

SOAH DOCKET NO. 582-08-2177
TCEQ DOCKET NO. 2007-1765-MWD

IN THE MATTER OF THE § BEFORE THE STATE OFFICE
APPLICATION OF TCB RENTAL, INC. §
FOR NEW WASTEWATER PERMIT, §
PROPOSED TEXAS POLLUTANT § OF
DISCHARGE ELIMINATION SYSTEM, §
PERMIT NO. WQ0014725001 § ADMINISTRATIVE HEARINGS

TCB RENTAL'S EXCEPTION AND PROPOSED CORRECTIONS TO THE
PROPOSAL FOR DECISION

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

TCB Rental, Inc. ("TCB") respectfully submits its Exception and Proposed Corrections to the Administrative Law Judge's ("ALJ's") Proposal for Decision ("PFD") and in support thereof would show the following:

I. SUMMARY OF EXCEPTION AND PROPOSED CORRECTIONS

TCB concurs with the ALJ's PFD recommendations in nearly every respect. TCB appreciates the ALJ's thorough analysis of the facts and law presented in this case. TCB's only exception is the ALJ's allocation of transcript costs to TCB alone. TCB has also noted several minor corrections that should be made to wording in the PFD and proposed Order. Otherwise, TCB respectfully requests that the Commission issue adopt the PFD and issue the Order as proposed therein.

II. TCB'S EXCEPTION - ASSESSMENT OF TRANSCRIPT COSTS

While assessment of transcript costs is not a substantive referred issue in this case, TCB agrees with the ALJ that it is an issue, albeit an administrative one, that requires Commission consideration. 30 TEX. ADMIN. CODE § 80.23(d)(1). The total transcript costs are \$3450.50. See

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Exhibit A. The ALJ recommends that TCB be responsible for all the transcript costs, except that Koontz Bayou Old River Group ("KBOR") should be responsible for its own copy of the transcript. PFD at 34.¹

TCB believes that KBOR should bear responsibility for some portion of the transcript costs. The transcript and court reporting service was arranged for by TCB upon the ALJ's own motion and request for a transcript per Order No. 1. 30 TEX. ADMIN. CODE § 80.23(b)(4); Order No. 1. No evidence on this subject was presented during the hearing because the scope of the hearing was limited to the five Commission-referred issues since HB 801 procedures applied to this contested case hearing. PFD, at 3. The ALJ did not specifically request evidence and argument on assessment of costs prior to providing the recommendation in the PFD. 30 TEX. ADMIN. CODE § 80.23(d)(3). However, the issues are fairly straightforward and the Commission may, upon its own motion, assess reporting and transcript costs. 30 TEX. ADMIN. CODE § 80.23(d)(1).

30 TEX. ADMIN. CODE § 80.23(d)(1) sets forth the following factors for the Commission to consider in assessing transcript costs:

- (A) the party who requested the transcript;
- (B) the financial ability of the party to pay the costs;
- (C) the extent to which the party participated in the hearing;
- (D) the relative benefits to the various parties of having a transcript;
- (E) the budgetary constraints of a state or federal administrative agency participating in the proceeding;
- (F) in rate proceedings, the extent to which the expense of the rate proceeding is included in the utility's allowable expenses; and
- (G) any other factor which is relevant to a just and reasonable assessment of costs.

TCB urges that the Commission assess costs using the 30 TEX. ADMIN. CODE § 80.23(d)(1) factors considered as follows.

TCB arranged for court reporting services and the hearing transcript per ALJ Order No. 1,

¹ Presumably, this would also apply to Jean Killgore, a KBOR member who participated in the hearing as both a KBOR member and an individual protesting party.

but KBOR's hearing request is what necessitated the transcript to begin with. 30 TEX. ADMIN. CODE § 80.23(d)(1)(A), (G); PFD at 1; Order No. 1. There is no evidence TCB is aware of suggesting that KBOR cannot pay the transcript costs, and KBOR has funded litigation of this case up to this point. 30 TEX. ADMIN. CODE § 80.23(d)(1)(B). The ALJ correctly states that "[a]ll parties actively participated in this case." *Id.*; 30 TEX. ADMIN. CODE § 80.23(d)(1)(C). All parties benefit equally from having a transcript available and used the transcript in preparing closing arguments. 30 TEX. ADMIN. CODE § 80.23(d)(1)(D). Factors (E) and (F) are not applicable here. 30 TEX. ADMIN. CODE § 80.23(d)(1)(E)-(F). KBOR should bear some portion of the transcript costs.

In summary, it would be just and reasonable for KBOR to bear 50% of the transcript costs to lessen that burden on TCB. 30 TEX. ADMIN. CODE § 80.23(d)(1)(G). TCB has been forced to spend a great deal of money to litigate this case because of KBOR contentions that have been soundly rejected by the ALJ. TCB respectfully requests that the Commission assess each party their own costs for their own transcript copies, but assess 50% each of the remaining transcript bill to KBOR and TCB.²

III. CORRECTIONS TO THE PFD AND PROPOSED FINAL ORDER

Upon review of the PFD and proposed Final Order, TCB found a few minor corrections that it respectfully requests be implemented before the documents are adopted by the Commission as final. A list of requested changes follows:

PFD Corrections:

- Page 5, "recreational contact" should be replaced with "contact recreation" to be more consistent with TCEQ terminology. See TCB-15.
- Page 5, "TBC" should be replaced with "TCB"

² It is reasonable for Jean Killgore's transcript costs to be consolidated with KBOR's since she primarily participated through KBOR.

- Page 8, "TCB disputes that that there is an issue" should be corrected to read "TCB disputes that there is an issue."
- Page 8, "TCB also point out" should be corrected to read "TCB also points out"
- Page 14, "100-year floor plain" should be corrected to read "100-year flood plain"
- Page 16, "it expert witness, Cathy Dougherty" should be corrected to read "its expert witness, Cathy Dougherty"
- Page 18, "TCB's reiterates" should be corrected to read "TCB reiterates"
- Page 18, "with KBOR assertion" should be corrected to read "with KBOR's assertion"
- Page 19, "with KBOR it was required" should be corrected to read "with KBOR *that* it was required"
- Page 21, "may occur during the flood event" should be corrected to read "may occur during *that* flood event"
- Page 26, "closer than 150 to the nearest property line" should be corrected to read "closer than 150 *feet* to the nearest property line."
- Page 26, "almost a mile and half" should be corrected to read "almost a mile and *a* half."
- Page 26, "an activated sludge extended aeration plants" should be corrected to read "an activated sludge aeration plant."
- Page 27, "a mile and half or more does would not produce" should be corrected to read "a mile and *a* half or more would not produce."
- Page 28, "it does believe that Commission Staff had the authority" should be corrected to read "it does *not* believe that Commission Staff had the authority."
- Page 29, "the plant has to be accessible to during all weather conditions" should be corrected to read "the plant has to be accessible during all weather conditions."
- Page 31, "TCB plans to build an all-access road" should be corrected to read "TCB plans to build an all-weather access road."
- Page 31, all references to FM 150 should be corrected to read FM 50.
- Page 32, "would not result in an unreasonable risk to the treatment plant performance" should be corrected to read "would not result in an unreasonable risk

to treatment plant performance.”

Order Corrections:

- Page 2, Findings of Fact 2 “the activated sludge process mode” should be corrected to read “the activated sludge process.”
- Page 5, Findings of Fact 28 “water quality is expected in the in the water downstream” should be corrected to read “water quality is expected in the water downstream.”
- Page 5, Findings of Fact 29 “recreational contact” should be replaced with “contact recreation” to be more consistent with TCEQ terminology. *See* TCB-15.
- Page 6, Findings of Fact 41 “100-year floor plain” should be corrected to read “100-year flood plain.”
- Page 6, Findings of Fact 42 “for the duration of a 100-year flood event because TCB intends” should be corrected to read “for the duration of a 100-year flood event, in part, because TCB intends.” *See* PFD at 32-33; Finding of Fact No. 62.
- Page 10, Findings of Fact 72 “would not be a viable option during; a boat would not be safe” should be corrected to read “would not be a viable option; a boat would not be safe.”

IV. CONCLUSION AND PRAYER

The transcript cost assessment issue is minor, but TCB believes the Commission should consider the change requested herein. TCB’s other requested PFD corrections are similarly minor issues, but will create a cleaner record if implemented.

After considering the foregoing, TCB respectfully requests that the Commission adopt the ALJ’s PFD and issue the ALJ’s proposed Order with the changes discussed herein, approve TCB’s Texas Pollutant Discharge Elimination System (“TPDES”) permit application, and issue TCB proposed TPDES Permit No. WQ0014725001.

Respectfully submitted,

THE TERRILL FIRM, P.C.

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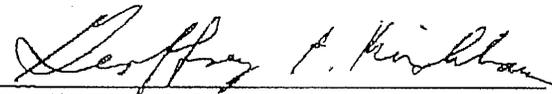
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I hereby certify that on July 6, 2009, a true and complete copy of the foregoing was sent to the individuals on the attached mailing list via the method indicated.

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Office of Public Interest Council	Eli Martinez TCEQ Office of Public Interest, MC-103 P.O. Box 13087 Austin, Texas 78711-3087	via fax to: 239-3377
Jean Killgore	Jean & Leonard Killgore P.O. Box 625 Somerville, Texas 77879-0625	via fax to: (979) 272-9181
Koontz Bayou Old River Group	Amy Rickers Munsch, Hardt, Kopf & Harr, P.C. 500 N. Akard St. 3800 Lincoln Plaza Dallas, Texas 75201-3302	via fax to: (214) 978-4339

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9056-1-3	Beckie Figg	582-08-2177	App. of TCB Rental

DATE TAKEN	DESCRIPTION	QUANTITY	RATE	AMOUNT
	State Office of Administrative Hearings for the Texas Commission on Environmental Quality Hearing on the Merits, Volumes 1 - 3			
2/18/2009	Original & Two Copies - Regular	266	5.25	1,396.50
2/19/2009	Original & Two Copies - Regular	318	5.25	1,669.50
2/20/2009	Original & Two Copies - Regular	68	5.25	357.00
	Complimentary E-transcript	1	0.00	0.00
	Administrative Expense Fee	1	27.50	27.50
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Please see attached TCB's Exceptions to the Proposal for Decision.			
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