State Office of Administrative Hearings

Kristofer S. Monson
Chief Administrative Law Judge

August 23, 2022

Mary Smith
General Counsel
Texas Commission on Environmental Quality
12100 Park 35 Circle, Bldg. F, Room 4225
Austin Texas 78753

VIA EFILE TEXAS

Re: SOAH Docket No. 582-22-1016; Texas Commission on Environmental Quality No. 2021-1214-MWD; Application by AIR-W 2017-7 L.P. For TPDES Permit No. WQ0015878001

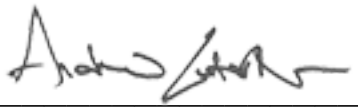
Dear Ms. Smith:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality (Commission) on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

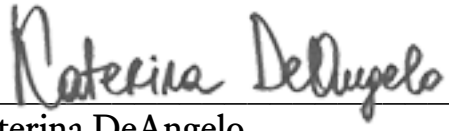
Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Commission no later than September 12, 2022. Any replies to exceptions or briefs must be filed in the same manner no later than September 22, 2022.

This matter has been designated **TCEQ Docket No. 2021-1214-MWD; SOAH Docket No. 582-22-1016**. All documents to be filed must clearly

reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the Commission electronically at http://www14.tceq.texas.gov/epic/eFiling/ or by filing an original and seven copies with the Chief Clerk of the Commission. Failure to provide copies may be grounds for withholding consideration of the pleadings.



Andrew Lutostanski
Presiding Administrative Law Judge



Katerina DeAngelo
Co-Presiding Administrative Law Judge

CC: Service List

SOAH Docket No. 582-22-1016 **Suffix: TCEQ**

BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

APPLICATION BY AIR-W 2017-7 L.P. FOR TPDES PERMIT NO. WQ0015878001

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SOAH Docket No. 582-22-1016 **Suffix: TCEQ**

BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

APPLICATION BY AIR-W 2017-7 L.P. FOR TPDES PERMIT NO. WQ0015878001

PROPOSAL FOR DECISION

AIR-W 2017-7 L.P. (AIRW) filed an application (Application) with the Texas Commission on Environmental Quality (Commission or TCEQ) for new Texas Pollutant Discharge Elimination System (TPDES) permit No. WQ0015878001 (Draft Permit) to release treated domestic wastewater from a proposed plant site (Facility) located in Williamson County, Texas.

The City of Georgetown (City) opposed the Application. The Commission determined that the City was an affected person, granted the hearing request, and referred the matter to the State Office of Administrative Hearings (SOAH) for hearing on eight issues.

The Commission's Executive Director (ED) and Office of Public Interest Counsel (OPIC) both recommend issuance of the permit. Based on the evidence in the record and the applicable law, the Administrative Law Judges (ALJs) find the Commission should issue the Draft Permit without alterations.

I. NOTICE, JURISDICTION, AND PROCEDURAL HISTORY

No party contested the Commission's jurisdiction to act on the Application or SOAH's jurisdiction to convene a hearing and prepare a Proposal for Decision (PFD). The ALJs will address jurisdiction only in the findings of fact and conclusions of law in the Proposed Order attached to this PFD. The City contested the adequacy of notice regarding the Application, and the ALJs will address the notice issue in Section VI.E.

AIRW filed the Application on April 6, 2020. The ED determined the Application was administratively complete on June 19, 2020, and technically complete on November 19, 2020, and prepared the Draft Permit. On December 8, 2021, the Commission referred the Application to SOAH for a contested case hearing.

On February 24, 2022, a preliminary hearing was convened in this case via videoconference by SOAH ALJs Andrew Lutostanski and Ross Henderson. The

administrative record and jurisdictional documented were admitted into evidence.[1] Jurisdiction was noted by the ALJs, and the ALJs admitted AIRW, the ED, OPIC, the City, and two additional protestants, Jonah Water Special Utility District (Jonah) and Jimmy Webb,[2] as parties. A second preliminary hearing was convened via videoconference by ALJs Lutostanski and Katerina DeAngelo on May 12, 2022, at which the ALJs ruled on all timely-filed motions and objections.

On May 23-25, 2022, ALJs Lutostanski and DeAngelo convened the evidentiary hearing at SOAH via videoconference. Attorney Helen Gilbert appeared for AIRW; attorneys William A. "Cody" Faulk, Trish Carls, and Carlota Hopkins-Baul appeared for the City; attorneys John Carlton, Grayson McDaniel, and Kelsey Daugherty appeared for Jonah; attorney Bobby Salehi appeared for the ED; and attorney Sheldon Wayne appeared for OPIC. The record closed with the filing of post-hearing briefs on June 24, 2022.

II. PROPOSED FACILITY AND DRAFT PERMIT CONDITIONS

The following description of the Facility and the Draft Permit is based on descriptions in the administrative record. New TPDES

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[1] AIRW Exs. 1-7. The administrative record included the Application (including all Technical Reports and attachments submitted by AIRW); the Draft Permit (made by TCEQ after its review of the Application), including TCEQ's Statement of Basis Technical Summary and Preliminary Decision, Compliance History Report, and Technical Memoranda; and all associated jurisdictional documents (notices, affidavits, and the Commission's Interim Order).

[2] Mr. Webb submitted his withdrawal from the proceeding on May 17, 2022. Jonah originally opposed the issuance of the Draft Permit; however, as of April 20, 2022, Jonah and affiliates of AIRW, 600 Westinghouse Investments, LLC (600 Westinghouse) and 800 Westinghouse Investment, LLC (800 Westinghouse), have entered into Non-Standard Service Agreements (NSSAs), providing that Jonah will be the future owner and operator of the Facility. AIRW Ex. 43. Jonah was henceforth aligned with AIRW on the Draft Permit Application.

Permit No. WQ0015878001 would authorize discharge from the Facility of treated domestic wastewater at a daily average flow not to exceed 200,000 gallons per day (or 0.20 million gallons per day (MGD)). The Facility, which has not been constructed, will be located approximately 500 feet southeast of the intersection of Rockride Lane (County Road (CR) 110) and Westinghouse Road (CR 111), in Williamson County, Texas 78626. The Facility would serve The Mansions of Georgetown III residential development, an 880-house subdivision.

The Facility would be an activated sludge with nitrification process plant operated in the conventional mode. Treatment units include aeration basins, a final clarifier, a cloth effluent filter, chemical injection for phosphorus removal, an aerated sludge holding and thickening tank, and a chlorine contact chamber. Sludge generated from the Facility would be hauled by a registered transporter and disposed of at a TCEQ-permitted solid waste processing facility, Austin Wastewater Processing Facility. The Draft Permit also authorizes the disposal of sludge at a TCEQ-authorized land application site, co-disposal landfill, wastewater treatment facility, or facility that further processes sludge.

The effluent limitations in the final phase of the Draft Permit, based on a 30-day average, are 7 milligrams per liter (mg/L) five-day carbonaceous biochemical oxygen demand ($CBOD_5$), 10 mg/L total suspended solids, 2 mg/L ammonia-nitrogen (NH_3-N), 0.5 mg/L total phosphorus (TP), 126 colony forming units (CFU) or most probable number (MPN) of *E. coli* per 100 milliliters (ml), and 4.0 mg/l minimum dissolved oxygen (DO). The effluent will contain a chlorine residual of at least 1.0 mg/L and shall not exceed a chlorine residual of 4.0 mg/L after a detention time of at least 20 minutes based on peak flow.

The treated effluent will be discharged via pipe, then through a culvert, then to an unnamed tributary,[3] then to Mankins Branch, then to the San Gabriel/North Fork San Gabriel River in Segment No. 1248 of the Brazos River Basin. The unclassified receiving water uses are limited aquatic life use (ALU) for the unnamed tributary and Mankins Branch (intermittent with perennial pools) and high ALU for Mankins Branch (perennial). The designated uses for Segment No. 1248 are primary contact recreation, public water supply, aquifer protection, and high aquatic life use. TCEQ issued the Draft Permit with effluent limitations intended to maintain and protect the existing instream uses.

TCEQ found that the end-of-pipe compliance with pH limits between 6.0 and 9.0 standard units reasonably assures instream compliance with the Texas Surface Water Quality Standards (TSWQS) for pH when the discharge authorized is from a minor facility and the unclassified waterbodies have minimal or limited ALU. TCEQ further found that the discharge from the Facility is not expected to have an effect on any federal endangered or threatened aquatic or aquatic-dependent species or proposed species or their critical habitat.

Mankins Branch is currently listed on the 2018 Clean Water Act section 303(d) list, specifically for elevated bacteria levels (recreational use) from the confluence with the San Gabriel River upstream to the intersection of CR 105 and CR 104 in Williamson County. TCEQ determined that the Facility would be designed to provide adequate disinfection and, when operated properly, should not add to the bacterial impairment of the segment. To ensure that the proposed

[3] There are three on-channel stock ponds on the unnamed tributary.

discharge meets the stream bacterial standard, an effluent limitation of 126 CFU or MPN of *E. coli* per 100 ml was added to the Draft Permit.

III. BURDEN OF PROOF AND PRIMA FACIE CASE

AIRW, as the moving party, bears the burden of proof by a preponderance of the evidence.[4] The Application was filed after September 1, 2015, and the Commission referred it to SOAH under Texas Water Code section 5.556, which governs referral of environmental permitting cases to SOAH.[5] Therefore, this case is subject to Texas Government Code section 2003.047(i-1)-(i-3), as enacted in 2015, which provides:

> (i-1) In a contested case regarding a permit application referred under Section 5.556 [of the] Water Code, the filing with [SOAH] of the application, the draft permit prepared by the executive director of the commission, the preliminary decision issued by the executive director, and other sufficient supporting documentation in the administrative record of the permit application establishes a prima facie demonstration that:
>
> 1) the draft permit meets all state and federal legal and technical requirements; and
> (2) a permit, if issued consistent with the draft permit, would protect human health and safety, the environment, and physical property.
>
> (i-2) A party may rebut a demonstration under Subsection (i-1) by presenting evidence that:

[4] 30 Tex. Admin. Code § 80.17(a); 1 Tex. Admin. Code § 155.427.

[5] Tex. Water Code §§ 5.551(a), .556.

> (1) relates to . . . an issue included in a list submitted under Subsection (e) in connection with a matter referred under Section 5.556, Water Code; and
>
> (2) demonstrates that one or more provisions in the draft permit violate a specifically applicable state or federal requirement.
>
> (i-3) If in accordance with Subsection (i-2) a party rebuts a presumption established under Subsection (i-1), the applicant and the executive director may present additional evidence to support the draft permit.[6]

Although this law creates a presumption, sets up a method for rebutting that presumption, and shifts the burden of production on that rebuttal, it does not change the underlying burden of proof. The burden of proof remains with AIRW to establish by a preponderance of the evidence that the Application would not violate applicable requirements and that a permit, if issued consistent with the draft permit, would protect human health and safety, the environment, and physical property.[7]

In this case, the Application, the Draft Permit, and the other materials listed in Texas Government Code section 2003.047(i-1), which are collectively referred to as the prima facie demonstration, were offered and admitted into the record at the preliminary hearing.[8]

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[6] *Accord* 30 Tex. Admin. Code § 80.17(c).

[7] 30 Tex. Admin. Code § 80.17(a), (c).

[8] *See* AIRW Exs. 1-7.

IV. WASTEWATER DISCHARGE PERMIT REQUIREMENTS

Chapter 26 of the Texas Water Code requires a person who seeks to discharge wastewater into water in the State to file an application with TCEQ. 30 Texas Administrative Code, chapter 305, subchapter C contains TCEQ's application filing requirements. Once an application is filed, TCEQ reviews the application in accordance with 30 Texas Administrative Code chapter 281. Based on a technical review, TCEQ prepares a draft permit that is consistent with Environmental Protection Agency (EPA) and TCEQ rules and a technical summary that discusses the application facts and significant factual, legal, methodological, and policy questions considered while preparing the draft permit.

A domestic wastewater treatment facility in Texas is subject to wastewater discharge permit requirements. 30 Texas Administrative Code, chapter 305, subchapter F contains standard permit requirements, which TCEQ has adapted specifically for use in wastewater discharge permits. All wastewater discharge permits are also subject to regulations found in 30 Texas Administrative Code, chapter 319, which require the permittee to monitor its effluent and report the results as required in the permit.

Finally, TCEQ has adopted water quality standards applicable to wastewater discharges in accordance with section 303 of the Clean Water Act and section 26.023 of the Texas Water Code. These standards, known as the TSWQS, are

found in 30 Texas Administrative Code, Chapter 307. Provisions for implementing the TSWQS are described in Procedures to Implement the TSWQS (IPs).[9]

Additional law specifically applicable to the eight issues referred by the Commission will be discussed below.

V. SUMMARY OF THE EVIDENCE

The administrative record established a prima facie demonstration that: (1) the Draft Permit meets all state and federal legal and technical requirements; and (2) a permit, if issued consistent with the Draft Permit, would protect human health and safety, the environment, and physical property.[10]

At the hearing on the merits, the City offered evidence for the purpose of rebutting AIRW's prima facie demonstration.[11] The City had 44 exhibits admitted, which included the prefiled testimony of Wayne Reed, Carol Rubinstein, and Allen D. Woelke.[12]

The ED, AIRW, and Jonah presented additional evidence in response to evidence offered by the City. At the hearing, AIRW had 46 exhibits admitted, which included the prefiled testimony of Janet Sims, Paul Price, Mark Perkins, and

[9] ED Exhibit JL-3 contains the IPs (RG-194) (Jun. 2010).

[10] Tex. Gov't Code § 2003.047(i-1).

[11] Tex. Gov't Code § 2003.047(i-1)-(i-3).

[12] City Exs. 1, 1A, 2-4, 4A, 5-18, 20-43.

David Tuckfield.[13] The ED had seven exhibits admitted, which included the prefiled testimony of Gordon Cooper and Jenna Lueg.[14] Jonah had four exhibits admitted, which included the prefiled revised testimony of William Brown and Miles Whitney.[15] OPIC offered no testimony or exhibits.

VI. ANALYSIS

The Commission referred this matter to SOAH for hearing on the following eight issues:

A. Whether the Draft Permit is protective of water quality and the existing uses of the receiving waters in accordance with applicable TSWQS, including protection of aquatic and terrestrial wildlife;

B. 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 Texas Water Code section 26.0282;

C. Whether the Draft Permit is protective of the health of the nearby residents;

D. Whether the Draft Permit complies with applicable requirements regarding nuisance odors;

E. Whether the application is substantially complete and accurate;

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[13] AIRW Exs. 8-53.

[14] ED Exs. GC1-GC3, JL1-JL4.

[15] Jonah Exs. 3-6. The ALJs denied the City's motion to dismiss on the basis that Jonah's revised testimony established that Jonah should be classified as a co-applicant and the Application should be appropriately amended and re-filed to reflect such a material change.

F. Whether the Draft Permit complies with TCEQ's antidegradation policy and procedures;

G. Whether the Draft Permit should be altered or denied based on the AIRW's compliance history; and

H. Whether the Draft Permit contains sufficient provisions to ensure protection of water quality, including necessary operational requirements.[16]

With respect to each of the eight referred issues, and for the reasons set forth below, the ALJs find that AIRW has met its burden to prove by a preponderance of the evidence that the Draft Permit should be issued without changes.

A. Whether the Draft Permit is Protective of Water Quality and the Existing Uses of the Receiving Waters in Accordance with applicable TSWQS, Including Protection of Aquatic and Terrestrial Wildlife

Under the TSWQS, the policy of the state is to maintain the quality of water consistent with public health and enjoyment, propagation and protection of terrestrial and aquatic life, operation of existing industries, and taking into consideration economic development of the state; to encourage and promote development and use of regional and area-wide wastewater collection, treatment, and disposal systems to serve the wastewater disposal needs of the citizens of the state; and to require the use of all reasonable methods to implement this policy.[17]

[16] AIRW Ex. 1.

[17] Tex. Water Code § 26.003; 30 Tex. Admin. Code § 307.1.

All permit applicants are requested to provide information about the receiving water as part of the permit application. Determining general stream flow characteristics (perennial, intermittent, or intermittent with perennial pools) is of major importance in assigning uses to unclassified streams. TCEQ considers hydrological conditions, appropriate assessment location, and applicability when determining the aquatic life uses for water bodies that receive or may receive a permitted wastewater discharge. For facilities that have not yet discharged, TCEQ gives more weight to physical, hydrological, chemical, and biological conditions downstream of the proposed discharge point.[18]

New permit applications are reviewed to ensure that permitted effluent limits will maintain instream criteria for DO and other parameters such as bacteria, phosphorus, nitrogen, turbidity, dissolved solids, temperature, and toxic pollutants. TCEQ reviews all available information from sources that may include the application, stream surveys, route monitoring information, waste load evaluations, and total maximum daily loads. Additional information may be acquired from TCEQ's regional staff, applicant, adjacent landowners, river authorities, or governmental entities.[19]

Jenna Lueg, an aquatic scientist on the Standards Implementation Team in the Water Quality Assessment Section of the Water Quality Division of TCEQ, reviewed the Application, prepared a memorandum and the ALU assessment,[20]

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[18] ED Ex. JL-3 at Bates 0033-0034.

[19] ED Ex. JL-3 at Bates 0036.

[20] Ms. Lueg assesses the ALU based on the IPs and the flow of unclassified waterbodies. ED Ex. JL-1 at Bates 0004 (Lueg Dir.).

and performed an antidegradation review in accordance with TCEQ's rules, standards, and procedures.[21]

During her review of permit applications, Ms. Lueg evaluates the water quality criteria associated with the uses of the receiving waters of a proposed discharge; confirms or finds the discharge route; assigns the aquatic life and human health water quality criteria associated with the uses of the unclassified receiving streams; finds appropriate uses for the classified receiving water; identifies endangered species in the watershed; and performs antidegradation reviews.[22]

In this case, Ms. Lueg determined the discharge route of the treated effluent—it will be discharged via pipe, then through a culvert, then to an unnamed tributary, then to Mankins Branch, then the San Gabriel/North Fork San Gabriel River in Segment No. 1248 of the Brazos River Basin. To the unnamed tributary and Mankins Branch (intermittent with perennial pools), Ms. Lueg assigned limited ALU and 3.0 mg/L DO; to Mankins Branch (perennial), high ALU and 5.0 mg/L DO; and to Segment 1248, primary contact recreation, public water supply, aquifer protection, high ALU, and 5.0 mg/L DO.[23] Ms. Lueg recommended a TP limit of 0.5 mg/l, based on a nutrient screening. Overall, Ms. Lueg's review determined that: existing water quality uses will not be impaired by the proposed discharge; numerical and narrative criteria to protect existing uses

[21] *See* ED Ex. JL-1 (Lueg Dir.).

[22] ED Ex. JL-1 at Bates 0004 (Lueg Dir.).

[23] AIRW Ex. 3 at Bates 0042. The memorandum states that the upper portion on Mankins Branch is in the transition zone of the Edwards Aquifer.

will be maintained; and there will be no significant degradation of water quality in Mankins Branch, which has high aquatic life use.[24]

Ms. Lueg determined that the Draft Permit will not negatively impact aquatic or terrestrial wildlife species.[25] She reviewed the United States Fish and Wildlife Service's (USFWS) biological opinion on the State of Texas authorization of the TPDES for the presence of critical habitat of federally listed endangered or threatened aquatic or aquatic-dependent species in the vicinity of the discharge, and determined that the proposed discharge is not expected to have an effect on any federally listed endangered or threatened aquatic or aquatic-dependent species or proposed species or their critical habitat.[26]

James Michalk, a water quality modeler on the Water Quality Assessment Team in the Water Quality Assessment Section of the Water Quality Division of TCEQ, performed DO modeling and determined that an effluent set at 7 mg/L $CBOD_5$, 2 mg/L NH_3-N, and 4.0 mg/L DO is predicted to be adequate to ensure that DO levels are maintained above the DO criteria established by Ms. Lueg's review of the Application.[27]

The City argues that the Draft Permit does not provide reasonable assurance that water quality and existing uses will be protected, due to the lack of information

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[24] ED Ex. JL-1 at Bates 0010 (Lueg Dir.); AIRW Ex. 3 at Bates 0042-0043.

[25] ED Ex. JL-1 at Bates 0010 (Lueg Dir.).

[26] AIRW Ex. 3 at Bates 00423.

[27] AIRW Ex. 3 at Bates 0044. City Exhibit 43 contains Mr. Michalk's DO Modeling Permit Review Checklist.

from AIRW regarding the receiving streams and existing[28] and known future uses, which precluded TCEQ from conducting an adequate investigation and review of the Application.[29]

The City cites TCEQ's Instructions for Completing Domestic Wastewater Permit Applications (Instructions).[30] For new applications, the Instructions require submittal of a U.S. Geological Survey (USGS) topographic map clearly outlining and labeling all ponds; all new and future commercial development, housing developments, industrial sites, parks, schools, and recreational areas; all springs, public water supply wells, and monitor wells; and all parks, playgrounds, and schoolyards around the point of discharge and one mile downstream of the discharge route.[31] The City identified the items that AIRW failed to include in its Application: the detention ponds for the tracts identified as part of AIRW's property;[32] the Patterson Ranch residential development;[33] Gateway College Preparatory school,[34] Everett Williams Elementary School,[35] and the schools' schoolyards and playgrounds; the open space associated with the drainageway, perennial pools, and intermittent tributary running through the Patterson Ranch

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[28] Existing use is a use that is currently being supported by a specific water body or that was attained on or after November 28, 1975. 30 Tex. Admin. Code § 307.3(a)(26).

[29] *See* City Br. at 3-12 and City Reply Br. at 2-9.

[30] City Ex. 14.

[31] City Ex. 14 at Bates 000219-000220.

[32] City Ex. 14 at Bates 00138-00139.

[33] City Ex. 30. According to the City, the development is currently under construction on the parcel immediately north of the Facility.

[34] According to the City, Gateway College Preparatory is a private school whose soccer fields are located one half mile to the southwest of the Facility. The location of the school is suggested on AIRW's map by a small flag southwest of the Facility. AIRW Ex. 4 at Bates 00061.

[35] According to the City, Everett Williams Elementary School is a public school whose schoolyard is approximately one quarter mile to the north of the Facility.

residential development;[36] and any spring(s) providing water flow into Pond 1.[37] The City argues that the Application was inaccurate and incomplete and TCEQ did not seek additional information from adjacent landowners, the City, Williamson County, or other sources to confirm the receiving streams and existing uses;[38] therefore, Ms. Lueg's review was not in accordance with the IPs and the Draft Permit does not ensure protection of water quality and existing uses of the receiving waters.

Moreover, the City states that TCEQ did not consider the information received from adjacent landowners during the public comment period regarding the "dry weather creek" characteristics of the receiving stream,[39] the livestock and fishing uses of the perennial pools associated with the receiving stream,[40] and the aesthetic use and enjoyment of the receiving stream and perennial pools.

The City further argues that TCEQ did not conduct a receiving water assessment; did not seek to develop information about physical, hydrological, chemical, and biological conditions immediately downstream of the proposed

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[36] *See* AIRW Ex. 45; City Ex. 12 at Bates 000163.

[37] The perennial pool that marks the headwaters of the unnamed intermittent tributary to Mankins Branch on the USGS maps and is the closest to CR 110 was denominated "Pond 1" and the next pool along the unnamed tributary was denominated "Pond 2." *See, e.g.* City Exs. 32, 43.

[38] Hearing Tr. at 694-695. Ms. Lueg testified that she did not visit the Facility site and did not contact adjacent landowners, the City, City of Round Rock, or Williamson County for additional information about the unnamed tributary. She did not consider the proximity of two schools within half a mile of the discharge point in considering potential recreational use or other exposure of school-aged children. In making its argument, the City also relied on an email from Mr. Michalk to Ms. Lueg, in which he had questions regarding Mankins Branch, including the differentiation between the intermittent and perennial stretches, and noted that Mankins Branch was not labeled on the submitted maps. City Ex. 42. Ms. Lueg testified that, in response to Mr. Michalk's email, she changed the portion of Mankins Branch to perennial, which gave it high ALU. Hearing Tr. at 692, 694.

[39] AIRW Ex. 51.

[40] AIRW Ex. 51. The comment indicated that the two ponds, which are stocked with fish to control algae growth, create a drinking source for cattle and fishing recreation.

discharge point; and did not conduct a fish survey in the receiving stream and perennial pools. The City asserts that TCEQ did not consider whether the discharge of treated effluent may degrade aesthetic values[41] despite the existence of a narrative aesthetic water quality standard,[42] the identification of aesthetic values in the IPs,[43] and the policy that the water quality be maintained consistent with the protection of public health and enjoyment of waters in the State.[44]

The ED, OPIC, and AIRW maintain their position that the Draft Permit is protective of water quality and the existing uses of the receiving waters, including protection of aquatic and terrestrial wildlife.[45] AIRW indicates that the City did not present any evidence to dispute TCEQ's ALU determination, DO standards, and established effluent limits and did not present any expert testimony to support its claim of a failure to provide information. AIRW witness Mr. Price, an expert aquatic ecologist, confirmed that the ALU and accompanying water quality standards were determined appropriately and the Draft Permit conditions will be sufficient to protect existing uses in the receiving waters.[46]

At the hearing, Ms. Lueg testified that the Draft Permit will maintain and protect existing uses and will not harm aquatic or terrestrial wildlife. AIRW

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[41] Hearing Tr. at 695. Ms. Lueg testified that she did not consider whether the discharge of treated effluent may degrade aesthetic values.

[42] 30 Tex. Admin. Code § 307.4(b).

[43] ED Ex. JL-3 at Bates 0073. Narrative criteria may also apply for aesthetic parameters such as: taste and odor; suspended solids; turbidity; foam and froth; and oil and grease.

[44] Tex. Water Code § 26.003.

[45] *See* ED Br. at 2-3; ED Reply Br. at 1-2; OPIC Br. at 5; AIRW Br. at 3-6; AIRW Reply Br. at 4-6.

[46] AIRW Ex. 14 at Bates 000046; 000051 (Price Dir.). Mr. Price also testified that he agreed with TCEQ's DO modeling methodology and findings.

witnesses Ms. Sims and Mr. Price, as well as Ms. Lueg, confirmed that the *E. coli* limit and the 1.0 mg/L chlorine residual (with 20 minutes of detention time) have long been established to be sufficient disinfection criteria for the protection of human health for primary contact recreational uses.[47] According to AIRW, there is no reason to further investigate and collect additional information where it is uncontroverted that the discharge is to a dry creek with intermittent flows and limited ALU. Because aquatic life is more sensitive to chemicals in water, if the water/effluent is protective of the limited aquatic life, it should also be protective of livestock and wildlife.

As to future uses, Ms. Lueg and Mr. Cooper, a TCEQ environmental permit specialist, testified that permit provisions are not imposed based on future, speculative downstream development conditions but on what site characteristics are at the time of filing.[48] According to AIRW, there is no evidence of parks, playgrounds, or schoolyards within one mile downstream, or of any spring(s) providing water flow into Pond 1.[49] AIRW states that the Draft Permit contains prohibitions on discharges of visible oil, visible grease, foam, froth, and suspended solids so that the aesthetic qualities and fish and wildlife uses of the receiving

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[47] AIRW Ex. 8 at Bates 000025 (Sims Dir.); AIRW Ex. 14 at Bates 000050, 000052 (Price Dir.); Hearing Tr. at 433, 703. Mr. Price testified that the maximum allowable concentration of coliform bacteria (126 *E. coli* CFU or MPN/100 ml) in the effluent is the same as the standard that supports contact recreation in the TSWQS and in the receiving water. This standard has been established through public health studies to be protective of contact recreation. Because the San Gabriel River (Segment 1248) and lower Mankins Branch are many miles downstream of the proposed discharge location, the effluent will dilute, and *E. coli* number will decrease, with downstream transport.

[47] Hearing Tr. at 680, 701.

[48] Hearing Tr. at 680, 701.

[49] According to AIRW, the City referenced a 1951 USGS topological map unrelated to evidence of spring flow.

waters are not impaired.[50] Finally, AIRW states that the City's allegations of detention ponds and housing development either were not known at the time of the filing or are not supported by transect data.

1. ALJs' Analysis

The ALJs find that the preponderance of the credible evidence proves that the Draft Permit is protective of water quality and the existing uses of the receiving waters in accordance with applicable TSWQS, including protection of aquatic and terrestrial wildlife. The City failed to rebut the prima facie determination because its arguments were conclusory and unverifiable due to a lack of underlying data to support its conclusions. The City alleged that the Application lacked information regarding the receiving streams and existing and known future uses and that TCEQ's review of the Application was incorrect; however, the ALJs find that the City's allegations are not supported by any credible evidence. The City did not present evidence disputing the accuracy of the ALU, DO determinations, or effluent limits or how such determinations and limits are not protective of existing uses and wildlife.

TCEQ's and AIRW's witnesses credibly testified that the Application was reviewed in accordance with TCEQ's rules, standards, and procedures; and that the Draft Permit is protective of water quality and existing uses, as well as of aquatic and terrestrial wildlife. TCEQ's witnesses testified that TCEQ does not propose permit conditions based on how the land may be developed in the future

[50] AIRW Ex. 3 at Bates 0002.

and that they consider the circumstances at the time the application is filed. Ms. Lueg testified that her findings would be the same had she known that the Patterson Ranch area was under residential development, since the established limits would be protective of human health. The issue referred to SOAH addresses the existing uses, not future uses, of the receiving waters; and the ALJs conclude that the evidence established that the existing uses of the receiving waters would be protected under the Draft Permit conditions. Finally, the evidence showed that the Draft Permit conditions address the aesthetic water quality standard. Therefore, the ALJs find that the Draft Permit complies with TCEQ's rules and procedures for TPDES permit applications and conclude that AIRW has met its burden regarding Issue A.

B. 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 Texas Water Code section 26.0282.

1. Legal Background

The Texas Legislature adopted section 26.003 of the Texas Water Code to encourage and promote regionalization. Section 26.003 provides:

> 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.[51]

TCEQ implements regionalization through section 26.0282 of the Texas Water Code, which provides:

> In considering the issuance, amendment, or renewal of a permit to discharge waste, the commission may deny or alter the terms and conditions of the proposed permit, amendment, or renewal based on consideration of need, including the expected volume and quality of the influent and the availability of existing or proposed areawide or regional waste collection, treatment, and disposal systems not designated as such by commission order pursuant to provisions of this subchapter.[52]

TCEQ has recently provided guidance about regionalization on its website.[53] The guidance states that TCEQ may approve applications for discharges of wastewater in four situations:

- There is no wastewater treatment facility or collection system within three miles of the proposed facility.
- The applicant requested service from wastewater treatment facilities within the three miles, and the request was denied.
- The applicant can successfully demonstrate that an exception to regionalization should be granted based on costs, affordable rates, and/or other relevant factors.

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[51] Tex. Water Code § 26.003.

[52] Tex. Water Code § 26.0282.

[53] AIRW Ex. 46.

- The applicant has obtained a Certificate of Convenience and Necessity (CCN) for the service area of the proposed new facility or the proposed expansion of the existing facility.[54]

In addition, there are three recent administrative decisions that the parties argue are relevant: *Crystal Clear*,[55] *Regal*,[56] and *DMS Real Tree*.[57]

2. AIRW's Application

TCEQ requires applicants to determine: (1) whether any portion of the proposed service area is located in an incorporated city; (2) whether any portion of the proposed service area is located inside another utility's CCN area; and (3) whether there are any domestic permitted wastewater facilities or collection systems located within a three-mile radius of the proposed facility.[58] If there is another facility or system within three miles, applicants must provide information on whether the facility has sufficient capacity and is willing to expand to accept the additional wastewater and provide copies of relevant correspondence.[59]

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[54] AIRW Ex. 28; City Ex. 2 at 19.

[55] Tex. Comm'n on Envtl. Quality, *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 (June 14, 2021).

[56] Tex. Comm'n on Envtl. Quality, *An Order Granting the Application by Regal, LLC for TPDES Permit No. WQ001581701 in Guadalupe County, Texas*; SOAH Docket No. 582-21-0576; TCEQ Docket No. 2020-0973-MWD) (Nov. 29, 2021).

[57] Tex. Comm'n on Envtl. Quality, *Order Granting the Application By DMS Real Tree, LLC for TPDES Permit*, SOAH Docket No. 582-16-1442, TCEQ Docket No. 2015-1264-MWD (Feb. 27, 2017).

[58] ED Ex. GC-1 at 4.

[59] ED Ex. GC-1 at 4.

The City operates a domestic permitted wastewater treatment facility and collection system within three miles of the Facility, and the City has capacity to receive AIRW's discharge.[60] When AIRW explored obtaining wastewater services from the City, the City conditioned supplying wastewater services on annexation of the Facility and its associated development.[61] AIRW proceeded to apply to TCEQ for a permit and supplied cost estimates showing why it believed it need not contract with the City.[62] Jonah is a nearby water provider. Most of the Facility and its associated development are within Jonah's district boundaries.[63] Recently, AIRW and Jonah have contracted for Jonah to own and operate the Facility.[64]

All the parties except for the City argue that AIRW's application complies with regionalization.

3. AIRW's Position

AIRW states that its application for a permit should be approved under governing law and TCEQ's guidance concerning regionalization. AIRW argues that its application should be granted because: (1) it requested and was denied service because the City demanded annexation; (2) costs demonstrate that connection to the City's facilities is unreasonable; (3) the need to acquire third-party easements and the inherent delay in doing so are other relevant factors that justify granting the

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[60] City Ex. 1 at 18-19 (Reed Dir.).

[61] City Ex. 1 at 13.

[62] AIRW Exs. 21, 37, 38.

[63] AIRW Ex. 24 at 30.

[64] AIRW Ex. 24 at 32.

permit; and (4) its agreement to receive wastewater services through Jonah furthers regionalization.

AIRW argues that it requested service from the City's wastewater treatment facilities, and the City's condition of annexation was effectively a denial of the request for service. AIRW first asserts that the evidence shows that the City required annexation in order to receive wastewater services.[65] AIRW then relies on TCEQ's prior decision in *Crystal Clear* to show that requiring annexation is tantamount to a denial of service.[66] AIRW witness Mr. Tuckfield explained that this case is similar to *Crystal Clear* because (1) both proposed sites are located in the extra-territorial jurisdiction of a city, (2) both cities demanded annexation in exchange for sewer service, and (3) both applicants sought service from another provider.[67] AIRW argues that *Crystal Clear* indicates that forced annexation is effectively denial of service. AIRW adds that, even if the City's ordinance contains a provision permitting waiver of the annexation requirement, the City has not offered any evidence that waiving annexation has ever been done or that it would be done here.[68]

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[65] *See* AIRW Br. at 10-11; AIRW Ex. 30 (City Engineer: "using our wastewater will require voluntary annexation"); AIRW Ex. 31 (Assistant City Manager: "nothing Wes said on our call yesterday should have been construed as the City entertaining providing wastewater service to this project. . . . the City's position remains the same: annexation will be required in order to receive wastewater service from the City."); AIRW Ex. 34 (City Planning Manager: "The City may only provide [wastewater] services to property in the city limits. Please update or submit a request for voluntary annexation."); AIRW Ex. 37 (City Planning Director: "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.").

[66] *Crystal Clear* at *7 (FOF 47: "San Marcos's response requiring annexation of the Subdivision was properly considered a denial of service by Applicants and the ED's staff.").

[67] Hearing Tr. at 578-79.

[68] AIRW Reply Br. at 9.

AIRW argues that costs demonstrate that connection to the City's facilities was not justified. After Mr. Cooper requested that AIRW provide "a cost analysis of expenditures that includes the cost of connecting to the CCN facilities versus the cost of the proposed facility or expansion,"[69] AIRW provided cost estimates. AIRW witness Mr. Perkins estimated that construction of a new treatment plant would cost approximately $4.8 million, while connecting to the City's system would cost approximately $4.5 million.[70] However, Mr. Perkins further estimated an additional approximately $20 million cost of connecting to the City's system because of lost value due to City taxes.[71] AIRW witness Ms. Sims added further explanation.[72] She estimated that the costs of annexation reduced the value of the proposed development project "by over $20 million" based on the lost value of the property when sold, payment of additional City taxes and fees, and costs to comply with the City's zoning requirements.[73] She explained that the annual cost of property taxes is an operating expense that would not otherwise be incurred, and zoning restrictions and other costs of connection further add to the total cost of service.[74] In particular, she noted that the City would require a change in land use contrary to AIRW's intentions: the City insisted that some land be dedicated to other than residential purposes—commercial use—and this different land use "represents further loss of value."[75] Overall, Ms. Sims expressed that the costs of

[69] AIRW Ex. 4 at Bates 00103.

[70] AIRW Ex. 21.

[71] AIRW Ex. 21.

[72] AIRW Exs. 37-38.

[73] AIRW Ex. 37.

[74] AIRW Ex. 38.

[75] AIRW Ex. 37.

receiving wastewater service from the City were "not an economically viable alternative for AIRW."[76]

AIRW argues that the need to acquire third-party easements is a relevant factor that justifies granting the permit. AIRW relies on a prior TCEQ decision, *DMS Real Tree*, where TCEQ found that the applicant could not connect to a city's wastewater system because the route from the force main to the applicant's property crossed private land, meaning the applicant would have to "acquire numerous private easements, which may or may not be possible."[77] Here, AIRW likewise argues that acquiring private easements is a problem. AIRW witness Mr. Perkins testified that connecting to the City's system would require easements from seven different landowners.[78] He said the closest feasible connection is approximately 0.41 miles away at a manhole near the intersection of Southwestern Boulevard and Rockride Lane,[79] and he provided a map showing that the probable route to convey wastewater to the City's system crosses several properties.[80] Mr. Perkins opined that landowners do not derive a benefit from a pipeline carrying untreated wastewater across their property, so they often oppose an easement for a sewer force main.[81]

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[76] AIRW Ex. 38.

[77] Tex. Comm'n on Envtl. Quality, *Order Granting the Application By DMS Real Tree, LLC for TPDES Permit*, SOAH Docket No. 582-16-1442, TCEQ Docket No. 2015-1264-MWD (Feb. 27, 2017).

[78] AIRW Ex. 17 at 10 (Perkins Dir.).

[79] AIRW Ex. 17 at 10 (Perkins Dir.).

[80] AIRW Ex. 20.

[81] AIRW Ex. 17 at 11 (Perkins Dir.).

AIRW also argues that the delay due to securing easements is another factor that justifies granting the permit. Mr. Perkins testified that it could take at least 12-18 months to acquire the seven different easements—even if the City assisted and exercised eminent domain.[82] AIRW argues that, as City witness Mr. Rubinstein and AIRW witness Mr. Tuckfield have acknowledged, timing should be considered when examining the feasibility of regionalization.[83] And here, AIRW asserts that the "protracted time to secure service" provides reason to grant the application.[84]

Last, AIRW argues that the Application should be approved because it has chosen Jonah as its utility provider, and service by Jonah furthers regionalization.[85] AIRW notes that Jonah is a regional utility provider with a significant customer base, a 275-mile service area, and a professional staff.[86] Jonah plans to expand to "regional facilities" and later remove from service the smaller interim facilities serving developments.[87]

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[82] AIRW Ex. 17 at 11 (Perkins Dir.).

[83] Hearing Tr. at 125 (City witness Mr. Rubinstein), 621 (AIRW witness Mr. Tuckfield).

[84] AIRW Br. at 10.

[85] AIRW Br. at 13.

[86] Jonah Ex. 5 at 2 (Brown Dir.); Hearing Tr. at 288, 619-20.

[87] Hearing Tr. at 301-02.

4. Jonah's Position

Jonah argues that its ownership and operation of the wastewater treatment plant will encourage regionalization and maintain water quality.[88]

Jonah emphasizes that it seeks to maintain water quality within its area. Jonah is a water and sewer service for approximately 9,000 customers and 30,000 people.[89] Jonah has an interest in maintaining water quality, particularly regarding wastewater discharged from the proposed facility, because improperly treated wastewater could percolate into groundwater or flow into the surface water from which it obtains its water supply.[90] Jonah witness Mr. Brown explained that Jonah must maintain water quality in order to provide quality potable water to its customers.[91] To do this, Jonah runs a professional operation—35 full-time employees, 25 field staff, and employees with operator licenses for water and wastewater systems who will ensure water quality standards are met.[92] Also, Jonah has previously operated wastewater treatment plants, and its wastewater collection system has been approved by TCEQ.[93]

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[88] Tex. Water Code § 26.003 (making it the policy of this state "to maintain the quality of water in the state consistent with public health and enjoyment" and "to encourage and promote the development and use of regional and areawide waste collection, treatment, and disposal systems.").

[89] Jonah Ex. 5 at 4 (Brown Dir.).

[90] Hearing Tr. at 297-98.

[91] Jonah Ex. 5 at 4 (Brown Dir.).

[92] Jonah Ex. 5 at 4 (Brown Dir.).

[93] Hearing Tr. at 253, 255.

Jonah asserts that its ownership and operation of the plant encourages regionalization because it already operates successfully in the area: Jonah's water service area encompasses the site of the Facility;[94] Jonah is willing and able to operate the Facility;[95] and Jonah's cost-based fees for service are reasonable.[96] Jonah adds that its operation of this plant will also further regionalization because it is in negotiations to provide wastewater to other nearby developments as well, and it plans to expand its wastewater services within its certificated water service area.[97]

Jonah argues it is the superior wastewater provider for three reasons. First, Jonah can provide utility service; the City cannot. 16 Texas Administrative Code section 24.225(c) states: "except as otherwise provided by this subchapter, a retail public utility may not provide retail water or sewer utility service within the boundaries of a district that provides the same type of retail water or sewer utility service without the district's consent, unless the retail public utility has a CCN to provide retail water or sewer utility service to that area."[98] The proposed development is inside Jonah's water CCN and outside the City's water and sewer CCNs.[99] And Jonah provides both water and sewer service for approximately 9,000 customers and 30,000 people in its service area.[100] Further, the City did not request Jonah's consent to provide wastewater service to the Facility, and Jonah has not

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[94] Hearing Tr. at 295.

[95] Jonah Ex. 5 at 3 (Brown Dir.).

[96] AIRW Ex. 43.

[97] Hearing Tr. at 288.

[98] 16 Tex. Admin. Code § 24.225(c).

[99] Hearing Tr. at 33

[100] Jonah Ex. 5 at 4 (Brown Dir.).

given consent for the City to operate within its boundaries.[101] As a result, the City cannot provide sewer services according to Rule 24.225(c).

Second, Jonah's interests are providing water and wastewater utility services and maintaining water quality, while the City wants to impose development restrictions.[102] AIRW witness Mr. Tuckfield opined that the City is hindering regionalization by requiring annexation.[103]

Finally, Jonah argues that TCEQ's prior decision in *Crystal Clear* supports using Jonah as the wastewater provider. There, TCEQ found that "the provision of sewer service from Crystal Clear to the Subdivision furthers the State's policy of encouraging regionalization because Crystal Clear is a large service provider in the region and because Crystal Clear holds the water CCN for the area where the Subdivision is located."[104] Here, Jonah has an even larger service area than Crystal Clear, and the Facility is within Jonah's certificated water service area.[105] So TCEQ should similarly conclude that selecting Jonah as the wastewater provider supports regionalization.

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[101] Hearing Tr. at 289; Jonah Reply Br. at 4.

[102] Jonah Br. at 7.

[103] Hearing Tr. at 590.

[104] *Crystal Clear* at *7 (FOF 50: "The provision of sewer service from Crystal Clear to the Subdivision furthers the State's policy of encouraging regionalization because Crystal Clear is a large service provider in the region and because Crystal Clear holds the water CCN for the area where the Subdivision is located.").

[105] Hearing Tr. at 579.

5. The City's Position

The City argues that requiring annexation is not tantamount to a denial of services because the annexation requirement can be waived. The City explains that properties in its extraterritorial jurisdiction that desire wastewater services from the City must first submit a petition for voluntary annexation.[106] But the ordinance requiring annexation for wastewater services may be waived by the City Council.[107] Thus, as in *Regal*, because the annexation requirement can be waived, it is not tantamount to a denial of service.[108]

The City also argues that its land use restrictions are not a reason to grant the Application because its land use provisions allow for more density than the proposed 880-unit duplex project. City witness Mr. Reed testified that the City's future land use plan is not "set in stone": there is a process for an amendment, and AIRW did not apply to amend the future land use plan for the property.[109] Mr. Reed further opined that the City's future land use plan designated the property as a community center—predominately commercial use and up to 20 percent residential use.[110] He added that a community center designation permits up to fourteen dwelling units per acre, but he declined to provide an

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[106] City Ex. 1 at 11.

[107] City Ex. 35.

[108] *Regal* at *6 (FOF 38: "The City's ordinance requiring annexation for wastewater service is not tantamount to a denial of service because the requirement may be waived by City Council.").

[109] Hearing Tr. at 77.

[110] Hearing Tr. at 77.

approximation of the number of dwelling units that would be permitted under that designation, saying only, "It's very hard to say," and "It depends."[111]

The City argues that cost is not a reason to avoid connecting to its wastewater facility because the cost of constructing a facility is greater than the cost of connecting to the City's wastewater services. The City notes that the ED requested a straightforward cost analysis: compare the cost of connecting to the CCN facilities versus the cost of building the proposed facility.[112] City witness Mr. Woelke testified that it would cost AIRW approximately $3.1-3.5 million to connect to the City's wastewater system and approximately $5.0-6.0 million to construct the Facility.[113] The City emphasizes that AIRW's own cost estimate reflects that connecting to the City is cheaper than the proposed facility. Thus, both sides agree that constructing the Facility is more expensive than connecting to the City's system.[114] Additionally, neither party's expert counts the $2.4 million in connection fees AIRW will pay Jonah to connect to Jonah's system: if those connection fees are considered, then the cost of the stand-alone plant exceeds the cost of connecting to the City's system by approximately $2.6 million.[115]

The City argues that the additional costs AIRW mentions—diminution in market value, lost value attributable to City taxes, and loss of value due to land use requirements imposed by the City—are not responsive to the ED's request for

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[111] Hearing Tr. at 78.

[112] *See* AIRW Ex. 4 at Bates 00103.

[113] City Ex. 3 at 29.

[114] AIRW Ex. 21; City Ex. 3 at 29.

[115] City Br. at 27; AIRW Ex. 43 at Bates 00576, 00609.

"the cost of the proposed facility or expansion." And this is not the type of cost information TCEQ has accepted in the past. For example, in *Crystal Clear*, the applicant estimated a stand-alone plant would cost $2.0 million, connecting to the City of San Marcos' wastewater system would cost $2.9 million, and the costs of construction to meet San Marcos' development regulations—pavement, curbs, gutters, and storm drains for additional roadways and alleyways—would cost $2.9 million. In other words, the applicant specifically identified the cost if the project was built in conformance with the San Marcos' development code.[116] Similarly, in *Regal*, no comparative cost analysis was done, and in another application case, only typical construction costs were used—no alleged economic losses from land use restrictions.[117] The City argues that, although cost is a factor to be considered in regionalization analyses, certain costs should not be considered—diminution in market value of property, economic loss claims, consideration of property taxes—because considering these economic factors is beyond TCEQ's purview and the ED's staff lacks the expertise to evaluate this information.

Even if these additional types of costs are considered, the City takes issue with AIRW's calculation of loss due to property taxes and the appraisal estimating a diminution in land value due to annexation. Regarding property taxes, the City argues that AIRW will not incur any loss due to property taxes because different companies that own the property (not AIRW) will incur those costs.[118] The City also argues that AIRW's appraisal estimating economic loss is not credible because AIRW's witnesses were not qualified in appraisals, and the appraisal report did not

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[116] City Br. at 43-44.

[117] City Ex. 41; City Br. at 44-45.

[118] City Br. at 48.

provide a true comparison showing diminution in value because it only assessed the value of the property inside and outside the City—failing to consider the differing uses to which the property will be put if subject to or excluded from the City's development code. On this point, AIRW's appraisal compares the hypothetical as-is market value of the project assuming that the project (1) remains in an unincorporated area of Williamson County or (2) is annexed by the City.[119] The appraisal concludes that the property is $20 million more valuable when remaining in an unincorporated area.[120] The cause of this $20 million valuation difference is real estate taxes adjusted to a higher tax rate inside the City, even with water/sewer expenses adjusted downward inside the City because the property would receive those services through the City rather than using an on-site water treatment plant.[121]

The City argues that easements are not an issue; even if easements were an issue, AIRW has made no effort to acquire them; and delay is not due to easements. City witness Mr. Woelke testified that he evaluated whether an easement would be needed for the force main AIRW would have to construct to connect to the City's system and determined that it could be placed in the right-of-way, eliminating easement acquisition costs.[122] Thus, the City argues, no force main easements are needed from landowners.[123] The City further argues that, even if easements from landowners were needed, AIRW made no attempts to contact landowners to secure

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[119] AIRW Ex. 23 at 2.

[120] AIRW Ex. 23 at 2.

[121] AIRW Ex. 23 at 48.

[122] City Ex. 3 at 28 (Woelke Dir.).

[123] City Br. at 24-25.

the easements.[124] AIRW's failure to try to secure easements distinguishes this case from *Regal*, where the parties tried but failed to obtain needed easements, the City asserts.[125] The City also argues that delay due to securing third-party easements is a non-factor because the time to connect to the City's wastewater system is less than the time AIRW has already taken to pursue the application.[126]

The City states that 16 Texas Administrative Code section 24.225(c) does not prevent it from providing wastewater service to AIRW's proposed service area.[127] Rule 24.225(c) states that "a retail public utility may not provide retail water or sewer utility service within the boundaries of a district that provides the same type of retail water or sewer service without the district's consent, unless the retail public utility has a CCN to provide retail water or sewer utility service to that area."[128] The City points out that "only a portion of Jonah's jurisdictional boundaries overlap with the proposed service area."[129] And, although Jonah has approximately 9,000 wastewater customers, Jonah does not own or operate any of its own wastewater treatment facilities but rather has wholesale wastewater agreements for treatment: the wastewater treatment is provided through others.[130] Therefore, the City does not need Jonah's consent.[131]

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[124] Hearing Tr. at 463.

[125] City Br. at 25.

[126] City Br. at 24.

[127] City Br. at 17.

[128] 16 Tex. Admin. Code § 24.225(c).

[129] AIRW Ex. 24 at 30 (Tuckfield Dir.); Jonah Ex. 6 at 5 (Whitney Dir.); Hearing Tr. at 255-56.

[130] Hearing Tr. at 253-56.

[131] City Reply Br. at 21.

Finally, the City argues that making Jonah the plant owner and operator does not further regionalization because Jonah does not already provide wastewater services. The City relies on TCEQ's website, which provides that "regionalization is the administrative or physical combination of two or more community wastewater systems for improved planning, operation, or management."[132] Because Jonah does not own or operate any wastewater treatment facilities,[133] using Jonah does not further regionalization. Additionally, only one Jonah employee has a current wastewater treatment plan operator license from TCEQ.[134] And Jonah's wastewater treatment experience is very limited: it substituted as an operator when a nearby city was between operators for a few months, and it assisted Mauriceville with their plant for a few days in an emergency after Hurricane Harvey.[135] In short, neither Jonah nor AIRW is in the wastewater treatment business, and neither of their operations would further regionalization. Jonah is only "stepping into the shoes of single purpose entity that proposed to operate a package plant serving only a discrete apartment community."[136]

6. The ED's Position

The ED argues that the Draft Permit complies with the state's regionalization policy and demonstration of need in section 26.0282 of the Water Code.

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[132] City Ex. 15 at 1.

[133] Hearing Tr. 254-55.

[134] City Ex. 19.

[135] Hearing Tr. at 253-54.

[136] City Br. at 24.

The ED argues that AIRW requested service from nearby wastewater facilities and that AIRW's requests for service were denied. ED witness Mr. Cooper testified that AIRW provided communications with two nearby providers showing that it was unable to reach an agreement for service.[137] In particular, Mr. Cooper focused on an email from the City stating that annexation would be required if AIRW desired to connect to the City's wastewater system.[138] He explained that, although TCEQ can encourage and promote regional and area-wide wastewater systems, it cannot compel an applicant to connect with nearby facilities.[139] Rather, TCEQ looks for whether communication and negotiations took place, and here AIRW and the City were unable to reach an agreement because the City placed a condition on supplying service—annexation.[140] He opined that in this case the City's conditional requirement that AIRW accept annexation in order to receive service was a denial of service.[141] Moreover, the ED argues, although the City now asserts that it may have been willing to waive the annexation requirement,[142] the written communications show that the City was unwilling to consider a delayed annexation and that it would not provide service without annexation.[143]

The ED argues that AIRW was not required to submit a certified letter documenting its communications with nearby wastewater providers. City witness

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[137] ED Ex. GC-1 at 9.

[138] Hearing Tr. at 641.

[139] ED Ex. GC-1 at 7.

[140] ED Ex. GC-1 at 7-8.

[141] Hearing Tr. at 637-42.

[142] City Br. at 28.

[143] AIRW Ex. 4 at 77.

Mr. Rubenstein testified that the permit application requires an applicant to attach certified letters sent to nearby wastewater providers and the providers' responses, if any, and AIRW failed to attach such letters to the Application.[144] But ED witness Mr. Cooper responded that a certified letter is not required: lacking one is not "a fatal flaw."[145] He opined that AIRW was required to provide communications with nearby facilities about connections; AIRW did so, and the communications showed that AIRW would not be allowed to connect to the City's wastewater facilities without agreeing to annexation.[146] Moreover, the email communications were documented and provided similar "tracking and traceability" as a certified letter.[147] AIRW's communications were thus satisfactory, he opined.[148]

Finally, the ED asserts that AIRW provided satisfactory cost information to justify issuing the permit. Mr. Cooper opined that AIRW provided financial information about the costs to link to the City's wastewater facility, and the information AIRW provided satisfied the requirement to provide an analysis of expenditures for connecting to an adjacent collection system.[149] Applicants like AIRW are not required to accept a nearby facility's terms if the terms outweigh the costs of a new facility, he opined.[150]

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[144] City Ex. 2 at 54-55.

[145] ED Ex. GC-1 at 7.

[146] ED Ex. GC-1 at 7.

[147] ED Ex. GC-1 at 8.

[148] ED Ex. GC-1 at 8.

[149] ED Ex. GC-1 at 8.

[150] ED Ex. GC-1 at 8.

7. OPIC's Position

OPIC acknowledges that "*Regal* provides some support for the proposition that requiring annexation does not always amount to a denial of service."[151] But OPIC points out that, although the annexation requirement can be waived by the city council, here there was no evidence that the City was willing to do so. Rather, the evidence shows the City was not receptive to issuing a waiver because it was unwilling to consider delayed annexation and because it insisted that service could not be provided without annexation.[152]

OPIC agrees with Jonah and AIRW that the City's lack of wastewater CCN in the area and failure to secure Jonah's consent to provide wastewater services is a legal impediment to the City providing wastewater services.[153] OPIC notes that most of the Facility and its associated development are within Jonah's district boundaries, and the City does not have Jonah's consent to provide wastewater services within its boundaries.[154]

OPIC agrees that, if easements are required to connect to the City's system, which AIRW witnesses testified they are, then TCEQ's regionalization policy should not compel connecting with the City and denying the application.[155] OPIC notes that, in *Regal*, the Commission concluded that the applicant had complied

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[151] OPIC Br. at 8.

[152] Hearing Tr. at 521; AIRW Ex. 4 at Bates 00077.

[153] OPIC Br. 8.

[154] AIRW Ex. 24 at 31 (Tuckfield Dir.).

[155] OPIC Br. 8-9.

with the regionalization policy because it was unable to obtain a necessary easement.[156]

Finally, OPIC argues that AIRW's cost analysis was adequate and the higher cost of connecting to the City's system favors granting AIRW's application.[157] OPIC notes that TCEQ's guidance provides that costs can be considered, and here cost estimates reflect that annexation would reduce the value of AIRW's development by approximately $20 million.[158]

8. ALJs' Analysis

The ALJs agree with AIRW, Jonah, the ED, and OPIC that AIRW met the requirements regarding regionalization and that the ED's review of the Application was sufficient. The ALJs conclude that costs and Jonah's involvement as the wastewater provider support granting the Application.

a) The City Made a Conditional Offer for Service

Section 26.003 of the Texas Water Code provides it is the policy of this state to "encourage and promote" the development and use of regional and areawide wastewater systems, and "to require the use of all reasonable methods" to

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[156] OPIC Br. at 9.

[157] OPIC Br. 9.

[158] AIRW Ex. 24 at Bates 292.

implement this policy.[159] TCEQ has significant discretion under this statute, particularly in determining the "reasonable methods" to use to further regionalization.

The ALJs agree with the ED 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 nearby utilities. The ALJs also agree with the ED that AIRW's written communications with nearby providers were sufficient, and AIRW was not required to submit certified letters because the emails provided similar tracking and traceability. Here, communications show that AIRW explored securing wastewater services from the City and the City placed conditions on providing service—the property would have to be annexed into the City and comply with the City's land use restrictions. And although the City's ordinance requiring annexation for wastewater services may be waived by the city council, here a preponderance of the evidence gave no indication that the City was willing to waive the annexation requirement. The City would not consider delayed annexation, insisted that service could not be provided without annexation, and had time but failed to reach an agreement waiving annexation. Moreover, the City's argument that AIRW was required to apply for wastewater services, thereby voluntarily agreeing to annexation, and then hope that later the City would waive the annexation and land use requirements is unconvincing. That possibility is not something a reasonable person would rely upon: it's more illusory than reality. Thus, in the end, AIRW received a conditional offer for services from

[159] Tex. Water Code § 26.003.

the City. Or, put another way, the City denied AIRW's request for services unless AIRW agreed to annexation and land use restrictions.

The ALJs conclude that conditional offers for service defy easy categorization—whether the provider "denied" a request for service or not. As a result, different conclusions have prevailed depending on the facts. Relatedly, because conditional offers for service vary with the circumstances, the ALJs agree with the ED's approach in this case to request cost information from AIRW and, ultimately, with OPIC's conclusion: this was a conditional offer for service, so costs and other relevant factors should be considered.

b) Costs Support Granting the Application

The ALJs agree with AIRW, the ED, and OPIC that costs support granting the Application.

The ED requested from AIRW "a cost analysis of expenditures that includes the cost of connecting to the CCN facilities versus the cost of the proposed facility or expansion." The evidence shows that constructing a new plant will cost more than connecting to the City's system. Mr. Perkins estimated that constructing a new plant will cost approximately $300,000 more than connecting, and Mr. Woelke likewise testified that constructing a new plant is more costly. But the cost estimates did not stop there.

Although the City argues that only the construction costs of building versus connecting should be considered, the governing law is not so limited; it gives TCEQ discretion, and TCEQ's guidance provides that an applicant can satisfy regionalization concerns "based on costs, affordable rates, or other relevant factors."[160] Here, Ms. Sims estimated that the costs of annexation reduced the value of the proposed development project "by over $20 million" based on (1) lost value of the property when sold, (2) payment of additional City taxes and fees, and (3) costs to comply with the City's zoning requirements. But AIRW failed to prove its costs to comply with the City's zoning requirement (e.g., it provided no estimate of redesign costs, projected value of a redesigned development consistent with the City's land use restrictions, or costs of construction to comply with land use restrictions, such as alleys, curbs, or storm drains). Nor did AIRW prove lost value of the property when sold beyond taxes. Rather, AIRW's estimate of a $20 million diminution in property value was attributable solely to a higher property tax rate inside the City than outside it in the unincorporated area. Although the City argues that AIRW's cost information fails to provide a true comparison due to lack of an accompanying estimated value of a hypothetical different development built in conformance with the City's land use requirements, that argument fails because a preponderance of the evidence failed to show that the value of a different property built in conformance with the City's land use regulations would in fact exceed that of AIRW's proposed development. Indeed, the City's own expert would not commit to what precisely could be built on the property under the City's land use regulations, let alone its value. As a result, a preponderance of the evidence shows that although constructing a new facility costs slightly more than

[160] TCEQ webpage; AIRW Ex. 28.

connecting, the cost of connecting carries with it an approximately $20 million cost to AIRW—highly burdensome and disproportionate to the cost of constructing a new facility from AIRW's perspective. Costs weigh in favor of granting AIRW's application.

c) Easements Are Not An Impediment Here

The ALJs conclude that the evidence fails to show that easements and the delay inherent to acquiring them are an impediment to connecting to the City's system. Mr. Perkins testified that connecting to the City's system would require seven different easements. But Mr. Woelke testified in response that he evaluated whether an easement would be needed for the force main AIRW would have to construct to connect to the City's system, and he determined that it could be placed in the City's right-of-way, eliminating easement acquisition costs. Additionally, even if easements were needed, the ALJs agree with the City that the evidence fails to show that AIRW tried and failed to secure them. Unlike in *Regal* where a party tried and failed to obtain a necessary easement, the evidence here failed to show easements present an impediment to connection.[161]

d) Using Jonah Supports Regionalization

The ALJs agree with AIRW and Jonah that making Jonah the plant owner and operator furthers regionalization. Jonah provides water service to

[161] *Cf. Regal* at *7 (FOFs 50-51: "The landowners of the JK Ranch Property have refused to grant an easement. Despite attempts by both Regal and the City, the City's system is unavailable for a connection with Regal.").

approximately 9,000 customers and 30,000 people, has a professional staff, and expects to provide wastewater to more nearby developments in a growing area. The circumstances here are similar to those in *Crystal Clear*, where regionalization was furthered when a large service provider in the region that holds a water CCN for the area provided services to the development.[162]

C. Whether The Draft Permit is Protective of the Health of the Nearby Residents

One of the purposes of the TSWQS is to "maintain the quality of water in the state consistent with public health and enjoyment."[163] This purpose has been implemented in both the narrative and numerical requirements of the TSWQS. As part of the narrative requirements, water in the state must not be toxic to humans from ingesting the water or aquatic organisms, contacting the skin, or recreating in the water.[164] In addition, surface waters must not be toxic to terrestrial life, including livestock and domestic animals, due to contacting the water or ingesting the water or aquatic organisms.[165] The Draft Permit authorizes the Facility to treat and discharge wastes only according to effluent limitation, monitoring requirements, and other conditions set forth in the permit, State laws, and TCEQ's rules and regulations.[166] Therefore, insofar as the Draft Permit complies with the

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[162] *Crystal Clear* at *7 (FOF 50: "The provision of sewer service from Crystal Clear to the Subdivision furthers the State's policy of encouraging regionalization because Crystal Clear is a large service provider in the region and because Crystal Clear holds the water CCN for the area where the Subdivision is located.").

[163] 30 Tex. Admin. Code § 307.1; *accord* Tex. Water Code § 26.003.

[164] 30 Tex. Admin. Code §§ 307.4(b)(7), (d); .6(b)(3).

[165] 30 Tex. Admin. Code §§ 307.4(b)(7), (d); .6(b)(4).

[166] AIRW Ex. 3.

TSWQS, the TCEQ review concluded, it is protective of the health of nearby residents.[167]

The ED's, AIRW's, and City's arguments for Issue C overlap with their arguments for Issue A. According to ED witness Ms. Lueg, the Draft Permit is protective of the heath of nearby residents because it was developed to protect aquatic life and human health in accordance with the TSWQS. The Draft Permit terms ensure that no source will be allowed to discharge any wastewater that: (1) results in stream aquatic toxicity; (2) causes a violation of an applicable narrative or numerical state water quality standard; (3) results in the endangerment of a drinking water supply; or (4) results in aquatic bioaccumulation that threatens human health. If the Facility is operated in accordance with the approved terms, it will not negatively impact health of nearby residents.[168]

The City argues that because of a lack of sufficient information submitted by AIRW regarding the nature of the receiving stream and the uses thereof and deficiencies in TCEQ's review of the Application, there is no assurance that the Draft Permit is protective of recreational users, generally. The City argues that the discharge of treated effluent to the unnamed tributary that courses through the Patterson Ranch residential development would create potential exposure to pathogens, like *E. coli*, for nearby residents.[169] The City also asserts that the monitoring frequency for *E. coli* and nutrient levels that stimulate excessive algal

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[167] ED. Ex. JL-1 at Bates 0011 (Lueg Dir.).

[168] ED. Ex. JL-1 at Bates 0011 (Lueg Dir.).

[169] According to the City, appropriately treated domestic wastewater effluent may also contain enteric viruses, protozoa, etc.; however, the EPA has not developed criteria or guidance regarding such pathogens.

growth[170] is not frequent enough to promptly detect and eliminate discharges that violate those limits.[171] City witness Mr. Woelke testified that the monthly grab sampling requirement for *E. coli* is not adequate because a grab sample only reflects performance at the single, short point in time when the sample was collected and if the collection was proper; and the results can change depending on the time of day or whether the plant is operating near its average daily flow rate. Mr. Woelke believed that composite sampling is appropriate for *E. coli*.[172]

The ED and AIRW argue that the City did not present any evidence to support its contention that the proposed discharge would not be protective of health of nearby residents.[173] At the hearing, ED witness Ms. Lueg testified that the Draft Permit will maintain and protect human health, even given a hypothetical relating to viral pathogens causing illnesses. As mentioned above, Ms. Sims, Mr. Price, and Ms. Lueg testified that the *E. coli* limit and 1.0 mg/L chlorine residual (with 20 minutes of detention time) have long been established to be sufficient disinfection criteria for the protection of human health for primary contact recreational uses.[174] Ms. Lueg testified that the established 0.5 mg/L daily

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[170] To address his concern about nutrient levels, Mr. Woelke testified that the Draft Permit should require a Total Dissolved Solids (TDS) study from AIRW. City Ex. 3 at Bates 0000117 (Woelke Dir.). However, at the hearing, Mr. Woelke stated that TDS has nothing to do with nutrients and his concern was with water softeners that might be used in the development. Hearing Tr. at 219-220. Ms. Lueg testified that TDS is not required for the Application because TDS requirements do not apply to facilities with the permitted flow of 0.2 MGD.

[171] City Br. at 56-58; City Reply Br. at 30-33.

[172] City Ex. 3 at Bates 0000113-0000114 (Woelke Dir.).

[173] *See* ED Br. at 5; ED Reply Br. at 2-3; AIRW Br. at 15-16; AIRW Reply Br. at 16-17.

[174] AIRW Ex. 8 at Bates 000025 (Sims Dir.); AIRW Ex. 14 at Bates 000050, 000052 (Price Dir.); Hearing Tr. at 433, 703.

[174] Hearing Tr. at 680, 701.

average limit for TP[175] will prevent excessive growth of algae and other aquatic vegetation.[176] Furthermore, ED witness Mr. Cooper did not believe that composite sampling is more protective of water quality, because it does not provide a short-term, immediate reading but gives several samples over a period of time.[177] He stated that facilities with a 0.2 MGD flow should conduct sampling as required by Table 1 in 30 Texas Administrative Code section 319.9(a).[178] According to AIRW witness Mr. Price, absent any special circumstances applying to the Facility, there is no reason to require an unusual sampling method.[179] He stated that, because the chlorine residual in the effluent is to be maintained between 1.0 and 4.0 mg/L and be sampled and reported five times per week, the effluent will be free of significant numbers of pathogens and more frequent sampling for *E. coli* is unnecessary.[180]

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[175] Phosphorus is a nutrient that, in excess, can contribute to the undesirable growth of aquatic vegetation and impact uses. 30 Tex. Admin. Code § 307.3(a)(44).

[176] ED Ex. JL-1 at Bates 0006, 0008 (Lueg Dir.).

[177] Hearing Tr. at 654-655.

[178] Hearing Tr. at 670. Mr. Cooper explained that testing frequencies for pollutants limited in the permit are standardized based on rules located in 30 Texas Administrative Code section 319.9(a) and on the design capacity of the treatment facility. ED Ex. GC-1 at Bates 0010 (Cooper Dir.).

[179] AIRW Ex. 14 at Bates 000052 (Price Dir.).

[180] AIRW Ex. 14 at Bates 000052 (Price Dir.).

1. ALJs' Analysis

The ALJs previously found that the evidence demonstrates that the Draft Permit complies with the TSWQS and, as such, agree with AIRW and the ED that the Permit is protective of the health of nearby residents.

The City failed to rebut the prima facie determination because the City's arguments were conclusory and unverifiable due to a lack of underlying data to support its conclusions. Beyond a hypothetical about viral pathogens causing waterborne illnesses and a contact recreational risk, to which Ms. Lueg testified that her determinations would still be the same, the City did not provide any actual evidence to show that the Draft Permit would not be protective of the health of nearby residents.

With respect to the City's contention that the required *E. coli* sampling frequency is not adequate to protect the health of nearby residents, the ALJs are not persuaded that a variance from the standardized monitoring for the Facility is required. The ALJs find that the ED's and AIRW's evidence showed that the requirements for *E. coli* limitations and chlorine residual, as well as monitoring and sampling frequency, are sufficient to protect human health. The ALJs conclude that AIRW has met its burden regarding Issue C.

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

Under 30 Texas Administrative Code section 309.13(e), applicants have three options to abate and control nuisance odor prior to construction of a new wastewater treatment plant unit.[181] One option is ownership of a buffer zone: wastewater treatment plant units may not be located closer than 150 feet from the nearest property line, and the applicant must hold legal title or have other sufficient property interest to a contiguous tract of land necessary to meet the distance requirement.[182]

The Application shows its plan for a buffer zone. AIRW submitted a map showing that all wastewater treatment plant units will be located to maintain a 150-foot buffer zone between the unit and the nearest property line. [183] In addition, Mr. Perkins testified that there is "ample space" to accommodate all the major treatment units and maintain the 150-foot buffer zone,[184] and Mr. Cooper testified that based on his review the draft permit complies with the 150-foot buffer zone requirement and the requirements to abate and control nuisance odors.[185]

The City argues that the buffer zone runs next to CR 110, which will be abandoned and replaced with a new realigned CR to be built south of the proposed

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[181] 30 Tex. Admin. Code § 309.13(e).

[182] 30 Tex. Admin. Code § 309.13(e)(1).

[183] AIRW Ex. 4 at Bates 00070.

[184] AIRW Ex. 17 at 7.

[185] ED Ex. GC-1 at 13.

facility.[186] The City states that AIRW will be unable to comply with the buffer zone requirement as a result of this road realignment.[187] AIRW replies that there is no evidence that it was relying on the roads as part of the buffer zone. The ALJs agree with AIRW. The maps provided do not indicate reliance on the roads or any problem with the buffer zone.[188]

The City also argues that TCEQ failed to comply with section 26.030(b) of the Texas Water Code because it did not consider "any unpleasant qualities of the effluent, including unpleasant odor, and any possible adverse effects that the discharge of the effluent might have on the recreational value of the park, playground, or schoolyard."[189] TCEQ was required to do this, the City asserts, because the proposed discharge route goes through "green space" as well residential development.[190] AIRW replies that section 26.030(b) only applies if the discharge will go "into any body of water that crosses or abuts any park, playground, or schoolyard within one mile of the point of discharge,"[191] and here there are no parks, playgrounds, or schools on the Patterson Ranch property at issue.[192] And even if further development will lead to new amenities nearby in the future, the proposed permit requires renewal within five years, and the discharge route will be assessed then. The ALJs again agree with AIRW. A preponderance of the evidence failed to show that the discharge will go into any body of water that

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[186] Hearing Tr. at 452-53; AIRW Ex. 19 at Bates 000143.

[187] City Reply at 34.

[188] AIRW Ex. 4 at Bates 00070; AIRW Ex. 19 at Bates 000143.

[189] Tex. Water Code § 26.030(b).

[190] City Reply at 34.

[191] Tex. Water Code § 26.030(b).

[192] Hearing Tr. at 417-18.

crosses or abuts any park, playground, or schoolyard within one mile of the point of discharge. Therefore, section 26.030(b) does not apply.

E. Whether the Application is Substantially Complete and Accurate

ED witness Mr. Cooper testified that the Application is complete and accurate—it went through both an administrative and a technical review. During such reviews TCEQ determines whether the administrative and technical portions of the application are missing any information and requests more information if the application is confusing or incorrect. During the Application review, TCEQ sent AIRW a request for information, including a notice of deficiency dated May 12, 2020. After AIRW provided the requested information, the Application was declared administratively and technically complete and TCEQ composed the Draft Permit.[193]

The City argues that, because AIRW and Jonah entered into Non-Standard Service Agreements (NSSAs) whereby Jonah will own and operate the Facility and will assume overall responsibility of the Facility, Jonah must be listed as a co-applicant.[194] Moreover, because 600 Westinghouse owns the land on which the

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[193] ED Ex. GC-1 at Bates 0010-0012 (Cooper Dir.). Ms. Lueg also confirmed that the Application is complete and accurate. ED Ex. JL-1 at Bates 0012.

[194] If the facility is owned by one person and operated by another and the ED determines that special circumstances exist where the operator or the operator and the owner should both apply for a permit or a post-closure order, and for all TPDES permits, it is the duty of the operator and the owner to submit an application for a permit. 30 Tex. Admin. Code § 305.43(a). The Instructions provide that, for TPDES permits, whoever has overall responsibility for the operation of the facility must apply for the permit as a co-applicant with the facility owner. City Ex. 14 at Bates 0000215. The City stated that AIRW failed to update the name of the operator in the Application even after it included the NSSAs in its prefiled testimony.

12-inch effluent pipe that is part of the proposed package plant would be located,[195] and because AIRW did not include a copy of an executed easement for the land, 600 Westinghouse must be listed as a co-applicant.[196] The City contends that because Jonah and 600 Westinghouse were not included in the Application, TCEQ and the public were deprived of important information necessary to process and comment on the Application and TCEQ did not perform a compliance report on these entities.[197]

The City also argues that AIRW failed to provide required information addressing the permit need—there was no detailed discussion of the need for the Facility.[198] Mr. Rubinstein and Mr. Woelke testified that, because the Application does not list the population estimates, occupancy schedule, projections used to derive the flow estimates, anticipated growth rates for development, and supporting sources for the minimal information provided, the Application is incomplete and inconsistent with the Instructions.[199]

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[195] *See* City Ex. 37 at 1-3 and 5-37; City Ex. 8 at Bates 0000139; City Ex. 34; AIRW Ex. 43. The City states that AIRW misrepresented the extent of its property ownership on the Application. *See, e.g.* AIRW Ex. 4 at Bates 00063-00064.

[196] The Instructions provide that, if the facility is considered a fixture of the land, the owner of the land can apply for the permit as a co-applicant, or a copy of an executed deed recorded easement must be provided. City Ex. 14 at Bates 0000215.

[197] *See* City Br. at 61-66; City Reply Br. at 36-37.

[198] AIRW Ex. 4 at Bates 00044. The following is provided for the justification of permit need: "Central Texas is a fast-growing area. The construction of 880 residential housing units in the proposed service is planned to be completed in the next two years. The proposed [Facility] will provide services to the residential population that is expected to average 2.5 persons per unit. The [Facility] will be designed to support Type I reuse for irrigation throughout the development, minimizing potable water consumption." AIRW Ex. 4 at Bates 00044.

[199] City Ex. 2 at Bates 000053-000054 (Rubinstein Dir.); City Ex. 3 at Bates 000080-000081 (Woelke Dir.). The Instructions require applicants to provide information such as the size of the development (number of lots), the date of construction, the anticipated growth rate of population estimates and projections used to derive the flow estimates, and population projections at the end of the design life of the facility (usually 50+ years), and to include the sources and basis upon which population figures were derived. City Ex. 14 at Bates 0000232.

Moreover, according to the City, AIRW failed to provide required information addressing regionalization. Parties' arguments for the regionalization section in the Application overlap with their arguments for Issue B.[200] City witnesses Mr. Rubinstein and Mr. Woelke testified that AIRW did not include a list and a map of the facilities within a three-mile radius of the Facility as well as the actual permittee's name and permit number of those nearby facilities, making the Application inaccurate and incomplete.[201] The Application stated that there were no facilities within a three-mile radius that have capacity or are willing to accept the proposed wastewater.[202]

Mr. Woelke also testified that the buffer zone map[203] in the Application did not show all treatment units, like blower/electrical building, influent lift station, Return Activated Sludge pump system or headwork; the proper 150-foot distance between the treatment unit and the property line; and the distance to the property line from each treatment unit. However, at the hearing, Mr. Woelke admitted that there is no requirement to show the blower building or electrical building on the buffer zone map and that there is sufficient space between the treatment units and the nearest property line.[204]

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[200] Parties' specific arguments concerning the City's denial of services and need for certified letters were already addressed by the ALJs in Issue B.

[201] City Ex. 2 at Bates 000049-000052 (Rubinstein Dir.); City Ex. 3 at Bates 000085 (Woelke Dir.). The map submitted as Attachment H to the Application identifies the location of the proposed service area, the boundaries of the City of Round Rock's Sewer CCN, and a statement that the proposed service area is outside of the city limits. AIRW Ex. 4 at Bates 00076.

[202] AIRW Ex. 4 at Bates 00045. Mr. Perkins testified that, after reviewing the City's prefiled testimony, exhibits, and discovery, it appears that the City has sufficient capacity to serve the proposed development but the connection to the City's system is cost prohibitive. AIRW Ex. 17 at Bates 000135-000136 (Perkins Dir.).

[203] City Ex. 3 at Bates 000089 (Woelke Dir.). AIRW Exhibit 3 at Bates 00070 contains the buffer zone map.

[204] Hearing Tr. at 205; 208-209.

The City argues that only one of the 45 current individual owners of lots in the Fairview Subdivision, located across CR 110 and within less than 100 feet from the Facility, received mailed notice of the Application. According to the City, after reviewing the Williamson County Appraisal District (WCAD) records, it appears that several landowners were not on the mailing list, making the Application and notice defective.[205] The City added that the discharge route includes both a pipe and a culvert under the City's right-of-way for CR 110 but the Application stated that the treated wastewater will not discharge to a city right-of-way.[206] Finally, Mr. Woelke stated that the Application is not accurate with regard to whether the Facility will be above the 100-year floodplain level, as there have been not sufficient studies to make that determination.[207]

The ED, AIRW, OPIC, and Jonah maintain their position that the Application is substantially complete and accurate.[208] AIRW argues that the difference in ownership of the Facility and the development is a non-issue. Jonah witness Mr. Brown and ED witness Mr. Cooper testified that it is typical for the ownership of a residential development to change, sometimes before the permit is

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[205] City Ex. 3 at Bates 000089-000091 (Woelke Dir.). AIRW Exhibit 3 at Bates 00063 contains the affected landowner list and maps.

[206] Mr. Woelke also noted that the topographic map in the Application does not show that the part of the proposed discharge route between CR 110 and the first impoundment is a watercourse and that the Application mentions no easements for that area. Ex. 3 at Bates 000091-000092 (Woelke Dir.)

[207] City Ex. 3 at Bates 000092-000093 (Woelke Dir.). At the hearing, Mr. Woelke testified that, while the floodplain map in the Application does not show a floodplain, that does not mean there is no floodplain there. It just means that the limits of the floodplain study were not taken as far upstream as the AIRW's property. He said he believes that a further study is needed, as good engineering practice, but admitted that it is not required by TCEQ rules. Hearing Tr. at 189-191; 210.

[208] *See* ED Br. at 6; ED Reply Br. at 3-4; OPIC Br. at 11-13; Jonah Reply Br. at 5-6; AIRW Br. at 19-25; AIRW Reply Br. at 19-22.

issued or afterwards.[209] It is also typical for a residential developer to hire a professional utility operations company.[210] AIRW explains that 600 Westinghouse, an affiliated or "sister" company of AIRW, originally purchased 129.37 acres and the 21.29-acre site for the Facility was conveyed to AIRW.[211] Mr. Cooper testified that he understood all three entities were related and that Matthew Hiles was the common denominator.[212] Mr. Brown also agreed that it was "the same developer, same owner . . . It's just the names have changed."[213]

Jonah and AIRW argue that 30 Texas Administrative Code section 305.43 does not apply to the Facility because it is not, has not been, and will not be owned by one person and operated by other—Jonah will become the owner and operator after the permit is issued and transferred to Jonah[214]—and because the ED determined that no special circumstances exist where the operator or the operator and the owner should both apply for a permit or a post-closure order.[215] OPIC argues that the Draft Permit contains a condition requiring TCEQ approval for any permit transfer and the transfer to be in accordance with 30 Texas Administrative Code sections 50.133 (relating to ED Action on Application or WQMP update) and 305.64 (relating to Transfer of Permits).[216] OPIC opined that the Draft Permit

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[209] Hearing Tr. at 299, 674-675.

[210] Hearing Tr. at 672; AIRW Ex. 8 at 000009.

[211] City Ex. 37. AIRW further explained that Matthew Hiles serves as vice president of all three affiliated entities, AIRW, 600 Westinghouse, and 800 Westinghouse, and Mr. Hiles executed the signature page on the Application and the NSSAs.

[212] Hearing Tr. at 639-640.

[213] Hearing Tr. at 299.

[214] *See* AIRW Ex. 43.

[215] Jonah Reply Br. at 5-6; AIRW Br. at 24

[216] AIRW Ex. 3 at Bates 0012.

adequately addresses any concerns regarding future transfer of permit ownership.[217]

AIRW argues that it is not a fatal flaw if every element of every application is not rigidly followed. The Instructions include over 550 questions and 124 pages of instructions.[218] It is a one-size-fit-all document that contains numerous questions that do not pertain to the Facility.[219] According to AIRW, the City is playing a "game of gotcha" and ignores TCEQ discretion to review the application, interpret the instructions, declare completion, or request additional information as needed.[220] Ms. Sims testified that the need for the Facility exists, as the future development of 880 housing units with 2 to 3 persons per unit will require wastewater services. AIRW argues that population estimates and expected growth projections are not applicable to the Facility because the construction is planned to be completed in two years.[221] Mr. Cooper testified that AIRW provided an anticipated start and completion date for construction of the Facility and the proposed number of residential units. The project is planned to be completed in one phase. AIRW informed TCEQ that there will be 880 units constructed in two years, satisfying the anticipated growth rate for the development.[222]

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[217] OPIC Br. at 11.

[218] AIRW Ex. 8 at Bates 000018 (Sims Dir.).

[219] Hearing Tr. at 671.

[220] AIRW Br. at 20. The City further argued that allowing an applicant to substitute its own judgment about what information is required to be submitted by the application form, and to ignore the instructions for the application form, diminishes the integrity of the Commission's permitting process and results in both a lack of confidence in the agency and significant mistrust in its ability to protect water quality in the State. City Reply Br. at 35.

[221] AIRW Ex. 8 at Bates 000016-000017 (Sims Dir.).

[222] ED Ex. GC-1 at Bates 0008-0009 (Cooper Dir.).

Ms. Sims testified that the Facility is above the 100-year floodplain, which was confirmed by the Federal Emergency Management Agency (FEMA) National Flood Hazard Layer interactive mapping tool.[223] Mr. Cooper confirmed that the FEMA map used in the Application was an acceptable and verifiable way to identify the 100-year floodplain, with which he had no concerns.[224]

AIRW and OPIC argue that the City has no standing to raise a third-party notice complaint on nearby landowners' behalves and that the City itself has proper notice. OPIC noted that no landowners attempted to seek party status at the preliminary hearing, except for Mr. Webb and that, as a general rule, a party does not have standing to complain about lack of notice to another party.[225] According to OPIC, because of the absence of any landowner attempt to intervene and the fact that the City has not complained that it directly suffered any harm by lack of notice, the alleged notice deficiency does not rise to the level of rendering the Application substantially incomplete or inaccurate.[226] Ms. Sims testified that, consistent with her past practice, she conducted a search of the WCAD records a few weeks prior to submittal of the application to TCEQ and included the only landowner she found.[227]

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[223] Ms. Sims stated that FEMA is the standard source for determining if an area is within a flood hazard area. No flood hazard was identified by FEMA in the area of the proposed project. AIRW Ex. 8 at Bates 000021 (Sims Dir.). An email provided in the City's discovery documents shows that the same FEMA map was used by the Williamson County Engineering Division and accepted by the City Planning Department in January 2020. AIRW Ex. 13.

[224] Hearing Tr. at 662-663.

[225] *See Tex. Comm'n on Envtl. Quality v. Denbury Onshore, LLC*, No. 03-11-00891-CV, 2014 WL 3055912, at *10 (Tex. App.—Austin 2014, no pet.).

[226] OPIC Br. at 12.

[227] AIRW Ex. 8 at Bates 000021 (Sims Dir.). Ms. Sims also noted that deeds were not being recorded promptly in the WCAD records because that was the beginning of the COVID-19 pandemic.

AIRW argues that before and after the realignment of CR 110, treated effluent will be discharged on its own property. The effluent will flow through a drainage easement conveyed to Williamson County through a ditch,[228] through a culvert and north onto the Patterson Ranch property, through a pond, downstream to Mankins Branch, and so on. According to AIRW, the City provided no evidence that the discharge is within the City's right-of-way for CR 110 and, on the contrary, Ms. Sims provided multiple independent sources to prove that the discharge will be into an intermittent stream—a water in the state.[229] According to AIRW, the USGS map in the Application and the 1951 USGC topographical map clearly show the direction of the flow.[230] AIRW also stated that the Williamson County Drainage Easement provided authorization if the wastewater discharge would be to a city, county, state highway right-of-way, or flood control district drainage ditch.[231]

Ms. Sims stated that the purpose of the buffer zone map is to show how an applicant will comply with the requirements related to the abatement of nuisance odors. She testified that the submitted map is correct as it shows that there is a buffer zone of more than 150 feet between the property boundary and the proposed treatment units and, since buildings and blowers are not considered treatment units and are not sources of odor, they do not need to be indicated on the map.[232]

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[228] City Ex. 34.

[229] Hearing Tr. at 418-420. Ms. Sims testified that there was a dry creek that runs all the way across Mr. Patterson's land. She stated that AIRW Exhibit 11 depicts the existence and trajectory of the intermittent stream as of December 2002.

[230] AIRW Ex. 4 at 0061; City Ex. 32; Hearing Tr. at 386, 402, 421. Ms. Sims personally confirmed this information during her visits to the area. Hearing Tr. at 402. Mr. Patterson also makes several references to the "dry weather creek" on his property. AIRW Ex. 51.

[231] City Ex. 34; AIRW Br. at 22.

[232] AIRW Ex. 8 at Bates 000020 (Sims Dir.).

Moreover, 600 Westinghouse owns the property on the other side of the solid property line.[233]

1. ALJs' Analysis

The issue before the ALJs is whether the Application is substantially complete and accurate. No evidence was offered to demonstrate what "substantially" means; therefore, the ALJs relied on the definition that applies to the common usage of "substantial," which is in this context means considerable in extent, amount, or value; large in volume or number.[234] Based on this common usage and understanding of "substantial," the ALJs conclude that the preponderance of the credible evidence proves that the Application is substantially complete and accurate.

The ALJs already denied, at the hearing, the City's motion to dismiss this action and remand the Application back to TCEQ so Jonah can be added as a co-applicant. No parties disputed that 600 Westinghouse is an affiliate of AIRW and that the entities are under common control. The ALJs find that AIRW complied with its duty under 30 Texas Administrative Code section 305.43 to submit an application, and that the NSSAs contain sufficient provisions to ensure

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[233] City Ex. 34.

[234] Words and phrases in Texas law "shall be read in context and construed according to the rules of grammar and common usage." Tex. Gov't Code § 311.011. The most recent version of Black's Law Dictionary defines substantial as "1. Of, relating to, or involving substance; material. 2. Real and not imaginary; having actual, not fictitious, existence. 3. Important, essential, and material; of real worth and importance. 4. Strong, solid, and firm; large and strongly constructed. 5. At least moderately wealthy; possessed of sufficient financial means. 6. Considerable in extent, amount, or value; large in volume or number. 7. Having permanence or near-permanence; long-lasting. 8. Containing the essence of a thing; conveying the right idea even if not the exact details. 9. Nourishing; affording sufficient nutriment." *Substantial*, Black's Law Dictionary (11th ed. 2019).

that, if the permit is issued, it will be transferred to Jonah only upon TCEQ approval and in accordance with applicable TCEQ rules.

Further, the ALJs find that the credible evidence shows AIRW provided substantially sufficient information, as required by applicable portions of the Instructions, and shows the need for the permit and compliance with regionalization requirements.

The ALJs agree with AIRW and OPIC that the City lacks standing to challenge other people's possible lack of notice.[235] The City presented no evidence that someone entitled to receive notice did not receive it and the City has not challenged its own notice; therefore, the ALJs conclude that the City has not rebutted the prima facie demonstration on notice.

The ALJs find that the preponderance of the evidence showed that the Application contains substantially accurate information concerning the buffer zone map, the floodplain, and the discharge route. The City has not identified any special site characteristic that warrants an independent floodplain study and the evidence showed that the floodplain in the Application was indicated by using a verifiable and accurate method. Mr. Woelke admitted that the treatment units and the space between them and the nearest property line was indicated correctly in the Application. The City did not meet its burden to prove that the City's right-of-way for CR 110 is on the treated effluent discharge route. Therefore, the ALJs conclude that AIRW has met its burden regarding Issue E.

[235] *McDaniel v. Tex. Nat. Res. Conservation Comm'n*, 982 S.W.2d 650, 654 (Tex. App.—Austin 1998, pet. denied).

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

The Commission's antidegradation rule at 30 Texas Administrative Code section 307.5 establishes a multi-tiered policy to ensure that existing water quality uses, including aquatic life uses, will be maintained and not impaired by increases in waste loading. The purpose of an antidegradation review is to ensure that the existing water quality uses will be maintained in accordance with 30 Texas Administrative Code section 307.5 and the IPs.[236] The first two tiers apply to the Application.

The first tier (Tier 1) requires that existing instream water uses and water quality sufficient to protect the existing uses be maintained.[237] A Tier 1 review applies to waterbodies that have limited or minimal aquatic life uses.[238] The second tier (Tier 2) requires that authorized discharges cannot cause degradation of waters that exceed fishable and swimmable quality, unless it can be shown that the lowering of water quality is necessary for important economic and social development.[239] Tier 2 review is required for waterbodies that have an intermediate, high, or exceptional aquatic life use.[240]

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[236] ED Ex. JL-1 at Bates 0006 (Lueg Dir.).

[237] 30 Tex. Admin. Code § 307.5(b)(1); ED Ex. JL-3 at Bates 0071.

[238] ED Ex. JL-1 at Bates 0006 (Lueg Dir.).

[239] 30 Tex. Admin. Code § 307.5(b)(2); ED Ex. JL-3 at Bates 0071. Degradation is defined as a lowering of water quality by more than a de minimis extent, but not to the extent that an existing use is impaired. Fishable/swimmable waters are defined as waters that have quality sufficient to support propagation of indigenous fish, shellfish, terrestrial life, and recreation in and on the water.

[240] ED Ex. JL-1 at Bates 0006 (Lueg Dir.); ED Ex. JL-3 at Bates 0077.

Ms. Lueg testified that she performed a preliminary antidegradation review[241] of the Application in accordance with 30 Texas Administrative Code section 307.5 and the IPs. The results of her review are incorporated into a memorandum included in the permit file.[242] The Tier 1 review determined that existing water quality uses will not be impaired by the Draft Permit and that numerical and narrative criteria to protect existing uses will be maintained. The Tier 2 review determined that no significant degradation of water quality is expected in Mankins Branch, which has been identified as having high ALU, and that existing use will be maintained and protected. As part of the Tier 2 review, Ms. Lueg performed a nutrient screening[243] and recommended a TP limit of 0.5 mg/L to prevent degradation and excessive growth of algae and other aquatic vegetation because Mankins Branch has a concern for nitrate and TP.[244]

The ED, OPIC, AIRW, and City's arguments for Issue F overlap with their arguments for Issues A and C. The City argues that the Draft Permit does not comply with he antidegradation policy because (1) the Application is inaccurate and incomplete and TCEQ failed to gather sufficient data to correctly identify and consider receiving water and existing uses and to evaluate relevant water quality standards; (2) phosphorus loading in the proposed discharge may impair aquatic

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[241] Ms. Lueg conducted a preliminary review, which may be re-examined and modified if new information is received. ED Ex. JL-1 at Bates 0008 (Lueg Dir.).

[242] AIRW Ex. 3 at Bates 0042-0043.

[243] ED Exhibit JL-4 contains Ms. Lueg's nutrient screening. Ms. Lueg stated that TCEQ evaluates applications for new or expanding domestic discharges to reservoirs, streams, and rivers to determine if an effluent limit is needed for TP to prevent violation of numerical nutrient criteria and/or preclude excessive growth of aquatic vegetation. She testified that the nutrient screening included the proposed discharge flow rates, instream dilution, substrate type, depth, stream type, shading, impoundments, water clarity, sensitivity to growth of aquatic vegetation, existing water quality concerns and impairments, and consistency with other permits in the area. ED Ex. JL-1 at Bates 0008-0009.

[244] ED Ex. JL-1 at Bates 0008-0009 (Lueg Dir.).

life use in the unnamed tributary and may degrade water quality in Mankins Branch; and (3) the Tier 2 review used an incorrect standard.[245]

Specifically, the City claims that Ms. Lueg did not confirm the description of the receiving water, citing Mr. Michalk's email to Ms. Lueg;[246] did not conduct a site visit; and did not gather information from available resources; therefore, she did not consider all existing uses for which water quality should be protected, like livestock and other wildlife watering and aesthetic values. Further, the City argues that Ms. Lueg's failure to seek information from adjacent landowners and government entities precluded the consideration of site-specific information needed to accurately derive a TP limit for the proposed discharge. Because of the intermittent nature of the receiving stream and presence of three downstream ponds, there is a strong likelihood that the discharge will cause algal blooms, which can lead to a reduction in DO during high temperature periods when water levels are low, which can affect some aquatic species, including fish, that may be present in the ponds.[247] Since Ms. Lueg did not conduct a survey to determine the fish species present in the ponds, the sensitivity of fish to the increased algal growth was never evaluated by TCEQ.[248] Finally, the City argues that TCEQ did not use the correct standard in its Tier 2 review—TCEQ's review determined no significant degradation of water quality but did not evaluate the necessity of economic development or social development in considering the lowering of water quality in Mankins Branch.

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[245] *See* City Br. at 72-78; City Reply Br. at 41-45.

[246] City Ex. 42.

[247] The City relied on Mr. Price's testimony in making this argument. Hearing Tr. at 437-440.

[248] City Ex. 3 at Bates 0000118.

The ED, OPIC, and AIRW maintain their position that the Draft Permit complies with TCEQ's antidegradation policy and procedures.[249] As previously discussed, Ms. Lueg determined the treated effluent discharge route and assessed the ALUs. Mr. Price testified that the Draft Permit conditions are sufficient to protect existing uses in the receiving waters.[250] The 0.5 mg/L daily average limit for TP is more stringent than the 1.0 mg/L assumed for most small (less than 0.25 MGD) discharges. Mr. Price added that, based on physical and habitat characteristics of the stream channel and riparian zone, and the proximity of an impound downstream of the proposed outfall, this limit would be protective of the ALU and preclude the excessive growth of algae and other aquatic vegetation.[251] Based on information provided by the USFWS, TCEQ accurately concluded that there would be no adverse effects to federally listed species or their critical habitat.[252] Mr. Price stated that the only listed species of potential occurrence in the project area is a mollusk, but its occurrence in Segment 1248 has not been confirmed; however, even if mollusks were present, the Draft Permit would be protective of the species.[253]

AIRW argues that the expert testimony unanimously concluded that TCEQ properly conducted the antidegradation review, the water quality will be maintained, and existing use will be protected. Additionally, AIRW argues that the

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[249] *See* ED Br. at 7; ED Reply Br. at 4; OPIC Br. at 13; AIRW Br. at 26; AIRW Reply Br. at 23-29.

[250] AIRW Ex. 14 at Bates 000046 (Price Dir.).

[251] AIRW Ex. 14 at Bates 000046 (Price Dir.); ED Ex. JL-1 at Bates 0006, 0008 (Lueg Dir.).

[252] AIRW Ex. 14 at Bates 000048 (Price Dir.). Mr. Price reviewed the Rare, Threatened, and Endangered Species of Texas by County online application compiled and maintained by the Texas Parks and Wildlife Department's Wildlife Habitat Assessment Program.

[253] Hearing Tr. at 442; AIRW Ex. 14 at Bates 000049 (Price Dir.).

City presented no evidence that the proposed discharge would cause degradation of water quality. According to Mr. Price, limits of oxygen demanding constituents and the required DO level in the effluent would maintain the perennial reach of Mankins Branch and Segment 1248 of the San Gabriel River above the 5.0 mg/L average daily DO concentration and continue to support the existing use. Moreover, the chlorine disinfection of the effluent and concentration of viable *E. coli* in the effluent is protective of primary recreational uses of those waters.[254]

1. ALJs' Analysis

The ALJs find that the preponderance of the credible evidence shows that the Draft Permit complies with TCEQ's antidegradation policy. According to Ms. Lueg, the Tier 2 review determined that no significant degradation of water quality is expected in Mankins Branch, which has been identified as having high ALU, and that the existing use will be maintained and protected.[255] This testimony addressed the incorrect standard: the inquiry for a Tier 2 review is not whether existing uses will be maintained—that is the inquiry under a Tier 1 review and the floor for all permits under the antidegradation policy.[256] A Tier 2 review provides additional safeguards for waters that exceed fishable/swimmable quality, and considers whether the requested discharge will lower the water quality by more than a de minimis extent.[257] If the discharge will not lower the water quality by more than a de minimis amount, then there is no degradation, and the review ends there. If,

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[254] AIRW Ex. 14 at Bates 000048 (Price Dir.).

[255] ED Ex. JL-1 at Bates 0008 (Lueg Dir.).

[256] 30 Tex. Admin. Code § 307.5(b)(1), (4).

[257] 30 Tex. Admin. Code § 307.5(b)(2).

however, the discharge will lower the water quality by more than a de minimis amount, then it may still be permitted if it can be shown that the lowering of water quality is necessary for important economic or social development, and that the existing uses will not be impaired.[258] At all times, water quality sufficient to protect existing uses must be maintained.[259]

Ms. Lueg made a preliminary determination that no significant degradation of water quality is expected and there was no evidence presented as to the meaning of "no significant degradation of water quality" and whether it is the same as "no lowering of water quality by more than a de minimis extent."[260] The ALJs are not persuaded that Ms. Lueg failed to consider whether discharge would cause degradation of waters that exceed fishable/swimmable quality because she testified that her antidegradation review was in compliance with all applicable TCEQ rules and regulations and the existing uses will be maintained, her findings were confirmed by Mr. Price, and the City presented no evidence to show that the discharge would cause degradation.[261]

After considering the evidence and arguments, the ALJs conclude that the City did not rebut the prima facie demonstration, and the evidence supports Ms. Lueg's conclusion that the proposed discharge will maintain existing uses and will not lower water quality by more than a de minimis amount. Accordingly,

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[258] 30 Tex. Admin. Code § 307.5(b)(2).

[259] 30 Tex. Admin. Code § 307.5(b).

[260] 30 Tex. Admin. Code § 307.5(b)(2).

[261] Mr. Woelke, Mr. Reed, and Mr. Rubinstein did not testify about TCEQ's antidegradation policy. Mr. Woelke stated in his direct testimony that he would testify on this issue but admitted at the hearing that he was not a water quality or modeling expert. City Ex. 3 at Bates 000079 (Woelke Dir.); Hearing Tr. at 197, 199.

AIRW met its burden of proof to show that TCEQ's antidegradation review was accurate.

G. Whether the Draft Permit Should be Altered or Denied Based on the AIRW's Compliance History

TCEQ compiles compliance history information in accordance with the requirements of 30 Texas Administrative Code, Chapter 60. According to TCEQ's compliance history report for the period from September 1, 2015, through August 31, 2020, AIRW had "unclassified" classification status and no compliance rating. Mr. Cooper and Ms. Sims confirmed that the "unclassified" status is typical for sites that do not exist yet.[262]

The City argues that the lack of compliance history for Jonah, who will be the ultimate owner and operator of the Facility, and the lack of information about AIRW's compliance history and its financial, technical, and managerial experience warrant denying the Application.[263]

The ED and AIRW maintain their position that the Draft Permit should not be altered or denied based on AIRW's compliance history.[264] Mr. Cooper testified that AIRW's compliance history does not give him any cause for concern regarding its ability to operate the Facility.[265] AIRW argues that Jonah, the future owner and

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[262] AIRW Ex. 3 at Bates 0040-0041 (Sims Dir.); ED Ex. GC-1 at 0006 (Cooper Dir.); AIRW Ex. 8 at 000023.

[263] *See* City Br. at 78-79; City Reply Br. at 45-47.

[264] *See* ED Br. at 7-8; ED Reply Br. at 4; AIRW Br. at 26-28.

[265] ED Ex. GC-1 at 0006 (Cooper Dir.).

operator of the Facility, currently holds water and sewer CCNs in Williamson County, Texas, and its general manger, has over 30 years of experience operating sewer systems (along with the experience of 25 field staff).[266] AIRW also argues that the City's own compliance history is concerning.[267]

1. ALJs' Analysis

The issue referred to SOAH specifically asks whether the Draft Permit should be altered or denied based on the AIRW's compliance history. The ALJs already ruled on the City's motion to dismiss based on the NSSAs.[268] The City presented no evidence to contradict TCEQ's conclusion that the AIRW's compliance history should not alter or result in the Draft Permit being denied, and the City did not meet its burden of production to rebut the initial presumption.

H. Whether the Draft Permit Contains Sufficient Provisions to Ensure Protection of Water Quality, Including Necessary Operational Requirements

The Draft Permit contains numerous operational requirements.[269] The following are relevant to the City's argument for Issue H: (1) AIRW is required to install and maintain adequate safeguards to prevent the discharge of untreated or

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[266] AIRW 8 at 000023. AIRW argued that Jonah is more than qualified to provide sewer service to the development because it currently provides water service for approximately 9,000 customers and 30,000 people in its approximately 275-mile service area. AIRW Br. at 27-28.

[267] AIRW Br. at 28. Ms. Sims testified that the City has two ongoing enforcement actions. AIRW 8 at 000024.

[268] If ownership of the site changes during the five-year compliance period, a distinction of compliance history of the site under each owner during that five-year period shall be made. 30 Tex. Admin. Code § 60.1(d).

[269] AIRW Ex. 3 at Bates 0013-0016.

inadequately treated wastes during electrical power failures by means of alternate power sources, standby generators, and/or retention of inadequately treated wastewater; and (2) AIRW is required to ensure that the Facility is operated by an operator with a valid certificate of competency.[270]

The City's argument for Issue H mainly overlaps with its argument for Issues A and C.[271] The City's arguments concerning existing uses, sampling frequency, and the PT concentrating in the ponds were already addressed in this PFD. With respect to the operational requirements, the City argues that the Draft Permit should contain a requirement to ensure that, during any treatment system upsets or other problematic operations that may cause permit limit violations, untreated or inadequately treated wastewater is retained on-site for later treatment or off-site disposal (e.g., in a tank or surface impoundment with a capacity equal to at least the maximum daily flow).

Mr. Woelke testified that the Facility presents operational challenges because there are several components that are singular and, if that component experiences a failure or needs routine maintenance requiring down time, there will be a spill or release of untreated sewage. He stated that the Facility des not have a back-up unit or other means of managing wastewater in a way that prevents discharge into the receiving waters. For example, AIRW is only proposing to construct one clarifier with one clarifier drive, and if the clarifier drive malfunctions, there is no second clarifier to divert the untreated waste into.

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[270] Operational Requirements 4 and 9. AIRW Ex. 3 at Bates 0013, 0015.

[271] *See* City Br. at 79-83; City Reply Br. at 47-52.

Furthermore, the package plant tankage will be constructed of steel,[272] rather than concrete, which means that painting is required to maintain integrity. However, if the basin cannot be taken out of service for painting because there is no back-up unit, it cannot be properly maintained.[273] Mr. Woelke admitted that multiple clarifiers and concrete construction are not required by TCEQ rules, but it was his preference and good general practice.[274]

Mr. Woelke also was concerned that there is no so-called "bonus feature"[275] that would capture the discharge of untreated or partially treated wastewaters prior to it leaving the AIRW's property and crossing other private property. He stated that, even for larger facilities with redundant features, when there are concerns that untreated or partially treated wastewater could be discharged, TCEQ requires a bonus feature. The "bonus feature" will be a significant benefit and would work to improve the health and safety of the residents.[276]

Furthermore, Mr. Woelke was concerned that only a Class C licensed operator is required for the Facility—this license requires a high school degree and only two years of experience where only one year is in the field in which the license

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[272] Steel units that are not properly maintained are known to fail after 20 years in service under normal operating conditions. City Ex. 3 at Bates 0000107 (Woelke Dir.).

[273] City Ex. 3 at Bates 0000106-0000107 (Woelke Dir.).

[274] Hearing Tr. at 214-216.

[275] According to Mr. Woelke, the "bonus feature" is a pond that has enough volume to store the volume from a single day at permitted flows and provides a place to capture and attenuate the impact of untreated wastewater in the receiving stream. City Ex. 3 at Bates 0000108 (Woelke Dir.). He admitted that "bonus feature" is not defined by TCEQ rules. Hearing Tr. at 215.

[276] City Ex. 3 at Bates 0000108 (Woelke Dir.); Hearing Tr. at 194. Mr. Woelke mentioned another facility where a retention pond was negotiated during a settlement between an applicant and protesters but admitted that it was not required by TCEQ rules. Hearing Tr. at 215.

is requested.[277] Mr. Woelke stated that the requirement that the operator must be at the Facility five days per week and otherwise be available by phone or pager was concerning because of the lack of redundancies to prevent unauthorized discharges in the event of failure or malfunction. Moreover, there is nothing in the Application about how the Facility will communicate with the operators when they are off-site. Mr. Woelke did not know if an automated alert system is required by TCEQ rules but stated it would be good practice for personnel to be alerted. He admitted that an automated alert system may not be required in the application phase and that, in his experience, he has not seen TCEQ deny a permit based on what might occur in the future operationally.[278]

The ED, OPIC, and AIRW maintain their position that the Draft Permit contains sufficient provisions to ensure protection of water quality, including necessary operational requirements.[279] Mr. Cooper testified that, under TCEQ rules, the Facility requires a minimum of a Class C licensed operator. [280] He was not familiar with any rules that require a "bonus feature."[281] According to Mr. Cooper, the Draft Permit establishes the limits based on the conditions of the receiving streams and AIRW is required to build a plant to meet the limits.[282] He was not concerned about the Facility having only one clarifier because AIRW is

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[277] Mr. Woelke compared the Facility's operator license requirements to the City's Class B licensed operators that have more extensive requirements for education and experience. City Ex. 3 at Bates 0000108-0000109 (Woelke Dir.).

[278] City Ex. 3 at Bates 0000108-0000109 (Woelke Dir.); Hearing Tr. at 216-217, 223.

[279] *See* ED Br. at 8-9; ED Reply Br. at 8-9; OPIC Br. at 14; AIRW Br. at 29-30; AIRW Reply Br. at 30-31.

[280] ED Ex. GC-1 at Bates 0009 (Cooper Dir.). Activated sludge facilities with a flow limit range of 0.050 MGD to 1.0 MGD must have an operator with a valid Class C or higher license. 30 Tex. Admin. Code § 30.350(e).

[281] Mr. Cooper stated that he was not qualified to say if the Facility is required to have a "bonus feature" but said that a TCEQ modeler would have included it if it was necessary. Hearing Tr. at 668.

[282] Hearing Tr. at 667.

required to submit the plans and specifications for the treatment system for the Facility to TCEQ for review once the permit is issued and TCEQ may require changes to the system. The Facility will not be constructed until the plans and specifications are approved by TCEQ.[283]

Mr. Perkins confirmed that TCEQ rules do not require redundant clarifiers until average daily flow exceeds 400,000 gallon per day and the Facility will not exceed half of that amount. He stated that aeration basins are exempt from this requirement if the aeration equipment is removable without taking the aeration basin out of service. Circular clarifiers normally have one drive per clarifier. TCEQ does not have design criteria requiring redundant drives on a single basin and installing redundant drives would be highly unusual for a facility with a minor flow volume.[284] Mr. Perkins also confirmed that the design details are normally more thoroughly reviewed by TCEQ during plan submittals after a permit is issued. It is very rare for detailed plans to be completed at the time a permit application is submitted. Identifying all the treatment units during the permitting process is neither required nor practical. The plans and specification review and approval process occurs after permit issuance and is not subject to review and comment by the public.[285]

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[283] ED Ex. GC-1 at Bates 0011 (Cooper Dir.); Hearing Tr. at 668.

[284] AIRW Ex. 17 at Bates 000134 (Perkins Dir.). Mr. Perkins cited 30 Texas Administrative Code section 217.153(c)(1).

[285] AIRW Ex. 17 at Bates 000133 (Perkins Dir.).

1. ALJs' Analysis

The ALJs have already found that the Draft Permit is protective of water quality. With respect to the operational requirements in dispute, the ALJs agree with the ED, OPIC, and AIRW that the Draft Permit contains sufficient operational requirements to ensure protection of water quality. The ALJs are not persuaded that a non-standard operator licensing requirement should be required for the Facility. Furthermore, many of the City's concerns about the engineering details will be addressed, as testified by Mr. Cooper and Mr. Perkins, after the permit is issued during the construction phase and, if TCEQ then determines that any bonus or redundant features are necessary to meet the established limits, it will require those changes before approving the construction of the Facility. Moreover, the City's own witness admitted that those features are not required by TCEQ rules but were merely his preferences and would be good practice. Therefore, the ALJs find that AIRW has met its burden regarding Issue H.

VII. TRANSCRIPT COSTS

30 Texas Administrative Code section 80.23(d) provides for the allocation of transcript costs among the parties, excluding the ED and OPIC. In allocating those costs, the Commission is to consider the following applicable factors in allocating reporting and transcription costs among the other parties:

- The party who requested the transcript;
- The financial ability of the party to pay the costs;

- The extent to which the party participated in the hearing;
- The relative benefits to the various parties of having a transcript; and
- Any other factor which is relevant to a just and reasonable assessment of costs.

The ALJs ordered AIRW to arrange for and pay the costs of having a court reporter attend the hearing and prepare a transcript, subject to allocation of such costs at the end of the proceeding. AIRW argued that Jonah's participation in the hearing was minor and disproportionate to the City's and AIRW's participation, and that there was no evidence that the City is financially unable to pay its share of the costs. AIRW requested that itself and the City each pay one-half of the transcript costs, totaling $8,848.75. No party has disputed that amount or filed a response to AIRW's request.

The City and AIRW participated roughly equally in the hearing. Moreover, both sides cited to the transcript in their closing arguments; therefore, both sides benefitted from having a transcript. There is no direct evidence concerning the respective financial abilities of the parties to pay the transcript cost. Based on the above, the ALJs recommend that the Commission assess the City and AIRW each one-half of the transcript costs.

VIII. RECOMMENDATION

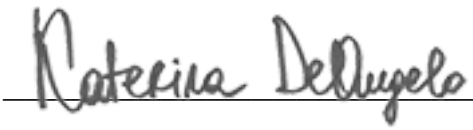
The ALJs recommend that the Commission adopt the attached proposed order containing Findings of Fact and Conclusions of Law and issue the

Draft Permit to AIRW. All requests for findings of fact that are not included in the Proposed Order are denied.

SIGNED AUGUST 23, 2022.

ALJ Signatures:

Andrew Lutostanski
Presiding Administrative Law Judge



Katerina DeAngelo
Co-Presiding Administrative Law Judge

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

AN ORDER
GRANTING THE APPLICATION BY
AIR-W 2017-7 L.P. FOR TPDES PERMIT NO. WQ0015878001
IN WILLIAMSON COUNTY, TEXAS;
SOAH DOCKET NO. 582-22-1016;
TCEQ DOCKET NO. 2021-1214-MWD

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the application of AIR-W 2017-7 L.P. (AIRW) for a new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0015878001 in Williamson County, Texas. A Proposal for Decision (PFD) was presented by Andrew Lutostanski and Katerina DeAngelo, Administrative Law Judges (ALJs) with the State Office of Administrative Hearings (SOAH), who conducted an evidentiary hearing concerning the application on May 23-25, 2022, in Austin, Texas via Zoom videoconferencing. After considering the PFD, the Commission makes the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

Application

1. AIRW filed its application (Application) for a new TPDES permit with TCEQ on April 6, 2020.

2. The Application requested authorization to discharge treated domestic wastewater from a proposed plant site, the Rockride Lane Water Resource Reclamation Facility (Facility), to be located approximately 500 feet southeast of the intersection of Rockride Lane (County Road 110) and Westinghouse Road (County Road 111), in Williamson County, Texas 78626. AIRW proposes to build the Facility to serve the Mansions of Georgetown III development, an 880-house subdivision.

3. The treated effluent will be discharged via pipe, thence through a culvert, thence to an unnamed tributary, thence to Mankins Branch, thence to the San Gabriel/North Fork San Gabriel River in Segment No. 1248 of the Brazos River Basin. The unclassified receiving water uses are limited aquatic life use for the unnamed tributary and Mankins Branch, and high aquatic life use for Mankins Branch. The designated uses for Segment No. 1248 are primary contact recreation, public water supply, aquifer protection, and high aquatic life use.

4. The Executive Director (ED) declared the Application administratively complete on June 19, 2020, and technically complete on October 26, 2020.

5. The ED completed the technical review of the Application, prepared a draft permit (Draft Permit) and made it available for public review and comment.

6. AIRW currently owns the site at which the proposed Facility will be located.

7. AIRW, through its affiliate, entered into Non-Standard Service Agreements (NSSAs) with Jonah Water Special Utility District (Jonah) on April 20, 2022, for the provision of retail wastewater services to the development.

8. Under the NSSAs, Jonah will own and operate the Facility once the TPDES permit is issued and transferred to it under 30 Texas Administrative Code section 305.64.

The Draft Permit

9. The Draft Permit would authorize a discharge of treated domestic wastewater at a daily average flow not to exceed 200,000 gallons per day (or 0.20 million gallons per day (MGD)).

10. The Facility will have treatment units including aeration basins, a final clarifier, a cloth effluent filter, chemical injection for phosphorus removal, aerated sludge holding and thickening tank, and a chlorine contact chamber. The Facility has not been constructed.

11. The unclassified receiving water uses are limited aquatic life use for the unnamed tributary and Mankins Branch (intermittent with perennial pools), and high aquatic life use for Mankins Branch (perennial). The designated uses for Segment No. 1248 are primary contact recreation, public water supply, aquifer protection, and high aquatic life use.

12. The effluent limitations in the Draft Permit, based on a 30 day average, include: 7 milligram per liter (mg/L) Five-Day Carbonaceous Biochemical Oxygen Demand; 10 mg/L Total Suspended Solids; 2 mg/L Ammonia Nitrogen; 0.5 mg/L Total Phosphorus; a minimum dissolved oxygen (DO) of 4.0 mg/L, pH in the range of 6.0 to 9.0, and Escherichia coli (E. coli) not to exceed 126 colony forming units/most probable number per 100 milliliter.

13. The effluent shall contain a chlorine residual of at least 1.0 mg/L and shall not exceed a chlorine residual of 4.0 mg/L after a detention of at least 20 minutes based on peak flow.

Notice and Jurisdiction

14. The Notice of Receipt of the Application and Intent to Obtain Water Quality Permit was published on June 28, 2020, in the *Williamson County Sun* in English and, on June 25, 2020, in *El Mundo Newspaper* in Spanish.

15. The Combined Notice of Receipt and Intent to Obtain a Water Quality Permit and Notice of Application and Preliminary Decision was published on December 13, 2020, in the *Williamson County Sun* in English and, on December 17, 2020, in *El Mundo Newspaper* in Spanish.

16. The comment period for the Application closed on January 19, 2021.

17. TCEQ's Office of the Chief Clerk received timely comments from various individuals and the City of Georgetown (the City). The City also timely filed a request for a Contested Case Hearing based upon issues raised during the public comment period.

18. The ED filed his Response to Public Comments on August 6, 2021.

19. On November 3, 2021, the Commission considered the hearing request at its open meeting and, on November 9, 2021, issued an Interim Order, directing that the following eight issues be referred to SOAH, denying all issues not referred, and setting the maximum duration of the hearing at 180 days from the date of the preliminary hearing until the date the PFD is issued by SOAH:

    A) Issue A: 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 (TSQWS), including protection of aquatic and terrestrial wildlife;

    B) Issue B: 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 Texas Water Code section 26.0282;

    C) Issue C: Whether the Draft Permit is protective of the health of the nearby residents;

    D) Issue D: Whether the Draft Permit complies with applicable requirements regarding nuisance odors;

E) Issue E: Whether the Application is substantially complete and accurate;

F) Issue F: Whether the Draft Permit complies with the TCEQ's antidegradation policy and procedures;

G) Issue G: Whether the Draft Permit should be altered or denied based on the AIRW's compliance history; and

H) Issue H: Whether the Draft Permit contains sufficient provisions to ensure protection of water quality, including necessary operational requirements.

20. On January 16, 2022, notice of the preliminary hearing was published in English in the *Williamson County Sun* and, on January 13, 2022, in Spanish in *El Mundo Newspaper*. The notice included the time, date, and place of the hearing, as well as the matters asserted, in accordance with the applicable statutes and rules.

Proceedings at SOAH

21. On February 24, 2022, a preliminary hearing was convened in this case via videoconference by SOAH ALJs Andrew Lutostanski and Ross Henderson. Attorney Helen Gilbert appeared for AIRW; attorney Patricia Carls appeared for the City; attorney Bobby Salehi appeared for the ED; attorney Jennifer Jamison appeared for the Office of Public Interest Counsel (OPIC); Jim Webb appeared for himself; and John Carlton appeared for Jonah.

22. Mr. Webb and Jonah sought party status at the preliminary hearing, and the ALJs granted those requests. Mr. Webb submitted his withdrawal from the proceeding on May 17, 2022.

23. Jurisdiction was noted by the ALJs and the Administrative Record, and AIRW's exhibits AIRW Exhibit 1-7 were admitted.

24. A second preliminary hearing was held via videoconference by SOAH ALJs Lutostanski and Katerina DeAngelo on May 12, 2022. All parties appeared

through their respective representatives and the ALJs ruled on all timely-filed motions and objections.

25. On May 23-25, 2022, ALJs Lutostanski and DeAngelo convened the hearing on the merits via videoconference and all parties appeared through their respective representatives. The record closed on June 24, 2022, after the parties filed post-hearing briefs.

Protection of Water Quality and Existing Uses, Including Aquatic and Terrestrial Wildlife

26. The prima facie demonstration that 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 (TSWQS), including protection of aquatic and terrestrial wildlife, was not rebutted.

27. TSWQS apply to surface water in the state and are set by the Commission at levels designed to be protective of public health, aquatic resources, terrestrial life, and other environmental and economic resources. The applicable water quality standards are the TSWQS in 30 Texas Administrative Code Chapter 307.

28. The TSWQS consist of general standards, narrative standards, surface water segment-specific numeric standards, numeric standards for toxic substances, and antidegradation review.

29. The TSWQS establish specific uses for each classified water body in the state and also provide numeric criteria for each classified stream.

30. The provisions of the Draft Permit are protective of water quality and are in accordance with the TSWQS.

31. The Draft Permit is protective of water quality and existing uses of the receiving water.

32. The Draft Permit is protective of aquatic and terrestrial wildlife.

Regionalization

33. To effectuate its policy of encouraging regionalization of wastewater services, TCEQ requires an applicant to provide certain information to allow TCEQ to conduct a regionalization analysis.

34. No part of the Facility or development is within the City's corporate limits.

35. The proposed Facility and its discharge are within the City's extraterritorial jurisdiction.

36. Properties in the City's extraterritorial jurisdiction that desire wastewater services from the City must first submit a petition for voluntary annexation.

37. The ordinance requiring annexation for wastewater services may be waived by the City Council.

38. As part of its Application, AIRW provided email correspondence to and from nearby providers regarding whether they would provide sewer service.

39. AIRW's written communications with nearby providers were sufficient, and AIRW was not required to submit certified letters because the emails provide similar tracking and traceability.

40. AIRW explored securing wastewater services from the City, and the City placed conditions on providing service, including: the Facility site would have to be annexed into the City and comply with the City's land use restrictions.

41. There was no indication that the City was willing to waive the annexation and land use requirements.

42. AIRW received a conditional offer for sewer service from the City. The City denied AIRW's request for service unless AIRW agreed to annexation and land use restrictions.

43. The ED requested from AIRW a cost analysis of expenditures that includes the cost of connecting to the CCN facilities versus the cost of the proposed facility or expansion.

44. Constructing a new plant will cost approximately $300,000 more than connecting to the City's system.

45. Because of the higher property tax rate inside the City than outside it in the unincorporated area and the City's condition of annexation to connect to its system, connecting carries with it an approximately $20 million cost due to diminution in property value.

46. Costs weigh in favor of granting AIRW's application.

47. The evidence fails to show that easements and the delay inherent to acquiring them are impediments to connecting to the City's system.

48. Even if easements were needed, the evidence fails to show that AIRW tried and failed to secure them.

49. There is no regional provider designated for the area where the Facility is proposed to be located.

50. The proposed Facility and its discharge are not within the sewer CCN of any retail public utility.

51. The proposed Facility and its discharge are partially within Jonah's district boundaries and partially within Jonah's water CCN.

52. The City did not request Jonah's consent to provide wastewater service to the Facility, and Jonah has not given consent for the City to operate within its boundaries.

53. Jonah is an established political subdivision that provides water service to approximately 9,000 customers, and 30,000 people are in its approximately 275-mile service area.

54. Jonah is negotiating to provide wastewater to other nearby developments and plans to expand its wastewater services within its certificated water service area.

Nearby Residents

55. The prima facie demonstration that the Draft Permit is protective of the health of nearby residents was not rebutted.

56. The Draft Permit contains adequate permit limits and monitoring requirements to protect the health of nearby residents.

57. The monitoring and sampling requirements in the Draft Permit comply with the Commission rules.

58. The Draft Permit contains appropriate effluent limits.

59. The Draft Permit is protective of human health, including those of nearby residents.

Nuisance Odors

60. AIRW will control nuisance odors by owning the 150-foot buffer zone from the wastewater treatment plant units to the property line.

61. The evidence failed to show that the discharge will go into any body of water that crosses or abuts any park, playground, or schoolyard within one mile of the point of discharge.

Completeness and Accuracy of Application

62. The prima facie demonstration that the Application is substantially complete and accurate was not rebutted.

63. The Application went through both an administrative and a technical review.

64. The Application included all required information and was substantially complete and accurate.

Antidegradation

65. The prima facie demonstration that the Draft Permit complies with TCEQ's antidegradation policy and procedures was not rebutted.

66. The ED performed a Tier 1 and Tier 2 antidegradation review of the receiving waters in accordance with 30 Texas Administrative Code section 307.5.

67. The narrative and numeric criteria to protect existing uses will be maintained throughout the receiving waters; therefore, existing water quality uses will be maintained and protected.

68. The existing water quality uses of the receiving waters of the unnamed tributary of unnamed tributary, Mankins Branch, the San Gabriel/North Fork San Gabriel River in Segment No. 1248 of the Brazos River Basin will not be impaired by the Draft Permit as long as AIRW complies with the Draft Permit, which will satisfy the antidegradation Tier 1 requirements.

69. The Draft Permit will not cause significant degradation of water quality in the receiving waters of the unnamed tributary, Mankins Branch, the San Gabriel/North Fork San Gabriel River in Segment No. 1248 of the Brazos River Basin as long as AIRW complies with the Draft Permit, which will satisfy the antidegradation Tier 2 requirements.

70. The Draft Permit complies with TCEQ's antidegradation policy and procedures.

Compliance History

71. AIRW's compliance status is unclassified.

72. No evidence was presented that indicated that AIRW's compliance history should alter or result in permit denial.

73. AIRW's compliance history of unclassified does not serve as a basis for alteration or denial of the Draft Permit.

Operational Requirements

74. The prima facie demonstration that the Draft Permit contains sufficient provisions to ensure protection of water quality, including necessary operational requirements, was not rebutted.

75. The operational requirements in the Draft Permit are sufficient to ensure protection of water quality.

Transcription Costs

76. Reporting and transcription of the hearing on the merits was warranted because the hearing lasted for three days.

77. All parties fully participated in the hearing by presenting witnesses and cross-examining witnesses; however, Jonah's participation in the hearing was minor and disproportionate to the City and AIRW.

78. Both the City and AIRW participated roughly equally in the hearing and cited to the transcript in their closing arguments; therefore, both sides benefitted from having a transcript.

79. There was no evidence that any party subject to allocation of costs is financially unable to pay a share of the costs.

80. The total cost for recording and transcribing the preliminary hearing and the hearing on the merits was $8,848.75.

81. AIRW and the City should each pay one-half of the transcription costs.

II. CONCLUSIONS OF LAW

1. TCEQ has jurisdiction over this matter. Tex. Water Code, chs. 5, 26.

2. SOAH has jurisdiction to conduct a hearing and to prepare a PFD in contested cases referred by the Commission under Texas Government Code section 2003.047.

3. Notice was provided in accordance with Texas Water Code sections 5.114 and 26.028; Texas Government Code sections 2001.051 and 2001.052; and 30 Texas Administrative Code sections 39.405 and 39.551.

4. The Application is subject to the requirements in Senate Bill 709, effective September 1, 2015. Tex. Gov't Code § 2003.047(i-1)-(i-3).

5. AIRW's filing of the Administrative Record established a prima facie case that: (1) the Draft Permit meets all state and federal legal and technical requirements; and (2) a permit, if issued consistent with the Draft Permit, would protect human health and safety, the environment, and physical property. Tex. Gov't Code § 2003.047(i-1); 30 Tex. Admin. Code § 80.17.

6. AIRW retains the burden of proof on the issues regarding the sufficiency of the Application and compliance with the necessary statutory and regulatory requirements. 30 Tex. Admin. Code § 80.17(a).

7. The City did not rebut the prima facie demonstration by demonstrating that one or more provisions in the Draft Permit violate a specifically applicable state or federal requirement that relates to a matter referred by TCEQ. Tex. Gov't Code § 2003.047(i-2); 30 Tex. Admin. Code § 80.117(c).

8. The Draft Permit is protective of water quality and the existing uses of the receiving waters in accordance with applicable TSWQS, including protection of aquatic and terrestrial wildlife.

9. The Draft Permit is protective of the health of residents near the proposed Facility and discharge route.

10. The Application demonstrates compliance with TCEQ's regionalization policy. Tex. Water Code §§ 26.003, 26.081(a)-(b), (d); 26.0282.

11. The Application demonstrates a need for the Draft Permit. Tex. Water Code § 26.0282.

12. The Draft Permit contains sufficient provisions to prevent nuisance odors. 30 Tex. Admin. Code §§ 217.38, 309.13(e).

13. The Application is substantially complete and accurate.

14. The Draft Permit complies with TCEQ's antidegradation policy. 30 Texas Admin. Code §§ 307.5, 307.6(b)(4).

15. AIRW's compliance history does not raise issues regarding AIRW's ability to comply with the material terms of the Draft Permit or that would warrant altering the terms of the Draft Permit.

16. The Draft Permit contains sufficient provisions, including necessary operational requirements, to ensure protection of water quality.

17. No transcript costs may be assessed against the ED or OPIC because TCEQ's rules prohibit the assessment of any cost to a statutory party who is precluded by law from appealing any ruling, decision, or other act of the Commission. 30 Tex. Admin. Code § 80.23(d)(2).

18. Factors to be considered in assessing transcript costs include: the party who requested the transcript; the financial ability of the party to pay the costs; the extent to which the party participated in the hearing; the relative benefits to the various parties of having a transcript; the budgetary constraints of a state or federal administrative agency participating in the proceeding; and any other factor which is relevant to a just and reasonable assessment of the costs. 30 Tex. Admin. Code § 80.23(d)(1).

19. Considering the factors in 30 Texas Administrative Code section 80.23(d)(1), a reasonable assessment of hearing transcript costs against parties to the contested case proceeding is: one-half to AIRW and one-half to the City.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. AIRW's Application for Texas Pollutant Discharge Elimination System Permit No. WQ0015878001 is granted as set forth in the Draft Permit.

2. AIRW and the City must each pay one-half of the transcription costs.

3. The Commission adopts the ED's Response to Public Comment in accordance with 30 Texas Administrative Code section 50.117.

4. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.

5. The effective date of this Order is the date the Order is final, as provided by Texas Government Code section 2001.144 and 30 Texas Administrative Code section 80.273.

6. TCEQ's Chief Clerk shall forward a copy of this Order to all parties.

7. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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Jon Niermann, Chairman, For the Commission