

Bryan W. Shaw, Ph.D., *Chairman*  
Buddy Garcia, *Commissioner*  
Carlos Rubinstein, *Commissioner*  
Mark R. Vickery, P.G., *Executive Director*



## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

July 8, 2010

The Honorable Rebecca Smith  
State Office of Administrative Hearings  
300 West 15<sup>th</sup> Street, Suite 502  
P.O. Box 13025  
Austin, Texas 78711-3025

Re: In the Matter of the Application by Oak Grove Management Company LLC for  
Renewal and Major Amendment to TPDES Permit No. WQ0001986000;  
TCEQ Docket No. 2009-0398-IWD; SOAH Docket No. 582-09-3322

Dear Judge Smith:

Enclosed please find the original of the Executive Director's Reply to Protestants' Exceptions to the ALJ's Proposal for Decision in the above-named and numbered cause. If you have any questions, please do not hesitate to contact me at (512) 239-3417.

Sincerely,

A handwritten signature in black ink that reads "Kathy J. Humphreys" with a stylized flourish at the end.

Kathy J. Humphreys  
Staff Attorney  
Environmental Law Division

Enclosure

cc: Service List

SOAH DOCKET NO. 582-09-3322  
TCEQ DOCKET NO. 2009-0398-IWD

APPLICATION OF OAK	§	STATE OFFICE
GROVE MANAGEMENT	§	
COMPANY LLC FOR WATER	§	OF
QUALITY PERMIT NO.	§	
WQ0001986000	§	ADMINISTRATIVE HEARINGS

---

EXECUTIVE DIRECTOR'S REPLY TO PROTESTANTS' EXCEPTIONS TO  
THE ADMINISTRATIVE LAW JUDGE'S PROPOSAL FOR DECISION

---

The Executive Director of the Texas Commission on Environmental Quality (TCEQ or Commission) respectfully files this Reply to the Exceptions to the Administrative Law Judge's (ALJ's) Proposal for Decision (PFD) filed by Robertson County: Our Land, Our Lives and Roy Henrichson (collectively "Protestants"). The Executive Director has considered the arguments made by the Protestants in their Exceptions to the PFD (Exceptions) and finds they are not persuasive; therefore the Executive Director respectfully recommends the Commission adopt the ALJ's PFD as drafted and modify the Order as recommended by the Executive Director.

**I. Summary**

The Protestants assert that since the Primary Discharge Canal is used to convey water, it is water in the state; and the Primary Discharge Canal is indistinguishable from Sub-impoundment A and since the Executive Director determined that Sub-impoundment A is water in the state, the Primary Discharge Canal must also be water in the state. In an attempt at brevity, the Executive Director is only responding to these arguments in his Reply to Exceptions.

## II. The Executive Director Correctly Classified the Primary Discharge Canal as not “Water In The State”

Protestants’ assertion that the Primary Discharge Canal is “water in the state” and therefore should be subject to water-quality based effluent limits is misguided and is contrary to the law.

The Oak Grove Steam Electric Generating System (OGSEGS) uses steam to drive turbines which generate electric power.<sup>1</sup> The steam is condensed with cooling water from Twin Oak Reservoir,<sup>2</sup> the cooling water is then discharged via Outfall 001 located at the end of the Primary Discharge Canal.<sup>3</sup> The cooling water then travels through Sub-Impoundment A, through the Final Discharge Canal, over a drop weir to Twin Oak Reservoir.<sup>4</sup> The stored water is then reused as cooling water for the turbines.<sup>5</sup>

The Primary Discharge Canal was constructed to convey once-through cooling water;<sup>6</sup> both Sub-Impoundment A and Twin Oak Reservoir are streams that were impounded for use as industrial cooling impoundments.<sup>7</sup> Cooling impoundments are used primarily to remove heat from industrial effluent.<sup>8</sup> The cooling water impoundments remove heat via evaporation, conduction and radiation.<sup>9</sup> Industrial cooling water impoundments are addressed in both the Texas Water Code and in the Texas Surface Water Quality Standards.

---

<sup>1</sup> Ex. App-300 24-25:30-1.

<sup>2</sup> Ex. App-300 25:2-3.

<sup>3</sup> Ex. ML-6 3:first paragraph.

<sup>4</sup> Ex. ML-5 1:third paragraph.

<sup>5</sup> Ex. App-300 26:29-30.

<sup>6</sup> Hrn’g Tr. 59:4-6.

<sup>7</sup> Ex. LM-1 11:17-23 (Herds Branch was impounded to form Sub-Impoundment A and Duck Creek was impounded to form Twin Oak Reservoir).

<sup>8</sup> Ex. App-300 26:4-12.

<sup>9</sup> Ex. App-300 27:1.

According to the Texas Water Code, “facilities to provide for the collection, control and disposal of waste heat” are “treatment works.”<sup>10</sup> The Texas Surface Water Quality Standards (TSWQS) provide that surface water in the state includes “lakes. . . ponds, impounding reservoirs . . . canals. . . and all other bodies of surface water, natural or artificial . . . ; except that waters in treatment systems which are authorized by state or federal law, regulation, or permit, and which are created for the purpose of waste treatment are not considered to be water in the state.”<sup>11</sup> Thus, the water in a canal created to collect, control or dispose of waste heat is not surface water in the state and is not subject to the TSWQS.

Mr. Jack Thibodeau, an engineer who testified on behalf of Oak Grove Management Company LLC (Oak Grove), testified that the non-contact cooling water from the condensers combines with non-contact cooling water from the auxiliary cooling pumps prior to discharge to the Primary Discharge Canal.<sup>12</sup> The Primary Discharge Canal is used to convey non-contact cooling water to Outfall 001, and Sub-impoundment A and Twin Oak Reservoir are the primary facilities used to remove waste heat from the non-contact cooling water,<sup>13</sup> however, since the waste heat enters the Primary Discharge Canal before reaching Sub-impoundment A, it follows that waste heat is collected, controlled and partially disposed of in the Primary Discharge Canal.

---

<sup>10</sup> TEX. WATER CODE § 26.001(24)(F).

<sup>11</sup> 30 TEX. ADMIN. CODE § 307.3(57).

<sup>12</sup> Ex. App-200 40:22-25.

<sup>13</sup> Hr'g Tr 104:16-18.

Protestants agree with the Executive Director that the Primary Discharge Canal is used to convey wastewater, but then go on to state that there is no evidence that the canal was created to treat the wastewater. In support of their position, the Protestants rely in part on the prefiled testimony of Dr. Lial Tischler.<sup>14</sup> As the Protestants state, Dr. Tischler testified on behalf of Oak Grove, that the purpose of the Primary Discharge Canal is to transfer the effluent from the condensers to Sub-impoundment A; however in the very next sentence, which the Protestants omitted, Dr. Tischler testified that “[I]t [the Primary Discharge Canal] also is part of the SES treatment system . . .”<sup>15</sup>

Protestants’ argument that the Primary Discharge Canal is used to convey wastewater and therefore is not part of the treatment works and should be subject to the TSWQS cannot be reconciled with the TSWQS. The Primary Discharge Canal collects and controls (as well as disposes) waste heat between the point the heat is generated and the outfall, and thus the Primary Discharge Canal is not surface water in the state and is not subject to the TSWQS.

Protestants also assert that since Sub-impoundment A and the Primary Discharge Canal are indistinguishable and therefore the Primary Discharge Canal should be subject to the TSWQS. This argument also fails because Protestants fail to consider the exception for canals created for waste treatment in the definition of surface water found in the TSWQS, which exempts canals used for waste treatment.<sup>16</sup> As discussed above, the Primary Discharge Canal was constructed to convey the once-through cooling water

---

<sup>14</sup> Protestants’ Exceptions to ALJ’s PFD at 4.

<sup>15</sup> Ex. App-300 53:10-14. SES is the acronym Dr. Tischler used for “steam electric station”

<sup>16</sup> 30 TEX. ADMIN. CODE § 307.3(57).

to Sub-Impoundment A, therefore it is not surface water in the state and is not subject to the TSWQS. In contrast, Sub-Impoundment A was formed by the impoundment of Herds Branch, therefore, it is surface water in the state and is subject to the TSWQS.<sup>17</sup>

## V. Conclusion

The Primary Discharge Canal is not water in the state because it was created to collect, control and dispose of waste heat; therefore, it is part of the treatment system and is not water in the state. The fact that the Primary Discharge Canal is also used to convey water from the point where it exits the condensers to the outfall does not make it surface water.

After evaluating all the information presented at the hearing, and all arguments made by all Parties, the Executive Director concludes that Oak Grove has satisfied all applicable statutory and regulatory requirements in its application for TPDES Permit No. WQ0001986000. The proposed permit meets all applicable statutory and regulatory requirements and the Executive Director recommends that the Commission adopt the Administrative Law Judge's PFD and modify the Proposed Order with the revisions suggested by the Executive Director in his Exceptions.

---

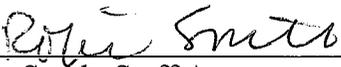
<sup>17</sup> Ex. LM-1 11:17-19.

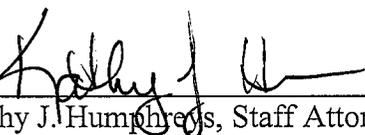
Respectfully submitted,

Texas Commission on Environmental  
Quality

Mark R. Vickery, P.G.  
Executive Director

Robert Martinez, Director  
Environmental Law Division

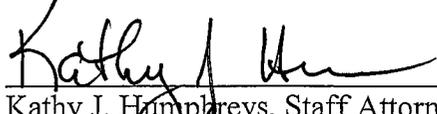
By:   
Robin Smith, Staff Attorney  
Environmental Law Division  
State Bar No. 18645600  
P.O. Box 13087, MC 173  
Austin, Texas 78711-3087  
(512) 239-0463

By:   
Kathy J. Humphreys, Staff Attorney  
Environmental Law Division  
State Bar No. 24006911  
P.O. Box 13087, MC 173  
Austin, Texas 78711-3087  
(512) 239-3417

REPRESENTING THE EXECUTIVE  
DIRECTOR OF THE TEXAS  
COMMISSION ON ENVIRONMENTAL  
QUALITY

CERTIFICATE OF SERVICE

I certify that on July 8, 2010, the original and 7 copies of the foregoing Executive Director's Reply to Protestants' Exceptions to the Administrative Law Judge's Proposal for Decision was filed with the Office of the Chief Clerk and was served on all parties listed below via hand delivery, first class mail, agency mail, facsimile and/or email.

  
Kathy J. Humphreys, Staff Attorney  
Environmental Law Division

The Honorable Rebecca Smith  
Administrative Law Judge  
State Office of Administrative Hearings  
300 West 15<sup>th</sup> Street, Suite 502  
P.O. Box 13025  
Austin, Texas 78711-3025  
Facsimile: (512) 475-4994

Ms. Molly Cagle  
Vinson & Elkins LLP  
2801 Via Fortuna, Ste. 100  
Austin, Texas 78746  
Facsimile: (512) 236-3280  
[mcagle@velaw.com](mailto:mcagle@velaw.com)

Eric Allmon  
Allmon & Rockwell  
707 Rio Grande, Ste. 200  
Austin, Texas 78701  
Facsimile: (512) 482-9346  
[eallmon@lf-lawfirm.com](mailto:eallmon@lf-lawfirm.com)

Ms. LaDonna Castañuela  
Office of Chief Clerk, MC-105  
Texas Commission on Environmental Quality  
P. O. Box 13087  
Austin, TX 78711-3087

Mr. Garrett Arthur  
Public Interest Counsel, MC-103  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087  
[garthur@tceq.state.tx.us](mailto:garthur@tceq.state.tx.us)