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## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

October 14, 2009

April Hoh, MC-150  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

Re: Request for Written Comments  
Water Quality Management within the Barton Creek and Onion Creek Watersheds  
2009-034-311-PR

Dear Ms. Hoh:

This letter is to inform you that the Office of Public Interest Counsel ("OPIC") cannot support the proposed changes to Chapter 311 of the Texas Administrative Code, governing Watershed Protection in Texas, as presented to the Stakeholders group during the September 30, 2009 meeting ("TCEQ Draft Rule"). Although the Draft Rule would implement more stringent effluent requirements than are already in place for the Barton and Onion Creek area, the Draft Rule may not be protective of water quality and could lead to degradation of water quality within the watershed this rule would seek to protect. Please consider the following comments when submitting a proposed rule for the Commission to consider for publication.

### **Background**

On October 1, 2008, The City of Austin and the Barton Springs/Edwards Aquifer Conservation District petitioned the Commission to initiate a rulemaking ("Austin Draft Rule"). This petition for rulemaking proposes to protect the Contributing Zone of the Barton Springs segment of the Edwards Aquifer, through improved water quality management of the Onion Creek and Barton Creek Watersheds.

The Edwards Aquifer, as an EPA-designated sole source of drinking water, provides drinking water for thousands of Texans. It also supplies flows to Barton Springs, a unique aesthetic and recreational resource. In addition, the Edwards Aquifer is the only known habitat of the endangered Barton Springs salamander, and the Austin blind salamander, a candidate for endangered status under the Endangered Species Act.

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The Austin Draft Rule seeks to protect this sensitive area by prohibiting direct discharge into waters of the state within these water quality areas. New or expanding wastewater treatment facilities in the area covered by the Austin Draft Rule could still indirectly discharge effluent, as long as the effluent would meet or exceed the following effluent limits; 5 mg/l carbonaceous biochemical oxygen demand, 5 mg/l total suspended solids, 2 mg/l ammonia nitrogen, and 1mg/l total phosphorous.

On November 19, 2008, the Commission considered the Petition for Rulemaking and the Austin Draft Rule. The Commission denied the rulemaking because it determined that additional stakeholder input was necessary to insure that all issues relating to the petition are fully explored and all potentially impacted entities have an opportunity to participate.<sup>1</sup> It also directed the ED to solicit stakeholder input on all issues raised in the petition, and on any other issues relevant to topics raised in the petition and to take appropriate action.

Pursuant to this Order, the ED formed the Barton and Onion Creek Stakeholder Group.<sup>2</sup> This group met first on January 16, 2009, where stakeholders discussed existing research pertinent to the Barton and Onion Creek watersheds. The group met again on March 26, 2009, where stakeholders heard a presentation by the City of Austin and then split up into two groups to discuss issues and options associated with a possible rulemaking.

A final meeting took place on September 30, 2009, where a draft rule created by the ED was discussed ("TCEQ Draft Rule"). At the September 30, 2009 meeting, the ED summarized a draft rule it had posted on the stakeholder website and solicited feedback about the TCEQ Draft Rule. Although the ED has yet to release a formal summary of the meeting, staff from OPIC attended the meeting and took notes. At this meeting, the ED also invited stakeholders to submit written comments on the rule.

### **The TCEQ Draft Rule does not Incorporate Stakeholder Input**

The general consensus of those in attendance at the September 30, 2009 meeting was that the TCEQ Draft Rule did not reflect the input the ED received from stakeholders, nor take into account the voluminous peer reviewed studies on this area. OPIC is of a similar opinion, and urges the ED to revise the rule to address legitimate issues presented by stakeholders.

Numerous stakeholders expressed concern that the TCEQ Draft Rule would allow degradation of sensitive waterways in the very area it sought to protect. Most notably, the TCEQ Draft Rule allows for direct discharge into waterways, which many stakeholders argue is not protective of the environment, even if very stringent effluent levels were imposed. The rule appears to disregard stakeholder input that extensive scientific research shows that direct discharge would be harmful to downstream waterways and degrade the Edwards Aquifer. The TCEQ Draft Rule also appears to disregard stakeholder input that the rule may be crafted to

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<sup>1</sup> *Decision of the Commission Regarding the Petition for Rulemaking Filed by the Barton Springs/Edwards Aquifer Conservation District and the City of Austin*, TCEQ Docket No. 2008-1601-RUL, issued on December 8, 2008.

<sup>2</sup> See [http://www.tceq.state.tx.us/permitting/water\\_quality/stakeholders/barton\\_onion.html](http://www.tceq.state.tx.us/permitting/water_quality/stakeholders/barton_onion.html) for general information, handouts, and agency contact information.

encourage indirect discharge of wastewater effluent, while allowing direct discharge under specific, restricted conditions.

OPIC encourages the ED to follow the Commission order. As the ED has determined that the appropriate action is indeed to initiate a rulemaking, OPIC encourages the ED to also take into account the voluminous information it has received during the Commission-ordered stakeholder process. Specifically, when the ED prepares its final version of the rule to be submitted to the Commission, it should incorporate stakeholder input received during the three stakeholder meetings, as well as those written comments submitted to the ED. OPIC also recommends the ED utilize the numerous scientific studies submitted to the ED through the stakeholder process.

### **Changes to the TCEQ Draft Rule**

OPIC proposes several specific changes to the TCEQ Draft Rule, in addition to incorporating effluent limits that reflect the voluminous amount of research submitted to the TCEQ during the stakeholder process.

First, OPIC is of the opinion that in light of the numerous studies conducted showing the sensitivity of the Barton and Onion Creek watersheds, a rule that requires indirect discharge would be more appropriate. Direct discharge into the area should only be allowed under certain, highly restrictive situations, where there is scientific certainty that the discharge will not degrade the receiving waters or the Edwards Aquifer.

Second, if the ED, after evaluating the information submitted by stakeholders, still concludes that direct discharge is appropriate, or appropriate under certain conditions, it should include added protections in the revised draft rule to ensure that the direct discharge will not degrade the receiving waters and Edwards Aquifer. Some added protections to ensure that receiving waters are not degraded include;

- 1) limit direct discharge to streams or seasons where there is measurable flow in the receiving waters,
- 2) include 7-day average, daily maximum, single grab and minimum (when appropriate) effluent limits for all permit constituents, including phosphorous and total nitrogen,
- 3) include language to indicate that the effluent limits represent the maximum limits allowed within the watershed, the specific effluent limits will not be appropriate for all areas of the watershed, and some areas may require more stringent effluent limits

In addition, the ED should include language that encourages recycling of effluent for purposes such as groundwater recharge or direct reuse, as is feasible for each application.

Third, the TCEQ Draft Rule does not specifically address existing facilities, except in that the rule only applies to facilities that receive a permit for a new or expanded facility after

September 1, 2010. The revised rule should include language that specifically addresses existing facilities, as proposed by the City of Austin.<sup>3</sup>

Including this language will ensure that existing facilities remain in compliance with their permits, or risk having to comply with more restrictive effluent limits and discharge methods. At the same time, this section requires no action from existing facilities, unless they choose to modify or expand their facility. Including this language will also enable the TCEQ to more easily enforce its rules, should a facility become substantially noncompliant, as defined by 30 TAC, Chapter 70.

Further, the language included in the Austin Draft Rule, § 311.94, entitled *Existing Facilities in Water Quality Areas*, is identical to language contained in current TCEQ watershed rules that address existing facilities.<sup>4</sup> It is appropriate for the TCEQ to also include this language in its revised draft rule, to maintain consistency with other watershed rules.

Finally, if the ED proposes a rule that restricts discharge to only those authorized by the new subchapter, the TCEQ Draft Rule should include language from Austin Draft Rule, § 311.95, entitled *Allowable Storm Water Runoff and Certain Non-Storm Water Discharges*. This exact language appears in other TCEQ rules governing specific watersheds.<sup>5</sup>

### Conclusion

The Commission has ordered the ED to gather stakeholder input and take appropriate action. As the ED has determined that the appropriate action is to submit a proposed rule for the Commission to consider for publication, OPIC urges the ED to submit a proposed rule that reflects input it received during the stakeholder process. The TCEQ Draft Rule, in its current form, does not. OPIC encourages the ED to consider these and other legitimate stakeholder comments when revising the TCEQ Draft Rule.

Sincerely,

  
Amy Swarholm  
Assistant Public Interest Counsel

cc: Service List

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<sup>3</sup> See Austin Draft Rule, §311.94.

<sup>4</sup> See 30 TAC § 311.4, 311.14 and 311.54.

<sup>5</sup> See 30 TAC § 311.6, 311.16, and 311.56. See also 25 TexReg 11957.