

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. Clearly, 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.

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)