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Of Counsel:  
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October 24, 2017

Via Certified U.S. Mail

Scott Pruitt, Administrator  
United States Environmental Protection Agency  
1200 Pennsylvania Ave., N.W.  
Washington, D.C. 20460

Greg Sheehan, Principle Deputy Director  
United States Fish and Wildlife Service  
1849 C. Street, NW, ROOM 3331  
Washington, DC 20240

Bryan W. Shaw, P.E., Ph.D., Chairman  
Texas Commission on Environmental Quality  
Mail Code 100  
12015 Park 35 Circle  
P.O. Box 13087  
Austin, Texas 78711-3087

Regarding: Notice of intent to sue under the federal Endangered Species Act for failure to re-initiate consultation regarding delegation of National Pollutant Discharge Elimination System authority to the State of Texas.

To whom it may concern:

Protect Our Water ("POW"), hereby, provides notice pursuant to the citizen suit provision of the Endangered Species Act, 16 U.S.C. § 1540(g), that the United States Environmental Protection Agency ("EPA") and the United States Fish and Wildlife Service ("USFWS") have failed to reinitiate formal consultation regarding approval of Texas' application to administer the National Pollutant Discharge Elimination System ("NPDES") Program (the "Application") as required by 50 Code of Federal Regulations ("CFR") § 402.16.

With regard to federal agency decisions, 50 CFR § 402.16, provides that:

POW NOI  
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Reinitiation of formal consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and:

- (a) If the amount or extent of taking specified in the incidental take statement is exceeded;
- (b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
- (c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or
- (d) If a new species is listed or critical habitat designated that may be affected by the identified action.

Subsequent to EPA's approval of Texas' Application on September 14, 1998:

- (1) New information reveals unconsidered potential effects of NPDES permitting upon the Barton Springs Salamander;
- (2) New species have been listed as endangered and new critical habitat has been designated that may be affected by the approval of Texas' Application; and,
- (3) Texas' implementation of the NPDES program has been modified from what was approved in a manner that causes impacts to listed species and critical habitat.

Any one of these factors would result in a mandatory duty for the EPA to reinitiate formal consultation with the USFWS regarding approval of the Application.

**New information demonstrates that the exercise of NPDES permitting authority by Texas will impact the Barton Springs Salamander in a manner, and to an extent, not previously considered.**

*The range of the Barton Springs Salamander is now known to be more extensive than considered at the time of delegation.*

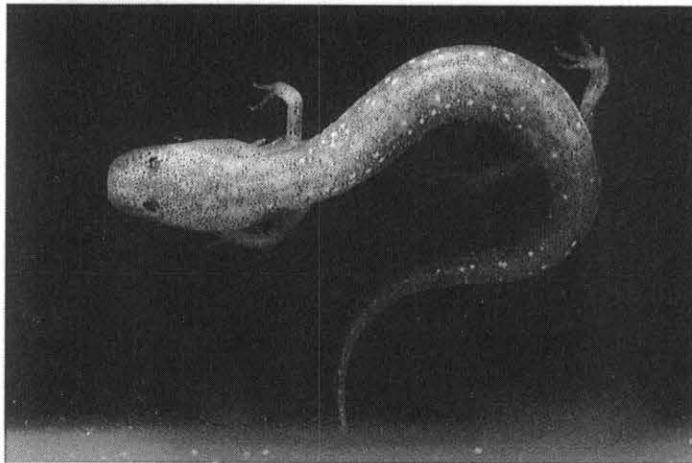
The initial consultation for the approval of Texas' Application addressed the Barton Springs Salamander. However, the USFWS Biological Opinion stated, "This small salamander is only found at four spring outlets in Zilker Park within the City of Austin."<sup>1</sup> It is now known that the range of the Barton Springs Salamander well exceeds these four spring outlets at Zilker Park. Barton Springs Salamanders have been located

<sup>1</sup> September 14, 1998 Biological Opinion, at p. 23.

and identified at multiple locations along Onion Creek. In addition, Barton Springs Salamanders have been found at: Cold Spring, Backdoor Spring, Blowing Sink Cave, and State Well 58-50-705 in southern Travis County, as well as Taylor Spring and Spillar Ranch in Hays County.

The discovery of Barton Springs Salamanders in these surface waters, and particularly Onion Creek, increases the likelihood that an authorized discharge of pollutants would result in harm to the Barton Springs Salamander.

As a current example of the unaddressed potential harm to the Barton Springs Salamander, TCEQ is now considering an application by the City of Dripping Springs for TPDES Permit No. WQ0014488003, TX 0136778, which would authorize the discharge of 995,000 gpd of domestic wastewater into Walnut Springs Creek, shortly upstream of Onion Creek in Hays County. By this permit, TCEQ intends to authorize the discharge of significant quantities of nutrients into a clear hill country stream. Due to the expanded range of the Barton Springs Salamander, this permit action and the issuance of other permits in the same general area pose hazards to the Barton Springs Salamander that were not considered or addressed in the 1998 consultation. Historic and recent water quality monitoring indicates that the receiving waters for this discharge are of excellent quality with respect to nutrients, dissolved oxygen and the absence of algae. The immediate receiving water for the discharge is intermittent, but at a short distance of less than 1/2 mile downstream of the discharge the effluent will flow into a perennial portion of Onion Creek.



**Figure 1: Barton Springs Salamander in Onion Creek**



**Figure 2: Photograph of Onion Creek Downstream of Dripping Springs Permit Discharge Point**

Onion Creek provides high-quality recharge to the Edwards Aquifer, and is a major source of recharge to Barton Springs, which is habitat for federally-listed endangered species: the Barton Springs salamander (*Eurycea sosorum*); and the Austin Blind Salamander (*Eurycea waterlooensis*). Barton Springs is also a critical recreational and economic resource of the City of Austin.

The discharge proposed for authorization by the Draft Permit would degrade the high quality waters of Onion Creek. The City of Austin has utilized the Water Quality Analysis Simulation Program (WASP) to evaluate the impact of the discharge. This modeling focused on the area of Onion Creek shortly downstream of the convergence between Walnut Creek and Onion Creek, and modeled conditions from January 1, 2000, to October 26, 2015. Available data indicates that under baseline conditions the annual mean benthic chlorophyll *a* at this location is always under 25 mg/m<sup>2</sup>, and in most years

is under  $10 \text{ mg/m}^2$ .<sup>2</sup> Under these conditions, the Creek would be characterized as oligotrophic, with limited algal growth.<sup>3</sup>

The locations where the salamanders have been collected are locations that would be affected directly by wastewater effluent discharges authorized by the draft permit. These reaches of Onion Creek are within the extent of the stream where the Water Quality Analysis Simulation Program (WASP) model performed by the City of Austin indicated that the discharge would degrade Onion Creek from an oligotrophic condition to a mesotrophic condition.

Yet, since the 1998 biological opinion did not consider the potential for the Barton Springs Salamander to be located in Onion Creek, the potential for this type of impact was in no way assessed. Particularly considering Texas' approach to issues involving endangered species, this new information warrants the re-initiation of consultation.

*New Information Has Revealed the Potential Impact of Emerging Contaminants, including impacts on the Barton Springs Salamander, but TCEQ ignores those impacts.*

Since the delegation of NPDES permitting authority to Texas was granted in 1998, further information has been developed regarding the role of "emerging contaminants" and the impact of those contaminants upon species such as the Barton Springs Salamander. "Emerging Contaminants" include pollutants such as human and veterinary pharmaceuticals (such as antibiotics and analgesics), industrial and household wastewater products (such as fragrances, detergents, and flame retardants), and reproductive and steroidal hormones. By comments issued in December of 2016, the USFWS noted that such emerging contaminants had the potential to impact species such as the Barton Springs Salamander. But, Texas has taken the position that it will not consider requiring permit holders to either control or monitor discharges for emerging contaminants.<sup>4</sup>

This problem is also exemplified by the pending permit application by the City of Dripping Springs. The discharge of emerging contaminants in that case has not been addressed, but has a real potential to impact downstream populations of the Barton Springs Salamander.

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<sup>2</sup> City of Austin, WASP Model Analysis of a City of Dripping Springs Proposed Wastewater Treatment Plant Discharge to Onion Creek, SR-16-05, p. 13. (Attachment A to this letter)

<sup>3</sup> City of Austin, WASP Model Analysis of a City of Dripping Springs Proposed Wastewater Treatment Plant Discharge to Onion Creek, SR-16-05, p. 13, citing Dodds, Walter, Eutrophication and Trophic State in Rivers and Streams, *Limno. Oceanogr.* 51(1, part 2) 2006, 671-680. (Observing an oligotrophic/mesotrophic threshold of  $36 \text{ mg/m}^2$  chlorophyll-*a*, which the draft permit would cause to be exceeded in Onion Creek).

<sup>4</sup> See, e.g., Proposal For Decision in the matter of the Application of Hays County WCID No. 1 for TPDES Permit No. WQ0014293001, at p. 38.

**New Species have been listed, and new critical habitat has been designated, that may be affected Texas' exercise of its delegated permitting authority.**

Since delegation of NPDES permitting authority to Texas in 1998, the Austin blind salamander (*Eurycea waterlooensis*) has been listed as an endangered species, with critical habitat designated for the Austin blind salamander, and the Comal Springs dryopid beetle (*Stygoparnus comalensis*) has been listed as an endangered species, with critical habitat designated for this species. TCEQ's implementation of the TPDES program has the potential to impact these species, but the potential impact of the TPDES program on these species was not examined in the initial consultation for the delegation of NPDES permitting authority to the State of Texas.

**Since receiving delegation, Texas has modified its TPDES program in a manner that causes an effect to endangered species not considered in the biological opinion.**

Texas does not consider impacts on endangered species relevant and material to its review of TPDES permits.

When the Barton Springs Salamander was identified by the USFWS as a species of concern in its 1998 Biological Opinion, the USFWS noted that, "any future TPDES permits that could directly or indirectly impact the Barton Springs watershed must be reviewed with extreme caution to ensure that future impacts are avoided or minimized."<sup>56</sup> Further, the Biological Opinion issued by the United States Fish & Wildlife Service on September 14, 1998 was premised on representations by the State of Texas that Texas' regulations require the imposition of more stringent permit conditions to protect listed species from the direct effects of a discharge if other Texas surface water quality standards are not sufficient to provide protection.<sup>7</sup> In short, delegation of NPDES authority was granted to Texas on the presumption that impacts on endangered species would be evaluated on a case-by-case basis in the consideration of permit applications.

Since that time, Texas has made clear that it will *not* alter its review of permit applications based on potential impacts upon endangered species. At one point, in considering the scope of a contested case hearing, the Commission was charged with determining whether a question of impact to endangered species was relevant and material to its decision on a TPDES permit. The Commissioners found that impacts of a discharge on an endangered species was *not* within the scope of the Commission's review for a TPDES permit, explaining:

<sup>5</sup> USFWS Sept. 14, 1998 Biological Opinion at p. 41.

<sup>6</sup> 63 Fed. Reg. 51164, 51196 (Sep. 24, 1998)

<sup>7</sup> September 14, 1998 USFWS Biological Opinion, at p. 9.

Commissioner Baker: There is an issue regarding endangered species that I think is outside of our purview and I think we have understandings in place with US Fish and Wildlife and Texas Parks and Wildlife to handle that and so if there is an issue there, they're going to, as I recall the way the process works, they step in, and that's not necessarily something we would look at.

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Chairman Shaw: I think it's appropriate that we, ensure that we, refer issues that are relevant material and by that that we have authority and jurisdiction over it so I share your concern that we not include that item or other items in general that are outside our jurisdiction. I think it's important that we protect the integrity of our process and it would make sense for us to assume authority that we don't, we're not the EPA. Sorry that was a joke.<sup>8</sup>

Clearly, the Commission has abrogated its duty to apply the Texas WQS in a manner that ensures the adequate protection of endangered species.

Texas has failed to implement the Tier 2 Review Process

At the time when Texas was delegated NPDES permitting authority, it was assumed that Texas would apply both a "Tier 1" and a "Tier 2" review to state waters. A Tier 2 review seeks to maintain the quality of high-quality waters, while requiring a balanced consideration of the need for, and impacts of, a discharge that will adversely impact high-quality waters.

In effect, Texas has not implemented the Tier 2 review process. That failure of implementation compromises the protection of endangered species such as the Barton Springs Salamander. Texas' water quality standards only require a regulatory action involving the "degradation" of water quality to undergo a Tier 2 review, and in turn define "degradation" as a greater-than *de minimis* lowering of water quality. Texas has chosen to implement this definition in a manner that renders the alternatives analysis of the Tier 2 review wholly inapplicable to any NPDES permit issued by the Texas Commission on Environmental Quality. Since receiving delegated authority over the NPDES program in 1998, Texas has issued numerous discharge permits lowering water quality to a point where the receiving waters barely meet the applicable Tier 1 standard to protect attainable uses. At the same time, Texas has concluded that none of its permitting actions resulted in a greater than *de minimis* lowering of water quality, and thus, to POW's knowledge, Texas has exempted every permitting action taken from the alternatives analysis of a Tier 2 review, including the currently-pending application by the City of Dripping Springs for TPDES Permit No. WQ0014488003, TX0136778.

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<sup>8</sup> February 17, 2016 public meeting of the TCEQ.

The proposed discharge for which Dripping Springs seeks authorization exemplifies the type of circumstance where a full Tier 2 Review is critically important. The proposed permit would authorize a new discharge. The EPA's Water Quality Standards Handbook provides that activities such as a new discharge are *presumed* to result in a lowering of water quality.<sup>9</sup> There is no indication that such a presumption should not apply in the case of Dripping Springs' application. In fact, the best available modeling supports the presumption that the discharge will noticeably lower water quality.

The Dripping Springs permit exemplifies a situation where the balancing test required by a full Tier 2 evaluation is warranted and would lead to greater protection for endangered species. EPA's Water Quality Standards' Handbook provides that the lowering of water quality should only be allowed "in a few extraordinary circumstances where the economic and social need for the activity clearly outweighs the benefit of maintaining water quality above that required for 'fishable/swimmable' water, and both cannot be achieved."<sup>10</sup> In that case, the City of Dripping Springs has alternatives to the discharge that could provide the wastewater treatment needs of the area and avoid the risk of harm to the Barton Springs Salamander. Specifically, Dripping Springs currently has a state permit for the reuse of wastewater *via* subsurface irrigation.

A full Tier 2 evaluation would properly consider the balance between Dripping Springs' desire to discharge wastewater into Onion Creek as against the significant interests that rely upon this high-quality water. Those interests include interests in the protection of the Barton Springs Salamander and the Austin blind salamander. Onion Creek provides recharge to the Edwards Aquifer, which has been recognized by the EPA as a Sole Source Aquifer. This recharge provides valuable support for endangered species in Barton Springs, and for the recreational uses of Barton Springs. The purpose of a Tier 2 review is to provide a wholistic consideration of whether degradation of water quality is necessary in light of the impacts of that degradation. Due to TCEQ's systematic disregard for the Tier 2 review process for almost 20 years, endangered species are not receiving the level of protection anticipated when Texas was delegated NPDES permitting authority in 1998.

### Conclusion

As this discussion demonstrates, new information and changed circumstances warrant and require that USFWS and EPA re-initiate consultation regarding the delegation of NPDES authority to the State of Texas. POW, therefore, provides notice pursuant to the citizen suit provision of the Endangered Species Act, 16 U.S.C. § 1540(g), of its intent to sue the United States EPA and the United States Fish and Wildlife Service to require that these agencies discharge their mandatory duty to reinitiate formal consultation regarding approval of Texas' application to administer the National Pollutant Discharge Elimination System (NPDES) Program (the "Application") as

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<sup>9</sup> Environmental Protection Agency, Water Quality Standards Handbook, at 4.5. EPA 823-B-94-005a.

<sup>10</sup> *Id.*



required by 50 Code of Federal Regulations ("CFR") § 402.16.

Please feel free to contact me if you have any questions, or to discuss whether this issue may be resolved without the need to resort to litigation.

Sincerely,



Eric Allmon

Counsel for POW

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