear Creek at Davis Pond is 0.06 mg/L, and the proposed discharge pursuant to the revised Draft Permit will increase the nitrogen concentration at Davis Pond to 11.8 mg/L, or 1,863 percent of the assimilative capacity.

Finding 55: As the operation of the Proposed Facility will result in effluent with a total phosphorus long-term average of 0.1 mg/L, the proposed discharge pursuant to the terms of the Partial Settlement Agreement will not increase the phosphorus concentration at Davis Pond above Bear Creek’s assimilative capacity of 0.045 mg/L.

Finding 56: As the operation of the Proposed Facility will result in effluent with a 6 mg/L Total Nitrogen, the proposed discharge pursuant to the revised Draft Permit as modified by the Partial Settlement Agreement will not increase the nitrogen concentration at Davis Pond above Bear Creek’s assimilative capacity of 0.06 mg/L.

The Procedures to Implement the Texas Surface Water Quality Standards (IPs) describe the process of how TCEQ reviews water quality standards with TPDES permits, including the process of anti-degradation reviews, which EPA conditionally approved in November 2002. For anti-degradation reviews, the standards reviewer performs a Tier I and for certain instances performs a Tier II anti-degradation review. For a Tier II anti-degradation review, the water quality baseline conditions are compared to the effect of the

proposed discharge to determine if degradation occurs as a result of the discharge. In 30 TAC § 307.5(b)(2), degradation is defined as lowering of water quality by more than a *de minimis* amount and *de minimis* is defined as having a less than noticeable decrease in water quality.⁵ The ED reviews the criterion for each relevant constituent when determining if there is lowering of water quality beyond a *de minimis* amount. Certain constituents have numeric criteria while other constituents have narrative criteria. For constituents that have numeric criteria, a change to the assimilative capacity can be calculated to help determine if there is more than a *de minimis* change.

The ALJs cite to the U. S. Sixth Circuit Court of Appeals decision of *Kentucky Waterways v. Johnson*, 2008 U. S. App., LEXIS 18802 as an aid for defining the term *de minimis* in terms of a Tier II anti-degradation review.⁶ Specifically the ALJs cite to a part of the opinion that suggests that more than a 10% reduction in assimilative capacity would be a *de minimis* amount of degradation and therefore would be a significant amount of degradation to the water body.⁷ The ALJs rely on the percent changes of assimilative capacities from the Protestants' experts for the increase of phosphorus and nitrogen.

Reliance on the *Kentucky Waterways* case and the Protestants' expert testimony about percent changes of assimilative capacity is misplaced. The percent change of assimilative capacity is applicable only to constituents with numeric criteria.⁸ The *Kentucky Waterways* case construed the term *de minimis* in the contest of the application of a numeric criterion. In this case, however, phosphorus and nitrogen have narrative

⁵ See ED-8, page 14, lines 14-15.

⁶ ALJ's Proposal for Decision, page 13, 14, and 15.

⁷ *Id.*

⁸ See ED-10, page 32.

criteria. Because phosphorus and nitrogen have narrative criteria the *Kentucky Waterways* analysis does not apply in this situation. Therefore, the percent changes of assimilative capacity is not appropriate to determine if the proposed discharge would degrade the pertinent water bodies.

The ED respectfully requests that the ALJs delete Findings of Fact 48-52 and 55-56 which reference the nutrient (phosphorus and nitrogen) assimilative capacity of Bear Creek.

C. Exceptions Relating to the Use of Trophic Status Changes Capacity in the Analysis of *de minimis*

Finding 44: Streams are classified by the levels of aquatic plants, from least-dense to most-dense concentrations, as set forth below:

- Oligotrophic waters are nutrient limited with corresponding low populations of aquatic plants.
- Mesotrophic waters are the transition zones between oligotrophic and eutrophic waters, and have occurrences of nuisance plant growth, but usually at a lower frequency and in more limited locations than for waters in the eutrophic range.
- Eutrophic waters are nutrient enriched, resulting in dense populations of aquatic plants that are considered nuisance by most persons and that will have an adverse affect on aquatic life and recreational uses.

Finding 45: The boundary between oligotrophic and mesotrophic states (trophic boundary) is 0.025 mg/L of total phosphorus concentration and 0.70 mg/L of total nitrogen concentration.

Finding 51: The proposed effluent discharge will cause an increase of the total phosphorus concentration at Davis Pond from 0.03 mg/L to 0.06 mg/L, or 200 percent, and would have the result of pushing Davis Pond toward the upper end of the mesotrophic classification.

The ALJs improperly relied on the testimony of Dr. Lial Tischler regarding degradation and the trophic status of a waterbody. Dr. Tischler used a potential change in the trophic status of Bear Creek to demonstrate the creek would be degraded by the

discharge from the HCWCID WWTP.⁹ To define the oligotrophic-mesotrophic and the mesotrophic-eutrophic boundaries Dr. Tischler relied on boundaries *suggested* by EPA.¹⁰ During his cross examination Dr. Tischler admitted that this approach was new and had not been used before.¹¹ Lili Murphy, the ED's expert, testified that a change in trophic status does not necessarily mean the waterbody has been degraded.¹² Ms. Murphy also testified that the oligotrophic-mesotrophic line is imaginary.¹³

Because the ALJs relied on a new approach, one that is not incorporated into the IPs, the ED respectfully requests that the ALJs delete Finding of Fact Numbers 44-45 and 51.

D. Exceptions Relating to Findings of Degradation of Bear Creek, the Edwards Aquifer, and an increase in the algal concentration in Barton Springs Pool.

Finding 52. A 200 percent increase in the total phosphorus concentration at Davis Pond, together with the effect of the proposed discharge on the assimilative capacity of the creek and the long term effects of the increased phosphorus loading, would cause more than a *de minimis* degradation of Bear Creek.

Finding 67. The degradation of the surface water in Bear Creek by the proposed discharge pursuant to the revised Draft Permit will also degrade the groundwater going into the Edwards Aquifer.

Finding 68. The discharge of effluent authorized by the revised Draft Permit would cause greater than a *de minimis* degradation of the Edwards Aquifer due to the recharge from Bear Creek.

Finding 69. An intermittent discharge pursuant to the terms of the revised Draft Permit as modified by the Partial Settlement Agreement would not cause greater than *de minimis* degradation of the Edwards Aquifer.

⁹ LO-1, pgs 14-15.

¹⁰ LO-8.

¹¹ Transcript Vol 4, pages 82-83.

¹² Transcript Vol. 5, page 209, line 9.

¹³ Transcript Vol. 5, page 209, line 14.

Finding 73. The effluent discharge authorized by the revised Draft Permit would cause greater nutrient loadings in Bear Creek would likewise cause an increase in the level of nutrients in Barton Springs Pool at low-flow conditions, resulting in an increase of the growth of algae in the pool.

Finding 74. An intermittent discharge pursuant to the terms of the revised Draft Permit as modified by the Partial Settlement Agreement would not cause an increase in the level of nutrients in Barton Springs Pool at low-flow conditions that would result in an increase of algal growth in the pool.

The ALJs improperly relied on a greater than 10% change in the assimilative capacity of Bear Creek and a change in trophic status to find that the algal concentration in Barton Springs Pool would increase and that Bear Creek and the Edwards Aquifer would be degraded by the effluent discharged under the terms of the revised Draft Permit. After performing the Tier 2 anti-degradation review Ms. Murphy determined that by adding permit requirements for total phosphorus of 0.1 mg/L and dechlorination, no significant degradation of high aquatic life uses of Bear Creek, its on-channel impoundments, or Onion Creek would be anticipated.¹⁴

The ED respectfully recommends the foregoing Findings of Fact be replaced by the following Findings of Fact:

Finding 52. The effluent discharged from the HCWCID WWTP, under the terms of the revised Draft Permit will not degrade Bear Creek by more than a *de minimis* amount.

Finding 67. The degradation of the surface water in Bear Creek by the proposed discharge pursuant to the revised Draft Permit will not degrade the groundwater going into the Edwards Aquifer.

Finding 68. The discharge of effluent authorized by the revised Draft permit would not cause greater than a *de minimis* degradation of the Edwards Aquifer due to the recharge from Bear Creek.

¹⁴ ED-12. The terms of the non-unanimous settlement require HCWCID to disinfect its effluent via UV.

Finding 69. An intermittent discharge pursuant to the terms of the revised Draft Permit as modified by the Partial Settlement Agreement would not cause greater than *de minimis* degradation of the Edwards Aquifer.

Finding 73. The effluent discharge authorized by the revised Draft Permit that would not cause greater nutrient loadings in Bear Creek nor an increase in the level of nutrients in Barton Springs Pool at low-flow conditions, resulting in an increase of the growth of algae in the Pool.

Finding 74. An intermittent discharge pursuant to the terms of the revised Draft Permit as modified by the Partial Settlement Agreement would not cause an increase in the level of nutrients in Barton Springs Pool at low-flow conditions that would result in an increase of algal growth in the Pool.

Additionally, in order for the conclusions of law to conform with the Executive Director's revised findings of facts, the Executive Director recommends that the Commission revise the proposed conclusions of law. The revisions are noted below.

Conclusion of Law 3. ~~WCID has not shown by a preponderance of the evidence that~~ Since a continuous discharge pursuant to terms of the revised Draft Permit would not cause degradation of Bear Creek below Aspen Drive by more than a *de minimis* extent, it is not necessary to prove that a lowering of the water quality of Bear Creek is necessary for important economic or social development, within the meaning of 30 TAC § 307.5.

Conclusion of Law 5. WCID has ~~not~~ shown by a preponderance of the evidence that a continuous discharge pursuant to the terms of the revised Draft Permit would not cause degradation of the Edwards Aquifer, within the meaning of 30 TAC § 307.5

Conclusion of Law 6. WCID has ~~not~~ shown by a preponderance of the evidence that a continuous discharge pursuant to the terms of the revised Draft Permit would not cause degradation of the Edwards Aquifer, within the meaning of 30 TAC § 307.

IV. Conclusion

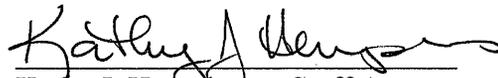
The ED respectfully recommends the ALJs amend their PFD to delete Findings of Fact numbers 44-45 and 51, and incorporate the amended Findings of Fact numbers 52, 67-69, 73-74 and Conclusions of Law numbers 3, 5, 6.

Respectfully submitted,

Texas Commission on Environmental Quality

Mark R. Vickery, P.G.
Executive Director

Robert Martinez, Director
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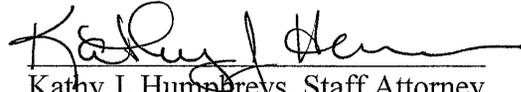


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REPRESENTING THE
EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

CERTIFICATE OF SERVICE

I certify that on December 10, 2008, a copy of the foregoing Executive Director's Exceptions to the ALJ's PFD was filed with the Office of the Chief Clerk and sent by first class, agency mail and/or facsimile to the persons listed below.


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