

SOAH Docket No. 582-08-0202  
TCEQ Docket No. 2007-1426-MWD

IN THE MATTER OF  
APPLICATION OF HAYS COUNTY  
WATER CONTROL AND  
IMPROVEMENT DISTRICT  
NO. 1 FOR  
PERMIT NO. WQ 0014293001

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BEFORE THE STATE OFFICE  
OF  
ADMINISTRATIVE HEARINGS

CHIEF CLERK'S OFFICE

2008 DEC 10 PM 4:03

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

Protestant Landowners' Exceptions to Proposal for Decision and Findings of Fact and  
Conclusions of Law

COMES NOW Protestant Landowners Alston and Barbara Boyd and Joel and Kim Stearns and file these Exceptions to the Proposal for Decision and Proposed Findings of Fact and Conclusions of Law:

The Protestant Landowners live on Bear Creek downstream of the Applicant Hays County Water Control and Improvement District No. 1 ("WCID") and its proposed direct discharge of wastewater effluent. The landowners live along Bear Creek because of the pristine creek water that invites fishing, swimming, boating, and observing plants and wildlife. Bear Creek's recreational and aquatic life uses depend on the clear water and low levels of algae. There are no existing discharges into Bear Creek. The direct discharge proposed by the WCID threatens the landowners' use and enjoyment of the creek because increased nutrients released into the creek from the discharge will cause excessive algae growth and lowered dissolved oxygen.

The ALJ's found in the evidence and stated in the Proposal for Decision ("PFD") that Applicant failed to show that "a continuous discharge under the terms of the revised draft permit" would meet the antidegradation standard because of the excessive algae growth that would be caused by the discharge. The PFD recommends that the terms of

the non-unanimous settlement agreement be adopted into the permit in order for the discharge to be intermittent, limited in volume, and made only when it will have the least impact on Bear Creek. The recommendation that the terms of the non-unanimous settlement agreement be adopted into the permit accounts for many of the failures of the draft permit but falls short of creating a discharge that meets the required antidegradation standard. The hearing evidence and the proposed Findings of Fact show in order to meet the antidegradation standard the discharge must be limited to times when there is a minimum creek flow in Bear Creek. Proposed Findings 57 and 58, draft Order page 12. The non- unanimous settlement agreement terms do not limit the discharge to these minimum flow requirements and thus adoption of these terms, alone, into the draft permit will not prevent greater than de minimis degradation.

The only evidence of discharge conditions at which there would not be a greater than de minimis impact is the testimony of Dr. Tischler as to minimum creek flows, as cited by the ALJ's in the PFD and Proposed Findings. PFD at 26, citing Vol 4, 96: 21-24; 102: 4-8; and Proposed Findings 57 and 58, draft Order page 12. Dr. Tischler's testimony is that there would not be a greater than de minimis impacts to the creek from nitrogen if not more than 350,000 gallons of effluent per day 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 page 12. The minimum creek flow needed to limit impacts from phosphorous, at .15 mg/L, is 9 cfs. Proposed Finding 57, draft order page 12. The requirements for nitrogen to avoid greater than de minimis impact are the relevant conditions that must be met: 350,000 gallon per day discharge and 14 cfs minimum creek flow.

The non-unanimous settlement agreement limits discharge to the following conditions: 1) no more than 350,000 gallons per day may be discharged; 2) when land to be irrigated is frozen or saturated and the storage pond is full; OR, 3) when Bear Creek is flowing 14 cfs at the USGS gauging station. These terms allow discharge regardless of the flow in Bear Creek when irrigation is not available and the storage is full, thus discharge can occur when flow is less than 14 cfs. Under the settlement terms discharge could occur when there is zero flow in Bear Creek, 1 cfs, 10 cfs or any flow when irrigation isn't available and the storage pond is full.

The WCID used historical rainfall data, creek flow and soil saturation data to project the amount and frequency of discharge that would have occurred had the draft permit and non unanimous settlement conditions been in effect over the last 25 ½ years. This data was presented in the hearing as Exhibit HC 10. The projections show that discharge will occur on average 24 days per year when creek flow is below 14 cfs, plus additional discharges when creek flow is above 14 cfs. Over the 25 ½ year period discharge will be necessary on 531 days when Bear Creek is flowing less than 14 cfs. Hearing Exhibit HC 10. These discharges will almost always occur not just on individual days spread throughout the year but instead as multiple consecutive days of discharge. The flow in Bear Creek on these projected discharge days varies wildly, from as low as .2 cfs up to 13 cfs. The continuous discharging for weeks at a time into low flows will increase nutrient concentrations in the creek, causing algae growth and greater than de minimis degradation.

The chart below shows examples of the consecutive blocks of discharge days expected over the most recent years from the WCID's historical projections, presented in Exhibit HC 10.

	Number of Days Consecutive Discharge	Range of Bear Creek while receiving discharge
December 2004	16	13 to 5.8 cfs
February 2004	18	.41 to .20 cfs
January/February 2003	36	13 to 3.9 cfs
January/February 2002	28	13 to 4.8 cfs
January 1999	21	3.8 to 2.2 cfs
January 1998	18	13 to 4 cfs

In addition to these examples, there are also many individual discharge days, smaller groups of consecutive days, and many more instances of long periods of consecutive discharge.

Proposed findings of fact 57 and 58 state the creek flow needed to avoid impacts from nutrients (nitrogen limited to 6 mg/L and 350,000 gpd discharge into 14 cfs; phosphorous limited .15 mg/l into 9 cfs), but proposed finding 59 then makes a non sequitur conclusion that adoption of the settlement terms into the permit will create these conditions. The non-unanimous settlement terms do not limit discharge to the conditions described in findings 57 and 58. The non-unanimous settlement terms allow discharge at any flow level in the creek. Proposed finding 59 and proposed conclusion of law 8 are in error because there is no evidence to conclude that the "optional alternate disposal methods" (the settlement condition terms) will limit discharge to times when Bear Creek is flowing 14 cfs or greater and thus not have more than a de minimis effect.

A discharge limited to times when Bear Creek is flowing 14 cfs or greater would protect Bear Creek from greater than de minimis degradation. Limiting discharge to conditions when there is minimum flow in the creek is not prohibited and has been done in other TCEQ permits, according to TCEQ permit writer Julian Centeno. Hearing Transcript Vol 5, 143:1-13. Adopting a permit term that limits discharge to times when Bear Creek flow registers 14 cfs at the USGS gauging station will bring this draft permit into compliance with the Texas antidegradation standard.

The minimum flow requirement should be adopted into the permit along with the terms of the non-unanimous settlement agreement. The non-unanimous agreement terms must be incorporated into the draft permit in clear and enforceable terms as special provisions. Without adoption into the permit TCEQ has no enforcement authority for the settlement terms that the ALJ's determined "each and every one of [which] is necessary to ensure that the WCID's discharge is intermittent, limited in volume, and made only when it will have the least impact on Bear Creek." PFD at 29. Without the non-unanimous settlement terms incorporated into the permit as enforceable terms "the WCID has not shown by a preponderance of the evidence that the draft permit would not cause degradation of Bear Creek by more than a de minimis amount." Proposed Conclusion of Law 3. The most clear and enforceable terms to adopt into the permit are to limit discharge to 350,000 gallons per day when the creek is flowing 14 cfs or greater.

This contested case hearing involved evidence on multiple scenarios, including the draft permit provisions and the non-unanimous settlement agreement. There are some inconsistencies in the ALJ's proposed findings as to each of these scenarios that should be corrected:

- Proposed Finding of Fact 46 states the phosphorous baseline is .3 mg/L. Protestant Landowners maintain the appropriate baseline is .015 mg/L, but here there is a clerical error where the ALJ probably meant .03 mg/L. No parties presented evidence that the phosphorous baseline was .3 mg/L, only .03 mg/L.
- Proposed Finding of Fact 54 is in error. The evidence presented by Applicant that there would be on average 24 discharge days per year under the settlement agreement does not include discharges when flow is at or above 14 cfs. There will be many more days of discharge when flow is above 14 cfs, as presented in HC 10, Applicant's spreadsheet.
- Proposed Findings of Fact 55 and 56 are not supported by any evidence. The evidence shows that under the draft permit the assimilative capacity of Bear Creek will be greatly exceeded for both phosphorous and nitrogen as explained in proposed findings 49, 50, 51 and 52. There is no evidence to support a finding that the discharge scenario under the partial settlement agreement will result in nutrient levels in the creek below the assimilative capacities of the creek.

The ALJ's mention on page 29 of the PFD that the Commission will have to consider and determine whether incorporation of the non-unanimous settlement agreement terms and use of Pond 6B as a wastewater treatment facility are substantive changes requiring major amendment notice. Some of the changes from the original notice to the plan presented in the hearing and now recommended by the ALJ's include: use of the existing treatment facility for pre-treatment equalization storage for the new treatment

plant, the continued operation of the subsurface irrigation facilities, and the addition of effluent irrigation on 201 acres of land. These changes all substantively change the description of treatment and disposal from the notice originally issued for this application as described in 30 TAC 305. 62, and there are likely landowners adjacent to these facilities that are affected differently under the combination irrigation/discharge scenario than they would have been under the straight discharge scenario presented in the original notice. Similarly the evidence presented in the contested case hearing by Applicants made clear that Pond 6b is being used as a wastewater treatment facility. Transcript Volume 2, 260: 8-12 and Applicant's Exhibit 7, Testimony of Dr. James Machin, page 10: 1-18. Pond 6B however, was not included in the notice as a treatment facility, and the use of the pond for wastewater treatment may affect adjacent residents who use the pond as a recreational amenity. The recommended substantive changes to this application meet the requirements of a major amendment and should be noticed accordingly.

#### PRAYER

This permit should be denied unless the Proposed Findings of Fact and Conclusions of Law and Proposal for Decision are modified such that the proposed conditions found necessary for meeting the antidegradation standard are included, specifically limiting the discharge to 350,000 gallons per day when Bear Creek is flowing 14 cfs or greater, along with the other terms from the settlement agreement including monitoring and storage.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "S N Henry", with a long horizontal flourish extending to the right.

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**Certificate of Service**

I hereby certify that a true and correct copy of the Exceptions to Proposed Findings of Fact and Conclusions of Law and Proposal for Decision was served on the following counsel/parties of record by regular U.S. mail, facsimile, and/or hand-delivery on December 10, 2008.

  
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