

LOWERRE, FREDERICK, PERALES,

ALLMON & ROCKWELL

ATTORNEYS AT LAW  
707 Rio Grande, Suite 200

Austin, Texas 78701

(512) 469-6000 • (512) 482-9346 (facsimile)

Mail@LF-LawFirm.com

CHIEF CLERKS OFFICE

2008 DEC 10 PM 4: 50

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

December 10, 2008

Via facsimile and hand delivery

Ms. LaDonna Castanuela, Chief Clerk  
MC-105, TCEQ  
P.O. Box 13087  
Austin, Texas 78711-3087

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 Ms. Castanuela:

Enclosed please find an original and seven copies of Exceptions to the Proposed Order of Protestant Hays County.

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

Sincerely,

David Frederick  
Lowerre, Frederick, Perales,  
Allmon & Rockwell

Enclosures  
CC: Service List

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

2008 DEC 10 PM 4: 50

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

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

§ § § § § § §

BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

EXCEPTIONS TO THE PROPOSED ORDER OF PROTESTANT HAYS COUNTY

Hays County takes, here, exception to portions of the order proposed by the administrative law judges in this docket.

On balance, the strengths of the proposed order outweigh its weaknesses.

Hays County was not a signatory to the nonunanimous settlement agreement ("NUA"). It did not join the agreement, primarily because the NUA allows discharges of effluent that is high in nutrients compared to the background nutrient levels in Bear Creek. This deficiency of the NUA is not corrected by the proposed order. Indeed, the proposed order, largely, just adopts the NUA.

Hays County also rejected the NUA, however, because the NUA did not commit its terms to the proposed permit; i.e., the NUA was not to be part of the permit. Thus, Hays County's permit-enforcement powers under § 7.351, Texas Water Code, would be unavailable to it. The proposed order, however, pulls most of the NUA into the permit. This is a substantial benefit to Hays County of the propose order, if you adopt it.

Additionally, the proposed order presents reasoning that, if the proposed order is adopted, should help Hays County in the future maintain surface and ground water

quality within its jurisdiction. (The proposed order suggests, for the first time at the agency, a rational calculus for evaluating Tier 2 degradation potentially caused by nutrient loading, and its explicit tie of degradation of aquifer recharge water to aquifer degradation should help Hays County garner additional support for surface water protection from the Edwards Aquifer Authority and the Barton Springs/Edward Aquifer Conservation District.)

Finally, of course, Hays County benefits if the proposed order is adopted, inasmuch as the uncertainties and costs of the appellate process would be avoided. Presumably, since it negotiated the NUA, the WCID#1 will not appeal an order that issues a permit with special conditions that are the NUA terms.

There are a few significant ways, set out, below, in which the proposed order could be improved.

#### **Opportunities to improve the proposed order**

Be more clear regarding emerging contaminants. Proposed conclusion of law 11 provides "WCID has no legal obligation under existing Texas law to monitor or treat its effluent for pharmaceutical and personal care products (PPCPs) that may enter its treatment facility." Were it not for the discussion of this topic in the PFD, this conclusion of law could be implied to say, "*based on the facts adduced in this particular case*, WCID has no legal ...." However, the PFD certainly suggests the ALJs based their conclusion of law not on the facts, or deficiencies thereof, in this particular docket but, rather, on a broad policy determination applicable to all TPDES permitting dockets. In their PFD, the ALJs said (pages 38-39 of the mailed version of the PFD):

Notwithstanding the growing number of studies, this area of research appears not to have matured to the point of a consensus on the appropriate way to regulate PPCPs. ... [T]he scientific and public policy questions regarding the impacts of these chemicals have not yet been answered by 2008. The ALJs concluded that, absent a standard against which to measure any PPCPs in WCID's effluent, there is no legal basis to require WCID to test for or control these constituents, either under the TCEQ's general discharge rules or the antidegradation requirements.

The absence of numerical standards for a contaminant is just not a legal basis on which to decline to apply the state's antidegradation law. Neither the state Tier 2 antidegradation law (30 TAC § 307.5(b)(2)) nor the federal law on which it is based (40 CFR § 131.12(a)(2)), allows degradation of high-quality waters simply because there are no generally or regulatorily-specified standards for the pollutant that cause the degradation. The narrative water quality standards (30 TAC § 307.4(b-j)) may not be degraded, and some of them, such as "surface waters shall be maintained in an aesthetically attractive condition," plainly can be degraded by contaminants for which there are no numerical standards. The narrative standard that "the aquatic environment will be maintained or mitigated to protect aquatic life uses" is of a similar nature.

There is no need, in this docket, to adopt in an order a conclusion of law that is so easily susceptible of being interpreted as a statement of a generally-applicable legal principle – especially, a legal principle that is at odds with regulations adopted through the conventional notice and comment process. Instead, conclusion of law 11 should be re-worded to provide:

*Under the facts in this record, WCID has no legal obligation under existing Texas law to monitor or treat its effluent for pharmaceutical and personal care products (PPCPs) that may enter its treatment facility.*

Hays County won't challenge a final order like the one proposed that includes such a conclusion, and any other party would face long odds doing so successfully, given the extreme deference given agency factual determinations on appeal.

Do not adopt a "response to comments" that is inconsistent in so many aspects to the proposed final order. Ordering paragraph 2 (page 18 of the mailed version of the proposed order) provides that the Commission adopts the ED's response to public comments. The Response to Comments was released November 21<sup>st</sup>, 2007, eight months before the hearing on the discharge application. It was released before the NUA was negotiated. It was released before the ED amended his draft permit in such significant ways as to include a total nitrogen limit.

The ED offered 76 responses to comments. Of those, 13 are plainly inconsistent with the proposed order.<sup>1</sup> Two more certainly may be interpreted as inconsistent with the proposed order.<sup>2</sup> Likely, another party would be more rigid than was Hays County in identifying an inconsistency between the proposed order and a response to comments. The opportunities for inconsistency are numerous, given the raft of changes negotiated into the NUA and the evidence adduced at the contested case hearing on the permit.

The ordering paragraph should be re-written, thusly, to track the statutory language regarding the status of the response to comments:

The Commission *enters into the administrative record* ~~adopts~~ the Executive Director's Response to Comment in accordance with § 5.557, *Tex. Water*.

<sup>1</sup> The responses are nos. 2, 6, 11, 15, 16, 17, 20, 21, 23, 36, 40, 46, and 52.

<sup>2</sup> The responses are nos. 45 and 60.

*Code 30 Tex. Admin. Code § 50.117. Responses that are inconsistent with this Order are explicitly disavowed.*

(The regulation cited in the proposed order, 30 TAC § 50.117, predated the 2001 legislative action (S.B. 688) that provided for direct referrals and included the language now set out at §5.557, Tex. Water Code.)

Let's get the facts correct on the number of discharges to be expected under the propose order, with the NUA incorporated. The proposed order, finding of fact no. 54, recounts that, based on historical data, the limitations of the NUA would indicate an average of 24 discharges/year with an annual average daily discharge of 12,000 gpd (i.e., would indicate the 24 discharges would total 12,000 x 364.25 gallons).

This is incorrect. The 24 discharges/year estimate assumes no discharges, unless 150,000 gallons of the day's effluent has been irrigated and the storage pond is full. The NUA also allows discharges whenever Bear Creek is measured, 8 miles downstream from the discharge point, to be flowing at or above 14 cubic feet/second, *regardless of the state the effluent storage pond.* As demonstrated by the Applicant's Exh. A-30 (Blair's data for Scenario 6), there were 1018 days in the 25.5 year recent historical record when Bear Creek flow met or exceeded 14 cfs at the gauging station. So, since any one of those days could have been a discharge day under the terms of the proposed permit, there could be, not 24, but 40 days of discharge on average each year (1018/25.5). The Blair data also show 43 days in that same time period when the discharge from the storage pond that was necessary exceeded 350,000 gpd, the maximum allowed by the proposed permit and NUA. So, WCID#1 will be required to use some days each year (on

average) in excess of 24 to manage the pond volume so as to avoid discharging in excess of 350,000 gpd on the days when discharge is necessary.

Finding of fact 54 should be re-written to read that between 24 and 40 discharges, on average, would be expected each year. The average daily volume, though Hays County considers it a nearly meaningless figure, need not be changed.

Conclusion

Hays County, *generally*, does not except to the proposed order. The proposed order is flawed in a few significant ways identified, here, but those flaws are subject to rather easy corrections, as suggested, above. There are other flaws, too, but those flaws are sufficiently small, in the big picture of things, that Hays County is not inclined to except to them.

It is very important to Hays County that the final order adopt the proposed order's incorporation of the features of the NUA identified in finding of fact 25. Your staff was not supportive, at the time the NUA was being negotiated, of that course of action. If staff's position is still in opposition to incorporation of the NUA terms into the permit, please critique that opposition very, very critically.

Respectfully,



Lowerre, Frederick, Perales,  
Allmon & Rockwell  
David Frederick  
SBT No. 07412300  
707 Rio Grande Street, Ste. 200  
Austin, Texas 78701

COUNSEL FOR HAYS  
COUNTY

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Certificate of Service

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I hereby certify that a true and correct copy of the Initial Closing Argument of Hays County was served on the following counsel/parties of record by regular U.S. mail, facsimile, and/or hand-delivery on December 10, 2008

FOR APPLICANT HAYS COUNTY WCID

NO. 1:

Mr. Ray Chester  
McGinnis, Lochridge & Kilgore, LLP  
600 Congress Avenue  
Suite 2100  
Austin, Texas 78701  
(512) 495-6000  
(512) 495-6093 FAX  
*By Hand Delivery*

FOR PROTESTANT ASSOCIATIONS GROUP:

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

FOR PROTESTANT GOVERNMENT GROUP A:

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  
*By First Class Mail*

FOR OFFICE OF PUBLIC INTEREST  
COUNSEL:

Ms. Christina Mann  
Office of Public Interest Counsel  
P.O. Box 13087, MC-103  
Austin, Texas 78711  
(512) 239-6363  
(512) 239-6377 FAX  
*By Hand Delivery*

FOR PROTESTANT DAVIS FAMILY:

Mr. Fred B. Werkenthin, Jr.  
515 Congress Ave  
Suite 1515  
Austin, Texas 78701-3503  
(512) 472-3263  
(512) 473-2609 FAX  
*By First Class Mail*

FOR TCEQ EXECUTIVE DIRECTOR:

Ms. Kathy Humphreys  
Texas Commission on Environmental Quality  
P.O. Box 13087, MC-175  
Austin, Texas 78711-3087  
(512) 239-3417  
(512) 239-0606 FAX  
*By Hand Delivery*

FOR PROTESTANT PROPERTY OWNERS  
GROUP:

Mr. Stuart N. Henry  
1350 Indian Springs Trace  
Drippings Springs Texas 78620  
(512) 858-0385  
(512) 708-7297  
*By First Class Mail*

STATE OFFICE OF ADMINISTRATIVE  
HEARINGS:

Hon. Judge Roy G. Scudday  
Administrative Law Judge  
300 West 15<sup>th</sup> Street, Suite 502  
Austin, Texas 78711-3025

STATE OFFICE OF ADMINISTRATIVE  
HEARINGS

Hon. Judge Cassandra Church  
Administrative Law Judge  
300 West 15<sup>th</sup> Street, Suite 502  
Austin, Texas 78711-3025

# LOWERRE, FREDERICK, PERALES,

## ALLMON & ROCKWELL

44 East Avenue, Suite 100  
Austin, TX 78701  
(512) 469-6000 Phone  
(512) 482-9346 FAX

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To:

|                    |              |
|--------------------|--------------|
| ALJ Scudday        | 512.475.4994 |
| LaDonna Castanuela | 512.239.3311 |
| Ray Chester        | 512.495.6093 |
| Kathy Humphreys    | 512.239.0606 |
| Patricia Link      | 512.974.1311 |
| Andrew Miller      | 512.320.5431 |
| Christina Mann     | 512.239.6377 |
| Fred Werkenthin    | 512.473.2609 |

*→ The original and 7 copies have been mailed as well.*

From: David O. Frederick  
Date: December 10, 2008

| DOCUMENTS                    | NUMBER OF PAGES (not including cover pg.) |
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