

**SOAH DOCKET NO. 582-22-0489
TCEQ DOCKET NO. 2021-0755-MWD**

APPLICATION FROM KENDALL WEST UTILITY, LLC FOR A NEW TPDES PERMIT WQ00015787001	§ § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
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**CANYON LAKE WATER SERVICE CO.’S REPLY TO
EXCEPTIONS TO THE PROPOSAL FOR DECISION AND PROPOSED ORDER**

SJWTX, Inc. d/b/a Canyon Lake Water Service Co. (“Canyon Lake”) files this Reply to Exceptions to the Proposal for Decision and Proposed Order on behalf of Applicant Kendall West Utility, LLC (“Applicant”) to the Proposal for Decision (the “PFD”) and Order issued on May 25, 2022, by Administrative Law Judge Pemberton (“ALJ”) in the above-referenced matter.

Applicant believes the ALJ’s recommendation in the PFD and the findings of fact, conclusions of law, and ordering provisions in the ALJ’s Proposed Order are all well supported. But both the Executive Director of the Texas Commission on Environmental Quality (“TCEQ ED”) and Protestants have filed exceptions to the PFD. And while the TCEQ ED’s “exceptions” reflect a few light, technical changes to the PFD, Protestants exceptions advocate an outright reconsideration of its fundamental reasoning and conclusions. The TCEQ ED’s exceptions may have merit, but Protestants do not.

I. Reply to TCEQ ED’s Exceptions to the PFD

TCEQ ED “supports the administrative law judge’s (ALJ’s) conclusions that Kendall West Utility, LLC (KWU) has met its burden of proof regarding all the referred issues in this case and that KWU’s application for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ00015787001 should be granted.” Nevertheless, TCEQ ED advocates for a few light, technical changes to the PFD, which TCEQ ED notes are more in the vein of typographical corrections than exceptions. Applicant does not oppose TCEQ ED’s proposed revisions to the PFD.

II. Reply to Protestants Exceptions to the PFD

Protestants concede that under Texas Government Code § 2001.058(e), an ALJ's PFD is subject to change, vacatur, or modification by an agency only if:

- (1) the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies provided under Subsection (c), or prior administrative decisions;
- (2) a prior administrative decision on which the administrative law judge relied is incorrect or should be changed; or
- (3) a technical error in a finding of fact should be changed.

Protestants ask the tribunal to overturn findings of fact and conclusions of law in the PFD. But because the legal questions raised by Protestants have already been fully briefed by the parties in closing arguments, and because Protestants do not identify a single “technical error” in any challenged finding of fact, their exceptions should be denied.

As to the first and second bases for an agency's change, vacatur, or modification of a PFD, Protestants say that the tribunal misinterpreted and misapplied numerous laws. But Protestants make the same arguments that each of the parties has already addressed in closing arguments, and they cite no intervening change of law that would afford their arguments any further merit. For the reasons already articulated in Applicant's and TCEQ ED's closing arguments—as well as the tribunal's PFD—Protestants exceptions are not subject to change, vacatur, or modification under Texas Government Code § 2001.058(e)(1)–(2).

As to the third basis for an agency's change, vacatur, or modification of a PFD, Protestants say that the tribunal reached myriad incorrect findings of fact. But § 2001.058(e)(3) is clear that only a “technical error in a finding of fact should be changed.” Unlike the TCEQ ED, Protestants do not argue that the PFD contains any technical error in a finding of fact. Instead, Protestants

claim that the PFD reaches incorrect findings of fact because it failed to explicitly address certain studies and other evidence presented by Protestants. In every case, “litigants may offer conflicting evidence as to adjudicative facts,” but it is the role of the ALJ to determine “how much weight to give each side’s evidence” and “mak[e] credibility determinations.” *Hyundai Motor Am. V. New World Car Nissan, Inc.*, 581 S.W.3d 831, 838 (Tex. App.—Austin 2019, no pet.). This is not a case where Protestants aver that material was erroneously kept out of the administrative record, and there is no rule mandating that a PFD must make reference to each item of evidence—or arguable inferences therefrom—to insulate itself from committing error. The PFD was issued after the tribunal heard all relevant evidence and arguments, and its findings of fact were based on an assessment of the weight of the evidence and credibility of the witnesses. As the Third Court of Appeals has stated, the “ALJ is better suited to [make those determinations] than an agency or board reviewing a PFD.” *Id.*

Because none of the conditions of Texas Government Code § 2001.058(e) are met, Applicant respectfully urges the tribunal to deny Protestants exceptions.

Respectfully Submitted,
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Certificate of Service

I hereby certify that a true and correct copy of Applicants' Reply to Exceptions to the Proposal for Decision has been served on the persons below on this the 24th day of June, 2022.

By: /s/ Christopher C. Cyrus

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