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MEMORANDUM

DATE: October 24, 2011

TO: John Blount, HCPID

CC: Josh Stuckey & Alisa Max, HCPID

FROM: Snehal R. Patel, Chief
Environmental Regulatory Section
Harris County Attorney's Office

SUBJECT: Legal Opinion Related to Harris County On-Site Sewage Facility Local County Order

Question Presented

Whether a thirty-day average is correctly interpreted and applied by Harris County Public Infrastructure Department's Watershed Protection Group (HCPID WPG) as a thirty-day average to ensure meeting the Carbonaceous Biochemical Oxygen Demand (CBOD) and Total Suspended Solids (TSS) requirements for bacteria-impaired waterways in Harris County, Texas, as provided in the Harris County, Tex., Rev. Rules for On-Site Sewage Facilities (OSSF) § 10 Amendments Y(2) (Last amended, February 11, 2011) (Local County Order)?

Answer

Yes. Based on the clear and plain meaning of the unambiguous Local County Order and other factors discussed below, a thirty-day average is correctly interpreted as an average of a single thirty-day period as opposed to a thirty-day average of all thirty-day averages over the length of the testing period.

Background

Harris County is the designated local agent for the on-site sewage disposal program as authorized by the TCEQ; and in 2011, Harris County promulgated more stringent requirements for OSSFs to address water quality concerns related to the region's many water bodies that do not meet the water quality standards for contact recreation (bacteria is the parameter by which this standard is measured).

As amended, Harris County's Local County Order states, "In watersheds where one or more stream segments are listed as impaired for bacteria on the EPA 303(d) list, the following additional requirements apply, . . . (2) All on-site sewage facilities must use secondary treatment meeting a 30 day average CBOD of 10 mg/L and TSS of 10 mg/L." Harris County, Tex., Rev. Rules for On-Site Sewage Facilities § 10 Amend. Y(2) (2011). Under the Section 10 amendments, the Local County Order also states, "The County of Harris, Texas wishing to adopt more stringent Rules for its OSSF Order understands that the more stringent local Rule shall take precedent over the corresponding TCEQ requirement." *Id.* This Local County Order was authorized by the Harris County Commissioners Court on December 21, 2010 and then approved by the Executive Director of the TCEQ on February 11, 2007. The TCEQ found that "the Order is at least equivalent to the standards of the Commission" and "meets the Commission's minimum requirements for on-site sewage disposal systems." TCEQ Order, Feb. 7, 2011.

In regards to non-bacteria impaired waterways, the Texas Commission on Environmental Quality (TCEQ) sets requirement maximums under the general OSSF program as a "thirty-day average of all thirty-day averages . . . over the length of the testing period." 30 Tex. Admin. Code § 285.32(e) (West 2011). The TCEQ rules, however, do not provide a requirement or an interpretation regarding the average for bacteria impaired waterways. *Id.*

As TCEQ has remained silent in its interpretation of thirty-day-average with regards to bacteria-impaired waterways and also because the Local County Order is established under the

authority provided in the Texas environmental statutes, we look to other acceptable tools such as the Texas Code Construction Act and case law to interpret the section in question. *See*, Tex. Gov. Code § 311.002 (West 2011). In this context, references to statutes and legislative body are analogous to the Local County Order and Harris County Commissioners Court, respectively.

Legal Authority

Under the Texas Code Construction Act, section 331.011 states, “(a) Words and phrases shall be read in context and construed according to the rules of grammar and common usage; (b) Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.” *Id.* Additionally, consistency is important when interpreting statutes. “We must interpret a statute according to its terms, giving meaning to the language consistent with other provisions of the statute.” *Dallas County Cmty. Coll. Dis. v. Bolton*, 185 S.W.3d 868, 873-74 (Tex. 2005).

Furthermore, “[o]ur ultimate goal in construing a statute is to give effect to the legislature's intent as expressed in the language of the statute.” *Tara Partners, LTD. v. City of South Houston*, 282 S.W.3d 564, 572 (Tex. App.—Houston [14th Dist.] 2009, pet. denied). *See also, Polland v. Ott*, 278 S.W.3d 39, 46 (Tex. App.—Houston [1st Dist.] 2008, pet. denied) (substituted opinion dissenting from the denial of en banc consideration Jan. 22, 2009). “In doing so, we must always consider the statute as a whole rather than its isolated provisions.” *Tara Partners, LTD.*, 282 S.W.3d at 572. “All words used and omitted are presumed used and omitted purposefully.” *Polland v. Ott*, 278 S.W.3d 39, 46 (Tex. App.—Houston [1st Dist.] 2008, pet. denied). Likewise, the United States Supreme Court looks towards the ordinary, everyday sense of the word when construing the words in a given rule or statute. *Carter Trust v. United States*, 256 F. Supp. 2d 536, 540 (N.D. Tex.—Fort Worth 2003). For example, the United States Supreme

Court looked towards the ordinary, everyday sense of those words in the Revenue Act when deciding *Carter Trust v. United States*, in order to properly interpret the Act. *Id.*

Additionally, section 311.023 of the Texas Government Code stipulates, “In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the: (1) object sought to be attained; (2) circumstances under which the statute was enacted; (3) legislative history; (4) common law or former statutory provisions, including laws on the same or similar subjects; (5) consequences of a particular construction; (6) administrative construction of the statute; and (7) title (caption), preamble, and emergency provision.” *See also, Tara Partners, LTD.*, 282 S.W.3d at 572; *Polland*, 278 S.W.3d at 46; *Raines*, 930 S.W.2d at 913.

Case law also provides that, “[o]f course, when a statute is clear and unambiguous, no construction by the court is necessary, and the words will be given their common meaning.” *Raines v. Sugg*, 930 S.W.2d 912, 913 (Tex. App.—Fort Worth 1996, no pet.). *See also, Carter Trust*, 256 F. Supp. 2d at 540. “Where the words and meaning of a statute of this kind are clear, there is no room for judicial consideration of Congressional intent.” *Carter Trust* at 540. Therefore, “We construe the statute's words according to their plain and common meaning.” *Critical Health Connection, Inc. v. Texas Workforce Comm’n*, 338 S.W.3d 758, 761 (Tex. App.—Austin 2011, no pet. h.). *See also, Texas Mut. Ins. Co. v. Baker*, 292 S.W.3d 798, 802 (Tex. App.—Fort Worth 2009, no pet.).

Analysis

In the issue at contention, HCPID WPG construes the local rule to mean that a thirty-day-average should be taken as an average over 30 days, and on its face as the Local County Order is written, that is the most clear and unambiguous plain language meaning of the rule.

In addition, it is correct that TCEQ has expressed how to interpret the averages for non-bacteria-impaired waterways in its rules but it is silent on the interpretation of averages for

bacteria-impaired waterways. The Local County Order, on the other hand, has removed all ambiguity by expressly providing for an average of thirty-days without reference to any other average being utilized and specifically chose to not include the TCEQ rule language.

Taking the analysis a step further and reviewing the factors that are provided in the Texas Code Construction Act, Section 311.023, the result remains the same. The Local County Order as revised was specifically enacted to be more stringent than the TCEQ requirements in furtherance of attaining healthier and safer waterways and to protect the health and welfare of the citizens of Harris County and others who may be affected by its bacteria-impaired waterways. With all of these factors in mind, the interpretation of thirty-day average to be an average of thirty days and not a sum of averages over a testing period is environmentally more protective and is consistent and in accordance with goals and circumstances related to Harris County's amended Local County Order.

Summary

In conclusion, the HCPID WPG's interpretation of a thirty-day average being an average of a single thirty-day period is supported by the common and plain meaning of the Local County Order and is congruent with the overall goals and intent of the Local County Order..