SOAH DOCKET NO. 582-22-1016
TCEQ DOCKET NO. 2021-1214-MWD

APPLICATION BY AIRW 2017-7, LP FOR TPDES PERMIT NO. WQ0015878001	**§**	**BEFORE THE STATE OFFICE OF**
	§	**ADMINISTRATIVE HEARINGS**

AIRW 2017-7, LP'S REPLY TO EXCEPTIONS TO THE PROPOSAL FOR DECISION

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TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVRIONMENTAL QUALITY:

COMES NOW, AIRW 2017-7, LP (AIRW or Applicant) and files its Reply (Reply) to Exceptions to the Proposal for Decision (PFD), and in support thereof would show the following.

I. SUMMARY OF REPLY

The PFD is correct that the Draft Permit meets all state and federal legal and technical requirements and a permit, if issued, consistent with the Draft Permit is protective of human health, safety, the environment and physical property.[1] Despite its vitriol, scare tactics and liberal use of adjectives, the City of Georgetown (City) simply failed to rebut Applicant's prima facie case and additional evidence and identify any Draft Permit provisions that would violate applicable state or federal requirements relative to all eight issues referred by the Interim Order.[2] The Administrative Law Judges (ALJs), Applicant, Executive Director (ED), Office of Public Interest Counsel (OPIC), and Jonah Water Special Utility District (Jonah) all agree that the Draft Permit should be issued without changes.

The PFD provides a well-reasoned justification for permit issuance. The legal bar to overturn it is very high, and there is no basis in the evidentiary record to substantively amend the PFD, its findings of fact or its conclusions of law, or refer this matter back to SOAH to take additional evidence.[3] Applicant urges the Texas Commission on Environmental Quality (TCEQ

[1] Tex. Gov't Code § 2003.047(i-1); Proposed Conclusion of Law No. 5.

[2] Tex. Gov't Code § 2003.047(i-2), (i-3); Proposed Conclusion of Law No. 7.

[3] Tex. Gov't Code § 2003.047(m).

or Commission) to adopt the PFD consistent with the minor corrections recommended by the ED and Jonah.

The City finally conceded what Applicant understood from the get-go: this case was never about water quality.[4] Instead, the City attempts to use the State's Regionalization Policy to force annexation on a residential developer in its extraterritorial jurisdiction (ETJ) contrary to the will of the Legislature.[5] Procedurally, the City seeks to create a new regulatory process by requiring an applicant to "exhaust *local* administrative remedies,"[6] obtain easements and seek waivers from the city council before ever applying to the TCEQ for an individual permit – a process Applicant began more than three years ago. This would be followed by the review of a narrow category of costs outside the purview of the TCEQ. Substantively, the effect of the City's onerous land use restrictions would take land otherwise slated for duplexes and convert it into a mostly commercial strip-center[7] on top of annexation costs of at least $20 million. Thus, far from seeing regionalization as a permissive goal to "encourage and promote" regional wastewater treatment, the City tries to use regionalization in the wastewater context to accomplish what it could no longer do through its ETJ. In the meantime, the City's Exceptions tellingly fail to address the fact that the Facility and Mansions-Luxe Development (Development) are mostly within the jurisdictional boundary of Jonah which **legally bars** the City from providing service.[8]

Fortunately the Administrative Law Judges (ALJs) astutely recognized that the City's approach conflicts with the "reasonable method" announced in statute and implemented with "significant discretion"[9] through TCEQ's Web Page guidance.[10] Applicant wholeheartedly agrees the City's flawed approach should be rejected. The City fails to rebut or raise any new evidence

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[4] *See* City's Exceptions at 21-22. As discussed in more detail below, the City's bare assertions on the remaining referred technical issues do not constitute evidence, and the City has not sustained its burden on those issues. To that point, the City did not call any expert witnesses to testify regarding the water quality aspects of the proposed discharge and its impact on the receiving waters – the word "antidegradation" is referenced exactly one time (and only preliminarily, not substantively) in the City's rebuttal testimony.

[5] Tex. Loc. Gov't Code § 43.0691.

[6] City's Exceptions at 21 (emphasis added).

[7] AIRW-Exhs. 35, 52 at 47 (Fig. 33); Tr. at 608:3-6.

[8] Tex. Water Code § 13.244(c); 16 TAC § 24.225(c).

[9] PFD at 40-41.

[10] AIRW-Exh. 28.

supporting denial of the permit for this minor facility proposing a nearly 100% reuse program under parameters more stringent than the City's Dove Springs wastewater treatment plant (WWTP) to be operated by an established political subdivision.[11]

II. REPLY TO THE ED

Applicant agrees with the ED's minor change to proposed Finding of Fact No. 3. The additional language provides a more accurate description of the receiving waters, and its adoption will result in a clearer Final Order.

III. REPLY TO JONAH

Jonah's Exceptions are also in the nature of a minor but important correction. Proposed Finding of Fact No. 51 should be corrected to properly reflect the evidence in the record that the proposed Water Resource Reclamation Facility (WRRF or Facility) is not partially, but wholly within Jonah's water Certificate of Convenience and Necessity (CCN) area. The distinction between CCN boundaries and the jurisdictional boundaries of a retail public utility and Article 16 Section 59 water district like Jonah is an important one in this case that will be discussed at more length herein. Jonah is not just the exclusive water provider to the area where the Facility is located through its water CCN, but the Facility (and Development) are partially within its jurisdictional sewer boundaries also. Water and sewer service from Jonah clearly furthers the State's Regionalization Policy.

[11] The City argues that the ALJs' vision of regionalization leads to more sources of point source pollution and costlier service. The City's argument misses the point. It is not about the number of sources of pollution, but the amount and type of pollutants that matters. In this case, the proposed facility will beneficially reuse its treated wastewater via irrigation within the duplex community nearly 100% of the time which would not occur if Applicant connected to the Dove Spring's plant. The Dove Springs WWTP also lacks a numerical total phosphorus (TP) limit and is plagued by other enforcement problems making the proposed WRRF an environmentally better option. *See* AIRW-Exhs. 49 and 50 (TCEQ Agreed Order and EPA Compliance Order).

IV. REPLY TO THE CITY[12]

1. Whether the Draft Permit is Protective of Water Quality and the Existing Uses of the Receiving Waters in Accordance with Applicable Texas Surface Water Quality Standards, Including Protection of Aquatic and Terrestrial Wildlife

The City claims the ALJs ignored its rebuttal evidence relating to water quality and existing uses. This is a distortion of the evidentiary record and the Senate Bill 709 process codified at Texas Government Code § 2003.047(i-2). The City's opportunity to rebut Applicant's prima facie case that the Draft Permit is protective of water quality and existing uses consistent with the Texas Surface Water Quality Standards (TSWQS) was through its prefiled testimony (PFT). However, the City put on **no** direct evidence challenging the limited aquatic life use (ALU) designation on the upper "intermittent with perennial pools" reach of the unnamed tributary or the high ALU on the lower perennial Mankins Branch portion.[13] The City never explained how the receiving water designation is not protective of and compatible with primary contact recreation, fishing, livestock watering, aquatic and wildlife use and aesthetic appreciation nor a deviation from the TCEQ's 2010 Procedures to Implement the Texas Surface Water Quality Standards (IPs). Similarly, the City put forth no evidence in its PFT or later, challenging effluent limitations, including dissolved oxygen (DO).[14] At that point, the Applicant's had established its prima facie case. Indeed, during the hearing on the merits, the City's own witness conceded he was not a water quality expert, aquatic scientist or modeler[15] and was unacquainted with Title 30 Texas Administrative Code (TAC) chapter 307, the TSWQS.[16]

Only during cross examination and only after Applicant presented additional evidence from its experts,[17] which it did only in an abundance of caution, did the City first allege through cross

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[12] This Response incorporates Applicant's Closing Arguments and Response to Closing Arguments herein, as if set out in full, and replies in the numerical order of the City's Exceptions instead of the alphabetical order of the PFD.

[13] AIRW-Exh. 3 at 42 (ED Standards Memo), 44 (ED Modeling Memo).

[14] PFD at 19.

[15] Tr. at 197:20-198:2 and 199:9-15 ("Q: Do you ever estimate or figure out what the aquatic life use is for a specific receiving stream? A: Not typically, no").

[16] Tr. at 219:24-25.

[17] Applicant's experts had a combined 122 years of experience on hundreds of wastewater applications, while Jonah's General Manager has over 30 years of experience as an operator and manager of WWTPs, is a holder of AA water and wastewater operator's licenses, and has over 20 years of experience as an instructor. This is in addition to the ED's staff's experience reviewing thousands of applications, collectively.

examination and later legal argument that the Applicant and the ED "failed to collect data."[18] The City's argument seems entirely based on the City's mistaken belief that receiving waters and existing uses are characterized on the basis of what may be developed downstream from the discharge in the future. As Janet Sims testified, based on her three to four visits to the site area and personal interaction with the downstream landowner, Glenn Patterson, there was no downstream residential subdivision at the time the Application was filed in April 2020. Mr. Patterson's own January 2021 comment letter describes his property as a family ranch with livestock and a dry weather creek.[19] The ED's experts testified that permit provisions are not imposed based on future, speculative downstream development conditions, but on what site characterizations are at the time of application filing.[20] As the PFD correctly concludes, the issue referred to SOAH references existing, not future uses. Nevertheless, there simply was no "residential use of the immediately adjacent property through which the undiluted effluent would flow" at the time the Application was filed or even during the hearing on the merits.[21] However, even if there were existing homes and the Applicant was not proposing almost 100% reuse, the Draft Permit contains DO limits to protect the aquatic life and bacteria limits and chlorination requirements to protect human health for primary contact recreational uses. Further, because aquatic life is more sensitive to chemicals in water, if the water/effluent is protective of the limited aquatic life, it should be protective of livestock and wildlife as well.[22] The Draft Permit was based on primary contact recreational use which is applicable whether the pond is for fishing, agriculture, boating or subdivision use – it is protective of human health.[23]

The City also attempts a bait and switch with the undefined term "aesthetic values" (as in a stand-alone right of the public to enjoy the perennial pools) and existing term "aesthetic parameters," which is the term used in the TSWQS, 30 TAC § 307.4(b). The Draft Permit contains express prohibitions on discharges of visible oil and grease, foam and froth, and suspended solids

[18] City's Exceptions at 7. Note, Applicant's 27-year expert visited the site and discharge route area 3-4 times.

[19] AIRW-Exh. 51.

[20] Tr. at 679:24-680:11, 701:4-13.

[21] Tr. at 396:24-397:4.

[22] AIRW-Exh. 8 at 21:7-17; AIRW-Exh. 14 at 11:1-19, 13:11-15; Tr. at 433:3-11, 703:7-18. Applicant's expert Paul Price is an aquatic ecologist of more than 50 years of experience who also confirmed the ED's conclusions.

[23] Tr. 393:11-19 and 397:18-22.

so that the aesthetic *qualities* and fish and wildlife uses of the receiving waters are not impaired.[24] The City's Exceptions relating to water quality and existing uses should be rejected.

2. Whether the Draft Permit is Consistent with the State's Regionalization Policy and Demonstration of Need for the Volume Requested in the Application for a New Discharge Permit Pursuant to TWC § 26.0282

This permit proceeding is the latest in a string of wastewater permitting cases relating to the State's Regionalization Policy.[25] More specifically, this case follows previous proceedings in which municipalities have tried to use the State's Regionalization Policy to force annexation on developers in the cities' ETJs in exchange for sewer service. While the particular facts of these cases differ, the common denominator is that the Commission has issued *all* the subject permits and has never denied a permit based solely on Regionalization.

Fortuitously, immediately prior to the evidentiary hearing in this case, the Commission provided a clear roadmap for how to apply the State's Regionalization Policy. On May 20, 2022, the Commission issued its Decision of the Commission Regarding the Petition for Rulemaking Filed by San Marcos, McAllen, and Jarrell (Regionalization Petition Order).[26] The Regionalization Petition Order expressly states that "*[e]stablished* guidance on TCEQ's Regionalization Policy for Wastewater Treatment is available on the TCEQ website."[27] Accordingly, the PFD properly applied the TCEQ's Regionalization process, acknowledging that the TCEQ has significant discretion to use reasonable methods to further regionalization – all which is spelled out clearly on TCEQ's Web Page.[28]

However, the City stridently dislikes the TCEQ's interpretation of the State's Regionalization Policy and its Web Page. The City has deemed the Commission's guidance on

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[24] AIRW-Exh. 3 at 2, Item 4 (Effluent Limitations and Monitoring Requirements).

[25] *Application of DMS Real Tree, LLC for TPDES Permit No. WQ0015293001*, SOAH Docket No. 582-16-1442, TCEQ Docket No. 2015-1264-MWD (DMS Real Tree); *Application by Crystal Clear Special Utility District and MCLB Land, LLC for TPDES Permit No. WQ0015266002*, SOAH Docket No. 582-20-4141, TCEQ Docket No. 2020-0411-MWD (Crystal Clear); *Application by Regal, LLC for TPDES Permit No. WQ0015817001*, SOAH Docket No. 582-21-0576; TCEQ Docket No. 2020-0973-MWD (Regal); *Application of HK Real Estate Development, LLC for TPDES Permit No. WQ0015784001*, SOAH Docket No. 582-21-1893, TCEQ Docket No. 2021-0053-MWD (HK).

[26] AIRW-Exh. 46 (May 20, 2022 Decision of the Commission Regarding the Petition for Rulemaking Filed by San Marcos, McAllen, and Jarrell).

[27] AIRW-Exh. 46 (emphasis added).

[28] AIRW-Exh. 28; PFD at 41.

Regionalization as "uneven and inconsistent," "shifting," and its Web Page guidance as a "candid admission of weakness and inadequacies."[29] But the City's criticisms of the TCEQ do not stop there, as the City further alleged:

- "[TCEQ] missed it or intentionally ignored their own application form and instructions."[30]
- "[The Web Page] encourage[s] balkanization not regionalization."[31]
- "I find the Webpage to be a poor attempt to show . . . that the agency is encouraging regionalization because it created a website with that heading."[32]
- "[T]he TCEQ is outsourcing its responsibility . . . ."[33]
- A statement on the Web Page is "either a list of issues that an applicant can raise to get a permit even when a protestant has raised regionalization as an issue – like a checklist of how an applicant can circumvent a proper regionalization review – or a list of excuses as to why the TCEQ is not actually working to encourage regionalization."[34]
- The Web Page's "future coordination" statement "is an admission that the TCEQ is not, in fact, considering regionalization in current wastewater permitting cases."[35]
- "I would ask what the purpose of the agency is, if it is just going to accept anything and everything submitted by an applicant as true and accurate, without review."[36]
- "I do not know why the agency is choosing to be less than diligent on the topic of regionalization, unless it really is not interested in following the legislature's mandate to use all reasonable methods to encourage regionalization."[37]
- On the issue of Regionalization in TPDES permits, "the TCEQ is treading water."[38]

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[29] City's Closing Brief at 12, 17.

[30] GT-Exh. 2 at 27:7-8.

[31] GT-Exh. 2 at 17:11-12.

[32] GT-Exh. 2 at 17:13-14.

[33] GT-Exh. 2 at 18:8-9.

[34] GT-Exh. 2 at 18:22-24.

[35] GT-Exh. 2 at 19:8-9.

[36] GT-Exh. 2 at 32:20-21.

[37] GT-Exh. 2 at 33:1-2.

[38] GT-Exh. 2 at 34:22.

Regardless of the City's criticisms, the TCEQ's Web Page is the best guidance to properly implement the State's Regionalization Policy. It is therefore inappropriate to create the new *ad hoc* standards and sub-standards as the City urges in this case.[39] For example, the City argues the TCEQ should consider Jonah's connection fees, but not $20 million in lost value (if the Development was annexed into the City).[40] Elsewhere it criticized the ALJs for not applying an "experience" test to Jonah.[41] The concept that the ALJs should weigh some factors more than others, or follow the cost analysis in one case versus another,[42] has no basis in rule or other administrative law. Thus, the City's reference to "the kind of cost information relevant to regionalization" is an empty concept - there are no rules setting out what criteria must be considered for an analysis of expenditures under Domestic Technical Report 1.1, Section 1.B.3.[43]

Furthermore, the Web Page provides that the presence of a WWTP within three miles of a proposed new facility is <u>not</u> an automatic basis to deny an application or to compel connection. The TCEQ may also approve a new discharge where the nearby wastewater service provider denies a request for service.[44] To make this determination, the ALJs considered all the evidence in the record and correctly concluded, "*the City denied AIRW's request* for services unless AIRW agreed to annexation and land use restrictions."[45] Yet, the City spends pages of its Exceptions brazenly denying what the preponderant evidence clearly shows: the City denied service to Applicant by

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[39] The City also previously urged that RG-357 (AIRW-Exh. 29) relating to utilities and the *MidTex* case rejected by the ALJ in the Crystal Clear case were applicable precedents, which arguments the City has now apparently jettisoned. It has also flip-flopped on other arguments, like its vehement insistence that Applicant make its service request by certified mail instead of email. *Compare* GT-2 at 27:1-16 (Prefiled Testimony of Carlos Rubinstein) and City's Exceptions at 10. Still other arguments relating to profit margins, long-term jobs and the promotion of economic development are outside the evidentiary record and the scope of this hearing. *See* City's Exceptions at 20-21.

[40] City's Exceptions at 16.

[41] City's Exceptions at 22-24.

[42] Crystal Clear, HK, Regal and DMS each approached the calculation of costs differently. For example, in Crystal Clear, the Applicant calculated the lost value of lots that could not be sold because of the City of San Marcos' land use restrictions requiring more space for garages and alleyways. While in HK, the Applicant calculated the time and cost of obtaining multiple easements to connect to the City of San Marcos' WWTP. In the instant case, there is not only the exorbitant $20 million lost value cost but the (still) uncalculated cost of requiring a residential developer to build "community centers" or commercial space under the City's 2030 Future Land Use plan. Neither Crystal Clear, HK nor DMS had the arguably worse AIRW situation where the City's land use requirements would force the conversion of a would-be residential development into a mostly commercial development. *See* AIRW-Exh. 35 ("Big Pink Dot" excerpt) and AIRW-Exh. 52 (City's 2030 Future Land Use Plan).

[43] AIRW-Exh. 24 at 26:1-10; Tr. at 136:19-137:15.

[44] AIRW-Exh. 28.

[45] PFD at 42 (emphasis added).

unambiguously requiring annexation. As the Commission can plainly see, the City's words speak for themselves:

> David Munk: "using our ***WW will require voluntary annexation***."[46]
>
> Wayne Reed: "***Nothing Wes said on our call yesterday should have been construed as the City entertaining providing wastewater service to this project*** in the ETJ. We have had multiple meeting and communications with Matt Hiles on this topic, have explained our position in detail, and there is no need to revisit this request as ***the City's position remains the same***; ***annexation will be required*** in order to receive wastewater service from the City."[47]
>
> Wayne Reed: "***. . .[w]e have been clear that should you desire or need to connect to the City's wastewater system you would have [sic] annex [submit a petition for voluntary annexation*** per City's UDC]."[48]
>
> Adreina Davila: The City may only provide [wastewater] service to property in the city limits. Please ***update or submit a request for voluntary annexation***."[49]
>
> Sophia Nelson: "***Should you desire to connect to the City wastewater system annexation will be required***. We do not support a delayed annexation approach at this point."[50]

In light of the City's repeated statements requiring annexation in exchange for service, it was reasonable for the Applicant to fill out Domestic Technical Report 1.1, Section 1.B.3 in the negative.[51] Indeed all four recent regionalization cases (i.e., Crystal Clear, Regal, HK and AIRW) have proceeded this way. Here, the ED understood that the City's annexation requirement was the effective denial of service, he declared the application administratively and technically complete,

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[46] AIRW-Exh. 30 (emphasis added).

[47] AIRW-Exh. 31 (emphasis added).

[48] AIRW-Exh. 33 (emphasis added).

[49] AIRW-Exh. 34 (emphasis added).

[50] AIRW-Exh. 37 (Enclosure 1) (emphasis added).

[51] As addressed more fully below at Section IV.5, the City repeatedly takes issue with how various parts of the application form were completed, including especially, Domestic Technical Report 1.1, Section B.1. And, in so doing, the City contradicts rules, policy and often common sense.

and made his preliminary decision in favor of permit issuance.[52] The Crystal Clear ALJ found this same process appropriate:

> [B]ecause Section 26.0282 gives TCEQ broad and permissive discretion to implement the State's regionalization policy and the TCEQ as not adopted any rules to implement the State policy, the ED's interpretation of its own application and Technical Reports to allow Applicants to provide emails in lieu of a certified letter requesting service and to exempt Applicants from conducting a comparative cost-analysis is reasonable and does not violate the State's regionalization policy.
>
> The *ALJ gives deference to the ED's interpretation* that, with respect to utilities within three miles of the proposed facility, *the purpose of the regionalization review is to encourage Applicants to explore and give serious consideration to connection to such utilities – not to provide neighboring utilities leverage and means to require* such connection.[53]

Because the City effectively denied service by demanding annexation, under the plain terms of Domestic Technical Report 1.1, Section 1.B.3 and prior Commission precedent,[54] Applicant was not required to provide a cost analysis.[55] Even where costs should be submitted, the ED has stated they "do not review a dollar amount," and it is justified as long as they (applicants) have "done some homework."[56] Still, although not required in this case because of the City's denial, Applicant provided this information twice – first in response to Mr. Cooper's inquiry,[57] based on the Colliers Appraisal Report,[58] and as Texas Government Code § 2003.047(i-3) additional information through Mr. Perkins' and Mr. Tuckfield's prefiled direct testimonies. Applicant's additional information not only showed that the lost value due to annexation was exorbitantly high at approximately $20 million, but there were additional significant costs under

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[52] The City states that the ED's request for cost information in the present case was a "notice of deficiency" (NOD) but there is no reference to NOD in Mr. Cooper's email which states the request is in response to comments by the City. *Compare* City's Exceptions at 16 and AIRW-Exh. 4, Bates Nos. 103-104.

[53] AIRW-Exh. 27 at 22-23 (*Application of Crystal Clear Special Utility District and MCLB Land, LLC for TPDES Permit No. WQ0015266002*, SOAH Docket No. 582-20-4141, TCEQ Docket No. 2020-0411-MWD, Proposal for Decision) (emphasis added); Tr. at 620:22-621:2 ("ED has vast amount of discretion in figuring out what needs to be done because this regionalization policy encourages – is to encourage regionalization, not to require it.").

[54] AIRW-Exh. 39 (Deposition of Firoj Vahora explaining as 30-year TCEQ employee and head of the municipal wastewater permitting section how the ED has historically considered annexation as denial and cost analysis).

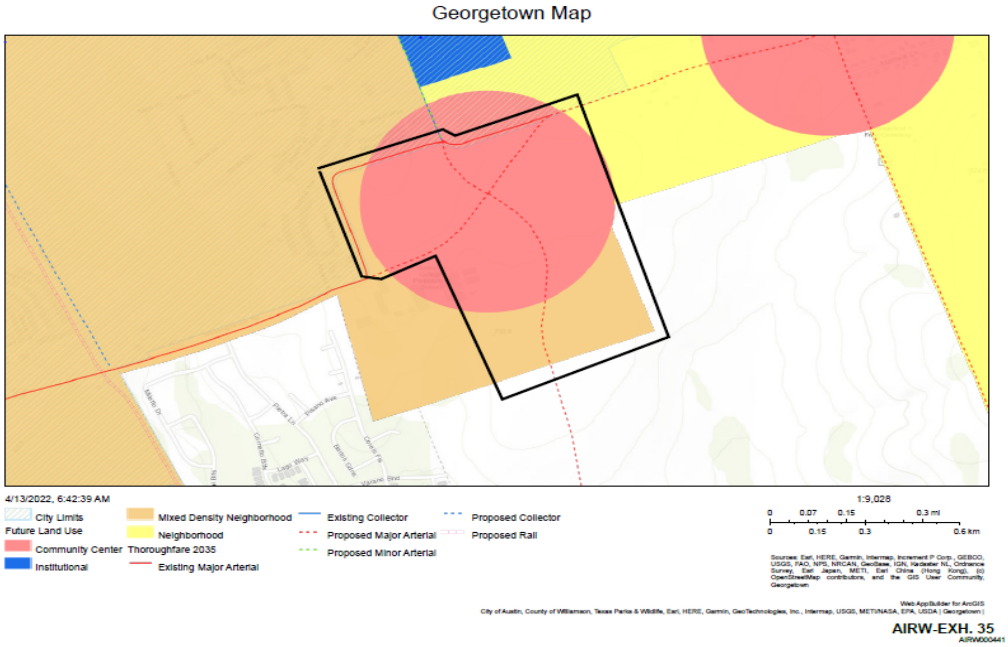
[55] AIRW-Exh. 39; Tr. at 642:6-13.

[56] AIRW-Exh. 39 at 33-34.

[57] AIRW-Exhs. 37, 38.

[58] AIRW-Exh. 23.

the City's 2030 Future Land Use Plan which requires 80% non-residential or commercial development in "community centers."[59] As is obvious from AIRW-Exh. 35, an excerpt from the City's 2030 Future Land Use Plan attached below, the City's requirement (represented by the "Big Pink Dot" within the Development footprint) alone makes the residential duplex development untenable.



As to the potential to waive its ordinance requiring annexation, the City's witnesses have made no mention of the City's reconsideration, a grant of variance, or otherwise allowing service without annexation as it provides other customers, including Gateway College Prep High School and several municipal utility districts. Unbelievably, the City insists that under its new "exhaustion of local administrative remedies" standard, Applicant would have to agree to annexation, obtain easements, and only then request (and hopefully obtain) waivers to its annexation policy. As so aptly put by the ALJs, the possibility of a waiver is "more illusory than reality."[60] Indeed, the only mention of waiver or variance in this case is by Mr. Reed who stated that Mr. Hiles' open space or park proposal was a non-starter and not enough of a concession or enticement for the City to

[59] AIRW-Exh. 52. Applicant did not see the need to specifically quantify the cost of converting a 100% residential development into an 80% non-residential development since this requirement alone would wholly defeat the project.

[60] PFD at 41.

forego or waive its UDC requirements.[61] Thus, given the opportunity as late as the evidentiary hearing, the City has only doubled down. As Mr. Tuckfield noted, the City's annexation demands are barriers to service, which actually disqualify Applicant from any capacity that might have been available and is at odds with the Legislature's goal to "encourage" and "promote" regionalized wastewater service.[62]

Not only is service from the City cost-prohibitive, it is illegal under state law. This is an inconvenient truth the City completely ignores in all its post-hearing briefing. Texas Water Code § 13.244(c) and 16 TAC § 24.225(c) prohibit a retail public utility, like the City, from serving within the jurisdictional boundaries of another retail public utility, like Jonah, without its consent.[63] That prohibition does not go away just because this TPDES proceeding falls under chapter 26 of the Water Code and TCEQ's implementing rules. It is uncontroverted that the City has not asked nor has Jonah given its consent to the City to serve Applicant within portions of its jurisdictional boundaries.[64] Thus, even if the City had not denied Applicant service by forced annexation, even if Applicant had not provided a cost estimate, even if Applicant had not shown service by the City was cost-prohibitive, and even if the City somehow waived section 13.05 of its ordinances agreeing to serve without annexation, the City is **still legally prohibited** from serving most of the proposed Development.

That the City is legally barred from serving most of the proposed Development, makes the City's attack on Jonah's qualifications and experience even more baseless. As discussed in more detail in Section IV.7 regarding compliance history, this proceeding is not a competition over which utility is better equipped to serve Applicant. The evidentiary record is clear that Jonah will own, operate and provide regional wastewater service[65] within its 275-mile service area which currently includes approximately 9,000 water customers, 30,000 people, 35 fulltime employees

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[61] GT-Exh. 1 at 12:19-13:3.

[62] Tr. at 599:9-25.

[63] Tex. Water Code § 13.244(c) and 16 TAC § 24.225(c). The jurisdictional boundary of a retail public utility is legally distinct from a CCN area and those entities may, but are not required, to possess CCNs. *See* Tex. Water Code § 13.242.

[64] Tr. at 289:17-23.

[65] AIRW-Exh. 43; JWSUD-5 at 1:17-18, 3:23-4:6.

and 25 field staff.[66] According to Jonah's General Manager, Mr. Brown, Jonah's plans for the Development are interim only until it can be connected to a larger Jonah facility to be built in the future.[67] Jonah is also in the process of preparing its master wastewater plan which envisions sewer service to many potential developments over its large geographic boundary.[68] Jonah will be a regional provider to the Development in way that the City legally cannot,[69] service by Jonah clearly furthers the State's Regionalization Policy.

3. Whether the Draft Permit is Protective of the Health of the Nearby Residents

Under Texas Government Code § 2003.047(i-1)(2), there is a presumption that a permit issued consistent with the Draft Permit would protect human health and safety, the environment and physical property.[70] Here, that presumption was not overcome because the Draft Permit complies with the TSWQS, which are designed to be protective of human health and the environment. The PFD is correct that the Draft Permit is protective of the health of nearby residents.[71]

The evidentiary record is clear that there are no site specific features which justify special conditions in the permit.[72] But as discussed above, the future construction of a residential subdivision at Patterson Ranch is not a "site-specific condition" as it was not in existence at the time the Application was filed in April 2020. Even if it were, the Draft Permit's standard *E. coli* limit and chlorination requirements will protect public contact recreation, public exposure and, by extension, aquatic and terrestrial wildlife.[73] The City provides no justification to deviate from the normal sampling frequency for discharges of less than 0.5 MGD, where Applicant is already required to sample five times per week.[74] The ED confirmed that since the Draft Permit was

[66] JWSUD-5 at 2:2-15; Tr. at 288:21-22.

[67] Tr. at 301:20-302:4.

[68] Tr. at 288:12-289:16.

[69] Tr. at 619:15-620:9.

[70] Tex. Gov't Code § 2003.047(i-1)(2).

[71] PFD at 49; Proposed Finding of Fact No. 59.

[72] Tr. at 662:25-663:3.

[73] Tr. at 703:14-18.

[74] 30 TAC § 319.9(a) (Table 1).

developed to protect aquatic life and human health in accordance with the TSWQS, which are based on low flow conditions, the Draft Permit would be protective of the health of nearby residents, including adjacent landowners.[75]

4. Whether the Draft Permit Complies with Applicable Requirements Regarding Nuisance Odors

The City chastises the ALJs for finding that the Draft Permit meets the requirements regarding nuisance odors.[76] However, the ALJs properly based their findings on the facts in the evidentiary record.

The City raised the applicability of Texas Water Code § 26.030(b), not as rebuttal in accordance with § 2003.047(i-2), but for the first time on cross examination, then accused the ALJs of interpreting the statute too narrowly.[77] The City's proof, not discussed during the hearing, is the preliminary plat, GT-Exh. 12. According to the City's argument, GT-Exh. 12, page 2 of 8, shows that Georgetown Independent School District (GISD) owns Lot 1 while GT-Exh. 7 indicates the discharge route through the Patterson Ranch property. What these two exhibits actually depict is that the proposed discharge route is nowhere close to the GISD lot or some future schoolyard – evidence of which is wholly missing from the evidentiary record. Rather, GT-Exh. 12 shows that the discharge route, as confirmed by Ms. Sims, does not cross or abut GISD Lot 1 at all, but would flow southwest of the marked "private open space and drainage lot" which is further buffered by multiple streets and future houses. That is to say, a large private open space and multiple homes and streets will substantially separate the discharge route and the GISD lot. There is no simply no evidence in the record that the discharge will cross or abut any parks, playgrounds and schoolyards within one mile downstream.

The City further alleges that Applicant and the ED failed to consider the "adverse effects of the discharge,"[78] which, again, are ameliorated because of the *E. Coli* and chlorination

[75] ED-JL-1 at 11:13-26. (TSWQS state: "surface waters will not be toxic to man from ingestion of water, consumption of aquatic organisms, or contact with the skin, or to terrestrial or aquatic life").

[76] City's Exceptions at 26.

[77] City's Exceptions at 26.

[78] City's Exceptions at 27.

requirements that protect public contact. Indeed the entire TCEQ permitting process is focused on that issue:

> It is the policy of this state and the purpose of this subchapter to maintain the quality of water in the state consistent with the public health and enjoyment, the propagation and protection of terrestrial and aquatic life, and the operation of existing industries, taking into consideration the economic development of the state; to encourage and promote the development and use of regional and areawide waste collection, treatment, and disposal systems to serve the waste disposal needs of the citizens of the state; and to require the use of all reasonable methods to implement this policy.[79]

TCEQ considers any unpleasant qualities of the effluent consistent with Texas Water Code § 26.030 by virtue of its implementation of the TSWQS, effluent limitations, and nuisance odor provisions, 30 TAC chapters 307 and 309.[80] The City had the opportunity to rebut the evidence regarding water quality but failed to do so. Instead, the City only made "conclusory" and "unverifiable" arguments, as the ALJs so astutely observed. The City cannot now complain about the ALJs' reasoning based on the credible evidence in the record and their correct application of the applicable statutes and rules.

In its Exceptions, the City challenges the ALJs' determination that the Applicant met the TCEQ's buffer zone requirements, as follows: "Regarding the buffer zone map, the City demonstrated that the buffer zone map included in the Application did not show the individual wastewater treatment units comprising the Facility, making it impossible to determine whether the buffer zone would be maintained."[81] The City failed to cite to any evidence whatsoever for this assertion. However, the ALJs reviewed the evidence in the record, disagreed with the City's position, and correctly determined that Applicant had met his burden to show that it complied with the TCEQ's buffer zone requirements in 30 TAC § 309.13(e).

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[79] Tex. Water Code § 26.003; *see also* 30 TAC § 307.1.

[80] 30 TAC chs. 307, 309.

[81] City's Exceptions at 26.

5. Whether the Application is Substantially Complete and Accurate

The PFD is correct that the Application is substantially complete and accurate.[82] Applicant submits this is true under any definition of the word "substantial."

The TPDES Application form (Form TCEQ-10053) is a one-size-fits-all form that includes over 500 questions with 124 pages of instructions. That is, the same TPDES permit application used for a 6,000-GPM trailer park site is used for a 100-MGD facility servicing 20 cities. As such, experienced professionals exercise their best professional judgment (BPJ) to prepare and review the applications. Not every box is relevant to every application, and reasonable minds may differ how best an application may be completed.[83] This is why there is an administrative and technical review process overseen by the ED and a lengthy public participation process. In this case, Applicant's experts with over 67 years of combined experience preparing over 150 wastewater applications prepared the Application which Mr. Cooper and Ms. Lueg testified was complete and accurate[84] and declared administratively and technically complete.[85]

Unfortunately, the City is not content to "agree to disagree" on the exercise of BPJ and how the Application should have been completed. The City makes repeated unsubstantiated claims of falsification. In doing so, the City crosses the line of professional conduct. Applicant would submit these are serious, career-ending accusations that have no place in a TPDES permit proceeding, especially considering testimony from the City's witness that he had no evidence that any person intentionally and knowingly made a false statement on the Application.[86] As addressed in Section IV.2 above, it was reasonable for the Applicant to conclude the City's repeated annexation demand were the effective denial of service and to proceed from there. There was nothing "patently false" about the Applicant's actions, nor is there any credible evidence in the record that any deficiencies were numerous much less material, nor that the ED's review was compromised.

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[82] PFD at 61; Proposed Finding of Fact Nos. 62 and 64.

[83] Tr. at 671:16-672:12.

[84] ED-GC-1 at 13:24-26; ED-JL-1 at 12:5-6. Ms. Lueg has reviewed over 1,400 wastewater applications.

[85] Tr. at 175:6-10, 670:21-24.

[86] Tr. at 155:23-158:20.

Texas Government Code § 2005.052 prohibits TCEQ from denying a person's permit application if there is no evidence that a false statement was made knowingly.[87] The City's witness, Carlos Rubinstein, not only conceded that he has never prepared a TPDES or any other kind of application, but that he had **no** evidence that the Application had been knowingly and intentionally falsified.[88]

a. Co-applicants are not Required

The Application is not substantially incomplete or inaccurate because neither Applicant's developer affiliates,[89] 600 and 800 Westinghouse Investments, LLC, nor Jonah were included as co-applicants in the Application. The City misinterprets 30 TAC § 305.43 that only applies when the owner and operator are different parties.[90] That is not the case here. Nor does the City acknowledge that any duty, if such duty exists, is triggered by the ED's determination that a special circumstance exists.[91] That also has not occurred in this case. Finally, the clause, "and for all Texas Pollutant Discharge Elimination System permit," relates back to the earlier language, "if the facility is owned by one person and operated by another *and* the executive director determines that special circumstances exist. . . ." The reasoning for this rule is obvious - if the entities are one and the same, there is no need for co-applicants.

In this case, AIRW was the owner of the Facility at the time the Application was submitted. Per the Non-Standard Service Agreements (NSSA),[92] Jonah will own and operate the Facility *only* after permit issuance and only after it has been transferred under a separate legal process under 30

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[87] Tex. Gov't Code § 2005.052(a).

[88] Tr. at 156:1-157:18, 158:13-20. Similarly, the City's "water quality" witness has prepared only 14 wastewater application and was not aware that the TSWQS were in chapter 305, not 307 ("Q: Again, what rule are you referring to that requires the TDS study here? A: I think it's 305 is where the water quality standards are."). In response to questions about nutrients, Mr. Woelke also testified that a total dissolved solids (TDS) limit was necessary though inapplicable to permitted flows under 1 million gallons per day. *See* AIRW-Exh. 14 at 15:25-31.

[89] It is uncontroverted that not only are AIRW, 600 and 800 Westinghouse Investments, LLC under common ownership and control of Matthew Hiles, but it is typical for development and facility ownership to change over the course of the application process for a new permit. *See* Tr. at 299:4-16 and 639:25-640:10.

[90] 30 TAC § 305.43.

[91] The City is wrong that the ED cannot "vary that requirement." The plain language of the rule,". . .and the executive director determines that special circumstances exist. . ." indicates that this determination is uniquely within the ED's discretion.

[92] AIRW-Exh. 43.

TAC § 305.64. The 600 and 800 Westinghouse Investments, LLC developer entities do not currently own nor will they ever operate the Facility in the future. The City's discussion of alter egos and piercing corporate veils is irrelevant and outside the scope of this proceeding.

b. Applicant Established Need

Domestic Technical Report 1.1, Section 1.A provides the justification for permit need - there are 880 house units to which the City is legally unable and unwilling to provide service. The Mansions-Luxe residents clearly need service.[93] The City states that the information provided in the Application, PFT and hearing was "minimal" or outside the record.[94] On the contrary, both Ms. Sims and Mr. Tuckfield testified that growth projections or absorption schedules urged by Messrs. Woelke and Rubinstein are not required where there is only one phase of operation, as in the case of duplex construction.[95] The uncontroverted evidence in the record is that construction will be completed in less than two years.[96]

c. Regionalization Information was Accurate

As explained above and in Section 2, Applicant completed Domestic Technical Report 1.1, Section 1.B.3 based on the City's repeated annexation demands (by multiple city staffers on multiple occasions) which it reasonably perceived as denials. This interpretation was confirmed by the ALJs, the ED, OPIC and, under very similar circumstances, by the ALJ in the Crystal Clear case. It is a very bad path for protestants to tread to make charges of falsification anytime they disagree with the manner in which an application is completed.

d. The Landowner List is Accurate and Notice is Sufficient

The PFD is correct that a claim of deficient notice to alleged third party Fairhaven Subdivision residents is not properly raised by the City.[97] More importantly, it is entirely

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[93] AIRW-Exh. 24 at 36:26-29.

[94] City's Exceptions at 35. The City does not state what material Applicant relied on that was specifically outside the record.

[95] AIRW-Exh. 8 at 12:28-13:2; AIRW-Exh. 24 at 36:26-19.

[96] AIRW-Exh. 8 at 12:28-13:2.

[97] PFD at 61 (citing *McDaniel v. Tex. Nat. Res. Conservation Comm'n*, 982 S.W.2d 650, 654 (Tex. App. – Austin 1998, pet. denied)).

reasonable for Ms. Sims to have relied on the Williamson County Central Appraisal District's (WCCAD) electronic database of recorded deeds as she has done numerous times (with other appraisal districts) for approximately 100 other TPDES applications.[98] There is no evidence in the record to substantiate the City's slur that Ms. Sims did not "care to update the list of adjacent owners at or near the time that she filed the permit application."[99] On the contrary, Ms. Sims checked the WCCAD database just weeks before filing the application. Like many, WWCAD was struggling with the onset of the COVID-19 pandemic in March of 2020 and was not promptly uploading recorded deeds in that time period.[100] When the City references the relative ease Mr. Woelke had accessing this information, it ignores that fact that Mr. Woelke was doing so *two years after* Ms. Sims – their experience with WCCAD is not comparable.

e. The Buffer Zone Depiction is Correct

The ED and PFD agree that the depiction of the buffer zone in the Application complies with 30 TAC § 309.13(e). It matters not what Mr. Woelke "guesstimated" because the drawing speaks for itself and unequivocally shows the 150-foot buffer zone within the WRRF site.[101] Mr. Woelke's insistence that blowers and other non-odor-producing structures and non-treatment units must be shown in the buffer zone drawing is also a misreading of the rules.

f. Floodplain Requirements are Met

The City attempts another bait and switch in its Exception relating to the floodplain.[102] The City's witness did not testify that the Facility was not included in the floodplain map. Rather, in his PFT, Mr. Woelke criticized the level of detail on the FEMA Map - FIRM MAP 48491C0485F[103] which is a source routinely used to determine the 100-year floodplain and accepted by the ED.[104] He also insisted that a floodplain study was required but conceded later

[98] AIRW-Exh. 8 at 17:8-11.

[99] City's Exceptions at 37.

[100] AIRW-Exh. 8 at 17:11-16.

[101] AIRW-Exh. 4 at 16, 70 (Attachment E); AIRW-Exh. 8 at 16:29-30; ED-GC-1 at 11:7-8.

[102] City's Exceptions at 38.

[103] AIRW-Exh. 13 shows that the City had no problem with the same FEMA floodplain map when submitted by Williamson County.

[104] GT-Exh. 14 at 66-67; Tr. at 662:7-14.

during the hearing that he was not aware of a Commission rule that requires such study.[105] The City's own documents, including the Patterson Ranch drawings, show that the proposed WRRF site will be at a higher elevation of 804-805 mean sea level (msl) while the 100-year floodplain is at a lower elevation of approximately 788 msl.[106] The floodplain issue has been definitively addressed, and no changes should be made as a result of the City's Exceptions.

g. The Discharge Route is Properly Described

Here again, the City changes its tactics from those used at the hearing to those raised later in its legal argument. Both are unpersuasive. In its PFT and during the hearing, the City claimed that the first part of the discharge route into an intermittent stream is not a watercourse.[107] The City initially objected to Ms. Sims' characterization because it claimed she could not render a legal opinion on what constitutes a "watercourse."[108] The City now objects that Ms. Sims is not a hydrologist.[109] Ms. Sims has prepared over 100 discharge applications over the last 27 and is competent to identify an intermittent stream and attach appropriate USGS mapping.[110] More specifically, Ms. Sims is capable of interpreting the contour lines (in the absence of flow lines) on a USGS topographical map to discern the direction water is flowing.[111] As addressed earlier, all parties agreed that the discharge is into an intermittent stream (i.e., "dry weather creek" identified in AIRW-Exh. 51 by the previous landowner), not perennial, and the limited ALU is appropriate as a result.

Further, the City has provided no evidence that the discharge is within the City's right-of-way for CR 110, nor explained why the lack of dotted line on the USGS topographical map means there is no intermittent stream or "watercourse." The evidentiary record includes multiple independent sources proving that the discharge will be to an intermittent stream, water in

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[105] Tr. at 210:2-5.

[106] *See* AIRW-Exh. 44 and 45; Tr. at 210:22-211:13, 213:15-25.

[107] GT-Exh. 3 at 21:10-22:9.

[108] *Compare* AIRW-Exh. 8 at 9:4-11 and GT-Exh. 3 at 21-22 (where Mr. Woelke uses same terminology).

[109] City's Exceptions at 39.

[110] AIRW-Exh. 4, Administrative Report 1.0, Section 13, Attachment B.

[111] Tr. at 386:21-25, 402:16-20, 421:5-7 (The City's own exhibit, GT-Exh. 32, a 1951 USGS topographical map also shows the direction of flow by virtue of contour lines).

the state.[112] First, AIRW-Exh. 11 (Google Earth image) clearly depicts the existence and trajectory of the intermittent stream as of December 2002 in the early reach of the unnamed tributary. Second, AIRW-Exh. 12 shows the intermittent stream on a Williamson County Highway Map existed even as long ago as 1958. Third, the City's produced Kimley-Horn drawings also show existing culverts will have to be replaced by larger, four-barrel culverts so as not to impede flow and facilitate a greater volume of water flowing from the Applicant's site northward.[113] With the addition of the larger culvert, the developers of Patterson Ranch and Williamson County clearly anticipate even more flow through this watercourse.[114] All of this information about the character and nature of the discharge route was confirmed by Ms. Sims' personal observation on at least three different occasions where she observed a swale and, on one visit, standing water.[115] The City fails to address the planned realignment of CR 110 by Williamson County or the fact that Applicant's affiliate has already conveyed a perpetual drainage easement to the County.[116] As the ALJs found, the preponderant evidence in this record shows that Applicant is proposing to discharge into a water in the state.

Of all the City's bulleted, so-called deficiencies, perhaps the most preposterous is Applicant's alleged failure to provide "information required for a TLAP permit."[117] This again is another part of the TCEQ's application form that is not applicable to the Applicant's Facility. Not only is the City's TLAP discussion entirely outside the evidentiary record, but it is simply wrong. At no point in this proceeding, has the Applicant ever sought a TLAP permit for the land application of effluent. Instead, Applicant has proposed to discharge treated effluent to water in the state via a drainage easement conveyed to Williamson County through a ditch, then culvert and north onto the Patterson Ranch property, through the pond, and then downstream to Mankins Branch and so on. This demonstrates the weakness of the City's arguments as it struggles to make some semblance of a protest.

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[112] Tr. at 418:9- 421:25.

[113] AIRW-Exhs. 44 and 45; Tr. at 404:2-6.

[114] AIRW-Exh. 17 at 6:18-19.

[115] Tr. at 402:13-15, 404:2-10 (the term "swale" was misspelled in the transcript as "swell").

[116] GT-Exh. 34.

[117] City's Exceptions at 30.

6. Whether the Draft Permit Complies with TCEQ's Antidegradation Policy and Procedures

The City argues that the ALJs got the antidegradation analysis wrong by concluding that the City presented no evidence.[118] Again, the City mischaracterizes the evidence and burden of proof in a post-Senate Bill 709 case. As the ALJs correctly recognized, the ED presented evidence that the antidegradation review was performed in accordance with the TSWQS and IPs. All the experts who testified on the issue unanimously concluded that there would be no degradation of water quality in the receiving waters.[119]

In its Exceptions, the City tries to mask its failure to provide expert testimony on the issue of antidegradation by referencing a series of hypothetical questions it asked of Applicant's witness, Paul Price. Obviously, cross examination is not rebuttal evidence under § 2003.047(i-2) of the Texas Government Code. Nevertheless, as any credible expert would, 50-year aquatic ecologist expert Paul Price testified that it is possible that phosphorus may concentrate in a perennial pool and may increase algal growth.[120] The City then attempts to spin the hypotheticals into evidence that there "would" in fact be *de minimis* degradation in water quality.[121] However, the City fails to include all of Mr. Price's testimony on the subject. Mr. Price personally observed algal growth in the watercourse all the way to the San Gabriel River.[122] He also went on explain that the accumulation of nutrients and the growth of algae is a natural condition for a pond, and that the cycle of algal growth in the downstream ponds is "*going to happen whether there's a discharge or not*."[123] Importantly, Mr. Price explained that algal growth becomes a problem when it results in a lowering of dissolved oxygen in the water, but that farm ponds are not known for having fish that would be sensitive to low dissolved oxygen.[124] Furthermore, the testimony does not support the City's conclusion that the Draft Permit *will* allow significant algal growth. The City also fails

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[118] *See* GT-Exh. 3 at 9:13. (Mr. Woelke states that, among other things, the purpose of his direct testimony is to address antidegradation; however, the word "antidegradation" never appears again in his PFT nor in the testimony or exhibits sponsored by any other City witness). Mr. Woelke himself conceded he was not a water quality expert.

[119] AIRW Resp. to Closing Arguments at 23-29.

[120] Tr. at 436:24-437.

[121] City's Exceptions at 41.

[122] Tr. at 439:3-10.

[123] Tr. at 438:5-20 (emphasis added).

[124] Tr. at 439:19-440:3.

to mention that the Draft Permit TP limitation of 0.5 mg/L is much more stringent than its own Dove Springs WWTP.[125]

The City simply did not rebut the unanimous opinions of the experts in this hearing that the antidegradation review was properly performed and there will be no degradation of water quality in the receiving waters.

7. Whether the Permit Should be Altered or Denied Based on the Applicant's Compliance History

The City accuses the ALJs of impermissibly limiting the compliance history analysis to Applicant.[126] The City states that the histories of Jonah, 600 Westinghouse Investments, LLC, and 800 Westinghouse Investments, LLC should be considered as well. As accurately stated in the PFD, the City failed to meet its burden to show that the Draft Permit should be denied based on compliance history.[127] As set out above, the two affiliated development entities are not now nor should they be co-applicants in the future as they have no ownership nor operational responsibility for the WRRF. They simply are not regulated entities. As such, there is no basis for the TCEQ to regulate them regarding the subject matter of the Application. Moreover, reference to "other affiliates with similar developments elsewhere in Texas"[128] is outside of the record and should be disregarded.

The City makes the same argument relative to Jonah's compliance history, which fails for the same and additional reasons. First, Jonah's compliance history is not relevant to this proceeding because it is not the owner or operator of the WRRF under 30 TAC § 305.2(24) and (26) and thus has no affirmative duty to provide any evidence of compliance history. Second, the City improperly conflates Jonah's compliance history and its (alleged inadequate) qualifications and experience. As the name implies, compliance history only relates to prior permitting performance, specifically the five years preceding the TCEQ's receipt of the permit application.[129]

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[125] AIRW-Exh. 14 at 8:6-18. According to Mr. Price, the City's Pecan Branch plant has a 1.0 mg/L TP limit, and the Dove Springs does not have a TP limit at all but must only comply with the City's system-wide load of 258 lbs/day.

[126] City's Exceptions at 42.

[127] PFD at 69.

[128] City's Exceptions at 44.

[129] 30 TAC § 60.1(b).

As such TCEQ's scrutiny of Jonah's performance relative to *this* permit is prospective and triggered only by the transfer of the permit under the separate legal process under 30 TAC § 305.64.[130] Accordingly, Jonah's compliance history is not relevant until those events happen in the future.

8. Whether the Draft Permit Contains Sufficient Provisions to Ensure Protection of Water Quality, Including Necessary Operational Requirements[131]

The City's Exception relating to sufficiency of the Draft Permit including operational requirements is one blanket statement without citation to applicable TCEQ rules, the evidentiary record, and most importantly, those operational requirements with which the City has concerns. That is, the City does not identify one Draft Permit provision which it claims is deficient or even those operational requirements it previously demanded. To rebut Applicant's prima facie case established by the filing of the administrative record, Texas Government Code § 2003.047(i-2) requires the City to present evidence on a matter referred and to demonstrate that one or more of the Draft Permit provisions violates a specifically applicable state or federal requirement.[132] The City not only failed to specify any Draft Permit provisions, but it also fails to comprehend the basic regulatory scheme that underlies TCEQ's permitting process generally. When the City states "there is no reasonable assurance that the Draft Permit contains conditions that are appropriate,"[133] it disregards that the "reasonable assurance" is the fact that Draft Permit conditions are based on statutes and rules promulgated after notice and opportunity for hearing and subject to federal oversight. For instance, effluent limitations are based on application of the TSWQS and IPs in chapter 307, sampling frequency is based on chapter 319 relative to the volume of treated wastewater, operator certification requirements are based on chapter 30, and so forth.

In its PFT, the City argued that additional treatment units and other features were necessary – such things as a second clarifier, back-up units or bonus features (i.e., pond), more frequent sampling frequency, steel (versus concrete) construction, etc. Applicant and the ED agreed that none of these extra items were required by rule or warranted by special site characteristics for this

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[130] If the TCEQ issues the permit, Applicant will transfer title to and operational control of the WRRF to Jonah as set out in the NSSAs. *See* AIRW-Exh. 43.

[131] Applicant incorporates its discussion at Sections IV.1 and 6 above relating to water quality protection and antidegradation, that the Draft Permit provisions ensure protection of water quality and no additional operational requirements (i.e., more frequent sampling, etc.) should be required.

[132] Tex. Gov't Code § 2003.047(i-2).

[133] City's Exceptions at 45.

proposed small discharge.[134] During the hearing in fact, Mr. Woelke conceded that these additional measures were not required, but just a matter of "preference."[135]

The City's complaints about the plans and specification approval process also highlight its misunderstanding of the permitting process generally. For example, in his PFT, Mr. Woelke claimed the Application was deficient relative to its detail on the future communication system (i.e., a SCADA alert system). Later at hearing, however, Mr. Woelke conceded that this level of detail in the application "may not be required."[136] Mr. Cooper confirmed that many such details are addressed during staff's review of plans and specifications and may be required to change before construction can commence.[137] Forty-year engineering expert Mr. Perkins explained that not only are specific design details normally reviewed during plan submittal after a permit is issued, but it is very rare (and impractical) for detailed plans to be completed at the time a permit application is submitted.[138] The City's unsubstantiated "preferences" are not grounds for denial of the Draft Permit.

9. The City's Motion to Dismiss is Unwarranted

As explained earlier in section IV.5 and in its Response to Closing Arguments, there is no justification to dismiss and/or remand this proceeding to require refiling with would-be co-applicants Jonah and/or 600 Westinghouse Investments, LLC.[139] This is not a situation where the owner and operator will be different entities. The City has misconstrued 30 TAC § 305.43(a) and the permit transfer provision in 30 TAC § 305.64. However, to now say that its motion must be granted to "allow for a complete record" belies the fact that this issue was already fully addressed by the parties and ALJs during the hearing on the merits when the City made its Motion to Dismiss orally.[140] It is squarely within the authority of the ALJs to have denied the City's

[134] ED-GC-1 at 12:10-18; AIRW-Exh. 17 at 8:9-11, 20-22.

[135] Tr. at 214:18-215:5, 216:7-12.

[136] Tr. at 217:5-9.

[137] ED-GC-1 at 12:14-18.

[138] AIRW-Exh. 17 at 7:21-27.

[139] The City inexplicably argues that both 600 and 800 Westinghouse Investments, LLC must be co-applicants on page 43 of its Exceptions, but only mentions 600 Westinghouse Investments, LLC on page 47.

[140] Tr. at 239:12-245:14.

motion. To demand another bite of the apple at this juncture also highlights the City's basic misunderstanding of the burden of proof in a post-Senate Bill 709 case and procedural rules applied to contested case hearings.[141]

10. Transcript Costs

The PFD is correct that the City and Applicant participated roughly equally in the hearing.[142] Jonah did not – it participated a fraction of the amount of time that the other non-statutory parties participated. Section 80.23(d) requires the Commission to consider the extent to which the party participated in the hearing.[143] The City ignores this provision in its attempts to shift some of its costs onto another party.

V. CONCLUSION

For the foregoing reasons, Applicant AIRW 2017-7, LP respectfully requests that the Commission adopt the PFD and issue the proposed Order with the minor changes recommended by the ED and Jonah, overrule all the City's Exceptions, approve Applicants' TPDES permit application and issue proposed TPDES Permit No. WQ0015878001 as drafted, and grant all other relief to which it has shown itself to be entitled.

Respectfully submitted,

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[141] Tex. Gov't Code Ann. § 2003.047(i-2).

[142] PFD at 75.

[143] 30 TAC § 80.23(d).

CERTIFICATE OF SERVICE

I hereby certify that I have served or will serve a true and correct copy of the foregoing document via hand delivery, facsimile, electronic mail, overnight mail, U.S. mail, or Certified Mail Return Receipt Requested on all parties on this 22nd day of September 2022:

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