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August 21, 2015

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:

Pursuant to the Commission's July 10th Interim Order in the above-referenced matter memorializing Commissioner's rulings during a posted public agenda conference granting DHJB's amendments to its TPDES Permit, the Commission directed DHJB to prepare a revised proposed Final Order consistent with those rulings. Pursuant to the Interim Order, DHJB circulated a proposed revised Order on July 15th and again on July 24, 2015. That same Order provided for the parties to the proceeding, other than the Applicant and the Johnson Ranch Municipal Utility District, which had been aligned with the Applicant, to submit comments on those proposed Orders. While the Office of Public Interest Counsel filed no comments to any of the proposed revised Orders, the Executive Director and the Protestants each filed comments.

By e-mail dated July 23, 2015, the Executive Director provided redline edits to the proposed July15th Order circulated by DHJB. Having sufficient time to consider and address the Executive Director's comments and proposed edits, the same were incorporated and/or addressed in the revised proposed Order circulated by DHJB on July 24th. A copy of the Executive Director's Comments on the Proposed Order is attached as Appendix "A."

The afternoon of July 24th, the deadline for DHJB to circulate its revised proposed Order, DHJB also received comments from the Protestants. A copy of Protestants' comments are attached as Appendix "B." Because of the late hour the comments were received, DHJB did not have the opportunity to address any of the comments in the July 24th revised proposed Order it circulated, but indicated that it would do so in conjunction with any additional comments received by the August 7th deadline prescribed in the Commission's Interim Order.

On August 7, 2015, the Executive Director submitted a letter indicating that it had no additional comments on the revised proposed Order circulated by DHJB on July 24, 2015, and indicating that its July 15th comments had been adequately addressed in the revised proposed Order. A copy of the Executive Director's letter is attached as Appendix "C."

By letter dated August 7, 2015, the Protestants submitted additional comments addressing the July 24th revised proposed Order circulated by DHJB. A copy of the Protestants' letter dated August 7, 2015, is attached as Appendix "D."

After considering the two sets of comments submitted by Protestants, DHJB is enclosing a revised proposed Final Order which, to the limited extent that the Applicant agreed with Protestants' comments, those comments have been addressed. That revised proposed Order is included herewith in both a redline format and a clean format as Appendices "E" and "F," respectively. DHJB's specific responses to Protestants' comments are included herewith as Appendix "G."

The Applicant believes that the enclosed revised proposed Final Order is consistent with the Commission's decision and rulings on July 1st and its directions in its July 10th Interim Order. The Applicant also believes that the revised proposed Order, like the explanatory remarks provided by the Commissioners during the July 1st agenda conference comply with the requirements of Sections 2001.058 and 2003.047, Texas Gov't Code, relating to the criteria and procedures for modifying a Proposal for Decision submitted by an Administrative Law Judge of the State Office of Administrative Hearings in a matter referred to SOAH by the Commission.

By copy of this letter all counsel of record are each receiving a copy of this letter, together with DHJB's responses to comments on the revised Order and the proposed Order, including changes made in response to the comments, by e-mail in both PDF and WORD formats (redline and clean). If there are any questions about the enclosed documents, or other information is needed, I can be reached at (512) 225-5606.

Best wishes.

Sincerely,

Edmond R. McCarthy, Jr.

ERM/tn
Encl.

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

APPENDIX "A"

Executive Director's Comments dated July 23, 2015 on Proposed Order – July 15, 2015

Ed McCarthy

From: Elisabeth Villarreal <Elisabeth.Villarreal@Tceq.Texas.Gov>
Sent: Thursday, July 23, 2015 2:02 PM
To: Ed McCarthy
Cc: Kathy Humphreys; Rudy Calderon; Ashley McDonald; Robert Brush; Todd Galiga; phaag@mcginnislaw.com; charles@irvineconner.com
Subject: ELD Proposed Edits to the Final Order for DHJB; TPDES Permit No. WQ0014975001
Attachments: DHJBs Proposed Final Order with FOFs-COLs - REDLINE of ALJs - 7-21-15 - ....doc

Dear Mr. McCarthy:

On behalf of Ms. Kathy Humphreys, Environmental Law Division, MC 173, (512) 239-3417, the attached ED proposed edits to final order in redline/strikeout for the above-referenced case is provided for your information.

If you have concerns please contact Ms. Kathy Humphreys (out until Monday).

Regards,

Elisabeth L. Villarreal
Texas Commission on Environmental Quality
General Law Division, Office of Legal Services
512.239.5329
512.239.0626
elisabeth.villarreal@tceq.texas.gov

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 (~0.075 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.

~~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.~~24. A TPDES permit would authorize a wastewater discharge from a treatment plant that will be an activated sludge process plant operated in the ~~with~~ extended aeration mode.

~~26.~~25. 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.~~26. Applicant intends for the plant to serve residential customers at a residential subdivision being developed by Applicant on approximately 470 acres.

~~28.~~27. The parties referred to the proposed subdivision as Johnson Ranch.

~~29.~~28. Applicant proposes to discharge the treated effluent at an outfall location on Applicant's property into an unnamed tributary of Cibolo Creek.

~~30.~~29. Johnson Ranch overlies the Edwards Aquifer contributing zone, except for the southern 50 acres which ~~overlie~~ overlies the Edwards Aquifer recharge zone.

~~31.~~30. The proposed wastewater treatment plant site is located ~~only~~ on the Edwards Aquifer contributing zone.~~, not the recharge zone.~~

~~32.~~31. The outfall from the proposed wastewater treatment plant site would be ~~over~~ on the Edwards Aquifer contributing zone.

~~33.~~32. 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~~classified segment within the San Antonio River Basin.~~, through the property of two of the Protestants, Patricia Lux Graham and Margie Hastings.~~

~~34.~~33. The distance from the ~~discharge point~~outfall to the regulatory boundary of the mapped Edwards Aquifer recharge zone is ~~less than~~approximately 565 feet.

~~35.~~34. 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.~~35. 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.~~36. 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.~~37. The distance along the unnamed tributary of Cibolo Creek from the discharge point to Cibolo Creek is approximately 0.8 miles.

~~39.~~38. 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.~~39. Discharged effluent from the proposed facility into the unnamed tributary of Cibolo Creek will moisten or saturate soils.

Buffer Zones

~~41.~~40. Applicant's wastewater treatment plant site and all wastewater treatment plant units will be more than 150 feet from the nearest property line.

~~42.~~41. All~~The~~ wastewater treatment plant units will be ~~protected from inundation and damage during a flood event~~located above the 100-year flood frequency level.

~~43.~~42. The wastewater treatment plant units will not be located in wetlands.

~~44.~~43. The wastewater treatment plant units will not be located within 500 feet of any public water supply well.

~~45.~~44. The wastewater treatment plant units will not be located within 250 feet of any private water well.

Effluent Limits

~~46.~~45. The proposed discharge outfall is within 0 and 5 miles of the Edwards Aquifer recharge zone. Accordingly, the effluent limits ~~of~~ required by the Edwards Aquifer Rule found in 30 TAC § 213.6(c)(1) apply.

~~47.~~46. The Edwards Aquifer Rule stipulates that proposed effluent limits for any permit located within 0 to 5 miles of the Edwards Aquifer recharge zone, based on a 30-day average, ~~would~~ must be: 5.0 milligrams per liter (mg/l) 5-day carbonaceous biochemical oxygen demand (CBOD5), 5.0 mg/l total suspended solids (TSS), 2.0 mg/l ammonia nitrogen

(NH3-N), ~~0.5~~1.0 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.~~47. The proposed effluent limit of 0.5 mg/L~~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~~limit required by the Edwards Aquifer Rule.

~~49.~~48. 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.~~49. The proposed effluent limit for pH ~~limit for the TPDES permit~~ is 6-9 standard units.

Surface Water Quality Standards

~~51.~~50. 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 Aquifer Rules").

~~52.~~51. The TSWQS consist of general standards, narrative standards, surface water segment-specific numeric standards, numeric standards for toxic substances, and antidegradation review. The Edwards Aquifer Rules consist of general standards, narrative standards, and numeric standards presented as minimum acceptable criteria to ~~prevent~~ comply with the antidegredation policy.

~~53.~~52. The TSWQS establish specific uses for each classified water body in the state and also provide numeric criteria for each classified stream.

~~54.~~53. When discharging to an intermittent stream with perennial pools, the effluent limits necessary to maintain the existing uses and aquatic life of that stream including its pools areas are typically more stringent than the effluent limits necessary to protect the existing uses of an intermittent stream or watercourse with no perennial pools. ~~The TSWQS for an intermittent stream are more stringent and protective than effluent standards for a dry creek or watercourse with no flow.~~

~~55.~~54. Pursuant to the Texas Surface Water Quality Standards (TSWQS), the specified uses for any ~~unassigned~~ unclassified tributary ~~of~~ within three miles of Cibolo Creek (Segment 1908) and in the contributing, transition, or recharge of the Edwards Aquifer which is considered to have perennial pools include primary contact recreation, ~~high~~ limited aquatic life use, ~~public drinking water supply,~~ and aquifer protection.

~~56.~~55. 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.~~56. The dissolved oxygen criterion for the unnamed tributary of Cibolo Creek is ~~5~~3.0 mg/l.

~~58.~~57. 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~~3.0 mg/l criterion and, therefore, aquatic life use will be maintained and protected.

~~59.~~58. The proposed discharge will not violate the dissolved oxygen standards for a tributary of Cibolo Creek.

~~60.~~59. Compliance with the recreational use standard in the TSWQS is evaluated solely through application of the bacteria standard.

~~61.~~60. For freshwater, the geometric mean of *E. coli* ~~should~~ shall 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.~~61. 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.~~62. 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.~~63. The TSWQS establish numeric criteria for toxic materials, and those criteria apply regardless of whether they are in the permit.

~~65.~~64. 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.~~65. 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.~~66. 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.~~67. All TPDES permits must be reviewed for compliance with the ~~TSQWS~~ TSWQS antidegradation policy.

~~69.~~68. 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.~~69. 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.~~70. 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.~~71. The proposed discharge would not impact Cibolo Creek's ability to meet the TSWQS.

~~73.~~72. The proposed discharge is~~s are~~ within 0 ~~and~~ to 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.~~73. The effluent limits of 30 TAC § 213.6(c)(1) are as follows: 5.0 mg/L 5-day carbonaceous biochemical oxygen demand (CBOD5), 5.0 mg/L total suspended solid (TSS), 2.0 mg/L ammonia nitrogen (NH3-N), ~~0.5~~1.0 mg/L total phosphorus.

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

~~76.~~74. 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.~~75. 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.~~76. 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.~~77. 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.~~78. 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.~~79. The proposed discharge would not contribute excess bacteria to Cibolo Creek.

~~82.~~80. The proposed discharge will not impact the unnamed tributary of Cibolo Creek's ability to maintain its primary contact recreation use.

~~83.~~81. The proposed discharge would not contribute excess bacteria to Cibolo Creek.

~~84.~~82. The proposed permit will not adversely impact the use and enjoyment of any adjacent and/or downstream property or create nuisance conditions.

~~85.~~83. The discharge route in the unnamed tributary of Cibolo Creek in the proposed permit has been properly characterized.

~~86.~~84. The proposed permit complies with the TCEQ siting regulations found in 30 TAC Chapter 309.

~~87.~~85. The treated effluent will not adversely impact cattle that currently graze in the area.

~~88.~~86. The proposed discharge will not result in negative impacts to water in ~~s of~~ the state.

~~89.~~87. 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.~~88. 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.~~89. 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.~~90. No aquatic resources on the Johnson Ranch are permanent.

~~95.~~91. A recent United States Geological Services (USGS) map shows an unnamed tributary of Cibolo Creek as a broken line and dots typical of USGS markings denoting an intermittent stream.

~~96.~~92. The discharge route is dry under normal conditions, but has a regular flow and route during rainfall events and for short duration thereafter.

~~97.~~93. A grassy swale in the unnamed tributary of Cibolo Creek upstream from the~~near the property line between Applicant and~~ Protestants' properties has native grasses growing in it.

~~98.~~94. Aquatic resources on the Johnson Ranch include ephemeral watercourses, an artificial waterbody, ~~upland vegetates~~vegetated swales, and areas of diffuse surface drainage, as well as the unnamed tributary of Cibolo Creek that is the proposed discharge route.

~~99.~~95. 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.~~96. 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.~~97. 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.~~98. Johnson Ranch MUD is a municipal utility district, a governmental entity with limited resources.

~~103.~~99. Applicant is a residential development company, Protestants are individual landowners, and the Greater Edwards Aquifer Alliance is a 501(c)(3) nonprofit corporation.

~~104.~~100. Protestants ordered a copy of the transcript for which they paid $1,000.

~~105.~~101. Applicant had the burden of proof and benefitted the most from having the ability to cite to the transcript.

~~106.~~102. 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~~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~~Ch~~.~~apter 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 un-classified 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 water in the~~s 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 on 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-Dunn~~e~~ 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 Chapter 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 water in ~~s 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~~TAC § 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

APPENDIX "B"

Protestants' Comments (dated July 21st and received July 24th) to July 15th Draft Proposed Order

IRVINE & CONNER PLLC

Irvine & Conner PLLC
4709 Austin Street,
Houston, Texas 77004
713.533.1704
irvineconner.com

Charles Irvine
charles@irvineconner.com

July 21, 2015

Mr. Ed McCarthy
Via email
emccarthy@jacksonsjoberg.com

Re: Modifications to PFD

Dear Mr. McCarthy:

We are in receipt of your changes to the ALJ's PFD. We believe the changes to the PFD contain factual inaccuracies and faulty conclusions of law and also include matters outside the evidentiary record. We do recognize that, at this juncture, an attempt is being made to conform with the Commission's recent Order. Even so, we believe some facts have been changed—ones found by the judge—which were not overturned or even discussed by the Commissioners at the agenda meeting.

We provide the following specific notations:

- ¶31 – Should be deleted. Issue was not discussed at Commissioner's meeting; Commission did not instruct Applicant to rehabilitate entire PFD or Order.

- ¶33 – Should be deleted. Issue was not discussed at Commissioner's meeting; Commission did not instruct Applicant to rehabilitate entire PFD or Order.

- ¶39 - Change it back to "will" because the Commission did not make any findings about the reach of the flow to Protestants' property. Applicant was not instructed to make this change.

- ¶54 – It is unclear what the meaning or purpose of this addition is, because to Protestants knowledge, there are no "standards for a dry creek" separate from the standards for an intermittent stream.

- ¶62 – Should be deleted. Issue was not discussed at Commissioner's meeting; Commission did not instruct Applicant to rehabilitate entire PFD or Order.

- ¶84 – Should be deleted. The Commission did not make a finding that there was no nuisance, only that it would be outside the Commission's jurisdiction.

- ¶85 – Should be deleted. This is not related to the header "Bacteria and Chlorine".

- ¶86 – Should be deleted. This is not a finding of fact and is not related to the header "Bacteria and Chlorine".

- The deleted ¶82 and deleted ¶¶86-90 – these should remain in. There were factfindings of the judge, and evidence in the record. They were not disturbed by the Commission's interim order; there was no instruction to delete every factfinding that was the basis of the PFD.

- ¶93 – Should be reverted to "Several". The Commission did not make a finding that the portions were "Small."

- The deleted ¶97-99 – Should not be deleted. Issue was not discussed at Commissioner's meeting; Commission did not instruct Applicant to rehabilitate entire PFD or Order.

- The deleted ¶105 – Should not be deleted. Transcript cost issue was not discussed at Commissioner's meeting.

Protestants plan to reserve further comments for their motion for rehearing (motion to overturn).

Sincerely,

Irvine & Conner, PLLC

by_____

Charles W. Irvine

APPENDIX "C"

Executive Director's Letter dated August 7, 2015, Indicating No Additional Comments on Proposed Order

Bryan W. Shaw, Ph.D., P.E., *Chairman*
Toby Baker, *Commissioner*
Zak Covar, *Commissioner*
Richard A. Hyde, P.E., *Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 7, 2015

Tucker Royall, General Counsel
Texas Commission on Environmental Quality
Office of the General Counsel (MC-101)
P.O. Box 13087
Austin, Texas 78711-3087

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

Dear Mr. Royall:

In accordance with the Commission's Interim Order, the Executive Director reviewed and commented on the draft Order circulated by the Applicant on July 15, 2015. Additionally, the Executive Director reviewed the Revised Proposed Final Order that the Applicant filed with the Commission on July 24, 2015. The Revised Proposed Final Order incorporates all of the Executive Director's comments; therefore, the Executive Director recommends that the Commission issue the Applicant's Revised Proposed Final Order as drafted.

Sincerely,

Kathy J. Humphreys, *Staff Attorney*
Environmental Law Division
State Bar No. 24006911

cc: Mailing List

APPENDIX "D"

Protestants' Letter dated August 7, 2015submitting additional Comments on Proposed Order – July 24, 2015

IRVINE & CONNER
PLLC

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Charles Irvine
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August 7, 2015

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

Re: TCEQ Docket No. 2013-2228-MWD; SOAH Docket No. 582-14-3427: Comments on Proposed Final Order.

Dear Mr. Royall:

On July 10, 2015, the Texas Commission on Environmental Quality ("TCEQ" or "Commission") issued an interim order concerning the application by DHJB Development, LLC for amendment of TPDES Permit No. WQ0014975001; TCEQ Docket No. 2013-2228-MWD; SOAH Docket No. 582-14-3427 ("Interim Order"). In its Interim Order, the Commission directed DHJB Development (the Applicant) to draft a proposed order containing findings of fact and conclusions of law on all the contested issues consistent with the ALJ's recommendations on the issues to the extent that they are not in conflict with the Commission's directions.

The Applicant drafted and circulated a proposed order pursuant to the Commission's Interim Order on July 15, 2015. Protestants submitted comments on this proposed order on July 24, 2015. The Applicant submitted its amended proposed order on July 24, 2015, acknowledging that it had received the Protestants' comments, but stating that it had not had an opportunity to evaluate these comments and thus would consider and respond to them no later than August 23, 2015, as prescribed in the Commission's interim order.

The Applicant made numerous changes to the PFD in its revised proposed final order *that do not comply with the Commission's Interim Order or the directions given by the Commission at the agenda meeting on July 1, 2015*. These changes should be rejected because they represent arbitrary and unsupported modifications of the ALJ's PFD. Additionally, some of the Applicant's changes in the revised proposed final order are not supported by the record and should be rejected.

We provide the following specific examples:

Proposed Finding of Fact #19. This new FOF should be deleted. The Commission did not instruct the Applicant to rehabilitate the entire PFD or to add findings of fact unrelated to the issues discussed at the agenda meeting. Additionally, the Applicant's TLAP permit has expired.

The Applicant switching back and forth between 75,000 gallons per day and 0.075 MGD and 350,000 gallons per day and 0.35 MGD is confusing. The Applicant should be directed to use one form or the other throughout.

Proposed Finding of Fact #25. The reasons for amending this FOF are unclear. Substituting "in the" for "with" and adding mode after aeration were not necessary. The mode of treatment was not discussed at the Commissioners' agenda meeting and was not discussed in the Interim Order. The Commission did not instruct the Applicant to rehabilitate the entire PFD or to add findings of fact unrelated to the issues discussed at the agenda meeting.

Proposed Finding of Fact #27. There isn't anything in the record that supports the change made to this FOF. It also appears to be incorrect. The Applicant's wastewater treatment plant is purportedly for the entire approximately 750 acre Johnson Ranch development, not simply the portion being developed by the Applicant. Acreage covered by this permit amendment was not discussed at the Commissioners' agenda meeting and was not discussed in the Interim Order. The Commission did not instruct the Applicant to rehabilitate the entire PFD or to add findings of fact unrelated to the issues discussed at the agenda meeting.

Proposed Finding of Fact #29. The Applicant's deletion here adds nothing. The ALJ's FOF did no harm to the Applicant and was consistent with the record. Cleary, the Applicant feels that the proper designation of the proposed discharge route is the unnamed tributary of the Cibolo Creek. The proper designation of the proposed discharge route was not discussed at the Commissioners' agenda meeting and was not discussed in the Interim Order. The Commission did not instruct the Applicant to rehabilitate the entire PFD or to add findings of fact unrelated to the issues discussed at the agenda meeting.

Proposed Finding of Fact #30. Protestant's did not take exception to the ALJ's PFD because this issue did not appear important at the time. At the hearing the Applicant asserted 50 acres were in the recharge zone and the ALJ merely followed the Applicant's assertion. With all of the changes to the PFD being made by the Applicant regarding the Edwards aquifer, Protestant feel that it is important to point out that the Applicant's Water Pollution Abatement Plan notes that the southern approximately 113 acres is in the recharge zone.

Proposed Finding of Fact #31. This new FOF should be deleted. The issue of whether the wastewater treatment plant is located on the Edwards Aquifer contributing zone or the recharge zone was not discussed at the Commissioners' agenda meeting and was not discussed in the Interim Order. The Commission did not instruct the Applicant to rehabilitate the entire PFD or to add findings of fact unrelated to the issues discussed at the agenda meeting.

Proposed Finding of Fact #32. Whether or not the outfall was located on the contributing zone is not part of the record. The location of the outfall was not discussed at the Commissioners' agenda meeting and was not discussed in the Interim Order. The Commission did not instruct the Applicant to rehabilitate the entire PFD or to add findings of fact unrelated to the issues discussed at the agenda meeting.

Proposed Finding of Fact #33. This new FOF should be deleted. The issue of the exact path of the discharge route was not discussed at the Commissioners' agenda meeting and was not discussed in the Interim Order. The Commission did not instruct the Applicant to rehabilitate the entire PFD or to add findings of fact unrelated to the issues discussed at the agenda meeting.

Proposed Finding of Fact #34. Once again location of the outfall is not part of the record. Location of the outfall in relation to the recharge zone is also not part of the record. The ALJ's finding of fact comports with the record. Ms. Brittany Lee testified that it was approximately 565 feet from the discharge point to the recharge zone.[1] Additionally, this issue was not even discussed by the Commission at the agenda meeting. It is once again unclear why the Applicant is taking the liberty of changing a finding of fact that is supported by the record and that is unrelated to the Interim Order.

Proposed Finding of Fact #39. The Applicant has changed the ALJ's finding of fact to now find that the discharged effluent "could" reach the Protestants' property; the ALJ had found and written that the effluent "will" reach the Protestants' property. The Applicant's change here is not supported by the record. The ALJ clearly found that "the effluent will reach Protestants' property."[2] At the hearing, the Applicant did not challenge Protestants' evidence on this issue.[3] Additionally, this issue was not even discussed by the Commission at the agenda meeting. It is once again unclear why the Applicant is taking the liberty of changing a finding of fact that is supported by the record and that is unrelated to the Interim Order.

Deleted Finding of Fact #40. This issue was not even discussed by the Commission at the agenda meeting. It is unclear why the Applicant is taking the liberty of deleting a finding of fact that is supported by the record and that is unrelated to the Interim Order.

Proposed Finding of Fact #42. In the ALJ's PFD this FOF comported with the record. The Applicant's changes to this FOF do not comport with the record. Additionally, this issue was not even discussed by the Commission at the agenda meeting. It is once again unclear why the Applicant is taking the liberty of changing a finding of fact that is supported by the record and that is unrelated to the Interim Order.

Proposed Finding of Facts #46 and #47. The Applicant's changes in these findings of fact are legally erroneous. The Applicant states that the effluent limits "required by the Edwards Aquifer rule . . . apply" that the effluent limits "must" be the limits set out in 30 Texas Administrative Code 213.6(c)(1). But this rule clearly states that the proposed effluent limits are "minimum" standards: more restrictive standards are clearly required in some cases (including the current one). The ALJ's amended PFD clearly stated that these were minimum standards.[4] The Applicant's changes imply that these rules establish required effluent limitations. Because these changes are outside of the Commission's Interim Order and are legally inaccurate or legally confusing, they should be rejected. Alternatively, the FOFs should make clear that these limits are minimum standards.

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[1] Hearing Transcript, Volume 3 of 3, page 52, lines 2 to 5.
[2] Amended Proposal for Decision at 10.
[3] *Id.*
[4] *Id.* at 32.

Proposed Finding of Fact #48. At this point some of these changes to the ALJ's FOF take on a kid-in-a-candy-store type quality. Nothing in these changes improves the FOF. Additionally, this issue was not even discussed by the Commission at the agenda meeting. It is once again unclear why the Applicant is taking the liberty of changing a finding of fact that is supported by the record and that is unrelated to the Interim Order.

Proposed Finding of Fact #50. It is not clear which FOF the Applicant is changing. This looks somewhat like the ALJ's FOF #55, which was fine as written. It is once again unclear why the Applicant is taking the liberty of changing a finding of fact that is supported by the record and that is unrelated to the Interim Order.

Proposed Finding of Fact #51. At a minimum this FOF is not properly marked-up. This FOF does not bear any relationship to the ALJ's FOF #55 as indicated. This could not have been discussed at the Commissioners' agenda meeting and was not discussed in the Interim Order. The Commission did not instruct the Applicant to rehabilitate the entire PFD or to add findings of fact unrelated to the issues discussed at the agenda meeting.

Proposed Findings of Fact #52-55. These FOFs appear to mirror some of the ALJ's FOFs. It is once again unclear why the Applicant is taking the liberty of changing a finding of fact that is supported by the record and that is unrelated to the Interim Order.

Proposed Finding of Fact #63. This new FOF should be deleted. The issue of the bacteria limits in the TSWQS for the discharge route was not discussed at the Commissioners' agenda meeting and was not discussed in the Interim Order. The Commission did not instruct the Applicant to rehabilitate the entire PFD or to add findings of fact unrelated to the issues discussed at the agenda meeting. Additionally, it is unclear whether this finding of fact is even supported by the record at the hearing. The ALJ's amended PFD did not include this factfinding and did not discuss this particular fact in its analysis.

Proposed Findings of Fact #74–76. These findings of fact are redundant with findings of fact already in the revised proposed final order.

Proposed Finding of Fact #82. It is unclear what FOF is being modified here. The only FOF that begins with, "When children play in and around . . ." is the ALJ's FOF #78. The record clearly shows that children will be exposed by direct contact. Additionally, this issue was not even discussed by the Commission at the agenda meeting. It is once again unclear why the Applicant is taking the liberty of changing a finding of fact that is supported by the record and that is unrelated to the Interim Order.

Proposed Finding of Fact #83. It is unclear where the proposed FOF comes from. Nothing in the record supports this FOF. This FOF should be deleted. The Commission did not instruct the Applicant to rehabilitate the entire PFD or to add findings of fact unrelated to the issues discussed at the agenda meeting.

Proposed Finding of Fact #84. This finding of fact related to nuisance conditions is overly broad. At the agenda meeting, the Commission instructed the Applicant to not include findings of fact regarding issues outside of the Commission's jurisdiction in the matter (*e.g.*, erosion, stormwater, property access). But the record clearly demonstrated, and the ALJ found, that there would be nuisance impacts to the Protestants in this case. An overly broad finding of fact that the permit will not adversely impact any property owners or create nuisance conditions is not supported by the record or the ALJ's findings in this case.

Proposed Findings of Fact #85–87. These findings of fact should be deleted. In a section entitled "Bacteria and Chlorine," the Applicant has randomly inserted a finding of fact related to the characterization of the unnamed tributary (#85), the siting regulations found in 30 TAC Chapter 309 (#86), and impacts to cattle (#87). These findings of fact are redundant and do not fit within this section. Proposed finding of fact #86 is not even a finding of fact; it is a conclusion of law.

Deleted Findings of Fact #80–82; 83–86; Proposed changes to Finding of Fact #82. These findings of fact should not be deleted from the revised proposed final order. These were factfindings made by the ALJ based on the record. They were not disturbed by the Commission's Interim Order: even if there is an ultimate factfinding that cattle would not be harmed by the proposed discharge, the factfindings made by the ALJ about the existence of the cattle and their use of the discharge route were well-established at the hearing based on the evidence. These deletions are arbitrary and the factfindings should remain undisturbed by the Interim Order. An Applicant may not simply delete relevant, well-supported factfindings.

Proposed Finding of Fact #87. This FOF purports to change the ALJ's FOF #78. The ALJ's FOF #78 addressed direct contact with the effluent by children. Proposed FOF #87 regards cattle. How the two relate is unclear. It is once again unclear why the Applicant is taking the liberty of changing a finding of fact that is supported by the record and that is unrelated to the Interim Order.

Proposed Finding of Fact #88. Once again it is unclear which FOF the Applicant is changing. The ALJ's FOF 88 regards the fact that the proposed discharge route did not have the beds and banks of a channel. The proposed FOF #88 regards negative impact to waters of the state. It is once again unclear why the Applicant is taking the liberty of changing a finding of fact that is supported by the record and that is unrelated to the Interim Order.

Proposed Finding of Fact #89. Proposed FOF #89 purports to change the ALJ FOF #79. The FOFs are unrelated. The Commission did not instruct the Applicant to rehabilitate the entire PFD or to add findings of fact unrelated to the issues discussed at the agenda meeting. Additionally, it is unclear whether this finding of fact is even supported by the record at the hearing. The ALJ's amended PFD did not include this factfinding and did not discuss this particular fact in its analysis.

Proposed Finding of Fact #91. The Applicant has changed the ALJ's finding of fact from "[s]everal portions of the discharge route do not have defined bed and banks" to "[s]mall portions of the discharge route . . . does not have well-defined beds and banks." There is no basis

for changing "several" to "small." The Commission did not discuss the fact that only small portions lack beds and banks. The ALJ, based on the evidence at the hearing, found that several portions of the route lacked bed and banks, including the Protestants' property. The Applicant's change here is arbitrary and unsupported by the record.

Deleted Finding of Fact #88. It is unclear why the Applicant deleted this FOF, which was supported by the record. The Commission did not instruct the Applicant to rehabilitate the entire PFD or to delete findings of fact unrelated to the issues discussed at the agenda meeting.

Marked through Findings of Fact #90 & 93. The Commission did not instruct the Applicant to rehabilitate the entire PFD or to add findings of fact unrelated to the issues discussed at the agenda meeting. Additionally, it is unclear whether this finding of fact is even supported by the record at the hearing.

Deleted Findings of Fact #94–96. These factfindings should not be deleted. The Commission did not state that the discharge route was not a swale or that cattle did not graze in this portion of the discharge route; did not discuss that grass and trees grow in the discharge route; and did not discuss the soil's flatness on Ms. Hastings' property. The Applicant is once again simply deleting factfindings that are completely unrelated to the Commission's Interim Order and were supported by the record.

Proposed Finding of Fact #98. This FOF is not supported by the record. This FOF was not discussed at the Commissioners' agenda meeting and was not discussed in the Interim Order. The Commission did not instruct the Applicant to rehabilitate the entire PFD or to add findings of fact unrelated to the issues discussed at the agenda meeting.

Deleted Finding of Fact #102. This should not be deleted. The Applicant has deleted a finding of fact related to transcript costs, even though the Commission clearly did not discuss or even reference this issue at the agenda meeting. The Interim Order did not give the Applicant license to delete whatever findings of fact it disagreed with that were unrelated to the discussion at the meeting or the Interim Order.

General Remark. As a general matter, Protestants are very concerned that the revised PFD has drawn on facts that are outside of and completely unsupported by the administrative record. For example, during the agenda meeting, Chairman Shaw stated that a drought was occurring prior to the hearing and that this drought contributed to the finding that there were no perennial pools along the discharge route. The record does not support this conclusion. No party provided testimony at the hearing that a drought was occurring in the Bulverde area when Ms. Lee characterized the watercourse. This is just one example, and Protestants alert the TCEQ that this issue is present.

Protestants reserve further facts, issues, comments, conclusions of law, and clarification of case law for its Motion for Rehearing.

Sincerely,

Irvine & Conner, PLLC

by_____
Charles W. Irvine

cc: SOAH Docket Clerk (via electronic filing)
TCEQ Chief Clerk (via electronic filing)
Mr. Edmond R. McCarthy, Jr., Attorney for Applicant (via email)
Ms. Kathy Humphreys, Attorney for the Executive Director (via email)
Mr. Rudy Calderon, Counsel for OPIC (via email)
Mr. Phil Haag, Counsel for Johnson Ranch MUD (via email)

APPENDIX "E"

Revised Proposed Final Order Granting DHJB Development, LLC's Application to Amend TPDES Permit No. WQ0014975001
REDLINE FORMAT

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 (0.075 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~~(.35 MGD).

~~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~~in the extended aeration mode.

~~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.

~~27.~~28. The parties referred to the proposed subdivision as Johnson Ranch.

~~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~~overlies the Edwards Aquifer recharge zone.

31. ~~Outfall~~The proposed wastewater treatment plant site is located on the Edwards Aquifer contributing zone.

32. The outfall from the proposed ~~water~~wastewater treatment plant site would be on the Edwards Aquifer contributing zone.

~~30.~~33. The discharge route from the outfall at DHJB Development, LLC's wastewater treatment plant, as described in the Application, will run through Applicant's property across the Contributing Zone and over the ~~Edwards Aquifer contributing zone~~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 classified segment within the San Antonio River Basin.

~~31.~~34. The distance from the ~~discharge point~~outfall to the regulatory boundary of the mapped Edwards Aquifer recharge zone is ~~less than~~approximately 565 feet.

~~32.~~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.

~~33.~~36. The entire portion of the discharge route ~~on~~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

~~34.~~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).

~~35.~~38. The distance along the unnamed tributary of Cibolo Creek from the discharge point to Cibolo Creek is approximately 0.8 miles.

~~36.~~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 ~~will~~could reach the Graham-Hastings property.

~~37. Discharged effluent from the proposed facility into the unnamed tributary of Cibolo Creek will moisten or saturate soils on Protestants' property.~~

~~38. The moistened soils will inhibit vegetative growth on Protestants' property.~~

~~39. The flow of effluent will increase the potential for exposed soils to erode.~~

~~40. 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.~~

~~41. Erosion on the Graham-Hastings property will cause the loss of pastureland used for cattle grazing.~~

~~42. Erosion on the Graham-Hastings property will impact the Grahams' use and enjoyment of the property.~~

~~43. 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.~~

~~44. 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.~~

~~45.~~40. ~~A TPDES permit will impair the Protestants' access to and enjoyment of the western portion of their property~~.

Buffer Zones

~~46.~~41. Applicant's wastewater treatment plant site and all wastewater treatment plant units will be more than 150 feet from the nearest property line.

~~47.~~42. ~~The~~All of the wastewater treatment plant ~~unit~~units will be located outside the nearest FEMA 100-year flood frequency level, and protected from inundation and damage during a 100-year flood frequency event.

~~48.~~43. The wastewater treatment ~~plan unit~~plant units will not be located in wetlands.

~~49.~~44. The wastewater treatment plant ~~unit~~units will not be located within 500 feet of any public water supply well.

~~50.~~45. The wastewater treatment plant ~~unit~~units will not be located within 250 feet of any private water well.

Effluent Limits

~~51.~~46. The proposed discharge outfall is within 0 and 5 miles of the Edwards Aquifer recharge zone. Accordingly, the effluent limits ~~of~~required by the Edwards Aquifer Rule found in 30 TAC § 213.6(c)(1) apply.

~~52.~~47. ~~The~~The Edwards Aquifer Rule stipulates that proposed effluent limits for any permit located within 0 to 5 miles of the Edwards Aquifer recharge zone, based on a 30-day average ~~would~~, must be: 5.0 milligrams per liter (mg/l) 5-day carbonaceous biochemical oxygen demand (CBOD5), 5.0 mg/l total suspended solids (TSS), 2.0 mg/l ammonia nitrogen (NH3-N), 1.0~~.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.

~~53.~~48. The proposed effluent limit ~~for~~of 0.5 mg/L 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~~limit required by the Edwards Aquifer~~, which is where the plant will be located~~ Rule.

~~54.~~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~~ proposed effluent limit for pH is 6-9 standard units.

~~55.~~51. The effluent limits, chlorine residual criteria and other pertinent requirements in the ~~TPDES~~proposed permit ~~is 6-9.~~ meet and/or exceed the standards prescribed by the applicable Edwards Aquifer Rule for any permit located within 0 to 5 miles of the Edwards Aquifer recharge zone.

Surface Water Quality Standards

52. 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 Aquifer Rules").

53. The TSWQS consist of general standards, narrative standards, surface water segment-specific numeric standards, numeric standards for toxic substances, and antidegradation review. The Edwards Aquifer Rules consist of general standards, narrative standards,

and numeric standards presented as minimum acceptable criteria to comply with the antidegredation policy.

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

55. When discharging to an intermittent stream with perennial pools, the effluent limits necessary to maintain the existing uses and aquatic life of that stream including its pools areas are typically more stringent than the effluent limits necessary to protect the existing uses of an intermittent stream or watercourse with no perennial pools.

56. Pursuant to the Texas Surface Water Quality Standards (TSWQS), the specified uses for ~~any unassigned~~an unclassified tributary within three miles of Cibolo Creek (Segment 1908) and in the contributing, transition, or recharge of the Edwards Aquifer which is considered to have perennial pools include primary contact recreation, ~~high~~limited aquatic life use, public drinking water supply, and aquifer protection.

57. 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.

58. The dissolved oxygen criterion for the unnamed tributary of Cibolo Creek is ~~5~~3.0 mg/l.

59. 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~~3.0 mg/l criterion and, therefore, aquatic life use will be maintained and protected.

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

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

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

63. 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.~~64. 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.~~65. The TSWQS establish numeric criteria for toxic materials, and those criteria apply regardless of whether they are in the permit.

~~65.~~66. 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.~~67. 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.~~68. 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.~~69. All TPDES permits must be reviewed for compliance with the ~~TSQWS~~TSWQS antidegradation policy.

~~69.~~70. 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.~~71. 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.~~72. 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.~~73. The proposed discharge would not impact Cibolo Creek's ability to meet the TSWQS.

74. The proposed discharge is within 0 to 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.

75. The effluent limits of 30 TAC § 213.6(c)(1) are as follows: 5.0 mg/L 5-day carbonaceous biochemical oxygen demand (CBOD5), 5.0 mg/L total suspended solid (TSS), 2.0 mg/L ammonia nitrogen (NH3-N), 1.0 mg/L total phosphorus.

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

~~73.~~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.

~~74.~~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.

~~75.~~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.

~~76.~~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.

~~77.~~81. The proposed discharge would not contribute excess bacteria to Cibolo Creek.

~~**Additional Public Use and Enjoyment Issues**~~

82. ~~When children play in and around the~~ The proposed discharge will not impact the unnamed tributary of Cibolo Creek's ability to maintain its primary 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~~, the children will be exposed to~~ 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.

~~78.~~87. The treated effluent ~~by direct contact~~will not adversely impact cattle that currently graze in the area.

88. ~~There was no evidence that undiluted, treated~~The proposed discharge will not result in negative impacts to water in the state.

~~79.~~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).

~~80. Ms. Graham, Ms. Hastings, and Mr. Dunn currently lease their property to a rancher for cattle ranching.~~

~~81. Approximately twenty head of cattle are ranched on the property.~~

~~82. The discharge route is the only source of shade in the pasture on the Graham-Hastings property.~~

90. 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).

~~83. The cattle seek shade from the sun and protection from colder winds along the proposed discharge route.~~

~~84. The discharged effluent will become a new source of water for the cattle to drink.~~

~~85. Cattle will drink water that is available to them, regardless of its source.~~

~~86. Cattle need clean, high-quality water for healthy growth and good weight gain.~~

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

~~87.~~91. ~~Several~~Small portions of the discharge route ~~do~~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.

~~88. Prior to construction on the Johnson Ranch property, the outfall location did not have the beds or banks of a channel.~~

~~89.~~92. No aquatic resources on the Johnson Ranch are permanent.

~~90. What a~~A recent United States Geological Services (USGS) map shows ~~as a broken line and dots, which some witnesses described as~~ an unnamed tributary of Cibolo Creek~~, is significantly interrupted in several places.~~

~~91.~~93. ~~The connectivity~~ as a broken line and dots typical of ~~the discharge route is completely severed at several places.~~USGS markings denoting an intermittent stream.

~~92.~~94. The discharge route is dry under normal conditions, but has a regular flow and route during rainfall events and for short duration thereafter.

~~93.~~95. ~~The~~A grassy swale ~~at the property line between Applicant and~~in the unnamed tributary of Cibolo Creek upstream from the Protestants' properties has native grasses growing in it.

~~94. 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.~~

~~95. Grasses and some wild plum trees grow along the southern portion of Protestants' property where effluent would flow.~~

~~96. On the southern end on Ms. Hastings' property, the soil is relatively flat, and there is no regular flow of water.~~

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

97. 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.

98. 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

~~97.~~99. 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.

~~98.~~100. Johnson Ranch MUD is a municipal utility district, a governmental entity with limited resources.

~~99.~~101. Applicant is a residential development company, Protestants are individual landowners, and the Greater Edwards Aquifer Alliance is a 501(c)(3) nonprofit corporation.

~~100.~~102. Protestants ordered a copy of the transcript for which they paid $1,000.

~~101.~~103. Applicant had the burden of proof and benefitted the most from having the ability to cite to the transcript.

~~102. 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.~~

~~103.~~104. 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.

~~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

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

~~7~~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).

~~8~~11. The discharge route in the proposed permit has ~~not~~ been properly characterized as water in the state.

~~9~~12. ~~Even though the~~The discharged effluent would comply with the limits for toxins established by the TSWQS, 30 TAC ~~ch.~~Chapter 307~~, the treated effluent will not be mixed with any existing water in the state and will thus be undiluted.~~.

~~10~~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.

~~11.~~14. 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 cattle that will consume undiluted treated effluent. 30 TAC § 307.1.

~~12.~~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 un-classified 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 § 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 water in 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 on her 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. ~~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-Dunn 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 Chapter 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 water in 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.

~~1.~~7. The application of DHJB Development, LLC for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014975001 is ~~denied~~granted.

~~2.~~8. ~~2.~~ In accordance with 30 TAC § 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 ~~ED's~~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~~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.

~~4~~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.

~~5~~10. The Commission's Chief Clerk shall forward a copy of this Order to all parties.

~~6~~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

APPENDIX "F"

Revised Proposed Final Order Granting DHJB Development, LLC's Application to Amend TPDES Permit No. WQ0014975001
CLEAN FORMAT

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 ____, 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 (0.075 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 (.35 MGD).

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.

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 in the extended aeration mode.

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 overlies the Edwards Aquifer recharge zone.

31. The proposed wastewater treatment plant site is located on the Edwards Aquifer contributing zone.

32. The outfall from the proposed wastewater treatment plant site would be on the Edwards Aquifer contributing zone.

33. The discharge route from the outfall at DHJB Development, LLC's wastewater treatment plant, 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 classified segment within the San Antonio River Basin.

34. The distance from the outfall to the regulatory boundary of the mapped Edwards Aquifer recharge zone is approximately 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. All of the wastewater treatment plant units will be located outside the nearest FEMA 100-year flood frequency level, and protected from inundation and damage during a 100-year flood frequency event.

43. The wastewater treatment plant units will not be located in wetlands.

44. The wastewater treatment plant units will not be located within 500 feet of any public water supply well.

45. The wastewater treatment plant units 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 required by the Edwards Aquifer Rule found in 30 TAC § 213.6(c)(1) apply.

47. The Edwards Aquifer Rule stipulates that proposed effluent limits for any permit located within 0 to 5 miles of the Edwards Aquifer recharge zone, based on a 30-day average, must be: 5.0 milligrams per liter (mg/l) 5-day carbonaceous biochemical oxygen demand (CBOD5), 5.0 mg/l total suspended solids (TSS), 2.0 mg/l ammonia nitrogen (NH3-N), 1.0 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 effluent limit of 0.5 mg/L total phosphorus is more stringent than the limit required by the Edwards Aquifer Rule.

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 proposed effluent limit for pH is 6-9 standard units.

51. The effluent limits, chlorine residual criteria and other pertinent requirements in the proposed permit meet and/or exceed the standards prescribed by the applicable Edwards Aquifer Rule for any permit located within 0 to 5 miles of the Edwards Aquifer recharge zone.

Surface Water Quality Standards

52. 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 Aquifer Rules").

53. The TSWQS consist of general standards, narrative standards, surface water segment-specific numeric standards, numeric standards for toxic substances, and antidegradation review. The Edwards Aquifer Rules consist of general standards, narrative standards, and numeric standards presented as minimum acceptable criteria to comply with the antidegredation policy.

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

55. When discharging to an intermittent stream with perennial pools, the effluent limits necessary to maintain the existing uses and aquatic life of that stream including its pools areas are typically more stringent than the effluent limits necessary to protect the existing uses of an intermittent stream or watercourse with no perennial pools.

56. Pursuant to the Texas Surface Water Quality Standards (TSWQS), the specified uses for an unclassified tributary within three miles of Cibolo Creek (Segment 1908) and in the contributing, transition, or recharge of the Edwards Aquifer which is considered to have perennial pools include primary contact recreation, limited aquatic life use, public drinking water supply, and aquifer protection.

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

58. The dissolved oxygen criterion for the unnamed tributary of Cibolo Creek is 3.0 mg/l.

59. 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 3.0 mg/l criterion and, therefore, aquatic life use will be maintained and protected.

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

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

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

63. 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).

64. 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.

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

66. 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.

67. 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.

68. 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.

69. All TPDES permits must be reviewed for compliance with the TSWQS antidegradation policy.

70. 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.

71. 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.

72. 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.

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

74. The proposed discharge is within 0 to 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.

75. The effluent limits of 30 TAC § 213.6(c)(1) are as follows: 5.0 mg/L 5-day carbonaceous biochemical oxygen demand (CBOD5), 5.0 mg/L total suspended solid (TSS), 2.0 mg/L ammonia nitrogen (NH3-N), 1.0 mg/L total phosphorus.

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 primary 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 result in negative impacts to water in 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. 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

91. 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.

92. No aquatic resources on the Johnson Ranch are permanent.

93. A recent United States Geological Services (USGS) map shows an unnamed tributary of Cibolo Creek as a broken line and dots typical of USGS markings denoting an intermittent stream.

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

95. A grassy swale in the unnamed tributary of Cibolo Creek upstream from the Protestants' properties has native grasses growing in it.

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

97. 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.

98. 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

99. 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.

100. Johnson Ranch MUD is a municipal utility district, a governmental entity with limited resources.

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

102. Protestants ordered a copy of the transcript for which they paid $1,000.

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

104. 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 Chapter 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 un-classified 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 § 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 water in 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 on her 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-Dunn 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 Chapter 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 water in 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 TAC § 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

DRAFT

APPENDIX "G"

DHJB's Combined Responses to Protestants' Comments

DHJB's Responses to Protestants Comments received July 24, 2015

Protestants' Comment: FOF 31 should be Deleted, issue wasn't discussed at Commissioner's meeting; Commission didn't instruct Applicant to rehabilitate entire PFD or Order.

DHJB's Response: Commission addressed ALJ failing "to give deference to, again, our longstanding reasonable interpretation of our governing statutes, rules and policies in the implementation of the TPDES program, including our implementation procedures and rules found in 30 TAC, Chapter 307 and the procedures to implement the Texas Surface Water Quality Standards" The siting issues in 307 and 213 were at issue in this hearing and included debate as to what is in the Edwards contributing zone vs recharge zone.

Protestants' Comment: FOF 33 should be deleted, issue wasn't discussed at Commissioner's meeting; Commission didn't instruct Applicant to rehabilitate entire PFD or Order.

DHJB's Response: The Commission directed the Applicant to prepare a revised Order consistent with the rulings and actions taken at the July 1, 2015, Agenda. The discharge route location and classification was discussed at length during the meeting, including the order that "the Commission finds that pursuant to the law applicable to a TPDES permit the discharge route has been properly characterized."

Protestants' Comment: FOF 39: Change it back to "will" because the Commission did not make any findings about the reach of the flow to Protestants' property. Applicant was not instructed to make this change.

DHJB's Response: The Applicant understood the Commissioners' comments during the July 1st deliberation to reflect the belief that the ALJ had erred in concluding that the effluent "will" vs. "could" reach the Protestants' property once discharged into the watercourse. In any event, the Commissioners' correctly interpreted Texas law and the Commission's rules and long standing policy to conclude that the discharge (i) will be into a watercourse, and (ii) would not impact the use and enjoyment of the property or create a nuisance. Accordingly, whether the effluent actually reaches the Protestants' property or with what frequency it may reach the property is immaterial.

Protestants' Comment: FOF 54 It is unclear what the meaning or purpose of this addition is, because to Protestants knowledge, there are no "standards for a dry creek" separate from the standards for an intermittent stream.

DHJB's Response: The Applicant understood the Commissioners' comments to indicate that the ALJ had misconstrued/misinterpreted TCEQ policy and established stream standards on this topic, and observed that the standards for an intermittent reach were more stringent to protect the water of the state when present.

Protestants' Comment: FOF 62 should be deleted, issue wasn't discussed at Commissioner's meeting; Commission didn't instruct Applicant to rehabilitate entire PFD or Order.

DHJB's Response: No limitation in order, only saying that we draft order: "containing findings of fact and conclusions of law on all the contested issues consistent with the ALJ's recommendations on the issues to the extent that they are not in conflict with the Commission's directions today." Not inconsistent with ALJ's recommendations. This issue was raised by the

ED during the July 1st Agenda, and the FOF 62 (proposed) is consistent with the Commissioners' ruling that the ALJ erred in her interpretation of the TCEQ's Texas Surface Water Quality Standards (TSWQS).

Protestants' Comment: FOF 84 should be deleted, Commission didn't make a finding that there was no nuisance, only that it would be outside the Commission's JDX

DHJB's Response: The Commissioners found that the ALJ's rulings regarding nuisance, and several other matters were beyond the scope of TCEQ jurisdiction. It was specifically held that: "the Commission finds that 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 the Graham/Hastings property pursuant to 30 TAC 307.1 or create nuisance conditions." *See* p.3, TCEQ Interim Order dated 7-1-15.

Protestants' Comment: FOF 85 should be deleted, not related to header "Bacteria and Chlorine"

DHJB's Response: The "header" is irrelevant. Can move that finding if truly an issue.

Protestants' Comment: FOF 86 should be deleted, not related to header "Bacteria and Chlorine."

DHJB's Response: Again, the "header" is irrelevant. Can move that finding if truly an issue.

Protestants' Comment: Deleted FOFs 82 and 86-90 should remain in. There were fact findings of the judge, and evidence in the record. They were not disturbed by the Commission's interim order; there was no instruction to delete every fact finding that was the basis of the PFD

DHJB's Response: Commission held that "the Commission finds that Findings of Fact regarding issues outside of the Commission's jurisdiction in this matter such as erosion, stormwater and property access are superfluous to the Commission's decision and should not be included in the Order." These reference property access by children and cattle. Further, the Commission held that "the Commission finds that 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," and that the discharge would "not impair the use and enjoyment of the Graham/Hasting Property pursuant to 30 TAC 307.1 or create a nuisance." These superfluous FOFs could be adverse to this finding. Moreover they are unnecessary.

Protestants' Comment: FOF 93 should be reverted to "several" Commission made no finding that the portions were "small."

DHJB's Response: The Applicant believes that the recharacterization of the Finding by changing "several" to "small" is consistent with the Commissioners' rulings, however, changing it back to "several" does not change the fundamental rulings of the Commission.

Protestants' Comment: Deleted FOFs 97-99 should not be deleted. Issue was not discussed at Commissioner's meeting; Commission did not instruct Applicant to rehabilitate entire PFD or Order.

DHJB's Response: The Applicant believe deleting these provisions is correct and consistent with the Commissioners' rulings and conclusions that the ALJ committed multiple errors in her misinterpretation of the law, the Commission's rules, and long-standing policy. The deleted FOFs deal with the ALJ's erroneous conclusion that the Applicant's proposed discharge would *not* be into a state water course, and/or that the discharge would impair the Protestants' use and enjoyment of their property or create a nuisance.

Protestants' Comment: Deleted FOF 105 shouldn't be deleted. Transcript cost issue wasn't discussed at Commissioner's hearing.

DHJB's Response: This Finding was deleted because of the Commissioners' conclusions and findings which invalidated the proposition that was suggested that a ruling not in favor of Protestants meant that the ruling granted the Applicant the right to discharge effluent would negatively or impermissibly change the Protestants' lives. The latter issue was clearly discussed and ruled upon by the Commissioners as noted above.

DHJB's Responses to Protestants Comments dated August 7, 2015

Protestants' Comment: FOF 19 This new FOF should be deleted. The Commission did not instruct the Applicant to rehabilitate the entire PFD or to add findings of fact unrelated to the issues discussed at the agenda meeting. Additionally, the Applicant's TLAP permit has expired. The Applicant switching back and forth between 75,000 gallons per day and 0.075 MGD and 350,000 gallons per day and 0.35 MGD is confusing. The Applicant should be directed to use one form or the other throughout.

DHJB's Response: As for it being confusing, that is a description of the currently held permit. This is a basic fact, fully acknowledged by the ALJ. The Applicant filed for the renewal of its current permit to prevent its termination. Accordingly, the Protestants' comments are without merit.

Protestants' Comment: FOF 25 The reasons for amending this FOF are unclear. Substituting "in the" for "with" and adding mode after aeration were not necessary. The mode of treatment was not discussed at the Commissioners' agenda meeting and was not discussed in the Interim Order. The Commission did not instruct the Applicant to rehabilitate the entire PFD or to add findings of fact unrelated to the issues discussed at the agenda meeting.

DHJB's Response: The Commission did not instruct the Applicant to limit its work in any way that prohibited Applicant's "clean-up" of the ALJ's proposed Order. The Finding is not inconsistent with the holding. Further, the instructions were to draft an order consistent with their holding. To have a complete order that includes all of the appropriate and necessary findings and holdings from the Commissioners, certain underlying Findings of Fact are needed.

Protestants' Comment: FOF27 There isn't anything in the record that supports the change made to this FOF. It also appears to be incorrect. The Applicant's wastewater treatment plant is purportedly for the entire approximately 750 acre Johnson Ranch development, not simply the portion being developed by the Applicant. Acreage covered by this permit amendment was not discussed at the Commissioners' agenda meeting and was not discussed in the Interim Order. The Commission did not instruct the Applicant to rehabilitate the entire PFD or to add findings of fact unrelated to the issues discussed at the agenda meeting.

DHJB's Response: The 470 acres refers to the land specifically owned by DHJB, which was added for clarification and is not inconsistent with the Application or the evidence of record regarding the Applicant's property intended to be served.

Protestants' Comment: FOF 29 The Applicant's deletion here adds nothing. The ALJ's FOF did no harm to the Applicant and was consistent with the record. Cleary, the Applicant feels that the proper designation of the proposed discharge route is the unnamed tributary of the Cibolo Creek. The proper designation of the proposed discharge route was not discussed at the Commissioners' agenda meeting and was not discussed in the Interim Order. The Commission did not instruct the Applicant to rehabilitate the entire PFD or to add findings of fact unrelated to the issues discussed at the agenda meeting.

DHJB's Response: The Commission did not instruct the Applicant to limit its work in any way. Finding is not inconsistent with the holding. Further, the instructions were to draft an order

consistent with their holding. In order to have a complete order that includes all of the findings and holdings from the Commissioners, certain underlying findings of fact are needed. More importantly, the deletion of the phrase "what Applicant described as" was accurate and consistent with the Commissioners' (i) ruling that the ALJ had made errors of law in her characterization that the tributary was *not* a watercourse, and (ii) holding that the watercourse was properly described a water of the state, and the watercourse was described as an unnamed tributary of Cibolo Creek.

Protestants' Comment: FOF 30 Protestants did not take exception to the ALJ's PFD because this issue did not appear important at the time. At the hearing the Applicant asserted 50 acres were in the recharge zone and the ALJ merely followed the Applicant's assertion. With all of the changes to the PFD being made by the Applicant regarding the Edwards aquifer, Protestant feel that it is important to point out that the Applicant's Water Pollution Abatement Plan notes that the southern approximately 113 acres is in the recharge zone.

DHJB's Response: The evidence of record supports the Finding and was presented after the creation of the WPAP. The evidence at hearing was updated and corrected with respect to the description in the WPAP. The ALJ's Finding on this subject is accurate, was supported by testimony of experts for the ED and the Applicant, and was not challenged or contested at the hearing on the merits by any party, including the Protestants. Moreover, by their own admission, the Protestants did not challenge this ALJ proposed Finding – this Finding is *not* a new Finding proposed by the Applicant.

Protestants' Comment: FOF 31 This new FOF should be deleted. The issue of whether the wastewater treatment plant is located on the Edwards Aquifer contributing zone or the recharge zone was not discussed at the Commissioners' agenda meeting and was not discussed in the Interim Order. The Commission did not instruct the Applicant to rehabilitate the entire PFD or to add findings of fact unrelated to the issues discussed at the agenda meeting.

DHJB's Response: Commission addressed ALJ failing "to give deference to, again, our longstanding reasonable interpretation of our governing statutes, rules and policies in the implementation of the TPDES program, including our implementation procedures and rules found in 30 TAC, Chapter 307 and the procedures to implement the Texas Surface Water Quality Standards" The siting issues in 307 and 213 were at issue in this hearing and included debate as to what is in the Edwards contributing zone vs recharge zone. Further, the instructions were to draft an order consistent with their holding. In order to have a complete order that includes all of the findings and holdings from the Commissioners, certain underlying findings of fact are needed. The proposed Finding is supported by the record evidence in this case.

Protestants' Comment: FOF 32 Whether or not the outfall was located on the contributing zone is not part of the record. The location of the outfall was not discussed at the Commissioners' agenda meeting and was not discussed in the Interim Order. The Commission did not instruct the Applicant to rehabilitate the entire PFD or to add findings of fact unrelated to the issues discussed at the agenda meeting.

DHJB's Response: Commission addressed ALJ failing "to give deference to, again, our longstanding reasonable interpretation of our governing statutes, rules and policies in the implementation of the TPDES program, including our implementation procedures and rules found in 30 TAC, Chapter 307 and the procedures to implement the Texas Surface Water Quality Standards" The siting issues in 307 and 213 were at issue in this hearing and included debate as to what is in the Edwards contributing zone vs recharge zone. Further, the instructions were to draft an order consistent with their holding. In order to have a complete order that includes all of the findings and holdings from the Commissioners, certain underlying findings of fact are needed. Additionally, the Commission can take Official Notice of the location of the Outfall over the "contributing zone" as the same reflects facts ascertainable on the ground.

Protestants' Comment: FOF 33 This new FOF should be deleted. The issue of the exact path of the discharge route was not discussed at the Commissioners' agenda meeting and was not discussed in the Interim Order. The Commission did not instruct the Applicant to rehabilitate the entire PFD or to add findings of fact unrelated to the issues discussed at the agenda meeting.

DHJB's Response: The proposed Finding continues a general description of the proposed flow path that the effluent will take upon discharge, not the "exact path." Moreover, the discharge route location and classification was discussed at length during the July 1st Agenda and in the Interim Order that "the Commission finds that pursuant to the law applicable to a TPDES permit the discharge route has been properly characterized." Further, the exhibits from the record relied upon by the Protestants during argument on July 1st reflected and Protestants' counsel's arguments included a general description of the flow path that provides a basis for the proposed Finding.

Protestants' Comment: FOF 34 Once again location of the outfall is not part of the record. Location of the outfall in relation to the recharge zone is also not part of the record. The ALJ's finding of fact comports with the record. Ms. Brittany Lee testified that it was approximately 565 feet from the discharge point to the recharge zone.1 Additionally, this issue was not even discussed by the Commission at the agenda meeting. It is once again unclear why the Applicant is taking the liberty of changing a finding of fact that is supported by the record and that is unrelated to the Interim Order.

DHJB's Response: The outfall location was certainly part of the record. "Discharge Point" and "Outfall" were used interchangeably throughout the hearing, and were discussed at length. *See* TR 1: p. 69, line 10; p. 70, lines 13-5; p. 74, lines 17-23; p. 81, lines 17-22; p. 83, lines 15-16; p. 141, lines 6-10; p. 146, line 20-p. 147 line 17; p. 176, lines 2-10; p. 209, lines 19-22. Further, the instructions were to draft an order consistent with their holding. In order to have a complete order that includes all of the findings and holdings from the Commissioners, certain underlying findings of fact are needed. The location of the outfall, specifically in relation to the Recharge Zone, also has to do with "siting criteria," which were addressed by the Commissioners.

Protestants' Comment: FOF 39 The Applicant has changed the ALJ's finding of fact to now find that the discharged effluent "could" reach the Protestants' property; the ALJ had found and written that the effluent "will" reach the Protestants' property. The Applicant's change here is not supported by the record. The ALJ clearly found that "the effluent will reach Protestants' property." At the hearing, the Applicant did not challenge Protestants' evidence on this issue.

Additionally, this issue was not even discussed by the Commission at the agenda meeting. It is once again unclear why the Applicant is taking the liberty of changing a finding of fact that is supported by the record and that is unrelated to the Interim Order.

DHJB's Response: This comment was raised in Protestants' comments to the July 15th proposed Order and is addressed in Applicant's responses thereto.

Protestants' Comment: Deleted FOF 40 This issue was not even discussed by the Commission at the agenda meeting. It is unclear why the Applicant is taking the liberty of deleting a finding of fact that is supported by the record and that is unrelated to the Interim Order.

DHJB's Response: This Finding was deleted because it goes to the ALJ's erroneous rulings related to the Protestants' use and enjoyment of and access to their property which is inconsistent with the Commissioners' ruling that (i) the Applicant met its burden of proof on, and/or (ii) were Findings on matters outside of the Commissioners' jurisdiction.

Protestants' Comment: FOF 42 In the ALJ's PFD this FOF comported with the record. The Applicant's changes to this FOF do not comport with the record. Additionally, this issue was not even discussed by the Commission at the agenda meeting. It is once again unclear why the Applicant is taking the liberty of changing a finding of fact that is supported by the record and that is unrelated to the Interim Order.

DHJB's Response: This Finding was deleted pursuant to the Commissioners' express instruction that matters such as erosion are outside the Commission's jurisdiction and any such Findings "should not be included in the Order."

Protestants' Comment: FOFs 46-47 The Applicant's changes in these findings of fact are legally erroneous. The Applicant states that the effluent limits "required by the Edwards Aquifer rule . . . apply" that the effluent limits "must" be the limits set out in 30 Texas Administrative Code 213.6(c)(1). But this rule clearly states that the proposed effluent limits are "minimum" standards: more restrictive standards are clearly required in some cases (including the current one). The ALJ's amended PFD clearly stated that these were minimum standards. The Applicant's changes imply that these rules establish required effluent limitations. Because these changes are outside of the Commission's Interim Order and are legally inaccurate or legally confusing, they should be rejected. Alternatively, the FOFs should make clear that these limits are minimum standards.

DHJB's Response: Nothing in proposed Findings 46-47 is legally erroneous or confusing. Protestants' claim that "more restrictive standards are clearly required in some cases (including the current one)" has no merit. The changes to the proposed Findings 46 and 47 are accurate with respect to the law applicable to a TPDES Permit as discussed by the Commissioner and in the Interim Order.

Protestants' Comment: FOF 50 It is not clear which FOF the Applicant is changing. This looks somewhat like the ALJ's FOF #55, which was fine as written. It is once again unclear why the Applicant is taking the liberty of changing a finding of fact that is supported by the record and that is unrelated to the Interim Order.

DHJB's Response: This finding was originally ALJ's FOF # 55, the change in the language was merely to match the terminology to the proceeding FOFs related to effluent limitations.

Protestants' Comment: FOF 51 At a minimum this FOF is not properly marked-up. This FOF does not bear any relationship to the ALJ's FOF #55 as indicated. This could not have been discussed at the Commissioners' agenda meeting and was not discussed in the Interim Order. The Commission did not instruct the Applicant to rehabilitate the entire PFD or to add findings of fact unrelated to the issues discussed at the agenda meeting.

DHJB's Response: The Protestant is correct that proposed FOF 55 is not the same as the ALJ's FOF 55, which was renumbered as FOF 50. The proposed FOF 55 does not have a bearing to the original FOF 55. It was inserted as a new finding to summarize all of the effluent limitation issues in one finding as they relate to the ALJ's finding during the hearing and the Commission's finding that the limits in the proposed Permit all meet or exceed the standards prescribed by the Commission's applicable rules for a TPDES permit within 0 to 5 miles of the Edwards Aquifer recharge zone.

Protestants' Comment: FOFs 52-55 These FOFs appear to mirror some of the ALJ's FOFs. It is once again unclear why the Applicant is taking the liberty of changing a finding of fact that is supported by the record and that is unrelated to the Interim Order.

DHJB's Response: The instructions were to draft an order consistent with their holding. In order to have a complete order that includes all of the findings and holdings from the Commissioners, certain underlying findings of fact are needed. The issues raised in proposed FOFs 52-55 all relate to issues the Commissioners made findings on and were added to clear-up/clean-up errors made in the PFD relating to the Texas Surface Water Quality Standards.

Protestants' Comment: FOF 63 This new FOF should be deleted. The issue of the bacteria limits in the TSWQS for the discharge route was not discussed at the Commissioners' agenda meeting and was not discussed in the Interim Order. The Commission did not instruct the Applicant to rehabilitate the entire PFD or to add findings of fact unrelated to the issues discussed at the agenda meeting. Additionally, it is unclear whether this finding of fact is even supported by the record at the hearing. The ALJ's amended PFD did not include this fact finding and did not discuss this particular fact in its analysis.

DHJB's Response: Ms. Brittany Lee's testimony both at the hearing and in prefiled testimony spoke to this FOF. *See* ED Exhibit 20 p. 4, lines 13-20; p. 5, lines 16-22; p. 6, line 1-p. 12, line 23; p. 13, line 15; p. 14, line 9; - ED Exhibit 22; ED Exhibit 23; ED Exhibit 26; TR3: p. 45, lines 8-12. Further, the Commissioners' Order included "The Commission finds that in accordance with TCEQ's regulations implementing the TSWQS at 30 TAC Chapter 307, the discharge under the terms of the permit will comply with all of the general criteria…" Obviously that includes the applicable bacteria limits. This issue was clearly ruled on by the Commissioners, and the proposed Finding is appropriate.

Protestants' Comment: FOFs 74-76 These findings of fact are redundant with findings of fact already in the revised proposed final order.

DHJB's Response: The instructions were to draft an order consistent with their holding. In order to have a complete order that includes all of the findings and holdings from the Commissioners, certain underlying findings of fact are needed. The issues raised in proposed FOFs 74-76 all relate to issues the Commissioners made findings on at the July 1st Agenda, and were added to clear-up/clean-up errors made by the ALJ in the PFD, and/or as a result of other changes to the PFD made pursuant to the Commissioners' Interim Order.

Protestants' Comment: FOF 82 It is unclear what FOF is being modified here. The only FOF that begins with, "When children play in and around . . ." is the ALJ's FOF #78. The record clearly shows that children will be exposed by direct contact. Additionally, this issue was not even discussed by the Commission at the agenda meeting. It is once again unclear why the Applicant is taking the liberty of changing a finding of fact that is supported by the record and that is unrelated to the Interim Order.

DHJB's Response: The "When children play in and around" was from a FOF that was removed pursuant to the Commissioners' Interim Order, it has no bearing on the added FOF 82. This FOF was added pursuant to the Commissioners' holding that the permit will not impair use and enjoyment pursuant to 30 TAC 307.1 and that it it complies with the criteria of 30 TAC Chapter 307. The deletion of all erroneous Findings and Conclusions by the ALJ related to or suggesting that the Applicant failed to meet its burden on the subject was ruled upon by the Commissioners.

Protestants' Comment: FOF 83 It is unclear where the proposed FOF comes from. Nothing in the record supports this FOF. This FOF should be deleted. The Commission did not instruct the Applicant to rehabilitate the entire PFD or to add findings of fact unrelated to the issues discussed at the agenda meeting.

DHJB's Response: This FOF is supported by the record, and was added pursuant to the Commissioners' holding that the permit will comply with the criteria of 30 TAC Chapter 307. The instructions were to draft an order consistent with their holding. In order to have a complete order that includes all of the findings and holdings from the Commissioners, certain underlying findings of fact are needed.

Protestants' Comment: FOF 84 This finding of fact related to nuisance conditions is overly broad. At the agenda meeting, the Commission instructed the Applicant to not include findings of fact regarding issues outside of the Commission's jurisdiction in the matter (e.g., erosion, stormwater, property access). But the record clearly demonstrated, and the ALJ found, that there would be nuisance impacts to the Protestants in this case. An overly broad finding of fact that the permit will not adversely impact any property owners or create nuisance conditions is not supported by the record or the ALJ's findings in this case.

DHJB's Response: This FOF is supported by the record, and the Commissioners' rulings. The Commissioners held at the Agenda meeting, and included in the Interim Order, that "The Commission finds that, 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 the Graham-Hastings property pursuant to 30 TAC §307.1 or create nuisance conditions."

Protestants' Comment: FOFs 85-87 These findings of fact should be deleted. In a section entitled "Bacteria and Chlorine," the Applicant has randomly inserted a finding of fact related to the characterization of the unnamed tributary (#85), the siting regulations found in 30 TAC Chapter 309 (#86), and impacts to cattle (#87). These findings of fact are redundant and do not fit within this section. Proposed finding of fact #86 is not even a finding of fact; it is a conclusion of law.

DHJB's Response: Protestants target these findings based upon the heading and order of numbering of Findings in the ALJ's proposed Order. The comments are substantively accurate. Proposed Findings 85-87 are (i) supported by the record, and (ii) consistent with the Commissioners' rulings on July 1st and in the Interim Order.

Protestants' Comment: Deleted Findings of Fact #80–82; 83–86; Proposed changes to Finding of Fact #82. These findings of fact should not be deleted from the revised proposed final order. These were fact findings made by the ALJ based on the record. They were not disturbed by the Commission's Interim Order: even if there is an ultimate fact finding that cattle would not be harmed by the proposed discharge, the fact findings made by the ALJ about the existence of the cattle and their use of the discharge route were well-established at the hearing based on the evidence. These deletions are arbitrary and the fact findings should remain undisturbed by the Interim Order. An Applicant may not simply delete relevant, well-supported fact findings.

DHJB's Response: The Interim Order included holdings that "the Applicant met its burden of proving the permit will not adversely impact the cattle that graze in the area" and that "the Commission finds that Findings of Fact regarding issues outside of the Commission's jurisdiction in this matter, such as erosion, stormwater, and property access are superfluous to the Commission's decision *and should not be included in the order*." (emphasis added) The instructions were to draft an order consistent with their holding. In order to have a complete order that includes all of the findings and holdings from the Commissioners, certain changes to the original PFD are needed. The issues raised in the original FOFs 80-82 and 83-86 all relate to issues the Commissioners held the ALJ erred on, and were deleted to clear-up errors made in the PFD.

Protestants' Comment: FOF 87 This FOF purports to change the ALJ's FOF #78. The ALJ's FOF #78 addressed direct contact with the effluent by children. Proposed FOF #87 regards cattle. How the two relate is unclear. it is once again unclear why the Applicant is taking the liberty of changing a finding of fact that is supported by the record and that is unrelated to the Interim Order.

DHJB's Response: ALJ's FOF #78 addressed direct contact with the effluent by children. Proposed FOF #87 regards cattle. How the two relate is unclear. It is once again unclear why the Applicant is taking the liberty of changing a finding of fact that is supported by the record and that is unrelated to the Interim Order. Further, the Commissioners' rulings and Orders found that there would not be adverse impacts to children and/or cattle from direct contact with the effluent treated to the prescribed state standards. The proposed Findings are consistent with these rulings.

Protestants' Comment: FOF 88 Once again it is unclear which FOF the Applicant is changing. The ALJ's FOF 88 regards the fact that the proposed discharge route did not have the beds and banks of a channel. The proposed FOF #88 regards negative impact to waters of the state. It is once again unclear why the Applicant is taking the liberty of changing a finding of fact that is supported by the record and that is unrelated to the Interim Order.

DHJB's Response: The confusion suggested by Protestants results from a re-ordering of Findings in the proposed Order necessitated by changes made to address the Commissioners' July 1st decisions and/or the Interim Order. There is nothing inaccurate or inappropriate in the proposed FOF language.

Protestants' Comment: FOF 89 Proposed FOF #89 purports to change the ALJ FOF #79. The FOFs are unrelated. The Commission did not instruct the Applicant to rehabilitate the entire PFD or to add findings of fact unrelated to the issues discussed at the agenda meeting. Additionally, it is unclear whether this finding of fact is even supported by the record at the hearing. The ALJ's amended PFD did not include this fact finding and did not discuss this particular fact in its analysis.

DHJB's Response: The Commissioners' Order included "The Commission finds that in accordance with TCEQ's regulations implementing the TSWQS at 30 TAC Chapter 307, the discharge under the terms of the permit will comply with all of the general criteria..." The instructions were to draft an order consistent with their holding. In order to have a complete order that includes all of the findings and holdings from the Commissioners, certain changes to the original PFD are needed. Proposed FOF 89 fully complies with the Commissioners' Interim Order. Moreover, the Commissioners made clear during the July 1st Agenda that the Commission's rules on water quality criteria for discharged effluent were safe.

Protestants' Comment: FOF 91 The Applicant has changed the ALJ's finding of fact from "[s]everal portions of the discharge route do not have defined bed and banks" to "[s]mall portions of the discharge route . . . does not have well-defined beds and banks." There is no basis for changing "several" to "small." The Commission did not discuss the fact that only small portions lack beds and banks. The ALJ, based on the evidence at the hearing, found that several portions of the route lacked bed and banks, including the Protestants' property. The Applicant's change here is arbitrary and unsupported by the record.

DHJB's Response: This comment was raised in Protestants' comments, received on July 24th, and is addressed in Applicant's responses thereto.

Protestants' Comment: Deleted Finding of Fact #88. It is unclear why the Applicant deleted this FOF, which was supported by the record. The Commission did not instruct the Applicant to rehabilitate the entire PFD or to delete findings of fact unrelated to the issues discussed at the agenda meeting.

DHJB's Response: The Finding is appropriately deleted as an accurate reflection of facts ascertainable on the ground at the time the Commissioners acted on July 1st. Moreover, as a matter of law, treated effluent can be discharged on an Applicant's property near, as well as into, a water course and the water of the state, so long as it is done pursuant to a permit.

Protestants' Comment: Marked through Findings of Fact #90 & 93. The Commission did not instruct the Applicant to rehabilitate the entire PFD or to add findings of fact unrelated to the issues discussed at the agenda meeting. Additionally, it is unclear whether this finding of fact is even supported by the record at the hearing.

DHJB's Response: This change was made to correct the errors of law made by the ALJ suggesting that the ED improperly characterized the proposed discharge route as a watercourse, which were pointed out by both the Applicant and the Executive Director. This also goes to the Commissioners' holding that "the discharge route has been properly characterized."

Protestants' Comment: Deleted Findings of Fact #94–96. These fact findings should not be deleted. The Commission did not state that the discharge route was not a swale or that cattle did not graze in this portion of the discharge route; did not discuss that grass and trees grow in the discharge route; and did not discuss the soil's flatness on Ms. Hastings' property. The Applicant is once again simply deleting fact findings that are completely unrelated to the Commission's Interim Order and were supported by the record.

DHJB's Response: See the comment preceding this one. Additionally, the Commissioner's Interim Order held that FOFs regarding issues outside of the Commission's jurisdiction were superfluous and should be removed. These FOFs were superfluous and, therefore, removed. FOF 94 specifically was an error by the ALJ, mischaracterizing the testimony of Brittany Lee.

Protestants' Comment: FOF 98 This FOF is not supported by the record. This FOF was not discussed at the Commissioners' agenda meeting and was not discussed in the Interim Order. The Commission did not instruct the Applicant to rehabilitate the entire PFD or to add findings of fact unrelated to the issues discussed at the agenda meeting.

DHJB's Response: This proposed Finding is supported by the record, and is consistent with the Commissioners' rulings that the ALJ committed errors of law with regard to her finding that the discharge was not into a watercourse.

Protestants' Comment: Deleted Finding of Fact #102. This should not be deleted. The Applicant has deleted a finding of fact related to transcript costs, even though the Commission clearly did not discuss or even reference this issue at the agenda meeting. The Interim Order did not give the Applicant license to delete whatever findings of fact it disagreed with that were unrelated to the discussion at the meeting or the Interim Order.

DHJB's Response: This comment was previously raised and addressed. Additionally, the Commissioner's Interim Order held that FOFs regarding issues outside of the Commission's jurisdiction were superfluous and should be removed. These FOFs were superfluous and therefore removed. Transcript costs have been allocated. As there was no argument as to the allocation, editorializing on the effect of allocation is unnecessary.

Protestants' Comment: General Remark. As a general matter, Protestants are very concerned that the revised PFD has drawn on facts that are outside of and completely unsupported by the administrative record. For example, during the agenda meeting, Chairman Shaw stated that a drought was occurring prior to the hearing and that this drought contributed to the finding that there were no perennial pools along the discharge route. The record does not support this

conclusion. No party provided testimony at the hearing that a drought was occurring in the Bulverde area when Ms. Lee characterized the watercourse. This is just one example, and Protestants alert the TCEQ that this issue is present.

DHJB's Response: The TCEQ is allowed to take official notice of those factual realities ascertainable on the ground and in the evidence of record. The proposed Order is consistent with these principals, as well as the Commission's rulings on July 1st and in the Interim Order. Chairman Shaw's statement regarding a drought is not a factual supposition or a fact that needs to be supported in the record. Instead, it is a well-documented and easily ascertainable fact that the Commission can take "Official Notice" and a Court "Judicial Notice." The Commission deals with droughts frequently. The fact that the Chairman knew the area was in a state of drought is a reasonable fact for the Chairman to reference.