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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 10, 2011

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

Re: **CITY OF PATTON VILLAGE**
SOAH DOCKET NO. 582-10-0353
TCEQ DOCKET NO. 2009-0913-MWD

Dear Ms. Castañuela:

Enclosed for filing is the Office of Public Interest Counsel's Exceptions to the Proposal for Decision in the above-entitled matter.

Sincerely,

Amy Swanholm

Amy Swanholm, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ Docket No. 2009-0913-MWD
SOAH Docket No. 582-10-0353

In the Matter of the Application of City of Patton Village for Permit No. WQ0014926001	§ § § § §	**Before the Texas Commission on Environmental Quality**

The Office of Public Interest Counsel's Exceptions to the Proposal for Decision

To the Honorable Commissioners and Administrative Law Judge Rebecca S. Smith:

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (the Commission or TCEQ) and files these Exceptions to the Proposal for Decision in the above-referenced matter.

I. INTRODUCTION

A. Background of Facility

The City of Patton Village has applied to the Texas Commission on Environmental Quality (TCEQ) for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014926001. The facility would be located within the city limits of Patton Village, approximately 550 feet west of the intersection of South Lakeview Drive and Lakeview Drive, in Montgomery County, Texas. The proposed permit would authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 350,000 gallons per day. The treated effluent would be discharged to Peach Creek in Segment No. 1011 of the San Jacinto River Basin.

The designated uses for Segment No. 1011 are high aquatic life uses, public water supply and contact recreation. In accordance with 30 TAC §307.5 and the TCEQ implementation procedures (January 2003) for the Texas Surface Water Quality Standards, an antidegradation review of the receiving waters was performed. The Executive Director's (ED) Tier 1 antidegradation review preliminarily determined that existing water quality uses will not be impaired by this permit action. The review also

concluded that numerical and narrative criteria adequate to protect existing uses would be maintained. The Tier 2 review preliminarily determined that no significant degradation of water quality is expected in Peach Creek. The Tier 2 review also determined that existing uses will be maintained and protected, although the ED's preliminary determination could be reexamined and modified if new information is received.

B. Procedural Background

TCEQ received this application on September 15, 2008. On November 24, 2008 the ED declared the application administratively complete. The Notice of Receipt and Intent to Obtain Water Quality Permit (NORI) was published in the *East Montgomery County Observer* on December 10, 2008, in Montgomery County. The NORI was also published in Spanish in *La Prensa de Houston* December 11-17, 2008, in Montgomery County. The ED declared the application technically complete on February 5, 2009 and the Notice of Application and Preliminary Decision (NAPD) was published in the *East Montgomery County Observer* on February 18, 2009, in Montgomery County. The NAPD was also published in Spanish in *La Prensa de Houston* February 19-25, 2009, in Montgomery County. The public comment period ended on March 23, 2009 and the deadline to request a contested case hearing was June 12, 2009.

On September 9, 2009, the Commission granted the hearing requests filed by Adriana Casenave, Gino Garza, Tamara Garza, and Gloria Giarruso. The Commission also referred three issues to the State Office of Administrative Hearings (SOAH):

1. Will the proposed discharge impact Peach Creek's ability to meet TCEQ water quality standards;
2. Whether the proposed discharge would contribute to excess bacteria in Peach Creek and Lake Houston; and
3. Will the proposed discharge impact the hearing requestors' use of Peach Creek for recreational purposes.

At the preliminary hearing on November 16, 2009, Tamara Garza and Adriana Casenave were named parties and allowed to participate in the contested case hearing. The hearing on the merits was held from March 31, 2010, to April 1, 2010. On September

29, 2010, a second hearing on the merits was held, to allow all parties to present additional evidence on the issue of dissolved oxygen. The Proposal for Decision was issued on December 21, 2010.

II. ANALYSIS

A. Reliance upon TCEQ Staff Analysis

OPIC does not object to the Applicant's reference to and reliance upon TCEQ staff analysis. However, Mr. Lazaro lacked understanding of the very basic elements of TCEQ Staff's analysis and his lack of understanding of the Texas Surface Water Quality Standards (TSWQS). It is not enough to place a witness on the stand who introduces TCEQ documents that are already in the public record but cannot offer any substantive testimony on the quality of the TCEQ staff analysis. Likewise, if an Applicant could meet its burden of proof by simply showing that the ED had completed a technical analysis of the application, this would call into question whether the contested case hearing process gives protestants a meaningful opportunity to protest a permit application. Clearly, something more is required.

Here, during the second hearing held on September 29, 2010, the Applicant did present an additional witness, Dr. James D. Miertschin, who testified about the dissolved oxygen levels in the draft permit. This witness was well qualified and knowledgeable on the TSWQS. This late-introduced evidence may be enough for the Applicant to meet its burden on the issue of whether the proposed discharge would impact Peach Creek's ability to meet dissolved oxygen limits for Peach Creek. However, this witness' testimony does not assist the Applicant in meeting its burden of proof on the other referred issues.

B. Peach Creek's ability to meet TCEQ Water Quality Standards

1. Dissolved Oxygen

The additional testimony presented by Dr. Miertschin may have been enough for the Applicant to meet its burden of proof on whether the dissolved oxygen criteria in the draft permit will be sufficient. However, this testimony does not assist the Applicant in

meeting its burden of proof on any other referred issues, for which no credible evidence was presented. The Commission need not decide whether the opinion of an expert alone, with little or no independent analysis conducted, would be enough for an Applicant to meet its burden of proof. The Applicant has offered little or no credible evidence to meet its burden on other referred issues, and therefore the application must be denied.

2. *Toxic materials*

The ALJ, when discussing whether the proposed discharge would meet the rules prohibiting the discharge of toxic materials, concludes that the evidence presented by the Applicant was sufficient to meet its burden of proof. However, in her analysis of this issue, she references no witnesses presented by the Applicant. She also includes no analysis of the potential toxicity of the proposed discharge, because the Applicant did not present any. The only piece of evidence justifying her conclusion is that the discharge will be solely from domestic sources, not from industrial sources.[1] The ALJ even notes the scant evidence presented on this topic, but then concludes that the Applicant has met its burden.[2]

She also states that the TCEQ Implementation Procedures for the TSWQS (IPs) instruct TCEQ staff not to review permit applications with less that 1 million gallons per day (mgd) of discharge, and that the TCEQ staff did not review this proposed discharge for compliance with TSWQS rules on discharge of toxic materials. But she also uses "TCEQ staff's analysis" to justify that the Applicant has met its burden.[3] The Conclusion seems to be that because this is a domestic discharge of less than 1 million gpd, TCEQ staff did not have to review it, and the Applicant did not need to present any further substantive evidence on this issue to meet its burden of proof.

Furthermore, even though the TCEQ may not review a proposed discharge under 1 mgd for its potential compliance with TSWQS toxicity standards, this does not mean

[1] Application of Patton Village for TPDES Permit No. WQ0014926001, Proposal for Decision, December 21, 2010, (PFD) at 10.

[2] *Id.*

[3] *Id.*

that the proposed discharge need not comply with these rules. The TCEQ simply does not inquire into this during the permit review process. However, in a contested case hearing setting, when the Protestant has raised this specific issue, more is required of an Applicant than to simply point out that the TCEQ does not conduct a review of potential toxicity. The Applicant should have presented some evidence justifying that this proposed discharge can meet the applicable TSWQS to meet its burden of proof.

C. The Proposed Discharge's impact on Excess Bacteria in Peach Creek

1. Septic Systems

OPIC objects to the ALJ's conclusions on this issue. While replacing failing septic systems with a wastewater treatment plant is good public policy, in a contested case hearing, a proposal for decision must be based on an evidentiary record. Unfortunately, the record does not contain sufficient evidence for OPIC to determine whether the proposed discharge would be more protective than the septic systems to be replaced by the proposed facility. The Applicant presented no evidence on how many septic systems were failing or what sort of environmental harm was arising from failing or poorly operating systems. In addition, no evidence was presented on the location of the septic systems that the Applicant claims are failing.

The Mayor of Patton Village stated that the City has applied for a wastewater discharge permit in order to eliminate the use of septic systems.[4] Historically, she states, Patton Village has relied upon septic systems to treat waste.[5] Currently, those septic systems are failing or poorly operating.[6] The City has also been selected to receive a $4.1 million dollar loan and grant from the United States Department of Agriculture-Rural Development. She stated that 735 citizens in Patton Village have requested and paid money for wastewater service from the City.[7]

OPIC understands the purpose served by a general public policy favoring

[4] App Ex. 1 at 3.

[5] *Id.*

[6] *Id.*

[7] *Id.*

centralized wastewater treatment over the use of numerous individual septic systems. In this case, however, the record does not clearly demonstrate that septic systems are causing impairment of the receiving water.

The ALJ's conclusion that granting the permit would have a positive effect on Peach Creek has no basis within the record. The only evidence on this issue consisted of the unsupported and uninformed testimony of Mr. Lazaro and the testimony of Patton Village's mayor, neither of whom had any technical expertise with septic tanks or water quality. Patton Village's mayor was not testifying as an expert witness. Mr. Lazaro's testimony demonstrates limited experience or knowledge of water quality issues. When asked whether he was familiar with the term photosynthesis, he stated that he was not a biologist.[8] He was aware that dissolved oxygen (DO) helps aquatic life, but did not know how the presence of DO in water benefits plants.[9]

He believes the water quality in Peach Creek would improve once homes connect to the proposed facility and failing or poorly operating systems are disconnected.[10] He also claims that these failing septic systems are currently contributing to elevated bacteria levels and impacting the dissolved oxygen levels in Peach Creek.[11] And he stated that runoff from septic tanks can be a source of source of bacteria, nitrogen, and phosphate for waterways.[12]

But, he acknowledges that this opinion is based primarily upon a report he did not create[13] and his observations of ponding above septic systems in the area. Nor could he offer any proof to support his opinion besides his review of this report.[14] No water samples were taken to determine whether septic systems in the area were actually

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[8] T. at 51-52.

[9] T. at 52.

[10] App. Ex. 4 at 12.

[11] *Id.*

[12] T at 72-73.

[13] T at 20.

[14] *Id.*

malfunctioning.[15] Neither was any analysis conducted to determine whether septic waste was entering Peach Creek.[16] He stated that the large amount of rainfall in the area contributes to failing septic systems,[17] but did not know the average rainfall per year in Montgomery County. He also could not elaborate on what exactly he meant by "large amounts of rainfall" in the area.[18]

This proposed facility, if approved, would replace septic systems that may be failing. However, this does not justify disregarding SOAH rules requiring the Applicant to present evidence to meet its burden of proof on each referred issue.

2. *Mr. Lazaro's testimony*

The ALJ disregards Mr. Lazaro's testimony as unreliable, basing her conclusion on Staff's analysis, as introduced by Patton Village, and the fact that the limits in the draft permit match the contact recreation criterion. However, unlike the Applicant's arguments related to DO and DO related effluent limits, the Applicant has not presented any witness who can credibly testify on the substance of TCEQ staff's analysis. It is absolutely not enough for the Applicant to put forward one witness who is unqualified to offer an opinion on bacteria, use him to introduce Staff analysis which he does not understand, and conclude that this shows the Applicant has met its burden of proof.

3. *Excess bacteria in Peach Creek and Lake Houston*

Water quality criteria is guided by 30 TAC § 307.7, which sets out site-specific uses and criteria to accompany those uses. TCEQ designates that certain waterways have certain uses, such as aquatic life or recreation. Once a waterway has been assigned one of these uses, TCEQ, must ensure the waterway is clean enough to accommodate these uses. Texas waters where people recreate must not have elevated bacteria levels.[19]

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[15] T at 73-74.

[16] T at 19.

[17] App. Ex. 4 at 11.

[18] T at 24.

[19] See 30 TAC § 307.7(b)(1).

Elevated bacteria levels in freshwater are measured through an indicator bacteria, E.coli. If a freshwater waterway that is used for contact recreation has, on average, E.coli levels less than 126 colonies per 100 mg/L, TCEQ considers the waterway in compliance with the TSWQS rules governing recreational use and safe for recreation. The E.coli threshold of 126 colonies per 100 mg/L applies to the level of bacteria appropriate for the waterway as a whole, and contrary to Mr Lazaro, is not necessarily indicative of the appropriate bacteria level for a specific discharge into the waterway.

Peach Creek is on the list of impaired Texas waterways, commonly referred to as the 303(d) list. It is on this list because of elevated levels of bacteria. If the E.coli effluent limit of the proposed discharge is the same as the maximum level of E.coli allowed to be present in the receiving waters, the discharge could still contribute to excess bacteria in Peach Creek and Lake Houston. In addition, it is doubtful that the waterway would be able to comply with TSWQS for recreational use, when the waterway currently exceeds these limits, and this discharge would contain a bacteria limit that is at the level of bacteria TCEQ should be trying obtain in Peach Creek. Assuming that this level will be protective when the Applicant has presented no credible evidence to show this is the case is absolutely not enough for the Applicant to meet its burden of proof.

As discussed above, the Applicant presented one witness to testify on this issue, Mr. Lazaro. When asked basic questions about bacteria and its impact upon waterways, Mr. Lazaro could offer little expertise. He was unaware of current E.coli levels in Lake Houston.[20] He also stated that he made no assessment of excess bacteria in relation to Lake Houston or Peach Creek.[21] He acknowledges that bacteria can accumulate in the sediment of waterways, but has done no assessment of whether that will happen to Peach Creek or Lake Houston.[22]

Although the ED properly conducted its technical and administrative review of the application, it did not fully evaluate the discharge's impact upon bacteria levels in the receiving waters. The ED witness who wrote the technical review stated in

[20] T at 55.

[21] T at 56-57.

[22] T at 58.

testimony that he did not look at bacteria levels in Lake Houston,[23] although Bacteria impairment was discussed in the Executive Director's Technical Summary.[24] Michael Redda, in creating the draft permit, reviewed memos created by other TCEQ teams.[25] The memo discussing bacteria states that the river segment of Peach Creek where the Applicant proposes to discharge is on the 303(d) list, or the state's inventory of impaired and threatened waters.[26] It also states that the facility, when operated properly, should not add to the bacterial impairment of this segment. But the memo does not discuss what evaluations were conducted to confirm this statement.

Neither does the memo evaluate bacteria levels in Lake Houston.[27] In fact, Mr Redda states that none of the memoranda he relied on considered bacteria levels in Lake Houston.[28] Michael Redda further testified that the TCEQ did not consider bacteria levels in Lake Houston at all.[29] For this particular permit, he said, TCEQ does not have any numbers on bacteria levels for Lake Houston.[30] Mark Rudolph, who conducted DO modeling for the ED, had no opinion on this referred issue.[31]

Because the Commission has specifically referred the issue of the proposed discharge's impact upon bacteria levels in Lake Houston, the Applicant has the burden to present evidence on this issue. It relied on the ED's evaluation of the application and creation of the draft permit for many other issues raised by the Protestants. But it cannot completely rely on the ED for information on this referred issue, because the ED did not evaluate the discharge's impact upon Lake Houston. And because it did not present any evidence of its own on this issue, the Applicant has not met its burden of

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[23] T at 145-147.

[24] Executive Director's Exhibit (ED Ex.) 4, at 2.

[25] T at 141.

[26] ED Ex. 4.

[27] T at 145-146.

[28] T at 147.

[29] T at 146.

[30] *Id.*

[31] T at 208.

proof.

Furthermore, the Protestants have raised questions about whether the effluent limits in the draft permit would impact bacteria levels in the receiving waters. Mary Ellen Whitworth, an expert testifying for the Protestants, stated that the effluent will be treated with chlorine, to kill pathogens[32] for which E.coli is used as an indicator. The effluent will also contain a chlorine residual, in order to prevent regrowth of bacteria in the facility pipes and out into the receiving stream.[33] But she also testified that the National Science Foundation indicates that when wastewater effluent contains nitrogen and phosphorous, as this proposed effluent would, E.coli and other pathogens will grow.[34] She also testified that because the proposed discharge will contain nitrogen and phosphorous, the discharge will potentially exacerbate the bacteria levels in Peach Creek and Lake Houston.[35]

The Applicant offered no evidence to the contrary. In fact, Mr. Lazaro actually acknowledged that if nitrogen and phosphorous are introduced into a waterway where bacteria has accumulated in the sediment, this could contribute to excess bacteria in the waterway.[36] Michael Redda, testifying for the ED, also stated that he did not consider the possible regrowth of bacteria, when creating the draft permit.[37]

The ALJ states that Ms. Wentworth testified that the chlorine residual level in the draft permit should not be any higher than it actually is, however the ALJ does not reference any testimony by Ms. Wentworth. Furthermore, the ALJ assumes that because the effluent limit for bacteria will be the same as the criteria limit for Peach Creek, the effluent limit will be protective of water quality in Lake Houston.[38] In a contested case hearing, when the Applicant has the burden of proof, it is *not* enough to

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[32] T at 105.

[33] T at 105.

[34] T at 112.

[35] T at 125.

[36] T. at 58-60.

[37] T. at 155.

[38] PFD at 14-15.

assume. There must evidence to show that it is more likely than not that the bacteria effluent limits will be protective of water quality in Lake Houston.

OPIC concludes that the Applicant has not met its burden of proof on the issue regarding excess bacteria in Lake Houston. The Applicant has presented no evidence on this issue. The ED completed its administrative and technical review of the application in accordance with the rules, but did not examine whether the proposed discharge will impact bacteria levels in Lake Houston. Furthermore, the ALJ bases her conclusion on the assumption that bacteria levels in the draft permit are sufficient, as opposed to any evidence within the record. This is not enough. Therefore, OPIC must find that the Applicant has not met its burden of proof on this referred issue.

D. The Protestants' use of Peach Creek for Recreational Purposes

OPIC concludes that the Applicant has not met its burden of proof on this issue. As discussed previously, the draft permit contains a bacteria limit intended to ensure the proposed discharge does not impact the recreational capacity of the receiving waters, although OPIC questions whether the effluent will indeed ensure the receiving waters will be safe to recreate, considering that Peach Creek already contains elevated levels of bacteria. The ED witness, Michael Redda, testified that he did not model for bacteria, and that he also did not consider the potential regrowth of bacteria.[39] Mary Ellen Whitworth and George Lazaro acknowledged that the presence of nitrogen and phosphorous in a discharge can cause bacterial regrowth in receiving waters. Mary Ellen Whitworth and George Lazaro also agreed that wastewater discharges could lead to bacteria deposits in sediments downstream of the discharge.[40] Mr. Lazaro based his opinion primarily on the Qual-tex model, even though he could provide no details about the working of this modeling[41] and was unaware that this model does not address bacteria.

The Protestant has presented evidence indicating that the proposed discharge could cause bacterial regrowth in Peach Creek, leading to further elevated bacteria levels

[39] T. at 154-155.

[40] T. at 58-60 and 125.

[41] T. at 34.

in Peach Creek. The Applicant's witness has agreed that this is a possibility, but offered no evidence to indicate this would not happen with this discharge. Although Michael Redda did not believe it would happen with this proposed discharge, he generally appeared to agree with the underlying facts on which both the Protestants' and Applicant's witnesses based their opinions on.[42]

The Applicant was unaware of how citizens in the area use Peach Creek for recreational purposes. The Applicant was also unaware of how the Protestants used Peach Creek. Mr. Lazaro, testifying on behalf of the Applicant, did not even know whether local residents swim or fish in Peach Creek.[43] The ALJ argues that Peach Creek's water quality would be improved, were this permit granted, but as discussed in Section II.C.1., there is no reliable evidence in the record showing that the proposed discharge would improve the water quality in Peach Creek. Therefore, OPIC concludes that the Applicant has not met its burden regarding potential impacts to the hearing requestors' use of Peach Creek for recreational purposes.

The ALJ also argues that it is unrealistic to allow one landowner to block a TPDES permit because they say that if the proposed permit is approved, their recreational use of the waterway would be impacted. OPIC does not disagree with this. But, the burden is on the Applicant, and the Applicant knew virtually nothing about Peach Creek's recreational uses. If the Applicant did not know how the Protestants used Peach Creek, how could it offer an opinion on whether the proposed discharge would impact these recreational uses? Because the Applicant presented no evidence showing this proposed discharge would not impact the Protestants' use of Peach Creek for recreational purposes, OPIC concludes it has not met its burden of proof.

III. CONCLUSION

OPIC recommends the ALJ find that the Applicant has not met its burden of proof on all referred issues and, therefore, that the proposed permit be denied.

Respectfully submitted,

[42] T. at 154-157.
[43] T. at 35.

Blas J. Coy, Jr.
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Certificate of Service

I hereby certify that on January 10, 2011 the original of the Office of the Public Interest Counsel's Exceptions to the Proposal for Decision were filed with the SOAH and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.

_____
Amy Swanholm

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