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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

March 30, 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: **DHJB Development, LLC**
SOAH Docket No. 582-14-3427; TCEQ Docket No. 2013-2228-MWD

Dear Mr. Royall:

Enclosed please find the Executive Director's Exceptions to the Proposal for Decision in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Kathy J. Humphreys".

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

cc: Mailing List

Enclosure

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

APPLICATION BY	§	
DHJB DEVELOPMENT, LLC	§	BEFORE THE
FOR TPDES PERMIT NO.	§	STATE OFFICE OF
WQ0014975001	§	ADMINISTRATIVE HEARINGS

**EXECUTIVE DIRECTOR' S EXCEPTIONS TO THE
PROPOSAL FOR DECISION**

**TO THE COMMISSIONERS OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY:**

The Executive Director of the Texas Commission on Environmental Quality (TCEQ) submits the following specific exceptions (Exceptions) to the Proposal for Decision (PFD) filed by the Administrative Law Judge (ALJ) relating to the application by DHJB Development, LLC (DHJB) for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014975001 in Comal County, Texas.

I. INTRODUCTION

In consideration of the exceptions and policy arguments set forth herein, the Executive Director respectfully requests that the ALJ amend the PFD to support the approval of the Application and the issuance of Draft TPDES Permit No. WQ0014975001 (Draft Permit). Should the ALJ decide not to amend the PFD, the Executive Director requests that the Commission: (1) not adopt the ALJ's Order as presently proposed and attached to the PFD, and (2) adopt a Revised Order approving the Application and the issuance of the Draft Permit. The Executive Director supports the ALJ's findings of fact and conclusions of law not specifically excepted to in these exceptions at this time.

By determining that the Draft Permit should be denied because DHJB did not: 1) demonstrate that the treated effluent would not cause a nuisance because there is no evidence that the treated effluent will be safe for children or 2) demonstrate that the treated effluent would be safe for cattle to drink, the ALJ has effectively recommended that TCEQ suspend the TPDES permitting program. If the Commission adopts the PFD as drafted the Executive Director will be required to place all new and amendment TPDES permit applications on hold until such time as the TCEQ adopts effluent limits that meet drinking water standards for all of Texas' rivers and streams. Additionally, the ALJ disregarded the testimony of the expert most clearly qualified to determine the characteristics of the discharge route in favor of the testimony of a witness that has not visited the site and an expert's report that was prepared for use by the United States Army Corps of Engineers, regarding potential impact to "waters of the U.S." The Texas Water Code, however, requires a permit for discharges to water in the state.¹

II. STANDARD OF REVIEW

ALJs have the regulatory authority to amend their PFDs in response to exceptions, replies, or briefs filed by the parties.² Should the ALJ decide not to amend the PFD, the Commission may modify the ALJ's order or change an ALJ's finding of fact or conclusion of law if the Commission determines that: (1) the ALJ improperly applied or interpreted the law, agency rules or policies, or prior administrative decisions; (2) the ALJ based her decision on a prior administrative decision that is incorrect; or (3) a

¹ TEX. WATER CODE §26.027.

² 30 TEX. ADMIN. CODE § 80.259 (2009).

finding of fact contains a technical error requiring correction.³ Any amendment to the PFD and the accompanying order must be based solely on the record made before the ALJ, and must include an explanation of the basis of the amendment.⁴

III. EXCEPTIONS TO FINDINGS OF FACT, CONCLUSION OF LAW, AND ORDERING PROVISIONS

The Executive Director files exceptions to the Findings of Fact 36-45, 84-86, 89, 90-96, and Conclusion of Law 5, 8, 9-17, 105, 106, 19, 20. These findings of fact and conclusions of law are inaccurate, misleading, against the great weight of the evidence in the record, and are contrary to the Texas Surface Water Quality Standards (TSWQS) and Implementation Procedures (IPs). As such, they should be modified by the ALJ or revised by the Commission.

The ALJ makes significant errors in her discussion regarding the Protestants' use and enjoyment of their property, the impact to cattle, and the characterization of the discharge route, any of which standing alone would be sufficient for the Commission to amend the PFD. The first significant error occurs in the ALJ's discussion regarding the Protestants' use and enjoyment of their property where she states "[t]here was no evidence that it is safe for children to play in or drink effluent treated at the levels Applicant has proposed."⁵ None of the laws, rules, or guidance implementing the Texas Pollutant Discharge Elimination System (TPDES) require that discharges to water in the state be treated to drinking water standards.

³ TEX. GOV'T. CODE § 2001.058(e) (Vernon Ann. 2009).

⁴ *Id.* at § 2003.047(m) (Vernon Ann. 2009).

⁵ Proposal for Decision, Page 15.

The second significant error occurs when the ALJ recommends denying the application because she determined that the proposed discharge route is not a watercourse. As will be discussed in detail below, there is ample expert testimony that demonstrates that the discharge would be to an unnamed tributary then to Upper Cibolo Creek in Segment 1908 of the San Antonio River Basin.

The third significant error occurs when the ALJ finds that the Protestants' cattle may be harmed by the treated effluent.

Throughout the PFD and Proposed Order, the ALJ refers to a portion of the discharge route as "Tributary 21." The Executive Director objects to the ALJ's use of the term "Tributary 21," given that during the Executive Director's review, this section of the discharge route was designated as an "unnamed tributary" which is also incorporated into the terms of the draft permit.⁶ The Executive Director recommends all references to "Tributary 21" be changed to "unnamed tributary" to comply with the Executive Director's naming convention and to avoid confusion.

Additionally, in several locations in the PFD and Proposed Order the ALJ uses the acronym "TSQWS." The Executive Director assumes that this is a simple transposition error and should be TSWQS (Texas Surface Water Quality Standards). The Executive Director, therefore, recommends all instances of "TSQWS" be replaced with "TSWQS."

A. Deference should be given to the Executive Director's interpretation of TCEQ's governing statutes, rules and policy.

⁶ ED-3, Draft Permit, at 000032.

While the ALJ did not specifically rule on the sufficiency of the Executive Director's TPDES permitting process, by finding that the Applicant had not met its burden by failing to prove that the draft permit would not negatively impact the Protestants' use and enjoyment of their property, that the discharge route was not properly characterized, and that the cattle grazing in the area would be negatively impacted, she implicitly ruled that the TCEQ's rules and policies are insufficient. It is well-settled that reviewing courts must give deference to an agency's reasonable interpretation of statutory authority.⁷ This deference applies to formal opinions in formal proceedings.⁸ Moreover, the Supreme Court has explicitly stated that where "Congress has. . . left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."⁹ The Supreme Court has also stated that enforcement and guidance materials, while not entitled to Chevron-style deference, still are accorded "respect to the extent they are persuasive."¹⁰

B. General Discussion regarding Referred Issues 1, 2 and 4.

1. Whether the Proposed Permit Will Adversely Impact Use and Enjoyment of Adjacent and Downstream Property or Create Nuisance Conditions.

The ALJ found that the effluent discharged under the terms of the proposed permit would negatively impact the use and enjoyment of the Protestants' property.

⁷ *In re American Homestar of Lancaster, Inc.*, 50 S.W.3d 480, 490-91 (Tex. 2001).

⁸ *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 747 (Tex. 2006).

⁹ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

¹⁰ *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L. Ed..2d 621 (2000); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L. Ed. 124 (1944).

Principally, the ALJ found that there is no evidence that the effluent is safe for children to play in or drink at the levels proposed by the Applicant. Further, while the ALJ concluded that many of the nuisance issues raised by the Protestants were outside the scope of a TPDES application (i.e., erosion and construction debris), she still included several Findings of Fact related to these irrelevant issues. In making these conclusions and findings, the Executive Director believes that the ALJ applied an inappropriate standard to the facts at hand.

Before discussing use and enjoyment and nuisance issues related to this Application, it is useful to define the standard by which these issues should be assessed. In the context of a TPDES permit, the standard to determine nuisance should be limited to whether an applicant has complied with all statutory and regulatory requirements that apply to those aspects of the discharge and associated permitted treatment units that have the potential to cause a nuisance. The Protestants have consistently promoted a common law theory of nuisance that should guide this case. However, as it relates to the protection of water quality, the jurisdiction of TCEQ is limited by the Texas Water Code (TWC) to the creation and enforcement of water quality standards, the issuance of permits, and conducting hearings “with respect to its jurisdiction under this [Texas Water] code and other laws and rules.”¹¹ The TCEQ does not have jurisdiction to hear matters arising in tort. Texas courts define a nuisance as “a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or

¹¹ See, TEX. WATER CODE ANN. §§ 5.013(a)(3) and 5.102(b)(Vernon 2008).

annoyance to persons of ordinary sensibilities.”¹² Neither TCEQ nor the SOAH judge should be called upon to define “a condition,” to determine what it means to “substantially interfere,” or dissect the concepts of “unreasonable discomfort” or “ordinary sensibilities.”

Although the ALJ never expressly adopts a clear standard for the consideration of nuisance or use and enjoyment issues, the PFD includes Findings of Fact that address issues that are beyond the scope of a TPDES permit, some of which contradict the ALJ’s conclusions on those issues in the body of her analysis. These Findings of Fact include 36, 37, 38, 39, 40, 42, 43, 44, 45, and 84.

In forming her conclusion regarding use and enjoyment of the Protestants’ property, the ALJ found that “there was no evidence that it is safe for children to play in or drink effluent treated at the levels Applicant proposed.”¹³ The ALJ’s finding on this issue is flawed because she applied an incorrect standard to the application and neglected to weigh or consider evidence on the record.

To the extent that the ALJ believes that the Texas Surface Water Quality Standards require discharges to be safe for drinking or direct consumption, the ALJ has applied the incorrect standard. The TSWQS do not require effluent to be treated to drinking water standards. Rather, the TSWQS require that “existing, designated, presumed, and attainable uses of aquatic recreation must be maintained, as determined by criteria that indicate the potential presence of pathogens.”¹⁴ For a water body with a designated or presumed use of “primary contact recreation 1,” the term is defined in the

¹² *Schneider National Carriers, Inc. v. Bates*, 147 S.W.3d 264, 269 (Tex. 2004).

¹³ Proposal for Decision, page 15.

¹⁴ 30 TEX. ADMIN. CODE §307.4(j)(1).

TSWQS to include “activities that are presumed to involve a significant risk of ingestion of water,” including “wading by children, swimming, water skiing, diving, tubing, surfing ...”¹⁵ Under the TSWQS, recreational uses of waters are maintained through the implementation of criteria for bacteria, and through disinfection.¹⁶ In the case of an unclassified intermittent stream or intermittent stream with perennial pools, primary contact recreation 1 is presumed by rule.¹⁷ While these standards are meant to be protective of recreation activities involving a risk of ingestion, they are not intended to be protective for direct consumption of water.¹⁸ To the extent that the ALJ applied the TSWQS in her analysis, the statement that there was “no evidence that it is safe” for recreational uses is simply not correct.¹⁹ Ms. Brittany Lee provided testimony in the form of an interoffice memorandum, which stated that an antidegradation review had determined that existing water quality uses – including recreational uses - would not be impaired by the permit action.²⁰ Mr. Phillip Urbany also provided testimony that the draft permit included a chlorination requirement and a bacteria limit of 126 colony forming units per 100 ml, which complies with 30 Tex. Admin. Code § 307.7(b)(1)(A)(i).²¹ The ALJ’s conclusion is particularly confusing because the ALJ acknowledged this standard in her PFD and noted that “effluent limits had been established for protection of recreational uses.” On page 49 of the PFD, the ALJ noted

¹⁵ *Id.* at §307.3(49).

¹⁶ *Id.* at §307.7(b)(1).

¹⁷ *Id.* at §307.4(j)(2)(A).

¹⁸ *See, e.g.*, 30 TEX. ADMIN. CODE §307.7(b)(1)(“A designation of primary or secondary contact recreation is not a guarantee that the water so designated is completely free of disease-causing organisms.”).

¹⁹ Proposal for Decision, page 15.

²⁰ ED-24 (Testimony of Ms. Brittany Lee, Interoffice Memorandum, dated 11 January 2013).

²¹ ED-1, page 000028.

that “effluent limits have been set for receiving waters classified as ‘contact recreation, public water supply, aquifer protection, and high aquatic life use...”²² Additionally, the ALJ noted in Finding of Fact 74 that “with proper dosage of chlorine for the proper detention time, the bacteria levels will be reduced to levels that comply with TCEQ requirements.”²³

The decision of the ALJ creates an untenable situation where compliance with the TSWQS is not sufficient for determining whether an application should or should not be issued. While the ALJ acknowledged that recreational uses will be maintained, she nevertheless determined that effluent discharge will not be “safe for children to play in or drink ... at the levels Applicant proposed.” The ALJ leaves the Commission with the impossible task of determining what standard should apply to this application, and future applications, if the TSWQS are not sufficient.

2. Referred Issue 2 – Whether the Discharge Route has been Properly Characterized.

The discharge route is properly characterized as to an unnamed tributary, then to Upper Cibolo Creek in Segment 1908 of the San Antonio River Basin. The ALJ determined that the discharge route is not a watercourse; however, that is not the correct standard. The correct standard is whether the discharge would be to water in the state. The TCEQ may authorize permits for the “discharge of waste or pollutants into or adjacent to water in the state.”²⁴ The term “watercourse” is used in the definition

²² Proposal for Decision, page 49.

²³ Order, Finding of Fact No. 74, page 7.

²⁴ TEX. WATER CODE §26.027(a).

of “water in the state”; however, the term “water in the state” encompasses more than a watercourse. The TWC defines “water in the state” as:

groundwater, percolating or otherwise, lakes, bays, ponds, impounding reservoirs, springs, rivers, streams, creeks, estuaries, wetlands, marshes, inlets, canals, the Gulf of Mexico, inside the territorial limits of the state, and all other bodies of surface water, natural or artificial, inland or coastal, fresh or salt, navigable or nonnavigable, 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.²⁵

To reach her erroneous conclusion that the discharge would not be to a watercourse the ALJ determined that: 1) while some of the maps had “slight” indications of an intermittent stream, most do not; 2) an aerial map did not show a watercourse; 3) swales are shown on some of SWCA’s maps; 4) the bed and banks are not visible in the Applicant’s 2012 photographs, and 5) the Applicant began making a channel in 2013.²⁶

The ALJ, however, completely disregarded the testimony of Ms. Lee, the one witness most qualified to make the determination that the discharge would be to water in the state. Ms. Lee has been a full-time employee of the TCEQ for over six years and has reviewed over 700 applications.²⁷ Ms. Lee, along with representatives from DHJB, the Protestants’ and the Executive Director’s staff, visited the Johnson Ranch property and walked along the discharge route on October 20, 2014, prior to the contested case hearing. According to Ms. Lee’s testimony, she walked the discharge route from the location of the proposed outfall to FM 1863.²⁸ Ms. Lee noted that “[s]everal areas upstream of the concrete culvert do not depict a defined bed and banks for a channel,

²⁵ TWC § 26.001(5).

²⁶ PFD, Page 24, Item 2.

²⁷ ED-20, at 000165, line 9 and 000166, line 4.

²⁸ ED-20, at 000182, lines 14-15.

however, slope and vegetation patterns indicated that water flowed in a general direction. These areas could be considered to be more like swales than a defined stream.”²⁹ Ms. Lee testified that the site visit confirmed her original determination that the discharge was to an unnamed tributary.³⁰

a. The USGS map used by the Executive Director clearly showed that the discharge would be to an intermittent stream.

It appears that the ALJ misunderstood Ms. Lee’s testimony. In her PFD, the ALJ states that “[w]hile some maps have slight indications of an intermittent stream, most do not. On the map Ms. Lee used, she had to draw lines in blue to show what she thought was the tributary.”³¹ To support this conclusion, the ALJ relied on ED-Exhibit 28 (a USGS map). The ALJ did not consider Ms. Lee’s testimony as a whole. Ms. Lee did not draw the blue dotted and dashed line, she simply highlighted it. Ms. Lee first testified that she made an independent determination of the discharge route.³² As part of her research, Ms. Lee consulted with United States Geological Survey (USGS) maps and GIS aerial photography.³³ Ms. Lee testified that the USGS map denoted the unnamed tributary with blue dashes and dots, indicating an intermittent stream, and the GIS aerial photography suggested pools both upstream and downstream of the discharge point.³⁴ Later, during her testimony regarding the location of the discharge relative to the Edwards Aquifer Recharge Zone, Ms. Lee testified that Exhibit 28 is “a

²⁹ ED-20, at 000183, lines 1-5.

³⁰ *Id.* at 000183, lines 9-10.

³¹ Proposal for Decision, page 24.

³² ED-20, at 000187, lines 9-20.

³³ *Id.* at 000188, lines 4-10.

³⁴ *Id.* at 000188, lines 7-14.

copy of the USGS topo map that I generated using GIS. I highlighted the proposed discharge route.”³⁵ ED Exhibit 28 clearly indicates the discharge route as a blue dashed and dotted line. Ms. Lee did not draw the blue dotted and dashed line, she simply highlighted it in yellow. The blue line Ms. Lee added is a solid line with her handwritten note regarding the beginning of the Edwards Aquifer Recharge Zone.

b. All of the aerial maps used as exhibits at the hearing clearly show the discharge route.

In her analysis of the characterization of the discharge route, the ALJ references the photographs DHJB submitted with its Application in 2012.³⁶ The ALJ relied on photographs DHJB submitted with its application and entirely disregarded all of the aerial photographs, as well as Ms. Lee’s testimony regarding her field observations from her site visit. During the hearing several different photographs were admitted that clearly demonstrate a defined discharge route. Ms. Lee testified that she reviewed the aerial photograph submitted as exhibit ED-27, and in conjunction with her review of the USGS map, verified the discharge route.³⁷ Mr. Tracy Bratton, one of DHJB’s witnesses, testified that he used a purple line to demonstrate the discharge route, including the swale, on DHJB’s exhibit 1.7A.³⁸ During the Protestants’ cross examination of Ms. Lee, the Protestants showed Ms. Lee various photographs taken during her site visit that clearly show a defined bank.³⁹

³⁵ ED-20, at 000190, lines 10-11.

³⁶ Proposal for Decision, page 24.

³⁷ ED-20, at 000187, lines 9-19.

³⁸ Hearing Transcript, Vol. 2, page 221, lines 21-25.

³⁹ Hearing Transcript, Vol. 3, page 59, line 22 through page 61, line 20.

As part of an application for a TPDES permit, Applicants must submit color photographs. The ALJ formed her opinion regarding the discharge route using the maps DHJB submitted with its application, completely discounting Ms. Lee's expert testimony. It is important to note that the photographs in the application were taken at or near ground level, while the GIS photograph that Ms. Lee relied on is an aerial photograph. Both types of photographs are useful, but the ED respectfully submits that without any evidence supporting what ground-level photographs demonstrate, they should not be used to determine the absence of the discharge route.

c. The maps included in the SWCA report support the Executive Director's determination that the discharge route is to an unnamed tributary.

The ALJ relies on maps prepared by SWCA Environmental Consultants (SWCA) to assess potential impacts to aquatic resources for the U.S. Army Corps of Engineers (USACE). At the time, the USACE was reviewing the Johnson Ranch Project because of a citizen's inquiring regarding a possible discharge into potential waters of the U.S.⁴⁰ The important distinction here is that the SWCA was evaluating the site for potential impacts to waters of the U.S., not water in the state. The maps presented as Figures 2, 3 and 4 in the SWCA report all denote the initial portion of the discharge route as an upland vegetated swale.⁴¹ TCEQ has consistently interpreted the Texas Water Code to provide that a discharge of treated effluent to a grassy swale may be authorized because the grassy swale conveys water in the state. As discussed above, after walking along the discharge route, Ms. Lee determined that the discharge route would be to a grassy swale,

⁴⁰ Prot. Ex. 1.9, page, DHJB-02159.

⁴¹ *Id.* at pages, DHJB 02165-02167.

but that did not change her initial determination that the discharge route was properly characterized as to an unnamed tributary. To demonstrate that the effluent route chosen by DHJB is not unique, Mr. Mike Urrutia, Director of Water Quality Services for the Guadalupe-Blanco River Authority (GBRA), testified that the discharge route for the Canyon Lake Estates wastewater treatment plant is to both a grassy swale and a low spot in the land.⁴²

d. The unnamed tributary existed before DHJB began construction.

The Protestants offered various USGS maps dating from the early 1900s to demonstrate that the discharge route must be man-made, because it was not identified on all of the USGS maps. The determination of whether a discharge route exists is not based on the historical existence of the discharge route; rather it depends on current data regarding the discharge route's existence at the time the application is submitted. Nevertheless, Ms. Lee testified that she was aware that DHJB had re-routed the unnamed tributary that already existed around the plant rather than having it go through the plant; however, that did not change her opinion that the discharge route would be to an unnamed tributary then to Upper Cibolo Creek in Segment 1908 of the San Antonio River Basin.⁴³

e. Applicability of *Hoefs v. Short* and *Domel v. City of Georgetown*.

The ALJ makes a distinction between this case and the *Hoefs* and *Domel* cases, concluding that neither case supports DHJB's application. The Executive Director respectfully disagrees. The decision in *Hoefs v. Short* has stood for over 90 years. In

⁴² Hearing Transcript, Vol. 2, Page 36, line 14 through page 37, line 3.

⁴³ ED-20, at 00192, line 8 through page 000193, line 22 (Pre-filed Testimony of Ms. Brittany Lee).

Hoefs, the court recognized that the bed and banks could be slight, imperceptible or absent in some instances and still be a water course.⁴⁴ The *Hoefs* court went on to explain that swales may sometimes be a watercourse. In 1999, the Texas Court of Appeals reiterated the decision in *Hoefs*, that a water course may, in places, not have clearly defined bed and banks.⁴⁵ While the issue in *Hoefs* was whether a dam could be constructed across a particular water body, *Domel* dealt with a discharge from a waste water treatment facility. Both are instructive in this case. Experts for both DHJB and the Executive Director testified that in this case, the swales are a watercourse.⁴⁶ The pictures produced by the Protestants depict a grassy swale. To illustrate that the Commission issues TPDES permits to tributaries that are grassy swales, Mr. Urrutia, the Director of Water Quality Services for GBRA, testified that the Canyon Park waste water treatment facility is authorized to discharge to a grassy swale.⁴⁷

3. *Referred Issue 4 – Whether the Treated Effluent will Adversely Impact the Cattle that Currently Graze in the Area.*

The ALJ found that DHJB failed to demonstrate that the discharge of effluent on Protestants' property will not adversely impact the cattle. However, in making this finding the ALJ acknowledged that the Texas Surface Water Quality Standards (TSWQS) were promulgated with the idea of protecting livestock.

The Executive Director determined that this permit should not be denied based on the ALJ's finding that DHJB failed to demonstrate that the discharge will not

⁴⁴ *Hoefs v. Short*, 114 Tex 501, 273 S.W. 785 (1925).

⁴⁵ *Domel v. City of Georgetown*, 6 S.W. 3d 349, 356 (Tex. App.-Austin 1999).

⁴⁶ ED-20, at 000187, lines 9-20 through 000188, lines 4-14 (Pre-filed Testimony of Ms. Brittany Lee); App. Ex. 3.0- at 7 line 13-18 (Pre-filed Testimony of Mr. Tracy Bratton).

⁴⁷ Hearing Transcript, Vol. 2, page 51, line 25 through page 52, line 1.

adversely impact cattle. The TSWQS embody the standards to which the Commission reviews a discharge application to carry out its legislative directive “to maintain the quality of water in the state consistent with public health and enjoyment, the propagation and protection of terrestrial and aquatic life...”⁴⁸ As stated before, the Executive Director has determined that the proposed permit for the facility complies with the TSWQS.

The ALJ has applied an incorrect standard in analyzing the quality of effluent applicable to this permit application.⁴⁹ In her analysis, the ALJ states that given that this is not Type I effluent, there is no evidence that the limits in the draft permit will be adequately protective of the cattle.⁵⁰ Type I effluent is not an applicable standard when analyzing the quality of effluent that will be discharged under this proposed TPDES permit. Type I effluent standards are numerical limits pertaining to specific uses of reclaimed water.⁵¹ The effluent limitations that are applicable to Chapter 210 reuse authorizations are more stringent, given that they are directly applied to an area via an irrigation system.⁵² The Executive Director did not use Type I effluent standards to assign the effluent set for this draft permit; therefore, it would be improper for the ALJ to require that such standards be met by the Applicant. For example, Mr. Urbany has testified that a Chapter 210 authorization and the applicable effluent standards for Type I and Type II effluent are not a part of the permitting review process for a wastewater

⁴⁸ TEX. WATER CODE § 26.003.

⁴⁹ Proposal for Decision, page 48.

⁵⁰ Proposal for Decision, page 49.

⁵¹ 30 TEX. ADMIN. CODE § 210.1.

⁵² *Id.* at §210.32.

treatment facility.⁵³ In addition, Mr. Urbany stated that a permit authorization for a Chapter 210 reuse authorization is reviewed separately from a discharge permit.⁵⁴ The TCEQ's rules do not require that the effluent limitations of a TPDES permit meet the Type I effluent standards for a Chapter 210 reuse authorization. The ALJ's finding on this issue is flawed because she improperly applied agency rules in her analysis of this issue.

The ALJ has ostensibly concluded that the TSWQS are created to protect livestock; however, she has also concluded that there is insufficient evidence presented that the effluent discharge from the proposed facility will be safe for the cattle on the Protestants' property to drink.⁵⁵ As previously stated, it is important to note that although the TSWQS are meant to be protective of recreational activities, including the risk of consumption, they are not intended to be protective for direct consumption of water.⁵⁶ The Commission does not have specific water quality-based effluent limitations for water consumed by livestock or wildlife.⁵⁷ However, as a protective measure against toxic constituents being introduced into surface waters of the state, the TSWQS require that certain criteria and controls measures be implemented for toxic materials. The TSWQS incorporates toxic numerical criteria for aquatic life, human health and total (whole-effluent) toxicity of permitted discharges.⁵⁸ Therefore, in accordance with the standards set forth in the TSWQS at 30 TEX. ADMIN. CODE § 307.7(b)(1)(A) and 30 TEX.

⁵³ ED-1 page 000014, line 1 through page 00015, line 13 (Pre-filed Testimony of Mr. Phillip Urbany).

⁵⁴ *Id.* at 000015, lines 7-13.

⁵⁵ Proposal for Decision, page 49.

⁵⁶ 30 TEX. ADMIN. CODE § 307.7(b)(1).

⁵⁷ ED-13 at 000146 (Executive Director's Response to Comments).

⁵⁸ 30 TEX. ADMIN. CODE § 307.6(b)(1-4).

ADMIN. CODE § 307.6(b)(1-4), the draft permit includes chlorination of the effluent for disinfection and a bacteria limit of 126 colony forming units of *E. coli* per 100 ml.⁵⁹

The Executive Director has determined that DHJB proposed a treatment process that will meet the standards set forth in the TSWQS; therefore, the proposed effluent discharge will not adversely affect the cattle that currently graze on the Protestants' property. While the ALJ did not specifically rule on the Executive Director's review of this permit application under the TSWQS, she did imply that these standards are insufficient by determining that the Applicant failed to demonstrate that the discharge of effluent on Protestants' property will not adversely impact cattle. If meeting these standards is insufficient, according to the ALJ, again, it leaves the Commission with the impossible task of determining what standard should apply to this application.

VI. CONCLUSION

Based on the evidentiary record in this case the Executive Director concludes that DHJB has satisfied all applicable statutory and regulatory requirements in its application for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014975001, and that Draft TPDES Permit No. WQ0014975001 meets all applicable statutory and regulatory requirements and can be issued without any additional provisions.

⁵⁹ ED-3, Draft Permit, at 000033-000035 (regarding the Interim I, II and Final phase effluent limitations and monitoring requirements).

VII. EXECUTIVE DIRECTOR'S EXCEPTIONS TO AND RECOMMENDED CHANGES TO FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The Executive Director respectfully recommends the ALJ either delete or amend the following Findings of Fact and Conclusions of Law.

1. *Finding of Fact 36. If the effluent is discharged at the rate of 350,000 GPD, the effluent will reach the Graham-Hastings property.*

The Executive Director recommends Finding of Fact 36 be deleted in its entirety. This finding of fact is neither relevant nor material to any of the issues referred to SOAH by the Commission and therefore should not be included in the Findings of Fact.

2. *Finding of Fact 37. Discharged effluent will moisten or saturate soils on Protestants' property.*

The Executive Director recommends Finding of Fact 37 be deleted in its entirety. This finding of fact is neither relevant nor material to any of the issues referred to SOAH by the Commission and therefore should not be included in the Findings of Fact.

3. *Finding of Fact 38. The moistened soils will inhibit vegetative growth on Protestants' Property.*

The Executive Director recommends Finding of Fact 38 be deleted in its entirety. This finding of fact is neither relevant nor material to any of the issues referred to SOAH by the Commission and therefore should not be included in the Findings of Fact.

4. *Finding of Fact 39. The flow of effluent will increase the potential for exposed soils to erode.*

The Executive Director recommends Finding of Fact 39 be deleted in its

entirety. This finding of fact is neither relevant nor material to any of the issues referred to SOAH by the Commission and therefore should not be included in the Findings of Fact.

5. *Finding of Fact 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.*

The Executive Director recommends Finding of Fact 40 be deleted in its entirety. This finding of fact is neither relevant nor material to any of the issues referred to SOAH by the Commission and therefore should not be included in the Findings of Fact.

6. *Finding of Fact 41. Erosion on the Graham-Hastings property will impact the Grahams' use and enjoyment of the property.*

The Executive Director recommends Finding of Fact 41 be deleted in its entirety. Issues regarding erosion are outside the scope of issues considered in the TPDES permitting process. Erosion was not referred by the Commission and is not addressed during the review of a TPDES permit application. Neither the Texas Surface Water Quality Standards nor 30 TEX. ADMIN. CODE Chapter 309 contain any criteria by which erosion is assessed.

7. *Finding of Fact 42. Erosion on the Graham-Hastings property will cause the loss of pastureland used for cattle grazing.*

The Executive Director recommends Finding of Fact 42 be deleted in its entirety. Issues regarding erosion are outside the scope of issues considered in the TPDES permitting process. Erosion was not referred by the Commission and is not addressed during the review of a TPDES permit application. Neither the Texas Surface

Water Quality Standards nor 30 TEX. ADMIN. CODE Chapter 309 contain any criteria by which erosion is assessed.

8. *Finding of Fact 43. The proposed permit amendment will diminish Protestants' opportunities to walk along their property and to eat the wild fruits that grow there.*

The Executive Director recommends Finding of Fact 43 be deleted in its entirety. The TWC § 26.027 provides that the TCEQ may authorize permits for the “discharge of waste or pollutants into or adjacent to water in the state.”

The draft permit would authorize DHJB to discharge treated effluent to an unnamed tributary, then to Upper Cibolo Creek. The evidence in the record does not support a finding that under normal conditions, even if DHJB were discharging at its full permitted volume, that the Protestants would not be able to walk along their property and eat the wild fruits.

9. *Finding of Fact 44. Access by the Grahams and Ms. Hastings to their western property line to tend to fence repairs and other property management issues will be made more difficult because of the presence of discharged effluent.*

The Executive Director recommends Finding of Fact 44 be deleted in its entirety. Issues regarding the Protestants’ access to property are outside the scope of issues, including nuisance issues, considered in the TPDES permitting process.

10. *Finding of Fact 45. The proposed permit amendment will impair the Protestants' access to and enjoyment of the western portion of the property.*

The Executive Director recommends Finding of Fact 45 be deleted in its entirety. Issues regarding the Protestants’ access to property are outside the scope of issues considered in the TPDES permitting process.

11. *Finding of Fact 84. Undiluted discharged effluent is not a high quality source of water for cattle.*

The Executive Director recommends Finding of Fact 45 be deleted in its entirety.

As discussed above, there is insufficient evidence in the record to support this finding.

12. *Finding of Fact 85. What may appear to be a watercourse on some maps of Protestants' property is actually a rock wall used for either stormwater control or soil conservation.*

The Executive Director recommends Finding of Fact 85 be deleted in its entirety. The determination of whether a discharge route exists is not based on the historical existence of the discharge route; rather it depends on current conditions. Ms. Lee, a witness for the Executive Director, testified that she consulted with United States Geological Survey (USGS) maps and that the USGS map denoted the unnamed tributary with blue dashes and dots, indicating an intermittent stream.⁶⁰

13. *Finding of Fact 86. Although some maps indicate that Cibolo Tributary 21 is an intermittent stream, it is not depicted at all on a large number of the maps.*

The Executive Director recommends Finding of Fact 86 be deleted and replaced with: The unnamed tributary is clearly depicted by a blue dotted and dashed line on the USGS map the Applicant submitted with its application.

First, as discussed above, the Executive Director objects to the ALJ's use of the term "Tributary 21." Mr. Bratton, an engineer for DHJB, used the term in his testimony to distinguish between the unnamed tributary on DHJB's property and the unnamed tributary it joins. Mr. Bratton testified that the FEMA map denoted the

⁶⁰ ED-20 at 000188, lines 4-14.

tributary on DHJB's property as "Tributary 21."⁶¹ The designation is not on the USGS maps used by the Executive Director to determine the discharge route; therefore, to avoid undue confusion, the Executive Director recommends that all references to "Tributary 21" be deleted and replaced with "unnamed tributary."

Additionally, the Executive Director objects to this Finding of Fact because the determination of whether a discharge route exists is not based on the historical existence of the discharge route; rather it depends on current conditions. Ms. Lee, a witness for the Executive Director, testified that she consulted with United States Geological Survey (USGS) maps and that the USGS map denoted the unnamed tributary with blue dashes and dots, indicating an intermittent stream.⁶²

14. *Finding of Fact 89. On the southern end on Ms. Hastings' property, the soil is relatively flat, and there is no regular flow of water.*

The Executive Director recommends that Finding of Fact 89 be deleted in its entirety. As discussed above, neither the TWC nor the TCEQ's rules require the Executive Director to find that the discharge route conforms to any particular shape or have a regular flow of water. In fact, the unnamed tributary was classified as "intermittent with pools."⁶³

15. *Finding of Fact 90. Photographs of Johnson Ranch from 2012 do not show any beds or banks at the proposed outfall location.*

The Executive Director recommends Finding of Fact 90 be deleted and replaced with: The unnamed tributary is clearly depicted by aerial photography.

⁶¹ App. Ex. 3.0, pg 008, lines 5-15.

⁶² ED-20, at 000188, lines 4-14.

⁶³ ED-20, at 000175, Line 19.

The Executive Director assumes that the photographs the ALJ is referring to are the photographs the Applicant submitted with its application for a TPDES permit. The photographs in the application were taken at or near ground level, while the GIS photograph that Ms. Lee relied on is an aerial photograph. Both types of photographs are useful, but the ED respectfully submits that without any evidence supporting what ground-level photographs demonstrate, they should not be used to determine the absence of the discharge route.

16. *Finding of Fact 91. Aquatic resources on the Johnson Ranch include ephemeral watercourses, an artificial waterbody, upland-vegetated swales, and areas of diffuse surface drainage.*

The Executive Director recommends Finding of Fact 91 be deleted in its entirety. The TWC § 26.027 provides that the TCEQ may authorize permits for the “discharge of waste or pollutants into or adjacent to water in the state.” As discussed above, this Finding is based on a study to determine possible impacts to jurisdictional waters from the proposed discharge. The definition of water in the state is broader than the definition of jurisdictional, and, therefore is of limited use in the TPDES permitting scheme. In particular for this finding, the existence or absence of aquatic resources on DHJB’s property, other than water in the state, are not relevant to any of the issues referred to SOAH, nor are they relevant to the issuance of a TPDES permit.

17. *Finding of Fact No 92. No aquatic resources on Johnson Ranch are relatively permanent, rather they are ephemeral with flows being infrequent as evident by the broken, fitful nature.*

The Executive Director recommends Finding of Fact 92 be deleted and replaced with: The unnamed tributary is intermittent.

The TWC § 26.027 provides that the TCEQ may authorize permits for the “discharge of waste or pollutants into or adjacent to water in the state.” As discussed above, this Finding is based on a study to determine possible impacts to jurisdictional waters from the proposed discharge. The definition of water in the state is broader than the definition of jurisdictional, and, therefore is of limited use in the TPDES permitting scheme. In particular for this finding, the fact that the aquatic resources are ephemeral with infrequent flows supports the Executive Director’s determination that the unmated tributary is intermittent.

18. Finding of Fact 93. High water mark indicators on Johnson Ranch are inconclusive, unreliable, misleading, and otherwise not evident along many areas because of the infrequent flows.

The Executive Director recommends Finding of Fact 93 be deleted in its entirety. The TWC § 26.027 provides that the TCEQ may authorize permits for the “discharge of waste or pollutants into or adjacent to water in the state.” As discussed above, this Finding is based on a study to determine possible impacts to jurisdictional waters from the proposed discharge. The definition of water in the state is broader than the definition of jurisdictional, and, therefore is of limited use in the TPDES permitting scheme. In particular for this finding, the fact that the flows are infrequent supports the Executive Director’s determination that the unnamed tributary is intermittent.

20. Finding of Fact 94. Historical agricultural practices have either attenuated all ordinary flows or completely severed connectivity.

The Executive Director recommends Finding of Fact 93 be deleted in its entirety. The determination of whether a discharge route exists is not based on the

historical existence of the discharge route; rather it depends on current conditions.

Ms. Lee, a witness for the Executive Director, testified that she consulted with United States Geological Survey (USGS) maps and that the USGS map denoted the unnamed tributary with blue dashes and dots, indicating an intermittent stream. [ED-20 at 000188, lines 4-14.].

21. *Finding of Fact 95. Discharged effluent passing over these portions of the Johnson Ranch property would be diffuse surface water.*

The Executive Director recommends Finding of Fact 95 be deleted in its entirety.

Ms. Lee, a witness for the Executive Director, testified that she consulted with United States Geological Survey (USGS) maps and that the USGS map denoted the unnamed tributary with blue dashes and dots, indicating an intermittent stream.⁶⁴ Ms. Lee, along with representatives from DHJB, the Protestants and the ED, visited the Johnson Ranch property and walked along the discharge route on October 20, 2014, prior to the contested case hearing. According to Ms. Lee's testimony, she walked the discharge route from the location of the proposed outfall to FM 1863.⁶⁵ Ms. Lee noted that "[s]everal areas upstream of the concrete culvert do not depict a defined bed and banks for a channel, however, slope and vegetation patterns indicated that water flowed in a general direction. These areas could be considered to be more like swales than a defined stream."⁶⁶ Ms. Lee testified that site visit confirmed her original determination that the discharge was to an unnamed tributary.⁶⁷

⁶⁴ ED-20 at 000188, lines 4-14.

⁶⁵ *Id.*, at 000182, lines 14-15.

⁶⁶ *Id.*, 000183, lines 1-5.

⁶⁷ *Id.*, 00183, lines 9-10.

22. *Finding of Fact 96. Only a short segment in an area designated for discharge has high water marks, but these are interrupted by large areas of disturbance.*

The Executive Director recommends Finding of Fact 96 be deleted in its entirety. The TWC § 26.027 provides that the TCEQ may authorize permits for the “discharge of waste or pollutants into or adjacent to water in the state.” As discussed above, this Finding is based on a study to determine possible impacts to jurisdictional waters from the proposed discharge. The definition of water in the state is broader than the definition of jurisdictional, and, therefore is of limited use in the TPDES permitting scheme. In particular for this finding, the existence or absence of high water marks is not relevant to any of the issues referred to SOAH, nor is it relevant to the issuance of a TPDES permit.

II. CONCLUSIONS OF LAW

1. *Conclusion of Law 5. If a permit is issued to Applicant, it will impair the use and enjoyment of the Graham-Hastings-Dunn properties and would provide water that has not been deemed safe for cattle consumption.*

The Executive Director recommends that this Conclusion be deleted and replaced with:

5. The proposed permit will not impair the use and enjoyment of the Graham-Hastings-Dunn properties.

6. The proposed permit will not adversely affect the cattle that graze in the area.

2. *Conclusion of Law 8. In accordance with TCEQ's regulations implementing the TSWQS at 30 TAC ch. 307, Applicant's discharge under the terms of the revised Draft Permit will not comply with all the general criteria, antidegradation policy, toxic material provisions, and site-specific uses and*

criteria because of the impact on Protestants' use and enjoyment of their property.

The Executive Director recommends that this Conclusion be deleted and replaced with: In accordance with TCEQ's regulations implementing the TSWQS at 30 TAC ch. 307, Applicant's discharge under the terms of the revised Draft Permit will comply with all the general criteria, antidegradation policy, toxic material provisions, and site-specific uses and criteria and will not negatively impact Protestants' use and enjoyment of their property.

3. *Conclusions of Law 9-15 citing various portions of the holding in Hoefs v. Short.*

The Executive director excepts to Conclusions of Law 9-15 in that they are statements from a water rights case that are either taken out of context or are incomplete. The Executive Director acknowledges that Conclusions of Law 9-15 are experts from *Hoefs v. Short*; however, the Executive Director asserts that the phrases have been taken out of context and are not relevant to the Commission's determination regarding whether the discharge is to an unnamed tributary. First, the Executive Director notes that *Hoefs* is a water rights case, not a TPDES case, and the standard for a "water course" in the context of water rights requires a higher showing than "water in the state" does in the context of TPDES permitting.

Specifically the Executive Director notes that Conclusions of Law 9 and 10 are taken from the factual description of Barilla creek (the creek at issue in *Hoefs*), and therefore, have no bearing on what legally constitutes either a water course or water in the state. Conclusions of Law 11, 12 and 13 are taken from the discussion of whether

the waters of Barilla creek are surface waters or waters that water rights can attach to. While the discussion might be instructive regarding the types of waters that may be permitted under the water rights permitting scheme, it is not relevant to the DHJB permitting action. Conclusion of Law 14 is not addressed here because the Executive Director was unable to locate the language in *Hoefs*. Conclusion of Law 15 is an incomplete restatement of a general rule. The entire sentence is “[t]he general rule is that ravines, swales, sloughs, swamps, and marshes are not water courses, and yet they are sometimes.”⁶⁸ The Texas Water Code definition of “water in the state” includes wetlands and marshes, thus, this general rule is not applicable to TPDES permits.

Ultimately what makes *Hoefs*, important in the TPDES permitting scheme is the concept that “a water course must have a well-defined channel, bed and banks, *yet there may be instances where these are slight, imperceptible, or absent and still a water course exist.*”⁶⁹ (*Emphasis added*)

The Executive Director recommends that Conclusions of Law 9-15 be deleted and replaced with: The discharge is to water in the state.

4. *Conclusion of Law 16. Portions of the so-called Cibolo Tributary 21 were part of a stormwater control project, soil conservation project, or were otherwise man-made.*

The Executive Director recommends Conclusion of Law 16 be deleted because, as discussed above, it is not relevant to the characterization of the discharge route.

⁶⁸ *Hoefs v. Short*, 114 Tex. 501, 273 S.W. 785, 507. (Tex. 1925).

⁶⁹ *Id.*

5. *Conclusion of Law 17. Many United States Geological Survey topographical maps and aerial images from 1929 to 2011 do not include Cibolo Tributary 21 at all.*

The Executive Director recommends Conclusion of Law 17 be deleted because, as discussed above, it is not relevant to the characterization of the discharge route.

6. *Conclusion of Law 105. The "unnamed tributary," also sometimes referred to as Tributary 21, is not a watercourse of the state. Hoefs v. Short, 114 Tex. 501, 273 S.W. 785 (Tex. 1925).*

The Executive Director recommends Conclusion of Law 105 be deleted because, as discussed above, the unnamed tributary is water in the state. Additionally, the term "watercourse of the state" is not defined in Chapter 26 of the Texas Water Code, nor in TCEQ's rules regarding TPDES permits. Finally, as discussed above, the ALJ's reliance on *Hoefs* to reach her decision that the unnamed tributary is not water in the state, is misplaced.

7. *Conclusion of Law 106. The discharge route in the proposed permit has not been properly characterized as a watercourse.*

The Executive Director recommends Conclusion of Law 106 be deleted because, as discussed above, the unnamed tributary is water in the state. Additionally, the term "watercourse" is not defined in Chapter 26 of the Texas Water Code, nor in TCEQ's rules regarding TPDES permits.

8. *Conclusion of Law 19. In accordance with TCEQ's regulations regarding Domestic Wastewater Effluent Limitation and Plant Siting at 30 TAC ch. 309, Applicant's discharge under the terms of the revised Draft Permit will not comply with all the general criteria, antidegradation policy, toxic material provisions, and site-specific uses and criteria.*

The Executive Director recommends that Conclusion of Law 19 be modified as:

In accordance with TCEQ's regulations regarding Domestic Wastewater Effluent Limitation and Plant Siting at 30 TAC ch. 309, Applicant's discharge under the terms of the revised Draft Permit will ~~not~~ comply with all the general criteria, antidegradation policy, toxic material provisions, and site-specific uses and criteria.

9. *Conclusion of Law 20. In accordance with TCEQ's regulations regarding the Edwards Aquifer at 30 TAC ch. 213, Applicant's discharge under the terms of the revised Draft 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.*

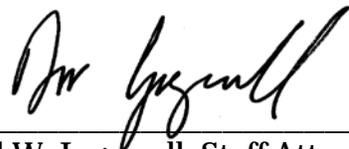
The Executive Director recommends that Conclusion of Law 20 be deleted in its entirety. This Conclusion of Law references 30 TEX. ADMIN. CODE Chapter 213, which are the rules governing the Edwards Aquifer. The Commission did not refer any issues regarding the Edwards Aquifer to SOAH; therefore, it is not appropriate for the PFD to include Findings of Fact or Conclusions of Law that were not referred.

Respectfully submitted,
Texas Commission on Environmental Quality

Richard A. Hyde, P.E.
Executive Director

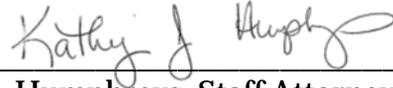
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CERTIFICATE OF SERVICE

I certify that on March 30, 2015, a copy of the foregoing Executive Director's Closing Argument was filed with the Office of the Chief Clerk and the State Office of Administrative Hearings and sent by first class, agency mail, e-mail, and/or facsimile to the persons listed in the attached mailing list.



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DHJB Development, LLC
SOAH Docket No. 582-14-3427
TCEQ Docket No. 2013-2228-MWD

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