

IN THE MATTER OF THE  
APPLICATION OF OAK GROVE  
MANAGEMENT COMPANY, LLC FOR  
TPDES PERMIT WQ0001986000

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BEFORE THE STATE OFFICE  
OF  
ADMINISTRATIVE HEARINGS

**EXCEPTIONS OF PROTESTANTS  
ROBERTSON COUNTY: OUR LAND OUR LIVES AND ROY HENRICHSON**

TO THE HONORABLE COMMISSIONERS:

COME NOW, Robertson County: Our Land, Our Lives (RCOLOL) and Roy Henrichson (Hereinafter “Protestants”) and file this, their Exceptions to the Proposal for Decision in this docket. Protestants would respectfully show the following:

**I. Summary**

The PFD does not present you with good proposals on several disputed issues.

The Primary Discharge Canal is a “water in the state,” inasmuch as it is no more a waterway created for waste treatment than is Sub-Impoundment A or Twin Oaks Reservoir of dozens of the water bodies associated with the cooling of industrial cooling water.

Sub-Impoundment A should have been accorded high aquatic life uses. It is a perennial water body, now, and the overwhelming evidence is that it has been ever since its creation. The Applicant has been allowed to model Sub-Impoundment A as a perennial for purposes of evaluating the impacts of its discharges, and the TCEQ’s *WQS Implementation Procedures* tie the aquatic life characterization of a water body to the conditions used in the modeling of that water body.

The PFD also errs to exempt Sub-Impoundment A from a Tier 2 antidegradation analysis. The OGSES discharges are low in concentration, but the mass loadings are huge, because the

volumes of discharge are huge. Furthermore there are dispersants, namely, hydroxyethylidene diphosphonic acid, and the Applicant presented no, not even a narrative, “BPJ,” description of the impacts of dispersants on aquatic life or on the behaviors of other pollutants in the discharge.

The ALJ has also failed to establish appropriate requirements for the cooling water intake structures at the facility. The location and design of cooling water intake structures must reflect the best technology available to minimize adverse environmental impacts. In this case, the ALJ has exempted the OGSES facility from current intake structure regulations based on an improper finding that the facility was an existing facility when these requirements were adopted in 2002. In fact, little more than a collection of unused parts and cleared land existed at the OGSES site in 2002. There was not even an air permit for the facility in 2002, so operation or construction of the facility would have been a violation of TCEQ rules. Rather than acknowledge this plain reality, the ALJ has accepted the purchase of the unused parts in the late 1970s as the date when the facility came into being for purposes of exempting the facility from current requirements. In doing so, the ALJ has entertained the notion that the equipment purchased in the late 1970s has always been intended for use “within a reasonable period of time,” including periods of time when no air permit existed and its use would have been illegal. Again, the ALJ has allowed the Applicant to perform a regulatory sleight-of-hand: no facility existed in 2002 if TCEQ’s air permitting program is asking the question, but a facility has continuously existed since the late 1970s if TCEQ’s water quality permitting program is asking the question.

Additionally, the ALJ has exempted the intake structures associated with OGSES located on Lake Limestone from TCEQ’s review based on findings that these structures do not involve “cooling water”, and are not under Oak Grove’s control. The water drawn through these structures is clearly intended for use as cooling water. There is no basis in the record to conclude

Oak Grove does not control these structures, nor is there any legal basis that this distinction in control makes any difference in the requirement to employ BTA.

The PFD fails to address one of the most strongly asserted of Protestants' arguments: that the requirements for the cooling water intake structures at OGSES cannot be determined from the draft permit, even if one accepts that the two documents incorporated into the permit by reference may be so incorporated. The issue is not only whether incorporation by reference is permissible but, also, whether what is incorporated states identifiable permit terms – terms that would support an enforcement action.

Despite a lot of cross-examination, no witness was able to clearly separate the terms of the incorporated documents that were, on the one hand, merely descriptive and those that were, on the other hand, prescriptive (i.e., enforceable). For example, one of the documents describes the velocity of water approaching a screen as “estimated at less than 0.56 ft/sec.” So, the TCEQ witness testified:

Q: So, we can't tell, looking at this document, what would or would not constitute compliance with any approach velocity that we may infer from this?

A: That's true.

There are no monitoring, recordkeeping or reporting requirements set out in the permit for the cooling water intake structures, so, there is nothing on which to base an enforcement action, were one able to decipher the permit limits that pertain to the cooling water intake structures.

The PFD, also, glosses over the undisputed fact that no one conducted a site-specific assessment of the environment (i.e., Twin Oaks Reservoir) in which the intake structure sits and from which the bulk of the cooling water will be drawn. There has been a reservoir about 30% full at the OGSES location for nearly 30 years. It strains credulity to argue, an argument the

PFD accepts, that the well-established in situ conditions simply are not relevant to developing the Best Technology Available for the intake structure.

## II. Antidegradation

The Primary Discharge Canal is a Water in the State. Water-quality based effluent limits should have been applied to discharges from Primary Discharge Canal and a Tier 2 antidegradation analysis should have been performed.

The ALJ states that the TCEQ's position that a manmade conveyance is a water in the state doesn't apply because in this case, it is the *surface* water quality standards that apply and "Surface" water in the state, excludes "waters in treatment systems...which are created for the purpose of waste treatment." For this conclusion, the ALJ cites testimony by Applicant's witness that the canal will carry or transfer wastewater.

Protestants do not dispute that the canal is a *conveyance* for wastewater. Importantly, there is no testimony or evidence that the primary discharge canal was created for the purpose of *treatment*. None of the witnesses for the ED or Applicant testified that the purpose of the canal was for heat dissipation. On the contrary, Dr. Tischler merely testified that the Primary Discharge Canal "is a ditch that the permittee constructed to *transfer* the effluent from the condensers to Sub-Impoundment A."<sup>1</sup> If heat dissipation alone were sufficient to constitute "treatment" exempting a water body from status as a "water in the state," then Sub-impoundment A, Twin Oaks Reservoir, as well as numerous other reservoirs in the state of Texas, would not be considered "water in the state."

The primary discharge canal is indistinguishable from the discharge canal carrying only wastewater involved in *Greenbush v. TCEQ*, wherein TCEQ took the position that a manmade

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<sup>1</sup> Exh. APP-300, at p. 53 (Tischler Prefiled Direct Testimony).

conveyance solely carrying wastewater constituted “water in the state.”<sup>2</sup> Likewise, a finding that the primary discharge canal is not water in the state would be contrary to *Watts*, where the courts found a wastewater collection system constituted a “water in the state.”<sup>3</sup> The Commission should not apply a different test for “water in the state” in this matter as opposed to the standard applied in those cases.

Sub-Impoundment A Should be Characterized as a Perennial Water body. By TCEQ’s Water Quality Standards, if an unclassified water body is perennial, it is presumed to have a high aquatic life use and corresponding dissolved oxygen criteria.<sup>4</sup> Any deviation from this presumption in a particular case constitutes a modification of the water quality standards, requiring adherence to specific procedures not even attempted in this case.<sup>5</sup> Thus, the sole question relevant to the proper aquatic life use designation in Sub-impoundment A is whether it is perennial or intermittent.

In determining whether Sub-Impoundment A is perennial, the ALJ contends that TCEQ should look to the state of the water body over 30 years ago. “Grandfathering” the characterization of a water body based on a status that has not existed for three decades, and is never expected to occur during the operation of the facility, would overturn existing TCEQ policy. Caddo Lake is the only natural lake in Texas, with all others being manmade reservoirs. If the Commission adopts the ALJ’s approach in this case, then, in the eyes of the TCEQ, Texas

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<sup>2</sup> See Attachment A, Excerpt from TCEQ’s Brief in Response, in *Greenbusch Ltd and the Gustafson Group, Inc., v. TCEQ and Fort Bend County MUD # 58*, In the District Court of Travis County, Texas; 261st Judicial District; Cause No. GN5-01870; [Citing *McGee v. State*, where a city’s sewage pipe was held to be water in the state.]

<sup>3</sup> *Watts v. State of Texas*, 140 S.W.3d 860 (Tex. App. – 14<sup>th</sup>, 2004) pet. dism’d.

<sup>4</sup> 30 TAC § 307.4(h)(3)

<sup>5</sup> 30 TAC 307.4(l)

would have no virtually no discharges into lakes. Such disregard for reality does not reflect TCEQ policy.

TCEQ's Implementation Procedures for its Water Quality Standards link the *current* status of the receiving water with its proper characterization. Specifically, TCEQ's procedures require the designation of aquatic life uses based on the same hydrologic conditions used to *model* the impact of a discharge.<sup>6</sup> In this case, Oak Grove has modeled the impact of its discharge based on an assumption that Sub-Impoundment A is perennial.<sup>7</sup> This gives Oak Grove the benefits of dilution that go with Sub-Impoundment A being considered perennial. Grandfathering Sub-Impoundment A as intermittent to claim less-stringent standards, and then enjoying the dilution benefits of a perennial water body when modeling the impacts of its discharge, it is simply a way for Oak Grove to game the system.

As a matter of fact, Sub-Impoundment A is perennial. Every photograph and eyewitness account in the record indicates that it is a perennial water body. As last-minute rebuttal, Applicant presented musings by Lial Tischler that Sub-Impoundment A did not naturally carry a flow of water before a discharge from the facility occurred.<sup>8</sup> Even he, however, was unwilling to testify that Sub-Impoundment A had ever been dry,<sup>9</sup> and the hard evidence flatly disproves his speculation that water does not flow through the final discharge canal from Sub-Impoundment A into Twin Oak Reservoir.

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<sup>6</sup> Exh. ML-8, at p. 5 (Procedures to Implement the Texas Surface Water Quality Standards, January, 2003, RG-194).

<sup>7</sup> Exh. APP-318, at p. 7 of 44 (Heat Dissipation and Thermal Performance Modeling of Twin Oak Reservoir). This image clearly depicts the depth of water in the Primary Discharge Canal and Sub-impoundment A and shows water will always be present in these water bodies.

<sup>8</sup> Tr. Vol. 4, p. 820 to 821 (Tischler Rebuttal Testimony).

<sup>9</sup> Tr. Vol. 1, pp. 154 to 157 (Tischler Testimony).

There is plenty of evidence that shows water in Sub-Impoundment A naturally occurs, even without the proposed discharge. No discharge reports were submitted for the facility until the Fall of 2009,<sup>10</sup> and there are no records of any discharge from the facility prior to that time. An unreported discharge prior to that time would be a violation of the permit. Tischler indicated during testimony, that with the exception of temporary pumping after construction of the impoundment was complete, continuous circulation of water only began in early 2009.<sup>11</sup> Yet, an image submitted with the Application in 2007 clearly depicts “flow...through the [final] discharge canal ... to Twin Oak Reservoir.”<sup>12</sup> In another aerial view of the OGSES facility submitted during the application process in 2008, water flows from Sub-Impoundment A into the Final Discharge Canal.<sup>13</sup> Another aerial photograph, included in a TXU presentation regarding the Oak Grove site, shows water in the Primary Discharge Canal, Sub-Impoundment A, the Final Discharge Canal, and Twin Oak Reservoir at a time when plant facilities had not yet been constructed at the site.<sup>14</sup> According to Mr. Tischler’s musings, the water shown in all of these pictures connecting Sub-Impoundment A and Twin Oak Reservoir should not exist.

The ALJ also erred in finding that the discharge will have a *de minimis* impact on water quality, thereby exempting Twin Oaks reservoir from a full Tier 2 anti-degradation analysis. Applicant mischaracterizes the discharge water as unaffected by its use for cooling purposes.

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<sup>10</sup> Exh. APP-326 (January 25, 2010 Letter Re: Outfall 002 Sample Analysis)

<sup>11</sup> Tr. Vol. 1, p. 156 (Tischler Testimony).

<sup>12</sup> See Attachment B, Exh. APP-206, at p. 78 of 130.

<sup>13</sup> See Attachment C, Exh. APP-210, at p. 2

<sup>14</sup> See Attachment D, Exh. P-16, at p. 15 (Offer of Proof). Protestants challenge ALJ’s failure to admit this exhibit into the record, apparently on authentication grounds. The document demonstrates adequate distinguishing characteristics to present a *prima facie* case for authenticity. Nothing further is required to overcome an authenticity objection. *City of Corsicana v. S.F. Herod, et al.*, 768 S.W.2d 805, 814 (Tex. App. – Waco, 1989) *no writ*.

Although low in concentration, the discharge will contain significant quantities of suspended solids.<sup>15</sup> The cooling water will be treated with hydroxyethylidenediphosphonic acid as a dispersant.<sup>16</sup> Both the impact of this dispersant on the concentration of suspended solids once in the receiving water, as well as the direct impact of the chemical itself, is unclear.<sup>17</sup>

Despite the potential impact of the discharge on the concentration of total suspended solids (TSS), Applicant has failed to quantify this impact in any way. Without any quantified information on how the proposed discharge will impact the concentration of total suspended solids in the receiving waters, there is no proper basis to find that the change in water quality will be *de minimis*.

### **III. Cooling Water Intake Structures**

Under the proposed Findings and Conclusions, the cooling water intake structures for the OGSES need not be designed to the highest tier of Best Technology Available (“BTA”) to minimize adverse environmental impacts. Instead they may be designed to a lower level of BTA, “BTA Lite,” if you will.<sup>18</sup> This environmentally undesirable situation arises, because the ALJ has determined that the OGSES is an existing, as opposed to a new, facility.<sup>19</sup>

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<sup>15</sup> Exh. APP-223, at p. 6 of 44 (March 2009 Revised Draft Permit) and Exh. P-13 (United States EPA October 2009 Report, Steam Electric Power Generating Point Source Category: Final Detailed Study Report), at pp. 3-19 to 3-20.

<sup>16</sup> Exh. APP – 206, at p. 84 (Application for Major Amendment with Renewal TPDES Permit No. 01986, submitted June 25, 2007).

<sup>17</sup> *Id.*

<sup>18</sup> BTA Lite is simply “best professional judgment.” EPA, in 2004, had adopted BTA regulations for existing facilities that were much, much less protective of aquatic species than were the regulations for new facilities. However, TCEQ never incorporated to state law the 2004 EPA regulations. Then, following a court challenge, EPA, effective July 9, 2007, suspended its 2004 regulation, save for the “best professional judgment” part of the regulations. See, 40 CFR §§125.90-.99 and 72 Fed. Reg. 37107 (July 9, 2007).

The suspended 2004 regulations presumably provide some information regarding protections that a regulator employing best professional judgment might require. There were various differences in the

The ALJ's determination is wrong on the law, but it is even more wrong on policy. There is certainly no policy reason to interpret, mis-interpret, bend, torture – whatever one wants to call it – the law so as let the OGSES skate by as a facility “existing” in 2002. You are dealing, here, with a facility that, in any real-world sense, began construction in 2007. Sure, back in the late 1970s, there was some significant facility equipment purchased and some basic site work completed; there was a creek dammed up for the facility's reservoir in 1982, but the dam's flood gates were not closed for another 25 years – and, then, only briefly.<sup>20</sup> The facility's air permit was allowed to lapse in the mid-1980s, and the permit was not renewed until 2007,<sup>21</sup> so it could not legally have been under ongoing construction during this 20-25 year period.

We all recognize that, since 1978, society's expectations of appropriate environmental preservation have risen, our knowledge of the life functions of aquatic species has grown, and almost all technologies have advanced significantly. It is bad policy to allow a few significant actions taken 30 years ago to tie to that earlier time the “best technology available” today at a facility that is in overwhelming part built today. We should not do this, unless the law compels it, which the law does not.

The Federal Register explanation of a “new facility” is:

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new-facility and existing-facility standards, but the clearest two are: (1) BTA for new facilities requires the water flow through the intake structures to be no more than would be the case, were the facility cooling-water cycled in a closed loop (so that makeup water is the only water being taken into the system) and (2) BTA for new facilities limits the velocity of current flowing through the intake screens to 0.5 feet/second – whereas, BTA for existing facilities did not include these requirements. See, 40 CFR § 125.84 and compare to 40 CFR §125.94 (2004). For OGSES, cooling water makeup is on the order of 31.68 million gallons/day (Exh. P-23, Att. A), about 2% of the 1,600 million gallons/day flow through the Twin Oaks Reservoir intake structures. TCEQ witness Linendoll testified the velocity through the OGSES intake screens would be on the order of 1.1 feet/second. Tr. 795-796.

<sup>19</sup> See, Proposed Conclusion of Law #23.

<sup>20</sup> Exh. APP- 210 (the June 2008 Application supplement).

<sup>21</sup> Tr. Vol. 1, p. 17 and Exh. P-25.

A new facility subject to this regulation is any facility that meets the definition of “new source” or “new discharger” in 40 CFR 122.2 and 122.29(b)(1), (2), and (4); commences construction after January 17, 2002; and uses either a newly constructed cooling water intake structure, or an existing cooling water intake structure whose design capacity is increased; or obtains cooling water by any sort of contract or arrangement with an independent supplier who has a cooling water intake structure. The term “commence construction” is defined in 40 CFR 122.29(b)(4).

66 Fed. Reg. 85,256 at 65,258 (Dec. 18, 2001).

A “new source” and, so, potentially a “new facility” is one “the construction of which commenced” “after promulgation of standards of performance under Section 306 of [the Clean Water Act] which are applicable to such source.” 40 CFR § 122.2.

The PFD points to a web page copy that is an attachment to Dr. Tischler’s testimony and to Dr. Tischler’s reliance on that web page to conclude that the standards of performance applicable to a source such as the OGSES were promulgated in 1982. Since there was some construction of the OGSES in 1978, that, per the PFD, would mean the OGSES is not a new facility or source. This places undue reliance on an EPA web page, which, if interpreted as Dr. Tischler appears to have interpreted it and as the PFD does interpret it, is at odds with what Congress intended and how the law has plainly unfolded.

Clean Water Act Section 316(b) requires BTA for cooling water intake structures be included in standards of performance for sources subject to the NPDES program. 33 U.S.C. § 1326(b). When Congress legislated the requirement that there be standards of performance, it set out a time line for standards for certain source categories, one of which was steam electric power plants. For steam electric power plants, the time line was for EPA to propose standards within 15 months of October 18, 1972, and adopt standards within 19 months of that date. See, 33 U.S.C. § 1316 (Clean Water Act Sec. 306). Congress clearly felt some urgency about getting the

standards in place and, hence, of subjecting steam electric power plant cooling water intake structures to BTA.

EPA by-and-large met the § 306 deadline for steam electric power plants. EPA promulgated NSPS and other standards for the steam electric power plant point source category on October 8, 1974.<sup>22</sup> These were amended twice in 1975.<sup>23</sup> On July 16, 1976, the U.S. Court of Appeals for the Fourth Circuit remanded certain provisions of the 1974 regulations: (1) the thermal limitations, (2) the NSPS for fly ash transport water, (3) the rainfall runoff limitations for material storage and construction site runoff, and (4) the BPT variance clause. *All other provisions of the regulations were upheld.* *Appalachian Power v. Train*, 545 F.2d 1351 (4th Cir. 1976). The upheld regulations were revised and supplemented in 1982.<sup>24</sup> This is presumably the source of the web page notation.

In 1976, EPA promulgated a separate regulation for cooling water intake structures BTA.<sup>25</sup> As the PFD notes, these regulations were challenged in court, and EPA withdrew them in 1979.<sup>26</sup> *However, the steam electric power plant standards of performance – these are the standards promulgated under § 306 of the Act and that trigger the “new” source status – have been in constant force since 1974.* So, OGSES is a new source, and, hence, potentially a new facility, because it is one – regardless of ones view of the continuity of construction – “the construction of which commenced” “after promulgation of standards of performance under Section 306 of [the Clean Water Act] which are applicable to such source.” 40 CFR § 122.2.

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<sup>22</sup> 39 Fed. Reg. 36,186.

<sup>23</sup> 40 Fed. Reg. 7095 (February 19, 1975) and 40 Fed. Reg. 23987 (June 4, 1975).

<sup>24</sup> 47 Fed. Reg. 52,290,

<sup>25</sup> 41 Fed. Reg. 17,387 (April 26, 1976).

<sup>26</sup> 44 Fed. Reg. 32,854 at 32,956, c.1 (June 7, 1979).

Post-2002 construction commencement. A new source must have commenced construction after January 17, 2002, in order to be, potentially, a new facility. Did OGSES do this? Protestants say, “yes,” while the PFD concludes “no.” The disagreement turns, mostly, on whether the Applicant had “a binding contractual obligation for the purchase of facilities or equipment which are intended to be used in its operation with[in] a reasonable time.” 40 CFR §122.29(b)(4)(ii).<sup>27</sup>

The PFD decision exams the first prong of the definition, too. That prong provides that, to have commenced construction, the construction must have been continuous. Given that nothing but maintenance occurred for approximately 25 years after the mid-1980s and that the Applicant had, in that window, no PSD permit to allow legal construction, the PFD finds (p. 17), “it is difficult to conclude that the construction program at OGSES was continuous.” Inasmuch as the Applicant bears the burden of proof on this point, we have to accept what is obvious to a lay person: there was no continuous on-site construction program for the OGSES prior to 2007.

The PFD’s analysis of the second prong (i.e., equipment purchase contracts for use of equipment within a reasonable time) is set out in a single paragraph on page 17. The PFD argues

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<sup>27</sup> The full regulatory definition is:

- (4) Construction of a new source as defined under Sec. 122.2 has commenced if the owner or operator has:
  - (i) Begun, or caused to begin as part of a continuous on-site construction program:
    - (A) Any placement, assembly, or installation of facilities or equipment; or
    - (B) Significant site preparation work including clearing, excavation or removal of existing buildings, structures, or facilities which is necessary for the placement, assembly, or installation of new source facilities or equipment; or
  - (ii) Entered into a binding contractual obligation for the purchase of facilities or equipment which are intended to be used in its operation with a reasonable time. Options to purchase or contracts which can be terminated or modified without substantial loss, and contracts for feasibility engineering, and design studies do not constitute a contractual obligation under the paragraph.

that facilities and equipment actually were purchased before 2002 and that the intent of the purchaser was to use them (in its operations, presumably) within a reasonable time, “regardless of whether they were actually used within a reasonable time.”

The overarching problem with the PFD’s analysis is that it implies no requirement that the intent, itself, be objectively and continuously reasonable. It allows an applicant to contend that “just any time in the indefinite future” may be intended as a reasonable time. It also allows an applicant to cease to intend to use the equipment in an objectively reasonable time, but to, nonetheless, claim construction has commenced.

Doubtless, when the boilers, for example, were purchased in the late 1970s, the Applicant did not reasonably intend they be used for the first time 35 years later. The same would be true for other equipment. Somewhere along the way, likely, when the decision was made to allow the PSD permit to lapse, there ceased to be an intent that the equipment would be used at any particular time in the future. Either the intent lapsed, or it became objectively unreasonable.

Although the unreasonableness of the proposed interpretation is its overarching problem, there is an evidentiary problem, too. There is precious little evidence, if any evidence, in the record of the standard by which a “reasonable” time from equipment purchase to operation was judged, at any time in the past 35 years, by the Applicant. The PFD cites to no such evidence. Producing such evidence was the Applicant’s burden.

Intake structures – newly constructed or of increased capacity. The PFD apparently assumes the cooling water intakes structures are not newly constructed. However, those did not exist prior to the advent of the OGSES, so they were “new” with it, making their capacity increase not relevant.

As the PFD points out (p. 18), the Protestants, however, do believe design capacity has increased. They base this, primarily, on the testimony of TCEQ witness, Ms. Luxemborg (Tr. 651-653), and the Applicant's exhibit (Exh. A-210, p. 3 of 10) about which she was examined. The exhibit says "the design flow of the facility, with all six pumps operating is 2272.6 cfs (1,020,000 gpm)." The facility is the cooling water intake structure, apparently as it stood in 2008. The math on this ( $1.02 \times 10^6$  gallons/minute x 60 minutes/hour x 24 hours/day) leads to 1,470 million gallons/day. This is the limit in the existing permit (Exh. A-203), not the limit in the draft permit (Exh. A-223). So, there is being sought an increase in the design flow of the facility.

About the Lake Limestone intake structure. The PFD (p. 20) devotes almost no attention to Protestants' argument that the Lake Limestone intake structure needed to have a BTA analysis performed for it, too. The PFD says (1) the water taken into the pipeline at Lake Limestone is not, at that point, cooling water, and (2) it would be unfair to burden the Applicant with a BTA analysis of a structure it does not control.

First, there is absolutely no evidence in the record to support the latter reason. Protestants do not believe it is factually true. The first reason stated would defeat the structure in Twin Oaks Reservoir as a cooling water structure, too, if it were a reliable reason. The water entering the Twin Oaks Reservoir structure is not, at that moment, cooling water. It, like that that comes in from Lake Limestone, will soon be cooling water, however. The record is abundantly clear that the Lake Limestone water provides the makeup water necessary, with a small amount of makeup water that arrives at the reservoir via Duck Creek, to cool the OGSES facility. As the PFD acknowledges, the definition of a cooling water intake structure is very broad, and there is just no legally-defensible reason to exclude the structure in Lake Limestone from that definition.

#### IV. Permit Specificity

The ALJ has Erred in Finding the Draft Permit Adequately Enforceable. In addressing whether the draft permit is specific and enforceable, the Administrative Law Judge has simply said that the incorporation of documents is allowed. The ALJ has failed to address the most fundamental problems with the lack of specificity in the draft permit. Even if it were possible to impose requirements by the incorporation of documents, the permit still fails to establish specific requirements for the cooling water intake structures because the incorporated documents do not set out clear standards.

NPDES Permits Must Specifically Establish Requirements Ensuring Compliance with Relevant Law. The purpose of a TPDES permit is to reduce the general requirements of the Clean Water Act, and applicable regulations, into discrete and specific requirements for a particular facility.<sup>28</sup> Achieving clarity in an individual permit is important for several reasons.

For one, a regulated entity should have certainty in the agency's expectations. A regulated entity should not learn what a permit means only when the permit is interpreted by the enforcement division during a TCEQ enforcement action, or by a court during a citizen suit.

Additionally, the ability to specifically understand what a permit requires is critical for citizens to have a meaningful opportunity to participate in the permitting process.<sup>29</sup> If the permitting authority cannot inform the public of what a permit specifically requires during the permitting process, the public is unable to evaluate how effectively the permit will ensure compliance with applicable law.

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<sup>28</sup> *Environmental Protection Agency, et al. v. California ex rel. State Water Resources Control Board et al.*, 426 U.S. 200, 205 (1976).

<sup>29</sup> *Waterkeeper Alliance, Inc. et al. v. United States Environmental Protection Agency*, 399 F.3d 486, 503 (U.S. App. – 2d Cir. 2005).

Furthermore, the permit must be clear enough for enforcement by a member of the public or the United States Environmental Protection Agency (EPA). An affected member of the public is explicitly granted the power to enforce a TPDES permit on his or her own initiative.<sup>30</sup> A permit cannot be drafted in a manner that impairs the public's ability to independently exercise this power.<sup>31</sup> Ensuring that the permit is drafted in a manner that enables public enforcement of a permit is an issue appropriate to consider during the original permitting process.<sup>32</sup> The EPA also has continuing authority to independently enforce the requirements of a permit.<sup>33</sup> Both the public and the EPA are entitled to a comprehensible and specific permit in order for them to determine whether to bring an independent enforcement action. An agency's refusal to interpret a permit during the permitting stage, by treating the interpretation of a permit as solely a function of the agency's own enforcement process, unacceptably ignores these independent powers of enforcement.

The Executive Director's staff exhibited an inability to identify permit requirements contained in incorporated materials. The draft permit seeks to address cooling water intake structure requirements by the incorporation by reference of two reports submitted during the application process, and requiring that the facility operate "consistent with" these documents.<sup>34</sup> It is important to recognize that these documents were developed with a descriptive purpose, not

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<sup>30</sup> 33 U.S.C. § 1365(a).

<sup>31</sup> *Waterkeeper Alliance, Inc. et al. v. United States Environmental Protection Agency*, 399 F.3d 486, 503 (U.S. App. – 2d Cir. 2005).

<sup>32</sup> *Waterkeeper Alliance, Inc. et al. v. United States Environmental Protection Agency*, 399 F.3d 486, 503 (U.S. App. – 2d Cir. 2005).

<sup>33</sup> Exh. CL-3, at p.40, paragraph E (Memorandum of Agreement Between the Texas Natural Resource Conservation Commission and the United States Environmental Protection Agency, Region 6, Concerning the National Pollutant Discharge Elimination System)

<sup>34</sup> Exh. APP-223, Special Condition 18 (March 2009 Revised Draft Permit).

a prescriptive purpose. Unlike a nutrient management plan for a confined animal feeding operation, or a site operating plan for a landfill, these documents were not written with the purpose of providing operational guidance.

Because the incorporated documents were clearly not written to provide operational direction, an immediate problem in applying these documents is distinguishing between representations in the documents that are operational prescriptions, versus representations that were provided for purely descriptive purposes. The Executive Director's staff could provide no basis for a reader of the permit to make such a distinction:

Q (Allmon): [H]ow does one reading [the incorporated materials] distinguish between a representation that is a condition of a permit as opposed to a representation that is not a condition of the permit?

A (Luxemburg): It might be tough.<sup>35</sup>

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Q (Allmon): So, we can agree that there are some representations in [the incorporated documents] that are conditions of the permit, and some that are not conditions of the permit; that's your interpretation?

A (Linendoll): Yes.

Q: How does one distinguish between what representations are conditions of the permit, and what representations are not conditions of the permit?

A: I presume it would be difficult. In hearing the line of testimony yesterday, I tend to agree that providing potentially more specificity to clear that issue up may have some value.<sup>36</sup>

Importantly, these were the witnesses presented as *most* capable of interpreting the cooling water intake structure provisions of the draft permit. No witness for the applicant claimed to be capable of interpreting the draft permit provisions addressing cooling water intake

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<sup>35</sup> Tr. Vol. 3, p. 657, li. 9-13. (Luxemburg Testimony).

<sup>36</sup> Tr. Vol. 4, p. 800, li. 8-19. (Linendoll Testimony).

structures. Without any means of distinguishing the binding elements of the incorporated documents versus the non-binding elements of the incorporated documents, it is impossible for the public to determine whether the documents ensure compliance with applicable law, or what would constitute “compliance” with these documents.

The Descriptions of the Incorporated materials are vague and ambiguous. To whatever degree it is possible to determine which statements in the incorporated materials constitute permit conditions, the statements themselves are often unclear.

For example, the use of travelling screens is a primary element of the technology proposed to be used at the cooling water intake structures. When this technology is used, it is important to avoid forcibly sucking aquatic life onto the screens to meet an untimely death by being crushed or asphyxiated. Normally, the use of such a technology is regulated by establishing a limit on the velocity of water through the screens. The report incorporated into the permit states that “velocities approaching the water screens are estimated at less than 0.56 ft/sec.”<sup>37</sup> TCEQ’s permit writer was unsure if this constituted a *limit*, however.<sup>38</sup> Assuming that it is, this number is only an *estimate*:

Q (Allmon): Looking at [the incorporated documents], I know Ms. Cagle asked about the 0.56 feet per second earlier, and correct me if I’m wrong, but you noted that that’s an estimate. So that number isn’t required in the permit. Is that correct?

A (Linendoll): That would be my interpretation. I mean, the document right here says, “the approach velocities are estimated.” How one could determine that number to be an absolute, based on the wording in the document, you know, that’s certainly my opinion. That’s not an absolute; therefore, it wouldn’t be a specific requirement per se.<sup>39</sup>

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<sup>37</sup> See Attachment C, Exh. APP-210, p. 2.

<sup>38</sup> Tr. Vol. 3, p. 602, li. 15-20. (Luxemburg Testimony).

<sup>39</sup> Tr. Vol. 4, p. 794, li. 1-12. (Linedoll Testimony).

The velocity of inflowing water is influenced by the distance from the screen. The incorporated documents add an additional layer of uncertainty by failing to provide any distance from the screen for determining the approach velocity:

- Q (Allmon): Is the approach velocity measured at any specific distance from the screen?
- A (Linendoll): I'm sure they measured it in this instance, but, no, to my knowledge, there is not an absolute defined location across the board for approach velocities.
- Q: So reading this, we don't know at what distance from the screen you look to determine velocity of the approach velocity?
- A: That's my understanding.<sup>40</sup>

Given these uncertainties, staff for the Executive Director frankly admitted that this operational parameter was unenforceable:

- Q (Allmon): So, we can't tell, looking at this document, what would or would not constitute compliance with any approach velocity that we may infer from this?
- A(Linendoll): That's true.<sup>41</sup>

The meaninglessness of this parameter alone is cause for concern, but such uncertainty is hardly limited to this condition. The through-screen velocity is “*typically. . . estimated . . . at approximately twice the screen approach velocity*”<sup>42</sup> (wherever that is measured). Each travelling screen is *approximately* 14 foot wide.<sup>43</sup> The incorporated documents are rife with the types of caveats and hedging often found in a technical report, but not a water quality permit.

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<sup>40</sup> Tr. Vol. 4, p. 794, li. 24 to p. 795, li. 8. (Linendoll Testimony).

<sup>41</sup> Tr. Vol. 4, p. 796, li. 10-13.

<sup>42</sup> See Attachment C, APP-210, p. 2.

<sup>43</sup> APP-211, at p. 1 (Second Supplement to the Application, submitted December 15, 2008).

The Environmental Protection Agency specifically noted this frequent lack of specificity in the incorporated documents,<sup>44</sup> and this concern of the EPA has not been resolved.

Monitoring, Recording and Reporting Requirements related to CWIS are Absent from the permit. Any permit condition is meaningless without a means for the agency or public to confirm compliance. The monitoring, recording, and reporting requirements of permits provide this means of confirmation. The draft permit contains absolutely no monitoring, recording, or reporting requirements related to the cooling water intake structures, however:

Q(Allmon):           What monitoring is imposed by [the incorporated documents] that would allow the TCEQ to look at and tell what the approach velocity occurring at the facility is?  
A:(Linendoll)       There is no specific proposed monitoring included in these documents.<sup>45</sup>

\* \* \*

Q:                       Does the public have the right to enforce this permit?  
A:                       Yes.  
Q:                       And so let's say the public is looking at whether they're in compliance. What recording requirements are contained in these two documents that allow the public to determine whether the operation is in compliance with these documents?  
A:                       That specificity does not exist in these documents.

\* \* \*

Q:                       Are there reporting requirements that would allow that determination?  
A:                       Same answer.<sup>46</sup>

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<sup>44</sup> Exh. P-II. (Certified Copy of Email from Robin Smith (TCEQ) to Kelly Holligan (TCEQ) Re: Fwd: Updated Implementation of 316(b), Permit Conditions).

<sup>45</sup> Tr. Vol. 4, p. 798, li. 3-8. (Linendoll Testimony).

<sup>46</sup> Tr. Vol. 4, p. 801, li. 25 to p. 802, li. 14.

With no monitoring, recording or reporting requirements related to the cooling water intake structures, it is impossible to determine ongoing compliance with whatever operational and maintenance requirements can be divined from the permit.

Establishing Permit Terms by Incorporation Violates the Clean Water Act. The administrative law judge has found that it is acceptable to establish permit limits through the mere incorporation of documents by reference. This finding directly contradicts the requirements of the Clean Water Act that govern this permit.<sup>47</sup> The Clean Water Act does not allow the incorporation of documents by reference precisely to avoid the type of confusion that has been created in this case regarding the cooling water intake structure requirements.

No detailed evaluation was performed to support the development of specific CWIS requirements. The determination of the appropriate cooling water intake structure requirements was determined in this case without any site-specific examination. An adequate determination of the cooling water intake structure requirements applicable to a facility requires a specific examination of the organisms in the area of the proposed cooling water intake structures.<sup>48</sup> No such site specific examination was performed in this case.<sup>49</sup> Applicant's own expert on cooling water intake structure environmental impacts was unable to identify a single other case he had been involved in with a similar absence of site-specific information.<sup>50</sup> This may be partly why no cooling water intake structure expert for the Applicant was willing to endorse the cooling water intake structure requirements of the draft permit:

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<sup>47</sup> *Waterkeeper Alliance, Inc. et al. v. United States Environmental Protection Agency*, 399 F.3d 486, 502-503 (U.S. App. – 2d Cir. 2005).

<sup>48</sup> Exh. P-1, p. 6, li. 25 to p. 7, li. 9.

<sup>49</sup> Exh. P-1, p. 7, li. 24-26 and Tr. P. 278, li. 5-13.

<sup>50</sup> Tr. Vol. 2, p. 237, li. 18-22. (Englert Testimony).

Q(Allmon): [Y]ou're here to testify as to whether the permit requirements on 316(b) are adequate to meet the regulatory requirements. Is that correct?

A(Englert): No.<sup>51</sup>

\* \* \*

[Dr. Lippincott's] testimony is in the books . . . [I]f you can find anywhere in there where he says the permit is adequate, then we'll waive my objection and allow this cross-examination. He does not testify that way[.]<sup>52</sup>

The only witness addressing cooling water intake structures to endorse the cooling water intake structure portion of the permit was TCEQ's permit writer, Melinda Luxemburg, who was unsure as to whether she is an expert on the question.<sup>53</sup> She herself performed no independent evaluation of the issue, and made no site-specific evaluation of the environment. The full explanation of her own evaluation presented in the technical summary for the draft permit consisted of the phrase "Based on BPJ."<sup>54</sup>

In the absence of site-specific evaluation of the environment, it is impossible to develop cooling water intake structure permit requirements specifically addressing the potential environmental impact on Twin Oaks Reservoir, where the intake structures are located.

In conclusion, the operational and maintenance requirements for the cooling water intake structures at the proposed facility are, by the Executive Director's own admission, difficult to divine, often too vague to be enforceable when they can be discerned, and wholly lack any associated monitoring, recording or reporting requirements that would enable TCEQ, EPA or an interested citizen to determine compliance with those conditions. These conditions fall far short

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<sup>51</sup> Tr. Vol. 2, p. 270, li. 2-5. (Englert Testimony).

<sup>52</sup> Tr. Vol. 2, p. 328, li. 16-19 (Argument of Applicant's Counsel, Mr. Bryan Moore, during hearing on the merits).

<sup>53</sup> Tr. Vol. 3, p. 583, li. 22-24. (Luxemburg Testimony).

<sup>54</sup> Tr. Vol. 3, p. 624, li. 9-18.

of the level of specificity required for a TPDES permit. And, of course, there was, here, no site-specific assessment of the environment in which the Twin Oak Reservoir cooling water structure would sit, so there was no baseline from which to launch a true analysis.

#### V. Transcript Costs

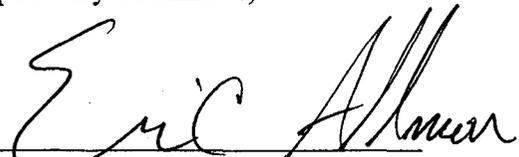
Protestants agree with the ALJ's recommendation that \$1,586.58 of the transcript costs be assessed to Protestants and that Oak Grove is responsible for the remaining balance.

#### VI. Conclusion

This PFD and its accompanying proposed findings and conclusions would set several terrible precedents. They, among other things, would allow applicants to dismiss as a "water in the state" any water body associated with industrial cooling. They would justify applicants' disregarding the *WQS Implementation Procedures* long-standing guidance that the impact modeling and the life-use characterizations be linked. They completely mis-construct the EPA standards for determining BTA – sanctioning, as they do so, the application of nebulous "best professional judgment" in lieu of clear regulatory standards. They would allow an intake structure that handles some 30 million gallons/day to escape even a best professional judgment analysis. And, perhaps, most alarmingly, they would lead to issuance of a permit that has no enforceable terms related to intake structures or their operation.

This PFD and proposed order must be rejected.

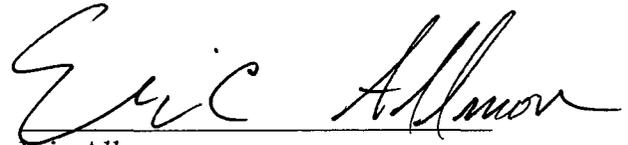
Respectfully Submitted,

By:   
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**CERTIFICATE OF SERVICE**

I hereby certify that on June 28, 2010, the forgoing document was electronically filed with the Chief Clerk of the TCEQ. The original and seven copies were also filed with the Chief Clerk via deposit in the United States Mail. True and correct copies were served upon all parties listed below via hand delivery, facsimile transmission, email, or by deposit in the United States Mail.

  
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# ATTACHMENT A

Cause No. GN5-01870

GREENBUSCH LTD. and THE  
GUSTAFSON GROUP, INC., plaintiffs,

v.

TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY,  
defendant, and FORT BEND COUNTY  
MUNICIPAL UTILITY DISTRICT  
NUMBER 58, intervenor.

§  
§  
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§

IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

261ST JUDICIAL DISTRICT

**TEXAS COMMISSION ON ENVIRON-  
MENTAL QUALITY'S BRIEF IN RESPONSE**

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**ATTORNEYS FOR DEFENDANT, THE TEXAS  
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Date: January 9, 2006

GREENBUSCH LTD. and THE	§	IN THE DISTRICT COURT OF
GUSTAFSON GROUP, INC., plaintiffs,	§	
	§	
v.	§	
	§	
TEXAS COMMISSION ON	§	TRAVIS COUNTY, TEXAS
ENVIRONMENTAL QUALITY,	§	
defendant, and FORT BEND COUNTY	§	
MUNICIPAL UTILITY DISTRICT	§	
NUMBER 58, intervenor.	§	261ST JUDICIAL DISTRICT

**TEXAS COMMISSION ON ENVIRON-  
MENTAL QUALITY'S BRIEF IN RESPONSE**

TO THE HONORABLE JUDGE MARGARET COOPER:

The Texas Commission on Environmental Quality (TCEQ or the agency), the defendant, files this brief in response to the Initial Brief filed about November 21, 2005, by the plaintiffs, Greenbusch Ltd. and The Gustafson Group, Inc. (referred to in some places below as Greenbusch and Gustafson).

**STATEMENT OF THE CASE**

This is an administrative law case arising under chapter 26 of the Texas Water Code, the water quality control chapter.<sup>1</sup> Fort Bend County Municipal Utility District Number 58 (the MUD or MUD 58) applied to the agency for a new permit to treat sewage in a to-be-built municipal wastewater treatment plant (WWTP) and to discharge the resulting treated effluent, ultimately into Buffalo Bayou. The WWTP is to serve a planned residential

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1. Text and citing references to "Code" in this brief will be to the Texas Water Code unless stated otherwise.

subdivision near Katy, Texas, a couple of miles south of I-10. Greenbusch and Gustafson filed a comment letter with the agency's Executive Director (ED), urging denial of the application. They asked for a contested case hearing. After discussion at a Commission agenda meeting, the agency denied the hearing request and granted the application. Greenbusch and Gustafson filed this lawsuit against the TCEQ. The successful MUD intervened on the defense side.

### STATEMENT OF FACTS

Since MUD 58's territory, in flat prairieland,<sup>2</sup> does not abut Buffalo Bayou, the MUD will have to use some kind of conveyance to get its treated effluent into the Bayou. Its application said it intends to construct a long drainage channel within its own boundaries for conveyance, heading southeast, then northeast.<sup>3</sup> The MUD's territory, however, ends at Katy Gaston Road.<sup>4</sup> From there, the MUD will need land for the channel's planned eastward extension the rest of the way to the Bayou.<sup>5</sup> At the time of the Commission agenda meeting,

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2. See Record of Administrative Decision (R.O.A.D.) Item 1 (original application's Attachment 1, topographical map showing contour lines that are spaced far apart, indicating little change in elevation [map is in a pocket inside the back cover of Volume 1 of the R.O.A.D. ]).

In the R.O.A.D. are divider sheets with numbered tabs. The material whose location is marked by a given tab precedes the divider sheet.

3. See R.O.A.D. Item 10 (page 5, part 5.b. of application [revised]); *see also id.*, Item 1 (original application's page 5, part 5.b., showing the approximate lengths of the various reaches of the proposed drainage channel, and Attachment 1, topographical map inscribed by the applicant's engineer to show the MUD's footprint, the WWTP location, and part of the drainage channel's planned route).

4. *See id.*, Item 8. This is a June 4, 2004, letter from Benchmark Engineering Corporation, the applicant's engineer, to Laurie Lancaster of the TCEQ. One attachment with the letter was a revised adjacent property landowner map. It is in a pocket inside the back cover of Volume 1 of the R.O.A.D. "Attachment 4, Item 1, page 12 of 12" is printed on it and it is stamped as having been received June 9, 2004, by the TCEQ Water Quality Applications Team. In its upper right quadrant are the circled numbers 3, 4, 5, 6, 7, 8, 9. Appendix Number 1, bound at the back of this brief, is a copy of the map.

5. *See id.*

the MUD had not yet acquired the land. Since it is governmental, it can take land by eminent domain.<sup>6</sup>

MUD 58's application was governed by permitting procedures in Code §§ 5.551-.557<sup>7</sup> and by 30 Texas Administrative Code § 55.201,<sup>8</sup> which call for notice to the public, an opportunity for the public to comment, a written response by the ED to significant comments, and an opportunity for a contested case hearing on limited issues. The Commission may not refer an issue to the State Office of Administrative Hearings (SOAH) unless it involves a disputed question of fact, was raised during the public comment period, and is relevant and material.

A notice of the application and of the agency's preliminary decision on it was published October 21, 2004.<sup>9</sup> The comment period closed November 22, 2004. Within that period — on November 8, 2004 — Greenbusch and Gustafson filed a letter containing their comments,<sup>10</sup> to which the ED responded on January 13, 2005.<sup>11</sup> On February 21, 2005, their attorney on their behalf filed a timely hearing request.<sup>12</sup>

The plaintiffs also filed what they indicated were supplemental comment letters with

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6. See CODE § 49.222.

7. Copied in Appendix 9.

8. Copied in Appendix 10.

9. See R.O.A.D. Item 44.

10. R.O.A.D. Item 45 (copied in Appendix 2). The letter also asked for a hearing.

11. R.O.A.D. Item 50 (copied in Appendix 4).

12. R.O.A.D. Item 54 (copied in Appendix 6).

the Chief Clerk on December 9, 2004,<sup>13</sup> and February 11, 2005.<sup>14</sup> Both letters were untimely.

On April 13, 2005, the Commission took up the MUD's application at its regular agenda meeting,<sup>15</sup> discussed it, decided not to send it to SOAH, and granted it. The order issuing the permit was signed April 25, 2005.<sup>16</sup>

### SUMMARY OF THE ARGUMENT

The plaintiff-protestants did not exhaust their administrative remedies on their "no water body at point of discharge and therefore no agency permitting jurisdiction" notion, because they did not raise it in a timely comment letter as required by statute and agency rules. The issue therefore was not presented to the Commissioners as an available basis for referral to SOAH or for permit denial. But assuming *arguendo* that the issue had been presented, the TCEQ had jurisdiction over MUD 58's discharge in the location and by the method the MUD proposed. Agency power to apply the Code's categorical ban on unpermitted discharges, and, on the other side of the same coin, to issue a permit authorizing discharges under strict controls, does not depend on the treatment plant's directly abutting a natural water body that will initially receive the treated effluent. An applicant's proposal of a manmade conveyance does not destroy jurisdiction, because a discharge into a manmade conveyance is "into . . . water in the state" under the regulatory system. As explained in

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13. R.O.A.D. Item 47 (copied in Appendix 3).

14. R.O.A.D. Item 52 (copied in Appendix 5).

15. *See* R.O.A.D. Item 57; *see also* Supplemental Record of Administrative Decision Item 1 (tape of agenda meeting).

16. R.O.A.D. Items 63 (permit, copied in Appendix 8), 64 (order, copied in Appendix 7).

caselaw, the conveyance itself, though artificial, is a watercourse. The conveyance's preexistence or not, and whether or not it has an upstream source of supply, are irrelevant.

In addition to being "into . . . water in the state," a discharge into a conveyance is "*adjacent* to . . . water in the state," because gravity will take the effluent down the conveyance into other water — in the present case, Buffalo Bayou.

The logically compelled but absurd consequence of Greenbusch and Gustafson's idea is that someone proposing a location and a method like MUD 58's *would not need a permit* and could send out effluent freely without violating the law.

The TCEQ's ED's responses to the plaintiffs' November 8 comments were adequate, having been directed at the only issues raised in the letter. The issues discussed under Point of Error No. 4 in the plaintiffs' initial brief in this Court, to the extent they go beyond matters discussed earlier in their brief, were absent from the comment letter under a fair reading. Therefore, the ED had no obligation to respond to them.

As to the plant location issue that plaintiffs now insist they raised under chapter 309 of the TCEQ's rules, their November 8 comment letter did not specify how that chapter supposedly was violated and in fact did not invoke the chapter at all. Therefore, no issue under the chapter could have gone to SOAH.

### **STANDARD OF REVIEW**

Commission decisions are reviewed pursuant to the substantial evidence standard of

review,<sup>17</sup> under which “the proper test is whether the evidence in its entirety is sufficient that reasonable minds could have reached the conclusion the agency must have reached.”<sup>18</sup> Greenbusch and Gustafson imply that the TCEQ did not correctly interpret applicable — or inapplicable, as the case may be — statutes and rules. Although not controlling, an interpretation of a statute by an agency charged with implementing it is entitled to great weight.<sup>19</sup> The role of the reviewing court is “to determine whether an agency’s decision is based on a permissible interpretation of its statutory scheme.”<sup>20</sup> Similarly, an agency’s interpretation of rules it promulgated is entitled to deference.<sup>21</sup> A court will reverse an agency decision for arbitrariness when the agency fails to follow clear language in the rules.<sup>22</sup> Absent evidence that the agency has disregarded clear, unambiguous language, the reviewing court must afford the agency sufficient flexibility to carry out its responsibilities.<sup>23</sup>

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17. *City of San Antonio v. Texas Water Comm’n*, 407 S.W.2d 752, 756 (Tex. 1966) (decisions of the Water Rights Commission [a predecessor to the TCEQ] are “to be tried under the substantial evidence rule”).

18. *H.G. Sledge, Inc. v. Prospective Inv. & Trading Co., Ltd.*, 36 S.W.3d 597, 602 (Tex. App.—Austin 2000, pet. denied).

19. *Quick v. City of Austin*, 7 S.W. 3d 109, 123 (Tex. 1998); *Dodd v. Meno*, 870 S.W. 2d 4, 7 (Tex. 1994).

20. *Phillips Petroleum Co. v. Texas Comm’n on Env’tl. Quality*, 121 S.W.3d 502, 508 (Tex. App.—Austin 2003, no pet.).

21. *Bexar Metro. Water Dist. v. Texas Comm’n on Env’tl. Quality*, 2005 WL 2673694 (Tex. App.—Austin 2005, no pet.).

22. *Id.*

23. *Id.* See also *Phillips Petroleum Co.*, 121 S.W. 3d at 507.

## ARGUMENT AND AUTHORITY

**I. Assuming arguendo that the plaintiffs exhausted their administrative remedies on their “no permitting jurisdiction” issue, the Commission had regulatory jurisdiction and thus jurisdiction to grant a permit. (Primarily responsive to plaintiffs’ Points of Error Nos. 1 and 2.)**

**A. The plaintiffs did not exhaust their remedies at the agency level.**

The plaintiffs did not exhaust their administrative remedies on the point they argue first in their Initial Brief, because they did not raise it in a timely comment letter as required by the Code and agency rules.<sup>24</sup> The issue therefore was not eligible for referral to the State Office of Administrative Hearings (SOAH) in the first place, nor may this Court reach it or reverse on it.<sup>25</sup>

The balance of this part of the TCEQ’s brief assumes arguendo, without intending to concede, that plaintiffs did exhaust their remedies on this point.

**B. The TCEQ had jurisdiction to bar the discharge proposed by MUD 58 and thus jurisdiction to permit it.**

Greenbusch and Gustafson’s challenge to the agency’s permitting jurisdiction necessarily implies an attack on agency jurisdiction to regulate at all. That is, if plaintiffs were correct that no body of water constituting water in the state exists at the MUD’s

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24. See CODE § 5.556(d) (Commission may not refer an issue to SOAH unless it involves a disputed question of fact, was raised during the comment period, and is relevant and material to the decision). 30 Texas Administrative Code § 55.152(a) says that the public comment period ends 30 days after publication of notice of application, meaning, in the present case, November 22, 2004. See R.O.A.D. Item 50 at 3, lines 1-2 (Executive Director’s Response to Public Comment) (Appendix 4). This end date is not disputed by Greenbusch and Gustafson. See Plaintiffs’ Initial Brief at 3, line 7.

25. See *Friends of Canyon Lake, Inc. v. Guadalupe Blanco River Auth.*, 96 S.W.3d 519 (Tex. App.—Austin 2002, pet. denied).

proposed point of discharge or along the discharge path, then the Code’s general prohibition against discharges — in § 26.121(a), which says “Except as authorized by the commission, no person may . . . discharge sewage . . . into or adjacent to any water in the state . . .” — would not apply, and the MUD could spill its effluent on the ground and face no Code-based legal consequences (although it might violate some other statute or incur liability for nuisance or trespass). Two courts of appeals have rejected the idea that the state’s anti-water-pollution power depends on a discharge’s being directly into a natural water body. The Houston First District Court of Appeals in *McGee v. State*<sup>26</sup> affirmed the conviction of a grease trap and septic system cleaning employee for dumping the contents of his truck into a city sewer line. (A copy of this case is in Appendix 12.) The line itself was held to constitute “water in the state” under a definition in what was then the criminal offense subchapter of Code chapter 26.<sup>27</sup> The definition said, “Water in the state’ means any water within the jurisdiction of the state.” In the present case the relevant definition is in Code § 26.001(5):

“Water” or “water in the state” means groundwater, percolating or otherwise, lakes, bays, ponds, impounding reservoirs, springs, rivers, streams, creeks, estuaries, wetlands, marshes, inlets, canals, the Gulf of Mexico, inside the territorial limits of the state, and all other bodies of surface water, natural or artificial, inland or coastal, fresh or salt, navigable or nonnavigable, and including the beds and banks of all watercourses and bodies of surface water, that are wholly or partially inside or bordering the state or inside the jurisdiction of the state.

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26. 923 S.W.2d 627 (Tex. App.–Houston [1st Dist.] 1995, pet. ref’d).

27. Since moved to Code chapter 7, subchapter E.

Although wordier than the definitional language construed in *McGee*, this is just as broad. The phrase “water in the state” appears in §§ 26.121 (general prohibition of unauthorized discharges) and 26.027(a) (authorizing the TCEQ to grant permits) and should be given the same meaning as it was given in *McGee*. Thus, just as the city sewer line in *McGee* was water in the state, MUD 58's proposed drainage channel is water in the state.

Nothing in § 26.121 or § 26.027(a) supports Greenbusch and Gustafson's contention — intricately intertwined, not to say tangled up, with their no-water idea — that there needs to be material for the effluent to mingle with in a conveyance, and that the receiving material is legally required to be something other than effluent.<sup>28</sup> *McGee*

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28. See Plaintiffs' Initial Brief at 7, lines 7-9, 11-12, 8, lines 10-13.

Plaintiffs attach to their brief in this Court 1982 orders by the TCEQ's predecessor agency, denying wastewater discharge permit applications submitted by Economy Custom Homes, Inc., and Cecil D. Bullock. See Plaintiffs' Attachments D and E. The orders were not made part of the record of this case at the administrative level. One of the policies underlying the normal rule of exclusion of such material is that it can be difficult to understand when presented without its context.

Even if the Court considered the orders, they do not support the plaintiffs' arguments. A fair reading of the *Bullock* order must take into account its statements that the discharge route was not a *continuous* watercourse, being nothing more than a swale (“A low-lying, depressed, and often wet stretch of land.” — Webster's Ninth New Collegiate Dictionary, 1987), see Plaintiffs' Attachment E, ¶ 12 (paraphrase), and including a swampy portion “which would cause the discharge to spread onto surrounding areas.” *Id.* The agency added, “An effluent of a quality conforming to the terms and conditions set forth in the permit may unreasonably impair the quality or adversely affect the quality and uses of the ground and surface waters.” *Id.* ¶ 14. Finally, it wrote, “There is no evidence on the impact of the proposed discharge on the receiving stream.” *Id.* ¶ 17. Thus, the order does not say or even suggest what plaintiffs claim: that “the [predecessor agency] denied the application because no water in the state existed at the discharge point to accept the discharge,” see Plaintiffs' Initial Brief at 11, lines 10-11. The denial was *not* based on non-existence of water at the discharge point but on the applicant's failure to show that its hoped-for permit would be protective of water in the state — water that the agency implicitly acknowledged as the basis for chapter 26 jurisdiction and *explicitly* acknowledged as not merely existing in the applicant's proposed location but also as being in jeopardy from pollution.

The agency also asserted discharge-control jurisdiction in the *Economy Custom Homes, Inc.*, case, identified water that would be in jeopardy, wrote that there was no continuous watercourse to carry the applicant's effluent, Plaintiffs' Attachment D, ¶ 13, and wrote, “The most economically feasible alternative would be to correct the proposed discharge route to characteristics of a watercourse.” *Id.* ¶ 16. MUD 58's

contradicts the contention. The sewage pipe that McGee sent his truck material into contained only effluent. Effluent in conveyances may be waste rather than water for purposes of Code chapter 11,<sup>29</sup> which concerns allocation of usufructory rights to divert and impound the people's surface water, but for the present chapter 26 purposes it is water in the state when it is in a conveyance. This interpretational non-parallelism from chapter to chapter is soundly based in text<sup>30</sup> and policy. To meet the societal problem of water pollution in an increasingly densely populated state requires strong, broad regulatory controls.

In *Watts v. State*,<sup>31</sup> the Fourteenth District Court of Appeals wrote, "With respect to pollution, . . . the legislature clearly sought to abolish . . . common law distinctions between private and public waters. It is an offense to pollute *any* 'water in the state'."<sup>32</sup> (A copy of this case is in Appendix 11.) Citing the § 26.001(5) definition set out in an indented

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drainage channel as it is proposed will have the characteristics of a watercourse.

29. See *City of San Marcos v. Texas Comm'n on Envtl. Quality*, 128 S.W.3d 264 (Tex. App.—Austin 2004, pet. denied). This case's central holding was about chapter 11, focusing on the then-applicable version of Code § 11.042, concerning the agency's power to grant permits for transport of privately owned water down the beds and banks of existing watercourses. The court of appeals held that the city lost ownership when it allowed its effluent to commingle with Edwards Aquifer springwater flowing down the San Marcos River. The city therefore was not entitled to divert an amount of the "polished" flow of the people's water equivalent to its upstream treated sewage effluent contribution.

30. Compare CODE § 11.021 (declaring ordinary flow, storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state to be the property of the state) with *id.* § 26.001(5) (quoted in text at page 8, above, and copied in Appendix 9). The chapter 11 public ownership declaration omits mention of groundwater, whereas § 26.001(5) expressly protects it from pollution by including it. Similarly, under caselaw, chapter 11 does not extend to diffuse surface water before it enters a watercourse, see *Turner v. Big Lake Oil Co.*, 128 Tex. 155, 96 S.W.2d 221 (Tex. 1936), whereas § 26.001(5) would sweep it in. See generally 45 WEST'S TEXAS PRACTICE SERIES, ENVIRONMENTAL LAW, § 14.3(a)(2)(A) ("the State's jurisdiction over water for purposes of pollution control is broader than 'state water' for water rights purposes.").

31. 140 S.W.3d 860 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd).

32. *Id.* at 865 (emphasis in original), citing CODE §§ 7.145(a) (part of the modern Code's enforcement chapter) and 26.121(a).

quotation on page 8 above, it wrote that the Legislature sought to protect “*all* water found within the environment — whether impounded or free-flowing, above or beneath the surface of the ground, in or out of a watercourse, salt or fresh, or *public or privately owned*.”<sup>33</sup> It explained that *Watts*, who was appealing a criminal conviction, was charged with letting raw sewage run down a small constructed trench, from the surface of his land 140 to 150 feet into a county drainage ditch.<sup>34</sup> It agreed with the trial court that *the drainage ditch itself* was water in the state.<sup>35</sup> The ditch, it wrote, was a watercourse under the § 26.001(5) definition — one that specifically sweeps “the beds and banks of all watercourses” into the universe of “water” — even though it was artificial and even though flow in it was intermittent.<sup>36</sup> Just so in the present case. The MUD’s drainage channel, when built, will be a watercourse, and when the MUD sends its effluent into the channel, it will be discharging into water in the state.

In *Watts*, the county drainage ditch that the Court of Appeals wrote was water in the state existed before the defendant sent his discharge there. This is a point of distinction, because in the present case, MUD 58 plans to build a brand new channel. Also, in *Watts* —

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33. 140 S.W.3d at 866 (emphasis added to “public or privately owned”).

34. *Id.* at 864.

35. *Id.* at 865.

36. *Id.* at 866. For complicated reasons involving criminal procedural strictures on a trial judge’s commenting on the weight of evidence, the Court of Appeals in *Watts* reversed the trial court despite the correctness of her statement of water pollution law. *Id.*

The cases plaintiffs cite, defining what constitutes a watercourse in the Code chapter 11 water rights context, *see* Plaintiffs’ Initial Brief at 7-8 & notes 15, 18, and 19, are trumped by the more-directly-on-point *Watts* holding.

although the opinion is unspecific on this point — the county ditch seems to have been carrying water, intermittently, from a location higher than where the defendant’s bootleg sewerage trench emptied into it. In the present case the MUD’s planned drainage channel will begin west of the WWTP and the point of discharge,<sup>37</sup> so it, too, is designed already to be carrying stormwater drainage by the time the MUD’s effluent stream joins it. But even assuming this were not so — assuming, that is, that the drainage channel were slated to begin at the discharge point, meaning that this would be another distinguishing factor with respect to *Watts* — both points of distinction should be viewed as making no difference. Every manmade ditch or system of ditches was initially constructed somewhere. Every ditch or system of ditches has a head, a highest point of elevation, somewhere. Is the landowner at that first-built point or that highest point to be exempted from the anti-pollution laws? The answer must be no, that could not have been the legislative intention.<sup>38</sup>

Contrary to plaintiffs’ suggestion,<sup>39</sup> it was reasonable for the agency to assume existence of the channel described in the application. In fact, the assumption was logically compelled by the structure of the Code chapter 26 command and control regulatory system.

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37. See Appendix 1 (attachment to the MUD’s application, showing part of the channel as projecting from west to east, toward the point of discharge); cf. also R.O.A.D. Item 60 (Applicant’s Response to Protestants’ Motion For Rehearing) at 5-6.

38. “In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the . . . consequences of a particular construction . . .” TEX. GOV’T CODE § 311.023(5). “In enacting a statute, it is presumed that . . . a just and reasonable result is intended . . .” *Id.* § 311.021(3).

39. See Plaintiffs’ Initial Brief at 6, lines 9-10 (“The presence of water in the state is a condition precedent” that a not-yet-existing channel supposedly cannot meet).

Again, the law categorically bars discharges except under and in compliance with permits.<sup>40</sup> People are not allowed to begin construction of their facilities until after permitting and agency approval of plans and specifications.<sup>41</sup> Necessarily, then, the agency deputized by the Legislature to consider applications for discharge permits must make assumptions about future performance by the permit applicant. This mandate to think ahead comes with a natural safeguard, as the present case illustrates: if MUD 58 does *not* build the channel — because, for example, it cannot acquire a way across the plaintiffs’ land at a price it can afford, or for any other reason — or if the channel does not lead down to the Bayou the way the application promised, the MUD will not be allowed by the permit to discharge.

By definition, then, a discharge of effluent into the head of a newly constructed conveyance is “into” water in the state, because the conveyance itself is water. (Once the first drop of effluent goes in, further discharges will also be into water in the more conventional sense, because the effluent will be water in the state.) Such a discharge also is “adjacent” to water in the state<sup>42</sup> within the meaning of §§ 26.121(a) and 26.027(a), because gravity, and stormwater<sup>43</sup> and other effluent coming behind it, will carry it into other water — in the present case, Buffalo Bayou.<sup>44</sup> For these reasons, the agency’s permitting

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40. CODE § 26.121.

41. *Id.* § 26.027(a).

42. *Cf., e.g., Heiringhoff v. State*, 130 S.W.3 117, 131-32 (Tex. App.—El Paso 2003, pet. ref’d).

43. *See* page 12 and note 37, above.

44. Given that pollutants can travel long distances, potentially causing problems miles from their origin, a broad interpretation of “adjacent,” one that aids regulation and enforcement, is necessary to minimize bad impacts on the environment.

The plaintiffs are inaccurate in writing that Buffalo Bayou was not analyzed or authorized in the

authority was properly premised on such a discharge and such a conveyance. If Greenbusch and Gustafson's idea, that the agency lacked jurisdiction because no body of water constituting water in the state existed at the proposed point of discharge when the application was considered by the Commission, were valid, no one could build new residential subdivisions or other kinds of new projects, like factories, needing to discharge treated effluent, unless rainfall and erosion or the hand of man already had etched a watercourse on or right next to the to-be-developed land in a configuration convenient for discharge.

**II. The ED properly responded to the two issues actually raised in plaintiffs' only timely comment letter, and in any event, neither issue is being pressed in this Court; the Commission properly declined to give a contested case hearing on the issues actually and timely raised and on the issues the plaintiffs tried to raise tardily. (Primarily responsive to plaintiffs' Points of Error Nos. 3 and 4.)**

Greenbusch and Gustafson wrote one and only one timely comment letter, on November 8. Under Code § 5.556(d), which bars referral of an issue to SOAH unless it was raised during the public comment period,<sup>45</sup> only issues presented in that letter could possibly pass the test for hearing eligibility. Fairly read, the letter raises only two matters: whether MUD 58 should be allowed — whether it had a need — to send treated effluent in a to-be-condemned drainage course across Greenbusch and Gustafson land, and whether public

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permit. Plaintiffs' Initial Brief at 6, line 18. The application delineated the discharge route in reasonable detail, *see, e.g.*, R.O.A.D. 16 (map submitted to TCEQ by applicant's engineer, showing route of proposed channel and direction of flow, into Buffalo Bayou); the permit, copied in Appendix 8, sets out the discharge route, including Buffalo Bayou, *id.* Item 63 at 1 (saying "to an unnamed ditch; thence to Buffalo Bayou upstream of Segment no. 1014; thence to Buffalo Bayou in Segment No. 1014 of the San Jacinto River Basin."); and, most importantly, TCEQ staffers analyzed impacts on water quality in Buffalo Bayou as well as on the drainage channel. *See, e.g., id.* Items 17, 26 (TCEQ water quality impact analyses discussing the drainage channel and Buffalo Bayou) (copied in Appendices 14 and 15).

45. *See also* 30 TEX. ADMIN. CODE § 55.201(d)(4) (hearing request must list all relevant issues raised during comment period on which hearing is sought).

notice (of the completed application and the ED's proposal that it be granted) was adequate.

In pertinent part, the letter said:

It is my understanding that Fort Bend County Municipal Utility District No. 58 ("MUD 58") intends to condemn, out of 163 acres owned by the undersigned, approximately 17 acres of property in a configuration 200 feet wide, and 3,700 feet long for use as a drainage and discharge facility. There is no need for the taking of 17 acres by MUD #58. The stated drainage policy of Fort Bend County is that raw land developments are to retain storm water on the same land that is improved. Improved seems to mean impervious cover, such as roads, driveways, rooftops and parking lots. After the storm water is retained, it is to be released into the natural courses of drainage at the same rate as it would have been released had the raw land not been improved. That being the affirmed governmental requirement, the need and the right of MUD #58 to take a 200-foot wide channel is not only against the stated policy of the entity (Fort Bend County) which must approve their drainage plan, but is contrary to sound practices, as it is a huge and unnecessary acreage requirement.

No natural outfall channel or drainage course from MUD #58 currently passes through the 163-acre property owned by the undersigned. MUD #58 apparently feels that it is to the economic benefit of others (MUD #58 and/or owners of land served by MUD #58) to condemn a new 17-acre channel through the 163 acres owned by the undersigned. The 163 acres owned by the undersigned neither needs the drainage, nor the discharge route that MUD #58 seeks, and strongly and respectfully states to TCEQ that our private property rights should not be sacrificed to allow profit motives of others to be achieved. It may cost more for MUD #58 to use existing routes, but condemnation should not be a vehicle which merely increases the profit of others to the detriment of a private landowner. We respectfully request that TCEQ cause MUD #58 to utilize the current existing drainage and discharge route(s) that currently serve the land which MUD #58 encompasses. . . .

Further, may I respectfully suggest that whoever is attempting to notify the appropriate landowners, please do the necessary title work to determine the legal owners (who may be different than the taxpayers) together with their addresses so that the legal owners may be properly notified in accordance with TCEQ's policies and procedures. It might be presumed that the casual fashion in which the undersigned received this notice is indicative of the casual fashion in which the applicant is treating the very strict statutory and administrative

regulations that govern TCEQ and hence govern MUD #58.<sup>46</sup>

In his response, the ED summarized these comments, as follows:

COMMENT 1

James Gustafson was concerned that the discharge route of the treated effluent would cross his property and that the Applicant intended to condemn the discharge route to construct a drainage ditch. Mr. Gustafson asked that the TCEQ require the Applicant to use a different discharge route. . . .

COMMENT 2

James Gustafson complained about the mailed notice.<sup>47</sup>

The ED went on to explain how the notice was proper and, in response to comment 1, wrote:

No property rights are granted in this draft wastewater discharge permit. A permit does not grant to the permittee the right to use private or public property for the conveyance of wastewater along the discharge route. It is the duty of the Applicant to obtain any permits, rights or easements necessary for the route of the discharge when that route involves a pipeline or use of a constructed storm water drainage ditch that crosses property not owned by the permittee.

TCEQ is tasked with protecting the quality of water in the state. The permitting process is limited to controlling the discharge of pollutants to state water and protecting the water quality of the state's rivers, lakes, and coastal waters. The TCEQ does not have authority over the facility location selected by an applicant and does not require evaluation of alternative sites or alternative discharge routes.<sup>48</sup>

This response was ample.<sup>49</sup> In any event, although the plaintiffs' hearing request spoke about

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46. R.O.A.D. Item 45 (Appendix 2).

47. R.O.A.D. Item 50 (Executive Director's Response to Public Comment, January 23, 2005) (Appendix 4) at 3.

48. *Id.*

49. Moreover, the plaintiffs have not explained the role ED responses to comments play in a TCEQ adjudication. They have not cited, and the TCEQ has searched for and has not found, cases in which an order of the Commissioners, who are the governor-appointed final agency decisionmakers, was set aside because of a deficiency in the comment responses at the ED level.

certain notice and need issues, the need issue fell away by the time of their motion for rehearing,<sup>50</sup> and in this Court, neither issue is being pressed.

The plaintiffs in their initial brief ask the Court to accept their creative reconstruction of the November 8 letter<sup>51</sup> and thus to view it as raising issues that are not in it. Their post-comment period communications with the agency were more direct about their wish to *add* issues, having said, “We wish to submit this letter *as a supplement* to our timely request for a contested case hearing and a public meeting.”<sup>52</sup>; and “*In addition to any issues raised in comments*, the issues on which the Requesters seek a hearing include . . .” four other issues.<sup>53</sup>

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50. R.O.A.D. Item 66 (Protestants’ Motion For Rehearing).

51. In Plaintiffs’ Initial Brief at 14, lines 18-20, plaintiffs write that they “are not attorneys and had not secured legal representation on this matter at the time of their timely comment filing. Thus, they were not versed in the precise vernacular that the Commission considers when determining that an issue was properly raised.” *See also id.* at 17, line 7: “Plaintiffs wrote their initial comment letter without the assistance of legal counsel.”

Lay people’s filings with tribunals merit no special consideration. *Cf. Mansfield State Bank v. Cohn*, 573 S.W.2d 181, 184-85 (Tex. 1978) (“[N]o basis exists for [a court of appeals’s] differentiating between litigants represented by counsel and litigants not represented by counsel in determining whether [trial-level] rules of procedure must be followed . . . . There cannot be two sets of procedural rules, one for litigants with counsel and the other for litigants representing themselves. Litigants who represent themselves must comply with the applicable procedural rules, or else they would be given an unfair advantage over litigants represented by counsel.”).

The plaintiffs’ statements that they are not attorneys and had no assistance of counsel when they wrote the November 8 comment letter are unsupported by citation to the Record of Administrative Decision, and as far as the TCEQ’s examination of the record has revealed, have no support there.

The statements seem at most technically correct (because a corporation or a limited partnership cannot hold a law license). The letter was on The Gustafson Group, Inc.’s letterhead. The signature box showed “Greenbusch, Ltd.” as the sender. On behalf of Greenbusch, Ltd., James W. Gustafson signed as “Trustee.” Mr. Gustafson, according to State Bar of Texas records, is an attorney, has been licensed since 1964, and is board-certified in commercial real estate law. The Greenbusch Ltd. web site identifies him as an attorney. *See generally* Appendix 13. The Initial Brief’s bid for indulgence of him, as though he were a layperson, about his letter’s meaning underscores the thinness of the plaintiffs’ arguments about what the letter covered and what it did not cover.

52. *See* R.O.A.D. Item 47 (December 9, 2004, letter) (emphasis added) (Appendix 3).

53. *Id.* Item 54 (request for contested case hearing, February 21, 2005) (emphasis added) (Appendix

These statements implicitly acknowledged the November 8 letter's limited issue-coverage and sought to expand it, although the statutes and rules do not authorize supplementation after the end of the comment period.

Whether interpreted strictly, indulgently, or someplace in between, the November 8 letter did not raise — and therefore the ED had no obligation to respond to, and the Commissioners were barred from granting a hearing on — the four issues discussed on pages 14-17 of their Initial Brief, as the next paragraphs explain.

As to the plant location issue that plaintiffs now insist they presented to the agency under chapter 309 of the rules, their November 8 comment letter did not cite the chapter at all and perforce did not specify how it supposedly was violated. Nor did the letter invoke the chapter by implication. For example, despite what the plaintiffs write to this Court,<sup>54</sup> it did not speak of concerns about nuisance or overflow of effluent from the drainage channel. No words in the letter describe or hint at these concerns. The ED's comment-response obligation, whatever may be its legal contours, should not include guesswork. No issue under chapter 309 was raised during the comment period and therefore none had to be responded to by the ED. (For the same reasons, no chapter 309 issue was eligible to have gone to SOAH.)

Plaintiffs write that the November 8 letter raised the “no water, ergo no jurisdiction” issue that the TCEQ has responded to substantively on pages 7-14, above. In fact, this issue

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6).

54. *See* Plaintiffs' Initial Brief at 13-14.

was absent from the comment letter, in which the phrase “water in the state” and the word “jurisdiction” do not appear.

Plaintiffs point to language in the November 8 letter: “It might be presumed that the casual fashion in which the undersigned received this notice is indicative of the casual fashion in which the applicant is treating the very strict statutory and administrative regulations that govern TCEQ . . . .” The quoted sentence was part of a paragraph complaining about supposedly inadequate notice. Nothing in it and nothing elsewhere in the letter mentioned past violations at the facility.<sup>55</sup>

The expression “use and enjoyment of property” appears in Plaintiffs’ Initial Brief on page 17 but is absent from their November 8 letter. To the extent the letter’s reference to private property rights was about use and enjoyment, the ED replied adequately in his Response 1, beginning, “No property rights are granted in this draft wastewater discharge permit.”<sup>56</sup>

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55. A new facility, like MUD 58’s, has no compliance history. The TCEQ wrote that the facility had no compliance history problems, noting that there were “no enforcement orders.” R.O.A.D. Item 41.

56. R.O.A.D. Item 50 (Appendix 4) (quoted from at length on page 16, above). The rules of the TCEQ—whose focus is water pollution, not land use—show that the ED was correct. See 30 TEX. ADMIN. CODE §§ 305.122(b) (“A permit . . . does not convey any property rights of any sort, nor any exclusive privilege, and does not become a vested right in the permittee.”), (c) (“The issuance of a permit does not authorize any injury to persons or property or an invasion of other property rights, or any infringement of state or local law or regulations.”), -.125(16) (“A permit does not convey any property rights of any sort. . . .”), Appendix 8 to this brief (copy of MUD 58’s permit, whose page 1 says, “Neither does this permit authorize any invasion of personal rights nor any violation of federal, state, or local laws or regulations. It is the responsibility of the permittee to acquire property rights as may be necessary to use the discharge route.”). Cf. also *Railroad Comm’n v. City of Austin*, 524 S.W.2d 262 (Tex. 1975) (state agency has no power to determine title to land or property rights), *Manchester Terminal Corp. v. Texas TX TX Marine Transp., Inc.*, 781 S.W.2d 646 (Tex. App.—Houston [1st Dist.] 1989, writ denied) (TCEQ permit is no defense against a tort action).

## CONCLUSION AND PRAYER

For the reasons set out above, the TCEQ asks that the plaintiffs take nothing by their suit and that the TCEQ order be affirmed, and further asks for such other and further relief as it may show itself entitled to.

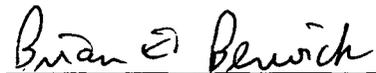
Respectfully submitted,

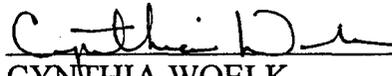
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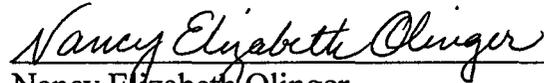
  
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ATTORNEYS FOR THE TCEQ

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing TCEQ's Brief in Response has been served on the persons listed below, by the method indicated, this 9th day of January, 2006.

  
\_\_\_\_\_  
Nancy Elizabeth Olinger

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# ATTACHMENT B

## OUTFALL 001

(Flow is From the Left to Right Through Discharge Canal Over Weir Structure Then to Twin Oak Reservoir. Photo is Taken From the East Looking West Across the Weir)



# ATTACHMENT C

screens. Each of the six circulating water pumps has a rated capacity of 387.7 cfs (170,000 gpm). There is a trash rack at the front of each intake which prevents large debris from reaching the traveling water screens. The traveling water screens are located about 13 ft downstream of the trash racks. The screens for each CWIS are 14 ft. wide, are equipped with 3/8 in. square mesh. The intake structure is designed for passive fish escape, utilizing both the low traveling screen approach velocity and fish openings between the cells and on each end. The design will allow fish to escape prior to capture on the traveling screens.

The design flow for the facility, with all six circulating water pumps operating, is 2272.6 cfs (1,020,000 gpm). Velocities for the CWIS are calculated at the conservation pool water level (El. 401.0 ft) and the maximum design flow capacity of 2272.6 cfs. Velocities approaching the traveling water screens are estimated at less than 0.56 ft/sec. The through-screen velocities were not calculated since the exact porosity of the traveling water screens is not known. Typically, based on the design flow, the through-screen velocity would be estimated at approximately twice the screen approach velocity. This estimate does not, however, account for any degradation of the pump efficiency.

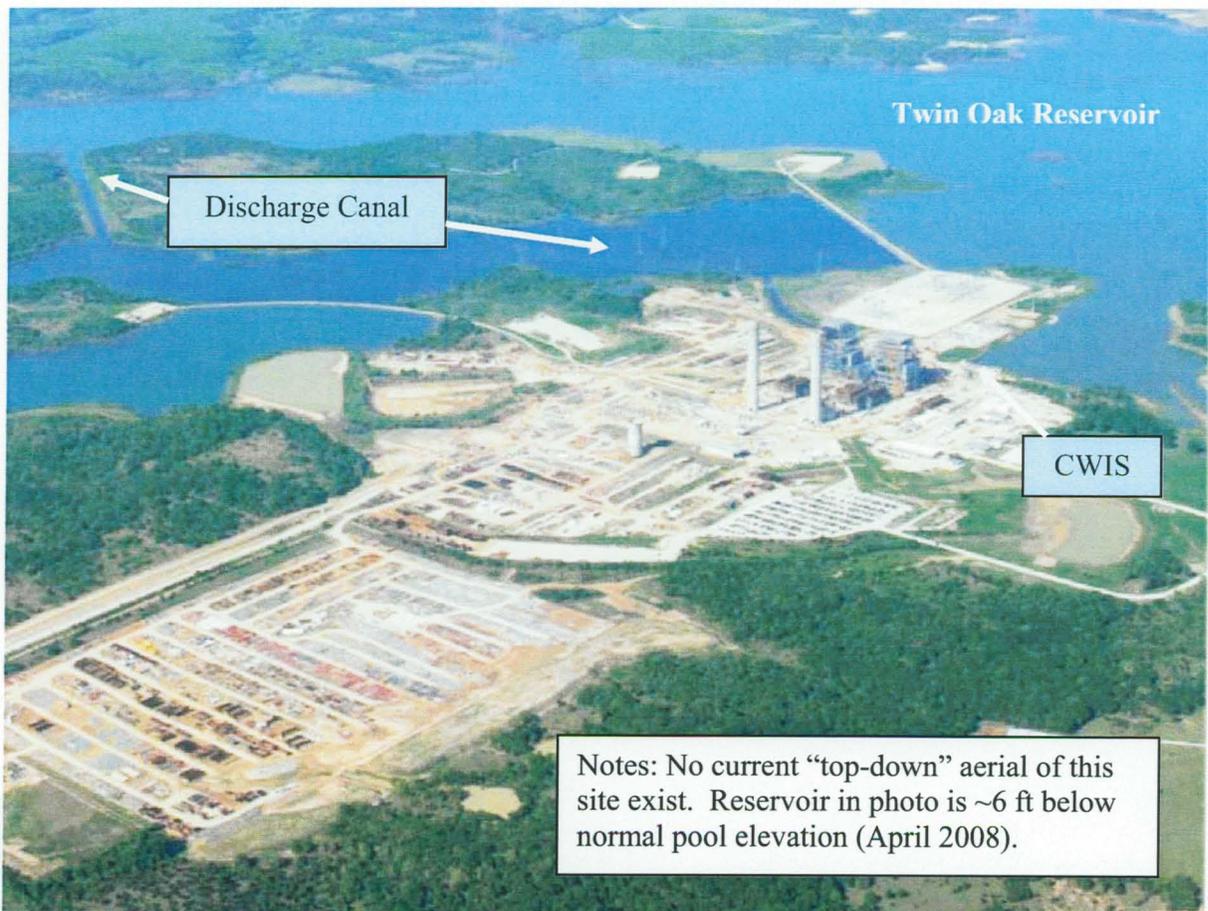


Figure 1 : Aerial view of OGSES site.

# ATTACHMENT D

# ***Gulf Coast Power Association Spring Conference***



**TXU**

**Brad Jones  
Vice President - Development**

**April 6, 2006**

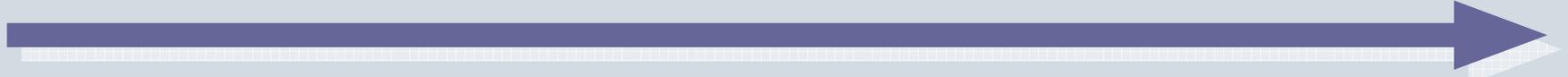
# Oak Grove Has a Long History in Central Texas

1970

1980

1990

2000



Oak Grove was originally named the Twin Oak project and was authorized in January 1973 with a planned commercial operation date in 1978 (Unit 1) and 1979 (Unit 2).

## Major events

- |            |  |
|------------|--|
| May 1973   | Joint memorandum of agreement with Alcoa to jointly construct, own and operate the plant.  |
| Nov. 1976  | Project delayed two years (first of several delays)  |
| Feb. 1978  | Engineering re-started   |
| Sept. 1977 | EPA issued air construction permit (PSD)   |
| Feb. 1979  | Plant construction began   |
| Oct. 1984  | TXU purchased Alcoa's lignite properties and interest in the plant   |
| Sept. 1987 | Construction and engineering halted due to multi-year project delay (engineering 90% complete, Unit 1 construction 20% complete)           |
| Sept. 1989 | Engineering re-started   |
| Nov. 1992  | Construction and engineering halted, project delayed indefinitely  |
| Dec. 1994  | Air permit application withdrawn   |
| July 2005  | Project was re-initiated under the new name Oak Grove utilizing the Twin Oak Unit 1 equipment and the former Forest Grove Unit 1 equipment |
| July 2005  | TXU applied to TCEQ for new air permit   |

# Oak Grove Site Summary

**Site** – Located 40 miles southeast of Waco, Texas in Robertson, Limestone and Falls Counties. Approximately 4,230 acres (1,900 acres for the plant and ancillary facilities, and 2,330 acres for the cooling reservoir).

**Rail Access** – Rail spur connection to Union Pacific Railroad is installed and operational.

**Cooling Reservoir** – 30,300 acre-ft., normal pool level is 401 ft elevation, current pool level is maintained at 389 ft. elevation, 12 feet below normal. Make-up water provided from Lake Limestone via 12 miles of 42” concrete pressure pipe.

**Lignite Leases** – A total of 4 different deposits covering 33,000 surface acres. Estimated quantity of lignite is 485,000,000 tons with delivered heat contents ranging from 6,700 to 7,000 Btu/pound.



**Water Rights Permits** – Permit (issued 10-08-74) authorized construction of the dam, the use of 30,319 acre-ft. for filling and consumptive use of 13,100 acre-ft. per year. Permit (issued 10-08-74 and amended 07-14-81) authorizes a maximum make-up of 25,000 acre-ft. per year from Lake Limestone. Contract in place with the Brazos River Authority to use 25,000 acre-ft. per year from Lake Limestone and the Brazos River.

**Plant Design** – Two 860 MW lignite/coal-fired supercritical steam generating units with wet flue gas desulfurization systems.

**Equipment Available\*** - Boilers (2), turbines (2), generators (2), boiler feed pump turbines (4), boiler feed pumps (2), feedwater heaters (8), miscellaneous equipment including 6.9 kV switchgear, make-up water pump and equipment, high energy piping. All turbine-generator equipment and all boiler feed pump and turbine equipment are in storage at Twin Oak.