

# State Office of Administrative Hearings

Kristofer S. Monson  
Chief Administrative Law Judge

November 29, 2022

Mattie Isturiz

VIA EFILE TEXAS

Eli Martinez

VIA EFILE TEXAS

Peter T. Gregg / Curran M. Walker

VIA EFILE TEXAS

**RE: Docket Number 582-22-2095.TCEQ; Texas Commission on  
Environmental Quality No. 2389-37; IN RE: 2389-37**

Dear Parties:

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

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than December 19, 2022. Any replies to exceptions or briefs must be filed in the same manner no later than December 29, 2022.

This matter has been designated TCEQ Docket No. 2021-1216-MWD; SOAH Docket No. 582-22-2095. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www14.tceq.texas.gov/epic/eFiling/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Rebecca S Smith

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Rebecca Smith  
Presiding Administrative Law Judge

CC: Service List

**BEFORE THE  
STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

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**APPLICATION BY STUDIO ESTATES, LLC FOR  
NEW TEXAS POLLUTANT DISCHARGE ELIMINATION SYSTEM  
PERMIT No. WQ0015933001**

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**BEFORE THE  
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NEW TEXAS POLLUTANT DISCHARGE ELIMINATION SYSTEM  
PERMIT No. WQ0015933001**

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**PROPOSAL FOR DECISION**

Studio Estates, LLC (Applicant) filed an application (Application) on October 1, 2021, with the Texas Commission on Environmental Quality (TCEQ or Commission) for new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0015933001. Applicant seeks the permit to discharge up to 150,000 gallons of treated domestic wastewater per day during the final phase into Brushy Creek, a tributary of Plum Creek. The Administrative Law Judge (ALJ) recommends the Application be granted.

## **I. NOTICE, JURISDICTION, AND PROCEDURAL HISTORY**

No party has challenged notice, which is set out in the proposed order without further discussion here.

A preliminary hearing was held on May 31, 2022, via Zoom videoconference.

The hearing on the merits was held via Zoom videoconference on September 7, 2022, before ALJ Rebecca S. Smith of the State Office of Administrative Hearings (SOAH). Applicant was represented by attorney Peter T. Gregg. The Guadalupe Blanco River Authority (GBRA) was represented by attorneys Emily Rogers, Stefanie Albright, Courtney Kerr-Moore, and Justin C. Adkins. TCEQ's Executive Director (ED) was represented by attorney Michael Parr. TCEQ's Office of Public Interest Counsel was represented by attorney Eli Martinez. The record closed on September 30, 2022, with the filing of reply briefs.

## **II. BURDEN OF PROOF**

The Application was filed after September 1, 2015, and TCEQ referred it under Texas Water Code section 5.556, which governs referral of environmental permitting cases to SOAH based on a request for a contested case hearing.<sup>1</sup>

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<sup>1</sup> Tex. Water Code §§ 5.551(a), .556.

Therefore, this case is subject to Texas Government Code section 2003.047(i-1)-(i-3),<sup>2</sup> which provides:

- (i-1) In a contested case regarding a permit application referred under Section 5.556 . . . [of the] Water Code, the filing with [SOAH] of the application, the draft permit prepared by the executive director of the commission, the preliminary decision issued by the executive director, and other sufficient supporting documentation in the administrative record of the permit application establishes a prima facie demonstration that:
  - (1) the draft permit meets all state and federal legal and technical requirements; and
  - (2) a permit, if issued consistent with the draft permit, would protect human health and safety, the environment, and physical property.
- (i-2) A party may rebut a demonstration under Subsection (i-1) by presenting evidence that:
  - (1) relates to . . . an issue included in a list submitted under Subsection (e) in connection with a matter referred under Section 5.556, Water Code; and
  - (2) demonstrates that one or more provisions in the draft permit violate a specifically applicable state or federal requirement.
- (i-3) If in accordance with Subsection (i-2) a party rebuts a presumption established under Subsection (i-1), the applicant and the executive director may present additional evidence to support the draft permit.

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<sup>2</sup> Acts 2015, 84th Leg., R.S., ch. 116 (S.B. 709), §§ 1 and 5, eff. Sept. 1, 2015.

Although this law creates a presumption, sets up a method for rebutting that presumption, and shifts the burden of production on that rebuttal, it does not change the underlying burden of proof. Accordingly, the burden of proof remains with the Applicant 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.<sup>3</sup>

In this case, the Application, the Draft Permit, and the other materials listed in Texas Government Code section 2003.047(i-1), which are collectively referred to as the “Prima Facie Demonstration,” were offered and admitted into the record for all purposes.<sup>4</sup>

### **III. THE DRAFT PERMIT**

The Application describes a wastewater treatment facility (Facility) that will be located approximately 1.03 miles southeast of the intersection of Goforth Road and Niederwald Strasse Road, in Hays County, Texas, and will be an activated sludge process plant operated in the extended aeration mode.<sup>5</sup> The Draft Permit provides for two phases, the interim phase and the final phase. Treatment units in the interim phase will include a bar screen, a flow equalization basin, an aeration

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<sup>3</sup> 30 Tex. Admin. Code § 80.17(a), (c).

<sup>4</sup> App. Ex. 1.

<sup>5</sup> App. Ex. 1 Tab C at 0001.



basin, a final clarifier, a sludge digester, and a chlorine contact chamber.<sup>6</sup> Treatment units in the final phase will include a bar screen, a flow equalization basin, two aeration basins, two final clarifiers, two sludge digesters, and two chlorine contact chambers.<sup>7</sup>

During the interim phase, the Facility may not discharge more than 0.075 million gallons per day (MGD).<sup>8</sup> In the final phase, the Facility would be authorized to discharge up to 0.15 MGD.<sup>9</sup> There is no limit on how long the Facility can remain in the interim phase.

The Draft Permit contains the following limits for the interim phase:<sup>10</sup>

<b>Constituent</b>	<b>Limit</b>
5-day Biochemical Oxygen Demand (BOD5)	20 milligrams (mg)/ liter (L)
Total Suspended Solids (TSS)	20 mg/L
<i>E. coli</i>	126 colony forming units (CFU) or most probable number (MPN)
Dissolved Oxygen (DO)	3.0 mg/L minimum
Chlorine residual	At least 1.0 mg/L, no more than 4.0 mg/L
Effluent pH	Not less than 6.0 not more than 9.0

The Draft Permit contains the following limits for the final phase:<sup>11</sup>

<b>Constituent</b>	<b>Limit</b>
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<sup>6</sup> App. Ex. 1 Tab D at 00023.

<sup>7</sup> App. Ex. 1 Tab D at 00023.

<sup>8</sup> App. Ex. 1 Tab C at 0002.

<sup>9</sup> App. Ex. 1 Tab C at 0003.

<sup>10</sup> App. Ex. 1 Tab C at 0002.

<sup>11</sup> App. Ex. 1 Tab C at 0003.

BOD5	10 mg/L
TSS	15 mg/L
<i>E. coli</i>	126 CFU or MPN
DO	4.0 mg/L minimum
Chlorine residual	At least 1.0 mg/L, no more than 4.0 mg/L
Effluent pH	Not less than 6.0 not more than 9.0

The Draft Permit does not contain limits for ammonia nitrogen or total phosphorous in either the interim or final phase.

As set out in the Application, the proposed discharge route is first to Brushy Creek, then to Soil Conservation Service Site 14 Reservoir, then to Brushy Creek, and finally to Plum Creek in Segment No. 1810 of the Guadalupe River Basin.<sup>12</sup> Brushy Creek is a small tributary to Plum Creek and is intermittent in its upper reaches.<sup>13</sup>

#### IV. WATER QUALITY

The Commission referred a single issue for hearing: Whether the Draft Permit's effluent limitations are adequately protective of water quality in the receiving waters.

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<sup>12</sup> App. Ex. 1 Tab C at 0001.

<sup>13</sup> GBRA Ex. 1 at 6.

## **A. THE TEXAS SURFACE WATER QUALITY STANDARDS AND ANTIDegradation**

The Facility's proposed discharge is subject to the Texas Surface Water Quality Standards (TSWQS) found in title 30, chapter 307 of the Texas Administrative Code. The TSWQS identify appropriate uses for the state's surface waters (e.g., aquatic life, recreation, and public water supply), and establish narrative and numerical water quality standards to protect those uses. The TCEQ has standard procedures for implementing the TSWQS, referred to as the Implementation Procedures (IPs), which are approved by the U.S. Environmental Protection Agency (EPA).<sup>14</sup> The TSWQS and IPs are used in reviewing permit applications.<sup>15</sup>

The TCEQ has not adopted numeric criteria for nutrients in streams and rivers, so they are evaluated based on the general narrative criteria for nutrients and the antidegradation rules. Those general narrative criteria are that the nutrients must not cause excessive growth of aquatic vegetation that impairs uses of the waterbody. According to the IPs, the factors to be considered in this determination include the size of the discharge; instream dilution; sensitivity to growth of algae, attached vegetation, and aquatic vegetation; sensitivity to nutrient enrichment; streamflow sustainability; impoundments and pools; consistency with other

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<sup>14</sup> 30 Tex. Admin. Code § 307.2(e).

<sup>15</sup> ED Ex. 2 at 0018.

permits; and the existence of listed concern for nutrients in the TCEQ’s integrated report.<sup>16</sup>

The TSWQS also require that proposed wastewater discharges undergo an antidegradation review.<sup>17</sup> Antidegradation review is divided into two tiers. Tier 1 requires that “[e]xisting uses and water quality sufficient to protect those existing uses must be maintained.”<sup>18</sup> Tier 2 is more stringent and generally prohibits the lowering of water quality by more than a de minimis amount for waters that exceed fishable/swimmable quality, unless it can be shown that lowering is necessary for important economic or social development.<sup>19</sup>

## **B. THE PLUM CREEK WATERSHED PROTECTION PLAN**

In 2008, GBRA, along with several other entities, developed the Plum Creek Watershed Protection Plan (Plan) to restore water quality in Plum Creek and its tributaries and to ensure future watershed quality and health.<sup>20</sup> According to the Plan, the two main areas of concern were high levels of *E. coli* bacteria and high nutrient levels.<sup>21</sup> The plan was the result of work by stakeholders, with assistance from TCEQ. The Plan describes itself as “a guidance document”<sup>22</sup> and notes that

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<sup>16</sup> GBRA Ex. 1 at 5.

<sup>17</sup> 30 Tex. Admin. Code § 307.5(b).

<sup>18</sup> 30 Tex. Admin. Code § 307.5(b)(1).

<sup>19</sup> 30 Tex. Admin. Code § 307.5(b)(2).

<sup>20</sup> The Plum Creek Watershed Protection Plan was introduced into evidence as GBRA Exhibit 4.

<sup>21</sup> GBRA Ex. 4 at 000036.

<sup>22</sup> GBRA Ex. 4 at 000036.

it is “a voluntary, non-regulatory alternative to addressing water quality issues.”<sup>23</sup> Funding for the process of creating the Plan was provided through a federal grant.<sup>24</sup> As part of the Plan, all wastewater treatment facilities would work towards a permit treatment level of 5 mg/L BOD5, 5 mg/L TSS, 2 mg/L ammonia nitrogen, and 1 mg/L of total phosphorus.<sup>25</sup> This aspect of the Plan applied both to new facilities and to voluntary action by existing plants.

## **V. EVIDENCE**

Applicant and GBRA presented the testimony of a single witness each, and the ED presented the testimony of three witnesses. Applicant, GBRA, and the ED all introduced documentary exhibits, as well. OPIC did not present evidence.

### **A. CHARLES GILLESPIE’S TESTIMONY**

Applicant’s witness, Charles Gillespie III, is an engineer who focuses on wastewater permitting and water quality. He testified that the receiving stream Segment 1810 is not currently on the state’s list of impaired and threatened waters, also called the 303(d) list.<sup>26</sup> He testified that TCEQ appropriately followed the IPs and used appropriate modeling to conclude that the TSWQS will be maintained under the Draft Permit. He testified that discharge at the effluent concentrations in

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<sup>23</sup> GBRA Ex. 4 at 000063.

<sup>24</sup> GBRA Ex. 4 at 000063.

<sup>25</sup> App. Ex. 2 at 14.

<sup>26</sup> App. Ex. 2 at 13. Section 303(d) refers to the section in the 2020 Clean Water Act, 33 U.S.C. section 1251 *et seq.* App. Ex. 4.

the Draft Permit will not “severely impact” the ability to engage in recreational activities; and he contended that, to the extent that there is an impact within a mile downstream, the impact would be positive for canoeing and kayaking, since it is a shallow river at lower flows.<sup>27</sup> He testified there would be no impact more than two or three miles downstream of the outfall because the TCEQ’s modeling shows DO concentrations recovering rapidly beginning 0.6 miles downstream of the outfall.<sup>28</sup>

On cross-examination, Mr. Gillespie testified that he did not review the Plan because Plum Creek was over five miles from the proposed discharge point.<sup>29</sup> He also testified that he chose the BOD5 and TSS limits proposed in the Application because they were the least stringent ones.<sup>30</sup> He agreed he did not know of any permits in Segment 1810 with as high a limit of 20 mg/L BOD5 or 20 mg/L TSS.<sup>31</sup>

## **B. MICHAEL URRUTIA’S TESTIMONY**

GBRA witness Michael Urrutia, GBRA’s Deputy Executive Manager of Operations, expressed concerns about the proposed Draft Permit, particularly when considered in light of other permits being issued. According to Mr. Urrutia, issues with bacteria and nutrient load are greater in the upper portion of the Plum

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<sup>27</sup> App. Ex. 2 at 14.

<sup>28</sup> App. Ex. 2 at 15.

<sup>29</sup> Transcript (Tr.) at 20.

<sup>30</sup> Tr. at 20.

<sup>31</sup> Tr. at 20.

Creek watershed, which is where most of the population growth is located. This is also the area where Applicant plans to discharge.<sup>32</sup>

In his testimony, Mr. Urrutia emphasized the role of the Plan in protecting Plum Creek and its tributaries. He testified that despite the Plan, the Plum Creek watershed has *E. coli* levels that exceed the water quality standard limits and its nutrient levels remain elevated.<sup>33</sup> He added that Segment 1810 is included on TCEQ's 2022 Texas Integrated Report: Water Bodies with Concerns for Use Attainment and Screening Levels (Integrated Report)<sup>34</sup> for nitrate and total phosphorous in the water, plus impaired fish community, habitat, and microbenthic community.<sup>35</sup>

In particular, Mr. Urrutia described how increased levels of ammonia nitrogen and total phosphorous in streams can lead to algae blooms; and he noted that TCEQ often includes limits on ammonia nitrogen and total phosphorous in permits.<sup>36</sup> He testified that the 2 mg/L ammonia nitrogen and 1 mg/L total phosphorous limits set out in the Plan would help limit the amount of algae bloom in Plum Creek.<sup>37</sup> A permit that contained the limits anticipated by the Plan would be more protective than the Draft Permit and would assist in meeting recreation standard and lower nutrient levels. He stated that the type of plant Applicant

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<sup>32</sup> GBRA Ex. 1 at 10.

<sup>33</sup> GBRA Ex. 1 at 12.

<sup>34</sup> GBRA Ex. 7. This is a separate list from the 303(d) list.

<sup>35</sup> GBRA Ex. 1 at 12.

<sup>36</sup> GBRA Ex. 1 at 7.

<sup>37</sup> GBRA Ex. 1 at 10.

intends to construct—an activated sludge process operated in the extended aeration mode—provides no phosphorous control.<sup>38</sup>

Mr. Urrutia’s concern is that the Draft Permit will increase the nutrient load, which other entities will have to spend money to address. He also expressed concern that the TCEQ is issuing smaller permits, such as the Draft Permit, without considering the cumulative effect of all those small permits.<sup>39</sup>

In short, he testified that the Draft Permit should have limits that comply with the Plan: 5 mg/L BOD5, 5 mg/L TSS, 2 mg/L ammonia nitrogen, and 1 mg/L total phosphorous.

### **C. ED’S WITNESSES’ TESTIMONY**

ED witness Deba Dutta<sup>40</sup> is a permit coordinator, although he was not involved with the Application or the Draft Permit. He described the TCEQ’s process for evaluating applications such as the Application.

ED witness Jenna Lueg, an aquatic scientist with the TCEQ, described the process used in standards reviews. This process involves evaluating the discharge route; assigning uses and criteria to the receiving waters; and performing specific

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<sup>38</sup> GBRA Ex. 1 at 15.

<sup>39</sup> GBRA Ex. 1 at 14.

<sup>40</sup> Mr. Dutta adopted the written prefiled testimony of Tong Li, who was no longer at TCEQ at the time of the hearing. He then substituted his own prefiled testimony. ED Ex. 4.



water quality screenings. When evaluating the discharge route, she confirms the discharge route, including the discharge point and all receiving waters along that route; describes and determines the flow status of the unclassified receiving waters for the first three miles; describes the designated uses and criteria for the classified receiving water; describes the uses and criteria for the unclassified receiving waters for the first three miles; identifies endangered species with critical habitat listings for the waters; performs nutrient screenings and other specific water quality screening; and, if applicable, performs an antidegradation review.<sup>41</sup> Ms. Lueg was not the original standards reviewer for the Application; she replaced another reviewer who retired during the process.<sup>42</sup>

Ms. Lueg conducted a Tier 1 antidegradation review, which determined that existing water quality uses would not be impaired. She added that no Tier 2 review was performed because there were no water bodies with exceptional, high, or intermediate aquatic life within the stream reach. Ms. Lueg used three miles as the distance for determining unclassified water body uses and criteria, as that is the standard distance her team uses for such determinations and is based on the IPs. She noted that Brushy Creek is an intermittent stream with perennial pools and its uses are limited aquatic life use, incidental fisheries use, and primary contact recreation.<sup>43</sup>

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<sup>41</sup> ED Ex. 2 at 3.

<sup>42</sup> ED Ex. 2 at 7.

<sup>43</sup> ED Ex. 2 at 8.

Ms. Lueg checked TCEQ's 2020 Integrated Report to see if the receiving water was on the 305(b) or 303(d) lists and confirmed that Segment 1810 is listed in the report with concerns for nitrate, total phosphorous, impaired macrobenthic community, and ammonia.<sup>44</sup> Despite that, she testified that no nutrient screening was performed because, with the small amount of discharge and the significant distance of over six miles between the discharge and Plum Creek, no degradation is anticipated.<sup>45</sup> She testified that she did not think the constituents of concern in the discharge would reach, much less impair, the segment.<sup>46</sup> Because of that, she concluded that no ammonia nitrogen or total phosphorous limit is required in the Draft Permit.<sup>47</sup> Neither she, nor the original reviewer considered the Plan in the evaluation.<sup>48</sup> She also testified that she did not think it was necessary to address the concerns in the Integrated Report because Brushy Creek, the discharge location, is an intermittent stream with perennial pools.<sup>49</sup>

Ms. Lueg determined the appropriate dissolved oxygen criterion, which refers to the twenty-four-hour dissolved oxygen mean or twenty-four-hour dissolved oxygen minimum assigned to support a water body's aquatic life use.<sup>50</sup> The water-quality modeler then determined the effluent limits necessary to meet the criterion.

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<sup>44</sup> Tr. at 77-78. The question asked about "Segment 2018," which the ALJ interprets to mean Segment 1810. *See also* ED Ex. 13.

<sup>45</sup> Tr. at 78.

<sup>46</sup> Tr. at 78.

<sup>47</sup> ED Ex. 2 at 10.

<sup>48</sup> Tr. at 79.

<sup>49</sup> Tr. at 81.

<sup>50</sup> ED Ex. 2 at 9.

The ED also presented the testimony of modeler Josi Robertson, who performed the dissolved oxygen modeling for the Application.<sup>51</sup> A dissolved oxygen model is a mathematical representation of a surface water aquatic environment used to predict water quality conditions that would occur under a given set of discharge and ambient environmental conditions.<sup>52</sup> Modeling results are typically used in recommending effluent limits for BOD5, ammonia nitrogen, and effluent dissolved oxygen.<sup>53</sup> Ms. Robertson used the QUAL-TX model for modeling Brushy Creek, up until it enters the Soil Conservation Site 14 Reservoir about 7.8 kilometers downstream from the outfall, and then used the CSTR model for the reservoir.<sup>54</sup> She testified that no further modeling was warranted beyond those locations.<sup>55</sup>

Ms. Robertson testified that the Application's proposed effluent limits—in particular the 20 mg/L BOD5 limit—were insufficiently stringent at the higher flow, so she systematically increased the stringency of the limits, until limits were identified that would maintain the dissolved oxygen criteria.<sup>56</sup> The 20 mg/L BOD5 limit remains in the Draft Permit as the effluent limit during the Interim Phase.<sup>57</sup>

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<sup>51</sup> ED Ex. 3.

<sup>52</sup> ED Ex. 3 at 2.

<sup>53</sup> ED Ex. 3 at 2-3.

<sup>54</sup> ED Ex. 3 at 5-6.

<sup>55</sup> ED Ex. 3 at 7.

<sup>56</sup> ED Ex. 3 at 7.

<sup>57</sup> Tr. at 136.

## VI. ANALYSIS

GBRA argues that the Draft Permit is not protective during either the interim or the final phase. In addition to arguing that the Draft Permit does not comply with the Plan, it notes that the Interim Phase can continue indefinitely, and during that time, the BOD limit is 20 mg/L and the TSS limit is 20 mg/L. GBRA emphasizes that Mr. Gillespie testified that these limits were chosen because they were the least stringent limits possible.<sup>58</sup> Similarly, GBRA argues that the Draft Permit's final phase is also not protective because it does not include nutrient limits.

### **A. THE PLUM CREEK WATERSHED PROTECTION PLAN'S ROLE**

GBRA argues that the Draft Permit should be revised to contain limits that comply with the Plan. Applicant, the ED, and OPIC, citing the voluntary nature of the Plan, argue that the Draft Permit is not required to include the Plan's limits.

GBRA argues that the Plan is more than just a voluntary agreement because TCEQ was involved with its creation, and the EPA relied on the Plan in removing Segment 1810 from the 303(d) list. It argues that, but for the Plan, Segment 1810 would be included in the 303(d) list, which would trigger additional scrutiny. Relatedly, GBRA notes that failure to meet the Plan's milestones could result in the EPA adding Plum Creek to the 303(d) list.

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<sup>58</sup> Tr. at 21.

Considering GBRA’s first argument, the ALJ finds that the Plan was indeed voluntary. The Plan itself notes that it is “a voluntary, non-regulatory alternative to addressing water quality issues.”<sup>59</sup> The ALJ does not find that the TCEQ’s involvement in developing the Plan turns an agreement into a binding set of standards that apply to entities that did not agree to it. The Plan did not go through the required process by which the TCEQ adopts a rule, nor did the ED formally set out the Plan in the same way he did the IPs, for example. The Plan remains what it says it is—a voluntary agreement.

It appears that GBRA is correct that the EPA relied on the Plan in excluding Plum Creek from the 303(d) list. It is worth noting, however, that while the Plan specifically addressed both bacteria and nutrients, the concerns the EPA expressed involved bacteria but not nutrients.<sup>60</sup> Nonetheless, as with the TCEQ’s involvement, removal from the list based on voluntary action does not turn the voluntary action into a regulatory standard. Non-parties to the agreement are not subject to it.

## **B. OTHER BASES**

Much of Mr. Urrutia’s testimony addressed the Plan and the limits set out in the Plan. In addition, he testified that he was concerned that the Draft Permit’s limits would make it harder for the members of the Plum Creek Watershed Partnership to work toward their water quality goals. GBRA also presented

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<sup>59</sup> GBRA Ex. 4 at 000063.

<sup>60</sup> GBRA Ex. 6 at 000293.

evidence that permits for other wastewater treatment plants contained nutrient limits, and evidence that the Draft Permit's limits were higher than those of most of the other wastewater treatment plants in the Plum Creek watershed.<sup>61</sup> But GBRA did not present evidence from modelers or other experts who calculated the impacts of this particular discharge.

GBRA also points out other small permits issued within three miles of the Draft Permit contain ammonia nitrogen limits.<sup>62</sup> GBRA argues that the ED has not shown why those permits contain ammonia nitrogen limits but the Draft Permit does not. The ALJ notes that Ms. Lueg testified she did not believe those limits were necessary because, given the distance from Plum Creek, she did not think the constituents would make it to the impaired waters.

Finally, Ms. Robertson testified that the limits provided in the interim phase would not be protective if they were included in the final phase. Although GBRA is correct that there is no time limit for how long Applicant can continue to discharge during the interim phase, the discharge under the interim phase is half that in the final phase.<sup>63</sup>

GBRA did not present evidence that any more than a Tier 1 antidegradation review was necessary.

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<sup>61</sup> GBRA Exs. 9-23.

<sup>62</sup> GBRA Exs. 9-23.

<sup>63</sup> To the extent GBRA raises concerns about the ED's methods of calculating permit limits—starting with the proposed limits and then working down from that limit until a protective limit is reached—those concerns are outside the scope of this proceeding.

Although the Applicant bears the ultimate burden of proof, to overcome the presumption created by the prima facie demonstration, GBRA needed to present some evidence that the Draft Permit would violate a specifically applicable state or federal requirement.<sup>64</sup> GBRA presented evidence that the Draft Permit does not comply with the Plan and is less protective than most of the other wastewater discharge permits in the Plum Creek Watershed. But GBRA did not present evidence that it violated an applicable requirement.

The ALJ understands GBRA's concerns that the discharge the Draft Permit allows has the potential to increase costs to others. But, given the voluntary nature of the Plan and the absence of evidence that the Draft Permit violates a specifically applicable state or federal requirement, the ALJ recommends the Application be granted and the Draft Permit issued.

## **VII. TRANSCRIPTION COSTS**

The Commission may assess reporting and transcription costs to one or more of the parties participating in a proceeding, and when doing so, must consider the following factors:

- (A) the party who requested the transcript;
- (B) the financial ability of the party to pay the costs;
- (C) the extent to which the party participated in the hearing;
- (D) the relative benefits of the various parties of having a transcript; . . .

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<sup>64</sup> Tex. Gov't Code § 2003.047(i-2)(2).

and

- (G) any other factor which is relevant to a just and reasonable assessment of costs.<sup>65</sup>

In this case, no party presented any evidence or argument about transcription costs or any of the factors, so the ALJ is unable to make a recommendation regarding how those costs should be assessed. In the absence of a recommendation, the transcription costs remain with the party or parties who incurred them.

## VIII. CONCLUSION

In conclusion, the ALJ recommends that the Application be granted and the Commission adopt the Findings of Fact and Conclusions of Law in the Proposed Order.

**SIGNED NOVEMBER 29, 2022.**

ALJ Signature(s):



Rebecca Smith  
Presiding Administrative Law Judge

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<sup>65</sup> 30 Tex. Admin. Code § 80.23(d)(1).



**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

**AN ORDER  
GRANTING THE APPLICATION BY  
STUDIO ESTATES, LLC  
FOR NEW TEXAS POLLUTANT DISCHARGE ELIMINATION SYSTEM  
PERMIT NO. WQ0015933001  
IN HAYS COUNTY, TEXAS;  
SOAH DOCKET NO. 582-22-2095;  
TCEQ DOCKET NO. 2021-1216-MWD**

On \_\_\_\_\_, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the application of Studio Estates, LLC (Applicant), for new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0015933001 in Hays County, Texas. A Proposal for Decision (PFD) was presented by Administrative Law Judge (ALJ) Rebecca S. Smith with the State Office of Administrative Hearings (SOAH), who conducted an evidentiary hearing concerning the application on September 7, 2022, via Zoom videoconference.

After considering the PFD, the Commission makes the following findings of fact and conclusions of law.

**I. FINDINGS OF FACT**

**Application**

1. Applicant filed its application (Application) for a TPDES permit with the Commission on October 1, 2020.
2. The Application requested authorization to discharge treated domestic wastewater from a wastewater treatment facility (Facility), that will be located approximately 1.03 miles southeast of the intersection of Goforth Road and Niederwald Strasse Road, in Hays County, Texas.
3. The proposed discharge route is to Brushy Creek, then to Soil Conservation Service (SCS) Site 14 Reservoir, then to Brushy Creek, and finally to Plum Creek in Segment No. 1810 of the Guadalupe River Basin.
4. The Application requested to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 0.075 million gallons per day (MGD) in the interim phase and a daily average flow not to exceed 0.15 MGD in the final phase.
5. The Executive Director (ED) of the Commission declared the Application administratively complete on December 18, 2020.
6. The ED completed the technical review of the Application, prepared a draft permit (Draft Permit) and made it available for public review and comment.

### **Draft Permit**

7. The Facility will be an activated sludge process plant operated in the extended aeration mode. The Draft Permit provides for two phases, the interim phase and the final phase. During the interim phase, the Facility may not discharge more than 0.075 MGD. In the final phase, the Facility would be authorized to discharge up to 0.15 MGD.
8. Treatment units in the Interim phase will include a bar screen, a flow equalization basin, an aeration basin, a final clarifier, a sludge digester, and a chlorine contact chamber. Treatment units in the Final phase will include a bar screen, a flow equalization basin, two aeration basins, two final clarifiers, two sludge digesters, and two chlorine contact chambers.

9. The Draft Permit contains the following effluent limits for the interim phase:

<b>Constituent</b>	<b>Limit</b>
5-day Biochemical Oxygen Demand (BOD5)	20 milligrams (mg)/ liter (L)
Total Suspended Solids (TSS)	20 mg/L
<i>E. coli</i>	126 colony forming units (CFU) or most probable number (MPN)
Dissolved Oxygen (DO)	3.0 mg/L minimum
Chlorine residual	At least 1.0 mg/L, no more than 4.0 mg/L
Effluent pH	Not less than 6.0 not more than 9.0

10. The Draft Permit contains the following effluent limits for the final phase:

<b>Constituent</b>	<b>Limit</b>
BOD5	10 mg/L
TSS	15 mg/L
<i>E. coli</i>	126 CFU or MPN
DO	4.0 mg/L minimum
Chlorine residual	At least 1.0 mg/L, no more than 4.0 mg/L
Effluent pH	Not less than 6.0 not more than 9.0

11. The Draft Permit does not contain limits for ammonia nitrogen or total phosphorous in either the interim or final phase.

### **Notice and Jurisdiction**

12. The Notice of Receipt of Application and Intent to Obtain Water Quality Permit was published in English on January 13, 2021, in *The Daily Record* and in Spanish in *La Prensa Comunidad* on January 12, 2021.
13. The Application was determined technically complete on March 15, 2021.

14. The Applicant published the Notice of Application and Preliminary Decision in English in *The Daily Record* on May 6, 2021, and in Spanish in *La Prensa Comunitad* on May 18, 2021.
15. The public comment period closed on June 17, 2020.
16. The ED filed the Response to Comments on August 5, 2021.
17. The ED's Final Decision letter was mailed on August 10, 2021, and the period for requesting a hearing or a request for reconsideration ended on September 9, 2021.
18. At its January 12, 2022 open meeting, the Commission granted the hearing request filed by the Guadalupe Blanco River Authority (GBRA) and referred a single issue to SOAH for a contested case hearing.
19. The sole referred issue is whether the proposed effluent limitations contained in the draft permit are adequately protective of water quality in the receiving waters.
20. On April 20, 2022, notice of the preliminary hearing was published in the *Daily Record*. Known parties received mailed notice. The notice included the time, date, and place of the hearing, as well as the matters asserted, in accordance with the applicable statutes and rules.

### **Proceedings at SOAH**

21. On May 31, 2022, a preliminary hearing was convened in this case via videoconference by SOAH ALJ Rebecca S. Smith. Applicant, the ED, TCEQ's Office of Public Interest Council (OPIC), and GBRA appeared.
22. The Administrative Record was admitted into the record as Applicant's Exhibit 1.
23. The hearing on the merits was convened via Zoom videoconference on September 7, 2022. The record ultimately closed on September 30, 2022, the date on which the last post-hearing written arguments were filed.

## **The Texas Surface Water Quality Standards**

24. The Texas Surface Water Quality Standards (TSWQS) designate uses for the state's surface waters and establish narrative and numerical water quality standards to protect those uses.
25. The TCEQ has adopted standard procedures to implement the TSWQS, which are approved by the U.S. Environmental Protection Agency (EPA) and set forth in "Procedures to Implement the Texas Surface Water Quality Standards" (IPs).
26. The TSWQS and IPs are used to set permit limits for wastewater discharges.
27. Nutrients in streams and rivers are evaluated based on the general narrative criteria for nutrients and the antidegradation rules.
28. Nutrients must not cause excessive growth of aquatic vegetation that impairs uses of the waterbody.
29. Under a Tier 1 antidegradation review, existing uses and water quality sufficient to protect those uses must be maintained. 30 Tex. Admin. Code § 307.5(b)(1).

## **The Plum Creek Watershed Protection Plan**

30. In 2008, GBRA, along with several other entities, developed the Plum Creek Watershed Protection Plan (Plan) to restore water quality in Plum Creek and its tributaries and to ensure future watershed quality and health.
31. The two main areas of concern addressed in the Plan were the high levels of *E. coli* and high nutrient levels.
32. The Plan describes itself as "a guidance document" and notes that it is "a voluntary, non-regulatory alternative to addressing water quality issues."
33. The TCEQ assisted with the creation of the Plan but has not adopted its standards.

34. As part of the Plan, all wastewater treatment facilities discharging to Plum Creek would work towards a permit treatment level of 5 mg/L BOD5, 5 mg/L TSS, 2 mg/L ammonia nitrogen, and 1 mg/L of total phosphorus.
35. Applicant has not agreed to abide by the Plan.

### **Water Quality**

36. Brushy Creek is an intermittent stream with perennial pools, and its uses are limited aquatic life use, incidental fisheries use, and primary contact recreation.
37. Plum Creek is over six miles away from the proposed discharge point.
38. Segment 1810 has been removed from the 303(d) list, the state's list of impaired and threatened waters.
39. The Tier 1 antidegradation review, which examined uses within three miles of the proposed discharge point, determined that existing water quality uses would not be impaired.
40. A Tier 2 antidegradation review was not required because no water bodies with exceptional, high, or intermediate aquatic life were within the stream reach.
41. The ED's modeler determined that Applicant's requested 20 mg/L BOD5 limit would not be protective during the final phase and reduced the limit to 10 mg/L of BOD5. She also reduced the TSS limit in the final phase to 15 mg/L instead of the requested 20 mg/L.
42. The discharge amount permitted in the interim phase is half the amount permitted in the final phase.
43. GBRA did not present evidence that the Draft Permit violates a specifically applicable state or federal requirement.
44. No evidence or argument about transcription costs was presented.

45. In the absence of evidence or argument, each party should bear its own transcription costs.

## II. CONCLUSIONS OF LAW

1. TCEQ has jurisdiction over this matter. Tex. Water Code chs. 5, 26.
2. SOAH has jurisdiction to conduct a hearing and to prepare a PFD in contested cases referred by the Commission under Texas Government Code section 2003.047.
3. Notice was provided in accordance with Texas Water Code sections 5.114 and 26.028; Texas Government Code sections 2001.051 and .052; and 30 Texas Administrative Code chapter 39.
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. Applicant's filing of the Administrative Record established a prima facie demonstration that: (1) the Draft Permit meets all state and federal legal and technical requirements; and (2) a permit, if issued consistent with the Draft Permit, would protect human health and safety, the environment, and physical property. Tex. Gov't Code § 2003.047(i-1); 30 Tex. Admin. Code §§ 80.17(c)(1), .117(c)(1), .127(h).
6. To rebut the prima facie demonstration established by the Administrative Record, a party must present evidence that (1) relates to one of the Referred Issues; and (2) demonstrates that one or more provisions in the Draft Permit violates a specifically applicable state or federal requirement. *See* Tex. Gov't Code § 2003.047(i-2); 30 Tex. Admin. Code §§ 80.17(c)(2), .117(c)(3).
7. If a party rebuts the prima facie demonstration, the Applicant and the ED may present additional evidence to support the Draft Permit. Tex. Gov't Code § 2003.047(i-3); 30 Tex. Admin. Code §§ 80.17(c)(3), .117(c)(3).
8. Applicant 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).

9. The Plan's standards are not regulatory, and the TCEQ is not required to follow them in issuing permits.
10. GBRA did not rebut the prima facie demonstration because it did not present evidence that the Draft Permit violates a specifically applicable state or federal requirement.
11. The Draft Permit's effluent limitations are adequately protective of water quality in the receiving waters.
12. The Application should be granted and the Draft Permit issued.
13. No transcript costs may be assessed against the ED or OPIC because the 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. Tex. Water Code §§ 5.275, .356; 30 Tex. Admin. Code § 80.23(d)(2).
14. In the absence of discussion or evidence about the factors set out in 30 Texas Administrative Code section 80.23(d)(1), no assessment of transcription costs should be made.

**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. The Application of Studio Estates, LLC for Texas Pollutant Discharge Elimination System Permit No. WQ0015933001 is granted.
2. The parties are to bear their own transcription costs.
3. 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.



4. 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.
5. TCEQ's Chief Clerk shall forward a copy of this Order to all parties.
6. 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**