

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

APPLICATION OF DHJB	§	
	§	BEFORE THE STATE OFFICE
DEVELOPMENT, LLC FOR	§	
	§	OF
A MAJOR AMENDMENT TO	§	
	§	ADMINISTRATIVE HEARINGS
TPDES PERMIT NO. WQ0014975001	§	

**PROTESTANTS PATRICIA GRAHAM, TERRELL GRAHAM, MARGIE HASTINGS,
ASA DUNN, AND GREATER EDWARDS AQUIFER ALLIANCE’S
EXCEPTIONS TO THE ALJ’S PROPOSAL FOR DECISION**

TO THE HONORABLE SARAH RAMOS, ADMINISTRATIVE LAW JUDGE:

COME NOW Protestants Patricia Graham, Terrell Graham, Margie Hastings, Asa Dunn, and Greater Edwards Aquifer Alliance, by and through their attorneys of record, and file their Exceptions to the ALJ’s Proposal for Decision (PFD) in the above referenced case issued on March 9, 2015.

I. Introduction and Summary

The ALJ recommended that the permit amendment to TPDES Permit No. WQ0014975001 should not be issued because the discharge route is not a watercourse through which effluent may flow and because of the adverse impacts the permit would have on Protestants’ property. The Protestants agree with these recommendations.

Protestants’ exceptions primarily focus on the issue of whether the proposed permit complies with TCEQ siting regulations found in 30 Texas Administrative Code Chapter 309 (*i.e.*, Referred Issue C). As discussed below, Protestants urge that there are three important reasons under this referred issue to further recommend that the proposed permit amendment be denied. The importance of the issues is now more apparent, since new evidence has come to light after

the contested case hearing—evidence from the Applicant’s own submissions to the TCEQ regarding the existence of “solution cavities” on the Applicant’s property. This new evidence calls into question Dr. White’s testimony and credibility, and impacts statements in the PFD such as, “While Mr. Rice’s opinion of the possibility for effluent migration was also well supported, the ALJ found evidence presented by Dr. White more convincing....” (p. 41).

Additionally, Protestants urge that several additions and changes to existing findings of fact and conclusions of law are warranted, to make sure that the ALJ’s discussion in the PFD is fully reflected in the findings, and also to incorporate Protestants’ exceptions. Protestants specifically except to findings of fact #36, 50, #51, and #67; and conclusions of law #19 and #20. For ease of reference, Protestants have included their additions and changes as Attachment A. Protestants include the new evidence at Attachment B.

II. The Permit Should Also be Denied because the Applicant has Failed to Meet the Siting Requirements and the Unsuitable Site Characteristics Under Chapter 309

Referred Issue C is whether the proposed permit complies with the TCEQ siting regulations found in Chapter 309. Protestants urge that the Applicant failed to meet its burden of complying with these regulations for at least three independent reasons: (1) the proposed permit amendment application does not comply with Rule 309.12, which requires that a proposed site minimize possible contamination of surface water and groundwater;¹ (2) the proposed site, as evidenced by accurate buffer zone maps, violates Rule 309.13, which states that a “wastewater treatment plant unit may not be located closer than . . . 250 feet from a private water well”;² and (3) the proposed discharge violates the Edwards Aquifer rules.³

¹ 30 Tex. Admin. Code § 309.12.

² 30 Tex. Admin. Code § 309.13(c).

³ See Protestants’ Closing Arguments, at 40–61.

A. The Permit Amendment Application Does Not Comply with Rule 309.12

1. The TCEQ, by its own admission, failed to consider legally relevant factors found in Rule 309.12

Rule 309.12 prohibits the TCEQ from issuing a permit “unless it finds that the proposed site . . . minimizes possible contamination of surface water and groundwater.”⁴ The Rule lists specific factors the TCEQ may consider during this review.⁵ An important basis for permit denial is because the TCEQ, by its own admission, failed to consider legally relevant factors found in Rule 309.12. It is a fundamental doctrine of administrative law that an agency cannot omit consideration of legally relevant factors.

Mr. Urbany of the TCEQ testified that he did not review the TPDES permit applications against the Rule 309.12 requirements,⁶ even though there is nothing in the language of the rule stating that Rule 309.12 is not applicable to a TPDES permit.⁷ (The PFD made note of this.⁸) OPIC agreed with Protestants that “the factors laid out in 30 TAC § 309.12 should have been considered by the Executive Director when determining compliance with the requirements in 30 TAC Chapter 309.”⁹

The ALJ agreed that an applicant should present evidence of compliance with Rule 309.12, finding that Rule 309.12 requires a more thorough analysis than that found in Rule 309.13.¹⁰ However, the ALJ went on to find that the Applicant had met its burden of proving the discharge would not harm the wells, Protestants’ property, or the Edwards Aquifer.¹¹ In its analysis section on this issue, the PFD did not discuss the TCEQ’s failure to consider the factors

⁴ 30 Tex. Admin. Code § 309.12.

⁵ *Id.*

⁶ ED-1, 22:9–11.

⁷ Hearing Tr. vol. III, 29:9–13.

⁸ Proposal for Decision at 40.

⁹ OPIC Closing Arguments at 11.

¹⁰ Proposal for Decision at 40.

¹¹ *Id.*

listed in this Rule or the TCEQ's failure to require compliance with it. Protestants urge that this is a basis for permit denial.

These failures by the agency require denial of the permit and remand to the agency for additional analysis because Rule 309.12 clearly requires that the TCEQ itself make an affirmative finding about protection of surface water and groundwater: "The commission may not issue a permit . . . *unless it finds* that the proposed site, when evaluated in light of the proposed design, construction or operational features, minimizes possible contamination of surface water and groundwater."¹² The Rule then lists specific factors that the TCEQ may consider when it makes this determination.¹³ The TCEQ made absolutely no such determination in this case. Nothing in the record supports a finding that the TCEQ found or made a determination that the site "minimizes possible contamination" of surface water and groundwater. In fact, as the ALJ noted, staff for the Executive Director expressly admitted they did not apply the factors in this Rule.

Under case law, an agency abuses its discretion when it fails to consider legally relevant factors.¹⁴ An agency decision—here, a decision to approve the permit amendment—is arbitrary if it fails to follow the clear, unambiguous language of its own regulations.¹⁵ Possible contamination of surface water and groundwater is clearly a legally relevant factor to the TCEQ's decision, as evidenced by Rule 309.12. The clear, unambiguous language of this regulation requires the agency to make a determination that the proposed site for a wastewater treatment plant minimizes possible contamination. The agency's failure to do so, regardless of

¹² 30 Tex. Admin. Code § 309.12 (emphasis added).

¹³ *Id.*

¹⁴ *Kawasaki Motors Corp. USA v. Texas Motor Vehicle Com'n*, 855 S.W.2d 792, 795 (Tex. App.—Austin 1993); *see also Consumers Water, Inc. v. Pub. Util. Comm'n of Texas*, 774 S.W.2d 719, 721 (Tex. App.—Austin 1989).

¹⁵ *Public Utility Com'n of Texas v. Gulf States Utilities Co.*, 809 S.W.2d 201, 207 (Tex. 1991).

whether the permit amendment application complies or does not comply with this rule, is arbitrary and an abuse of discretion. An agency may not simply fail to apply an applicable rule during its review of a permit.

Irrespective of the ALJ's finding that the permit amendment application will not harm surface water and groundwater, the TCEQ has failed to make a determination, based on the relevant factors, as required by Rule 309.12. This is an important basis for permit denial, and the application should be remanded for additional analysis.

2. Particularly in light of new evidence, the Applicant Failed to Meet Its Burden of Proving that the Proposed Site Complies with Rule 309.12

The ALJ stated that an applicant should present evidence of compliance with Rule 309.12, but concluded that the Applicant had met its burden of proving compliance in this case.¹⁶ But not only did the Applicant put on very limited evidence regarding the possibility of groundwater contamination, evidence available for the first time after the hearing demonstrates the very real risk of contamination vis-à-vis solution cavities on Johnson Ranch.

During the contested case hearing, the Applicant did not review for potential impacts to groundwater—instead choosing to defer to the TCEQ, which (as just stated) did not review the permit amendment application against Rule 309.12 requirement—except to offer the testimony of Dr. Kemble White.¹⁷ Dr. White testified that infiltration beyond the root zone would be “minimal” and the ability to produce effluent which did reach the Upper Trinity would be unlikely.¹⁸ Dr. Ross, on the other hand, reviewed driller logs that indicated karst features¹⁹ and Mr. Rice performed a site visit that demonstrated honeycombed solution channels in the

¹⁶ Proposal for Decision at 40.

¹⁷ See Protestants' Closing Arguments, at 52-53.

¹⁸ See Applicant's Closing Argument at 20 (quoting Applicant Exhibit 4.0, 10:19–20).

¹⁹ Protestant Exhibit 3, 12:19–20.

discharge route.²⁰ Evidence offered by the Protestants' experts showed that the discharged effluent poses a strong risk of infiltrating in the Upper Glen Rose formation and then migrating into groundwater and groundwater well supplies.

In the PFD, the ALJ “found evidence presented by Dr. White more convincing because the Edwards Aquifer recharge features are so far from the treatment plant.”²¹ But now evidence exists calling this into question. As explained in a filing by Protestants, there is evidence of recharge features near the wastewater treatment plant, which affirmatively negates Dr. White’s testimony and this basis for finding compliance with Rule 309.12. On March 16, 2015, Protestants filed a Notice of Newly Discovered Relevant Information highlighting the discovery of two solution cavities on the Johnson Ranch site relying on the TCEQ online database. A fuller TCEQ Investigation Report was completed on February 20, 2015, which Protestants obtained very recently through an open records request. This TCEQ Report confirmed that two solution features were found only a couple of hundred feet south of the wastewater treatment plant site. In order that the ALJ may review this information, Protestants have attached this TCEQ report as Attachment B to these exceptions.

Although this evidence is new, it is through no fault of Protestants that it is now being submitted. It only became available after the close of the record and, because it is directly relevant to the likelihood of groundwater contamination from the effluent discharge, must now be considered by the ALJ.

At a minimum, this evidence increases the likelihood that karst features exist on-site that could transmit effluent rapidly into the underlying groundwater. The existence of the solution cavities increases the likelihood that there could be rapid transmission of contaminants

²⁰ Protestant Exhibit 3, 11:22–23.

²¹ Proposal for Decision at 41.

underground through the groundwater to the groundwater used by Protestants. Pointedly, the new evidence undermines the credibility of Dr. White. Further, the new evidence underscores the testimony of Protestants' experts who testified about karst features in the vicinity of proposed treatment plant and Protestants' property and what that means for the possibility of groundwater contamination.

Plainly, the new evidence underscores the need for further investigation and review. With two solution cavities found in a single trench, the existence of more recharge features is probable. It is noteworthy that the Applicant did not have an approved recharge feature protection plan as noted by the TCEQ investigator. The lack of an approved recharge feature protection plan may have in part been due to Applicant's overconfidence that no recharge features existed on-site.

Given the proximity of the outfall location to the Edwards Aquifer Recharge Zone, the demonstrated existence of solution cavities just south of the proposed site, and solution channels in the discharge route on the Protestants' property, the Applicant has failed to meet its burden of proving compliance with Rule 309.12—that effluent discharged from the outfall location will minimize possible contamination of surface water and groundwater. Protestants respectfully request that the ALJ finds that this is an additional reason for denying the permit amendment application.

B. The Permit Amendment Application Violates the Unsuitable Site Characteristics Found in Rule 309.13, due to a Private Well being within 250 feet of the Proposed Plant

One of Chapter 309's central purposes is to prohibit issuance of a permit for facilities in an area that is determined to be unsuitable or inappropriate. Rule 309.13 lists specific requirements for the siting of wastewater treatment plant units. Rule 309.14 categorically states

that the Commission “may not issue, amend, or renew a permit for a wastewater treatment plant if the facility does not meet the requirements of § 309.13.”²² Among these requirements are location buffers from public and private water wells.²³ The rule states that a “wastewater treatment plant unit may not be located closer than . . . 250 feet from a private water well.”²⁴ Because a more accurate buffer zone map shows that there will be wastewater treatment plant units closer than 250 feet to a private water well, the permit amendment application must be denied.

All parties agreed that the permit amendment application and buffer zone maps do not accurately depict site conditions.²⁵ The PFD acknowledges that the outfall location has changed.²⁶ As Protestants argued in their Closing Arguments, the construction of a berm on-site has actually shifted the location of the proposed plant south, and more accurate maps indicate that units of the wastewater treatment plant are less than 250 feet from a private water well—in violation of Rule 309. During the hearing, Protestants introduced Protestant Exhibit 8, which is a site plan produced by the Applicant subsequent to the submission of their permit amendment application.²⁷ The Applicant stipulated that this site plan was more accurate than the buffer zone map that was reviewed as part of the application.²⁸

²² 30 Tex. Admin. Code § 309.14(a).

²³ 30 Tex. Admin. Code § 309.13(c).

²⁴ *Id.*

²⁵ *See* Hearing Tr. vol. I, 146:13–15 (Mr. Gregory stating that the “situation has changed” since the application was filled out); Hearing Tr. vol. III, 58:24 (Ms. Lee testifying that there was a new route next to the constructed berm).

²⁶ Proposal for Decision at 19.

²⁷ Protestant Exhibit 8.

²⁸ Hearing Tr. vol. III, 57:9–18 (Mr. McCarthy, Jr., stating that “the Applicant will stipulate that the Protestants’ Exhibit 8, dated September 20, 2013, is more accurate than Exhibit 30, dated August 13, 2012”).

Importantly, the more accurate site plan identifies the existing private water well to the south of the proposed plant site,²⁹ and it demonstrates that there will be wastewater treatment plant units within 250 feet of this water well. Even if a proposed chlorine disinfection building is not a “wastewater treatment plant unit,”³⁰ the updated buffer zone map makes clear that the Applicant has failed to meet its burden to prove compliance with Rule 309.13(c): by moving the plant south, the area available for wastewater treatment plant units has been drastically reduced; and by failing to send an updated map to the TCEQ, the Applicant has failed to meet its burden of proving compliance with this clear regulatory requirement.

The PFD omitted this issue. Under the discussion of whether the proposed permit complies with Chapter 309’s siting regulations, the PFD contains some discussion about the changes to the proposed site and outfall location, including the shift south on the property, but no analysis about the distance to the private water well.³¹ The TCEQ’s rules make clear that the Commission “may not issue, amend, or renew a permit for a wastewater treatment plant if the facility does not meet the requirements of §309.13.”³² If an applicant has failed to meet its burden of proof for complying with the Unsuitable Site Characteristics’ rules—as the Applicant here so fails—then the permit or permit amendment must be denied.

It is true that a facility’s final engineering design is subject to review under 30 TAC Chapter 217, which includes final compliance with the setback provisions of Rule 309.13.³³ But

²⁹ Protestant Exhibit 8.

³⁰ Under Rule 309.11(9), a “wastewater treatment plant unit” is defined to include “[a]ny apparatus necessary for the purpose of providing treatment of wastewater (i.e., aeration basins, splitter boxes, bar screens, sludge drying beds, clarifiers, overland flow sites, treatment ponds or basins that contain wastewater, etc.)” A chlorine disinfection building falls within this definition.

³¹ Proposal for Decision at 16–17.

³² 30 Tex. Admin. Code § 309.14.

³³ See 30 Tex. Admin. Code § 217.

this is done *after* the issuance of a permit.³⁴ No permit may be issued at all in the first instance under Rule 309.14(a) if the Applicant has not affirmatively proven compliance with the setback requirements.

In this case, the Applicant has failed to put on evidence demonstrating that the new site, shifted south, will comply with these rules. Instead, the Applicant stipulated that Protestant Exhibit 8 was more accurate than the buffer zone maps provided to the TCEQ. If additional maps were available showing compliance with the Unsuitable Site Characteristics rules, then these maps should have been provided to the agency. As of the date of the hearing, the most accurate evidence demonstrated that the Applicant is not in compliance with Rule 309.13(c), and, therefore, Protestants respectfully request that the ALJ find that this is an additional reason to recommend denial of the permit amendment application.

C. The Proposed Discharge Violates the Edwards Aquifer Rules

The proposed discharge authorized by the permit amendment application violates Chapter 213's prohibition against new wastewater discharges "into or adjacent to water in the state that would create additional pollutant loading . . . on the recharge zone."³⁵ The plain language of these rules supports Protestants' view that this prohibition applies to an entire site for which an applicant has filed an application for an Edwards Aquifer Protection Plan.

There is no dispute that the rules in Chapter 213 apply to this permit amendment application.³⁶ Subchapter A of these rules prohibits discharges on the recharge zone.³⁷ The

³⁴ 30 Tex. Admin. Code § 217.6(a).

³⁵ 30 Tex. Admin. Code § 213.6(a)(1).

³⁶ Hearing Tr. vol. I, 71:17 (Mr. Charlie Hill testifying that he believes the permit is in compliance with the Edwards Aquifer rules); Hearing Tr. vol. II, 177:17–20 (Dr. Ross testifying that she believes that when a site spans both the recharge and contributing zones, as this one does, Subchapter A applies); Hearing Tr. vol. II, 241:9–14 (Mr. Urbany stating that he reviews Chapter 213 "[w]henver we have a permit that it applies to," and that this Chapter was reviewed for this application).

³⁷ 30 Tex. Admin. Code §§ 213.6(a)(1), 213.8(a)(6).

parties agree that the site is mapped partially on the recharge zone and partially on the contributing zone.³⁸ In Subchapter B, the rules define “site” to include “[t]he entire area within the legal boundaries of the property described in the application.”³⁹ This definition clarifies that “[r]egulated activities on a site located partially on the recharge zone and the contributing zone must be treated as if the entire site is located on the recharge zone, subject to the requirements under Subchapter A of this chapter.”⁴⁰

The “application” in this definition refers to either the application for an Edwards Aquifer Protection Plan submitted pursuant to Rule 213.4 or a Contributing Zone Plan submitted pursuant to Rule 213.23. When an applicant wants to undertake a regulated activity on the Edwards Aquifer Recharge Zone or the Edwards Aquifer Contributing Zone, it must submit an application for an EAPP or Contributing Zone Plan, as applicable.⁴¹ In that application, the applicant must define the “site” (*i.e.*, the entire area within the legal boundaries). Then, pursuant to the definition for “site,” if the entire legal boundary is partially on the recharge and partially on the contributing, the entire property is treated as if it is on the recharge zone. In other words, the definition of “site” in these rules should be read as “[t]he entire area within the legal boundaries of the property described in the application [for an EAPP or Contributing Zone Plan].”

³⁸ Hearing Tr. vol. I, 34:15–18 (Mr. Hill testifying that part of the property is mapped as recharge zone and part is mapped as contributing zone); Hearing Tr. vol. I, 233:4 (Dr. White testifying that the Johnson Ranch property is designated in part as being in the recharge zone and in part as being in the contributing zone); Protestant Exhibit 2, 24:9–13 (Dr. Ross testifying that the development straddles the boundary between recharge and contributing zones); Hearing Tr. vol. III, 71:22 – 72:3 (Ms. Lee stating that the outfall is in the contributing zone and that the recharge zone is 565 feet from this location).

³⁹ 30 Tex. Admin. Code § 213.21(7).

⁴⁰ *Id.*

⁴¹ *See* 30 Tex. Admin. Code § 213.4; 30 Tex. Admin. Code § 213.23.

At the hearing, Mr. Charlie Hill testified that the EAPP for the Johnson Ranch development covers the entire Johnson Ranch.⁴² In other words, the application for an EAPP submitted by the Applicant describes the “site” as 751.3 acres of land.⁴³ Therefore, the entire “site”—the entire development—must be treated under the legal fiction that it is located entirely on the recharge zone.

The Applicant and the TCEQ argue that only the area used for “regulated activities” is to be considered when determining whether the site is located on the recharge zone,⁴⁴ and the ALJ concluded that the definitions in the rules “can as easily be read to refer to the site as the portion of the property where the wastewater treatment plant will be located.”⁴⁵ But this is inconsistent with the language of the Edwards Aquifer rules, which specifically govern, and describe the requirements for, applications for EAPPs or Contributing Zone Plans. If an applicant for an EAPP defines its site to include its entire development in the application for that EAPP (as DHJB Development, LLC, did), then the entire site is treated as if it were located on the recharge zone, and additional pollutant loading is prohibited anywhere on the property.

The Applicant has not met its burden of proving that its permit amendment application complies with Chapter 213’s prohibition against new wastewater discharges. Consistent with this plain regulatory language, Protestants respectfully request that the ALJ find that this is another reason for recommending denying the permit amendment application.

III. Additions and Changes to Findings of Fact

In the PFD, the ALJ made various findings throughout the decision and analysis that, in the view of Protestants, were not reflected in the findings of fact. Thus, Protestants make several

⁴² Hearing Tr. vol. I, 33:24 – 34:8.

⁴³ Protestant Exhibit 5, at 3, 9.

⁴⁴ Proposal for Decision at 43.

⁴⁵ Proposal for Decision at 44.

recommendations for additional fact-findings to support the decision. The recommended additions include issues related to the safety of the effluent for children at play in the creek, and the discharge route lacking a defined bed and banks. Additionally, the Protestants offer fact findings and conclusions of law related to the new evidence of solution cavities, and the TCEQ's admitted failure to consider factors in 309.12. These additions are written out in full in Attachment A.

IV. Conclusion

Protestants respectfully urge that the ALJ consider the new evidence and find a important additional basis for permit denial: that the Applicant has not met its burden with respect to 30 Texas Administrative Code 309.12. Additionally, the fact that the TCEQ expressly admitted they did not consider this provision, and the private well being within 250 feet, provides further support for this basis for denial. Protestants also provide, in Attachment A, changes and additions to the findings of fact and conclusions of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 30th day of March, 2015, a true and correct copy of the foregoing instrument was electronically filed with SOAH and served on all attorneys of record by the undersigned via email and/or regular U.S. mail.

/s/ Charles W. Irvine

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ATTACHMENT A

PROTESTANTS REQUESTED CHANGES AND ADDITIONS TO THE PFD'S FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR TPDES PERMIT NO. WQ0014975001

CHANGES (numbers correspond to those in PFD; deletions are indicated as such, and underlines indicate insertions):

FINDINGS OF FACT

36. If the effluent is discharged at the rate of 350,000 GPD, the effluent will reach the Graham-Hastings property, and even some lesser rates of discharge will reach the Protestants' property as well.
50. The wastewater treatment plant unit is ~~not~~ located within 250 feet of ~~any~~ private water well.
51. The proposed discharge outfall is within 0 and 5 miles of the Edwards Aquifer recharge zone. ~~Accordingly, the effluent limits of 30 TAC § 213.6(e)(1) apply.~~
67. The proposed discharge meets the TSWQS ~~and the Edwards Aquifer~~ rules necessary to maintain the public water supply use and the toxic pollutant numeric criteria, ~~and provide for aquifer protection.~~

CONCLUSIONS OF LAW

- 19.⁴⁶ 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 Rule 309.13(c). ~~all the general criteria, antidegradation policy, toxic material provisions, and site specific uses and criteria.~~
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 not comply with the prohibition against new industrial and municipal wastewater discharges into or adjacent to water in the state that would create additional pollutant loading on the recharge zone. ~~comply with the general criteria, antidegradation policy, applicable aquifer protection requirements, and site specific uses and criteria relating to the contributing zone and recharge zone of the Edwards Aquifer.~~

⁴⁶ NOTE: this Conclusion of Law is currently numbered #19, but may need to be renumbered, as the preceding two Conclusions of Law are numbered #105 and #106.

ADDITIONS (numbers do not correspond to any in PFD):

ADDITIONAL FINDINGS OF FACT

Impact on Protestants' Property

1. When children or grandchildren of the Protestants or their guests play in and around the creek on their property, the children will be exposed to the effluent by direct contact.

Discharge Would Not Be to a Watercourse

2. 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 the cattle graze.
3. Several portions of the discharge route do not have defined bed and banks.

Compliance with Chapter 309

3. Solution cavities exist on the Applicant's property site.
4. The Upper Glen Rose, from which the Protestants wells likely derive their groundwater, is highly karstified, allowing water to rapidly flow through it.
5. The existence of the solution cavities on Applicant's site increases the likelihood that there could be rapid transmission of effluent underground through the groundwater to the groundwater used by Protestants, and thus increases the likelihood of contamination of Protestants' groundwater wells.
6. The TCEQ, by its own admission, failed to consider legally relevant factors found in Rule 309.12.

ADDITIONAL CONCLUSIONS OF LAW

1. 30 TAC § 309.13(c) prohibits a wastewater treatment plant unit from being located "closer than . . . 250 feet from a private water well."
2. The Applicant has not met its burden to prove with sufficient admissible evidence that the wastewater treatment plant units are at least 250 feet away from all private water wells, in violation of 30 TAC § 309.13(c).

3. The requirement to “minimize possible contamination of surface water and groundwater” in 30 TAC § 309.12 applies to both TPDES discharge permits and TLAPs.
4. The Applicant has failed to meet its burden with sufficient admissible evidence to prove that the location of the wastewater treatment plant will minimize possible contamination of surface water and groundwater, as required by 30 TAC § 309.12.
5. Under 30 TAC § 213.21(7), regulated activities on a site, which includes the entire area within the legal boundaries of a property described in an Edwards Aquifer Protection Plan, located partially on the Edwards Aquifer recharge zone and partially on the Edwards Aquifer contributing zone must be treated as if the entire site is located on the recharge zone.
6. 30 TAC § 213.6(a)(1) prohibits “new industrial and municipal wastewater discharges into or adjacent to water in the state that would create additional pollutant loading . . . on the recharge zone.”
7. 30 TAC § 213.8(a)(6) prohibits “new municipal and industrial wastewater discharges into or adjacent to water in the state that would create additional pollutant loading” on the recharge zone.
8. The Applicant is violating the prohibition against new wastewater discharges on the recharge zone, found in 30 TAC § 213.6(a)(1) and 30 TAC § 213.8(a)(6).

ATTACHMENT B – NEW EVIDENCE ON SOLUTION CAVITIES

**Texas Commission on Environmental Quality
Investigation Report**

The TCEQ is committed to accessibility. If you need assistance in accessing this document, please contact oee@tceq.texas.gov

**Customer: DH/JB Partnership, Ltd.
Customer Number: CN602996472**

**Regulated Entity Name: JOHNSON RANCH
Regulated Entity Number: RN105332522**

Investigation # 1227866

Investigator: ALEX GRANT

Conducted: 02/10/2015 -- 02/13/2015

Program(s): EDWARDS AQUIFER

Investigation Type: Site Assessment

Additional ID(s): 13-12082002

Address: ,
, ,

Incident Numbers

Site Classification RESIDENTIAL

SIC Code: 1521

NAIC Code: 236115

SIC Code: 9224

NAIC Code: 621910

Location: NE CORNER OF HWY 281 AND FM 1863

Local Unit: REGION 13 - SAN ANTONIO

Activity Type(s): EAPPSTEASM - EAPP Site
Assessment

EAPPGRCVC - EAPP GRANT CAVE
CLOSURE PLAN REVIEW

Principal(s):

Role	Name
RESPONDENT	DH JB PARTNERSHIP LTD

Contact(s):

Role	Title	Name	Phone
Regulated Entity Contact	GEOLOGIST	MR JOHN LANGAN PG	Fax (210) 342-9401
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Other Staff Member(s):

Role	Name
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Investigator	DIANNE PAVLICEK
QA Reviewer	DIANNE PAVLICEK
Supervisor	LYNN BUMGUARDNER
Supervisor	TODD JONES

Associated Check List

<u>Checklist Name</u>	<u>Unit Name</u>
EDWARDS AQUIFER SENSITIVE FEATURE INFORMATION	JOHNSON RANCH
EDWARDS AQUIFER SENSITIVE FEATURE INVESTIGATION FINDINGS	JOHNSON RANCH
EDWARDS AQUIFER SENSITIVE FEATURE NOTIFICATION INVESTIGATION	JOHNSON RANCH
EDWARDS PLAN STATUS	JOHNSON RANCH

Investigation Comments:

Re: Edwards Aquifer, Comal County

NAME OF PROJECT: Johnson Ranch; Located on the northeast corner of the intersection between US Highway 281 and FM 1863; Bulverde, Texas

TYPE OF PLAN: Solution Feature Closure Plan /Sensitive Feature; 30 Texas Administrative Code (TAC) §213.5(f) (2)

Investigation No. 1227866; Regulated Entity No. RN105332522; Additional ID No. 13-12082002

INTRODUCTION

Between February 10, 2015 and February 13, 2015, Mr. Alex Grant of the Texas Commission on Environmental Quality (TCEQ), San Antonio Regional Office, conducted a review of a solution feature closure plan for 2 features that were discovered during construction activities at the Johnson Ranch site. The feature discovery report was submitted to the TCEQ on February 10, 2015 by Professional Service Industries, Inc. on behalf of DHJB Development, LLC. The purpose of this report is to document the findings of the TCEQ Solution Feature Discovery Investigation that was conducted on February 11, 2015.

GENERAL FACILITY AND PROCESS INFORMATION

The proposed development includes 287.75 acres with 382 residential lots. Impervious cover accounts for 52.52 acres (18.25 percent). The current modification included Unit 1, Phases 1 and 2, Unit 3, Unit 4 and Unit 5. Only Unit 1, Phases 1 and 2 are within the Recharge Zone.

ADDITIONAL INFORMATION

The feature locations and assessments are outlined below:

Feature Number: 1

Feature Dimensions: 0.5' x 0.7' x 80'

Location: Water Line C, Station 7+20

Case/Sensitivity: NA/45

Feature Number: 2

Feature Dimensions: 2' x 2' x 30'

Location: Water Line C, Station 7+00

Case/Sensitivity: NA/45

The solution features were reportedly discovered on February 6, 2015. The features were assessed by the geologist on February 9, 2015. The Solution Feature Protection Plans were submitted for review and approval to the San Antonio Region Office on February 10, 2015.

The San Antonio Region Office site assessment conducted on February 11, 2015 revealed that the features were generally as described in the Solution Feature Protection Plans.

The feature closure methods are described in the closure narrative (see Enclosure). Based on the information provided by Mr. John Langan, P.G., the feature protection plan is approved with the following conditions:

1. The feature locations shall be shown on the "as-built" plans.

2. In accordance with TAC § 213.5(f)(2), immediately notify the TCEQ if a new feature is discovered with continuation of construction activities.

3. During the site assessment of the solution features, non-compliance was observed. The applicant is hereby advised that the after-the-fact approval of the feature protection plan as provided by this letter shall not absolve the application of any violations of Commission rules related to this project.

An NOD was submitted on February 12, 2015 and the response was received on February 13, 2015.

No Violations Associated to this Investigation

Signed

[Handwritten Signature]

Environmental Investigator

Date 2-18-15

Signed

[Handwritten Signature]

Supervisor

Date 2-23-15

Attachments: (in order of final report submittal)

___ Enforcement Action Request (EAR)

Letter to Facility (specify type) : Appeal

___ Investigation Report

___ Sample Analysis Results

___ Manifests

___ Notice of Registration

___ Maps, Plans, Sketches

___ Photographs

___ Correspondence from the facility

___ Other (specify) :

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

February 20, 2015

Mr. Charles P. Hill
DHJB Development, LLC
102-A Cordillera Ridge
Boerne, Texas 78006

Re: Edwards Aquifer, Comal County

NAME OF PROJECT: Johnson Ranch; Located on the northeast corner of the intersection between US Highway 281 and FM 1863; Bulverde, Texas

TYPE OF PLAN: Solution Feature Closure Plan / Sensitive Feature; 30 Texas Administrative Code (TAC) §213.5(f)(2)

Investigation No. 1227866; Regulated Entity No. RN105332522; Additional ID No. 13-12082002

Dear Mr. Hill:

The Texas Commission on Environmental Quality (TCEQ) received a plan which addresses the protection of two solution features encountered during utility line trenching operations at the above referenced project. The plan was received at the San Antonio Regional Office on February 10, 2015. The feature locations and assessments are outlined in Table I, below.

Feature No.	Feature Dimensions	Location	Case*/Sensitivity**
1	0.5' x 0.7' x 80'	Water Line C, Station 7+20	NA / 45
2	2' x 2' x 30'	Water Line C, Station 7+00	NA / 45

*per TCEQ Guidance Document 96.004

**per Geologic Assessment Table

The solution features were reportedly discovered on February 6, 2015. The features were assessed by the geologist on February 9, 2015. The Solution Feature Protection Plans were submitted for review and approval to the San Antonio Region Office on February 10, 2015.

The San Antonio Region Office site assessment conducted on February 11, 2015 revealed that the features were generally as described in the Solution Feature Protection Plan.

The feature protection methods are described in the closure narrative (see Enclosure). Based on the information provided by John Langan, P.G., the feature protection plans are approved with the following conditions:

1. The feature locations shall be shown on the "as-built" plans.
2. In accordance with TAC § 213.5(f)(2), immediately notify the TCEQ if a new feature is discovered with continuation of construction activities.
3. During the site assessment of the solution features, alleged non-compliance was observed. The applicant is hereby advised that the after-the-fact approval of the feature protection plan as provided by this letter shall not absolve the application of any violations of Commission rules related to this project.

This action is taken under authority delegated by the Executive Director of the Texas Commission on Environmental Quality. If you have any questions or require additional information, please contact Alex Grant, of the Edwards Aquifer Protection Program of the San Antonio Regional Office at 210-403-4035.

Sincerely,



Lynn Bumguardner, Water Section Manager
San Antonio Region Office
Texas Commission on Environmental Quality

LMB/AG/eg

Enclosure: Proposed Protective Measures

cc: Mr. John Langan, P.G., Professional Service Industries, Inc.
The Honorable Bill Krawietz, City of Bulverde
Mr. Tom Hornseth, P.E., Comal County
Mr. Roland Ruiz, Edwards Aquifer Authority
TCEQ Central Records, Building F, MC 212

PROPOSED PROTECTIVE MEASURES

The cavities shall be filled with gravel to "fist sized" rock to the extent possible for stability. At least eighteen (18) inches of concrete shall be used to close the feature. The water line shall be concrete encased for width of the sensitive feature plus a minimum of five (5) feet on either end. The encasement shall provide a minimum of six (6) inches of concrete on all sides of the pipe and shall have a compressive strength of at least two thousand five hundred (2,500) psi (28-day strength). The concrete may be steel reinforced.

February 10, 2015

Texas Commission on Environmental Quality
14250 Judson Road
San Antonio, Texas 78233

Attn: Ms. Diane Pavlicek, Edwards Aquifer Protection Program

Re: Solution Feature Discovery
Johnson Ranch Subdivision, Lots 23 & 24
Johnson Way & F.M. 1863
Bulverde, Comal County, Texas
PSI Project No.: 435-544

2015 FEB 10 PM 2:07

RECEIVED TCEQ
SAN ANTONIO
REGION

Dear Ms. Pavlicek:

Solution cavities was encountered on February 6, 2015 while trenching for utility lines at the referenced development off F.M. 1863 in Bulverde, Comal County, Texas. Work was stopped, and the TCEQ was notified of the feature on February 9, 2015. The area isolated from further work. Professional Service Industries, Inc. (PSI) assessed the feature on February 9, 2015. The solution cavities appear to be fairly linear, with one extending approximately 80 feet, and is approximately 5.5 feet below grade. Attached are photographs and plan sketches, and a Solution Feature Discovery Notification Form. If you have any questions, or if we can be of additional service, please call us at 210/342-9377.

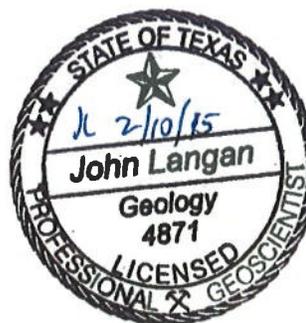
Respectfully submitted,

PROFESSIONAL SERVICE INDUSTRIES, INC.



John Langan, P.G.
Environmental Department Manager

Enclosures



Chris Espinosa

C. 210-275-7378

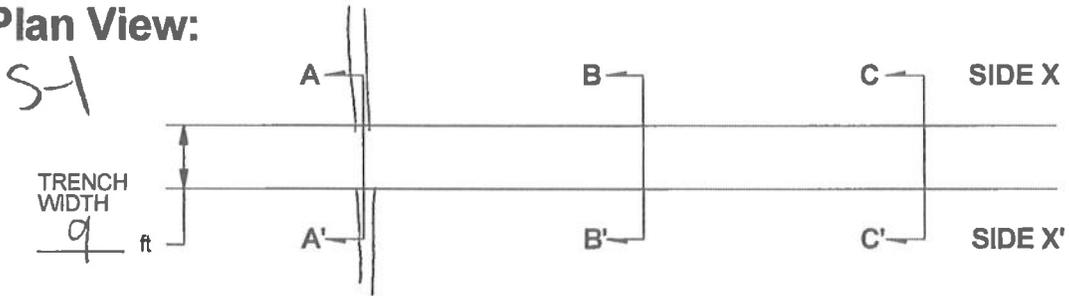
EAPP - Solution Cavity Form

- Sewage Collection System
- Water Line
- Other _____

PROJECT: Johnson Ranch - Water Line C 7+20

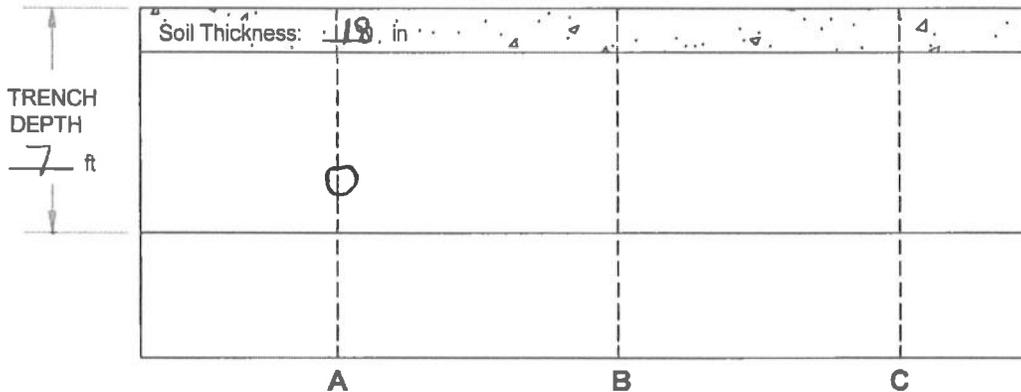
DATE OF FIND: 2/6/15 DATE TNRCC NOTIFIED: 2/9/15

Plan View:

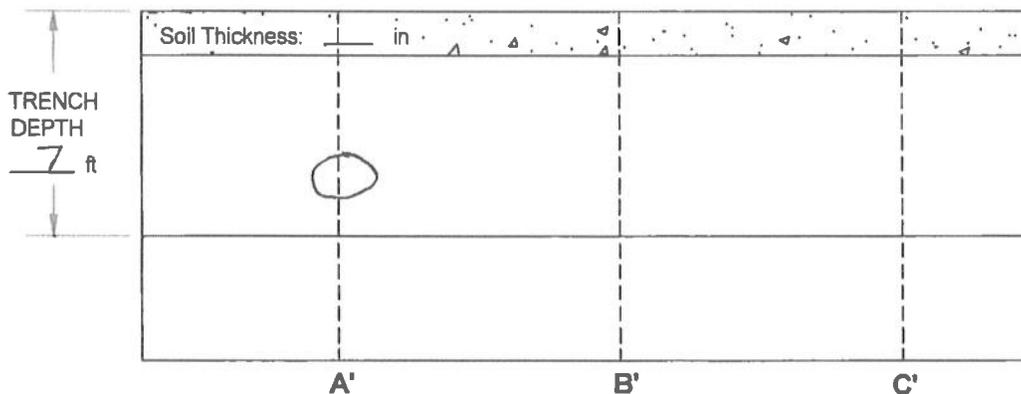


LINE: C STATION 7 + 20 _____ + _____ _____ + _____

Profile (Side X):



Profile (Side X'):



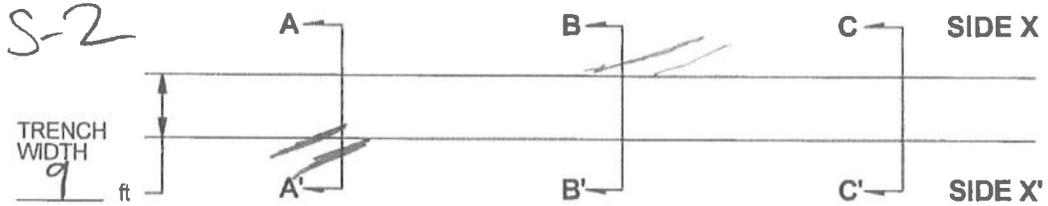
EAPP - Solution Cavity Form

- Sewage Collection System
- Water Line
- Other _____

PROJECT: Johnson Ranch - Water Line C 7+20

DATE OF FIND: 2/6/15 DATE TNRCC NOTIFIED: 2/9/15

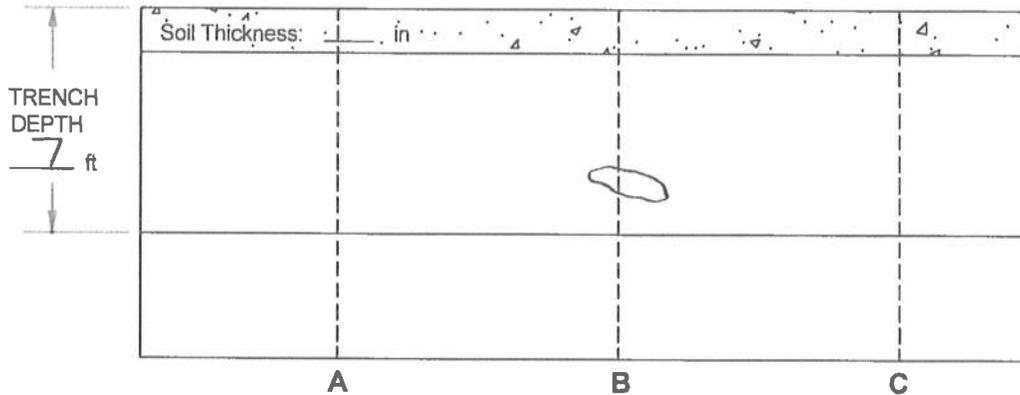
Plan View:



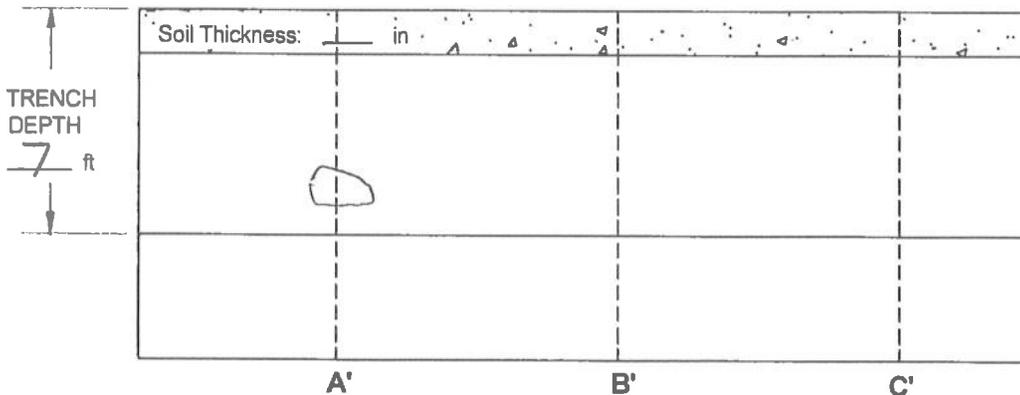
LINE: _____ STATION _____ + _____ + _____ + _____

← Downgradient POROSITY ZONE Upgradient →

Profile (Side X):



Profile (Side X'):



PROPOSED PROTECTIVE MEASURES

The cavities shall be filled with gravel to "fist sized" rock to the extent possible for stability. At least eighteen (18) inches of concrete shall be used to close the feature. The water line shall be concrete encased for width of the sensitive feature plus a minimum of five (5) feet on either end. The encasement shall provide a minimum of six (6) inches of concrete on all sides of the pipe and shall have a compressive strength of at least two thousand five hundred (2,500) psi (28-day strength). The concrete may be steel reinforced.



1. View of feature S-1 located at 29-45-11.4; 98-25-19.2, at Lots 23-24 of Johnson Ranch Unit 1 Phase II, Bulverde, Comal County, Texas. GPS unit is to the right of the feature for scale.



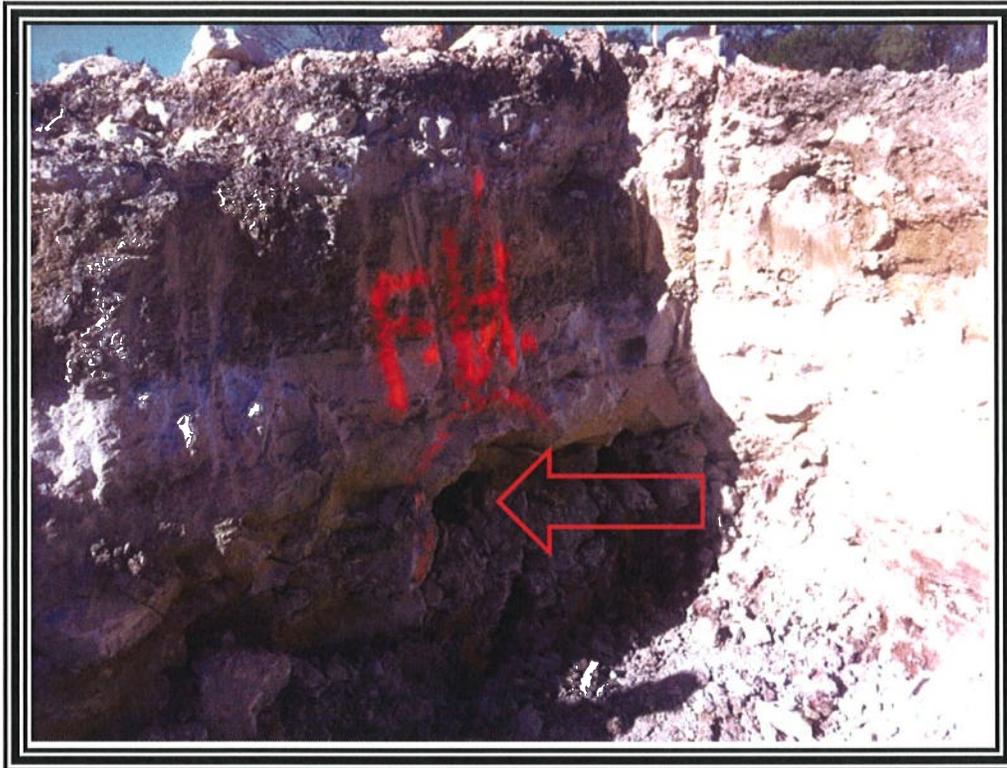
2. View of opposite trench wall of feature S-1, in water line C, Station 7+20.



3. View inside S-1 showing linear nature of the cavity.



4. Wider angle view of S-1.



5. Wider angle view of opposite trench wall of S-1, showing more indurated Glen Rose on top of the softer layer where the solution cavities are encountered.



6. View of feature S-2 located at 29-45-11.2; 98-25-18.5, water line C, Station 7+00.