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QUALITY

December 10, 2008

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(Via Hand Delivery)

RE: 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 District No. 1

Dear Clerk:

Enclosed please find the original and 12 copies of the Protestant, City of Austin's Exceptions to the Proposal for Decision and Order for the above referenced case. Please file the original with the chief clerk's office, give 11 copies to the Commission as per the directions of the Administrative Law Judges, and please return ~~one~~ file stamped copy back to this office in the SASE provided.

Thank you for your attention to this matter.

Sincerely,

Mona Light Being/Legal Secretary to
Patricia L. Link
Assistant City Attorney

Enclosures

cc: **VIA: Hand Delivery**
The Honorable Roy Scudday
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SOAH Docket No. 582-08-0202
TCEQ Docket No. 2007-1426-MWD

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2008 DEC 10 PM 3:00
CHIEF CLERK'S OFFICE

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

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

**PROTESTANT, CITY OF AUSTIN'S
EXCEPTIONS TO THE PROPOSAL FOR DECISION AND ORDER**

COMES NOW, Protestant, City of Austin ("City") and files this, its Exceptions to the Proposal for Decision and Order, and respectfully shows the following:

I. INTRODUCTION

On November 19, 2008, the Administrative Law Judges (ALJs) issued the Proposal for Decision (PFD) and Order recommending the Applicant be issued a permit that includes several provisions of the Partial Settlement. The ALJs found that the Applicant failed to meet its burden to establish that a discharge pursuant to the revised draft permit ("draft permit") would not cause more than *de minimis* degradation. The City agrees with the ALJs that discharge pursuant to the draft permit will cause more than *de minimis* degradation and that the draft permit should be denied. However, the ALJs found that the Applicant met its burden to demonstrate that a discharge carried out pursuant to the Partial Settlement terms would not cause more than *de minimis* degradation. Protestant City does not agree that the Applicant met its burden, in part due to a lack of scientific and quantitative evaluation of the Partial Settlement Agreement and its impact on water quality. Therefore, the draft permit should be denied either with or without the Partial Settlement terms.

There are some clarifications Protestant City would like to address in addition to the Exceptions. The City excepts to certain Findings of Fact and the corresponding Conclusions of Law (7, 8, 9, and 10) due to a lack of evidentiary support. These Findings of Fact are: 21, 54, 55, 56, 59, 69, 74, 78, 79, and 80. The City also excepts to Order provision number 2.

II. CLARIFICATIONS

A. Mr. Herrington's modeling

In the PFD, the ALJs state that reliance on Mr. Herrington's modeling is questionable because he had not used QUAL-TX/LA-QUAL prior to his work on this case, he had not received directed instruction on the program, he is not a licensed engineer, and he lacked scientific literature supporting the use of multiple model runs.¹ However, his qualifications and credibility were amply established during the hearing. First, Mr. Herrington has experience using computer modeling and water quality modeling.² Second, Ms. McClintock, the Assistant Director over Mr. Herrington's department, testified that Mr. Herrington was supervised by a licensed engineer and his work was reviewed by a licensed engineer.³ Third, there is no requirement that he be a licensed engineer in order to conduct water quality modeling. Fourth, he did not create a new use for the program and supporting scientific literature is not necessary. Mr. Herrington ran LA-QUAL multiple times and used real data for temperatures and flows in the model runs. He did not create a new use for the program. Furthermore, he followed the same method of analysis used by Dr. Miertschin, whose credibility has not been questioned. Dr. Miertschin, a non-testifying expert, conducted water quality modeling using the QUAL-TX

¹ PFD, 23,

² COA-4, 2:17-19; 11:12-21. COA-5.

program and he analyzed more than just the “7Q2” scenario.⁴ Finally, the Applicant was not able to show that Mr. Herrington’s modeling was conducted improperly or that he used the model inappropriately. The Applicant complains about Mr. Herrington’s work because the results do not favor granting the permit. For these reasons, Mr. Herrington’s credibility and reliability are supported in the record and his work should be relied upon.

B. Dr. Tischler’s analysis

In the PFD, the ALJs state that “Dr. Tischler primarily relied on a model run by Mr. Herrington” when discussing modeling conducted by the parties. This is incorrect. The citation for the ALJs statement is to LO-1, p.15, line 17 – p.16, line 21 (Dr. Tischler’s prefiled testimony).⁵ However, Dr. Tischler’s prefiled testimony is that he relied on two other City reports. The first report is the City’s Algae study and the second is modeling conducted by another City employee, not Mr. Herrington.

Dr. Tischler relied on the City’s Algae study, which has not been questioned. The City’s Algae study, which was admitted as evidence in the proceeding, is based on City experiments and basic, broadly understood biological concepts.⁶ It was overseen by a USGS biologist and City biologist.⁷

Dr. Tischler also relied upon a City modeling addendum admitted as LO-11. It is identified as “SR-06-07 (Addendum)”, which is the addendum to Exhibit APP-36. APP-36 is identified as “SR-06-07.” The title of SR-06-07 is “Predicted Impacts from Proposed Hays County Water Control and Improvement District #1 Discharge in Bear Creek and Barton

³ CR V.5, 12:24 –14:7; 18:7– 20:11.

⁴ APP-37.

⁵ See PFD, 22 (last paragraph).

⁶ COA-6.

⁷ COA-6.

Springs.” This City modeling report was actually a report generated by Martha Turner, P.E.⁸ Dr. Tischler did not analyze Mr. Herrington’s work in his prefiled testimony or as part of his opinion.

C. Background Concentration of Total Phosphorus

Finding of Fact No. 46 states that “[t]he most credible estimate of background total phosphorus concentration in Bear Creek is 0.30 mg/L.”

It appears that there is a typographical error in this Finding. The two estimates for background total phosphorus concentrations are 0.03 mg/L and 0.015 mg/L. Mr. Herrington’s modeling was conducted using 0.015 mg/L, which was in agreement with Dr. Tischler and Dr. Ross, both professional engineers.⁹

D. Segment 1427

Finding of Fact No. 18 states that Segment 1427 is currently on the State’s 303(d) List due to depressed dissolved oxygen levels. However, the evidence in the record shows that Segment 1427 is no longer on the 303(d) list as of 2006.¹⁰

III. EXCEPTIONS

Finding of Fact No. 21: “In accordance with 30 Tex. Admin. Code (TAC) §307.5 and the TCEQ implementation procedures for the *Texas Surface Water Quality Standards*, the TCEQ performed an antidegradation review of the receiving waters.”

TCEQ staff was not in a position to conduct an antidegradation review of the discharge pursuant to the Partial Settlement Agreement because the terms were not part of the record or the

⁸ This is supported by the identification numbers on the report and through the testimony of Ms. McClintock, CR V.5, 14:8-25.

⁹ COA-8, 4: Table 3; CR V.4, 122:17-19; CR V.5, 34:8-16.

¹⁰ ED-14, 10:5-11.

permit until the eve of the contested case hearing. Therefore, this Finding of Fact should be modified accordingly.

Finding of Fact No. 54: “Based on the terms of the Partial Settlement Agreement, a discharge would only occur 24 days a year on average, resulting in an annual average discharge of 12,000 gpd.”

This Finding is not supported by the record. First, it is an estimate of discharge and it was determined by averaging the discharge volume over the total number of days (with and without discharge) using the output of Blair Option 6.¹¹ An estimate is just that and does not demonstrate what a typical year of discharge will be or the worst case scenario will be. Second, the testimony that appears to support this finding was qualified by Hays County’s No. 10, which demonstrates that the discharge may exceed 24 days per year – sometimes in a single event (consecutive days).¹² Third, the purpose of the water balance was calculation of potential “reuse” and “not discharging to the creek.”¹³ The information in the water balance was used “to design the irrigation system and to maximize the conservation effort of that water.”¹⁴ Dr. Blair also stated that “[t]hese numbers here are just to put it in, as best you can, in a perspective of what it means over a longer period of time.”¹⁵ The 24 days per year/12,000 gallons per day is not a true reflection of the amount of discharge that may occur under the Partial Settlement Agreement. For the above reasons, it is clear this Finding should not be relied upon as a fact.

Finding of Fact No. 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.”

¹¹ CR V. 3, 100:25; 101:1-14.

¹² CR V.2, 188:10-25; 220:9-11; 226:14-15.

¹³ CR V.2, 228:4, 6.

¹⁴ CR V.2, 228:7-9.

¹⁵ CR V.2, 228:9-11.

Finding of Fact No. 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 terms of the Partial Settlement Agreement will not increase the nitrogen concentration at Davis Pond above Bear Creek’s assimilative capacity of 0.06 mg/L.”

These Findings are not logically supported in the record. First, Dr. Tischler’s testimony regarding the impact of certain effluent limits for phosphorus and nitrogen are based on flow limitations and dilution, not the assimilative capacity of the creek. Dr. Tischler discusses the issue of assimilative capacity in his prefiled testimony and it is based on the draft permit,¹⁶ while the flow limitations were discussed during the hearing¹⁷ and were specifically directed at certain Partial Settlement terms. There is no evidence in the record of the impact of the discharge pursuant to the Partial Settlement terms on the assimilative capacity of the creek. Second, Dr. Tischler’s conclusions about the impact of an increase in phosphorus and nitrogen require that the creek be at a certain flow level, specifically 14 cfs, which he describes as a storm event.¹⁸ The conclusions dependent on the flow limitation are not applicable to all discharges that occur under the terms of the Partial Settlement Agreement because it is permissible for the Applicant to discharge effluent when the creek is not at 14 cfs.¹⁹ Third, the enforceable limit for phosphorus is 0.15 mg/L which is higher than the numbers discussed by Dr. Tischler during the hearing. Finally, these facts do not take into consideration the cumulative impact of an intermittent discharge pursuant to the Partial Settlement Agreement. The cumulative impact concept was discussed in the testimony regarding what will happen if four pounds of phosphorus are added to the creek environment. For these reasons, these Findings are not adequately supported by the record.

¹⁶ LO-1, 25:17-23.

¹⁷ CR V.4, 96:18-20; CR V.4, 102:1-3.

¹⁸ CR V.4, 98:14-16.

Finding of Fact No. 59: “The in-stream monitoring provisions in the Partial Settlement Agreement and optional alternate disposal methods are sufficient to assure that the proposed discharge will not have more than a *de minimis* effect on the receiving stream.”

Protestant, City, agrees that the “optional alternate disposal methods” prevent more than *de minimis* degradation since the alternate disposal methods are not direct discharge into a receiving stream. Alternate disposal methods have worked in neighboring developments and would work here. However, the monitoring provisions do not assure that there will be less than *de minimis* degradation. Monitoring will allow the parties to determine if degradation is occurring as a result of the discharge. It happens after discharging begins and does not prevent degradation. Therefore, it does not follow that it will assure that the proposed discharge will not have more than a *de minimis* effect.

Finding of Fact No. 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 a *de minimis* degradation of the Edwards Aquifer.”

Finding of Fact No. 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.”

These Findings are not supported by the evidence. First, the Applicant may discharge to Bear Creek when its flow is less than 14 cfs so dilution will not prevent degradation of the creek. Second, the parties did not have an opportunity to model or to conduct experiments based on the terms of Partial Settlement agreement. Third, the ALJs found that there is a connection between the surface water in Bear Creek and the water in the Barton Springs segment of the Edwards Aquifer (“BS/EA”).²⁰ Connection between the surface water and the ground water does not cease because of the Partial Settlement Agreement. In light of the other Findings and the fact that

¹⁹ See Finding No. 25.

the Applicant failed to demonstrate that less than *de minimis* degradation will be the result of the Partial Settlement Agreement, there is no basis to accept these Findings as part of the Commission's Findings.

Finding of Fact No. 78: "The DO in Barton Creek²¹ with one treatment plant discharging 0.500 MGD would be 8.36 mg/L."

Finding No. 78 is the dissolved oxygen number in a modeling report and is the result of a particular flow and a particular temperature so it is a snap shot of dissolved oxygen for one circumstance.²² Dissolved oxygen is impacted by changes in flow and an increase in nutrients. A change in flow can also have a corresponding effect on dissolved oxygen.²³ An increase in nutrients will result in an increase in algae and that an increase in algae will decrease dissolved oxygen.²⁴ Therefore, this number should not be relied upon as definitive of the dissolved oxygen level in the creek when there is a discharge of effluent into the creek.

Due to the placement of this Finding, it appears that it is used to bolster the Findings concerning the Barton Springs Salamander. However, this Finding does not support the other Findings applicable to the salamander because it is not definitive of the creek's dissolved oxygen levels with a discharge and because it ignores the connectivity between the creek and the BS/EA. For these reasons, this Finding is not appropriate and should be deleted.

Finding of Fact No. 79: "The proposed discharge of 0.500 MGD under the revised Draft Permit would not cause any significant impact on the Barton Springs Salamander."

This Finding is not supported by the evidence or the ALJs findings. The ALJs found that the Applicant's discharge will impact phosphorus levels in Barton Springs, which would result in

²⁰ See Finding No. 67.

²¹ Probably should be Bear Creek.

²² LO-11, 6: Table 5.

²³ CR V.2, 248:11-15. See also COA-8 and COA-9.

²⁴ See Finding No. 41.

an increase in algal growth.²⁵ An increase in algal growth increases the amount of organic material found in sediment.²⁶ Both algae and organic materials are oxygen-demanding substances.²⁷ Algal growth, the ALJs correctly realize, will cause dissolved oxygen levels to decrease.²⁸ It is this decrease in dissolved oxygen that will harm the habitat and the species.²⁹ If the habitat is harmed there will be an impact on the mortality rate of the species.³⁰ The record clearly established that the habitat of the salamander, the Barton Springs pool, will be modified by increased algae and a decrease in dissolved oxygen and further that a decrease in dissolved oxygen will impact the salamander.³¹ In light of these Findings and the fact that there is no evidence from the Applicant to the contrary, there is no basis for the finding that the discharge will not cause any significant impact on the Barton Springs Salamander.

Finding of Fact No. 80: “An intermittent discharge pursuant to the terms of the revised Draft Permit as modified by the Partial Settlement Agreement would not cause any significant impact on the Barton Springs Salamander.”

This Finding is not supported by the evidence. Connection between the surface water and the ground water does not cease because of the Partial Settlement Agreement. The ALJs found that the Applicant’s discharge will impact phosphorus levels in Barton Springs, which would result in an increase in algal growth.³² An increase in algal growth increases the amount of organic material found in sediment.³³ Both algae and organic materials are oxygen-demanding

²⁵ See also Findings 72 and 73.

²⁶ COA-20, 9:12-13.

²⁷ CR V.2, 250:13-15; 251:10-11; CR V.3, 145:24-25; CR V.6, 33:14-18.

²⁸ See Finding 41.

²⁹ BSEACD/HC-7, 5:9-11.

³⁰ CR V.4, 241:22-25; 242:1-6.

³¹ Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon, 515 U.S. 687, 697; 115 S.Ct. 2407, 2412-2413 (1995).

³² See also Findings 72 and 73.

³³ COA-20, 9:12-13.

substances.³⁴ Algal growth, the ALJs correctly realize, will cause dissolved oxygen levels to decrease.³⁵ It is this decrease in dissolved oxygen that will harm the habitat and the species.³⁶ If the habitat is harmed there will be an impact on the mortality rate of the species.³⁷ In light of these Findings and the fact that there is no evidence from the Applicant to the contrary, there is no basis for the finding that the discharge will not cause any significant impact on the Barton Springs Salamander.

Order Provision No. 2: “The Commission adopts the Executive Director’s Response to Public Comment in accordance with 30 Tex. Admin. Code §50.117.”

Since the ALJs found that the Applicant did not meet its burden and that the draft permit will cause more than *de minimis* degradation, the City excepts to the Commission adopting the Executive Director’s Responses to Public Comment. Specifically, the City excepts to those responses that conflict with the ALJ’s Findings of Fact and Conclusions of Law and the Findings in this pleading. Adopting the Executive Director’s Response to Comment that conflict with the ALJ’s Findings of Fact and Conclusions of Law would be contrary to the evidence in the record.

IV. PRAYER

Protestant City prays that Finding 21 be modified. Findings 54, 55, 56, 59, 69, 74, 78, 79, and 80 are not supported by the record. Protestant City requests that Findings listed above be deleted. As a result, Protestant City, requests that Conclusions of Law 7, 8, 9, and 10 be deleted since these Conclusions of Law can not stand if the Findings are deleted. Furthermore, Order Provision No. 2 needs to be modified to address the difference between the ALJs Findings

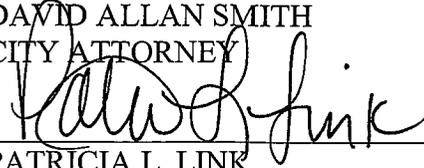
³⁴ CR V.2, 250:13-15; 251:10-11; CR V.3, 145:24-25; CR V.6, 33:14-18.

³⁵ See Finding 41.

³⁶ BSEACD/HC-7, 5:9-11.

and the Executive Director's Response to Comments. Protestant City requests that the draft permit be denied either with or without the Partial Settlement terms.

RESPECTFULLY SUBMITTED
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³⁷ CR V.4, 241:22-25; 242:1-6.

CERTIFICATE OF SERVICE

We 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:

cc: ***VIA: Hand Delivery***

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