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December 22, 2008

Hon. Roy G. Scudday  
Hon. Cassandra Church  
Administrative Law Judge  
State Office of Administrative Hearings  
300 West 15<sup>th</sup> Street, Suite 502  
PO Box 13052  
Austin, Texas 78711-3

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

Dear Honorable Judges Scudday and Church:

Enclosed please find Responses to Exceptions by Protestant Hays County in the above referenced matter.

Please do not hesitate to contact me with any questions or concerns.

Sincerely,



David Frederick  
Counsel for Hays County

Enclosures:  
Service List

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TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

SOAH DOCKET NO. 582-08-0202  
TCEQ DOCKET NO. 2007-1426-MWD

IN THE MATTER OF THE  
APPLICATION FOR PERMIT  
NO. WQ0014293001 OF HAYS  
COUNTY WATER CONTROL  
AND IMPROVEMENT  
DISTRICT NO. 1

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BEFORE THE STATE OFFICE  
OF  
ADMINISTRATIVE HEARINGS

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TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

RESPONSES TO EXCEPTIONS TO THE PROPOSED  
ORDER OF PROTESTANT HAYS COUNTY

Hays County, here, responds to the exceptions made by the Applicant and the Executive Director to portions of the order proposed by the administrative law judges in this docket.

Applicant.

The Applicant argues that the ALJs adopted the "10% consumption of assimilative capacity" standard in their Proposal for Decision. This simply is not borne out by the text of the PFD. The text of the PFD affirmatively declined to adopt this standard. See, PFD, p. 13. More importantly, the PFD is not on the table for Commission adoption, modification, etc.. The proposed order is the document the ALJs propose the Commissioners adopt. It says nothing about a 10% standard.

The proposed order defensibly<sup>1</sup> finds a background Davis Pond phosphorus concentration of 0.03 mg/L, a water quality change to a eutrophic state at roughly 0.075 mg/L, so it finds a remaining assimilative phosphorus capacity of 0.045 mg/L. The

<sup>1</sup> The ALJs found a background phosphorus concentration in Bear Creek of 0.03 mg/L. Hays County believes Dr. Tischler's and Mr. Herrington's evidence, which corrects the data set for "non-detects," of 0.015 mg/L is the more credible evidence of the background phosphorus concentration.

proposed discharge will consume 2/3s of this remaining assimilative capacity, not merely 10% of it.<sup>2</sup> There is nothing counter-intuitive or logically incorrect about finding such a large consumption to be more than *de minimis*.

The proposed order does not explicitly find a Davis Pond nitrogen background concentration, but the PFD (p.24) reflects that the ALJs to consider it to be 0.09 mg/L. The PFD (same page) also identifies the mesotrophic-eutrophic boundary for nitrogen concentration to be 1.5 mg/L. The proposed order's Finding of Fact 50 identifies this 0.06 remaining assimilative capacity, and notes that the post-discharge modeled nitrogen concentration in the Davis Bond will be 11.8 mg/L. Accounting for the 0.09 mg/L that is attributable to existing background, that still leaves a discharge-driven change of 11.71 mg/L, which consumes the remaining assimilative capacity (i.e., consumes 0.06 mg/L) 195 times. So, again, the ALJs are not relying on a mere 10% consumption of assimilative capacity to justify their degradation conclusion.

The Applicant also disparages, in passing, the use of the non-conservative material option in QUAL-TX as "essentially pseudo-science." This simply is not supported by any record evidence. The non-conservative material routine relies on a "decay rate"<sup>3</sup> which rate is a surrogate for a more complex set of calculations that would represent all the intricate biological and chemical and physical interactions that occur in the water

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<sup>2</sup> It does appear to Hays County that Finding of Fact 49 should read "67 percent of the assimilative capacity" instead of "150 percent of the assimilative capacity, so as to be consistent with the definition set forth at Finding of Fact 48.

<sup>3</sup> This is admittedly a misnomer, in that the non-conserve material does not disappear. Is taken up by aquatic vegetation or settles to the floor of the water body. It remains in the system, but becomes not immediately available to stimulate more aquatic plant growth.

body and that tend to remove the non-conservative material, at least temporarily, from the water column. This reliance on an approximation of reality is not pseudo-science. This is what all mathematical models do; they all simply approximate the more complicated world they represent. The decay rates used in this docket are open to criticism, but they were selected after studied consideration of actual results of phosphorus and nitrogen "decay" in what appear to be streams comparable to Bear Creek, so the decay rates are certainly defensible.

Executive Director.

The Executive Director argues that an increase in the concentration of a limiting nutrient in a water body does not, necessarily, lead to an increase in aquatic vegetation. This is not what Hays County understood the evidence to reflect; proposed Finding of Fact 41 seems generally accurate to Hays County. If a change were to be made to that proposed finding, Hays County recommends the proposed finding be introduced by the phrase, "Except in very unusual situations,". Hays County does not recommend any change to the finding as it was proposed.

The ED also excepts to the ALJs' consideration of consumption of assimilative capacity as a means of making the *de minimis* degradation decision. The ED's argument is that assimilative capacity is only relevant, if one is dealing with numeric criteria, as opposed to narrative criteria. This is so disingenuous. The agency's Implementation Procedures, page 32, set out the assimilative capacity "rule of thumb," without any limitation of it to numeric criteria. In fact, the Implementation Procedures, after stating the general 10% guideline, follow it up with an equation that may be used "for

constituents that have numerical criteria in the water quality standards.” There would be no need for the introductory words regarding the equation, were not the 10% guideline also applicable to other constituents for which there are no numeric criteria in the “water quality standards.”<sup>4</sup>

The ED’s displeasure with the ALJs’ consideration of the *Kentucky Waterways* case is unreasonable, for the same reason noted, above, that the Applicant’s displeasure is unreasonable. The ALJs did not adopt the conclusions of that case; they merely found the case to be credible legal guidance for the issues at hand in this docket.

The ED’s other exceptions to the proposed order’s findings and conclusions amount to “Mrs. Murphy testified that the agency’s position on degradation, a position largely imposed by Mr. Charles Bayer, her ex-supervisor, was that there will be none, so various findings and conclusions should be rewritten to support a ‘no degradation’ outcome.” We would all like our litigation positions to, by definition, define the conclusions to be reached by the judges, but that is just the way the process works.

After consideration of the exceptions of the Applicant and the ED, Hays County does not recommend that any of them be accepted.

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<sup>4</sup> The trophic boundaries on which the ALJs relied are numeric, but they are not codified in the “water quality standards.”

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Respectfully,

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**Certificate of Service**

I hereby certify that a true and correct copy of the RESPONSES TO EXCEPTIONS TO THE PROPOSED ORDER OF PROTESTANT HAYS COUNTY was served on the following counsel/parties of record by regular U.S. mail, facsimile, and/or hand-delivery on December 22, 2008

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DOCUMENTS	NUMBER OF PAGES (not including cover pg.)
Exceptions to Proposed Order	

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