



December 22, 2008

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CHIEF CLERKS OFFICE

2008 DEC 22 PM 3:47

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

**VIA HAND DELIVERY**

Ms. LaDonna Castañuela  
Chief Clerk, Texas Commission on Environmental Quality  
12100 Park 35 Circle, Bldg. E, Room 201S  
Austin, Texas 78753

RE: SOAH Docket No. 582-08-0202; TCEQ Docket No. 2007-0426-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

Dear Ms. Castañuela:

Please find enclosed herewith an original and 12 copies of the following for filing with  
the Texas Commission on Environmental Quality in the above referenced matter:

**Amended Exceptions to Proposal for Decision by  
Protestants Group C, Robert O'Boyle, and Barbara Stroud**

Please return a file-marked copy to our awaiting courier. A copy of this document has  
also been served upon the State Office of Administrative Hearings as well as all parties  
herein.

Sincerely,

Alexis Montgomery  
Legal Administrative Assistant to Robert M. O'Boyle

/am  
Encls.

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Chief Clerk, TCEQ  
December 22, 2008  
Page 2

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Cc w/encls: **(via facsimile)**

Honorable Cassandra Church  
State Office of Administrative Hearings  
300 West 15<sup>th</sup> Street, Suite 502  
Austin, Texas 78701

Honorable Roy G. Scudday  
Administrative Law Judge  
State Office of Administrative Hearings  
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SOAH Docket No. 582-08-0202  
TCEQ Docket No. 2007-0426-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 HEARINGS

**AMENDED EXCEPTIONS TO PROPOSAL FOR DECISION BY  
PROTESTANTS GROUP C, ROBERT O'BOYLE, AND BARBARA STROUD**

TEXAS  
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The Group C Protestants (the "Associations") and Protestants Robert O'Boyle and Barbara Stroud (herein collectively "Protestants") file this their Amended Exceptions to the Proposal for Decision and Order issued by the State Office of Administrative Hearings ("SOAH"), and would respectfully show the Administrative Law Judges the following:

**1. The Eleventh Hour Change to the Terms of the Non-Unanimous Settlement Requires Remand and Notice.**

The Applicant contends that, "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." This statement is a canard.

Protestants did not advocate that the Settlement Agreement should be incorporated into the permit. Protestants argued throughout the hearing that the Settlement Agreement WAS NOT RELEVANT to the hearing and evidence of the settlement should be excluded. The Executive Director, Texas Commission on Environmental Quality ("ED"), agreed that the hearing was about the original draft permit, NOT THE SETTLEMENT AGREEMENT. The objections of Protestants and the

ED to consideration of the settlement terms, along with Protestants' motion for remand, were improperly overruled.

**2. At a Minimum, the ALJ's Should Issue the Language of the Draft Permit As Amended by the Terms of the Non-Unanimous Settlement Agreement.**

Protestants have always contended that the terms of the Non-Unanimous Settlement Agreement are not protective of Bear Creek, and are vague and essentially unenforceable. At a minimum, Protestants should be entitled to see the final language of the permit as envisioned by the ALJs, and comment specifically on how TCEQ intends to word the permit in this forum rather than upon an appeal to District Court.

**3. Discharge Must Be Further Limited to Prevent Degradation.**

The Office of Public Interest Council ("OPIC") has recommended certain modifications to improve the permit. One of its proposed modifications is this:

WCID is only allowed to discharge during the following situations: When the land to be surface irrigated *through its 210 Beneficial Reuse Authorizations* is frozen or saturated and the effluent pond is full; *AND/OR* Bear Creek is flowing at a rate of 14 cubic feet per second at the U.S. Geological Survey gauge on Bear Creek, 5.1 miles downstream.<sup>1</sup>

Protestants contend that the word "OR" should be removed in its entirety. The permit language should read as follows: "WCID is only allowed to discharge during the following situations: When the land to be surface irrigated *through its 210 Beneficial Reuse Authorizations* is frozen or saturated and the effluent pond is full; **AND** Bear Creek is flowing at a rate of 14 cubic feet per second at the U.S. Geological Survey gauge on Bear Creek, 5.1 miles downstream."

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<sup>1</sup> OPIC's suggested changes to Findings of Fact No. 25 on p. 6 of the Proposed Order are shown in italics.

The only evidence of discharge conditions at which there would not be a greater than *de minimis* impact (*i.e.*, degradation) is the testimony of Dr. Lial Tischler as to minimum creek flows, as cited by the ALJs in the PFD and Proposed Findings. (PFD at 26, citing Vol, 4, 96:21-24; Proposed Findings 57 and 58, draft Order p. 12.) Dr. Tischler's testimony is that there would not be a greater than *de minimis* impact to Bear Creek from nitrogen if not more than 350,000 gpd with total nitrogen limited to 6 mg/L is discharged only when Bear Creek is flowing 14 cubic feet per second or greater. (Proposed Finding 58, draft Order p. 12.)

The terms of the Non-Unanimous Settlement Agreement allow discharge regardless of the flow in Bear Creek when irrigation is not available and the storage is full. (Tr. Vol. 2; 186:23-188:25.) Thus, Bear Creek will be degraded by discharges under the provisions of the non-unanimous settlement agreement because discharges will occur when there is little or no flow in the creek. (Tr. Vol. 4; 36:5-17.)

The very purpose of prohibiting discharge under the 210 Beneficial Reuse Authorization when soil is frozen or saturated is to PREVENT RUNOFF of surface irrigation into neighboring creeks. It makes no sense whatsoever to say that in order to avoid runoff into Bear Creek the WCID should avoid 210 reuse irrigation when the soil is saturated or frozen; and instead they should discharge the irrigant DIRECTLY into Bear Creek during times of little or no flow.

**4. The Executive Director Wishes to Ignore the Clear Language and Requirements of the Anti-Degradation Statute.**

The ED continues to argue in its Exceptions that, since there are currently no numeric standards for nutrients, TCEQ is permitted to use the narrative standards set forth in section 307.4(e) to evaluate degradation. Section 307.4(e) provides that

nutrients in a discharge “shall not cause excessive growth of aquatic vegetation which impairs an existing, attainable, or designated use.” The Tier 2 anti-degradation statute explicitly prohibits a lowering of water quality by more than a *de minimis* extent but “not to the extent that an existing use is impaired.”

The ED does not explain this obvious contradiction in their interpretation of the statute. The ED also does not address the clear prohibition contained in 307.4(k), which provides that, “Nothing in this section shall be construed or otherwise utilized to supersede the requirements of § 307.5 of this title (relating to anti-degradation)”. The ED apparently believes that the lack of numeric standards relieves the ED of the legal obligation to perform a true Tier 2 antidegradation review.

The TCEQ has declined to provide any guidance regarding the application of the Tier 2 anti-degradation standard as it applies to nutrients, which currently have no numeric standards.<sup>2</sup> Applicant’s expert testified that he has repeatedly asked for guidance from TCEQ, but has received none. Protestants’ expert witness, Lial Tischler, set forth clear, measurable standards by which to determine that the Tier II anti-degradation standard was not met in this case. The ALJs, after a week long hearing with the opportunity to assess the credibility of the witnesses (including the credibility of TCEQ staff), found this testimony relevant, persuasive and helpful. The ED now argues that Dr. Tischler’s testimony should be rejected because it is “a new approach.” (ED Exceptions at page 6.) The ED’s argument is without merit. Under that argument, a case of first impression could never be decided because it would constitute a “new approach.”

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<sup>2</sup> Numeric standards are currently being developed, but it will be approximately 5 years until they are available.

The ED argues that the oligotrophic-mesotrophic and the mesotrophic-eutrophic boundaries that Dr. Tischler relied on are mere 'suggestions' from EPA. (See ED Exceptions at page 6.) The ED argues that these boundaries are "imaginary." (*Id.*) What the ED declines to point out is that these boundaries are referenced by the United States Geological Survey ("USGS") in a study in which TCEQ was a "Participant/Cooperator." (See LO-8 at page 000002.) The USGS cited these boundaries as relevant to selected streams in the Edwards Plateau of Central Texas. The USGS found, with the participation and/or cooperation of TCEQ, that non-wastewater influenced streams in the Edwards Plateau are primarily oligotrophic and all wastewater influenced streams were eutrophic. (See LO-8 at 000015.) TCEQ's Lili Murphy clearly concedes that a change from oligotrophic to eutrophic is degradation. (Tr. Vol. 5 at 209:21 to 210:4.)

The ED fails to dispute the boundaries set forth in Dr. Short's study. Dr. Short found that the threshold for "great increases in algal growth" was a range between 0.05 and 0.10 mg/L total phosphorous. Ms. Murphy testified that a great increase in algal growth would be a more than *de minimis* change. (Tr. Vol. 5 at 244:10-18.) Therefore, regardless of whether the condition is called mesotrophic or eutrophic, the discharge would push Bear Creek's phosphorous concentration into a range which could result in a "great increase in algal growth," which Ms. Murphy concedes would be a more than *de minimis* impact.

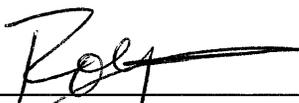
##### **5. Protestants Incorporate by Reference Their Prior Exceptions.**

Protestants' exceptions filed on December 10, 2008, are attached hereto as an exhibit and are incorporated herein by reference for all purposes.

## CONCLUSION

WHEREFORE, Protestants Group C, and Protestants Robert M. O'Boyle and Barbara Stroud, respectfully request that the Proposal for Decision be amended to provide for remand to TCEQ by virtue of a major amendment or, alternatively, for a new trial on the basis that Applicant was impermissibly allowed to introduce expert testimony and theories that were not the subject of timely discovery supplementation and which constituted a surprise. Alternatively, Protestants request that the Proposal for Decision be modified as requested herein, and that Protestants have such other relief as is just.

Respectfully submitted,



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**Attorney for Group C Protestants and  
Robert M. O'Boyle and Barbara Stroud**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and complete copy of the above and foregoing has been sent via U.S. mail this the 22<sup>nd</sup> day of December 2008, to the following counsel of record:

Ray Chester  
McGinnis Lochridge & Kilgore, LLP  
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Austin, Texas 78701

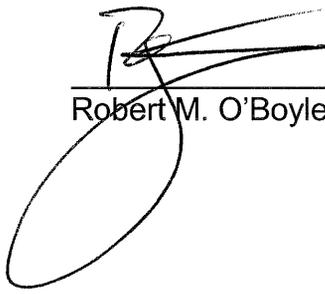
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Robert M. O'Boyle

TEXAS  
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CHIEF CLERKS OFFICE

# EXHIBIT A

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 HEARINGS

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TEXAS  
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**PROTESTANTS GROUP C'S, ROBERT O'BOYLE'S AND  
BARBARA STROUD'S EXCEPTIONS TO PROPOSAL FOR DECISION**

The Group C Protestants (the "Associations") and Protestants Robert O'Boyle and Barbara Stroud (herein collectively "Protestants") file this their Exceptions to the Proposal for Decision and Order issued by the State Office of Administrative Hearings ("SOAH"), and would respectfully show the Administrative Law Judges the following:

I.

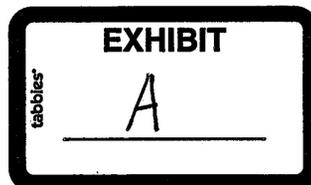
Protestants adopt and incorporate by reference herein all other post-hearing motions and exceptions filed by any protesting party.

ii.

Protestants incorporate by reference their Proposed Findings of Fact and Conclusions of Law and urge adoption of same where at variance with the ALJ's proposed findings and conclusions.

III.

Protestants incorporate by reference and re-urge their Motion to Require Applicant to File Application and Meet Other Procedural Requirements for a Major Amendment.



#### IV.

Protestants renew their objections to the contested case hearing and their request for a continuance of that hearing so that a major amendment can be considered.

#### V.

Protestants renew their objections to the contested case hearing and renew their motion for continuance based upon Applicant's late and untimely supplementation of discovery responses, expert reports, and expert testimony at the contested case hearing.

#### VI.

Protestants object and except to the Proposal for Decision because SOAH mistakenly assumes that discharges under the permit as modified by the Non-Unanimous Settlement Agreement shall only occur when there is sufficient flow (e.g., 9 CFS or 14 CFS) in Bear Creek to ensure no degradation. In truth, the permit as modified by the Non-Unanimous Settlement Agreement will allow discharge in numerous instances in which there is little or no flow in the creek and, therefore, degradation will occur.

#### VII.

Protestants object and specially except to Proposed Findings of Fact 46. The most credible evidence of background total phosphorus concentration in Bear Creek is 0.015 mg/L.

### VIII.

Protestants object and specially except to Proposed Findings of Fact 55 and 56, and Proposed Conclusions of Law 8 and 13, which were not the subject of any testimony or other evidence, and are invalid conclusions drawn by the ALJ's.

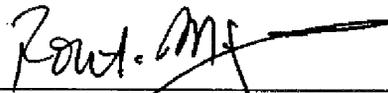
### IX.

Protestants request that a new, draft permit with the incorporated settlement terms be issued so that Protestants can have an opportunity to review the permit as it would issue if the Proposal for Decision is accepted by the Commission. As it stands, it is very difficult to tell from the Proposal for Decision what terms, exactly, will be included in the permit, and how those terms will be explained and defined in the permit.

### X.

WHEREFORE, Protestants Group C, and Protestants Robert M. O'Boyle and Barbara Stroud, respectfully request that the Proposal for Decision be amended to provide for remand to TCEQ by virtue of a major amendment or, alternatively, for a new trial on the basis that Applicant was impermissibly allowed to introduce expert testimony and theories that were not the subject of timely discovery supplementation and which constituted a surprise. Alternatively, Protestants request that the Proposal for Decision be modified as requested herein, and that they have such other relief as is just.

Respectfully submitted,



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**Attorney for Group C Protestants and  
Robert M. O'Boyle and Barbara Stroud**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and complete copy of the above and foregoing has been sent via U.S. mail this the 10<sup>th</sup> day of December 2008, to the following counsel of record:

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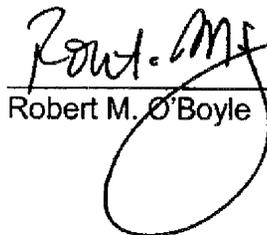
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