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Richard A. Hyde, P.E., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

April 9, 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 Reply to 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	§	BEFORE THE
DHJB DEVELOPMENT, LLC	§	STATE OFFICE OF
FOR TPDES PERMIT NO.	§	ADMINISTRATIVE HEARINGS
WQ0014975001	§	

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

**TO THE HONORABLE SARAH G. RAMOS AND THE COMMISSIONERS OF
THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:**

The Executive Director of the Texas Commission on Environmental Quality (TCEQ) submits the following Replies to 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.

As a preliminary matter the Executive Director notes that this application is for a TPDES permit; therefore, it is governed by the requirements in Chapter 26 of the Texas Water Code (TWC). In the Combined Exceptions filed by DHJB and the Johnson Ranch Municipal Utility District they referenced the definition of "state water" from Chapter 11 of the TWC.¹ Chapter 11 of the TWC applies to water rights and does not apply to TPDES permits. The correct definition of "water in the state" applicable to TPDES permits is:

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,

¹ Combined Exceptions of the Applicant, DHJB Development LLC, & the Johnson Ranch Municipal Utility District to the ALJ's Proposal for Decision, Page 2.

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. ²

I. The Application Complies with 30 TEX. ADMIN. CODE (TAC) § 309.12

As the Executive Director testified, the application complies with the requirements in 30 TAC § 309.12. The ALJ properly relied upon testimony and evidence submitted during the hearing in reaching her decision on the issue of groundwater impacts under 30 TAC § 309.12. As stated in the Executive Director's Closing Arguments, the factors in 30 TAC § 309.12 were addressed through the consideration of other rules and standards.³ As noted by the Protestants and implied by the ALJ, 30 TAC § 309.12 requires the Commission make an affirmative finding about protection of surface water and groundwater.⁴ Section 309.12 states that "the commission may not issue a permit for a new facility ... unless it finds that the proposed site, when evaluated in light of the proposed design, construction or operation features, minimizes possible contamination of surface water and groundwater." However, the rule also states that, in making this determination, "the commission may consider the following factors." The use of the word "may" in this context suggests that the Commission maintains some discretion as to the factors considered in making this determination.

As noted in the Executive Director's Closing Arguments, the Executive Director considered the siting provisions of Section 309.13. While the language of Section 309.12

² TEX. WATER CODE ANN. § 26.001(5).

³ ED Closing Arguments, page 27.

⁴ Protestants' Exceptions, page 4, PFD at 40.

contains generalized instructions to consider impacts to surface water and groundwater, the rules in Section 309.13 create specific setback provision designed to protect groundwater during the siting of wastewater treatment plants. Under the rules, a wastewater treatment plant unit may not be located closer than 500 feet from a public water well or 250 feet from a private water well.⁵ These rules mirror the setback requirements for public drinking water systems in Chapter 290 of the Texas Administrative Code. In his testimony, Phillip Urbany noted that the Application contained information sufficient to show compliance with the rule.⁶ Mr. Urbany stated that Exhibits 4A and 4B to the Application appear to indicate the nearest existing private well to the treatment plant units, which is more than 250 feet from the nearest unit.⁷

To the extent that groundwater may be impacted by the treated effluent itself, compliance with the Texas Surface Water Quality Standards and the Edwards Aquifer rules is appropriate. The Edwards Aquifer rules contain specific effluent limits for new discharges located within zero to five miles of the Edwards Aquifer recharge zone.⁸ This effluent set, along with other provisions of Chapter 213, was created to ensure “that the existing quality of groundwater not be degraded.”⁹ The record clearly indicates that the

⁵ 30 TEX. ADMIN. CODE § 309.13(c) (West 2014).

⁶ Ex. ED-1 at 000023, lines 8-20.

⁷ Ex. ED-1 at 000026, lines 12-20. *See also* Ex. App. 1.2A at 0052-0054.

⁸ 30 TEX. ADMIN. CODE § 213.6(c)(1) (West 2014).

⁹ 30 TEX. ADMIN. CODE § 213.1(1) (West 2014).

proposed permit contains the effluent limits that are specifically set forth in the Edwards Aquifer rules to maintain groundwater quality.¹⁰

Prior Agency practice supports the stance that protection of groundwater quality is achieved through the application of the Texas Surface Water Quality Standards and the Edwards Aquifer rules. In the Executive Director's Response to Public Comment, included in the record as Exhibit ED-13, the Executive Director replied to comments related to impacts to drinking water wells with Response 7, as follows:

The Water Quality Division has determined that the draft permit complies with the Texas Surface Water Quality Standards (TSWQS). The TSWQS ensure that effluent discharges are protective of aquatic life, human health and the environment. The review process for surface water quality is conducted by the Standards Implementation Team and Water Quality Assessment Team. According to the *Texas Groundwater Protection Strategy*, AS-188, if the surface water quality is protected, then the groundwater quality in the vicinity will not be impacted by the discharge.¹¹

Additionally, the Edwards Aquifer rules were developed with the same goal of non-degradation of groundwater under TWC § 26.401, including the effluent limitations established in 30 TAC § 213.6(c).¹² The effluent limitations contained in the draft permit are in compliance with TSWQS, the Edwards Aquifer rules, and the state's policies related to the protection of groundwater sources from discharges.

¹⁰ See, e.g. Ex. ED-1 at 000010, line 24 through 000011, line 8; 000015, line 22 through 000016, line 3; 000024, lines 21-24.

¹¹ The *Texas Groundwater Protection Strategy (Protection Strategy)* was developed in 2003 to fulfill the requirements of TWC § 26.405(2), and in consideration of the goals established by the legislature in TWC § 26.401, including the non-degradation standard established in TWC § 26.401(b) for the protection of groundwater. The *Protection Strategy* is a publicly-available Agency document and the Executive Director would request that the Commission take official notice of the document under Texas Rules of Evidence, Rule 204. While the *Protection Strategy* is not an Agency rule, it does provide insight into the Agency's stance on the protection of groundwater from surface water discharges.

¹² See 21 Tex. Reg. 12125, 12128 (December 17, 1996).

Protestants argue that the testimony of Phillip Urbany regarding his review under Section 309.12 warrants denial of the permit on the grounds that the TCEQ has failed to consider legally relevant factors. However, the decision of the Executive Director as expressed in the prefiled testimony of the Executive Director's witness, is preliminary in nature, and the Commission's final decision on the issue is properly based on the full evidentiary record developed at hearing.

The Protestants cite *Kawasaki Motors Corp. U.S.A. v. Texas Motor Vehicle Com'n*¹³ to support an argument that the lack of review under Section 309.12 constitutes a failure of the TCEQ to consider legally relevant factors. In *Kawasaki Motors*, the Court of Appeals of Texas outlined the standard for determining when an agency decision is arbitrary and capricious under the Administrative Procedure and Texas Register Act.¹⁴ In doing so, the court noted that an agency abuses its discretion if it bases its decision on legally irrelevant factors, or fails to consider legally relevant factors.¹⁵ Protestants argue that Phillip Urbany's testimony related to 30 TAC § 309.12 demonstrated that the TCEQ failed to make a determination on a relevant issue.

The Protestants' reliance on *Kawasaki Motors* is misplaced because the decision of the Executive Director is preliminary, and the record in this matter contains substantial evidence related to the factors articulated in 30 TAC § 309.12. Under TCEQ rules, the Executive Director has been delegated authority to act upon a permit

¹³ 855 S.W.2d 792, 795 (Tex. App. – Austin 1993).

¹⁴ *Id.*

¹⁵ *Id.*

application, but only if the application is not contested.¹⁶ When an application is contested, as it is in this case, the final decision of the Agency belongs to the Commission.¹⁷

The final decision of the Commission will be based on consideration of the record at SOAH. Under the standard articulated in *Kawasaki Motors*, a review of an agency action is based upon the record on which the decision was made.¹⁸ In a contested case hearing, the record includes each pleading, motion, and intermediate ruling; evidence received or considered; a statement of matters officially noticed; questions and offers of proof, objections, and rulings; proposed findings and exceptions; each decision opinion, or report by the officer presiding at the hearing; and all staff memoranda or data submitted to or considered by the hearings officer or members of the agency who are involved in making the decision.¹⁹

The record in this case is not limited to the testimony of Phillip Urbany, or even the preliminary decision of the Executive Director, but upon the evidence submitted by the parties at hearing. In her Proposal for Decision, the ALJ clearly made a determination on the issues related to 30 TAC § 309.12 based on the substantial amounts of evidence on the record related to subsurface geology and groundwater.²⁰ Accordingly, the final decision of the Agency will be based upon this PFD and the record made in support of its conclusions.

¹⁶See 30 TEX. ADMIN. CODE § 50.133(a) (West 2014).

¹⁷ 30 TEX. ADMIN. CODE § 80.267 (West 2014).

¹⁸ 855 S.W.2d 792, 795.

¹⁹ TEX. GOV'T CODE ANN. § 2001.060.

²⁰ See PFD at 40-41.

II. Objections to the Introduction of New Evidence Offered by the Protestants

The Executive Director objects to the Protestants' introduction of new evidence as part of their Exceptions to the ALJ's Proposal for Decision. In their exceptions, the Protestants present new evidence relating to an Investigation Report and Solution Feature Plan (Report) for the Johnson Ranch site. The Report is the result of an investigation by the TCEQ's San Antonio regional office conducted between February 10, 2015 and February 13, 2015, which was after the close of the record. The record in this matter closed on January 9, 2015 when the parties filed their Replies to Closing Arguments.

The Texas Rules of Civil Procedure contemplate parties having the opportunity to present additional evidence, if it is necessary for the due administration of justice.²¹ The courts have found that allowing additional evidence may be appropriate if: "(1) the moving party showed due diligence in obtaining the evidence, (2) the proffered evidence is decisive, (3) reception of such evidence will cause undue delay, and (4) granting the motion will cause an injustice."²² Additionally, both sides must be allowed to "present and fully develop the case" if new evidence is admitted.²³ The Protestants have not met any of the prerequisites that would allow the ALJ to consider their new evidence. The Protestants have not requested the ALJ reopen the record to take additional testimony on the new evidence, nor have they demonstrated that the new evidence is decisive; they

²¹ TEX. R. CIV. P. 270.

²² *Hernandez v. Lautensack*, 201 S.W.3d 771 (Tex. App.—Ft. Worth 2006, pet. denied)

²³ *In re the Estate of Donice Edward Johnson*, 886 S.W.2d 869 (Tex. App.—Beaumont 1994, no pet.)

simply attached the Report to their Exceptions to the PFD and add arguments to support it.

Moreover, the Report is not relevant to any of the issues the Commission referred to SOAH. The Protestants argue that the Report supports a finding that there are recharge features present on the site, and therefore, DHJB has failed to meet its burden in proving that it will be able to comply with the suitable site characteristics of 30 TAC Chapter 309. As stated in the Executive Director's Closing Argument and Replies to Closing Arguments, the Commissioners referred four specific issues, directly related to DHJB's application for a TPDES permit, to SOAH; compliance with the Edwards Aquifer Rules was not one of the referred issues and is not relevant to the review of DHJB's proposed TPDES permit. By rule, the Water Pollution and Abatement Plan (WPAP) is a part of the TCEQ's Edwards Aquifer Protection Program (EAPP) which requires that anyone who plans to build on any Edwards Aquifer zone must submit construction plans and receive approval from the EAPP staff.²⁴ The Report submitted by the Protestants is directly related to DHJB's reporting requirement for its WPAP.²⁵

The TPDES permitting process and the WPAP are two different authorization processes regulated by the TCEQ. Although the Edwards rules, found at 30 TAC Chapter 213, are considered during the review of a TPDES permit application, the Executive Director's staff provided testimony that a WPAP is not considered during the review of a TPDES application.²⁶ Given that the proposed discharge is on the contributing zone of the Edwards Aquifer, the effluent set in the proposed permit

²⁴ 30 TEX. ADMIN. CODE, Chapter 213(West 2014).

²⁵ 30 TEX. ADMIN. CODE §213.5(f) (West 2014).

²⁶ Ex. ED-1, Prefiled Testimony of Urbany page 000016 lines 12-13.

complies with the effluent limitations for discharges within zero to five miles upstream of the Edwards Aquifer.²⁷ However, the Executive Director reiterates that the proposed TPDES permit for DHJB is a separate authorization that is not conditional on DHJB's compliance with the Edwards Aquifer rules. None of the issues referred by the Commission involve the consideration of the Applicant's compliance with the WPAP.

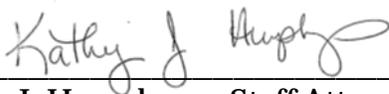
The Executive Director respectfully recommends that the ALJ not amend her PFD in response to the Protestants' arguments regarding whether the application complies with 30 TAC § 309.12 or the Report. The Executive Director has demonstrated that the application complies with the requirements in 30 TAC § 309.12; the Report is not relevant to the issues referred by the Commission and was submitted after the closing of the official hearing record.

²⁷ See, Transcript Vol. 2, at 173:6-21; Transcript Vol. 2 at 178:12-13; Ex. ED-20 at 000190:17-20.

Respectfully submitted,
Texas Commission on Environmental Quality

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CERTIFICATE OF SERVICE

I certify that on April 9, 2015, a copy of the foregoing Executive Director's Replies to Exceptions to the PFD 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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Environmental Law Division

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

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