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

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

CITY OF GEORGETOWN'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGES' PROPOSAL FOR DECISION

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW, the City of Georgetown ("Georgetown" or "City") and files this, its Exceptions to the Administrative Law Judges' ("ALJs'") Proposal for Decision ("PFD"), and would respectfully show the following.

I. EXECUTIVE SUMMARY

For the reasons outlined in these exceptions, and as presented during the hearing on the merits, the City's briefing, and the entirety of the administrative record, the Texas Commission on Environmental Quality ("Commission" or "TCEQ") should dismiss this proceeding, or in the alternative revise the ALJs' Findings of Fact and Conclusions of Law as presented in the PFD to deny the Application.

II. INTRODUCTION

This case involves an application (the "Application") by AIRW 2017-7, L.P. ("Applicant" or "AIRW") for a Texas Pollutant Discharge Elimination System ("TPDES") permit (the "Draft Permit") for a 0.2 million gallons per day wastewater package plant (the "Facility") that would serve an 880-duplex unit rental community situated on a 128 acre (+/-) tract of land directly

abutting the corporate limits of the City. The Facility would be less than 400 feet from existing homes, and effluent would be discharged directly through a 420-lot single-family subdivision currently under construction. A portion of the proposed discharge route has not been established as a State-owned watercourse and will traverse a green space within the 420-lot single family residential subdivision. The existing perennial pools along the proposed discharge route and within the green space will also receive effluent. Thereafter the proposed discharge will be to an impaired stream segment before entering the Brazos River, a primary drinking water source for citizens in the State of Texas.

Neither AIRW nor the plant operator, Jonah Water Special Utility District ("Jonah"), has ever owned or operated a wastewater treatment facility. The City owns and operates an extensive wastewater collection system and five wastewater treatment plants (it also has a permit for a sixth) serving over 30,000 wastewater customers. It is undisputed that there are existing City wastewater collection lines within one-half mile from the proposed Facility, and an existing City wastewater treatment plant within 2.5 miles of the proposed Facility, and that the City has with the current capacity to collect and treat the wastewater generated by the proposed development. It is undisputed that the City's wastewater master plan includes the proposed development area. It is also undisputed that the cost to construct the force main and lift station needed to connect the proposed development to the City's wastewater system is less than the cost to construct the Facility.

To comport with the Legislature's long-standing policy directive to the Commission to promote and encourage wastewater regionalization, and to address the numerous procedural and regulatory deficiencies in the permit review process, the PFD should not be adopted, the

Application dismissed, and the request to issue the Draft Permit denied. In the PFD, the ALJs have crafted an entirely new framework for analyzing regionalization that strips Sections 26.003, 26.081, and 26.082 of the Texas Water Code ("TWC") of all meaning. Approval of the PFD will jeopardize the Commission's wastewater discharge permitting program, especially as it applies to municipal wastewater discharges in or near cities with existing wastewater collection and treatment facilities. The PFD would bestow relevancy on any factor that can be quantified and monetized and allow all such factors to be considered a "cost" of regionalization. In expanding the types of evidence that are relevant to a regionalization review, the ALJs would have the Commission open Pandora's Box. Making every factor relevant renders no factor relevant. If the Commission approves the PFD, the Commissioners will have to hire staff with the competence to review the type of evidence that has not been in its purview since the Legislature transferred certain of the TCEQ's duties to the Public Utility Commission.

In addition to crafting an entirely new framework for regionalization analysis, the ALJs have erred in weighing the evidence presented in this case. The ALJs must consider all relevant evidence in the record, and determine the meaning, weight, and credibility to assign conflicting evidence.[1] The City, in its detailed prefiled direct testimony and over the course of the three-day hearing, established that AIRW provided a TPDES application that was substantially incomplete, erroneous, and false. The Applicant and TCEQ's Executive Director ("ED") did not provide evidence on how the gaps and failures were addressed, which should have caused the ALJs to find that the City rebutted the statutory presumptions and that AIRW did not meet its burden of proof. The missing evidence, falsifications, and other deficiencies should have been weighed as a

[1] *Sanchez v. Texas State Bd. of Med. Examiners*, 229 S.W.3d 498, 510 (Tex. App.—Austin 2007).

negative inference (i.e., as unfavorable to AIRW), not in favor of granting the Application.[2] Instead, the ALJs accept at face value bald, unsubstantiated, and conclusory statements offered by AIRW and the ED, claiming that the Application is complete and accurate, all appropriate procedures were followed, the Draft Permit includes appropriate limits protective of all relevant water quality standards, and the ED's review process was consistent with the State's antidegradation and regionalization policies in the face of ample rebuttal evidence presented by the City to the contrary. An incomplete and inaccurate Application cannot be the basis for a determination that the ED was fully informed or that the Draft Permit contains conditions sufficient to ensure protection of water quality and existing uses of the receiving water and consistent with State law, including relevant water quality standards and the State's antidegradation and regionalization policies. The PFD and the Commission's ultimate Final Order should reflect these evidentiary deficiencies and reach the inevitable conclusion that the Draft Permit should not issue.

The ALJs take the position that it is the City's duty to complete and correct the Application, as well as conduct the reviews and analyses that the ED failed to conduct. That is not the burden the City had to meet. The City had to rebut the presumption that the Draft Permit meets all state and federal legal and technical requirements, and would protect human health and safety, the environment, and physical property. The ALJs' standard, if allowed to stand, would raise the bar to an even higher level than established by the Legislature in 2015 with SB 709, and eviscerate the process for obtaining relief afforded affected parties via contested case hearings. The inappropriate weighing of evidence in the record, the granting of excessive deference to AIRW

[2] *Brewer v. Dowling*, 862 S.W.2d 156, 159 (Tex. App. 1993), *writ denied* (Jan. 26, 1994). ("Failure to produce evidence within a party's control raises the presumption that if produced it would operate against him, and every intendment will be in favor of the opposite party.").

and the ED, and the failure to properly consider and weigh the City's rebuttal evidence is erroneous and should be rejected. The City excepts to the ALJs' conclusion that the Commissioners "should issue the Draft Permit without alterations."[3] Instead, the Application should be dismissed or denied and no permit issued.

III. STANDARD OF REVIEW

The Commission may reject an ALJ's PFD and proposed Order and approve its own Order, but the Commission's Order must be based on the record made before the ALJ, and the Commission must explain the basis of its Order.[4] Further, the Commission may change a Finding of Fact ("FOF") or Conclusion of Law ("COL") made by the ALJ or vacate or modify a proposed Order issued by the ALJ if it determines: (1) that the ALJ did not properly apply or interpret applicable law, agency rules, written policies, or prior administrative decisions; or (2) that a technical error in an FOF should be changed.[5] If the Commission makes such a change, it is required to state in writing the specific reason and legal basis for such changes.[6] In addition, the ALJ has the regulatory authority to amend the PFD in response to exceptions, replies, or briefs filed by the Parties.[7]

In this case, the City has provided rebuttal evidence showing, by a preponderance of the evidence, that the ALJ did not properly apply or interpret applicable law, agency rules, written

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[3] PFD at 2.

[4] Tex. Gov't Code § 2003.047(m).

[5] Tex. Gov't Code § 2001.058(e).

[6] *Id*.

[7] 30 Tex. Admin. Code ("TAC") § 80.259.

policies, or prior administrative decisions. The City's Exceptions explain why the record supports revising the PFD such that the Application is denied and the Draft Permit not issued.

IV. EXCEPTIONS

Exception No. 1. Georgetown excepts to the PFD's recommendation 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.[8]

The ALJs err in recommending 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 Texas Surface Water Quality Standards ("TSWQS"), including protection of aquatic and terrestrial wildlife.[9] The ALJs reach this conclusion based on their determination that "[t]he 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."[10] This conclusion ignores the City's rebuttal evidence demonstrating that AIRW provided an application that did not include complete or accurate information, preventing the ED from determining 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, and instead places the burden of completing and correcting the Application on

[8] PFD, Finding of Fact ("FOF") Nos. 30–32.

[9] PFD at 19.

[10] *Id*.

the City. This is error. AIRW is the only party with the duty to provide information supporting the issuance of the permit.[11]

The PFD correctly cites Tex. Gov't Code § 2003.047(i-1)–(i-3), stating "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." However, the ALJs' analysis does not follow that prescription. On the City's demonstration that AIRW and the ED have failed to collect data regarding existing uses upon which the ED's evaluation is based, it is axiomatic that any presumption about the sufficiency of the Application and the ED's review of it is rebutted and fails in the absence of proof of such data collection and evaluation by AIRW and the ED.

The City showed that the ALJs' determination that the "TCEQ does not propose permit conditions based on how the land may be developed in the future and that they consider the circumstances at the time the application is filed"[12] is error and ignores the TCEQ's express Instructions to permit applicants. The Instructions explicitly require information to be provided

[11] Tex. Gov't Code § 2003.047(i-1).

[12] The ALJs accept statements by TCEQ staff that "permit provisions are not imposed on future, speculative downstream development conditions" as if this credibly represents the instant case. PFD at 19–20. Georgetown is not, however, positing that permit applicants or the ED must exercise clairvoyance to anticipate possible residential or other developments far into the future. Here, future residential development immediately adjacent to the proposed project is not the result of speculation. The Patterson Ranch development is currently under construction. *See* GT EXH. 30, District Map (showing current, ongoing construction of Patterson Ranch Subdivision). Had the ED contacted Georgetown for information about the project area as contemplated by the TCEQ's procedures to implement the TSWQS, the ED would have obtained information about this "future" development and would have realized that AIRW's application was substantially inaccurate and incomplete.

by an applicant about future residential developments.[13] That requirement is not mere surplusage, nor is it optional. Here, dense residential use of the immediately adjacent property through which the undiluted effluent would flow is not only a known future use, it is an existing use—the adjacent parcel was residential even before the groundbreaking for the Patterson Ranch residential development.[14]

The ALJs err in concluding that "the evidence showed that the Draft Permit conditions address the aesthetic water quality standard."[15] The ED's witness Ms. Lueg freely admitted that she did not consider aesthetic values, which are protected by a narrative water quality standard.[16] The TCEQ's aesthetic water quality standards are intrinsic to recreational use and public health and enjoyment of waters in the state.[17] An admitted failure to consider the protection of aesthetic values per the requirements of the TCEQ's water quality standards does not constitute any evidence (much less a preponderance of the evidence) that such values are protected. And even if narrative standards relating to foamy water might be somewhat safeguarded by including a permit

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[13] Although AIRW posits that future residential developments need not be considered, that assertion is belied by the requirement in the permit application to provide information about *future* residential development information. GT EXH. 14 at Bates p. 000219. The TCEQ's requirement for such information is not superfluous; rather, it is required by the TCEQ to allow it to make informed permitting decisions. Transcript of Hearing on the Merits—Day 3 at 631:1–13; *see also* Transcript of Hearing on the Merits—Day 3, at 631:1–13.

[14] Existing uses are those that are currently being supported by a specific water body or that were attained on or after Nov. 28, 1975. 30 TAC 307.3(a)(26). Here, recreational use by residential users of the perennial pools and unnamed tributary that will receive the proposed discharge is not only attainable by the current owners of the parcels that are being developed as single family residences in Patterson Ranch, it has been an attained use during the time that those adjacent parcels were owned by prior owners (including fishing, wading, and other aesthetic enjoyment). Transcript of Hearing on the Merits—Day 2 at 385:23–386:12; *see also* AIRW-EXH. 51, Glenn Patterson Letter. Yet, the TCEQ failed to give any consideration to the effect of the proposed discharge on aesthetic values of these perennial pools and unnamed intermittent tributary to Mankins Branch, which values are applicable to recreational uses and protected by the narrative aesthetic WQS codified at 30 TAC § 307.4(b). Transcript of Hearing on the Merits—Day 3 at 695:11–14.

[15] PFD at 20.

[16] Transcript of Hearing on the Merits—Day 3 at 695:11–14.

[17] *Id*.

condition prohibiting such conditions in the receiving stream, such conditions provide protection for only that one element of the narrative aesthetics standard, which does not give the TCEQ a pass on protecting other aesthetic values not considered by the agency.[18]

The City demonstrated, by a preponderance of the evidence, that AIRW failed to provide complete and accurate information regarding existing uses of surface waters and known future land uses, as required by the TCEQ's permit application process. By ignoring this review process, the ED failed to adequately investigate and consider existing uses of surface waters, known future development in the vicinity of the proposed package plant, and information about the receiving water. The absence of information from the Application coupled with admissions by both AIRW's and the ED's witnesses result in there being no credible evidence on which the ALJs can conclude 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 ALJs' failure to consider the absence of such critical facts from the Application, and the resulting inability to evaluate the Application, and failure to apply the necessary weight to those facts is error.

Exception No. 2. Georgetown excepts to the PFD's recommendation that the Draft Permit is consistent with the state's regionalization policy and demonstration of need for the volume requested in the Application for a new discharge permit, pursuant to TWC § 26.0282.[19]

[18] 30 TAC § 307.4(b).

[19] PFD, FOF Nos. 34–54 and COL Nos. 10–11.

The ALJs err in determining that, under the TWC, cost and Jonah's involvement as the "wastewater provider" support granting the Application.[20] The determination that cost and Jonah's involvement prevail over the State's policy to encourage and promote regional wastewater collection, treatment, and disposal systems is wrong because it: (1) ignores AIRW's untruthful response provided in Domestic Technical Report 1.1, Section 1, Part B, subpart 3 of the Application ("DTR 1.1 Section 1.B.3"); (2) is based on an incorrect interpretation of the TCEQ's requirements regarding when and what type of cost information is relevant to the regionalization analysis; and (3) gives undue weight to the role of Jonah, while ignoring its lack of qualifications and experience.

The ALJs' introduction to the regionalization issue reveals miscomprehension of what regionalization means and what evidence is relevant. The ALJs' introduction begins with a distracting discussion of whether an email or a certified letter is acceptable to document communications between an applicant and nearby wastewater providers.[21] The form of communication documentation was not a material issue in the case. True, the City pointed out that the TCEQ's TPDES application form and Instructions require applicants to attach copies of the certified letters they sent to providers having nearby facilities and the providers' responses, and AIRW attached emails instead. But the ALJs err in considering only the City's objections to form, and not its evidence about the substance of those communications.

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[20] PFD at 40; FOF Nos. 45–46, 51–54.

[21] PFD at 41; AIRW-EXH. 4 at Bates p. 00045 (Application). DTR 1.1, Section 1.B.3 has 5 subparts. The subpart requiring an applicant to submit documentation of applicant-provider communications is the third question, which asks, "If yes [there is a nearby service provider], attach copies of your certified letters to these facilities and their response letters concerning connection with their system."

DTR 1.1, Section 1.B.3, subpart 3 basically required AIRW to answer this question: "Did AIRW request wastewater service from the City, and if so, what did the City say?" To demonstrate that it requested wastewater service from the City, AIRW attached a single, two-sentence email sent to the City's Planning Director (not its Utility Director) from a person representing "W3 Luxury Living" which says, "Please site plan [sic] attached showing a 5 acre Park in place of the wastewater treatment plant. Also please let me know how the discussions went yesterday."[22] That's it. That is the only documentation provided by AIRW as "prima facie" evidence that it requested wastewater treatment service from the City. AIRW's witness who prepared the Application, Ms. Sims, admitted during the hearing that the email does not request wastewater service from the City.[23] The City also rebutted the contention that AIRW requested wastewater service from the City through the testimony of Mr. Reed. Mr. Reed was included in all, or nearly all, communications with the developer,[24] and he testified that no meaningful communication about wastewater service from the City occurred because the developer steadfastly refused to communicate with the City about it.[25] AIRW did not provide testimony from anyone involved these communications. None of AIRW's witnesses—neither Ms. Sims, Mr. Perkins, Mr. Price, nor Mr. Tuckfield—participated in discussions with the City about wastewater service from the City. The only credible evidence about the nature and extent of those discussions came from Mr. Reed, who testified that AIRW did not file an application for wastewater service with the City,[26]

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[22] AIRW-EXH. 4 at Bates p. 00077 (Application).

[23] Transcript of Hearing on the Merits—Day 2 at 356:20.

[24] GT EXH. 1 at 5:15–6:9, Bates pp. GT PFT 00007–00008.

[25] GT EXH. 1 at 11:4–13:11, Bates pp. GT PFT 000013–000015; Transcript of Hearing on the Merits—Day 1 at 22:15–23:3; 49:19–24.

[26] Transcript of Hearing on the Merits—Day 1 at 76:5–18; 81:19–82:2; 83:1–8.

and thoroughly rebutted the assertion that any meaningful or substantive discussions relating to City wastewater service occurred.[27] To drive this point home, the City's evidence included an email from the developer to Mr. Reed stating, "We do not desire or require connection to the Georgetown wastewater."[28] It is impossible to construe that statement as a request for wastewater service, and the ALJs' failure to consider the City's rebuttal evidence is error.

In response to DTR 1.1, Section 1.B.3, subpart 3, AIRW also provided the City Planning Director's response to W3 Luxury Living's email quoted above.[29] The City's emailed reply came a mere 25 hours later, an incredulously short time to analyze a request to provide 0.2 MGD of wastewater treatment services to a 128+ acre tract. The City's reply email does not mention any technical particulars about connecting to the City's wastewater system (e.g., what improvements are needed, what connection and other fees apply, etc.) Instead, the City's email addresses availability of platting exemptions, paraphrases the requirements of Section 13.05 of the City's Unified Development Code ("Section 13.05")[30] regarding wastewater service to land in its Extraterritorial Jurisdiction "(ETJ"), explains that "deferred annexation" is not an acceptable alternative to Section 13.05 at this time, and invites further dialog.[31] Nothing in the City's reply email conveyed an express or implied denial of service.

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[27] Transcript of Hearing on the Merits—Day 1 at 52:21–23; 54:12–14 and 19–23; 66:10–13.

[28] GT EXH. 9.

[29] AIRW-EXH. 4 at Bates p. 00077 (Application).

[30] Section 13.05 states, "All development, where desired or required, shall be served with an approved public wastewater system, including but not limited to, wastewater lines, manholes, force mains, and lift stations, consistent with the Comprehensive Plan. Properties in the ETJ that desire or require wastewater service from the City of Georgetown shall first submit a petition for voluntary annexation, in accordance with Section 3.25 of this Code. All improvements shall be designed and constructed according to the City's Construction Manual." GT EXH. 1 at 11:11–14 (Bates p. GT PFT 000013).

[31] AIRW-EXH. 4 at Bates p. 00077 (Application).

But the City's reply email contains one word that derailed the regionalization analysis—"annexation." Throughout this case, the City has had a scarlet "A" pinned to it for even uttering the word, much less having a service condition containing it. That word shifted the focus from whether wastewater service was available from the City's existing system, to whether the City had adopted a reasonable service condition. On seeing the word in the City's email, the ED and the ALJs proceeded as if the questions in DTR 1.1, Section 1.B.3, subpart 3 were, "Explain why annexation is bad from your personal point of view." Or, "Describe what additional inducements or concessions City offered you to connect to its system and why they were not enough for you?" Or, "How long and hard did the City negotiate against itself to accommodate your project?" The ALJs cast aspersions on the City for adopting and raising Section 13.05, not negotiating against itself long and hard enough to change its provisions for this developer, and not processing a waiver, variance, or exception from Section 13.05 in the absence of an application or even a request from the developer to do so. The City's rebuttal evidence demonstrated that its ordinances contain clear, codified processes by which developers can secure relief from staff decisions and stringent applications of ordinances, and that the developer failed to do so.[32] AIRW did not dispute the City's evidence showing that it never applied for a waiver, variance or exception using the City's codified processes. The ALJs ignored this undisputed evidence and instead describe a scenario to the Commission intended to convey that the only relief from Section 13.05 available to the developer was to submit a request for annexation and hope the City Council denied the request.[33] The ALJs' hypothetical is prejudicial, irrelevant and inappropriate for addressing the State's policy

[32] GT EXH. 35 (City's UDC, excerpts); Transcript of Hearing on the Merits—Day 1 at 52:21–23; 54:12–14 and 19–23; 66:10–13; 75:13–15; 76:5–18; 81:19–82:2; 83:1–8.

[33] PFD at 41.

on regionalization. The City never suggested, nor does the record support, a contention that a developer's only remedy was to request annexation and see what happens.

Instead of applying for a waiver, variance, or exception to Section 13.05 using the City's normal processes, the only alternative to compliance with Section 13.05 posited by the developer was a "deferred annexation agreement."[34] The City demurred because an agreement to defer annexation is not one of the annexation processes included in Chapter 43 of the Texas Local Government Code, and as such, would likely be legally unenforceable.[35] When the City declined to enter into an illegal agreement, Mr. Reed testified that the developer essentially shoved its chair away from the negotiating table, walked away, and never came back.[36] Yet, the ALJs find that the developer's offer to sign an agreement that does not comport with state law as an alternative to a disputed service condition is more reasonable than the City declining to enter into such an agreement.[37]

The ALJs go on to consider whether Section 13.05 is, in essence, a codified, pre-emptive denial of wastewater service.[38] The ALJs conclude that they do not know the answer to that question.[39] Indeed, the Commission's direction on that question is utterly inconsistent—deciding one way in Crystal Clear and another way in *Regal* when construing the same San Marcos

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[34] Transcript of Hearing on the Merits—Day 1, at 45:5–6.

[35] GT EXH. 1 at 12:7–16 (Bates p. GT PFT 000014). Chapter 43 of the Texas Local Government Code, governing annexation, does not mention "deferred annexation." TWC ch. 43.

[36] Transcript of Hearing on the Merits—Day 1, at 52:21–23; 54:12–14 and 19–23; 66:10–13.

[37] PFD at 41.

[38] PFD at 42.

[39] PFD at 42.

ordinance in both cases.[40] But the ALJs again demonstrate the distance they have strayed from a reasonable regionalization analysis and defensible reading of the TCEQ's TPDES application form and Instructions by stating that they reach the issue of cost only because they sidestepped the question of whether the City denied service by enacting Section 13.05.[41] That is a misreading of the TPDES application and Instructions. It also fails to hold AIRW accountable for providing a false answer to DTR 1.1, Section 1.B.3, subpart 4, which asks: "Does a permitted domestic wastewater treatment facility or a collection system located within three (3) miles of the proposed facility currently have the capacity to accept or is willing to accept the volume of wastewater capacity proposed in the application?"[42] A YES answer requires applicants to provide cost information.[43] But AIRW falsely answered NO.[44] It was undisputed that the City currently has the capacity to accept the volume of wastewater sought in the Application and does not need to expand its facilities to do so.[45] Allowing AIRW to proffer falsehoods with impunity is not

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[40] *An Order Granting the Application by Crystal Clear Special Utility District and MCLB Land, LLC for TPDES Permit No. WQ001526602 in Hays County, Texas*, TCEQ Docket No. 2020-0411-MWD; SOAH Docket No. 582-20-4141 (Jun. 14, 2021) ("*Crystal Clear*") FOF No. 47. "San Marcos's response requiring annexation of the Subdivision was property considered a denial of service by the Applicants and the ED's staff."); cf. *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) ("*Regal*") (FOF No. 38 "The City [of San Marcos's] ordinance requiring annexation for wastewater service is not tantamount to a denial of service because the requirement may be waived by City Council.").

[41] PFD at 42.

[42] AIRW-EXH. 4 at Bates p. 00045 (Application).

[43] If YES, the application requires an applicant to submit "an analysis of expenditures required to connect to a permitted wastewater treatment facility or collection system located within 3 miles versus the cost of the proposed facility or expansion." AIRW-EXH. 4 at Bates p. 00045 (Application).

[44] AIRW-EXH. 4 at Bates p. 00045 (Application).

[45] AIRW's expert concurred that the City's system had sufficient current capacity to provide wastewater service to the proposed development without the need to expand its facility. AIRW-EXH. 17 at 9:30–10:1 (Bates pp. AIRW000136–137).

consistent with the Commission's stance in *Regal*[46] and demonstrates the ALJs' failure to consider and properly weigh AIRW's credibility.

a. The ALJs err in finding costs support granting the application.

After the City filed its protest, and after the close of the public comment period, the ED finally issued a notice of deficiency requesting the cost information that AIRW was required to submit with the Application.[47] The City rebutted AIRW's cost evidence, showing that it was both unreliable and irrelevant. The ALJs err in: (1) representing to the Commission that the cost of cost of utilizing the Facility were merely "slightly more" than the cost of utilizing the City's wastewater system; and (2) in considering and giving major weight to irrelevant cost information pertaining to the developer's alleged lost profits.

It was undisputed that a new force main and lift station are the only improvements needed to connect to the City's system.[48] The ALJs' conclusion that utilizing the new Facility will cost "slightly more" than utilizing the City's system ignores the City's rebuttal evidence showing that the cost of the connecting improvements were overstated by AIRW, and failed to include the contractual commitment to pay Jonah's large connection fees per the Non-Standard Service Agreements ("NSSAs").

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[46] *Regal* at 5 (FOF No. 42) ("Regal provided false information in the Application when it answered Question 1.B.3. on Domestic Technical Report 1.1 and stated that there was not a permitted domestic wastewater treatment facility or a collection system located within a three-mile radius of the proposed facility with either the capacity to accept, or the willingness to expand to accept, the volume of wastewater proposed in the Application.")

[47] AIRW-EXH. 4 at Bates p. 00103 (Application).

[48] AIRW-EXH. 17 at 9:30–10:1 (Bates pp. AIRW000135–AIRW000136); GT EXH. 19; *see also* GT EXH. 3 at 17:4–8 (Bates p. GT PFT 000087); 23:17–24:9 (Bates pp. GT PFT 000093–GT PFT 000094); and 25:4–17 (Bates p. GT PFT 000095).

The City's expert, who has spent nearly his entire 40 year career designing and overseeing the construction of the City's wastewater system,[49] estimated that it would cost $2,324,000 to construct the force main and lift station,[50] or over $1,000,000 less than the inflated cost estimate provided by AIRW's witness.[51] That is not a "slightly" different estimate. The reliability of AIRW's witness's testimony was further rebutted when the City demonstrated that in preparing his cost comparison, AIRW's witness completely omitted Jonah's impact, inspection, and connection fees from its Facility cost estimate, but included those fees in his City cost estimate.[52] Jonah's connection fees alone are a staggering $2,400,000.[53] Jonah charges other fees as well, such as inspection fees (at 2% of certain construction costs), service investigation fees, plan review fees, and plan re-submittal fees. These fees are not speculative, the fees are contractually required by the NSSAs.[54] AIRW did not dispute that Jonah's fees must be paid to utilize the Facility. Thus, the actual cost of utilizing the Facility is at least $2,684,075 more than the cost of connecting to the City's system. The ALJs' characterization of the cost of utilizing the Facility as "slightly more" than the cost of utilizing the City's system is a misrepresentation of uncontroverted record evidence and is error.

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[49] GT EXH. 3 at 3:18 (Bates p. GT PFT 000073) and 4:9–6:8 (Bates pp. GT PFT 000074–000076).

[50] GT EXH. 3 at 29 (Bates p. GT PFT 000098).

[51] Mr. Perkins estimated the cost to construct the Lift Station and Force Main at $ 3,728,800. AIRW-EXH. 22.

[52] AIRW-EXH. 21 (Estimated Construction Cost Comparison) (showing zero values for Jonah's impact, inspection and connection fees).

[53] AIRW-EXH. 43 at Bates pp. AIRW000576, AIRW000609 (NSSAs). The City's connection fees are $3,200. AIRW-EXH. 21.

[54] AIRW-EXH. 43 (NSSAs).

b. Alleged diminution in property value and lost profits are not relevant "costs."

The ALJs erroneously considered and unjustifiably over-weighted AIRW's testimony regarding its alleged "cost" to comply with Section 13.05. The type of cost information that the ALJs found persuasive, the payment of property taxes if annexation is an un-waivable condition of receiving wastewater service from a city, is without precedent and ventures into a realm far outside the purview of the Commission. The ALJs placed great weight on AIRW's purely speculative testimony that if the developed project were annexed, the property taxes due over the life of the project would be approximately $20 million, and this property tax burden could reduce the developer's profits in a future sale of the developed property.[55] The City rebutted this testimony with evidence showing: (1) AIRW's position is inconsistent with the Commission's historical stance as articulated in the ED's Response to Comment No. 7 in this case that, "The TCEQ does not have jurisdiction to address . . . property values . . . in the wastewater permitting process;"[56] (2) AIRW's witnesses who proffered the evidence admitted they were unqualified to quantify lost profits, had never relied on such information before, and either had not read or did not understand the report upon which the alleged lost profit calculations were based;[57] and (3) a developer's speculation about its profit margin in a future sale is an unprecedented and incorrect interpretation of the kind of cost information relevant to regionalization.

A firm stance that the Commission has no jurisdiction over property values undergirds the Commission's decades-long practice of denying party status to landowners along a discharge route

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[55] PFD at 43–44.

[56] ED's Response to Comments at 12 (Response to Comment No. 7).

[57] Transcript of Hearing on the Merits—Day 2 at 365:18–366:9; and at 486:6–18.

who complain only of diminution of their property values and directing those landowners to pursue civil remedies in other forums. The ED has, itself, acknowledged that "[t]he TCEQ does not have jurisdiction to review the effect, if any, the discharge might have on property values of downstream landowners in reviewing a domestic wastewater discharge permit application."[58] If the ED were to consider profitability as relevant to the cost of receiving wastewater service, it would, in fact, be using its authority to protect the financial gains of the project proponents but not for protecting the equally legitimate property value interest of adjacent or downstream landowners burdened with the effluent. Neither AIRW nor the ED have provided any rationale for such novel, selective, and arbitrary consideration of the property values and associated financial interests of permit applicants. If the Commission agrees with the ALJs' determination that consideration of diminution in property value and a developer's profit margin when it sells the developed land served by a package plant is within its jurisdiction, it would be reversing decades of Commission precedent. The result would be to open the floodgates to NIMBY claims from protestants, which the Commission has steadfastly held at bay. Nonetheless, in the face of such precedent, the ALJs encourage the Commission to consider the effect of a wastewater permitting decision on property values of developers who build wastewater treatment plants to serve a single development, then flip the project and walk away, and to go even further—to take measures to ensure such a developer's property values remain as high as possible.

The ALJs have wholly failed to consider the admissions the City elicited on cross examination in which AIRW's witnesses admitted that they were unqualified to testify as to the

[58] ED's Response to Comments, City of Dripping Springs WQ00144088003 (Response to Comment No. 135) (Oct. 31, 2017), available online at https://www.tceq.texas.gov/assets/public/agency/Dripping-Springs-WQ00144880030-RTC.pdf.

alleged lost profits information included in the Application. Neither are qualified by education or experience to testify about property values or alleged lost profits.[59] Neither personally prepared or oversaw the preparation of the report from which the calculations were derived.[60] Both admitted that the report was not the type of information they had ever relied on before.[61] Mr. Perkins testified that he had not read the report as it was really long.[62] The City did read the report, and as the ALJs correctly noted, the City demonstrated that the report did not support many of AIRW's claims it was purported to support.[63] But only the $20 million amount, appearing in the report's executive summary, caught anyone's attention. The $20 million property tax amount was purported to be the cumulative amount of property taxes that would allegedly be paid over the life of the fully developed project if annexed, the payment of which AIRW asserted would cause the developers to lose money when they flipped the developed project.[64]

The ALJs' analysis reveals that they have a profound misunderstanding of the State's regionalization policies codified in TWC §§ 26.003 and 26.0282. Nothing in the record shows that the developer's profit margin considerations should outweigh the State's policy to encourage and promote wastewater regionalization. The proposed development is 100% residential.[65] Development of the project will not create new long-term jobs or boost the economy of the State

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[59] AIRW-EXH. 8 at 1:12–17 (Bates p. AIRW000005); AIRW-EXH. 9; AIRW-EXH. 17 at 1:12–23 (Bates p. AIRW000127); and AIRW-EXH. 18.

[60] Transcript of Hearing on the Merits—Day 2 at 365:18–366:9 and 486:6–18.

[61] *Id*.

[62] Transcript of Hearing on the Merits—Day 2 at 486:6–18.

[63] PFD at 43.

[64] AIRW-EXH. 23 at Bates p. AIRW000163 (Appraisal Report).

[65] AIRW-EXH. 4 at Bates p. AIRW00044 (Application).

or region in any way. It does nothing to promote economic development of the State or region. Profitability is not the same as economic development. The fact that the developer may (allegedly) make less money when it flips the developed property is irrelevant. The ALJs err by creating and using an entirely new framework to analyze the regionalization issue—a framework that opens Pandora's Box.

The ALJs' inability to correctly identify and maintain focus on the purpose of the Legislature's regionalization directive renders their analysis of the regionalization issue fundamentally flawed. The focus of regionalization scrutiny should be consistent with the TCEQ's prime directive—to implement the constitution and laws of this state relating to the conservation of natural resources and the protection of the environment.[66] If the Commission wants to add more sources of point source pollution, promote more costly wastewater alternatives, add review of developer's business plans and projected financials to the TCEQ's duties, usurp service providers' authority to plan and manage their systems, process applications from requestors who have not pursued or exhausted local remedies, then the Commission should adopt the ALJs' vision of regionalization. The result of adopting the PFD will be to ring the outskirts of every city in Texas with package plants. And that result will sit squarely on the shoulders of the TCEQ, not cities. But, if the Commission wants to reduce point sources of pollution, facilitate use of existing less costly infrastructure, require exhaustion of local administrative remedies before involving the TCEQ, and not dot Texas with unneeded package plants, then the Commission should reject the PFD in its entirety. The ALJs' reframing of the contents of the TPDES application have made this case a referendum on municipal utility and development planning, not a case about water quality

[66] TWC §§ 5.012, 5.013.

or protection of human health and the environment. This is a profound misunderstanding of the issues and has put the Commission in an untenable position of not performing its legislative obligations. If the PFD is adopted, the Commission is in grave danger of straying far afield of its duties and outside of its jurisdiction, while neglecting issues and responsibilities that are squarely in its purview.

c. The ALJs err in determining that using Jonah supports regionalization.

The only factor other than cost that the ALJs cite in support of its decision to recommend that the Application be granted is that Jonah became involved. Relying on Crystal Clear, the ALJs opine that Jonah is like Crystal Clear and in the Crystal Clear case having Crystal Clear involved was given great weight.[67] But the ALJs cannot sustain their own argument. The extent of the ALJs' analysis is as follows: SUD=SUD; water=wastewater. The type of entity that Jonah is and whether it has a water Certificate of Convenience and Necessity ("CCN") are completely irrelevant to the wastewater regionalization issue. At least Crystal Clear owned and operated at least one other wastewater treatment plant.[68] That is not the case with Jonah. The record contains ample, unrefuted evidence demonstrating that these two factors, even if relevant, are completely overshadowed by Jonah's lack of wastewater qualifications. Not even Jonah disagreed with any of the following statements:

[67] PFD at 44–45.

[68] *Crystal Clear* at 8, FOF No. 55.

- Jonah has constructed exactly ZERO wastewater treatment Facilities;[69]
- Jonah operates exactly ZERO wastewater treatment facilities;[70]
- Jonah owns exactly ZERO wastewater treatment facilities;[71]
- Jonah owns exactly ZERO wastewater treatment plant permits;[72]
- Jonah does not provide wastewater treatment services to the retail customers in its own sewer CCN; instead, the City of Hutto provides wastewater treatment services for the Jonah's retail sewer customers;[73]
- Jonah's sum total of wastewater treatment plant operation experience consists of filling in as operator for a plant owned by a neighboring city when it was between operators,[74] and a few days at Mauriceville after Hurricane Harvey;[75]
- Jonah provides collection system maintenance services to a municipal utility district, but wastewater treatment services for those customers is provided by the City of Round Rock;[76] and

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[69] Transcript of Hearing on the Merits—Day 1 at 253:7–9.

[70] *Id*. at 253:10–11.

[71] *Id*. at 253:12–14.

[72] *Id*. at 254:12–14.

[73] *Id*. at 254:25 and 255:20–24. On July 25, 2022 Jonah filed a petition with the PUC to transfer its entire, and only, sewer CCN area (approximately 1,485 acres) to the City of Hutto (PUC Docket No. 53870). https://interchange.puc.texas.gov/search/filings/?UtilityType=A&ControlNumber=53870&ItemMatch=Equal&DocumentType=ALL&SortOrder=Ascending

[74] *Id*. at 25315–22.

[75] *Id*. at 254:1–8.

[76] *Id*. at 255:1–5.

- Jonah has exactly one employee with a current wastewater treatment plant operator license, its General Manager, Mr. Brown.[77] Even if every other Jonah employee rushed to get such a license, none of them would have the experience in wastewater treatment plant permitting, ownership, and operations.

Contracting with an inexperienced wastewater treatment services provider does not meet or advance the legislature's wastewater regionalization goals.

The City's rebuttal evidence demonstrated that the Applicant's "cost" information and Jonah's involvement do not outweigh the the Legislature's policy directive to the TCEQ codified in the TWC to encourage and promote wastewater regionalization.[78] A Final Order concluding otherwise is error.

Exception No. 3. Georgetown excepts to the PFD's recommendation that the Draft Permit is protective of the health of the nearby residents.[79]

The ALJs also err in recommending that the Draft Permit is protective of the health of the nearby residents.[80] The City's rebuttal evidence showed that nothing in the record confirms the site-specific conditions—residential use of adjacent land over which the wastewater would flow (not through a surface water, but across dry land) were disclosed much less evaluated. The PFD concludes that "the City did not provide any actual evidence to show that the Draft Permit would

[77] GT EXH. 29, Jonah Water SUD's Response to AIRW 2017-7 LP's Request for Production Nos. 4 and 5.

[78] PFD at 40; FOF Nos. 45–46, 51–54.

[79] PFD, FOF Nos. 56–59 and COL No. 9.

[80] PFD at 49.

not be protective of the health of nearby residents," ignoring the City's rebuttal evidence demonstrating that the wastewater would flow over dry land and that the protection of the adjacent landowners was not considered, in light of the dry land conditions.[81]

The ALJs also errs by concluding that that the required *E. coli* sampling frequency is adequate to protect the health of nearby residents. The determination is based solely on conclusory statements from AIRW and the ED. The monitoring frequency for *E. coli* and nutrient limits that stimulate excessive algal growth are not frequent enough to promptly detect and eliminate discharges that violate those limits. However, even if more stringent conditions were incorporated, the information currently available to the ED (i.e., the incomplete and inaccurate Application) may not be sufficient to allow the ED to identify all existing uses implicating public health concerns, identify the relevant water quality standards, and derive other appropriate permit limits.

The City demonstrated that the Draft Permit should not be issued until the ED receives or collects additional information regarding the receiving water and existing uses, analyzes the public health concerns associated with such existing uses, and derives permit limits to ensure that the Draft Permit is protective of the health of nearby residents. The PFD is in error by concluding otherwise.

[81] The USGS map for this area provided by AIRW (AIRW-EXH. 4 at Bates p. 00061) and another offered by Georgetown (GT EXH. 32) show that the unnamed tributary to Mankins Branch does not extend upstream of the perennial ponds on the adjacent Patterson Ranch property. See also, AIRW-EXH. 51 (public comment noting "developers of this wastewater treatment plant plan to discharge up to 200,000 gallons of treated sewage per day through our dry creek making it wet with treated sewage year round. That will create an environmentally unstable barrier to both sides of our ranch, and a nightmare for us and the livestock to access both sides.").

Exception No. 4. Georgetown excepts to the PFD's recommendation that the Draft Permit complies with applicable requirements regarding nuisance odors.[82]

The ALJs err in concluding that the Draft Permit complies with applicable requirements regarding nuisance odors.[83] The PFD relies only on the conclusory statements of Mr. Perkins and Mr. Cooper in its conclusion, and improperly concludes that the provisions of TWC § 26.030(b) do not apply. Regarding the buffer zone map, the City demonstrated that the buffer zone map included in the Application did not show the individual wastewater treatment units comprising the Facility, making it impossible to determine whether the buffer zone would be maintained.

The ALJs also fail to require compliance with TWC § 26.030(b), which requires consideration of 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 any park, playground, or schoolyard. The ALJs invoke a narrow interpretation of TWC § 26.030(b), stating that there are "no parks, playgrounds, or schools on the Patterson Ranch property at issue."[84] This is wrong. The City's rebuttal evidence includes a plat of the Patterson Ranch Subdivision which shows that Georgetown Independent School District ("GISD") owns "Lot 1" in that subdivision, an 856,938 square foot tract of land.[85] GISD's school is plainly visible in the aerial photograph at GT EXH. 7.[86] The school is also clearly visible in the aerial photograph

[82] PFD, FOF Nos. 60–61 and COL No. 12.

[83] PFD at 51–52.

[84] PFD at 51.

[85] GT EXH. 12 (Plat for Patterson Ranch Subdivision.

[86] GT EXH. 7.

in the report prepared to support the Application.[87] The City's rebuttal evidence regarding the presence of a school is overwhelming. To ignore that evidence is error and indicative of the ALJs granting of undue deference to AIRW and the ED even in the face of a plat signed by GISD and photographic evidence of the existence of a school.

Moreover, neither the Water Code, nor the Parks and Wildlife Code, provide a definition of park, playground, or schoolyard, therefore we must look to the terms "read in context and construed according to the rules of grammar and common usage."[88] The Cambridge Dictionary defines a "park," as "a large area of land with grass and trees, usually surrounded by fences or walls, and specially arranged so that people can walk in it for pleasure or children can play in it."[89] It is uncontested that the proposed discharge route goes through a "green space"[90] as well as a residential development.[91] The ALJs split hairs in concluding that a "green space" is not a "park," when it very much is.

For these reasons, it is clear that record evidence does not support the ALJs' contention that, "A preponderance of 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. Therefore, section 26.030(b) does not apply." Rather, the record evidence supports the exact opposite contention. TWC § 26.030(b) does apply, and nothing in the record establishes that possible adverse effects of the discharge were considered by either AIRW or the ED. There is

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[87] AIRW-EXH. 23 at Bates p. AIRW 000175 (Colliers Report).

[88] Tex. Gov't Code § 311.011(a).

[89] https://dictionary.cambridge.org/us/dictionary/english/park

[90] Transcript of Hearing on the Merits—Day 2 at 417–418.

[91] Transcript of Hearing on the Merits—Day 2 at 397.

insufficient evidence to find that the Application complies with TWC § 26.030(b), and the ALJs commit error in concluding otherwise.

Exception No. 5. Georgetown excepts to the PFD's recommendation that the application is substantially complete and accurate.[92]

The ALJs err by concluding "that the preponderance of the credible evidence proves that the Application is substantially complete and accurate."[93] The ALJs' analysis relied on an inappropriate definition of "substantial" and failed to recognize relevant TCEQ precedent that establishes standards for accuracy in applications such as this.

The ALJs relied on a common usage definition of "substantial," from a pedestrian dictionary. The definition found by the ALJ includes six subparts, and selected the definition that goes to quantity: "considerable in extent, amount, or value; large in volume or number."[94] Under that definition the lengthiest application will prevail. The definition of "substantial" cited in the PFD actually includes a much more appropriate definition of "substantial," one that goes to quality, not quantity: "Important, essential, and material; of real worth and importance."[95] That is the definition of "substantial" that the ALJs should have applied.

It is reasonable to assume that the TCEQ's application form does not require superfluous information, and that the agency's decisions about the design of its Application Form and content

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[92] PFD, FOF No. 63–64 and COL No. 13.

[93] PFD at 60.

[94] PFD at 60.

[95] *Id*. at fn. 234. (Emphasis added).

of the Instructions should be afforded respect. The TPDES program and the water quality that the program is intended to safeguard depend on the accuracy and completeness of permit applications—every part of the application is important. As outlined by the City in its briefing and throughout this proceeding, the four corners of the Application lack essential and material information, and certain essential and material information was patently false.

In recommending that the Commission issue a draft permit based on an inaccurate and incomplete Application, the ALJs urge the Commission to give future applicants carte blanche to cherry pick the parts of the Application they want to complete, provide none or only some of the information required, and provide false information with impunity. It also nullifies the import of the certification statement that Applicants must sign (averring that, to the best of an applicant's knowledge and belief, the application is true, accurate, and complete).

The Application's numerous deficiencies and inaccuracies include:

- Identifying the wrong facility operator (Aqua Texas);
- Not identifying Jonah as the known Facility operator having overall responsibility of the Facility operations per the fully executed NSSAs;
- Not identifying 600 Westinghouse Investments LLC as an owner of land where a fixture of the Facility, the 12" diameter effluent pipe, will be located;
- Not identifying Jonah or 600 Westinghouse Investments, LLC as co-applicants;
- Not including the information pertaining to Jonah or 600 Westinghouse Investments, LLC required of co-applicants;
- Not including a lease agreement or deed-recorded instrument evidencing consent of 600 Westinghouse Investments, LLC to have the 12" effluent pipeline on its property;
- Inappropriately characterizing the discharge route between the end of the culvert and Pond #1 as an "unnamed tributary, in the absence of evidence

demonstrating that this portion of the proposed discharge route is shown as a watercourse on USGS maps[96] or had been field inspected to verify that it had bed and banks and other characteristics of a state-owned watercourse;

- Not demonstrating that AIRW has authority from the owner of the land along the proposed discharge route between the end of the culvert and Pond #1 to discharge treated effluent onto its private property;

- Not including the information required for a TLAP permit, required when discharge is to the ground for a portion of the proposed discharge route, rather than to a state-owned watercourse;

- Not including an accurate list of adjacent landowners entitled to receive notice of the Application;

- Falsely stating that AIRW owned all of the land where the proposed Facility would be located;

- Falsely stating that AIRW owned all of the land where the proposed development would be located;

- Erroneously representing that the Facility site was within the study area of the flood plain map relied upon to prepare the Application;

- Erroneously stating that the effluent would not discharge to a city, county, or state highway right of way or drainage ditch, when the evidence showed that it would discharge to the City's right-of-way for existing CR 110[97];

- Not accurately identifying existing uses of the receiving waters; and

- Falsely stating that there was no permitted domestic wastewater treatment plant located within three (3) miles of the proposed facility that currently has the capacity to accept or is willing to expand to accept the volume of wastewater proposed in the application.

[96] AIRW-EXH. 4, at Bates p. 00023 (USGS Topographic Map showing no absence of watercourse between end of effluent pipe and Pond #1).

[97] AIRW-EXH. 4, at Bates p. 00010.

a. Georgetown excepts to the ALJs' refusal to recognize that Jonah and 600 Westinghouse Investments, LLC are required co-applicants.

30 TAC 305.43(a) provides:

> (a) It is the duty of the owner of a facility to submit an application for a permit or a post-closure order. However, if the facility is owned by one person and operated by another and the executive director 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 Texas Pollutant Discharge Elimination System permits, it is the duty of the operator and the owner to submit an application for a permit.** (Emphasis added).

Adding the operator as a co-applicant to TDPES permit applications is not discretionary. 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, AIRW.[98] Per the NSSAs, Jonah will have overall responsibility for operation of the Facility.[99] Therefore, Jonah is a required co-applicant.

The rules of statutory construction equally apply to the Commission's rules, and the rules' specific terms relating to TPDES applications overrides the more general statement giving the ED discretion to determine proper permit applicants. The rule expressly required the operator having overall responsibility for the operation of a facility and the facility owner to submit an application for a permit. The ED has no discretion to vary that requirement, which is clearly set forth in the adopted rule, and the ALJS err in allowing the rule to be violated with impunity. It is important to know who the plant operator will be, as they will have primary responsibility for permit compliance. Jonah, not AIRW, is clearly contemplated to be the operator of the facility if the

[98] GT EXH. 14 at 22 (Bates p. GT PFT 0000211) (Instructions).

[99] AIRW-EXH. 43 (NSSAs)

permit is granted.[100] Per the NSSAs, Jonah will become the permit owner, facility owner, and plant site owner.[101] The failure to identify Jonah as a co-applicant is a material inaccuracy of the Application. The TCEQ rules applying to permit transfers are irrelevant. This is not an application to transfer a permit. It is an application for a new permit for which the operator is already known to the Facility owner and a contract fully executed. The involvement of Jonah in this proceeding is relied on by the ALJs to support significant findings and conclusions regarding regionalization, yet inappropriately disregarded by the ALJs when considering whether the Application complies with the non-waivable directive in 30 TAC 305.43(a). This is error.

The ALJs also err in concluding that the two landowner-developers, 600 Westinghouse Investments, LLC, a Nevada corporation ("600 Westinghouse") and 800 Westinghouse Investments, LLC, a Nevada corporation, ("800 Westinghouse") are not required co-applicants. AIRW contends that those entities are affiliates of AIRW.[102] However, according to AIRW, 600 Westinghouse and 800 Westinghouse apparently are not merely affiliates but operate collectively as if a single entity in the case of the Application. Where two related entities operate as if essentially fused as one[103]—or one functions as a "mere instrumentality"[104] of the other—the law recognizes that the controlled entity is an alter ego of the entity exercising such control.[105] The

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[100] AIRW-EXH. 43, at Bates p. AIRW000568, 578, 601, and 611.

[101] *Id*.

[102] PFD at 3, 65.

[103] *Ruel v. Sahara Hotel*, 374 F.Supp. 995, 1000 (S.D. Tex. 1974) (entailing integrated subsidiaries that "may, on paper, look like separate entities for bookkeeping, convenience, and tax purposes, [but] are for all operational purposes one big, albeit well organized, corporation controlled from the top" by the same person(s)).

[104] *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1159 (5th Cir. 1983).

[105] *Id.*; *PHC-Miden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 175 (Tex. 2007); *BMC Software, N.V. v. Marchand*, 83 S.W.3d 789, 799 (Tex. 2002); *see also Sahara Spiritual Trust v. U.S.*, 910 F.2d 240, 246 (the alter-ego

alter-ego doctrine recognizes that a parent corporation exerts such domination and control over its subsidiary that the two do not constitute separate and distinct entities, but are one and the same.[106] The operative inquiry into determining whether the subsidiary is in reality an alter-ego of a parent is whether the two entities are in fact mere divisions or branches of a larger whole.[107] Here, it is clear that the developers, 600 Westinghouse and 800 Westinghouse, along with AIRW, are not three autonomous entities but rather completely integrated, and the appearance of corporate autonomy is clearly and admittedly superficial. Matthew Hiles is the vice president of all three entities—AIRW, 600 Westinghouse, and 800 Westinghouse—and he executed the signature pages on the Application for AIRW and the NSSAs for each of the Westinghouse entities.[108] The relationship was understood by Jonah's General Manager, who said that AIRW and the developer are the same, stating, "the same developer, the same owner . . . It's just the names have changed."[109] Even counsel for AIRW refers to the developers and AIRW as "one and the same person[.]"[110]

For these reasons, it is inconsistent for the ALJs to conclude that 600 Westinghouse and 800 Westinghouse are not required co-applicants despite their ownership interests in the project area (which was not disclosed by AIRW in the Application),[111] their representations to Jonah as

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doctrine exists when the parent has an ownership interest in the other and the two entities operate as one); *Bridas S.A.P.I.C. v. Turkmenistan*, 477 F.3d 411, 416 (5th Cir. 2006).

[106] *Hargrave* at 710 F.2d at 1159.

[107] *PHC-Miden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 174 (Tex. 2007); *Licea v. Curacao Drydock Co.,* 952 F.3d 207, 212-13 (5th Cir. 2015) (Considerations for substantive veil piercing are less stringent than that of jurisdictional veil piercing, which involves Constitutional due process considerations).

[108] PFD at 56, fn. 211; Transcript of Hearing on the Merits—Day 3 at 639–640.

[109] Transcript of Hearing on the Merits—Day 2 at 299.

[110] Transcript of Hearing on the Merits—Day 1 at 207:3.

[111] The Application shows the boundary of the project site to include land owned by AIRW, 600 Westinghouse, and 800 Westinghouse, yet incorrectly identifies AIRW as the record owner of all of the project property. See AIRW

the real parties in interest in the NSSAs,[112] and AIRW's representations to the ALJs and the ED's acknowledgement that they are "one and the same" as AIRW. Having inserted their financial and property ownership interests in this project,[113] 600 Westinghouse and 800 Westinghouse are required co-applicants along with (or in place of) AIRW; because these "affiliates" were not included, the Application is not substantially complete or accurate.

The question of who AIRW or Applicants are is an important one, and an incomplete or obfuscated answer to that question should result in a finding of that the Application is substantially incomplete and contains inaccurate information; finding the very opposite is error.

b. Georgetown excepts to the ALJs' conclusion that AIRW provided substantially sufficient information showing the need for the permit.

The City's rebuttal evidence showed that AIRW failed to provide a thorough discussion of the need of the proposed package plant, population estimates and/or projections used to derive the flow estimates and anticipated growth rates for developments, and provided minimal information on the anticipated construction start date and operation schedule for each phase being proposed, and anticipated growth rate.114 Other than flow projections, none of the other information required in DTR 1.1, Section 1, Part A is in the four corners of the Application, all of the other

EXH. 4 at Bates p. 00063-00064 (Application). Compare GT EXH. 37 at 5–37 (all three deeds) and AIRW EXH. 43 (attaching 600 Westinghouse and 800 Westinghouse deeds).

[112] AIRW EXH. 43 (NSSAs).

[113] The ALJs find that the profitability of the 600 Westinghouse's and 800 Westinghouse's residential developments (the only land the Facility would serve) outweigh the State's interest in regionalization. And the NSSAs noted that 600 Westinghouse and 800 Westinghouse were the permit applicants (rather than AIRW) and they have many similar developments in Texas and elsewhere, making their compliance histories relevant in the instant case.

[114] GT EXH. 2, at 22–23.

material justifying need was presented outside of the Application. DTR 1.1, Section 1, Part A of the Application is incomplete and the ALJs err by concluding otherwise.

c. Georgetown excepts to the ALJs' failure to recognize material falsehoods in the Application pertaining to regionalization.

The ALJs' failure to acknowledge the material falsehoods in the Application relating to the regionalization analysis is flagrant error. It is in direct contradiction of the Commission's *Regal* Order.[115] In the *Regal* Order the Commissioners found that Regal LLC provided numerous falsehoods in its application. Specifically, the Commissioners found that Regal LLC provided false information in its application when it stated that: (1) no organized wastewater treatment facilities existed that were capable of providing service to the area;[116] (2) there were no domestic permitted wastewater treatment facility or collection systems located within a three-mile radius of the proposed facility;[117] and (3) there was no permitted domestic wastewater treatment facility or a collection system located within a three-mile radius of the proposed facility with either the capacity to accept, or the willingness to expand to accept, the volume of wastewater proposed in the application.[118] Instead, the Commissioners found that Regal LLC knew the City had a permitted system within a three-mile radius of the proposed facility, and that the City's system had

[115] 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) ("*Regal* Order").

[116] *Id*., at 6, FOF No. 40.

[117] *Id*., at 6, FOF No. 41.

[118] *Id*., at 6, FOF No. 42.

the capacity and the willingness to accept Regal LLC's proposed wastewater.[119] Therefore, the Commissioners found that Regal LLC should have provided additional information regarding San Marcos' system, including information on its response to a request to connect to their system.[120] The Commissioners also found that Regal LLC should have provided a comparative cost analysis of obtaining service from San Marcos versus constructing a new facility.[121] Despite the Commission's findings in *Regal* as to material falsehoods in the regionalization portions of that application, the PFD effectively glosses AIRW's identical falsehoods.

DTR 1.1, Section 1.B.3 of the Application, the portion of an application pertaining to regionalization, asks the five key questions on which the ED bases its regionalization review and analysis. Just as in the *Regal* case, AIRW here provided false or incomplete answers the questions in this section. If the failure to answer these questions accurately or honestly was material for the Commission in *Regal*, it should be material in this proceeding.

d. Georgetown excepts to the ALJs' conclusion that the Affected Landowner list included in the Application is complete or accurate.

The City's evidence demonstrated that the Affected Landowner list is wrong.[122] The Affected Landowner list is used to generate the list of landowners to whom notice is required to be sent. The Affected Landowner list is a required element of the Application, used to generate the statutorily required list of owners to whom notice is required to be sent, and therefore its

[119] *Id*., at 6, FOF No. 43.

[120] *Id*., at 6, FOF No. 44.

[121] *Id*., at 6, FOF No. 45.

[122] GT EXH. 3, at 18–23.

completeness is essential and any errors in it are jurisdictional. The City presented rebuttal evidence demonstrating that several persons to whom notice was required to be sent could not have received notice because they were not on the Affected Landowner list.[123] Ms. Sims admitted that she did not care to update the list of adjacent owners at or near the time that she filed the permit application.[124] Mr. Woelke used the same publicly available information sources as Ms. Sims and found that several landowners should have been on the Affected Landowner list, but were not. That information was available even at the time Ms. Sims prepared the list.[125] Many more were probably required to be placed on the list if it had been updated before the corrected notice was mailed. Because AIRW provided incomplete and inaccurate information on the Affected Landowner list, and the Chief Clerk failed to provide notice to adjacent landowners at the only time their rights and interests may be protected. Notice is statutorily required and the completeness and accuracy of the Affected Landowner list is crucial. The failure to provide a correct Affected Landowner list renders the Application substantially inaccurate and incomplete. Further, by foreclosing review of an inaccurate and incomplete Affected Landowner list, which sets the stage for a faulty notice, the ALJs have effectively insulated the permit Applicant from having to fulfill a jurisdictional requirement. The ALJs' analysis effectively eliminates notice from ever being properly challenged; if a landowner is not noticed, they are unlikely to object and, if they do, the failure is not prejudicial because they objected.

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[123] GT EXH. 3 at Bates p. 000089–000091. AIRW-EXH. 3 at Bates p. 00063 contains the affected landowner list and maps.

[124] Transcript of Hearing on the Merits—Day 2 at 344:5–345:6.

[125] GT EXH. 3 at 19:17–21:3 (Bates p. GT PFT 000089–000091).

e. Georgetown excepts to the ALJs' conclusion that the Application contains substantially accurate information concerning the buffer zone.

The PFD incorrectly mischaracterizes the testimony of City witness, Allen Woelke, stating that he "admitted that the treatment units and the space between them and the nearest property line was indicated correctly in the Application."[126] This was hardly what he said. Mr. Woelke was asked to "guesstimate" the distance between the treatment unit and the eastern property line, and then proceeded to state that if AIRW had followed the instructions, "they would have put a distance from each of the treatment units to the property line."[127]

f. Georgetown excepts to the ALJs' conclusion that the Application contains substantially accurate information concerning the floodplain.

The City demonstrated that the floodplain map used to support AIRW's contention that the Facility will not be in the 100-year floodplain did not, in fact, include the Facility site in the study area.[128] Whether the Facility will be in a floodplain is an important issue, and the City's rebuttal evidence regarding the reliability of the floodplain map identifies another instance in which the Application is misleadingly incomplete.

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[126] Transcript of Hearing on the Merits—Day 1 at 209:2–9.

[127] *Id*.

[128] GT EXH. 3 at 22:10–23:11.

g. Georgetown excepts to the ALJs' conclusion that the Application contains substantially accurate information concerning the discharge route.

The ALJs err in concluding that "did not meet its burden to prove that the City's right-of-way for CR 110 is on the treated effluent discharge route."[129]

The topographic map included with the Application in AIRW-EXH. 4 at page 51 "does not show that the part of the proposed discharge route between CR 110 and the first impoundment is a watercourse."[130] The Instructions state on page 35 that "The permittee must acquire all property rights as may be necessary to use the discharge route."[131] Because the first part of the discharge route was not shown by anything in the Application to be a State-owned watercourse, and the Application does not include easements or other property rights granted to AIRW to discharge effluent across this land, the Application is incomplete.

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[129] PFD at 61.

[130] The Applicant's consultant, Janet Sims, who prepared the Permit Application, assumed the extent of the unnamed intermittent tributary of Mankins Branch that flows through the pond on the Patterson Ranch property (identified by TCEQ as Pond 1) reached and crossed CR 110. However, even the USGS topographic map she provided did not corroborate that the unnamed tributary reaches quite so far (*see* AIRW-EXH. 4 at Bates p. 00061) and nothing in the administrative record indicates the extent or reach of the unnamed intermittent tributary was determined by a hydrologist. Rather, Ms. Sims acknowledges that the area in which she observed water during only one of her site visits (between Pond 1 and CR 110) is merely a swale, which is a storm water control feature rather than a water in the state, and while she claims the swale extends from the road to Pond 1, she did not claim to Transcript have seen water confined to a defined bed and banks in that area. See Transcript of Hearing on the Merits—Day 2 at 402:10–15; *see also* U.S. E.P.A., "NDPES: Stormwater Best Management Practice—Grassed Swales, EPA-832-F-21-031P (Dec. 2021), online at https://www.epa.gov/system/files/documents/2021-11/bmp-grassed-swales.pdf. Note: "swale" is defined as "a low-lying or depressed and often wet stretch of land." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/swale. Accessed 11 Jun. 2022.

[131] GT EXH. 14 (Instructions)

Ms. Sims admitted she is not a hydrologist.[132] The ED's witnesses admitted they did no field work.[133] The USGS maps included with the Application do not show that the reach of the unnamed tributary extends to AIRW's property.[134] The Applicant provided no evidence to support its contention that a watercourse exists at the point of discharge. The fact that water may flow through and along low spots does not render all such land features waters of the state—if it were so, all gutters, curbs, and any other perceptible indentation on the land would constitute waters in the state, and the bed-and-banks standard would be superfluous. In addition, the failure of AIRW to properly identify, within the four corners of the Application, the discharge route as crossing the City's right-of-way[135] in the Application is a material deficiency.

Exception No. 6. Georgetown excepts to the PFD's recommendation that the Draft Permit complies with TCEQ's antidegradation policy and procedures.[136]

The ALJs err in finding that the preponderance of the credible evidence shows that the Draft Permit complies with TCEQ's antidegradation policy.[137] The ALJs recommendation solely relies on the conclusory testimony of TCEQ witness Ms. Leug, which was parroted by Mr. Price, and improperly states that "the City presented no evidence to show that the discharge would cause degradation."[138]

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[132] Transcript of Hearing on the Merits—Day 2 at 426:22–23.

[133] Transcript of Hearing on the Merits—Day 3 at 694:10–14.

[134] AIRW-EXH. 4 at Bates p. 00061 (Application).

[135] AIRW-EXH. 4 at 10; *compare* GT EXHS. 7 and 13.

[136] PFD, FOF Nos. 66–70 and COL No. 14.

[137] PFD at 66.

[138] *Id*.

The PFD notes that the purpose of the total phosphorus ("TP") limit was to prevent "excessive" algal growth.[139] Paul Price, AIRW's witness, admitted that phosphorus may concentrate in the perennial pools or ponds along the unnamed tributary of Mankins Branch, especially under low flow conditions (i.e., when the stream flow is low due to the absence of storm water runoff or the absence of groundwater or spring flow).[140] The concentration of nutrients like phosphorus results in increased algal growth, which, in turn, leads to a reduction in dissolved oxygen ("DO") conditions that occur during high temperature periods when water levels are low. Such conditions would affect some aquatic species, including some species of fish that may be present in farm ponds like Ponds #1, #2, and #3.[141] This is evidence that the discharge would cause more than *de minimis* degradation. Because the Draft Permit allows significant algal growth (so long as it is not "excessive") by authorizing the discharge of additional nutrients in the Facility's treated wastewater, the Draft Permit authorizes a more than *de minimis* degradation in contravention of Tier 2 antidegradation review. Where this result is obvious by the TCEQ's own representations, modelling data or other technical data evidence is unnecessary.

The PFD should have concluded that there is no reasonable assurance that the Draft Permit is, in fact, consistent with Texas's antidegradation policy, which is intended to be protective of water like Mankins Branch, and its existing uses.

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[139] PFD at 63.

[140] Transcript of Hearing on the Merits—Day 2 at 436:24–437:5.

[141] *Id*. at 438:1–440:3.

Exception No. 7. Georgetown excepts to the PFD's recommendation that the Draft Permit should be altered or denied based on AIRW's compliance history.[142]

The ALJs err in limiting the analysis of compliance history solely to AIRW, and not examining the compliance history of Jonah, 600 Westinghouse or 800 Westinghouse.[143] Under TWC § 5.754(i), the Commission is required to consider the compliance history of a regulated entity when determining whether to grant a permit. And to deny a permit if the compliance history in unacceptable based on violations constituting a recurring pattern of conduct that demonstrates a consistent disregard for the regulatory process, including a failure to make a timely and substantial attempt to correct violations. In addition, the ALJs had authority pursuant to 30 TAC § 80.4(c)(15) to consider additional issues beyond the list referred by the Commission when the issue is material, supported by evidence, and there are good reasons for the failure to supply available information regarding the issues during the public comment period. The NSSAs were not fully executed until the day before AIRW's prefiled testimony was due—well after the close of the public comment period. Jonah revised its prefiled testimony to change its position and reveal its role per the NSSAs on the first day of the hearing, also well after the close of the public comment period.[144] At all times prior, Jonah's compliance history was not material because Jonah was protesting the Application, not supporting it. After Jonah flip-flopped and entered into

[142] PFD, FOF Nos. 71–73 and COL No. 6.

[143] PFD at 69.

[144] Transcript of Hearing on the Merits—Day 1, at 247:16–21.

lucrative NSSAs, Jonah put its compliance history at issue.[145] Yet the ALJs ignore Jonah's compliance history, which is error.

The TCEQ's rules[146] and the Instructions[147] are clear and unambiguous in their requirement for Jonah (as the owner and operator of the Facility), 600 Westinghouse and 800 Westinghouse be co-applicants and be subject to the same regulatory scrutiny that a facility owner is. Allowing those parties to avoid regulatory oversight is inconsistent with the TCEQ's rules and its clear instructions to applicants, and most importantly prejudices the City's substantial rights.[148] Jonah presented no evidence, beyond conclusory statements, regarding its ability to comply with the material terms of the Draft Permit. Jonah has no experience owning or operating wastewater treatment plants.[149] Moreover, the ED only reviewed the compliance history of AIRW, and not the ultimate owner and operator.[150] The lack of affirmative evidence in the record as to Jonah's compliance history and ability to operate the Facility warrants denying the Draft Permit.

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[145] PFD at 3, n. 2 ("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-EXH. 43. Jonah was henceforth aligned with AIRW on the Draft Permit Application.").

[146] Pursuant to 30 TAC § 305.43(a), entitled "Who Applies," "if the facility is owned by one person and operated by another . . . for all Texas Pollutant Discharge Elimination System permits, it is the duty of the operator and the owner to submit an application for a permit."(Emphasis added). An "operator," is defined as "[t]he person responsible for the overall operation of a facility." 30 Tex. Admin. Code (TAC) § 305.2(24).

[147] Page 22 of 124 of the Instructions document includes section entitled "Who Should Apply for a Wastewater Permit," noting that "[t]he owner(s) of a facility which treats domestic wastewater seeking authorization from the TCEQ." GT EXH. 14, TCEQ Instructions for Completing Domestic Wastewater Permit Applications, at Bates p. GT PFT 000211. The Instructions go on to state in bold, "**Important Note: More than one entity may be required to apply for the permit as co-applicant,"** then going on to state, "If a co-applicant is required, please provide the requested information about the co-applicant." GT EXH. 14, at Bates p. GT PFT 000215.

[148] *See* Tex. Gov't Code § 2001.174(2) (requiring substantial rights of appellant to have been prejudiced for reversal or remand).

[149] GT EXH. 26; and GT EXH. 27, Jonah SUD's Responses to the City of Georgetown's Interrogatory No. 3.

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

Similarly, the compliance history of AIRW's affiliates, 600 Westinghouse and 800 Westinghouse (and potentially their other affiliates with similar developments elsewhere in Texas), is also required.

By asserting that AIRW, 600 Westinghouse, and 800 Westinghouse are one and the same, and the ED accepting that proposition as true, AIRW and the ED have made the compliance history of those "affiliates" as relevant as AIRW's own. Here, AIRW represented to the ED that AIRW "and its affiliates have developed numerous luxury multi-family properties in Texas" such as the 880-duplex unit that the proposed Facility would serve.[151] Given that AIRW has admitted it is functionally the same as its affiliates, the compliance history of those affiliates at the "numerous" residential properties they have developed is not only relevant, it is required by law.[152] If the compliance history of 600 Westinghouse and 800 Westinghouse are not considered despite their ownership of the project property because they interjected an alter ego (i.e., AIRW) with no compliance history (since it is a single purpose entity), the Commission's Order in this case would tacitly approve circumvention of the requirement that the ED evaluate the compliance history of "other sites with are owned or operated by the same person." The approval of such tactics would not only allow for circumvention of the compliance history review for purposes of determining whether a permit should issue, it would also allow owners in interest to shield themselves from liability for enforcement all while freely and openly disregarding the corporate formalities that provide them such cover. Such an approach is offensive to the law and is bad policy; it must, therefore, be rejected.

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[151] AIRW-EXH. 4 at Bates p. 00108.

[152] 30 TAC § 60.1(c) (requiring an evaluation of the compliance history evaluation of "other sites which are owned or operated by the same person").

Exception No. 8. Georgetown excepts to the PFD's recommendation that the Draft Permit contains sufficient provisions to ensure protection of water quality, including necessary operational requirements.[153]

The ALJs err in concluding that the Draft Permit is protective of water quality, and further recommending that "that the Draft Permit contains sufficient operational requirements to ensure protection of water quality."[154]

As extensive rebuttal evidence from the City shows, the derivation of permit conditions that are protective of water quality and existing uses of the receiving water necessarily required the evaluation of information about the receiving water and its uses and consideration of the relevant water quality standards. In light of the non-existent, scant, incorrect and/or incomplete information about the nature of the receiving water, its water quality, and the existing uses thereof, there is no reasonable assurance that the Draft Permit contains conditions that are appropriate and sufficient to ensure protection of water quality and all existing uses consistent with the public health and enjoyment, as well as the propagation of terrestrial and aquatic life. Even considering the limited information included in the Application, it appears that the Draft Permit does not contain operational requirements and other provisions sufficient to ensure protection of water quality for all existing uses given the site-specific conditions.

[153] PFD, FOF No. 75 and COL No. 16.

[154] PFD at 74.

The ALJs' reliance on future construction plan review to excuse and deny serious inquiry into whether the terms and conditions in the Draft Permit are sufficiently protective is misplaced.[155] The design review and approval process contemplates that the plant will be designed to "ensure that [] wastewater treatment facility plans and specifications [will] meet all requirements in the associated wastewater permit."[156] And although more stringent criteria may be required for a wastewater treatment system than those in 30 TAC Ch. 217, such criteria are driven by the ED's determination that "it is necessary to protect public health or to meet water quality standards,"[157] which are considerations made during the permit application review process, not the construction plan review process.[158] But this review is only for new treatment units as, generally, "plans and specifications do not need to address existing treatment units."[159] Thus, if provisions are not included now to ensure measures are implemented to prevent the discharge of untreated or inadequately treated sewage through the neighboring residential development, measures to protect against human exposure to such discharges will be effectively waived.

The ALJs err by not adopting the City's proposed operational requirements and by finding that the Draft Permit is protective of water quality. To be protective of water quality and all existing uses of the receiving water, the Draft Permit should be denied. Rather than authorizing a

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[155] PFD at 74.

[156] 30 TAC § 217.5(e).

[157] *Id*. at § 217.5(h).

[158] The TCEQ's "Procedures to Implement the Texas Surface Water Quality Standards," RG-194 (June 2010), provides guidance on deriving permit limits for human health protection. *See* EX ED-JL-3 at Bates pp. 0094–0097; 0156–0157; and 0162.

[159] 30 TAC § 217.5(g).

new discharge point for treated wastewater to be discharged into a "dry creek"[160] flowing through a residential neighborhood[161] and into livestock watering ponds,[162] wastewater from the proposed service area should be treated by the City of Georgetown's existing wastewater treatment facilities, which are both in physically available (located in close geographical proximity)[163] and have adequate capacity[164] to accept the full volume of wastewater from the 880-unit duplex project.

Exception No. 9. Georgetown excepts to the PFD's failure to grant the City's Motion to Dismiss.

The City included a Motion to Dismiss in its Closing Brief, in which it urged the ALJs to reconsider the City's oral motion to dismiss raised at the hearing, based on facts elicited at the hearing.[165] Despite having authority to dismiss the action pursuant to 1 TAC § 155.503(d), the ALJs' PFD completely ignores the City's request to reconsider the oral motion and dismiss or remand the Application back to the ED with instructions for the ED to require AIRW to re-file the Application, adding 600 Westinghouse and Jonah as co-applicants. The ALJs err by not

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[160] AIRW-EXH. 51 (public comment noting "developers of this wastewater treatment plant plan to discharge up to 200,000 gallons of treated sewage per day through our dry creek making it we with treated sewage year round. That will create an environmentally unstable barrier to both sides of our ranch, and a nightmare for us and the livestock to access both sides.").

[161] Transcript of Hearing on the Merits—Day 2 at 396:22–397:4 (acknowledgement by Applicant's consultant that the Patterson Ranch is currently under construction as residential development).

[162] Pond 1 and Pond 2 are now part of the Patterson Ranch Subdivision open space and drainage way. *See* GT EXH. 12, Patterson Ranch Preliminary Plat, at Bates pp. GT PFT 000163 and GT PFT000166–000167. However, the use of Pond 3 does not appear to have changed. *See* AIRW-EXH. 45 (noting Patterson Ranch confines does not affect property owned by Jimmy C. Webb); *see also* GT EXH. 31 (showing Pond 3 along top right hand corner is unaffected by Patterson Ranch Subdivision development).

[163] GT EXH. 3 at Bates pp. GT PFT000082, lines 14–20 and GT PFT000083.

[164] GT EXH. 3 at Bates pp. GT PFT000093, line 17, to GT PFT000094, line 18; and GT PFT000095, lines 4–17; Transcript of Hearing on the Merits—Day 1, at 187:22–188:1.

[165] Georgetown Closing Brief at 84.

addressing, discussing, and considering the merits of the City's Motion to Dismiss to allow for a complete record of the proceedings for the TCEQ's full consideration.

To reiterate, the TCEQ's rules[166] and the Instructions[167] are clear and unambiguous in their requirement for Jonah as the owner and operator of the Facility and 600 Westinghouse (and, for that matter, 800 Westinghouse) as an owner of a portion of the Facility to be co-applicants and be subject to the same regulatory scrutiny as the named Applicant. Allowing those parties to avoid such regulatory oversight is inconsistent with the TCEQ's rules and its clear instructions to Applicants, and most importantly prejudices the City's substantial rights.[168]

The PFD's failure to dismiss this proceeding is in error and should be remedied.

Exception No. 10. The City excepts to the assessment of transcription costs equally between the City and AIRW.

The ALJs' allocation of the reporting and transcription costs is inconsistent with their statement that AIRW and Jonah were aligned parties.[169] Both of the aligned parties equally

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[166] Pursuant to 30 TAC § 305.43(a), entitled "Who Applies," "if the facility is owned by one person and operated by another . . . for all Texas Pollutant Discharge Elimination System permits, it is the duty of the operator and the owner to submit an application for a permit."(Emphasis added). An "operator," is defined as "[t]he person responsible for the overall operation of a facility." 30 TAC § 305.2(24)

[167] Page 22 of 124 of the Instructions document includes section entitled "Who Should Apply for a Wastewater Permit," noting that "[t]he owner(s) of a facility which treats domestic wastewater seeking authorization from the TCEQ." GT EXH. 14, TCEQ Instructions for Completing Domestic Wastewater Permit Applications, at Bates p. GT PFT 000211. The Instructions go on to state in bold, "**Important Note: More than one entity may be required to apply for the permit as co-applicant**," then going on to state, "If a co-applicant is required, please provide the requested information about the co-applicant." GT EXH. 14, at Bates p. GT PFT 000215.

[168] *See* Tex. Gov't Code § 2001.174(2) (requiring substantial rights of appellant to have been prejudiced for reversal or remand).

[169] PFD at 3, n. 2. (". . . providing that Jonah will be the future owner and operator of the Facility. AIRW-EXH. 43. Jonah was henceforth aligned with AIRW on the Draft Permit Application.").

benefitted from the reporting and transcription services. The ALJs err by stating, on the one hand, that Jonah was an aligned party, but on the other hand not holding that aligned party accountable for its share of the reporting and transcription costs. The City believes a just and reasonable assessment of transcription costs would be one-third to Georgetown, one-third to Jonah, and one-third to AIRW.

V. CONCLUSION

For all of the reasons discussed in these Exceptions, the City respectfully requests that the Commission dismiss this proceeding, or in the alternative revise the ALJs' Findings of Fact and Conclusions of Law as shown in the attached as **Attachment A** for the reasons stated in the foregoing Exceptions.

Respectfully submitted,

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ATTORNEYS FOR CITY OF GEORGETOWN

CERTIFICATE OF SERVICE

I hereby certify that I have served or will serve a true and correct copy of the foregoing document via hand delivery, facsimile, electronic mail, overnight mail, U.S. mail, or Certified Mail Return Receipt Requested on all parties on this 12th day of September, 2022:

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ATTACHMENT A

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~~a rental residential subdivision~~.~~ consisting of 880-duplexes,[1] on land owned by 600 Westinghouse Investments, LLC and 800 Westinghouse Investments, LLC, both Nevada limited liability companies.[2]

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~~were presumed to be limited aquatic life use for the unnamed tributary ~~and~~to Mankins Branch, and high aquatic life use for Mankins Branch.[3] Other existing uses for the unnamed tributary to Mankins Branch and of Mankins Branch itself include recreational use and livestock watering.[4] The designated uses for Segment No. 1248 are primary contact recreation, public water supply, aquifer protection, and high aquatic life use.

4. A portion of the Facility, consisting of 12" diameter underground effluent pipe, would be located on land owned by 600 Westinghouse Investments, LLC, (600 Westinghouse) a Nevada limited liability company, not by AIRW.[5]

5. The 12" diameter underground effluent pipe is part of the Facility, would be underground,

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[1] The 880- unit development consists of 422 duplex units associated with 600 Westinghouse Investments, LLC's "Luxe Project" and 458 duplex units associated with 800 Westinghouse Investment, LLC's "Mansions Project." See AIRW-EXH. 43 at 1 & 34.

[2] See GT EXH. 37 at 1–3 & 5–37 (deeds); *id*. at 3 (AIRW's CCN filing noting each developer would construct on their own parcels and AIRW "will *not* own the duplexes to be constructed in either of the two Developments on Tract 1 and 2"); GT EXH. 8 (Bates pp. GT PFT 0000138 & 0000139) (Non-Standard Service Agreements showing location of "Luxe" and "Mansions" projects); AIRW-EXH. 43 at 1 & 34 (identifying 600 Westinghouse and 800 Westinghouse as Nevada limited liability companies).

[3] AIRW-EXH. 3, at Bates p. 00042 (citing 30 TAC § 307.4(h)&(l), which provide for presumed aquatic life uses).

[4] AIRW-EXH. 51 (public comment filed by adjacent landowner, Glenn Patterson, noting existing recreational and livestock watering uses of perennial ponds that are associated with the unnamed, intermittent tributary to Mankins Branch).

[5] AIRW-EXH 19; GT EXH. 37 at 1–3 and 5–37; GT EXH. 34; AIRW-EXH. 43.

and is thus a "fixture."

6. The TCEQ's Instructions state, "IMPORTANT NOTE: More than one entity may be required to apply for the permit as co-applicant. . . . If the facility is considered a fixture of the land (e.g., ponds, units half-way in the ground), there are two options. 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. The deed recorded easement must give the facility owner sufficient rights to the land for the operation of the treatment facility."[6]

7. The point at which the effluent pipe discharges is within the tract of land owned by 600 Westinghouse. USGS maps for this area do not show a water body at the outfall location.[7] AIRW did not present a delineation of unnamed tributary (including identification of observable bed and banks) to extend the unnamed tributary from the adjacent land to the proposed discharge point.

8. The culvert through which the proposed discharge would flow under CR 110 toward the nearest mapped surface water body is located in an area that is the subject of a City of Georgetown (City or Georgetown)-controlled right of way.[8]

9. 600 Westinghouse, did not join the Application as a co-applicant.[9]

10. The Application did not include a deed recorded instrument giving AIRW sufficient rights to use the 600 Westinghouse–owned land for operation of the Facility or for routing of the proposed discharge toward the nearest surface water body, nor was any such instrument included in the record.[10]

11. The Non-Standard Service Agreements (NSSAs) with Jonah Water Special Utility District (Jonah) were executed by 600 Westinghouse and 800 Westinghouse, both of which are Nevada limited liability companies. These NSSAs identify the proposed package plant site as owned by an affiliate of both 600 Westinghouse and 800 Westinghouse and state that 600 Westinghouse and 800 Westinghouse are the TPDES permit applicants and the parties that will construct the proposed package plant.[11]The aforementioned affiliate is AIRW.[12]

12. The deed to AIRW for the parcel of land upon which the proposed package plant will be built

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[6] GT EXH. 14 at 29 (Bates p. GT PFT 0000215).

[7] AIRW EXH. 4 at Bates p. 00061.

[8] 600 Westinghouse granted Williamson County a drainage easement, GT EXH. 34, which transferred by operation of law to Georgetown upon its annexation of the land adjacent to the AIRW and 600 Westinghouse parcels. See Tex. Transp. Code § 311.001(a) (granting municipalities exclusive jurisdiction and control over roads in their city limits); GT EXH. 13 (ordinance annexing Patterson Ranch subdivision).

[9] AIRW-EXH. 4 at Bates p. 0004.

[10] AIRW-EXH. 4.

[11] See *id*. at 1 & 34 (noting 600 Westinghouse and 800 Westinghouse, respectively and as the "Developers", will construct the wastewater treatment plant for which they are obtaining a TCEQ permit); id. at 6 & 3 (indicating title to the plant site is recorded in the name of the developers' affiliate).

[12] See GT EXH. 37 at 2–3.

was executed by 600 Westinghouse as Grantor. [13]

13. AIRW did not provide, and the Executive Director (ED) did not request, leases or deed-recorded instruments demonstrating AIRW's ownership of the land where the Facility was proposed to be located.

14. AIRW did not provide, and the ED did not request, evidence demonstrating a corporate affiliation between AIRW and 600 Westinghouse, nor is any such information included in the record.

15. No evidence in the record establishes that AIRW has the authority to act on behalf of 600 Westinghouse.

16. No evidence in the record establishes that 600 Westinghouse, or any other entity, has the authority to act on behalf of AIRW.

17. AIRW's consultant[14] and attorney[15], as well as Jonah[16] stated that AIRW, 600 Westinghouse, and 800 Westinghouse are essentially "one and the same" entity.

18. 30 Texas Administrative Code (TAC) section 305.43(a) provides that, "It is the duty of the owner of a facility to submit an application for a permit or a post-closure order. However, if the facility is owned by one person and operated by another and the executive director 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 Texas Pollutant Discharge Elimination System permits, it is the duty of the operator and the owner to submit an application for a permit***." (emphasis added).

19. The language in 30 TAC §305.43(a) granting the ED discretion under "special circumstances" to require both the facility owners and facility operator to be named as permit applicants ***does not apply to TPDES permits***. For TPDES permits, the rule provides that both the owners and operator of the facility ***must*** apply for the permit, and does not grant the ED discretion to waive the provisions of the rule requiring all facility owner(s) and operators to join a TPDES application.

20. Jonah is not listed as a co-applicant or even as the operator on the Application, and Jonah did not sign the Application.[17]

~~4.~~21. The ED erroneously declared the Application administratively complete on June 19, 2020, and technically complete on October 26, 2020.

~~5.~~22. The ED completed the technical review of the administratively incomplete Application,

[13] GT EXH. 37 at Bates p. 0063.

[14] Transcript of Hearing on the Merits—Day 2, at 448:14–18.

[15] Transcript of Hearing on the Merits—Day 1, at 207:3.

[16] Transcript of Hearing on the Merits—Day 2, at 298:24 – 299:16.

[17] AIRW-EXH. 4 at Bates pp. 00007 and 00014.

prepared a draft permit (Draft Permit) and made it available for public review and comment.

~~6.~~23. AIRW ~~currently owns~~ provided false information in the ~~site at~~Application regarding ownership of the land on which the proposed Facility will be located~~.~~ *and* false information regarding ownership of the land where the proposed development will be located; AIRW only owns a 21.39 acre tract of land, but represented in the Application that it owned 128.37 acres of land.[18]

~~7.~~24. ~~AIRW, through its affiliate,~~600 Westinghouse and 800 Westinghouse, owners and developers of the land where the proposed development would be located,[19] entered into ~~Non-Standard Service Agreements (~~NSSAs~~)~~ with ~~–~~Jonah ~~–~~Water ~~– Special Utility District (Jonah) –~~ on April 20, 2022~~,~~ (prior to the commencement of the contested case hearing), for the provision by Jonah of ~~retail~~ wastewater services to ~~the development.~~their developments; but nothing in the NSSAs indicate that 600 Westinghouse and 800 Westinghouse were acting or had the authority to act on behalf of AIRW and AIRW is not a party to the NSSAs. [20]

[18] The deed-recorded real property instruments, Applicant's PUC filings, and the NSSAs all show that AIRW does *not* own all the land shown on the Applicant's landowner map labeled as "Applicant's Property." *Compare* AIRW-EXH. 4 at Bates pp. 00063–64 (Applicant's landowner map with false information) *with* deed recorded instruments, Applicant's PUC filings, and NSSAs, at GT EXH. 37 at 1–3 (PUC Pleading) and 5–37 (deeds) and AIRW-EXH. 43 (NSSAs – attaching same deeds).

[19] AIRW-EXH. 43 (NSSAs attaching deeds); GT EXH. 37 (Applicant's PUC filings).

[20] AIRW-EXH 43 (NSSAs contain no reference to AIRW).

~~8.~~25. Under the NSSAs, Jonah will own and operate the Facility ~~once~~if the TPDES permit is issued and if the permit transferred to it by the Commission under 30 ~~Texas Administrative Code section~~ TAC §305.64.

26. The Applicant provided false and incomplete information in the Application regarding ownership of the land where the proposed Facility would be located, its rights to place the Facility on land owned by a third party, and the proposed Facility operator. By failing to obtain information from other governmental entities as required by the ED's procedures implementing the TSWQS, the ED erred in determining that AIRW's permit application was accurate and complete.[21]

The Draft Permit

~~9.~~27. 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)).

~~0.20 million gallons per day (MGD)).~~

~~10.~~28. The Facility will have treatment units including aeration basins~~,~~ and other non-redundant units[22] including 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.~~29. The unclassified receiving water uses are primary contact recreation, livestock watering, and limited aquatic life use for the unnamed tributary ~~and~~of Mankins Branch (originating at livestock watering ponds within neighboring land) (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. No site visit was conducted to determine existing uses in the upstream segments of the discharge route.[23]

~~12.~~30. 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.~~31. ~~The~~The effluent limitations in the Draft Permit state that 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.

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[21] Ex. ED-JL-3 at Bates p. 0036 (IPs at 20).

[22] AIRW-EXH. 4 at Bates p. 00025 (Table 1.01(1)).

[23] Transcript of Hearing on the Merits—Day 3, at 694:10–13.

Notice and Jurisdiction

~~14.~~32. 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.~~33. 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~~.~~; the Combined Notice was necessary to correct the description of the proposed discharge route in the original June 2020 notices.[24]

34. The Combined Notice of Receipt and Intent to Obtain a Water Quality Permit and Notice of Application and Preliminary Decision was mailed to the statutory recipients and on the Affected Landowner List (Attachment C of the Application)[25] on or about December 3, 2020.[26]

35. The evidence showed that the Affected Landowner List attached as Attachment C to the Application was not based on the then current county tax rolls, rendering the application incomplete and inaccurate.[27] Seven landowners with deeds recorded at Williamson County Appraisal District[28] *before* the date the Application was signed on March 23, 3030[29] and *before* the date that the Application was submitted to the TCEQ on April 6, 2020 who were not included by the Applicant on the Affected Landowner List.[30]

36. The Applicant admitted that it did not update the Affected Landowner List prior to submittal to the TCEQ on April 6, 2020 or prior to the mailed notice date of December 20, 2020.[31]

~~16.~~37. The comment period for the Application closed on January 19, 2021.

~~17.~~38. 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.~~39. The ED filed his Response to Public Comments on August 6, 2021.

~~19.~~40. 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

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[24] AIRW-EXH. 2 at Bates p. 00026.

[25] AIRW-EXH. 4 at Bates pp. 00063–65.

[26] AIRW-EXH. 2 at Bates p. 00025.

[27] 30 TAC 305.48(a)(2) (requiring the identification of owners of tracts of land adjacent to the treatment facility and for a reasonable distance along the watercourse from the proposed point of discharge "as can be determined from the ***current*** county tax rolls").

[28] WCAD is the source of landowner names and mailing addresses the Applicant used to prepare the Affected Landowner List attached as Attachment C to the Application. See AIRW-EXH. 4 at Bates p. 00015.

[29] GT EXH. 3 at 20–21 (Bates pp. GT PFT 000090–91); *compare* AIRW-EXH. 4 at Bates pp. 00063–00065.

[30] AIRW-EXH. 4 at Bates pp. 00063–00065.

[31] Transcript of Hearing on the Merits—Day 2 at 344:5–345:6.

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.~~41. 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.~~42. 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.~~43. 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.~~44. 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

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

~~25.~~46. 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.~~47. 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 by the City.

~~27.~~48. 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.~~49. The TSWQS consist of general standards, narrative standards, surface water segment-specific numeric standards, numeric standards for toxic substances, and antidegradation review.

~~29.~~50. The TSWQS establish specific uses for each classified water body in the state and also provide numeric criteria for each classified stream.

51. The ~~provisions~~Application did not contain information to corroborate that the intermittent, unnamed tributary extended to the proposed point of discharge.[32]

~~30.~~52. For the ~~Draft Permit are protective~~segment of the intermittent, unnamed tributary of Mankins Branch that originates within the Patterson Ranch subdivision, the ED did not conduct any field work to identify aquatic life within the apparently spring-fed system and the water quality ~~and are in accordance with~~standards to support said aquatic life were not evaluated as contemplated by the TCEQ's procedures to implement the TSWQS.

53. The ~~Draft Permit is protective of water quality~~ Application did not include information required by the Instructions relating to existing uses, including "future" residential developments, nearby schools, recreational areas, and agricultural activities, in the vicinity of the proposed point of discharge.[33]

~~31.~~54. The ED did not independently confirm that the receiving water information in the Application was factually accurate by obtaining information from other sources to identify existing uses

[32] AIRW-EXH. 4 at Bates p. 00061.

[33] AIRW-EXH. 4 at Bates p. 00061; compare GT EXH. 14 at Bates p. GT PFT000219.

of the receiving water.[34]

55. The ~~Draft Permit is~~ ED did not consider existing uses not identified by the Applicant, but made known to it during the public comment period by Mr. Webb and the City.[35]

56. The ED did not evaluate the effect of the proposed discharge on aesthetic water quality standards relevant to recreational use and enjoyment of waters in the state.[36]

57. The ED did not evaluate the effect of the proposed discharge on water quality standards protective of the propagation and protection of livestock and other terrestrial life.[37]

58. The ED did not evaluate the sensitivity of aquatic species present in the receiving stream or the effect of the proposed discharge on the water quality necessary to support these species.[38]

59. The ED's Tier 2 antidegradation review was based on a "no significant degradation" standard instead of the regulatory standard, which is set forth at 30 TAC § 307.5(b)(2)—i.e., prohibiting any degradation of water quality in Mankins Branch "unless it can be shown to the commission's satisfaction that the lowering of water quality is necessary for important economic or social development."[39]

~~32.~~60. The provisions and issuance of the Draft Permit were based on incomplete information in the Application and an incomplete analysis by the ED, which does not ensure that the Draft Permit is protective of existing uses and water quality for aquatic and terrestrial wildlife.

[34] GT EXH. 42 at 1; Transcript of Hearing on the Merits—Day 3, at 690:25–692:17; 694:1–13; and 694:24–695:5.

[35] See GT EXH. 43, Section 16 at 3 (note that analysis of dissolved ("DO") criteria for "unnd trib" did not consider impacts to perennial pools used as livestock water ponds and fishing ponds).

[36] Transcript of Hearing on the Merits—Day 3, at 695:11–14.

[37] AIRW-EXH. 4 at Bates pp. 00091–00092; GT EXH. 43.

[38] GT EXH. 43, Section 16, at 3.

[39] AIRW-EXH 3 at Bates p. 00037.

Regionalization

61. TEX. WATER CODE § 26.003 provides: "It is the policy of this 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."

~~33.~~62. To effectuate its policy of encouraging regionalization of wastewater services, TCEQ ~~requires~~has never adopted any rules, but has promulgated an application form and the Instructions requiring an applicant to provide certain information to allow TCEQ to conduct a regionalization analysis~~.~~ in Domestic Technical Report 1.1, Section 1.

63. TEX. WATER CODE 26.027(b) states, "(b) A person desiring to obtain a permit or to amend a permit shall submit an application to the Commission containing all information reasonably required by the Commission."

64. AIRW provided false or incomplete answers to four out of five of the questions Domestic Technical Report 1.1, Section 1.

~~34.~~65. No part of the Facility or development is within the City's corporate limits~~.~~, but adjoin and directly abut the City limits.[40]

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

66. ~~Properties~~ (ETJ); the proposed discharge route is partially in the City's ~~extraterritorial jurisdiction~~ETJ and partially in its city limits.[41]

67. The City owns and operates five permitted domestic wastewater treatment plants and has a permit for a sixth.[42] The City's wastewater collection system, and one of the City's permitted domestic wastewater treatment plants, are located within three (3) miles of the proposed Facility and it was undisputed that both have the capacity to accept the volume of wastewater proposed in the Application.[43]

68. The Applicant intentionally and knowingly falsely replied NO to the fourth question in Domestic Technical Report 1.1, Section 1.B.3, of the Application asking whether a permitted domestic wastewater treatment plant is located within three (3) miles of the proposed facility that currently has the capacity to accept or is willing to expand to accept the volume of wastewater proposed in the application.[44]

~~36.~~69. Section 13.05 of the City's Unified Development Code states that properties in the City's ETJ

[40] GT EXH. 1 at 7:1–10; GT EXH. 7; GT EXH. 8.

[41] GT EXH. 7.

[42] GT EXH. 3 at 34:1–12 and 16:19; 35:1–2.

[43] GT EXH. 3 at 23:13–25:17; AIRW EXH 17 at 9:28–10:1.

[44] AIRW-EXH. 17 at 9:28–10:1; compare AIRW-EXH 4 at Bates p. 00045.

that desire wastewater services from the City must first submit a petition for voluntary annexation.[45] The requirements of Section 13.05 of the City's Unified Development Code may be waived by the City Council by following the City's process for requesting such a waiver[46] The record contains no evidence that AIRW ever filed an application for a waiver with the City.

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

~~38.~~70. As part of its Application, AIRW provided email correspondence to and from nearby providers regarding whether they would provide sewer service. With regard to service from the City, such email correspondence consisted of an email dated Wednesday, January 22, 2020, at 5:40 PM to Sofia Nelson, the City's Planning Director (not the City's Utility Director), containing the following two sentences: "Please site plan attached [sic] showing a 5 acre park in place of the wastewater treatment plant. Also please let me know how the discussions went yesterday. Thanks, Matt, Luxury Living."[47] No other evidence of a request for wastewater service from the City for the development was included with the Application.

~~39.~~ AIRW's written communications with ~~nearby providers~~the City included in the Application were ~~sufficient, and~~ insufficient as AIRW ~~was~~did not ~~required to submit certified letters because the emails~~ provide ~~similar tracking and traceability.~~

~~40.~~71. ~~AIRW explored securing~~ documentation that it requested wastewater ~~services~~service from the City for the proposed development, and expressly stated in an email to the City ~~placed conditions on providing~~that it did not want wastewater service~~, including: the Facility site would have to be annexed into~~ from the City ~~and comply with the City's land use restrictions.~~.[48]

72. The City explained to AIRW the requirements and implications of Section 13.05 of its Unified Development Code, and proposed alternatives, but AIRW did not pursue those alternatives.[49]

73. There was no indication that the City was ~~willing~~unwilling to waive the annexation and or any land use requirements.

~~41.~~74. The evidence showed that the proposed development density could be achieved under the City's current land use requirements.[50]

~~42. AIRW received a conditional offer for sewer service from the City. The City denied AIRW's~~

[45] GT EXH. 35 at 6.

[46] GT EXH. 35 at 4.

[47] AIRW-EXH. 4 at Bates p. 00077.

[48] GT EXH. 1 at 11:16–20 and 14:3–6; GT EXH. 9.

[49] GT EXH. 1 at 13:4–11.

[50] Transcript of Hearing on the Merits—Day 1, at 77:8–25.

~~request for service unless AIRW agreed to annexation and land use restrictions.~~

75. There was no evidence that the City denied or declined to provide service due to lack of currently available wastewater treatment capacity.

~~43.~~76. The ED requested from AIRW a cost analysis of expenditures that ~~includes~~included the cost of connecting to the ~~CCN~~City's facilities versus the cost of the proposed facility or expansion. It was undisputed that the only improvements needed to connect to the City's wastewater treatment system would be a force main and lift station.[51] Nothing in the supplemental Application filings compared the cost of constructing the proposed Facility to the cost of constructing the force main and lift station required to connect to the City's wastewater system.[52]

~~44. Constructing a new plant will~~During the contested case hearing, AIRW admitted constructing the Facility would cost approximately $300,000 more than connecting to the City's system.

~~45.~~77. ~~Because of the higher property tax rate inside the City than outside it in~~ However, per the ~~unincorporated area and~~ NSSA's, Jonah's connection fees would add another $2,400,000 to the cost associated with choosing the Facility over the City's ~~condition of annexation~~system.[53] The cost of constructing and operating the Facility therefor would be more than $2,600,000 higher than constructing the force main and lift station needed to connect to ~~its system, connecting carries with it an approximately $20 million cost due to diminution in property value.~~the City's system.[54]

78. AIRW averred that the cost to connect to the City's system should also include an amount attributable to alleged loss in property value by 600 Westinghouse Investments LLC and 800 Westinghouse Investments LLC accruing to their land after annexation, due to liability for payment of property taxes and other requirements in the City's Unified Development Code and that the requirement to pay City taxes would diminish the value of the developed property when sold.

79. No evidence was presented that in TPDES permitting proceedings the Commission has ever considered any landowners' diminished property value, lost profits, or other economic damage claims regardless of where the landowners were situated - whether along the discharge route, in the affected landowner radius, or on land that the facility would serve. [55]

80. The Commission does not consider, nor does it have any guiding rules or principles for considering, alleged reduction in property value and alleged lost profits on a future sale due

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[51] GT EXH. 3 at 25:18–26:9; AIRW-EXH. 21.

[52] AIRW-EXH. 4 at Bates pp. 00105–00108.

[53] AIRW-EXH. 21, and AIRW-EXH. 43.

[54] Transcript of Hearing on the Merits—Day 1, at 191:9–23.

[55] To the contrary, the ED has previously noted that "[t]he TCEQ does not have jurisdiction to review the effect, if any, the discharge might have on property values of downstream landowners in reviewing a domestic wastewater discharge permit application." ED's Response to Comments, City of Dripping Springs WQ00144088003, Comment 135 (Oct. 31, 2017), available online at https://www.tceq.texas.gov/assets/public/agency/Dripping-Springs-WQ00144880030-RTC.pdf.

to city taxes as a "cost" of connecting to a municipal wastewater treatment system.

81. Neither the Applicant nor the ED provided any support for the proposition that the ED may consider the profitability of a residential development, diminution in value of a property developed consistent or inconsistent with municipal land use regulations, or assessment of higher real estate taxes upon an applicant or, as here, *affiliates* of an applicant.

82. Even if it wanted to set such precedent with regard to such "costs", the Commission will not consider property tax liability in this case because AIRW does not own the land where the taxable improvements would be located (i.e., the duplex developments, owned by 600 Westinghouse and 800 Westinghouse)[56] and there is no evidence that AIRW would pay the property taxes on behalf of the landowners.

83. The allegedly deleterious effects of compliance with the City's Unified Development Code as applied to land inside the City limits is not relevant because the evidence included an admission by AIRW that it would not be the developer of any land and would thus not be subject to the City's Unified Development Code.[57]

~~46.~~84. Costs of constructing improvements needed to connect to the City's wastewater system compared to the costs of constructing the Facility weigh in favor of ~~granting~~denying AIRW's application.

~~47.~~85. The evidence fails to show that easements and the delay inherent to acquiring them are impediments to connecting to the City's system.

~~48.~~86. Even if easements were needed, the evidence fails to show that AIRW tried and failed to secure them.

87. The evidence showed that the time to design and construct the force main and lift station necessary to connect to the City's system would not be an impediment to connecting to the City's system.

~~49.~~88. There is no regional provider designated by TCEQ rule for the area where the Facility is proposed to be located~~.~~, nor has there been any such designation by the TCEQ for the past 44 years, since 1978.[58] However, the City owns and operates five wastewater treatment plants and has a permit for a sixth.[59]

~~50.~~89. The proposed Facility and its discharge route are not within the sewer CCN of any retail public utility, including Jonah.

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[56] GT EXH. 37 at 1–3 and 5–37; GT EXH. 8; GT EXH. 34, AIRW-EXH. 43.

[57] GT EXH. 37 at 3 ("Applicant will ***not*** own the duplexes to be constructed in either of the two Developments on Tract 1 and 2 to be serviced by Applicant's wastewater system" (emphasis in original.)); GT EXH. 37 at 1–3; GT EXH. 34; AIRW-EXH. 43.

[58] GT EXH 2 at 11:15–19.

[59] GT EXH 3 at 23:13–25:17.

~~51.~~90. The proposed Facility and its discharge route are only 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.~~

91. Public Utility Commission rules do not apply to the TCEQ.

~~53.~~92. Jonah is ~~an established political subdivisiona~~ SUD that provides water service to approximately 9,000 customers, and 30,000 people are in its approximately 275-mile service area. Jonah does not provide wastewater treatment services to anyone anywhere.

~~54.~~93. Jonah testified that it is "negotiating" to provide wastewater treatment services to other nearby developments and plans to expand its wastewater services within its certificated water service area, but there was no evidence that it has done so.

94. If Jonah were to begin to provide wastewater treatment services, it would require construction of new wastewater treatment plants, and each new plant is a new point source of pollution.

95. Jonah:

(a) Does not own any wastewater treatment plants;

(b) Does not operate any wastewater treatment plants;

(c) Does not hold any TPDES or TLAP permits for any wastewater treatment plants;

(d) Does not provide wastewater treatment services to anyone anywhere;

(e) Has contracted with others to receive wastewater treatment services for the retail sewer customers within its sewer CCN boundaries because it has no wastewater treatment capabilities;

(f) Has only one employee, its General Manager, who holds a wastewater treatment license that would allow him to operate the Facility, but the General Manager does not actually operate any wastewater treatment plant under that license, and no other Jonah employee meets the wastewater treatment plant operator licensing requirements in the Draft Permit;

96. Jonah is not like Crystal Clear SUD in the *Crystal Clear Case*– Jonah was not a co-applicant on the Application and does not own and operate a wastewater treatment plant. Crystal Clear SUD was a co-applicant and owns and operates at least one wastewater treatment plant in addition to the one at issue in the *Crystal Clear Case*.

97. The Draft Permit is inconsistent with the state's regionalization policy and demonstration of need for the volume requested in the application for a new discharge permit pursuant to TWC § 26.0282.

Nearby Residents

~~55.~~98. The prima facie demonstration that the Draft Permit is protective of the health of nearby residents was ~~not~~rebutted by the City.

~~56.~~99. The City demonstrated that the Draft Permit ~~contains~~does not contain adequate permit limits and monitoring requirements to protect the health of nearby residents.

100. ~~The~~The City demonstrated that the monitoring and sampling requirements in the Draft Permit ~~comply~~are not protective of human health.

101. The proposed Facility would be about 400 feet away from existing homes in the

Kasper/Fairhaven Subdivision.[60]

~~57.~~102. The proposed discharge route would traverse all the way through the Patterson Ranch Subdivision, a platted single-family residential subdivision that is currently under construction and, on full build out, will contain 420 homes with ~~the Commission rules.~~associated amenities, including public open space all along both sides of the proposed discharge route, including Pond #1 and Pond #2.[61]

~~58. The Draft Permit contains appropriate effluent limits.~~

103. ~~The~~ There are existing agricultural uses of land along the discharge route downstream of the Patterson Ranch Subdivision.[62]

104. AIRW failed to disclose that existing uses implicating public health and enjoyment considerations by failing to state that the Facility would be about 400 feet from existing single family homes in the Kasper/Fairhaven Subdivision and would flow through public open space in the Patterson Ranch Subdivision.

105. AIRW failed to disclose existing agricultural use of land along the discharge route downstream of the Patterson Ranch Subdivision.[63]

106. The Draft Permit does not include requirements to ensure untreated or partially treated wastewater is not discharged onto the ground or a receiving stream or Pond #1 or Pond #2 in the event of design or construction flaws or other failures[64].

107. The sample collection types in the Draft Permit ~~is~~are not protective. The sample type for Carbonaceous Biochemical Oxygen Demand, Total Suspended Solids, Ammonia Nitrogen, and Total Phosphorous is "Grab" not "Totalizing" or "Composite."[65]

108. The sampling frequency in the Draft Permit for E *coli* is not protective. It is "one/month" not "one/week."[66]

109. The Draft Permit includes phosphorus limits derived from a technical evaluation that included an incorrect characterization of the receiving water.[67]

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[60] GT EXH. 1 at 22:1–12; GT EXH. 7; GT EXH 11.

[61] GT EXH. 1 at 22:13–23:2; GT EXH. 7; GT. EXH. 12.

[62] See n. 4, supra.

[63] See Section 5(B) of Domestic Technical Report Worksheet 2.0, AIRW-EXH. 4 at Bates p. 00054 (asking for observed or evidence of, inter alia, livestock watering, fishing, contact recreation, non-contact recreation; no boxes were checked off).

[64] GT EXH. 3 at 36:16–38:8.

[65] GT EXH. 3 at 39:12–40:7.

[66] GT EXH. 3 at 39:12–40:7.

[67] AIRW-EXH. 3 at 43 (characterizing the aquatic life use as "limited"); but see AIRW-EXH. 51 (public comments noting existing recreational fishing use).

110. A sampling frequency of "one/week" for phosphorous limits is not protective.[68]

111. The level of operator license in the Draft Permit not protective.[69] The Draft Permit requires a Class C licensed operator, not a Class B licensed operator.

112. The Draft Permit contains inappropriate effluent discharge limits.

~~59.~~113. The ED failed to consider whether the disinfection requirement in the Draft Permit was sufficient to protect nearby residents from exposure to pathogens (including enteric viruses and *E. coli*) in treated wastewater in light of the proximity of the point of discharge to the adjacent Patterson Ranch residential subdivision (and other residences further downstream), as well as the low flow conditions in the receiving stream and associated perennial pools (i.e., the former stock ponds). The Draft Permit is not protective of human health, including those of nearby residents.

Nuisance Odors

~~60.~~114. AIRW ~~will~~plans to control nuisance odors by owning the 150-foot buffer zone from the wastewater treatment plant units to the property line.

115. AIRW's expert testified that 12" effluent pipe, which is a fixture of the Facility, will be located outside of the facility boundary line shown on Attachment E to the Application[70] on land owned by a third party, and is therefore well outside of 150-foot buffer zone.[71]

116. The Applicant's buffer zone map was not detailed, making it impossible to determine whether all wastewater treatment units were within the alleged 150-foot buffer zone. [72]

~~61.~~117. The evidence ~~failed to show~~showed that the discharge ~~will go into any body of water that crosses or abuts any park, playground, or schoolyard~~route is to an open green space area and two perennial ponds located within a single-family residential subdivision within one-half mile of the point of discharge.[73]

Completeness and Accuracy of Application

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[68] AIRW-EXH. 3 at 3. Because grab samples in two consecutive weeks could be taken as much as 13 days apart, discharges to the unnamed tributary and collecting in the perennial ponds could violate WQS for some or all of that time (especially during low flow and no-flow conditions).

[69] GT EXH. 3 at 38:9–39:2.

[70] AIRW-EXH. 4 at Bates p. 00070.

[71] Compare AIRW-EXH. 4 at Bates p. 00070 (buffer zone map omitting 12" effluent pipe) with AIRW-EXH. 19 (Perkins schematic showing 12" effluent pipe).

[72] Hearing Tr. at 204:1–209:9.

[73] AIRW-EXH. 4, at Bates p. 00023 (showing point of discharge, origin of unnamed tributary at first perennial pond, and location of first and second perennial ponds in relation to CR 110); AIRW-EXH. 45 (showing open space and first perennial pond in red irregular shape along CR 110, toward the bottom of the figure).

~~62.~~118. The prima facie demonstration that the Application is substantially complete and accurate was ~~not~~ rebutted by the City.

~~63.~~119. The Application went through ~~both~~ an inadequate administrative and ~~a~~ technical review by the ED, who failed to note numerous material deficiencies and inaccuracies.

120. The Application ~~included~~did not include all required information and was substantially ~~complete~~incomplete and inaccurate.

121. The Application:

- Identified the wrong facility operator (Aqua Texas);
- Did not identify Jonah as the known Facility operator having overall responsibility of the Facility operations per the fully executed NSSAs;
- Did not identify 600 Westinghouse Investments LLC as an owner of land where a fixture of the Facility, the 12" diameter effluent pipe, will be located;
- Did not identify Jonah or 600 Westinghouse Investments, LLC as co-applicants;
- Did not include the information pertaining to Jonah or 600 Westinghouse Investments, LLC required of co-applicants;
- Did not include a lease agreement or deed-recorded instrument evidencing consent of 600 Westinghouse Investments, LLC to have the 12" effluent pipeline on its property;
- Inappropriately characterizes the discharge route between the end of the culvert and Pond #1 as an "unnamed tributary, in the absence of evidence demonstrating that this portion of the proposed discharge route is shown as a watercourse on USGS maps[74] or had been field inspected to verify that it had bed and banks and other characteristics of a state-owned watercourse;
- Did not demonstrate that AIRW has authority from the owner of the land along the proposed discharge route between the end of the culvert and Pond #1 to discharge treated effluent onto its private property;
- Did not contain the information required for a TLAP permit, required when discharge is to the ground for a portion of the proposed discharge route, rather than to a state-owned watercourse;
- ~~64.~~ Did not include an accurate~~.~~ list of adjacent landowners entitled to receive notice of the Application;

[74] AIRW-EXH. 4, at Bates p. 00023 (USGS Topographic Map showing no absence of watercourse between end of effluent pipe and Pond #1).

- Falsely stated that AIRW owned all of the land where the proposed Facility would be located;
- Falsely stated that AIRW owned all of the land where the proposed development would be located;
- Erroneously represented that the Facility site was within the study area of the flood plain map relied upon to prepare the Application;
- Erroneously stated that the effluent would not discharge to a city, county, or state highway right of way or drainage ditch, when the evidence showed that it would discharge to the City's right-of-way for existing CR 110[75];
- Did not accurately identify existing uses of the receiving waters; and
- Falsely stated that there was no permitted domestic wastewater treatment plant located within three (3) miles of the proposed facility that currently has the capacity to accept or is willing to expand to accept the volume of wastewater proposed in the application.[76]

Antidegradation

~~65.~~122. The prima facie demonstration that the Draft Permit complies with TCEQ's antidegradation policy and procedures was ~~not~~ rebutted by the City.

~~66.~~123. 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.~~124. The narrative and numeric criteria to protect existing uses will not be maintained throughout the receiving waters; therefore, existing water quality uses will not be maintained and protected.

~~68.~~125. 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~~even if AIRW complies with the Draft Permit, which will not satisfy the antidegradation Tier 1 requirements.

~~69.~~126. 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~~even if AIRW complies with the Draft Permit~~, which will satisfy~~ because the ~~antidegradation Tier 2 requirements.~~Draft

[75] AIRW. EXH. 4, at Bates p. 00010.

[76] AIRW. EXH. 4, at Bates p.

Permit allows increased algal growth in the perennial pools during low flow conditions[77] to greater than a de minimis degree.[78]

~~70.~~127. The Draft Permit ~~complies~~does not comply with TCEQ's antidegradation policy and procedures.

Compliance History

~~71.~~128. AIRW's compliance status is unclassified. The compliance history of Jonah and 600 Westinghouse Investments, LLC was not in evidence.

129. Jonah's compliance history was required per 30 Texas Administrative Code section 305.43(a) because Jonah would be the Facility operator having overall responsibility for facility operations and thus a required co-applicant, was not presented as evidence or evaluated by the ED as required pursuant to 30 TAC § 305.43.

130. The compliance history for 600 Westinghouse Investments, LLC, the owner of the land on which the 12" diameter effluent pipeline fixture of the Facility would be located a and thus a required co-applicant, was not presented as evidence or evaluated by the ED as required pursuant to 30 TAC § 305.43.

~~72.~~131. No evidence was presented that indicated that AIRW's compliance history should ~~alter or~~ result in permit ~~denial~~issuance.

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

133. The failure to consider the compliance history of Jonah serves as a basis for denial of the Draft Permit.

~~73.~~134. The failure to consider the compliance history of 600 Westinghouse Investments, LLC serves as a basis for denial of the Draft Permit.

[77] Hearing Tr. at 437:21–440:10.

[78] PFD at 53 (total phosphorus limit "will prevent *excessive* growth of algae and other aquatic vegetation"); ED EX. JL-1 at Bates p. 0009 (phosphorus effluent limit imposed "to prevent degradation and *excessive* growth of aquatic life").

Operational Requirements

~~74.~~135. The prima facie demonstration that the Draft Permit contains sufficient provisions to ensure protection of water quality, including necessary operational requirements, was ~~not~~ rebutted by the City.

136. The operational requirements in the Draft Permit are not sufficient to ensure protection of water quality. The Draft Permit contains no measures to safeguard against the discharge of untreated or inadequately treated sewage.

~~75.~~

Transcription Costs

~~76.~~137. Reporting and transcription of the hearing on the merits was warranted because the hearing lasted for three days.

138. 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~~.

~~77.~~ The City ~~and AIRW.~~

~~78.~~139. ~~Both the City~~, Jonah, and AIRW participated roughly equally in the hearing and cited to the transcript in their closing arguments; therefore, ~~both sides~~these parties benefitted from having a transcript.

~~79.~~140. There was no evidence that any party subject to allocation of costs is financially unable to pay a share of the costs.

~~80.~~141. The total cost for recording and transcribing the preliminary hearing and the hearing on the merits was $8,848.75.

~~81.~~142. AIRW, Jonah, and the City should each pay one-~~half~~third 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 not 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~~rebutted 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 not 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 not protective of the health of residents near the proposed Facility and discharge route.

10. The Application ~~demonstrates~~does not demonstrate compliance with TCEQ's regionalization policy. Tex. Water Code §§ 26.003, 26.081(a)-(b), (d); 26.0282.

~~11.~~ The Application ~~demonstrates~~does not demonstrate a need for the Draft Permit. Tex. Water Code
11. § 26.0282.

12. The Draft Permit ~~contains~~does not contain sufficient provisions to prevent nuisance odors. 30 Tex. Admin. Code §§ 217.38, 309.13(e).

13. The Application is not substantially complete ~~and~~or accurate.

14. The Draft Permit ~~complies~~does not comply with TCEQ's antidegradation policy. 30 Texas Admin. Code §§ 307.5, 307.6(b)(4).

15. AIRW's compliance history does not ~~raise issues~~provide support regarding AIRW's ability to comply with the material terms of the Draft Permit ~~or that would warrant altering~~. Jonah's compliance history was not evaluated, so cannot provide support regarding Jonah's ability to comply with the material terms of the Draft Permit.

16. The Draft Permit ~~contains~~does not contain 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~~third to Jonah, one-third to AIRW and one-~~half~~third to the City.

~~19.~~

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~~denied.

2. AIRW, Jonah, and the City must each pay one-~~half~~third of the transcription costs.

3. The Commission ~~adopts~~rejects 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~~

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 a rental residential subdivision consisting of 880-duplexes,[1] on land owned by 600 Westinghouse Investments, LLC and 800 Westinghouse Investments, LLC, both Nevada limited liability companies.[2]

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 were presumed to be limited aquatic life use for the unnamed tributary to Mankins Branch, and high aquatic life use for Mankins Branch.[3] Other existing uses for the unnamed tributary to Mankins Branch and of Mankins Branch itself include recreational use and livestock watering.[4] The designated uses for Segment No. 1248 are primary contact recreation, public water supply, aquifer protection, and high aquatic life use.

4. A portion of the Facility, consisting of 12" diameter underground effluent pipe, would be located on land owned by 600 Westinghouse Investments, LLC, (600 Westinghouse) a Nevada limited liability company, not by AIRW.[5]

5. The 12" diameter underground effluent pipe is part of the Facility, would be underground, and is thus a "fixture."

6. The TCEQ's Instructions state, "IMPORTANT NOTE: More than one entity may be

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[1] The 880- unit development consists of 422 duplex units associated with 600 Westinghouse Investments, LLC's "Luxe Project" and 458 duplex units associated with 800 Westinghouse Investment, LLC's "Mansions Project." See AIRW-EXH. 43 at 1 & 34.

[2] See GT EXH. 37 at 1–3 & 5–37 (deeds); *id*. at 3 (AIRW's CCN filing noting each developer would construct on their own parcels and AIRW "will *not* own the duplexes to be constructed in either of the two Developments on Tract 1 and 2"); GT EXH. 8 (Bates pp. GT PFT 0000138 & 0000139) (Non-Standard Service Agreements showing location of "Luxe" and "Mansions" projects); AIRW-EXH. 43 at 1 & 34 (identifying 600 Westinghouse and 800 Westinghouse as Nevada limited liability companies).

[3] AIRW-EXH. 3, at Bates p. 00042 (citing 30 TAC § 307.4(h)&(l), which provide for presumed aquatic life uses).

[4] AIRW-EXH. 51 (public comment filed by adjacent landowner, Glenn Patterson, noting existing recreational and livestock watering uses of perennial ponds that are associated with the unnamed, intermittent tributary to Mankins Branch).

[5] AIRW-EXH 19; GT EXH. 37 at 1–3 and 5–37; GT EXH. 34; AIRW-EXH. 43.

required to apply for the permit as co-applicant. . . . If the facility is considered a fixture of the land (e.g., ponds, units half-way in the ground), there are two options. 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. The deed recorded easement must give the facility owner sufficient rights to the land for the operation of the treatment facility."[6]

7. The point at which the effluent pipe discharges is within the tract of land owned by 600 Westinghouse. USGS maps for this area do not show a water body at the outfall location.[7] AIRW did not present a delineation of unnamed tributary (including identification of observable bed and banks) to extend the unnamed tributary from the adjacent land to the proposed discharge point.

8. The culvert through which the proposed discharge would flow under CR 110 toward the nearest mapped surface water body is located in an area that is the subject of a City of Georgetown (City or Georgetown)-controlled right of way.[8]

9. 600 Westinghouse, did not join the Application as a co-applicant.[9]

10. The Application did not include a deed recorded instrument giving AIRW sufficient rights to use the 600 Westinghouse–owned land for operation of the Facility or for routing of the proposed discharge toward the nearest surface water body, nor was any such instrument included in the record.[10]

11. The Non-Standard Service Agreements (NSSAs) with Jonah Water Special Utility District (Jonah) were executed by 600 Westinghouse and 800 Westinghouse, both of which are Nevada limited liability companies. These NSSAs identify the proposed package plant site as owned by an affiliate of both 600 Westinghouse and 800 Westinghouse and state that 600 Westinghouse and 800 Westinghouse are the TPDES permit applicants and the parties that will construct the proposed package plant.[11]The aforementioned affiliate is AIRW.[12]

12. The deed to AIRW for the parcel of land upon which the proposed package plant will be

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[6] GT EXH. 14 at 29 (Bates p. GT PFT 0000215).

[7] AIRW EXH. 4 at Bates p. 00061.

[8] 600 Westinghouse granted Williamson County a drainage easement, GT EXH. 34, which transferred by operation of law to Georgetown upon its annexation of the land adjacent to the AIRW and 600 Westinghouse parcels. See Tex. Transp. Code § 311.001(a) (granting municipalities exclusive jurisdiction and control over roads in their city limits); GT EXH. 13 (ordinance annexing Patterson Ranch subdivision).

[9] AIRW-EXH. 4 at Bates p. 0004.

[10] AIRW-EXH. 4.

[11] See *id*. at 1 & 34 (noting 600 Westinghouse and 800 Westinghouse, respectively and as the "Developers", will construct the wastewater treatment plant for which they are obtaining a TCEQ permit); id. at 6 & 3 (indicating title to the plant site is recorded in the name of the developers' affiliate).

[12] See GT EXH. 37 at 2–3.

built was executed by 600 Westinghouse as Grantor. [13]

13. AIRW did not provide, and the Executive Director (ED) did not request, leases or deed-recorded instruments demonstrating AIRW's ownership of the land where the Facility was proposed to be located.

14. AIRW did not provide, and the ED did not request, evidence demonstrating a corporate affiliation between AIRW and 600 Westinghouse, nor is any such information included in the record.

15. No evidence in the record establishes that AIRW has the authority to act on behalf of 600 Westinghouse.

16. No evidence in the record establishes that 600 Westinghouse, or any other entity, has the authority to act on behalf of AIRW.

17. AIRW's consultant[14] and attorney[15], as well as Jonah[16] stated that AIRW, 600 Westinghouse, and 800 Westinghouse are essentially "one and the same" entity.

18. 30 Texas Administrative Code (TAC) section 305.43(a) provides that, "It is the duty of the owner of a facility to submit an application for a permit or a post-closure order. However, if the facility is owned by one person and operated by another and the executive director 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 Texas Pollutant Discharge Elimination System permits, it is the duty of the operator and the owner to submit an application for a permit***." (emphasis added).

19. The language in 30 TAC §305.43(a) granting the ED discretion under "special circumstances" to require both the facility owners and facility operator to be named as permit applicants ***does not apply to TPDES permits***. For TPDES permits, the rule provides that both the owners and operator of the facility ***must*** apply for the permit, and does not grant the ED discretion to waive the provisions of the rule requiring all facility owner(s) and operators to join a TPDES application.

20. Jonah is not listed as a co-applicant or even as the operator on the Application, and Jonah did not sign the Application.[17]

21. The ED erroneously declared the Application administratively complete on June 19, 2020, and technically complete on October 26, 2020.

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[13] GT EXH. 37 at Bates p. 0063.

[14] Transcript of Hearing on the Merits—Day 2, at 448:14–18.

[15] Transcript of Hearing on the Merits—Day 1, at 207:3.

[16] Transcript of Hearing on the Merits—Day 2, at 298:24 – 299:16.

[17] AIRW-EXH. 4 at Bates pp. 00007 and 00014.

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

23. AIRW provided false information in the Application regarding ownership of the land on which the proposed Facility will be located *and* false information regarding ownership of the land where the proposed development will be located; AIRW only owns a 21.39 acre tract of land, but represented in the Application that it owned 128.37 acres of land.[18]

24. 600 Westinghouse and 800 Westinghouse, owners and developers of the land where the proposed development would be located,[19] entered into NSSAs with Jonah Water on April 20, 2022 (prior to the commencement of the contested case hearing), for the provision by Jonah of wastewater services to their developments; but nothing in the NSSAs indicate that 600 Westinghouse and 800 Westinghouse were acting or had the authority to act on behalf of AIRW and AIRW is not a party to the NSSAs. [20]

25. Under the NSSAs, Jonah will own and operate the Facility if the TPDES permit is issued and if the permit transferred to it by the Commission under 30 TAC §305.64.

26. The Applicant provided false and incomplete information in the Application regarding ownership of the land where the proposed Facility would be located, its rights to place the Facility on land owned by a third party, and the proposed Facility operator. By failing to obtain information from other governmental entities as required by the ED's procedures implementing the TSWQS, the ED erred in determining that AIRW's permit application was accurate and complete.[21]

The Draft Permit

27. 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)).

28. The Facility will have treatment units including aeration basins and other non-redundant units[22] including 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.

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[18] The deed-recorded real property instruments, Applicant's PUC filings, and the NSSAs all show that AIRW does *not* own all the land shown on the Applicant's landowner map labeled as "Applicant's Property." *Compare* AIRW-EXH. 4 at Bates pp. 00063–64 (Applicant's landowner map with false information) *with* deed recorded instruments, Applicant's PUC filings, and NSSAs, at GT EXH. 37 at 1–3 (PUC Pleading) and 5–37 (deeds) and AIRW-EXH. 43 (NSSAs – attaching same deeds).

[19] AIRW-EXH. 43 (NSSAs attaching deeds); GT EXH. 37 (Applicant's PUC filings).

[20] AIRW-EXH 43 (NSSAs contain no reference to AIRW).

[21] Ex. ED-JL-3 at Bates p. 0036 (IPs at 20).

[22] AIRW-EXH. 4 at Bates p. 00025 (Table 1.01(1)).

29. The unclassified receiving water uses are primary contact recreation, livestock watering, and limited aquatic life use for the unnamed tributary of Mankins Branch (originating at livestock watering ponds within neighboring land) (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. No site visit was conducted to determine existing uses in the upstream segments of the discharge route.[23]

30. 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.

31. The effluent limitations in the Draft Permit state that 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

32. 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.

33. 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; the Combined Notice was necessary to correct the description of the proposed discharge route in the original June 2020 notices.[24]

34. The Combined Notice of Receipt and Intent to Obtain a Water Quality Permit and Notice of Application and Preliminary Decision was mailed to the statutory recipients and on the Affected Landowner List (Attachment C of the Application)[25] on or about December 3, 2020.[26]

35. The evidence showed that the Affected Landowner List attached as Attachment C to the Application was not based on the then current county tax rolls, rendering the application incomplete and inaccurate.[27] Seven landowners with deeds recorded at Williamson County

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[23] Transcript of Hearing on the Merits—Day 3, at 694:10–13.

[24] AIRW-EXH. 2 at Bates p. 00026.

[25] AIRW-EXH. 4 at Bates pp. 00063–65.

[26] AIRW-EXH. 2 at Bates p. 00025.

[27] 30 TAC 305.48(a)(2) (requiring the identification of owners of tracts of land adjacent to the treatment facility and for a reasonable distance along the watercourse from the proposed point of discharge "as can be determined from the ***current*** county tax rolls").

Appraisal District[28] *before* the date the Application was signed on March 23, 3030[29] and *before* the date that the Application was submitted to the TCEQ on April 6, 2020 who were not included by the Applicant on the Affected Landowner List.[30]

36. The Applicant admitted that it did not update the Affected Landowner List prior to submittal to the TCEQ on April 6, 2020 or prior to the mailed notice date of December 20, 2020.[31]

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

38. 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.

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

40. 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;

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[28] WCAD is the source of landowner names and mailing addresses the Applicant used to prepare the Affected Landowner List attached as Attachment C to the Application. See AIRW-EXH. 4 at Bates p. 00015.

[29] GT EXH. 3 at 20–21 (Bates pp. GT PFT 000090–91); *compare* AIRW-EXH. 4 at Bates pp. 00063–00065.

[30] AIRW-EXH. 4 at Bates pp. 00063–00065.

[31] Transcript of Hearing on the Merits—Day 2 at 344:5–345:6.

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.

41. 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

42. 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.

43. 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.

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

45. 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.

46. 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

47. 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 rebutted by the City.

48. 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.

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

review.

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

51. The Application did not contain information to corroborate that the intermittent, unnamed tributary extended to the proposed point of discharge.[32]

52. For the segment of the intermittent, unnamed tributary of Mankins Branch that originates within the Patterson Ranch subdivision, the ED did not conduct any field work to identify aquatic life within the apparently spring-fed system and the water quality standards to support said aquatic life were not evaluated as contemplated by the TCEQ's procedures to implement the TSWQS.

53. The Application did not include information required by the Instructions relating to existing uses, including "future" residential developments, nearby schools, recreational areas, and agricultural activities, in the vicinity of the proposed point of discharge.[33]

54. The ED did not independently confirm that the receiving water information in the Application was factually accurate by obtaining information from other sources to identify existing uses of the receiving water.[34]

55. The ED did not consider existing uses not identified by the Applicant, but made known to it during the public comment period by Mr. Webb and the City.[35]

56. The ED did not evaluate the effect of the proposed discharge on aesthetic water quality standards relevant to recreational use and enjoyment of waters in the state.[36]

57. The ED did not evaluate the effect of the proposed discharge on water quality standards protective of the propagation and protection of livestock and other terrestrial life.[37]

58. The ED did not evaluate the sensitivity of aquatic species present in the receiving stream or the effect of the proposed discharge on the water quality necessary to support these species.[38]

59. The ED's Tier 2 antidegradation review was based on a "no significant degradation" standard instead of the regulatory standard, which is set forth at 30 TAC § 307.5(b)(2)—

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[32] AIRW-EXH. 4 at Bates p. 00061.

[33] AIRW-EXH. 4 at Bates p. 00061; compare GT EXH. 14 at Bates p. GT PFT000219.

[34] GT EXH. 42 at 1; Transcript of Hearing on the Merits—Day 3, at 690:25–692:17; 694:1–13; and 694:24–695:5.

[35] See GT EXH. 43, Section 16 at 3 (note that analysis of dissolved ("DO") criteria for "unnd trib" did not consider impacts to perennial pools used as livestock water ponds and fishing ponds).

[36] Transcript of Hearing on the Merits—Day 3, at 695:11–14.

[37] AIRW-EXH. 4 at Bates pp. 00091–00092; GT EXH. 43.

[38] GT EXH. 43, Section 16, at 3.

i.e., prohibiting any degradation of water quality in Mankins Branch "unless it can be shown to the commission's satisfaction that the lowering of water quality is necessary for important economic or social development."[39]

60. The provisions and issuance of the Draft Permit were based on incomplete information in the Application and an incomplete analysis by the ED, which does not ensure that the Draft Permit is protective of existing uses and water quality for aquatic and terrestrial wildlife.

Regionalization

61. TEX. WATER CODE § 26.003 provides: "It is the policy of this 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."

62. To effectuate its policy of encouraging regionalization of wastewater services, TCEQ has never adopted any rules, but has promulgated an application form and the Instructions requiring an applicant to provide certain information to allow TCEQ to conduct a regionalization analysis in Domestic Technical Report 1.1, Section 1.

63. TEX. WATER CODE 26.027(b) states, "(b) A person desiring to obtain a permit or to amend a permit shall submit an application to the Commission containing all information reasonably required by the Commission."

64. AIRW provided false or incomplete answers to four out of five of the questions Domestic Technical Report 1.1, Section 1.

65. No part of the Facility or development is within the City's corporate limits, but adjoin and directly abut the City limits.[40]

66. The proposed Facility is within the City's extraterritorial jurisdiction (ETJ); the proposed discharge route is partially in the City's ETJ and partially in its city limits.[41]

67. The City owns and operates five permitted domestic wastewater treatment plants and has a permit for a sixth.[42] The City's wastewater collection system, and one of the City's permitted domestic wastewater treatment plants, are located within three (3) miles of the proposed Facility and it was undisputed that both have the capacity to accept the volume of wastewater proposed in the Application.[43]

68. The Applicant intentionally and knowingly falsely replied NO to the fourth question in

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[39] AIRW-EXH 3 at Bates p. 00037.

[40] GT EXH. 1 at 7:1–10; GT EXH. 7; GT EXH. 8.

[41] GT EXH. 7.

[42] GT EXH. 3 at 34:1–12 and 16:19; 35:1–2.

[43] GT EXH. 3 at 23:13–25:17; AIRW EXH 17 at 9:28–10:1.

Domestic Technical Report 1.1, Section 1.B.3, of the Application asking whether a permitted domestic wastewater treatment plant is located within three (3) miles of the proposed facility that currently has the capacity to accept or is willing to expand to accept the volume of wastewater proposed in the application.[44]

69. Section 13.05 of the City's Unified Development Code states that properties in the City's ETJ that desire wastewater services from the City must first submit a petition for voluntary annexation.[45] The requirements of Section 13.05 of the City's Unified Development Code may be waived by the City Council by following the City's process for requesting such a waiver[46] The record contains no evidence that AIRW ever filed an application for a waiver with the City.

70. As part of its Application, AIRW provided email correspondence to and from nearby providers regarding whether they would provide sewer service. With regard to service from the City, such email correspondence consisted of an email dated Wednesday, January 22, 2020, at 5:40 PM to Sofia Nelson, the City's Planning Director (not the City's Utility Director), containing the following two sentences: "Please site plan attached [sic] showing a 5 acre park in place of the wastewater treatment plant. Also please let me know how the discussions went yesterday. Thanks, Matt, Luxury Living."[47] No other evidence of a request for wastewater service from the City for the development was included with the Application.

71. AIRW's written communications with the City included in the Application were insufficient as AIRW did not provide documentation that it requested wastewater service from the City for the proposed development, and expressly stated in an email to the City that it did not want wastewater service from the City.[48]

72. The City explained to AIRW the requirements and implications of Section 13.05 of its Unified Development Code, and proposed alternatives, but AIRW did not pursue those alternatives.[49]

73. There was no indication that the City was unwilling to waive the annexation and or any land use requirements.

74. The evidence showed that the proposed development density could be achieved under the City's current land use requirements.[50]

75. There was no evidence that the City denied or declined to provide service due to lack of

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[44] AIRW-EXH. 17 at 9:28–10:1; compare AIRW-EXH 4 at Bates p. 00045.

[45] GT EXH. 35 at 6.

[46] GT EXH. 35 at 4.

[47] AIRW-EXH. 4 at Bates p. 00077.

[48] GT EXH. 1 at 11:16–20 and 14:3–6; GT EXH. 9.

[49] GT EXH. 1 at 13:4–11.

[50] Transcript of Hearing on the Merits—Day 1, at 77:8–25.

currently available wastewater treatment capacity.

76. The ED requested from AIRW a cost analysis of expenditures that included the cost of connecting to the City's facilities versus the cost of the proposed facility or expansion. It was undisputed that the only improvements needed to connect to the City's wastewater treatment system would be a force main and lift station.[51] Nothing in the supplemental Application filings compared the cost of constructing the proposed Facility to the cost of constructing the force main and lift station required to connect to the City's wastewater system.[52]

77. During the contested case hearing, AIRW admitted constructing the Facility would cost approximately $300,000 more than connecting to the City's system. However, per the NSSA's, Jonah's connection fees would add another $2,400,000 to the cost associated with choosing the Facility over the City's system.[53] The cost of constructing and operating the Facility therefor would be more than $2,600,000 higher than constructing the force main and lift station needed to connect to the City's system.[54]

78. AIRW averred that the cost to connect to the City's system should also include an amount attributable to alleged loss in property value by 600 Westinghouse Investments LLC and 800 Westinghouse Investments LLC accruing to their land after annexation, due to liability for payment of property taxes and other requirements in the City's Unified Development Code and that the requirement to pay City taxes would diminish the value of the developed property when sold.

79. No evidence was presented that in TPDES permitting proceedings the Commission has ever considered any landowners' diminished property value, lost profits, or other economic damage claims regardless of where the landowners were situated - whether along the discharge route, in the affected landowner radius, or on land that the facility would serve.[55]

80. The Commission does not consider, nor does it have any guiding rules or principles for considering, alleged reduction in property value and alleged lost profits on a future sale due to city taxes as a "cost" of connecting to a municipal wastewater treatment system.

81. Neither the Applicant nor the ED provided any support for the proposition that the ED may consider the profitability of a residential development, diminution in value of a property developed consistent or inconsistent with municipal land use regulations, or assessment of

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[51] GT EXH. 3 at 25:18–26:9; AIRW-EXH. 21.

[52] AIRW-EXH. 4 at Bates pp. 00105–00108.

[53] AIRW-EXH. 21, and AIRW-EXH. 43.

[54] Transcript of Hearing on the Merits—Day 1, at 191:9–23.

[55] To the contrary, the ED has previously noted that "[t]he TCEQ does not have jurisdiction to review the effect, if any, the discharge might have on property values of downstream landowners in reviewing a domestic wastewater discharge permit application." ED's Response to Comments, City of Dripping Springs WQ00144088003, Comment 135 (Oct. 31, 2017), available online at https://www.tceq.texas.gov/assets/public/agency/Dripping-Springs-WQ00144880030-RTC.pdf.

higher real estate taxes upon an applicant or, as here, *affiliates* of an applicant.

82. Even if it wanted to set such precedent with regard to such "costs", the Commission will not consider property tax liability in this case because AIRW does not own the land where the taxable improvements would be located (i.e., the duplex developments, owned by 600 Westinghouse and 800 Westinghouse)[56] and there is no evidence that AIRW would pay the property taxes on behalf of the landowners.

83. The allegedly deleterious effects of compliance with the City's Unified Development Code as applied to land inside the City limits is not relevant because the evidence included an admission by AIRW that it would not be the developer of any land and would thus not be subject to the City's Unified Development Code.[57]

84. Costs of constructing improvements needed to connect to the City's wastewater system compared to the costs of constructing the Facility weigh in favor of denying AIRW's application.

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

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

87. The evidence showed that the time to design and construct the force main and lift station necessary to connect to the City's system would not be an impediment to connecting to the City's system.

88. There is no regional provider designated by TCEQ rule for the area where the Facility is proposed to be located, nor has there been any such designation by the TCEQ for the past 44 years, since 1978.[58] However, the City owns and operates five wastewater treatment plants and has a permit for a sixth.[59]

89. The proposed Facility and its discharge route are not within the sewer CCN of any retail public utility, including Jonah.

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

91. Public Utility Commission rules do not apply to the TCEQ.

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[56] GT EXH. 37 at 1–3 and 5–37; GT EXH. 8; GT EXH. 34, AIRW-EXH. 43.

[57] GT EXH. 37 at 3 ("Applicant will ***not*** own the duplexes to be constructed in either of the two Developments on Tract 1 and 2 to be serviced by Applicant's wastewater system" (emphasis in original.)); GT EXH. 37 at 1–3; GT EXH. 34; AIRW-EXH. 43.

[58] GT EXH 2 at 11:15–19.

[59] GT EXH 3 at 23:13–25:17.

92. Jonah is a SUD that provides water service to approximately 9,000 customers, and 30,000 people are in its approximately 275-mile service area. Jonah does not provide wastewater treatment services to anyone anywhere.

93. Jonah testified that it is "negotiating" to provide wastewater treatment services to other nearby developments and plans to expand its wastewater services within its certificated water service area, but there was no evidence that it has done so.

94. If Jonah were to begin to provide wastewater treatment services, it would require construction of new wastewater treatment plants, and each new plant is a new point source of pollution.

95. Jonah:

(a) Does not own any wastewater treatment plants;

(b) Does not operate any wastewater treatment plants;

(c) Does not hold any TPDES or TLAP permits for any wastewater treatment plants;

(d) Does not provide wastewater treatment services to anyone anywhere;

(e) Has contracted with others to receive wastewater treatment services for the retail sewer customers within its sewer CCN boundaries because it has no wastewater treatment capabilities;

(f) Has only one employee, its General Manager, who holds a wastewater treatment license that would allow him to operate the Facility, but the General Manager does not actually operate any wastewater treatment plant under that license, and no other Jonah employee meets the wastewater treatment plant operator licensing requirements in the Draft Permit;

96. Jonah is not like Crystal Clear SUD in the *Crystal Clear Case*– Jonah was not a co-applicant on the Application and does not own and operate a wastewater treatment plant. Crystal Clear SUD was a co-applicant and owns and operates at least one wastewater treatment plant in addition to the one at issue in the *Crystal Clear Case*.

97. The Draft Permit is inconsistent with the state's regionalization policy and demonstration of need for the volume requested in the application for a new discharge permit pursuant to TWC § 26.0282.

Nearby Residents

98. The prima facie demonstration that the Draft Permit is protective of the health of nearby residents was rebutted by the City.

99. The City demonstrated that the Draft Permit does not contain adequate permit limits and monitoring requirements to protect the health of nearby residents.

100. The City demonstrated that the monitoring and sampling requirements in the Draft Permit are not protective of human health.

101. The proposed Facility would be about 400 feet away from existing homes in the Kasper/Fairhaven Subdivision.[60]

102. The proposed discharge route would traverse all the way through the Patterson Ranch Subdivision, a platted single-family residential subdivision that is currently under construction and, on full build out, will contain 420 homes with associated amenities, including public open space all along both sides of the proposed discharge route, including Pond #1 and Pond #2.[61]

103. There are existing agricultural uses of land along the discharge route downstream of the Patterson Ranch Subdivision.[62]

104. AIRW failed to disclose that existing uses implicating public health and enjoyment considerations by failing to state that the Facility would be about 400 feet from existing single family homes in the Kasper/Fairhaven Subdivision and would flow through public open space in the Patterson Ranch Subdivision.

105. AIRW failed to disclose existing agricultural use of land along the discharge route downstream of the Patterson Ranch Subdivision.[63]

106. The Draft Permit does not include requirements to ensure untreated or partially treated wastewater is not discharged onto the ground or a receiving stream or Pond #1 or Pond #2 in the event of design or construction flaws or other failures[64].

107. The sample collection types in the Draft Permit are not protective. The sample type for Carbonaceous Biochemical Oxygen Demand, Total Suspended Solids, Ammonia Nitrogen, and Total Phosphorous is "Grab" not "Totalizing" or "Composite."[65]

108. The sampling frequency in the Draft Permit for E *coli* is not protective. It is "one/month" not "one/week."[66]

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[60] GT EXH. 1 at 22:1–12; GT EXH. 7; GT EXH 11.

[61] GT EXH. 1 at 22:13–23:2; GT EXH. 7; GT. EXH. 12.

[62] See n. 4, supra.

[63] See Section 5(B) of Domestic Technical Report Worksheet 2.0, AIRW-EXH. 4 at Bates p. 00054 (asking for observed or evidence of, inter alia, livestock watering, fishing, contact recreation, non-contact recreation; no boxes were checked off).

[64] GT EXH. 3 at 36:16–38:8.

[65] GT EXH. 3 at 39:12–40:7.

[66] GT EXH. 3 at 39:12–40:7.

109. The Draft Permit includes phosphorus limits derived from a technical evaluation that included an incorrect characterization of the receiving water.[67]

110. A sampling frequency of "one/week" for phosphorous limits is not protective.[68]

111. The level of operator license in the Draft Permit not protective.[69] The Draft Permit requires a Class C licensed operator, not a Class B licensed operator.

112. The Draft Permit contains inappropriate effluent discharge limits.

113. The ED failed to consider whether the disinfection requirement in the Draft Permit was sufficient to protect nearby residents from exposure to pathogens (including enteric viruses and *E. coli*) in treated wastewater in light of the proximity of the point of discharge to the adjacent Patterson Ranch residential subdivision (and other residences further downstream), as well as the low flow conditions in the receiving stream and associated perennial pools (i.e., the former stock ponds). The Draft Permit is not protective of human health, including those of nearby residents.

Nuisance Odors

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

115. AIRW's expert testified that 12" effluent pipe, which is a fixture of the Facility, will be located outside of the facility boundary line shown on Attachment E to the Application[70] on land owned by a third party, and is therefore well outside of 150-foot buffer zone.[71]

116. The Applicant's buffer zone map was not detailed, making it impossible to determine whether all wastewater treatment units were within the alleged 150-foot buffer zone. [72]

117. The evidence showed that the discharge route is to an open green space area and two perennial ponds located within a single-family residential subdivision within one-half mile of the point of discharge.[73]

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[67] AIRW-EXH. 3 at 43 (characterizing the aquatic life use as "limited"); but see AIRW-EXH. 51 (public comments noting existing recreational fishing use).

[68] AIRW-EXH. 3 at 3. Because grab samples in two consecutive weeks could be taken as much as 13 days apart, discharges to the unnamed tributary and collecting in the perennial ponds could violate WQS for some or all of that time (especially during low flow and no-flow conditions).

[69] GT EXH. 3 at 38:9–39:2.

[70] AIRW-EXH. 4 at Bates p. 00070.

[71] Compare AIRW-EXH. 4 at Bates p. 00070 (buffer zone map omitting 12" effluent pipe) with AIRW-EXH. 19 (Perkins schematic showing 12" effluent pipe).

[72] Hearing Tr. at 204:1–209:9.

[73] AIRW-EXH. 4, at Bates p. 00023 (showing point of discharge, origin of unnamed tributary at first perennial pond, and location of first and second perennial ponds in relation to CR 110); AIRW-EXH. 45 (showing open space and

Completeness and Accuracy of Application

118. The prima facie demonstration that the Application is substantially complete and accurate was rebutted by the City.

119. The Application went through an inadequate administrative and technical review by the ED, who failed to note numerous material deficiencies and inaccuracies.

120. The Application did not include all required information and was substantially incomplete and inaccurate.

121. The Application:

- Identified the wrong facility operator (Aqua Texas);
- Did not identify Jonah as the known Facility operator having overall responsibility of the Facility operations per the fully executed NSSAs;
- Did not identify 600 Westinghouse Investments LLC as an owner of land where a fixture of the Facility, the 12" diameter effluent pipe, will be located;
- Did not identify Jonah or 600 Westinghouse Investments, LLC as co-applicants;
- Did not include the information pertaining to Jonah or 600 Westinghouse Investments, LLC required of co-applicants;
- Did not include a lease agreement or deed-recorded instrument evidencing consent of 600 Westinghouse Investments, LLC to have the 12" effluent pipeline on its property;
- Inappropriately characterizes the discharge route between the end of the culvert and Pond #1 as an "unnamed tributary, in the absence of evidence demonstrating that this portion of the proposed discharge route is shown as a watercourse on USGS maps[74] or had been field inspected to verify that it had bed and banks and other characteristics of a state-owned watercourse;
- Did not demonstrate that AIRW has authority from the owner of the land along the proposed discharge route between the end of the culvert and Pond #1 to discharge treated effluent onto its private property;
- Did not contain the information required for a TLAP permit, required when discharge is to the ground for a portion of the proposed discharge route, rather than to a state-owned watercourse;
- Did not include an accurate list of adjacent landowners entitled to receive notice of the

first perennial pond in red irregular shape along CR 110, toward the bottom of the figure).

[74] AIRW-EXH. 4, at Bates p. 00023 (USGS Topographic Map showing no absence of watercourse between end of effluent pipe and Pond #1).

Application;

- Falsely stated that AIRW owned all of the land where the proposed Facility would be located;
- Falsely stated that AIRW owned all of the land where the proposed development would be located;
- Erroneously represented that the Facility site was within the study area of the flood plain map relied upon to prepare the Application;
- Erroneously stated that the effluent would not discharge to a city, county, or state highway right of way or drainage ditch, when the evidence showed that it would discharge to the City's right-of-way for existing CR 110[75];
- Did not accurately identify existing uses of the receiving waters; and
- Falsely stated that there was no permitted domestic wastewater treatment plant located within three (3) miles of the proposed facility that currently has the capacity to accept or is willing to expand to accept the volume of wastewater proposed in the application.[76]

Antidegradation

122. The prima facie demonstration that the Draft Permit complies with TCEQ's antidegradation policy and procedures was rebutted by the City.

123. 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.

124. The narrative and numeric criteria to protect existing uses will not be maintained throughout the receiving waters; therefore, existing water quality uses will not be maintained and protected.

125. 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 be impaired by the Draft Permit even if AIRW complies with the Draft Permit, which will not satisfy the antidegradation Tier 1 requirements.

126. The Draft Permit will 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 even if AIRW complies with the Draft Permit because the Draft Permit allows increased algal growth in the perennial pools during

[75] AIRW. EXH. 4, at Bates p. 00010.

[76] AIRW. EXH. 4, at Bates p.

low flow conditions[77] to greater than a de minimis degree.[78]

127. The Draft Permit does not comply with TCEQ's antidegradation policy and procedures.

Compliance History

128. AIRW's compliance status is unclassified. The compliance history of Jonah and 600 Westinghouse Investments, LLC was not in evidence.

129. Jonah's compliance history was required per 30 Texas Administrative Code section 305.43(a) because Jonah would be the Facility operator having overall responsibility for facility operations and thus a required co-applicant, was not presented as evidence or evaluated by the ED as required pursuant to 30 TAC § 305.43.

130. The compliance history for 600 Westinghouse Investments, LLC, the owner of the land on which the 12" diameter effluent pipeline fixture of the Facility would be located a and thus a required co-applicant, was not presented as evidence or evaluated by the ED as required pursuant to 30 TAC § 305.43.

131. No evidence was presented that indicated that AIRW's compliance history should result in permit issuance.

132. AIRW's compliance history of unclassified does not serve as a basis for issuance of the Draft Permit.

133. The failure to consider the compliance history of Jonah serves as a basis for denial of the Draft Permit.

134. The failure to consider the compliance history of 600 Westinghouse Investments, LLC serves as a basis for denial of the Draft Permit.

Operational Requirements

135. The prima facie demonstration that the Draft Permit contains sufficient provisions to ensure protection of water quality, including necessary operational requirements, was rebutted by the City.

136. The operational requirements in the Draft Permit are not sufficient to ensure protection of water quality. The Draft Permit contains no measures to safeguard against the discharge of untreated or inadequately treated sewage.

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[77] Hearing Tr. at 437:21–440:10.

[78] PFD at 53 (total phosphorus limit "will prevent *excessive* growth of algae and other aquatic vegetation"); ED EX. JL-1 at Bates p. 0009 (phosphorus effluent limit imposed "to prevent degradation and *excessive* growth of aquatic life").

Transcription Costs

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

138. All parties fully participated in the hearing by presenting witnesses and cross-examining witnesses.

139. Both the City, Jonah, and AIRW participated roughly equally in the hearing and cited to the transcript in their closing arguments; therefore, these parties benefitted from having a transcript.

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

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

142. AIRW, Jonah, and the City should each pay one-third 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 not 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 rebutted 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 not 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 not protective of the health of residents near the proposed Facility and discharge route.

10. The Application does not demonstrate compliance with TCEQ's regionalization policy. Tex. Water Code §§ 26.003, 26.081(a)-(b), (d); 26.0282.

11. The Application does not demonstrate a need for the Draft Permit. Tex. Water Code § 26.0282.

12. The Draft Permit does not contain sufficient provisions to prevent nuisance odors. 30 Tex. Admin. Code §§ 217.38, 309.13(e).

13. The Application is not substantially complete or accurate.

14. The Draft Permit does not comply with TCEQ's antidegradation policy. 30 Texas Admin. Code §§ 307.5, 307.6(b)(4).

15. AIRW's compliance history does not provide support regarding AIRW's ability to comply with the material terms of the Draft Permit. Jonah's compliance history was not evaluated, so cannot provide support regarding Jonah's ability to comply with the material terms of the Draft Permit.

16. The Draft Permit does not contain 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-third to Jonah, one-third to AIRW and one-third 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 denied.

2. AIRW, Jonah, and the City must each pay one-third of the transcription costs.

3. The Commission rejects 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

Jon Niermann, Chairman