

# Protect Lake Travis Association

The logo for the Protect Lake Travis Association features the organization's name in a blue, cursive-style font. Below the text is a stylized graphic of a blue wave with a yellow sun partially obscured by it.

Lonnie Moore, President  
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October 29, 2009  
Office of Chief Clerk, MC 105  
TCEQ  
P. O. Box 13087  
Austin, TX 78711-3087

Re: Docket No. 2009-1586-RUL

Dear Ms. Castanuela:

Protect Lake Travis Association (PLTA) opposes the proposed rule change in Docket No. 2009-1586-RUL. The applicants' petition does not provide justification for eliminating the important safeguards afforded by the current rules, known as the Watershed Protection Rules. PLTA encourages the Commission to reject the petition and to not initiate rulemaking.

### *Background of Protect Lake Travis Association and its involvement in this issue*

Protect Lake Travis Association is a 501(c)(3) nonprofit organization formed in 1982. PLTA has been continuously active since that time, and we have over 2,000 subscribers to our newsletter. Our members are property owners, business owners and recreational users of Lake Travis.

During the early 1980's, PLTA was actively involved in the development and adoption of the current regulations, sometimes collectively referred to as "the Highland Lakes discharge ban", which are the target of the petitioners. In 1982-83, our then-president, Taylor Ollman, served on the Governor's Select Committee for Water Quality Standards for Lake Travis and Lake Austin. Among that committee's recommendations were discharge bans for those two lakes. Through education campaigns, PLTA was instrumental in increasing public awareness of potential degradation of our waterways, the uniqueness of the Highland Lakes and the effects of treated wastewater effluent on reservoirs, such as Lake Travis.

### *PLTA opposition to the Petition for Rulemaking*

Protect Lake Travis Association has never been opposed to centralized sewage systems or to development. We are opposed to degradation of our lakes and streams in general, and to degradation of Lake Travis in particular. We continue to be strong proponents of land-based discharge as the safest means of treated effluent disposal in the Highland Lakes area. We do favor beneficial reuse of treated wastewater effluent ("reclaimed water") – specifically, using reclaimed water in lieu of potable water for irrigation and industrial uses. Beneficial reuse is more cost effective for the wastewater treatment operator and helps reduce water needs on the supply side. PLTA encourages beneficial reuse and, where applicable, regulatory reform to encourage and incent its practice.

*Reasons supporting PLTA's opposition to the Petition for Rulemaking*

- Phase II of LCRA's CREMS modeling study clearly shows that degradation of Lake Travis, which currently has an "exceptional" aquatic life designation, will occur if the discharge ban is lifted. The LCRA modeling indicates that even partial releases from existing plants in the Lake Travis watershed would result in measurable reduction in water quality.
- Phase III of LCRA's CREMS modeling study should be completed before TCEQ even considers the possibility of modifying the current Watershed Protection Rules. Phase III will consider the impacts of potential discharges in lakes upstream of Lake Travis. We do not know, but can logically predict, that discharges upstream will compound the degradation of water quality in Lake Travis. In any event, revisions to the current protections should not be considered until the related scientific analyses have been completed.
- TCEQ's revision of its Water Quality Standards Implementation Procedures is still in progress. That revision may set numerical lake nutrient concentration levels. TCEQ should have the benefits of the outcomes of that process before considering removing the control afforded by the current regulations.
- While PLTA respects the agency's reserve about extending its regulatory reach, recent studies by USGS and others point to environmental problems (and potential health problems) associated with substances known as "constituents of emerging concern (CECs)", including "endocrine disrupting compounds (EDCs)", and the like. These are known components of treated wastewater discharges. Removing existing safeguards before more is known about the effects and remediation of these substances would be ill-advised.
- Any repeal or modification of the existing safeguards would likely involve EPA more directly in oversight of the TPDES program. Either action would also invite litigation and political controversy related to that action and the Texas Water Quality Standards (see attached letter from PLTA attorney, David Frederick). All of our resources could be better spent in finding more appropriate solutions to the problems of safe disposal of treated wastewater effluent and conservation of water supply.

*Summary*

No change that relaxes the protections afforded by the existing Watershed Protection Rules should be made without first having irrefutable scientific evidence that such a change would not result in additional degradation of any of the six Highland Lakes. The TCEQ should reject the Petition for Rulemaking and not initiate rulemaking at this time.

Thank you for your consideration of our position.

Sincerely,



Lonnie Moore, President

Attachment: Correspondence from David Frederick

# LOWERRE, FREDERICK, PERALES,

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Mr. Lonnie Moore  
President  
Protect Lake Travis Association  
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October 29, 2009

Regarding: Leander and Granite Shoals petition to delete the current ban on discharges to Lake Travis and upstream areas; TCEQ Docket No. 2009-1586-RUL

Dear Mr. Moore:

This letter responds to the Association's inquiry of my firm as to whether the rulemaking proposed by Leander and Granite Shoals poses any issues of note under federal law.

I see, on a quick review, two issues that are at least partially federal and that are raised by the proposed rulemaking. The proposal has implications for the State's implementation of the federal NPDES permitting program, and the proposal raises complicated issues for the resource-intensive antidegradation review required by state and federal law.

NPDES delegation. As you may know, waste water discharge permits in Texas are issued by TCEQ under a state program that is approved by EPA. This has been the situation only since 1998. For many years before that, EPA also issued waste water discharge permits to people in Texas who sought to discharge wastes to surface waters in the state. The EPA-issued permit, a National Pollutant Discharge Elimination System ("NPDES") permit, was necessary, if the person discharging were not to be exposed to suit under the federal Clean Water Act. The permit now issued in Texas by TCEQ is a "TPDES" permit. To a rough summary, the EPA has continuing oversight of the Texas waste water permitting program to try to ensure that the state program provides at least the level of water quality protection that would be accorded Texas surface waters, if EPA still issued the waste water discharge permits.

As part of the 1998 delegation, TCEQ (its predecessor, TNRCC, actually) entered into a memorandum of agreement with EPA under which TCEQ agreed to “ensure that EPA is kept fully informed and up-to-date regarding: ... draft, proposed, and final regulations related to TPDES.” Memorandum of Agreement between the Texas Natural Resource Conservation Commission and the U.S. Environmental Protection Agency, Region 6, Concerning the National Pollutant Discharge Elimination System (Sept. 14, 1998), Sec. III(A)(20). This “keep informed” duty is supposed to help EPA with its oversight responsibilities.

I have made inquiries at EPA to determine if TCEQ has apprised EPA of the petition to repeal the Lake Travis, etc., discharge ban. So far as I can tell, the answer is “no.”

Certainly, the petition language urges regulation related to the TPDES program. Perhaps, TCEQ does not consider the regulatory language proposed by the petition to be, yet, a “draft” regulation, inasmuch as it is not, yet, TCEQ’s language. In the late 1990s, however, my firm represented the Oil, Chemical and Atomic Workers’ Union and Environmental Defense Fund in their petition to EPA to withdraw Texas’s implementation of the federal Underground Injection Control program. (That is also a delegated program.) This petition was based, in part, on Texas’s long-running failure to inform EPA of changes in the regulations that defined the UIC program. In the end, Texas made a wholesale new submission to EPA of the program’s changes, and our clients elected to abandon their petition. However, from this experience, I believe EPA will view very negatively TCEQ’s moving down the road, if that in fact happens, toward a reversal of long-standing water quality law (i.e., the discharge ban), without having involved EPA early and often. Certainly, the Association should make an effort to keep EPA staff in Dallas apprised of events related to the discharge ban. (I have some names of EPA staff members that I will pass along to you, later.)

The discharge ban was in place in 1998, when EPA approved the Texas regulations and made the delegation. It had been on place for a dozen years before that. So, I would expect EPA to classify changing that ban as a significant change in the program EPA approved in 1998, and significant program changes require EPA approval. See, 40 CFR § 123.62. Also, EPA has regulations for withdrawing from a state a program that has previously been delegated. See, 40 CFR § 123.63. Among the reasons justifying program withdrawal are failure to comply with EPA’s regulations or with the memorandum of agreement between a state and EPA. So, while I doubt EPA would move to withdraw the Texas NPDES delegation solely on the basis of TCEQ’s actions or inactions on the Leander and Granite Shoals petition, a rulemaking based on this petition clearly would expose the Texas permitting program to some risks and EPA scrutiny that it currently avoids.

Antidegradation law. TCEQ has in its TPDES regulations an “antidegradation” provision that provides, for “exceptional” quality waters like those of Lake Travis and its environs, that:

Tier 2. No activities subject to regulatory action which would cause degradation of waters which exceed fishable/swimmable quality will be allowed unless it can be shown to the commission's satisfaction that the lowering of water quality is necessary for important economic or social development. Degradation is defined as a lowering of water quality by more than a de minimis extent, but not to the extent that an existing use is impaired. Water quality sufficient to protect existing uses will be maintained. Fishable/swimmable waters are defined as waters which have quality sufficient to support propagation of indigenous fish, shellfish, and wildlife and recreation in and on the water.

30 TAC § 307.5(b)(2).

The TCEQ’s antidegradation regulation springs from the federal Clean Water Act. The modern form of the Act dates from 1972. Pub. L. 92-500 (October 18, 1972); *PUD No. 1 of Jefferson County v. Washington Department of Ecology, et al.*, 511 U.S. 700, 731-732; 114 S.Ct. 1900, 1912 (1994). It was passed to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a).

Federal regulation, since 1968 (so, predating the modern Act), has required states to have water quality antidegradation protections, and Texas, in fact, has had such a regulation dating from about that time. The 1972 federal Clean Water Act provided for the continuation of the states’ water quality standards and, thus, of the states’ antidegradation protections and imposed on EPA a duty to review the states’ water quality standards and, if necessary, to promulgate amendments to bring deficient standards into compliance with the Act. *PUD No. 1*, at 511 U.S. 732; 33 U.S.C. § 1313(a)(2).

Congress held hearings in 1985, antecedent to 1987 amendments to the Act. There, it became clear that Congress was not satisfied that the regulatory antidegradation requirement was being vigorously overseen by EPA.<sup>1</sup> Thus, when the Act was amended

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<sup>1</sup> See, for example, the November 22, 1985, memo from Patrick Tobin, the Director of EPA’s Office of Water, Criteria and Standards Division, to water management division directors in the EPA regional offices:

As a direct result of public and Congressional interest much more activity is focusing on the antidegradation policy component of the water quality standards program than has been the case in previous years. Every indication is that this high level of interest will

in 1987, Congress explicitly provided that water quality standards for water bodies, like Lakes Travis and Austin, that exceed their designated uses may be revised only in ways consistent with the states' antidegradation provisions. 33 U.S.C. § 1313(d)(4)(B); *PUD No. 1, supra*, at 511 U.S. 723-724 and 732.

EPA's antidegradation regulation sets the floor for corresponding state regulations, such as TCEQ's at 30 TAC § 307.5, quoted earlier. The EPA regulation, adopted in 1975 and slightly amended in 1983, provides:

The State shall develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy pursuant to this subpart. The antidegradation policy and implementation methods shall, at a minimum, be consistent with the following:

. . . .

(2) Where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully. Further, the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.

40 C.F.R. § 131.12(a). This is known in Texas as the "tier 2" standard of protection, which the 30 TAC § 307.5 language quoted earlier more or less mirrors.<sup>2</sup>

Now, turning to the proposal to lift the discharge ban: all the information we have to date (i.e., the LCRA CREMS modeling) indicates lifting that ban would lead to greatly

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continue. During the latest Congressional debates on the Clean Water Act, "antibacksliding" is a dominant issue and the Office of Water has been quizzed repeatedly on its commitment to executing a strong antidegradation policy, a commitment the Office of Water has affirmed.

The entire memo is available at: <http://www.epa.gov/waterscience/standards/library/antideg1.pdf>.

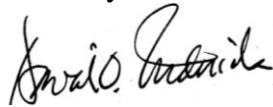
<sup>2</sup> Tier 1 being protection of existing uses, and tier 3 being an absolute protection for the quality of waters that are so significant as to be "outstanding national resource" waters. See, 40 C.F.R. § 1321.12(a)(1) and (a)(3). Tier 1 protection is accorded all water bodies, including those that do not exceed fishable/swimmable quality.

increased chlorophyll-a concentrations (so, algae and the like) in Lake Travis. Average summer concentrations would increase nearly 60% at near Mansfield Dam and more than a 100% in Hurst Cove. These would almost surely qualify as increases sufficient to degrade that very clear-water lake by more than a *de minimis* degree.

Lifting the discharge ban would be an “activit[y] subject to regulatory action,” so the lifting, itself, would likely be subject to an antidegradation review under TCEQ’s and EPA’s regulations. At the very least, individual dischargers, when they came forward for discharge permits, would be subject to that review. The review does not, necessarily, lead to a finding that the activity simply may not occur, but the burden on the proponent of the activity to demonstrate that it is necessary for important economic or social development is a costly burden, and the whole demonstration process is fertile ground for legal and political conflict. The antidegradation review, if honestly applied to the repeal of the discharge ban or to individual discharge permit applications, will open up, in the vernacular, a “whole can of worms” that will sap the resources of all involved.

I will be glad to follow up on these points or others the Association might want to explore, should future events in your mind justify that work.

Sincerely,

A handwritten signature in black ink, appearing to read "David Frederick". The signature is written in a cursive style with a large, looping initial "D".

David Frederick