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July 15, 2015

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Tennessee

Mr. Tucker Royall
General Counsel
Texas Commission on Environmental Quality
P. O. Box 13087
Austin, Texas 78711-3087

*via E-mail, Electronic Filing
& Regular U.S. Mail*

Re: Application by DHJB Development, LLC for a major amendment to TPDES Permit No. WQ0014975001; TCEQ Docket No. 2013-2228-MWD; SOAH Docket No. 582-14-3427

Dear Mr. Royall:

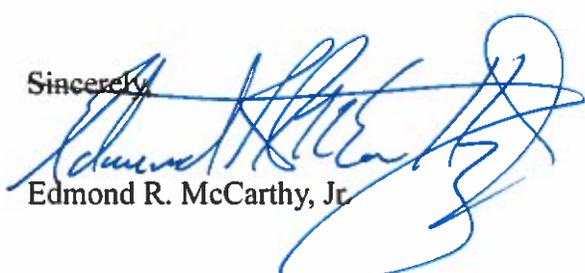
Enclosed please find a proposed Order granting DHJB Development, LLC's Application for a major amendment to TPDES Permit No. WQ0014975001. This proposed Order was prepared, and is being filed, pursuant to the Commissioner's direction to the Applicant during the Agenda Conference on July 1, 2015, and memorialized in the Commissioner's Interim Order granting the Permit dated July 10, 2015. The proposed Order is being provided both in a "Redline" and "Clean" format to reflect the changes from the original amended proposed Order with Findings and Conclusions prepared by the ALJ.

By copy of this letter all counsel of record are each receiving a copy of the proposed Order by e-mail in both PDF and WORD formats (Redline and Clean) so that they can provide comments. Pursuant to Commission Rule 10.5 (30 TAC), the parties will now have the opportunity to provide comments on the proposed order and, hopefully, reach agreement as to the final form to be filed and circulated on July 24, 2015, pursuant to the Interim Order.

If there are any questions about the Order, or other information is needed, I can be reached at (512) 225-5606.

Best wishes.

Sincerely,


Edmond R. McCarthy, Jr.

ERM/tn
Encl.

July 15, 2015
Page 2

cc: Attached Service List
SOAH Docket Clerk (via electronic filing)
TCEQ Chief Clerk (via electronic filing)
DHJB Development, LLC c/o Charlie Hill
Johnson Ranch MUD, c/o Phil Haag

SERVICE LIST
SOAH DOCKET NO. 582-14-3427
TCEQ DOCKET NO. 2013-2228-MWD

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JRMUD

Redline

TEXAS COMMISSION ON



ENVIRONMENTAL QUALITY

**ORDER GRANTING CONCERNING THE APPLICATION BY
DHJB DEVELOPMENT, LLC FOR AN AMENDMENT TO
TEXAS POLLUTANT DISCHARGE ELIMINATION SYSTEM (TPDES)
PERMIT NO. WQ0014975001**

On July ____, 2015, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the application of DHJB Development, LLC (DHJB or Applicant) to amend Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014975001 to authorize the for a permit to discharge of treated wastewater effluent at an average daily flow not to exceed 350,000 gallons per day in the final phase in Comal County, Texas. Sarah G. Ramos, Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), presented a Proposal for Decision (PFD). The Commission also considered timely public comments and the Executive Director's Response to Comments; the record; and timely related filings, including exceptions and replies.

The following are parties to the proceeding: Applicant; Johnson Ranch Municipal Utility District (Johnson Ranch MUD); Patricia Graham, Terrell Graham, Margie Hastings, Asa Dunn, and the Greater Edwards Aquifer Alliance (Protestants); the Executive Director (ED); and the Office of Public Interest Counsel (OPIC).

After considering the PFD, the Commission makes the following Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

Procedural History

1. On August 20, 2012, Applicant applied to TCEQ to amend its Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014975001.
2. TCEQ's ED received the permit application on September 24, 2012, and declared it administratively complete on November 7, 2012.
3. The Notice of Receipt of Application and Intent to Obtain a Water Quality Permit (NORI) was published on November 21, 2012 in the *New Braunfels Herald-Zeitung*.
4. The application was declared technically complete on May 2, 2013.
5. The Notice of Application and Preliminary Decision (NAPD) was published on May 17, 2013 in the *New Braunfels Herald-Zeitung*.
6. The combined Spanish language NORI/NAPD was published in the *La Voz* newspaper on August 30, 2013.
7. The public comment period ended on September 30, 2013.
8. The ED's Final Decision Letter and Response to Comments was mailed on November 21, 2013.
9. The hearing request period ended on December 23, 2013.
10. Patricia Graham timely requested a hearing.
11. By Interim Order dated April 21, 2014, TCEQ referred the application to SOAH to consider four issues:
 - Whether the proposed permit will adversely impact use and enjoyment of adjacent and downstream property or create nuisance conditions;
 - Whether the discharge route has been properly characterized;
 - Whether the proposed permit complies with TCEQ siting regulations found in 30 Texas Administrative Code (TAC) Chapter 309; and
 - Whether the treated effluent will adversely impact the cattle that currently graze in the area.
12. TCEQ's Chief Clerk certified that the Notice of Hearing was mailed on June 26, 2014 to the individuals on the mailing list maintained by the Chief Clerk for this matter.

13. The notice stated the time, date, and place of the hearing; the legal authority and jurisdiction under which the hearing was to be held; the particular sections of the statutes and rules involved; and the matters asserted.
14. The Notice of Hearing was published in the *New Braunfels Herald-Zeitung* on July 1, 2014.
15. At the preliminary hearing held on August 19, 2014, Terrell Graham, Patricia Graham, Margie Hastings, Asa Dunn, and the Greater Edwards Aquifer Alliance requested and were granted party status opposing the permit; Johnson Ranch MUD was granted party status and was aligned with DHJB.
16. Ms. Graham, Ms. Hastings, and Mr. Dunn own property that is adjacent on the east or downstream of the proposed discharge route where effluent would flow.
17. The Greater Edwards Aquifer Alliance is a 501(c)(3) nonprofit corporation.
18. The hearing on the merits, held at the SOAH offices at the William Clements Building, 300 West 15th Street, Austin, Texas 78701, began November 17, 2014, and concluded November 19, 2014.

Requested Permit

19. Applicant currently possesses TPDES Permit No. WQ0014975001 authorizing disposal of 75,000 gallons per day (.0075 MGD) of treated effluent by subsurface drip irrigation in its final phase.
- 19-20. Applicant applied to TCEQ for a major amendment to its Permit No. WQ0014975001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 75,000 gallons per day to a daily average flow not to exceed 350,000 gallons per day (GPD).
- 20-21. The major amendment would convert the existing permit from authorizing Applicant to dispose of treated effluent via subsurface drip irrigation under a Texas Land Application Permit (TLAP) to authorizing Applicant to dispose of treated effluent via discharge into water in the state via a TPDES permit.
- 21-22. The TLAP permit authorizes the disposal of treated domestic wastewater via a public access subsurface drip irrigation system with a minimum area of 750,000 square feet.
- 22-23. This permit amendment would not continue the authorization for Applicant to use a subsurface drip irrigation system.

- ~~23:24.~~ Applicant currently collects wastewater at its wastewater treatment plant site and has the same hauled off-site by an authorized “pump and haul” operator for disposal of wastewater.
- ~~24:25.~~ A TPDES permit would authorize a wastewater discharge from a treatment plant that will be an activated sludge process plant operated with extended aeration.
- ~~25:26.~~ The wastewater treatment facility is located approximately 0.7 mile north of Farm-to-Market Road 1863 and 0.5 mile east of U.S. Highway 281 in Comal County, Texas 78163.
- ~~26:27.~~ Applicant intends for the plant to serve residential customers at a residential subdivision being developed by Applicant on approximately 470 acres.
- ~~28.~~ The parties referred to the proposed subdivision as Johnson Ranch.
- ~~27.~~ _____
- ~~28:29.~~ Applicant proposes to discharge the treated effluent at an outfall location on Applicant’s property into ~~what Applicant described as~~ an unnamed tributary of Cibolo Creek.
- ~~29:30.~~ Johnson Ranch overlies the Edwards Aquifer contributing zone, except for the southern 50 acres which overlie the Edwards Aquifer recharge zone.
- ~~31.~~ The proposed water treatment plant site is located only on the Edwards Aquifer contributing zone, not the recharge zone.
- ~~32.~~ The Outfall from the proposed water treatment plant site would be over the Edwards Aquifer contributing zone.
- ~~33.~~ The discharge route from the outfall at DHJB Development, LLC's wastewater treatment plant site, as described in the Application, will run through Applicant's property across the Contributing Zone and over the Recharge Zone of the Edwards Aquifer in an unnamed tributary of Cibolo Creek. That unnamed tributary of Cibolo Creek will continue downstream in route to Cibolo Creek, a tributary of the San Antonio River Basin, through the property of two of the Protestants, Patricia Lux Graham and Margie Hastings.
- ~~30:34.~~ The distance from the discharge point to the boundary of the mapped Edwards Aquifer recharge zone is less than 565 feet.
- ~~31:35.~~ A portion of the discharge route in the unnamed tributary of Cibolo Creek on the Johnson Ranch is in the Edwards Aquifer recharge zone.

~~32-36.~~ The entire portion of the discharge route in the unnamed tributary of Cibolo Creek crossing through ~~on~~ the Graham-Hastings-Dunn properties is in the Edwards Aquifer recharge zone.

Impact on Protestants' Property

~~33-37.~~ The distance along the unnamed tributary of Cibolo Creek from the discharge point to the Graham-Hastings property is approximately 1,900 feet (about 0.4 miles).

~~34-38.~~ The distance along the unnamed tributary of Cibolo Creek from the discharge point to Cibolo Creek is approximately 0.8 miles.

~~35-39.~~ If the effluent is discharged into the unnamed tributary of Cibolo Creek at the rate of 350,000 GPD, or even at some lesser levels, the effluent could will reach the Graham-Hastings property.

~~36-40.~~ Discharged effluent from the proposed facility into the unnamed tributary of Cibolo Creek will moisten or saturate soils on Protestants' property.

~~37.~~ The moistened soils will inhibit vegetative growth on Protestants' property.

~~38.~~ The flow of effluent will increase the potential for exposed soils to erode.

~~39.~~ Applicant has concretized a channel it plans to use for the discharge of effluent, and the channel is aimed directly at and very near to Ms. Graham's property line.

~~40.~~ Erosion on the Graham-Hastings property will cause the loss of pastureland used for cattle grazing.

~~41.~~ Erosion on the Graham-Hastings property will impact the Grahams' use and enjoyment of the property.

~~42.~~ If the TPDES permit is issued, the effluent discharge will diminish Protestants' opportunities to walk along their property and to eat the wild fruits that grow there.

~~43.~~ Access by the Grahams and Ms. Hastings to their western property line to repair fences and address other property management issues will be made more difficult because of the presence of discharged effluent.

~~44.~~ A TPDES permit will impair the Protestants' access to and enjoyment of the western portion of their property.

Buffer Zones

~~45-41.~~ Applicant's wastewater treatment plant site and all wastewater treatment plant units will be more than 150 feet from the nearest property line.

- | 46.42. The wastewater treatment plant unit will be protected from inundation and damage during a flood event.
- | 47.43. The wastewater treatment plan unit will not be located in wetlands.
- | 48.44. The wastewater treatment plant unit will not be located within 500 feet of any public water supply well.
- | 49.45. The wastewater treatment plant unit will not be located within 250 feet of any private water well.

Effluent Limits

- | 50.46. The proposed discharge outfall is within 0 and 5 miles of the Edwards Aquifer recharge zone. Accordingly, the effluent limits of 30 TAC § 213.6(c)(1) apply.
- | 51.47. The proposed effluent limits for any permit based on a 30-day average would be: 5 milligrams per liter (mg/l) 5-day carbonaceous biochemical oxygen demand (CBOD5), 5 mg/l total suspended solids (TSS), 2 mg/l ammonia nitrogen (NH3-N), 0.5 mg/l total phosphorus, 126 *E. coli* colony forming units (CFU) or most probable number per 100 ml, and 4.0 mg/l minimum dissolved oxygen.
- | 52.48. The proposed limit for total phosphorus is more stringent than the standard TPDES permit effluent limits for domestic wastewater treatment plants in both Segment No. 1908 of the Upper Cibolo Creek and on the contributing zone of the Edwards Aquifer, which is where the plant will be located.
- | 53.49. The effluent must contain a chlorine residual of at least 1.0 mg/l, and not more than 4.0 mg/l, after a detention time of at least 20 minutes based on peak flow.
- | 54.50. The pH limit for the TPDES permit is 6-9.

Surface Water Quality Standards

- | 55.51. The applicable water quality standards are the Texas Surface Water Quality Standards (TSWQS) in Chapter 307 of TCEQ's rules. The TSWQS apply to surface water in the state and are set by the Commission at levels designed to be protective of public health, aquatic resources, terrestrial life, and other environmental and economic resources, as well and are supplemented by the applicable Commission rules protecting the Edwards Aquifer in the Contributing Zone and Recharge Zone published in 30 TAC Ch. 213 (the "Edwards Rules").
- | 52. The TSWQS consist of general standards, narrative standards, surface water segment-specific numeric standards, numeric standards for toxic substances, and antidegradation

review. The Edwards Rules consist of general standards, narrative standards, and numeric standards presented as minimum acceptable criteria to prevent antidegradation.

53. The TSWQS establish specific uses for each classified water body in the state and also provide numeric criteria for each classified stream.

56-54. The TSWQS for an intermittent stream are more stringent and protective than effluent standards for a dry creek or watercourse with no flow.

57-55. Pursuant to the Texas Surface Water Quality Standards (TSWQS), the specified uses for any unassigned tributary of Cibolo Creek (Segment 1908) include contact recreation, high aquatic life use, public drinking water supply, and aquifer protection.

58-56. To protect and maintain a stream's high aquatic life use, TCEQ evaluates a discharge's effect on the dissolved oxygen in the receiving stream.

59-57. The dissolved oxygen criterion for the unnamed tributary of Cibolo Creek is 5.0 mg/l.

60-58. The proposed effluent limits of 5.0 mg/l CBOD5, 2.0 mg/l NH3-N, and 4.0 mg/l minimum dissolved oxygen are adequate to ensure that the dissolved oxygen level in the receiving stream will be maintained above the 5.0 mg/l criterion and, therefore, aquatic life use will be maintained and protected.

61-59. The proposed discharge will not violate the dissolved oxygen standards for a tributary of Cibolo Creek.

62-60. Compliance with the recreational use standard in the TSWQS is evaluated solely through application of the bacteria standard.

63-61. For freshwater, the geometric mean of *E. coli* should not exceed 126 CFUs per 100 milliliters of water, which is the same as the specific numeric criteria for unnamed tributaries of Cibolo Creek.

64-62. The bacteria limits in the ED's proposed draft permit are the same as those in the TSWQS for the unnamed tributary of Cibolo Creek (Segment 1908).

65-63. For stream segments that are classified as a public water supply, TCEQ evaluates the presence of toxic materials and evaluates the discharge to ensure that it will not prevent a public water supplier from treating the surface water through conventional treatment methods to drinking water standards.

66-64. The TSWQS establish numeric criteria for toxic materials, and those criteria apply regardless of whether they are in the permit.

67-65. Applicant's proposed discharge does not require inclusion of specific effluent limits on toxic materials because its proposed permitted average flow would be less than one

million gallons per day (MGD), it will not have an approved pretreatment program, it is not an industrial facility, it will serve residential customers, and it will not likely have any industrial facilities discharging into the proposed plant.

~~68-66.~~ Applicant must provide notice to the ED if there is a substantial change in the volume or character of the wastewater, including the introduction of toxic materials by an industrial user of Applicant's plant.

~~69-67.~~ The proposed discharge meets both the TSWQS and the Edwards Aquifer Rules necessary to maintain the public water supply use, contact recreation, aquatic life, and the toxic pollutant numeric criteria, and provide for aquifer protection.

~~70-68.~~ All TPDES permits must be reviewed for compliance with the TSQWS antidegradation policy.

~~71-69.~~ Tier 1 of an antidegradation review confirms that the effluent quality is consistent with the designated uses of the receiving stream segment and that no in-stream surface water quality standards (either numeric or narrative) will be exceeded.

~~72-70.~~ A Tier 2 review is conducted on waterbodies with intermediate, high, or exceptional aquatic life uses to ensure that the water quality will not be diminished.

~~73-71.~~ A Tier 1 and Tier 2 antidegradation review found that no significant degradation of water quality is expected in the receiving water and that the existing uses will be maintained and protected.

~~72.~~ The proposed discharge would not impact Cibolo Creek's ability to meet the TSWQS.

~~73.~~ The proposed discharges are within 0 and 5 miles of the Edwards Aquifer Recharge Zone. Accordingly, the effluent limits of 30 TAC § 213.6(c)(1) apply. The effluent limits of 30 TAC § 213.6(c)(1) apply.

~~74.~~ The effluent limits of 30 TAC § 213.6(c)(1) are as follows: 5 mg/L 5-day carbonaceous biochemical oxygen demand (CBOD5), 5 mg/L total suspended solid (TSS), 2 mg/L ammonia nitrogen (NH3-N), 0.5 mg/L total phosphorus.

~~75.~~ The phosphorous limit in 30 TAC § 213.6(c)(1) is 1 mg/L.

~~75-76.~~ The Applicant has requested, and the Executive Director has proposed a more stringent phosphorous limit of 0.5 mg/L in the proposed Permit.

Bacteria and Chlorine

~~76-77.~~ To meet the bacteria limits for the proposed plant, Applicant will disinfect the effluent using chlorination and will expose the effluent to the chlorine for at least 20 minutes.

~~77.78.~~ With the proper dosage of chlorine for the proper detention time, the bacteria levels will be reduced to levels that comply with TCEQ requirements.

~~78.79.~~ Applicant must monitor the chlorine residual levels five times per week by grab sample and monitor the bacteria levels once a week by grab sample.

~~79.80.~~ Applicant must submit plans, specifications, and a final engineering design report to TCEQ for review and approval to ensure that the facility is designed to meet the permitted limits, including disinfection requirements and the bacteria limits.

~~80.81.~~ The proposed discharge would not contribute excess bacteria to Cibolo Creek.

~~82.~~ The proposed discharge will not impact the unnamed tributary of Cibolo Creek's ability to maintain its contact recreation use.

~~83.~~ The proposed discharge would not contribute excess bacteria to Cibolo Creek.

~~84.~~ The proposed permit will not adversely impact the use and enjoyment of any adjacent and/or downstream property or create nuisance conditions.

~~85.~~ The discharge route in the unnamed tributary of Cibolo Creek in the proposed permit has been properly characterized.

~~86.~~ The proposed permit complies with the TCEQ siting regulations found in 30 TAC Chapter 309.

~~87.~~ The treated effluent will not adversely impact cattle that currently graze in the area

~~81-88.~~ The proposed discharge will not impact waters of the state.

Additional Public Use and Enjoyment Issues

~~82.~~ When children play in and around the discharge route, the children will be exposed to effluent by direct contact.

~~83-89.~~ There was no evidence that undiluted, treated effluent discharged at the levels in the proposed TPDES permit would be safe for children who come into direct contact with it as prescribed by the TSWQS effluent criteria and uses for a tributary of Cibolo Creek (Segment 1908).

~~90.~~ Ms. Graham, Ms. Hastings, and Mr. Dunn currently lease their property to a rancher for cattle ranching.

~~84.~~

~~91.~~ Approximately twenty head of cattle are ranched on the property.

~~92. Treated effluent discharged at the levels in the proposed TPDES permit would be safe for cattle that come into direct contact with it as prescribed by the TSWQS effluent criteria and uses for a tributary of Cibolo Creek (Segment 1908).~~

~~85.~~

~~86. The discharge route is the only source of shade in the pasture on the Graham-Hastings property.~~

~~87. The cattle seek shade from the sun and protection from colder winds along the proposed discharge route.~~

~~88. The discharged effluent will become a new source of water for the cattle to drink.~~

~~89. Cattle will drink water that is available to them, regardless of its source.~~

~~90. Cattle need clean, high-quality water for healthy growth and good weight gain.~~

Discharge Would ~~Not~~ Be to Water in the State

~~91.93. Small ~~Several~~ portions of the discharge route in the unnamed tributary of Cibolo Creek on Johnson Ranch before it reaches the property line shared with the Protestants does not have well-defined beds and banks.~~

~~Prior to construction on the Johnson Ranch property, the outfall location did not have the beds or banks of a channel.~~

~~92.94. No aquatic resources on the Johnson Ranch are permanent.~~

~~93.95. What a recent United States Geological Services map shows an unnamed tributary of Cibolo Creek as a broken line and dots, ~~which some witnesses described as an unnamed tributary of Cibolo Creek, is significantly interrupted in several places.~~~~

~~94. The connectivity of the discharge route is completely severed at several places.~~

~~95.96. The discharge route is dry under normal conditions, but has a regular flow and route during rainfall events and for short duration thereafter.~~

~~97. The ~~A~~ grassy swale in the unnamed tributary of Cibolo Creek ~~at~~near the property line between Applicant and Protestants' properties has native grasses growing in it.~~

~~98. Aquatic resources on the Johnson Ranch include ephemeral watercourses, an artificial waterbody, upland vegetates swales, and areas of diffuse surface drainage, as well as the unnamed tributary of Cibolo Creek that is the proposed discharge route.~~

~~99. The discharge route from the point of discharge at the Applicant's outfall in the proposed Permit and continuing across Applicant's property in the unnamed tributary of Cibolo Creek is a watercourse.~~

~~96.100.~~ From and beyond the Applicant's property line on Johnson Ranch where the unnamed tributary of Cibolo Creek continues to flow into the Graham property and continuing through Ms. Hastings' property and continuing to Cibolo Creek, the unnamed tributary of Cibolo Creek is a watercourse with defined bed and banks.

~~97.~~ The portion of the discharge route on the Graham property is best characterized as a swale with smooth banks and is one of the areas where cattle graze.

~~98.~~ Grasses and some wild plum trees grow along the southern portion of Protestants' property where effluent would flow.

~~99.~~ On the southern end on Ms. Hastings' property, the soil is relatively flat, and there is no regular flow of water.

Transcript Costs

~~100.~~ 101. The cost for recording and transcribing the hearing on the merits by a court reporter and producing transcripts for Applicant, the ALJ, and the Commission totaled \$4,931.40.

~~101.~~ 102. Johnson Ranch MUD is a municipal utility district, a governmental entity with limited resources.

~~102.~~ 103. Applicant is a residential development company, Protestants are individual landowners, and the Greater Edwards Aquifer Alliance is a 501(c)(3) nonprofit corporation.

~~103.~~ 104. Protestants ordered a copy of the transcript for which they paid \$1,000.

~~104.~~ 105. Applicant had the burden of proof and benefitted the most from having the ability to cite to the transcript.

~~105.~~ A favorable ruling for Protestants on the application will mean that Protestants may return to life without the discharge requested. A favorable ruling for Applicant would provide the significant financial benefit of having a permit to operate its facility.

106. Except for the copy of the transcript ordered by Protestants, Applicant should pay court reporting and transcription costs.

II. CONCLUSIONS OF LAW

~~1.~~ 1. The Commission has jurisdiction over water quality to issue TPDES Permit No. WQ0014975001 under TEX. WATER CODE §§ 5.013, 26.003, 26.011, and 26.027

~~2.~~ 2. The Commission has jurisdiction over this matter. Texas Water Code chs. 5 and 26.

- ~~2.3.~~ SOAH has jurisdiction over this hearing process and the authority to issue a proposal for decision with findings of fact and conclusions of law. Texas Water Code §§ 5.311 and 26.021; Texas Gov't Code ch. 2003.
- ~~3.4.~~ Under 30 TAC § 80.17(a), Applicant has the burden of proof, by a preponderance of the evidence, on the referred issues.
- ~~4.5.~~ After final review under 30 TAC ch. 217, the Design Criteria for Domestic Wastewater Systems, the application will comply with TCEQ's regulations regarding Domestic Wastewater Effluent Limitation and Plant Siting at 30 TAC ch. 309.
- ~~5.6.~~ Pursuant to 30 TAC § 307.1, it is the policy of this state and the purpose of Chapter 307 to maintain the quality of water in the state consistent with, among other things, public health and enjoyment and protection of terrestrial life. All reasonable methods are to be used to implement this policy.
- ~~6.7.~~ The toxic criteria in the TSWQS apply to surface water in the state and specifically apply to substances attributed to waste discharges or human activity. 30 TAC § §307.6.
- ~~8.~~ In accordance with TCEQ's regulations implementing the TSWQS at 30 TEX. ADMIN. CODE Chapter 307, Applicant's discharge under the terms of the proposed permit will comply with the general criteria, antidegradation policy, toxic material provisions, and site-specific uses and criteria
- ~~7.9.~~ In accordance with TCEQ's regulations regarding the Edwards Aquifer at 30 TEX. ADMIN. CODE Chapter 213, Applicant's discharge under the terms of the proposed permit will comply with the general criteria, antidegradation policy, applicable aquifer protection requirements and site-specific uses and criteria relating the Contributing Zone and Recharge Zone of the Edwards Aquifer
- ~~8.10.~~ Water in the state includes, in part, groundwater, streams, creeks, natural or artificial, and including the beds and banks of all watercourses and bodies of surface water, that are wholly or partially inside or bordering the state or inside the jurisdiction of the state. Texas Water Code § 26.001(5).
- ~~9.11.~~ The discharge route in the proposed permit has ~~not~~ been properly characterized as water in the state.
- ~~10.12.~~ ~~Even though t~~The discharged effluent would comply with the limits for toxins established by the TSWQS, 30 TAC ch. 307, ~~the treated effluent will not be mixed with any existing water in the state and will thus be undiluted.~~
- ~~11.13.~~ Applicant ~~failed to meet~~met its burden of proving the permit would not impair the use and enjoyment of the Protestants' Graham-Hastings-Dunn properties, including in regard to children coming into direct contact with it. 30 TAC § 307.1.

~~12.14.~~ Applicant ~~failed to meet~~ its burden of proving the permit would not impair the use and enjoyment of the Protestants' Graham-Hastings-Dunn properties, including in regard to cattle that will consume undiluted treated effluent. 30 TAC § 307.1.

15. Allocating court reporting and transcription costs of \$3,931.40 to Applicant and \$1,000.00 to Protestants is a reasonable allocation of costs under the factors set forth in 30 TAC § 80.23(d).

EXPLANATION OF CHANGES TO ALJ'S ORDER

During its July 1, 2015 Agenda Meeting, the Commission heard arguments from the parties related to issues with the ALJ's Proposal for Decision. Having heard the comments from the parties and having reviewed the Exceptions and Replies to Exceptions to the Proposal for Decision from the Parties, the Commission found certain improper Findings of Fact and Conclusions of Law in the Proposal for Decision. Pursuant to §2001.058 of the Administrative Procedure Act, a state agency may change a finding of fact or conclusion of law made by an administrative law judge if it is determined 1) the ALJ did not properly apply or interpret applicable law, agency rules, policies, or prior administrative decision; 2) a prior administrative decision the ALJ relied on is incorrect or should be changed; or 3) that a technical error in a finding of fact should be changed. Pursuant to §2001.058, the Commission made the changes to the Proposal for Decision for the following reasons:

The Commission is limited in what can be considered when reviewing a TPDES permit like the Applicant has brought here. Texas Water Code §5.013 and §5.102 limit the Commission's consideration to those issues within its jurisdiction as prescribed by Chapter 26 of the Texas Water Code. Issues related to erosion and flooding addressed by the ALJ are outside of the bounds of the Commission's jurisdiction, and it would be inappropriate for the Commission to make findings on those issues.

Having reviewed the ALJ's Proposal for Decision, the record, the pleadings from the parties, and the applicable regulations, it is evident that the ALJ misapplied or misinterpreted the law, Commission Rules, and longstanding TCEQ policies. Specifically, the ALJ improperly applied TCEQ policy, relevant rules, and the law related to the determinations that the proposed permit would not be protective of children or cattle coming into contact with, or ingesting the effluent. The ALJ also improperly applied TCEQ policy, relevant rules, and the law with regard to the implementation of the TPDES program and implementing the procedures found in 30 TAC Chapter 307 related to implementation of the TSWQS. The record further establishes that the unclassified receiving waters are properly designated as being an intermittent watercourse with perennial pools in accordance with TCEQ rules found in Chapter 307. This designation presumes a limited aquatic life use, which includes primary contact recreation, and indicates that the expectation for activities in those waters involves a significant risk of ingestion, including wading by children. TSWQS standards adopted for this designation for the unnamed tributary of Cibolo Creek (Segment 1908) are protective of these interests and activities.

13. The fact that the unclassified receiving waters are often dry is not unusual, and is inherent in the designation of the receiving waters as intermittent with perennial pools. The designation as “including perennial pools” actually results in more stringent effluent limits being applicable. The effluent limits in the draft permit contained in the proposed permit are also more stringent than those required in 30 TAC Chapter 213 for discharges within 0 to 5 miles of the Edwards Aquifer. The record includes expert testimony that protectiveness of terrestrial and aquatic life is presumed in setting the TSWQS as stated in 30 TAC Section 307.1. There is no significant evidence contravening the Applicant showing that existing uses will be protected, including livestock. Further, there is not significant evidence in the record contravening the evidence establishing that the proposed effluent limits are protective of the designated uses of the receiving waters and that those designations were properly established through determination of the appropriate uses and criteria of the receiving waters, application of the TSWQS performance of Tier 1 and Tier 2 anti-degradation reviews, and QualTex modeling and nutrient screening.

Further, the Applicant met its burden to prove by a preponderance of the evidence that the characterization of the discharge route is correct as being waters of the state. In looking at the applicable case law, specifically the *Hoefs*, *Big Lake* and *Domel* decisions, as well as the evidence and testimony presented in the hearing by the Executive Director's expert witness, Ms. Lee, both based on her original characterization of the watercourse and her on the ground inspection of the discharge route which included her walking the watercourse itself, the ALJ improperly held that the discharge route was improperly characterized. See *Hoefs v. Short*, 273 S.W. 785, 787 (Tex. 1925); *Turner v. Big Lake Oil Co.*, 62 S.W.2d 491 (Tex. Civ. App. – El Paso 1933), *aff'd*, 96 S.W.2d 221 (Tex. 1936); *Domel v. Georgetown*, 6 S.W.3d 349, 358-59 (Tex. App. – Austin 1999, *pet. denied*).

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. The ALJ's Proposal for Decision, including the amended proposed Order with Findings and Conclusions, in part, contained errors of law based upon the ALJ's application and/or misinterpretation of applicable law, TCEQ rules and long standing policies which have been corrected pursuant to Section 2001.058, Tex. Gov't Code.
2. Pursuant to the law applicable to a TPDES permit the Applicant met its burden of proving the permit will not impair the use and enjoyment of adjacent and downstream property, including Protestants Graham-Hastings-Dunne property, pursuant to 30 TAC 307.1 or create nuisance conditions.
3. In accordance with TCEQ's regulations implementing the Texas Surface Water Quality Standards at 30 TAC Ch 307, the discharge under the terms of the Permit will comply with all of the general criteria, anti-degradation policy, toxic material provisions, and site specific uses and criteria.

4. Pursuant to the law applicable to a TPDES permit the Applicant met its burden of proving the Permit will not adversely impact the cattle that graze in that area.
5. Pursuant to the law applicable to a TPDES permit the discharge route has been properly characterized as waters of the state.
- ~~4.6.~~ Issues outside of the Commission's jurisdiction in this matter addressed in the ALJ's PFD, such as erosion, stormwater, and property access, are superfluous to the Commission's decision and should not be included in the order.
7. The application of DHJB Development, LLC for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014975001 is ~~denied~~granted.
- ~~2.8.~~ In accordance with 30 TEX. ADMIN. CODE § 50.117, the Commission issues this Order and the attached permit as its single decision on the permit application. Information in the agency record of this matter, which includes evidence admitted at the hearing and part of the evidentiary record, documents the Executive Director's review of the permit application, including that part not subject to a contested case hearing, and establishes that the terms of the attached permit (Exhibit A) are appropriate and satisfy all applicable federal and state requirements.
- ~~3.~~ In accordance with 30 TAC § 50.117, the Commission issues this Order as its single decision on the permit application. Information in the agency record of this matter, which includes evidence admitted at the hearing and part of the evidentiary record, documents the ED's review of the permit application, including that part not subject to a contested case hearing.
83. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
94. The effective date of this Order is the date the Order is final, as provided by Tex. Gov't Code § 2001.144 and 30 TAC § 80.273.
105. The Commission's Chief Clerk shall forward a copy of this Order to all parties.
116. If any provision, sentence, clause, or phase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Bryan W. Shaw, Ph.D., Chairman

Clean

TEXAS COMMISSION ON



ENVIRONMENTAL QUALITY

**ORDER GRANTING THE APPLICATION BY
DHJB DEVELOPMENT, LLC FOR AN AMENDMENT TO
TEXAS POLLUTANT DISCHARGE ELIMINATION SYSTEM (TPDES)
PERMIT NO. WQ0014975001**

On July ____, 2015, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the application of DHJB Development, LLC (DHJB or Applicant) to amend Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014975001 to authorize the discharge of treated wastewater effluent at an average daily flow not to exceed 350,000 gallons per day in the final phase in Comal County, Texas. Sarah G. Ramos, Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), presented a Proposal for Decision (PFD). The Commission also considered timely public comments and the Executive Director's Response to Comments; the record; and timely related filings, including exceptions and replies.

The following are parties to the proceeding: Applicant; Johnson Ranch Municipal Utility District (Johnson Ranch MUD); Patricia Graham, Terrell Graham, Margie Hastings, Asa Dunn, and the Greater Edwards Aquifer Alliance (Protestants); the Executive Director (ED); and the Office of Public Interest Counsel (OPIC).

After considering the PFD, the Commission makes the following Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

Procedural History

1. On August 20, 2012, Applicant applied to TCEQ to amend its Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014975001.
2. TCEQ's ED received the permit application on September 24, 2012, and declared it administratively complete on November 7, 2012.
3. The Notice of Receipt of Application and Intent to Obtain a Water Quality Permit (NORI) was published on November 21, 2012 in the *New Braunfels Herald-Zeitung*.
4. The application was declared technically complete on May 2, 2013.
5. The Notice of Application and Preliminary Decision (NAPD) was published on May 17, 2013 in the *New Braunfels Herald-Zeitung*.
6. The combined Spanish language NORI/NAPD was published in the *La Voz* newspaper on August 30, 2013.
7. The public comment period ended on September 30, 2013.
8. The ED's Final Decision Letter and Response to Comments was mailed on November 21, 2013.
9. The hearing request period ended on December 23, 2013.
10. Patricia Graham timely requested a hearing.
11. By Interim Order dated April 21, 2014, TCEQ referred the application to SOAH to consider four issues:
 - Whether the proposed permit will adversely impact use and enjoyment of adjacent and downstream property or create nuisance conditions;
 - Whether the discharge route has been properly characterized;
 - Whether the proposed permit complies with TCEQ siting regulations found in 30 Texas Administrative Code (TAC) Chapter 309; and
 - Whether the treated effluent will adversely impact the cattle that currently graze in the area.
12. TCEQ's Chief Clerk certified that the Notice of Hearing was mailed on June 26, 2014 to the individuals on the mailing list maintained by the Chief Clerk for this matter.

13. The notice stated the time, date, and place of the hearing; the legal authority and jurisdiction under which the hearing was to be held; the particular sections of the statutes and rules involved; and the matters asserted.
14. The Notice of Hearing was published in the *New Braunfels Herald-Zeitung* on July 1, 2014.
15. At the preliminary hearing held on August 19, 2014, Terrell Graham, Patricia Graham, Margie Hastings, Asa Dunn, and the Greater Edwards Aquifer Alliance requested and were granted party status opposing the permit; Johnson Ranch MUD was granted party status and was aligned with DHJB.
16. Ms. Graham, Ms. Hastings, and Mr. Dunn own property that is adjacent on the east or downstream of the proposed discharge route where effluent would flow.
17. The Greater Edwards Aquifer Alliance is a 501(c)(3) nonprofit corporation.
18. The hearing on the merits, held at the SOAH offices at the William Clements Building, 300 West 15th Street, Austin, Texas 78701, began November 17, 2014, and concluded November 19, 2014.

Requested Permit

19. Applicant currently possesses TPDES Permit No. WQ0014975001 authorizing disposal of 75,000 gallons per day (.0075 MGD) of treated effluent by subsurface drip irrigation in its final phase.
20. Applicant applied to TCEQ for a major amendment to its Permit No. WQ0014975001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 75,000 gallons per day to a daily average flow not to exceed 350,000 gallons per day (GPD).
21. The major amendment would convert the existing permit from authorizing Applicant to dispose of treated effluent via subsurface drip irrigation under a Texas Land Application Permit (TLAP) to authorizing Applicant to dispose of treated effluent via discharge into water in the state via a TPDES permit.
22. The TLAP permit authorizes the disposal of treated domestic wastewater via a public access subsurface drip irrigation system with a minimum area of 750,000 square feet.
23. This permit amendment would not continue the authorization for Applicant to use a subsurface drip irrigation system.

**DHJBs Proposed Final Order w/ FOFs-COLs
Redline of ALJ's Proposed Amended Order
Subject to Revision – 7-15-15**

24. Applicant currently collects wastewater at its wastewater treatment plant site and has the same hauled off-site by an authorized “pump and haul” operator for disposal of wastewater.
25. A TPDES permit would authorize a wastewater discharge from a treatment plant that will be an activated sludge process plant operated with extended aeration.
26. The wastewater treatment facility is located approximately 0.7 mile north of Farm-to-Market Road 1863 and 0.5 mile east of U.S. Highway 281 in Comal County, Texas 78163.
27. Applicant intends for the plant to serve residential customers at a residential subdivision being developed by Applicant on approximately 470 acres.
28. The parties referred to the proposed subdivision as Johnson Ranch.
29. Applicant proposes to discharge the treated effluent at an outfall location on Applicant’s property into an unnamed tributary of Cibolo Creek.
30. Johnson Ranch overlies the Edwards Aquifer contributing zone, except for the southern 50 acres which overlie the Edwards Aquifer recharge zone.
31. The proposed water treatment plant site is located only on the Edwards Aquifer contributing zone, not the recharge zone.
32. The outfall from the proposed water treatment plant site would be over the Edwards Aquifer contributing zone.
33. The discharge route from the outfall at DHJB Development, LLC's wastewater treatment plant site, as described in the Application, will run through Applicant's property across the Contributing Zone and over the Recharge Zone of the Edwards Aquifer in an unnamed tributary of Cibolo Creek. That unnamed tributary of Cibolo Creek will continue downstream in route to Cibolo Creek, a tributary of the San Antonio River Basin, through the property of two of the Protestants, Patricia Lux Graham and Margie Hastings.
34. The distance from the discharge point to the boundary of the mapped Edwards Aquifer recharge zone is less than 565 feet.
35. A portion of the discharge route in the unnamed tributary of Cibolo Creek on the Johnson Ranch is in the Edwards Aquifer recharge zone.
36. The entire portion of the discharge route in the unnamed tributary of Cibolo Creek crossing through the Graham-Hastings-Dunn properties is in the Edwards Aquifer recharge zone.

Impact on Protestants' Property

37. The distance along the unnamed tributary of Cibolo Creek from the discharge point to the Graham-Hastings property is approximately 1,900 feet (about 0.4 miles).
38. The distance along the unnamed tributary of Cibolo Creek from the discharge point to Cibolo Creek is approximately 0.8 miles.
39. If the effluent is discharged into the unnamed tributary of Cibolo Creek at the rate of 350,000 GPD, or even at some lesser levels, the effluent could reach the Graham-Hastings property.
40. Discharged effluent from the proposed facility into the unnamed tributary of Cibolo Creek will moisten or saturate soils.

Buffer Zones

41. Applicant's wastewater treatment plant site and all wastewater treatment plant units will be more than 150 feet from the nearest property line.
42. The wastewater treatment plant unit will be protected from inundation and damage during a flood event.
43. The wastewater treatment plant unit will not be located in wetlands.
44. The wastewater treatment plant unit will not be located within 500 feet of any public water supply well.
45. The wastewater treatment plant unit will not be located within 250 feet of any private water well.

Effluent Limits

46. The proposed discharge outfall is within 0 and 5 miles of the Edwards Aquifer recharge zone. Accordingly, the effluent limits of 30 TAC § 213.6(c)(1) apply.
47. The proposed effluent limits for any permit based on a 30-day average would be: 5 milligrams per liter (mg/l) 5-day carbonaceous biochemical oxygen demand (CBOD₅), 5 mg/l total suspended solids (TSS), 2 mg/l ammonia nitrogen (NH₃-N), 0.5 mg/l total phosphorus, 126 *E. coli* colony forming units (CFU) or most probable number per 100 ml, and 4.0 mg/l minimum dissolved oxygen.
48. The proposed limit for total phosphorus is more stringent than the standard TPDES permit effluent limits for domestic wastewater treatment plants in both Segment No. 1908

of the Upper Cibolo Creek and on the contributing zone of the Edwards Aquifer, which is where the plant will be located.

49. The effluent must contain a chlorine residual of at least 1.0 mg/l, and not more than 4.0 mg/l, after a detention time of at least 20 minutes based on peak flow.
50. The pH limit for the TPDES permit is 6-9.

Surface Water Quality Standards

51. The applicable water quality standards are the Texas Surface Water Quality Standards (TSWQS) in Chapter 307 of TCEQ's rules. The TSWQS apply to surface water in the state and are set by the Commission at levels designed to be protective of public health, aquatic resources, terrestrial life, and other environmental and economic resources, as well and are supplemented by the applicable Commission rules protecting the Edwards Aquifer in the Contributing Zone and Recharge Zone published in 30 TAC Ch. 213 (the "Edwards Rules").
52. The TSWQS consist of general standards, narrative standards, surface water segment-specific numeric standards, numeric standards for toxic substances, and antidegradation review. The Edwards Rules consist of general standards, narrative standards, and numeric standards presented as minimum acceptable criteria to prevent antidegradation.
53. The TSWQS establish specific uses for each classified water body in the state and also provide numeric criteria for each classified stream.
54. The TSWQS for an intermittent stream are more stringent and protective than effluent standards for a dry creek or watercourse with no flow.
55. Pursuant to the Texas Surface Water Quality Standards (TSWQS), the specified uses for any unassigned tributary of Cibolo Creek (Segment 1908) include contact recreation, high aquatic life use, public drinking water supply, and aquifer protection.
56. To protect and maintain a stream's high aquatic life use, TCEQ evaluates a discharge's effect on the dissolved oxygen in the receiving stream.
57. The dissolved oxygen criterion for the unnamed tributary of Cibolo Creek is 5.0 mg/l.
58. The proposed effluent limits of 5.0 mg/l CBOD₅, 2.0 mg/l NH₃-N, and 4.0 mg/l minimum dissolved oxygen are adequate to ensure that the dissolved oxygen level in the receiving stream will be maintained above the 5.0 mg/l criterion and, therefore, aquatic life use will be maintained and protected.
59. The proposed discharge will not violate the dissolved oxygen standards for a tributary of Cibolo Creek.

**DHJBs Proposed Final Order w/ FOFs-COLs
Redline of ALJ's Proposed Amended Order
Subject to Revision – 7-15-15**

60. Compliance with the recreational use standard in the TSWQS is evaluated solely through application of the bacteria standard.
61. For freshwater, the geometric mean of *E. coli* should not exceed 126 CFUs per 100 milliliters of water, which is the same as the specific numeric criteria for unnamed tributaries of Cibolo Creek.
62. The bacteria limits in the ED's proposed draft permit are the same as those in the TSWQS for the unnamed tributary of Cibolo Creek (Segment 1908).
63. For stream segments that are classified as a public water supply, TCEQ evaluates the presence of toxic materials and evaluates the discharge to ensure that it will not prevent a public water supplier from treating the surface water through conventional treatment methods to drinking water standards.
64. The TSWQS establish numeric criteria for toxic materials, and those criteria apply regardless of whether they are in the permit.
65. Applicant's proposed discharge does not require inclusion of specific effluent limits on toxic materials because its proposed permitted average flow would be less than one million gallons per day (MGD), it will not have an approved pretreatment program, it is not an industrial facility, it will serve residential customers, and it will not likely have any industrial facilities discharging into the proposed plant.
66. Applicant must provide notice to the ED if there is a substantial change in the volume or character of the wastewater, including the introduction of toxic materials by an industrial user of Applicant's plant.
67. The proposed discharge meets both the TSWQS and the Edwards Aquifer Rules necessary to maintain the public water supply use, contact recreation, aquatic life, and the toxic pollutant numeric criteria, and provide for aquifer protection.
68. All TPDES permits must be reviewed for compliance with the TSQWS antidegradation policy.
69. Tier 1 of an antidegradation review confirms that the effluent quality is consistent with the designated uses of the receiving stream segment and that no in-stream surface water quality standards (either numeric or narrative) will be exceeded.
70. A Tier 2 review is conducted on waterbodies with intermediate, high, or exceptional aquatic life uses to ensure that the water quality will not be diminished.
71. A Tier 1 and Tier 2 antidegradation review found that no significant degradation of water quality is expected in the receiving water and that the existing uses will be maintained and protected.

72. The proposed discharge would not impact Cibolo Creek's ability to meet the TSWQS.
73. The proposed discharges are within 0 and 5 miles of the Edwards Aquifer Recharge Zone. Accordingly, the effluent limits of 30 TAC § 213.6(c)(1) apply. The effluent limits of 30 TAC § 213.6(c)(1) apply.
74. The effluent limits of 30 TAC § 213.6(c)(1) are as follows: 5 mg/L 5-day carbonaceous biochemical oxygen demand (CBOD5), 5 mg/L total suspended solid (TSS), 2 mg/L ammonia nitrogen (NH3-N), 0.5 mg/L total phosphorus.
75. The phosphorous limit in 30 TAC § 213.6(c)(1) is 1 mg/L.
76. The Applicant has requested, and the Executive Director has proposed a more stringent phosphorous limit of 0.5 mg/L in the proposed Permit.

Bacteria and Chlorine

77. To meet the bacteria limits for the proposed plant, Applicant will disinfect the effluent using chlorination and will expose the effluent to the chlorine for at least 20 minutes.
78. With the proper dosage of chlorine for the proper detention time, the bacteria levels will be reduced to levels that comply with TCEQ requirements.
79. Applicant must monitor the chlorine residual levels five times per week by grab sample and monitor the bacteria levels once a week by grab sample.
80. Applicant must submit plans, specifications, and a final engineering design report to TCEQ for review and approval to ensure that the facility is designed to meet the permitted limits, including disinfection requirements and the bacteria limits.
81. The proposed discharge would not contribute excess bacteria to Cibolo Creek.
82. The proposed discharge will not impact the unnamed tributary of Cibolo Creek's ability to maintain its contact recreation use.
83. The proposed discharge would not contribute excess bacteria to Cibolo Creek.
84. The proposed permit will not adversely impact the use and enjoyment of any adjacent and/or downstream property or create nuisance conditions.
85. The discharge route in the unnamed tributary of Cibolo Creek in the proposed permit has been properly characterized.
86. The proposed permit complies with the TCEQ siting regulations found in 30 TAC Chapter 309.
87. The treated effluent will not adversely impact cattle that currently graze in the area.

88. The proposed discharge will not impact waters of the state.
89. Treated effluent discharged at the levels in the proposed TPDES permit would be safe for children who come into direct contact with it as prescribed by the TSWQS effluent criteria and uses for a tributary of Cibolo Creek (Segment 1908).
90. Ms. Graham, Ms. Hastings, and Mr. Dunn currently lease their property to a rancher for cattle ranching.
91. Approximately twenty head of cattle are ranched on the property.
92. Treated effluent discharged at the levels in the proposed TPDES permit would be safe for cattle that come into direct contact with it as prescribed by the TSWQS effluent criteria and uses for a tributary of Cibolo Creek (Segment 1908).

Discharge Would Be to Water in the State

93. Small portions of the discharge route in the unnamed tributary of Cibolo Creek on Johnson Ranch before it reaches the property line shared with the Protestants does not have well-defined beds and banks.
94. No aquatic resources on the Johnson Ranch are permanent.
95. A recent United States Geological Services map shows an unnamed tributary of Cibolo Creek as a broken line and dots.
96. The discharge route is dry under normal conditions, but has a regular flow and route during rainfall events and for short duration thereafter.
97. A grassy swale in the unnamed tributary of Cibolo Creek near the property line between Applicant and Protestants' properties has native grasses growing in it.
98. Aquatic resources on the Johnson Ranch include ephemeral watercourses, an artificial waterbody, upland vegetates swales, and areas of diffuse surface drainage, as well as the unnamed tributary of Cibolo Creek that is the proposed discharge route.
99. The discharge route from the point of discharge at the Applicant's outfall in the proposed Permit and continuing across Applicant's property in the unnamed tributary of Cibolo Creek is a watercourse.
100. From and beyond the Applicant's property line on Johnson Ranch where the unnamed tributary of Cibolo Creek continues to flow into the Graham property and continuing through Ms. Hastings' property and continuing to Cibolo Creek, the unnamed tributary of Cibolo Creek is a watercourse with defined bed and banks.

Transcript Costs

101. The cost for recording and transcribing the hearing on the merits by a court reporter and producing transcripts for Applicant, the ALJ, and the Commission totaled \$4,931.40.
102. Johnson Ranch MUD is a municipal utility district, a governmental entity with limited resources.
103. Applicant is a residential development company, Protestants are individual landowners, and the Greater Edwards Aquifer Alliance is a 501(c)(3) nonprofit corporation.
104. Protestants ordered a copy of the transcript for which they paid \$1,000.
105. Applicant had the burden of proof and benefitted the most from having the ability to cite to the transcript.
106. Except for the copy of the transcript ordered by Protestants, Applicant should pay court reporting and transcription costs.

II. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over water quality to issue TPDES Permit No. WQ0014975001 under TEX. WATER CODE §§ 5.013, 26.003, 26.011, and 26.027
2. The Commission has jurisdiction over this matter. Texas Water Code chs. 5 and 26.
3. SOAH has jurisdiction over this hearing process and the authority to issue a proposal for decision with findings of fact and conclusions of law. Texas Water Code §§ 5.311 and 26.021; Texas Gov't Code ch. 2003.
4. Under 30 TAC § 80.17(a), Applicant has the burden of proof, by a preponderance of the evidence, on the referred issues.
5. After final review under 30 TAC ch. 217, the Design Criteria for Domestic Wastewater Systems, the application will comply with TCEQ's regulations regarding Domestic Wastewater Effluent Limitation and Plant Siting at 30 TAC ch. 309.
6. Pursuant to 30 TAC § 307.1, it is the policy of this state and the purpose of Chapter 307 to maintain the quality of water in the state consistent with, among other things, public health and enjoyment and protection of terrestrial life. All reasonable methods are to be used to implement this policy.
7. The toxic criteria in the TSWQS apply to surface water in the state and specifically apply to substances attributed to waste discharges or human activity. 30 TAC § §307.6.

8. In accordance with TCEQ's regulations implementing the TSWQS at 30 TEX. ADMIN. CODE Chapter 307, Applicant's discharge under the terms of the proposed permit will comply with the general criteria, antidegradation policy, toxic material provisions, and site-specific uses and criteria
9. In accordance with TCEQ's regulations regarding the Edwards Aquifer at 30 TEX. ADMIN. CODE Chapter 213, Applicant's discharge under the terms of the proposed permit will comply with the general criteria, antidegradation policy, applicable aquifer protection requirements and site-specific uses and criteria relating the Contributing Zone and Recharge Zone of the Edwards Aquifer
10. Water in the state includes, in part, groundwater, streams, creeks, natural or artificial, and including the beds and banks of all watercourses and bodies of surface water, that are wholly or partially inside or bordering the state or inside the jurisdiction of the state. Texas Water Code § 26.001(5).
11. The discharge route in the proposed permit has been properly characterized as water in the state.
12. The discharged effluent would comply with the limits for toxins established by the TSWQS, 30 TAC ch. 307.
13. Applicant met its burden of proving the permit would not impair the use and enjoyment of the Protestants' Graham-Hastings-Dunn properties, including in regard to children coming into direct contact with it. 30 TAC § 307.1.
14. Applicant met its burden of proving the permit would not impair the use and enjoyment of the Protestants' Graham-Hastings-Dunn properties, including in regard to cattle that will consume undiluted treated effluent. 30 TAC § 307.1.
15. Allocating court reporting and transcription costs of \$3,931.40 to Applicant and \$1,000.00 to Protestants is a reasonable allocation of costs under the factors set forth in 30 TAC § 80.23(d).

EXPLANATION OF CHANGES TO ALJ'S ORDER

During its July 1, 2015 Agenda Meeting, the Commission heard arguments from the parties related to issues with the ALJ's Proposal for Decision. Having heard the comments from the parties and having reviewed the Exceptions and Replies to Exceptions to the Proposal for Decision from the Parties, the Commission found certain improper Findings of Fact and Conclusions of Law in the Proposal for Decision. Pursuant to §2001.058 of the Administrative Procedure Act, a state agency may change a finding of fact or conclusion of law made by an administrative law judge if it is determined 1) the ALJ did not properly apply or interpret applicable law, agency rules, policies, or prior administrative decision; 2) a prior administrative decision the ALJ relied on is incorrect or should be changed; or 3) that a technical error in a finding of fact should be changed. Pursuant to §2001.058, the Commission made the changes to the Proposal for Decision for the following reasons:

The Commission is limited in what can be considered when reviewing a TPDES permit like the Applicant has brought here. Texas Water Code §5.013 and §5.102 limit the Commission's consideration to those issues within its jurisdiction as prescribed by Chapter 26 of the Texas Water Code. Issues related to erosion and flooding addressed by the ALJ are outside of the bounds of the Commission's jurisdiction, and it would be inappropriate for the Commission to make findings on those issues.

Having reviewed the ALJ's Proposal for Decision, the record, the pleadings from the parties, and the applicable regulations, it is evident that the ALJ misapplied or misinterpreted the law, Commission Rules, and longstanding TCEQ policies. Specifically, the ALJ improperly applied TCEQ policy, relevant rules, and the law related to the determinations that the proposed permit would not be protective of children or cattle coming into contact with, or ingesting the effluent. The ALJ also improperly applied TCEQ policy, relevant rules, and the law with regard to the implementation of the TPDES program and implementing the procedures found in 30 TAC Chapter 307 related to implementation of the TSWQS. The record further establishes that the unclassified receiving waters are properly designated as being an intermittent watercourse with perennial pools in accordance with TCEQ rules found in Chapter 307. This designation presumes a limited aquatic life use, which includes primary contact recreation, and indicates that the expectation for activities in those waters involves a significant risk of ingestion, including wading by children. TSWQS standards adopted for this designation for the unnamed tributary of Cibolo Creek (Segment 1908) are protective of these interests and activities.

The fact that the unclassified receiving waters are often dry is not unusual, and is inherent in the designation of the receiving waters as intermittent with perennial pools. The designation as "including perennial pools" actually results in more stringent effluent limits being applicable. The effluent limits in the draft permit contained in the proposed permit are also more stringent than those required in 30 TAC Chapter 213 for discharges within 0 to 5 miles of the Edwards Aquifer. The record includes expert testimony that protectiveness of terrestrial and aquatic life is presumed in setting the TSWQS as stated in 30 TAC Section 307.1. There is no significant evidence contravening the Applicant showing that existing uses will be protected, including livestock. Further, there is not significant evidence in the record contravening the evidence establishing that the proposed effluent limits are protective of the designated uses of the receiving waters and that those designations were properly established through determination of the appropriate uses and criteria of the receiving waters, application of the TSWQS performance of Tier 1 and Tier 2 anti-degradation reviews, and QualTex modeling and nutrient screening.

Further, the Applicant met its burden to prove by a preponderance of the evidence that the characterization of the discharge route is correct as being waters of the state. In looking at the applicable case law, specifically the *Hoefs*, *Big Lake* and *Domel* decisions, as well as the evidence and testimony presented in the hearing by the Executive Director's expert witness, Ms. Lee, both based on her original characterization of the watercourse and her on the ground inspection of the discharge route which included her walking the watercourse itself, the ALJ improperly held that the discharge route was improperly characterized. See *Hoefs v. Short*, 273 S.W. 785, 787 (Tex. 1925); *Turner v. Big Lake Oil Co.*, 62 S.W.2d 491 (Tex. Civ. App. – El Paso 1933), *aff'd*, 96 S.W.2d 221 (Tex. 1936); *Domel v. Georgetown*, 6 S.W.3d 349, 358-59 (Tex. App. – Austin 1999, *pet. denied*).

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. The ALJ's Proposal for Decision, including the amended proposed Order with Findings and Conclusions, in part, contained errors of law based upon the ALJ's application and/or misinterpretation of applicable law, TCEQ rules and long standing policies which have been corrected pursuant to Section 2001.058, Tex. Gov't Code.
2. Pursuant to the law applicable to a TPDES permit the Applicant met its burden of proving the permit will not impair the use and enjoyment of adjacent and downstream property, including Protestants Graham-Hastings-Dunne property, pursuant to 30 TAC 307.1 or create nuisance conditions.
3. In accordance with TCEQ's regulations implementing the Texas Surface Water Quality Standards at 30 TAC Ch 307, the discharge under the terms of the Permit will comply with all of the general criteria, anti-degradation policy, toxic material provisions, and site specific uses and criteria.
4. Pursuant to the law applicable to a TPDES permit the Applicant met its burden of proving the Permit will not adversely impact the cattle that graze in that area.
5. Pursuant to the law applicable to a TPDES permit the discharge route has been properly characterized as waters of the state.
6. Issues outside of the Commission's jurisdiction in this matter addressed in the ALJ's PFD, such as erosion, stormwater, and property access, are superfluous to the Commission's decision and should not be included in the order.
7. The application of DHJB Development, LLC for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014975001 is granted.
8. In accordance with 30 TEX. ADMIN. CODE § 50.117, the Commission issues this Order and the attached permit as its single decision on the permit application. Information in the agency record of this matter, which includes evidence admitted at the hearing and part of the evidentiary record, documents the Executive Director's review of the permit application, including that part not subject to a contested case hearing, and establishes that the terms of the attached permit (Exhibit A) are appropriate and satisfy all applicable federal and state requirements.
8. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
9. The effective date of this Order is the date the Order is final, as provided by Tex. Gov't Code § 2001.144 and 30 TAC § 80.273.

10. The Commission's Chief Clerk shall forward a copy of this Order to all parties.
11. If any provision, sentence, clause, or phase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

**TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

Bryan W. Shaw, Ph.D., Chairman