

# State Office of Administrative Hearings

Kristofer S. Monson  
Chief Administrative Law Judge

April 26, 2023

## VIA EFILE TEXAS

The ED, represented by Aubrey Pawelka

OPIC, represented by Eli Martinez

Applicant, Represented by Joe Freeland, Jim Mathews, and Benjamin Mathews

Dave and Gale Hyden, Represented by Adam Friedman

Mary Louise Sims, Self-represented

Anne Cecile Daleon, Represented by Ms. Sims

**RE: SOAH Docket No. 582-22-09101; TCEQ No. 2022-0610-MWD;  
*Application of the City of Bryan***

Dear Parties:

Please find attached a Proposal for Decision in this case.

Exceptions and replies may be filed by any party in accordance with 1 Texas Administrative Code section 155.507(b), a SOAH rule which may be found at [www.soah.texas.gov](http://www.soah.texas.gov).

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## TABLE OF CONTENTS

I. Notice, Jurisdiction, and Procedural History .....	2
II. Introduction.....	3
A. Regulatory Context and Wastewater Discharge Permit Requirements .....	3
B. Proposed Facility and Draft Permit Conditions .....	5
C. Referred Issues.....	7
D. Burdens of Proof and Production.....	8
E. Summary of the Evidence.....	10
III. Discussion .....	11
A. Whether the Draft Permit Complies with the TSWQS and is Protective of Surface Water Quality .....	11
B. Whether the Draft Permit is Protective of Groundwater and Nearby Water Wells in the Area .....	13
C. Whether the Antidegradation review Complies with Applicable regulations and the Draft Permit Includes Adequate Nutrient Limits.....	15
D. Whether the Draft Permit is Protective of the Health of the Requesters, Their Families, and Other Individuals who Reside in the Immediate Vicinity of the Proposed Facility and Discharge Route .....	16
E. Whether the Draft Permit is Protective of Livestock, Wildlife, and Aquatic Life.....	18
F. Whether the Draft Permit Complies with Applicable Siting Requirements in 30 Texas Administrative Code Chapter 309.....	20
1. Adequate prevention of nuisance odors and vectors .....	20
2. Compliance with floodplain and wetland siting requirements .....	21
G. Whether the Commission should deny or alter the Terms and Conditions of the Draft Permit based on Consideration of Need under Texas Water Code § 26.0282.....	34
IV. TRANSCRIPTION COSTS.....	35
V. CONCLUSION.....	36

**BEFORE THE  
STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

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**APPLICATION BY THE CITY OF BRYAN FOR  
NEW TPDES PERMIT NO. WQ0015930001**

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**PROPOSAL FOR DECISION**

The City of Bryan (City or Applicant) filed an application (Application) with the Texas Commission on Environmental Quality (TCEQ or Commission) for a new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0015930001, to allow discharge of treated effluent from a proposed new wastewater-treatment facility (Facility) located in Brazos County, Texas.

The Executive Director (ED) reviewed the Application and issued a draft permit (Draft Permit) and recommended its issuance. Several individuals opposed the Application and the Commission referred the Application to the State Office of Administrative Hearings (SOAH) for a contested-case hearing on seven issues.

The Office of Public Interest Counsel (OPIC) and the named protesting parties recommend that the Application be denied. Having considered the evidence relating to these seven issues in the context of the governing law, the Administrative Law Judge (ALJ) recommends that the Application be approved and the Draft Permit issued without changes.

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

No party contested notice or the Commission's jurisdiction to act on the Application, or SOAH's jurisdiction to convene a hearing and prepare a Proposal for Decision (PFD). Therefore, a detailed description of these issues will be addressed only in the findings of fact and conclusions of law in the Proposed Order attached to this PFD.

The City submitted the Application on September 25, 2020, and the ED declared it administratively complete on January 14, 2021. The ED completed technical review of the Application on May 21, 2021, and prepared the Draft Permit, which, if approved, would establish the conditions under which the Facility must operate. After considering several requests for a hearing, on June 29, 2022, the Commission issued an interim order (Interim Order) referring seven issues to SOAH for a contested-case hearing and recommending several parties be granted affected-party status.

On October 31, 2022, ALJs Andrew Lutostanski and Ross Henderson convened a preliminary hearing via Zoom videoconference. At the preliminary

hearing, the ALJs admitted the administrative record, determined that SOAH had jurisdiction over the matter, named parties, and set the procedural schedule. In addition to the statutory parties (the City, the ED, and OPIC), the ALJs named protestants David and Margaret Hyden (the Hydens), Mary Louise Sims, and Anne Cecile Daleon as parties.

On February 2, 2022, ALJ Ross Henderson convened the evidentiary hearing at SOAH via Zoom videoconference. Attorneys Joe Freeland and Ben Mathews appeared for the City, Adam Friedman appeared for the Hydens, Aubrey Pawelka appeared for the ED, and Eli Martinez appeared for OPIC. Mary Louise Sims and Anne Cecile Daleon appeared as self-represented litigants and were aligned as parties for the hearing. The record closed with the filing of post-hearing briefs on February 28, 2022.

## **II. INTRODUCTION**

### **A. REGULATORY CONTEXT AND WASTEWATER DISCHARGE PERMIT REQUIREMENTS**

A person who seeks to discharge wastewater into water in the State must file an application with TCEQ under Chapter 26 of the Texas Water Code.<sup>1</sup> 30 Texas Administrative Code, chapter 305, subchapter C provides TCEQ's requirements for filing an application. Once an application is filed, TCEQ reviews the application in

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<sup>1</sup> Tex. Water Code § 26.027.

accordance with 30 Texas Administrative Code chapter 281.<sup>2</sup> Based on a technical review, the ED prepares a draft permit that is to be consistent with Environmental Protection Agency (EPA) and TCEQ rules and a technical summary that discusses the application and significant factual, legal, methodological, and policy questions considered while preparing the draft permit.<sup>3</sup>

A domestic wastewater treatment facility in Texas is subject to wastewater discharge permit requirements.<sup>4</sup> Title 30 Texas Administrative Code, chapter 305, subchapter F contains TCEQ's standard permit requirements, which TCEQ has adapted specifically for use in wastewater-discharge permits. All wastewater discharge permits are also subject to regulations found in 30 Texas Administrative Code, chapter 319, which require the permittee to monitor its effluent and report the results as required in the permit. Further, TCEQ has adopted water-quality standards applicable to wastewater discharges in accordance with section 303 of the Clean Water Act and section 26.023 of the Texas Water Code. These standards, the Texas Surface Water Quality Standards (TSWQS), are found in 30 Texas Administrative Code, Chapter 307. Additional law specific to the referred issues will be discussed further as relevant to the analysis.

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<sup>2</sup> 30 Tex. Admin. Code § 281.2(2).

<sup>3</sup> 30 Tex. Admin. Code § 281.21(b)-(c).

<sup>4</sup> Tex. Water Code ch. 26; *see, e.g.*, 30 Tex. Admin. Code chs. 217 (applying to domestic wastewater systems), 305, 307 (applying to all wastewater-discharge permits), 319.

## **B. PROPOSED FACILITY AND DRAFT PERMIT CONDITIONS**

The following description of the Facility and the Draft Permit is from the Administrative Record. Proposed TPDES Permit No. WQ0015930001 would authorize the discharge of treated domestic wastewater at an annual average flow not to exceed 6.0 million gallons per day (MGD) in the interim phase and an annual average flow not to exceed 12.0 MGD in the final phase from the Facility. The Facility, which has not been constructed, is proposed to be located approximately 1,400 feet northeast of the intersection of Australia Lane and Cole Lane in Brazos County, Texas 77845. The proposed Facility would serve the City.

The Facility would be an activated sludge process plant operated in the extended aeration mode. Treatment units in the Interim phase include a bar screen, a grit removal chamber, three aeration basins, three final clarifiers, a sludge holding tank, a belt filter press, an ultraviolet (UV) disinfection chamber and cascade aeration unit. Treatment units in the Final phase include two bar screens, two grit removal chambers, six aeration basins, six final clarifiers, two sludge holding tanks, two belt filter presses, two UV disinfection chambers and cascade aeration units.

Sludge generated from the treatment facility would be hauled by a registered transporter and disposed at a TCEQ-permitted landfill, Brazos Valley Solid Waste Management Authority, Twin Oaks Landfill, Permit No. 2292, in Grimes County and Brazos Valley Solid Waste Management Authority, Bryan Composting Facility, Permit No. 42003, in Brazos County. The Draft Permit also authorizes the disposal of sludge at a TCEQ-authorized land application site, co-disposal landfill, wastewater treatment facility, or facility that further processes sludge.

The Draft Permit would authorize discharge of treated effluent into receiving waters via Outfall 001. From Outfall 001, effluent would be discharged to Brushy Creek, thence to Wickson Creek, thence to the Navasota River Below Lake Limestone in Segment No. 1209 of the Brazos River Basin. The unclassified receiving water uses are limited aquatic life use for Brushy Creek and presumed high aquatic life use for Wickson Creek. The designated uses for Segment No. 1209 are primary contact recreation, public water supply, and high aquatic life use. The ED issued the Draft Permit with effluent limitations intended to maintain and protect the existing instream uses.

Effluent limitations in the final phase of the Draft Permit, based on a 30-day average, are 5 milligrams per liter (mg/L) five-day carbonaceous biochemical oxygen demand (CBOD<sub>5</sub>), 15 mg/L total suspended solids, 1.7 mg/L ammonia-nitrogen (NH<sub>3</sub>-N), 126 colony forming units (CFU) or most probable number (MPN) of *E. coli* per 100 milliliters (ml), and 6.0 mg/L minimum dissolved oxygen (DO).

The ED found that the Houston Toad, an endangered aquatic-dependent species of critical concern, occurs within the Segment No. 1209 watershed. Species distribution information for the Segment 1209 watershed provided by the United States Fish and Wildlife Service documents the toad's presence solely in the vicinity of Running Creek in Leon County. Based upon this information, the ED determined that the Facility's discharge is not expected to impact the Houston Toad, and thus, the discharge from the Facility is not expected to have an effect on any federal endangered or threatened aquatic or aquatic-dependent species or proposed species or their critical habitat.

Segment No. 1209 is currently listed on the 2020 Clean Water Act Section 303(d) list, specifically for bacteria in the portion of Navasota River from confluence with Camp Creek upstream to Lake Limestone Dam in Robertson County. Wickson Creek is also listed for bacteria from the confluence with an unnamed first order tributary (approximately 1.3 km upstream of Reliance Road crossing) upstream to the confluence with an unnamed first order tributary approximately 15 meters upstream of Dilly Shaw Road. The ED determined that the Facility would be designed to provide adequate disinfection and, when operated properly, should not add to the bacterial impairment of Segment No. 1209 or Wickson Creek. To ensure that the proposed discharge meets the stream bacterial standard, an effluent limitation of 126 CFU or MPN of E. coli per 100 ml was included in the Draft Permit.

### **C. REFERRED ISSUES**

As set forth in the Interim Order, the seven issues referred are:

- A. Whether the Draft Permit complies with the TSWQS and is protective of surface water quality;
- B. Whether the Draft Permit is protective of groundwater and nearby water wells in the area;
- C. Whether the antidegradation review complies with applicable regulations and the Draft Permit includes adequate nutrient limits;
- D. Whether the Draft Permit is protective of the health of the requesters, their families, and other individuals who reside in the immediate vicinity of the Facility and discharge route;
- E. Whether the Draft Permit is protective of livestock, wildlife, and aquatic life;

- F. Whether the Draft Permit complies with applicable siting requirements in 30 Texas Administrative Code Chapter 309, including adequate prevention of nuisance odors and vectors and compliance with floodplain and wetland siting requirements; and
- G. Whether the Commission should deny or alter the terms and conditions of the Draft Permit based on consideration of need under Texas Water Code § 26.0282.

#### **D. BURDENS OF PROOF AND PRODUCTION**

As the moving party, the City bears the burden of proof by a preponderance of the evidence.<sup>5</sup> The Application was filed after September 1, 2015, and the Commission referred it to SOAH under Texas Water Code section 5.556, which governs referral of environmental permitting cases to SOAH.<sup>6</sup> Therefore, this case is subject to Texas Government Code section 2003.047(i-1)-(i-3), as enacted in 2015, which provides:

- (i-1) In a contested case regarding a permit application referred under Section 5.556 . . . [of the] Water Code, the filing with [SOAH] of the application, the draft permit prepared by the executive director of the commission, the preliminary decision issued by the executive director, and other sufficient supporting documentation in the administrative record of the permit application establishes a prima facie demonstration that:

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<sup>5</sup> 30 Tex. Admin. Code § 80.17(a); 1 Tex. Admin. Code § 155.427.

<sup>6</sup> Tex. Water Code §§ 5.551(a), .556.

- (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.<sup>7</sup>

Although this law creates a presumption, sets up a method for rebutting that presumption, and shifts the burden of production on that rebuttal, it does not change the underlying burden of proof. The burden of proof remains with the City to establish by a preponderance of the evidence that the Application would not violate

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<sup>7</sup> *Accord* 30 Tex. Admin. Code § 80.17(c).

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>8</sup>

### **E. SUMMARY OF THE EVIDENCE**

The Administrative Record established a prima facie demonstration that: (1) the Draft Permit meets all state and federal legal and technical requirements; and (2) a permit, if issued consistent with the Draft Permit, would protect human health and safety, the environment, and physical property.<sup>9</sup>

At hearing, for the purpose of rebutting the City's prima facie demonstration,<sup>10</sup> the Hydens offered, and the ALJ admitted, the prefiled testimony and attachments of Gayle Hyden<sup>11</sup> and the prefiled testimony and attachments of Lawrence Dunbar, P.E.<sup>12</sup> Additionally, the Hydens offered seven cross-examination exhibits which were also admitted.<sup>13</sup>

Under Texas Government Code section 2003.047(i-3), if another party rebuts the prima facie demonstration by submission of evidence, the City and the ED may present additional evidence to support the draft permit. In that regard, in response

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<sup>8</sup> 30 Tex. Admin. Code § 80.17(a), (c).

<sup>9</sup> Tex. Gov't Code § 2003.047(i-1).

<sup>10</sup> Tex. Gov't Code § 2003.047(i-1)-(i-3).

<sup>11</sup> Exs. Protestants 100-103 (Hyden Dir. and attach.).

<sup>12</sup> Exs. Protestants 200-204 (Dunbar Dir. and attach.).

<sup>13</sup> Exs. Protestants Cross 1-7.

to the Hydens's evidence, the City offered, and the ALJ admitted, the testimony and attachment of Allen Woelke, P.E.<sup>14</sup> The ED offered the prefiled testimony and attachments of Brittany Lee and Abdur Rahim, which were all admitted.<sup>15</sup>

OPIC and the remaining protesting parties, Ms. Sims and Ms. Daleon, did not offer any testimony or exhibits.

### **III. DISCUSSION**

An analysis of the seven referred issues follows.

#### **A. WHETHER THE DRAFT PERMIT COMPLIES WITH THE TSWQS AND IS PROTECTIVE OF SURFACE WATER QUALITY**

With respect to the first referred issue, Staff of the ED (Staff) performed an antidegradation review of the receiving waters pursuant to 30 Texas Administrative Code § 307.5 and the Commission's Procedures to Implement the TSWQS (June 2010).<sup>16</sup> According to Staff's review of the Application, if approved, the Draft Permit would authorize treated effluent to be discharged to Brushy Creek, thence to Wickson Creek, thence to the Navasota River Below Lake Limestone in Segment No. 1209 of the Brazos River Basin.<sup>17</sup> The unclassified receiving water uses for Brushy Creek are limited aquatic life use and presumed high aquatic life use for

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<sup>14</sup> Exs. COB (City of Bryan) 1-2 (Woelke Dir. and attach.).

<sup>15</sup> Exs. ED BL 1-2 (Lee Dir. and attach.) and AR 1-2 (Rahim Dir. and attach.).

<sup>16</sup> *ED's Preliminary Decision*, Administrative Record, Tab C at 0112.

<sup>17</sup> *ED's Preliminary Decision*, Administrative Record, Tab C at 0112.

Wickson Creek.<sup>18</sup> The designated uses for Segment No. 1209 are primary contact recreation, public water supply, and high aquatic life use.<sup>19</sup> Staff's anti-degradation review determined that the effluent limitations in the Draft Permit will maintain and protect all existing instream uses. Specifically, Staff's Tier 1 antidegradation review determined that existing water quality uses will not be impaired by issuance of the Draft Permit and that numerical and narrative criteria to protect existing uses will be maintained.<sup>20</sup> Likewise, Staff's Tier 2 anti-degradation review determined that no significant degradation of water quality is expected in Wickson Creek and existing uses will be maintained and protected.<sup>21</sup>

The Administrative Record created a prima facie demonstration that the Draft Permit complies with the TSWQS, and no party offered evidence to rebut the demonstration.<sup>22</sup> Because no party rebutted the prima facie demonstration, additional evidence was not required from the ED or the City.<sup>23</sup> Further, whereas the City, Staff, and OPIC all argued that the Draft Permit meets the TSWQS and is protective of surface water quality, no other party addressed the issue in briefing. Therefore, the ALJ finds that the Draft Permit complies with the TSWQS and is protective of surface water quality.

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<sup>18</sup> *ED's Preliminary Decision*, Administrative Record, Tab C at 0112.

<sup>19</sup> *ED's Preliminary Decision*, Administrative Record, Tab C at 0112.

<sup>20</sup> *ED's Preliminary Decision*, Administrative Record, Tab C at 0112.

<sup>21</sup> *ED's Preliminary Decision*, Administrative Record, Tab C at 0112.

<sup>22</sup> Tex. Gov't Code § 2003.047(i-1)-(i-2).

<sup>23</sup> Tex. Gov't Code § 2003.047(i-3).

## **B. WHETHER THE DRAFT PERMIT IS PROTECTIVE OF GROUNDWATER AND NEARBY WATER WELLS IN THE AREA**

In regard to the protection of groundwater, the Draft Permit provides that the City's facility may not be built closer than 500 feet from a public water well nor 250 feet from a private water well.<sup>24</sup> The Administrative Record created a prima facie demonstration that the Draft Permit is protective of groundwater and nearby wells in the area.

Ms. Hyden testified that she is concerned that the operation of the Facility will contaminate the four wells on her property, which range from 900 to almost 3,000 feet from the proposed Facility, and all of which are drilled to depths of approximately 300 feet.<sup>25</sup> The ALJ finds that Ms. Hyden's concerns cannot rebut the prima facie demonstration that the Facility will meet the regulatory buffer zone requirement of being at least 250 feet from her private wells, and there was no evidence that the Facility would otherwise pose a threat to groundwater in the area, or more particularly to her wells.

Ms. Daleon and Ms. Sims also expressed concern in post-hearing briefing regarding their own and others' wells, but neither of them timely submitted evidence and their arguments discussed evidence that was not admitted into the record. The references to evidence outside of the record cannot be considered. The ALJ finds that Ms. Daleon and Ms. Sims did not rebut the prima facie demonstration that the

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<sup>24</sup> *Draft Permit*, Administrative Record, Tab C at 0052 ("The permittee shall comply with the requirements of 30 [Tex. Admin. Code] § 309.13(a) through (d)."); *see* 30 Tex. Admin. Code § 309.13(c).

<sup>25</sup> Ex. Protestants 100 (Hyden Dir.) at 6.

wells will meet the regulatory buffer zone requirement of being at least 500 feet from public wells and at least 250 feet from private wells, and there was no evidence that the wells would otherwise pose a threat to groundwater in the area.

Because no party rebutted the prima facie demonstration, additional evidence was not required from the ED or the City.<sup>26</sup> Nevertheless, in response, ED witness Brittany Lee testified that the Draft Permit, will be protective of groundwater and 23 nearby groundwater wells if the Facility is operated in accordance with the Draft Permit.<sup>27</sup> Additionally, the City's witness Mr. Woelke agreed, he testified that the nearest private well in the vicinity of the Facility is located more than 500 feet away from a treatment unit. He added that Ms. Hyden's wells are provided more than the minimum separation from the treatment units to the wells and the wells are further protected by being located uphill from the treatment units.<sup>28</sup> In briefing, the City, Staff, and OPIC all argued that the Draft Permit is protective of groundwater and nearby wells while Ms. Sims and Ms. Daleon expressed only their concerns regarding the issue in briefing. Therefore, the ALJ finds that the Draft Permit is protective of groundwater and nearby wells.

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<sup>26</sup> Tex. Gov't Code § 2003.047(i-3).

<sup>27</sup> Ex. ED BL-1 (Lee Dir.) at bates 17. Refer to bates numbers rather than the original page numbers for this exhibit.

<sup>28</sup> Ex. COB-1 (Woelke Dir.) at 12.

**C. WHETHER THE ANTIDegradation REVIEW COMPLIES WITH APPLICABLE REGULATIONS AND THE DRAFT PERMIT INCLUDES ADEQUATE NUTRIENT LIMITS**

The antidegradation review was addressed above in section III.A, and the ALJ found that no party rebutted the prima facie demonstration that the Staff's antidegradation review complied with all applicable regulations. The ED's Preliminary Determination states that the Draft Permit includes conventional effluent parameters "based on stream standards and waste load allocations for water quality-limited streams as established in the TSWQS and the State of Texas Water Quality Management Plan (WQMP) . . . [, and] effluent limitations in the draft permit meet the requirements for secondary treatment and the requirements for disinfection according to 30 [Texas administrative Code] Chapter 309."<sup>29</sup> With respect to whether the Draft Permit includes adequate nutrient limits, Staff's antidegradation review did not recommend additional limits, including nutrient limits, to protect the receiving waters.<sup>30</sup>

No party offered contrary evidence regarding the nutrient limits in the Draft Permit. Ms. Daleon and Ms. Sims asked Staff witness Ms. Lee about phosphorous limits during the hearing. Ms. Lee responded that no phosphorous limits are needed to protect the receiving waters based on the expected total phosphorous values of between 3 and 5 Mg/L.<sup>31</sup> Ms. Daleon also addressed this issue in closing arguments which included numerous references to evidence outside of the

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<sup>29</sup> ED's *Preliminary Decision*, Administrative Record, Tab C at 0114.

<sup>30</sup> ED's *Preliminary Decision*, Administrative Record, Tab C at 0114-0118.

<sup>31</sup> Ex. ED BL-1 (Lee Dir.) at bates 17.

record which cannot be considered. Ms. Daleon expressed her concern that the Facility will overload the surrounding areas with additional phosphorous levels and questions whether the rules are adequate. No other party contested the nutrient limits in the Draft Permit. On the other hand, the ED, the City, and OPIC all argue that Staff's antidegradation review complied with all regulations and that the Draft Permit includes adequate nutrient limits.

Once again, because no party rebutted the prima facie demonstration, the ALJ finds that Staff's antidegradation review complied with all regulations and that the Draft Permit includes adequate nutrient limits.<sup>32</sup>

**D. WHETHER THE DRAFT PERMIT IS PROTECTIVE OF THE HEALTH OF THE REQUESTERS, THEIR FAMILIES, AND OTHER INDIVIDUALS WHO RESIDE IN THE IMMEDIATE VICINITY OF THE PROPOSED FACILITY AND DISCHARGE ROUTE**

Above, the ALJ found that the Draft Permit complies with the TSWQS and is protective of surface water quality. Staff's review included protection of designated uses relevant to the health of individuals in the vicinity of the Facility and along the discharge route (including, as relevant to this issue, primary contact recreation and public water supply).<sup>33</sup> Staff concluded that all designated uses for Segment No. 1209

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<sup>32</sup> Tex. Gov't Code § 2003.047(i-3).

<sup>33</sup> *ED's Preliminary Decision*, Administrative Record, Tab C at 0112.

would be maintained and protected by the effluent limitations in the Draft Permit.<sup>34</sup> No party offered contrary evidence regarding this issue.

Because no party rebutted the prima facie demonstration, additional evidence was not required from the ED or the City on this issue.<sup>35</sup> Regardless, Ms. Lee testified for Staff that, as part of the antidegradation review, Staff was required to look at any factor that could degrade the waterbody, with special attention to potential concerns or impairments as designated by the state inventory list, or federal 303(d) list for all receiving streams.<sup>36</sup> Ms. Lee testified that the only concern listed for this area is bacteria and that an end of pipe bacteria limit was implemented that is less than or equal to segment criteria to ensure water quality and human health are protected and maintained. She reiterated that, based on the information given in the Application and additional resources, the antidegradation review complies with applicable regulations. Mr. Woelke also testified for the City regarding bacteria, noting that the Draft Permit includes a daily average limit for E. Coli bacteria of 126 CFU/MPN per 100 ml which is the criteria established in the TSWQS.<sup>37</sup> On this issue, he also noted that the Draft Permit complies with the siting requirements in 30 Texas Administrative Code, Chapter 309, including a buffer zone of 150 feet.<sup>38</sup>

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<sup>34</sup> *ED's Preliminary Decision*, Administrative Record, Tab C at 0112.

<sup>35</sup> Tex. Gov't Code § 2003.047(i-3).

<sup>36</sup> Ex. ED BL-1 (Lee Dir.) at bates 18.

<sup>37</sup> Ex. COB-1 (Woelke Dir.) at 13.

<sup>38</sup> Ex. COB-1 (Woelke Dir.) at 13.

The ED, the City, and OPIC all argue that Draft Permit is protective of persons in the vicinity of the Facility and the discharge route, while Ms. Sims expressed concerns regarding her and her family's health and safety. Ms. Sims's references in argument to evidence outside of the record cannot be considered. The prima facie demonstration is un rebutted; therefore, ALJ finds that the City met its burden to prove the Draft Permit is protective of human health and safety of persons in the vicinity of the Facility and along the discharge route.

**E. WHETHER THE DRAFT PERMIT IS PROTECTIVE OF LIVESTOCK, WILDLIFE, AND AQUATIC LIFE**

The ALJ found above that that the Draft Permit complies with the TSWQS and is protective of surface water quality, including protecting the uses of the receiving waters, which included aquatic life use. Regarding whether the Draft Permit is protective of livestock and wildlife, the Administrative Record shows the Facility's discharge is not expected to impact the Houston Toad, an endangered aquatic-dependent species of critical concern, that occurs within the Segment No. 1209 watershed as well as the United States Geological Survey hydrologic unit code 12030201.<sup>39</sup> Nor is it expected to have an effect on any other federal endangered or threatened aquatic or aquatic-dependent species or proposed species or their critical habitat.<sup>40</sup> These findings were not contested by any party.

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<sup>39</sup> *ED's Preliminary Decision*, Administrative Record, Tab C at 0112-0113.

<sup>40</sup> *ED's Preliminary Decision*, Administrative Record, Tab C at 0112-0113.

In testimony, Ms. Hyden expressed concern regarding contamination of her water supplies if untreated wastewater reaches Brushy Creek on her property but offered no evidence to support her concerns.<sup>41</sup> Similarly, Ms. Sims argues, without evidentiary support, that the Facility will alter the ecology of the area. Therefore, no party rebutted the prima facie demonstration, and additional evidence was not required from the ED or the City.<sup>42</sup>

The ED, the City, and OPIC all argue that the Draft Permit is protective of wildlife, aquatic life, and livestock. Mr. Woelke and Ms. Lee testified that because the Draft Permit was written to meet the TSWQS, it is protective of wildlife and livestock.<sup>43</sup> Further, Mr. Woelke testified that the Draft Permit requires that the Facility's effluent be tested using biomonitoring, which tests both the acute and chronic impacts of the effluent on two typical aquatic life species, the *Ceriodaphnia Dubia* (Water Flea) and *Pimephales promelas* (Fathead minnow).<sup>44</sup> He stated that if effluent is found to harm either of these species, special studies must be undertaken to find the source of toxicity and to remove it from the effluent.<sup>45</sup>

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<sup>41</sup> Ex. Protestants 100 (Hyden Dir.) at 6.

<sup>42</sup> Tex. Gov't Code § 2003.047(i-3).

<sup>43</sup> Ex. ED BL-1 (Lee Dir.) at bates 19; Ex. COB-1 (Woelke Dir.) at 13.

<sup>44</sup> Ex. COB-1 (Woelke Dir.) at 14.

<sup>45</sup> Ex. COB-1 (Woelke Dir.) at 14.

As noted above, the prima facie demonstration on this issue is unrebutted, therefore, the ALJ finds that the Draft Permit is protective of wildlife, aquatic life, and livestock.

**F. WHETHER THE DRAFT PERMIT COMPLIES WITH APPLICABLE SITING REQUIREMENTS IN 30 TEXAS ADMINISTRATIVE CODE CHAPTER 309**

**1. Adequate prevention of nuisance odors and vectors**

The Commission's siting requirements necessitate adequate prevention of nuisance odors and vectors. In that regard, the Draft Permit provides that the City's facility must abate and control nuisance odors in one of several ways specified by Commission rules.<sup>46</sup> The City intends to meet this requirement by inclusion of a buffer zone of 150 feet from the surrounding property lines in which it will not place wastewater treatment units.<sup>47</sup> Therefore, the Administrative Record created a prima facie demonstration that the Draft Permit adequately prevents nuisance odors and vectors.

Although no party offered contrary evidence regarding this issue, Mr. Woelke and Mr. Rahim (on behalf of Staff) each testified that the Draft Permit adequately addresses nuisance odors.<sup>48</sup> Mr. Woelke added his belief that Facility actually

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<sup>46</sup> *Draft Permit*, Administrative Record, Tab C at 0052 (“The permittee shall comply with the requirements of 30 [Tex. Admin. Code] § 309.13(a) through (d). In addition, by ownership of the required buffer zone area, the permittee shall comply with the requirements of 30 TAC § 309.13(e).”); *see* 30 Tex. Admin. Code § 309.13(e).

<sup>47</sup> *Application*, Administrative Record, Tab D, Att. G-1 at 000120; 30 Tex. Admin. Code § 309.13(e)(1).

<sup>48</sup> Ex. ED AR-1 (Rahim Dir.) at bates 0320; Ex. COB-1 (Woelke Dir.) at 14.

exceeds design requirements by including covered headworks and an odor control system.<sup>49</sup>

The ED, the City, and OPIC all argue that the Draft Permit adequately addresses this issue. Ms. Sims and Ms. Daleon addressed this issue only in closing arguments, and included numerous references to evidence outside of the record which cannot be considered. They expressed concern that the Facility will attract disease carrying vermin and that they will be subjected to nuisance odors produced by the Facility.

The prima facie demonstration cannot be rebutted solely with concerns, therefore, ALJ finds that the City met its burden to prove the Draft Permit adequately prevents nuisance odors and vectors.

## **2. Compliance with floodplain and wetland siting requirements**

The issue of siting in relation to the floodplain is the primary issue of contention. The Hydens and OPIC argue that the Application did not comply with 30 Texas Administrative Code, Chapter 309, by its alleged failure to demonstrate that the Facility will be constructed outside the 100-year floodplain.<sup>50</sup> The City and Staff contend that the Application is sufficient at this stage of the review. As will be

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<sup>49</sup> Ex. COB-1 (Woelke Dir.) at 14.

<sup>50</sup> 30 Tex. Admin. Code § 309.13(a).

discussed, the ALJ agrees with the City and Staff that the Draft Permit complies with the siting requirements in 30 Texas Administrative Code, Chapter 309.

**a) Background and Applicable Law**

30 Texas Administrative Code, Chapter 309, subchapter B establishes minimum standards for the location of a domestic wastewater treatment facility.<sup>51</sup> Its stated purpose is to:

condition issuance of a permit and/or approval of construction plans and specifications for new domestic wastewater treatment facilities or the substantial change in the function or use of an existing unit on selection of a site that minimizes possible contamination of water in the state; to define the characteristics that make an area unsuitable or inappropriate for a wastewater treatment facility; to minimize the possibility of exposing the public to nuisance conditions; and to *prohibit issuance of a permit for a facility to be located in an area determined to be unsuitable or inappropriate, unless the design, construction, and operational features of the facility will mitigate the unsuitable site characteristics.*<sup>52</sup>

Subchapter B's standards apply when evaluating an application for a wastewater treatment permit, as well as to the approval of construction plans and specifications.<sup>53</sup> In regard to siting near a floodplain, 30 Texas Administrative Code § 309.13(a) implements Subchapter B's stated purpose (of prohibiting issuance of a permit for a facility to be located in an area determined to be unsuitable or

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<sup>51</sup> 30 Tex. Admin. Code § 309.10(a).

<sup>52</sup> 30 Tex. Admin. Code § 309.10(b) (emphasis added); *see also* 30 Tex. Admin. Code § 309.14(a).

<sup>53</sup> 30 Tex. Admin. Code § 309.10(a).

inappropriate) by prohibiting a wastewater treatment plant from being located in the 100-year floodplain unless the plant is protected from inundation and damage that may occur during a 100-year flood event.<sup>54</sup>

Regarding the aforementioned construction plans and specifications related to new wastewater treatment facilities and their approval, they are detailed in 30 Texas Administrative Code, Chapter 217.<sup>55</sup> However, Chapter 217 states explicitly that, “an owner is not required to submit collection system or wastewater treatment facility plans and specifications to the ED for approval prior to the Commission issuing the wastewater treatment facility’s wastewater permit.”<sup>56</sup> Nevertheless, Chapter 217 provides specific requirements for the wastewater treatment facility’s design if the facility is within 1,000 feet of the 100-year floodplain, and the interpretation of this requirement is the main point of contention between the parties.<sup>57</sup> Specifically, Chapter 217 requires that the Facility’s site plan include the 100-year floodplain based on the most accurate available topography and elevation data for the site, and the Hydens contend that the City’s Application failed to meet that requirement.<sup>58</sup>

In response to information requested in the Commission’s application regarding the 100-year floodplain, the City responded “yes” to the question: “[w]ill

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<sup>54</sup> 30 Tex. Admin. Code § 309.13(a).

<sup>55</sup> 30 Tex. Admin. Code §§ 217.3(c), .31.

<sup>56</sup> 30 Tex. Admin. Code § 217.6(a).

<sup>57</sup> 30 Tex. Admin. Code § 217.35.

<sup>58</sup> 30 Tex. Admin. Code § 217.35(a).

the proposed Facility be located above the 100-year frequency flood level?”<sup>59</sup> The City also identified “FEMA Firm Panel 48041CO250E” as the source it used to determine the 100-year frequency floodplain.<sup>60</sup> Staff reviewed the Application and, consistent with 30 Texas Administrative Code § 309.13(a), included the following provision in the Draft Permit: “permittee shall provide facilities for the protection of its wastewater treatment facility from a 100-year flood.”<sup>61</sup>

The Administrative Record created a prima facie demonstration that the Draft Permit complies with the siting requirements in 30 Texas Administrative Code, Chapter 309.

#### **b) Protestant’s Rebuttal Evidence**

The other parties were entitled to present evidence to rebut the prima facie demonstration. In that regard, the Hydens introduced evidence that they have owned the land surrounding the proposed Facility’s boundaries on three sides for over 100 years.<sup>62</sup> Ms. Hyden testified that she has personally observed flooding recently, near to where (she believes) the Application indicated the proposed Facility

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<sup>59</sup> *Application*, Administrative Record, Tab D, at 000048.

<sup>60</sup> *Application*, Administrative Record, Tab D, at 000048.

<sup>61</sup> *Draft Permit*, Administrative Record, Tab C at 0052.

<sup>62</sup> Ex. Protestants 100 (Hyden Dir.) at 2.

will be located, and that flooding has occurred outside the 100-year floodplain delineation on the map that was identified by the City in the Application.<sup>63</sup>

In addition to Ms. Hyden’s personal experiences with flooding on the property, Mr. Dunbar was also offered by the Hydens as an expert on engineering, with special experience relating to flooding, floodplain and drainage issues—including analysis and preparation of FEMA floodplain maps for the Corps of Engineers.<sup>64</sup> Mr. Dunbar testified that the map used by the Applicant was a “FEMA Zone A map.”<sup>65</sup> He explained that a Zone A map does not contain depths or base flood elevations and is best understood as a rough approximation of the 100-year floodplain.<sup>66</sup> He further opined that, this “is problematic when trying to make sure that a proposed treatment plant is not within the 100-year floodplain.”<sup>67</sup> Although he did not conduct any floodplain modeling himself, and he acknowledged he could not say where the floodplain is actually located, he overlaid the Zone A map and the Site Layout from the Application over two-foot contours generated by the Texas Natural Resources Information System and concluded that the Zone A map was not accurate enough to delineate the floodplain for purposes of siting the Facility.<sup>68</sup> In his opinion, parts of the Facility (as it is depicted on the Application Site Layout)

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<sup>63</sup> Tr. at 25.

<sup>64</sup> Ex. Protestants 200 (Dunbar Dir.) at 1-3. Ms. Hyden and Mr. Dunbar also presented testimony on the issue of increased flooding, however, the issue was not referred by the Commission and so is not addressed in this PFD.

<sup>65</sup> Ex. Protestants 200 (Dunbar Dir.) at 6.

<sup>66</sup> Ex. Protestants 200 (Dunbar Dir.) at 8-9.

<sup>67</sup> Ex. Protestants 200 (Dunbar Dir.) at 8.

<sup>68</sup> Ex. Protestants 200 (Dunbar Dir.) at 10-12.

might fall within the 100-year floodplain.<sup>69</sup> Therefore, he concluded, the City violated 30 Texas Administrative Code § 217.35(a), which requires a floodplain determination based on a superimposition of the 100-year flood elevation on the most accurate available topography and elevation data for the site, if the floodplain is located within 1,000 feet of the site of the facility.

**c) Applicant's and Staff's Additional evidence**

The City and ED Staff each offered additional evidence in response to the Hydens' evidence on this issue.

The ED introduced evidence from Mr. Rahim, Staff's Permit Coordinator for the City's Application.<sup>70</sup> Mr. Rahim testified that he has reviewed approximately 220 wastewater permit applications in his time with TCEQ.<sup>71</sup> Mr. Rahim testified that the Applicant complied with the requirements of 30 Texas Administrative Code § 309.13(a), by identifying the most recent FEMA panel code as its source for the 100-year floodplain.<sup>72</sup> He explained that, for purposes of Staff's review of the Application, nothing more was needed from the Applicant at that time because the Commission's rules do not require an investigation by the ED regarding whether a

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<sup>69</sup> Ex. Protestants 200 (Dunbar Dir.) at 10-12.

<sup>70</sup> Ex. ED-AR-1 (Rahim Dir.) at bates 0309-0310.

<sup>71</sup> Ex. ED-AR-1 (Rahim Dir.) at bates 0310.

<sup>72</sup> Ex. ED-AR-1 (Rahim Dir.) at bates 0311.

proposed facility will be in the floodplain.<sup>73</sup> He further opined that the Applicant was not at the stage to submit plans and specifications for approval under 30 Texas Administrative Code, Chapter 217.<sup>74</sup>

For the City, Mr. Woelke, testified that 30 Texas Administrative Code § 217.35(a) is inapplicable to the submission of the Application and is only applicable for purposes of submitting the plans and specifications after a permit is approved.<sup>75</sup> For the Application, he stands by his determination that, based on the most recent FEMA firm panel associated with the Facility's location, it was sufficient to represent that the Facility will be above the 100-year floodplain.<sup>76</sup> Mr. Woelke acknowledged though, that the Facility will ultimately be designed and built within 1,000 feet of the floodplain, so a more accurate overlay map will be required when the City submits its plans and specifications for Staff review.<sup>77</sup> To that end, the City has since engaged Halff Associates to prepare a floodplain study, which the City has already submitted to FEMA for review, so the floodplain maps can be updated with more accurate information to be used in preparation of final plans that will be submitted to Staff for their review relative to the Chapter 217 rules.<sup>78</sup>

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<sup>73</sup> Ex. ED-AR-1 (Rahim Dir.) at bates 0311. Refers to bates numbers instead of original page numbers for this exhibit.

<sup>74</sup> Ex. ED-AR-1 (Rahim Dir.) at bates 0319.

<sup>75</sup> Ex. COB-1 (Woelke Dir.) at 9.

<sup>76</sup> Ex. COB-1 (Woelke Dir.) at 10; Tr. at 137.

<sup>77</sup> Ex. COB-1 (Woelke Dir.) at 9-10.

<sup>78</sup> Ex. COB-1 (Woelke Dir.) at 11.

On questioning by both the City's and OPIC's attorneys, the Hydens' witness Mr. Dunbar admitted that, even assuming the Application Site Layout depicts the Facility potentially sited close to (or possibly in) the floodplain, there is sufficient space on the City's property to design and construct the Facility above the floodplain and still maintain the 150-foot buffer with surrounding properties.<sup>79</sup>

**d) Summary of the arguments**

Essentially, the parties disagree whether the Zone A FEMA map submitted by the City in the Application (and the Draft Permit issued based upon the City's representations made in the Application) was sufficient to meet the floodplain siting requirements of Chapter 309, for purposes of obtaining a TPDES permit.

The Hydens argue that the Commission is prohibited by 30 Texas Administrative Code § 390.14(a) from issuing a permit to the City, unless the City has met the siting requirements in section 309.13(a), which state that a wastewater treatment plant may not be located in the 100-year flood plain unless the plant unit is protected from inundation and damage that may occur during that flood event. On this issue, the Hydens argue that their personal experience taken together with Mr. Dunbar's expert opinion, established that the Zone A map is insufficient in this instance to establish the 100-year floodplain's boundaries. Because, the location of the floodplain is uncertain, they argue, more evidence was required to prove the unbuilt Facility will not be located within the 100-year floodplain.

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<sup>79</sup> Tr. at 56, 70.

The Hydens also contend that the later design-review Staff performs under Chapter 217 is meant to provide a second layer of protection, which does not relieve the Applicant from meeting the siting requirements of Chapter 309 at this stage. They assert that reliance solely on the Chapter 217 review process to verify the Facility is not constructed in the floodplain, or without sufficient protections from flooding, would not provide the public with an opportunity to submit comments or otherwise participate in the review since it is conducted by the ED after a permit has already been issued.

OPIC agrees with the Hydens. OPIC argues that both the City's and the Hyden's witnesses confirmed that the proposed site layout for the Facility depict portions within 1,000 feet of the floodplain. OPIC notes that the City knew as much when it submitted the Application and chose not to obtain better information about the floodplain. As such, OPIC argues that, as a threshold issue, to comply with the Chapter 309 siting requirements, the City should have definitively demonstrated that the Facility will not lie in the floodplain—or will be protected from inundation.

Staff and the City argue that the Application meets all applicable siting requirements in Chapter 309. They emphasize that the proposed Facility's treatment units are all located outside the 100-year floodplain as it is depicted on the most current FEMA map, which the Protestants' expert confirmed. They both argue that the information provided by the City was all that was required by TCEQ's Application and rules, and the use of the FEMA Zone A map is consistent with the standard practices of the TCEQ. The City further argues that the FEMA Zone A map provided all the information needed for its expert to confirm that the Facility

*could* be built above the floodplain and still meet the 150-foot buffer requirement before he submitted the Application. Staff and the City both argue that the detail that the Hydens demand regarding the floodplain is simply not required at this point in the permitting process, and it will be completed prior to the Chapter 217 review by the ED of the detailed plans and specifications for the Facility.

### e) ALJ's Analysis

Because the parties did not present evidence regarding wetland requirements, and nuisance odor control and vectors were previously addressed, that leaves only the issue of whether the Draft Permit meets the siting requirements relating to the floodplain. The particular language of the issue referred by the Commission is important. Although the parties focused most of their attention on the sufficiency of the information in the Application and the sufficiency of the ED's review of the Application, the referred issue asks specifically "whether the *Draft Permit* complies with applicable siting requirements in 30 Texas Administrative Code Chapter 309, including adequate prevention of nuisance odors and vectors and compliance with floodplain and wetland siting requirements."<sup>80</sup>

Pursuant to Chapter 309, a wastewater treatment plant may not be located in the 100-year floodplain unless the plant is protected from inundation and damage that may occur during a 100-year flood event.<sup>81</sup> Therefore, on its face, the Draft

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<sup>80</sup> *Interim Order*, Administrative Record, Tab A at 00003. (emphasis added).

<sup>81</sup> 30 Tex. Admin. Code § 309.13(a).

Permit appears to meet the siting requirements because it specifically includes a provision requiring: “permittee shall provide facilities for the protection of its wastewater treatment facility from a 100-year flood.”<sup>82</sup> If the Applicant were to err and build the Facility in the 100-year floodplain without adequate protections, it would immediately be out of compliance with the Permit, and the rules, and be subject to enforcement actions.

The City’s determination that it could meet the siting requirements was based on reliance on the most recent FEMA flood map for the site. Such reliance was not prohibited by any rule. Mr. Rahim testified that the Applicant complied with standard TCEQ practice by relying on the FEMA flood map.<sup>83</sup> Therefore, the record evidence demonstrates that Staff’s review of the Application, relying on the Applicant’s use of the most recent FEMA flood map, was consistent with its own past practice.

The Hydens were entitled to provided evidence to rebut the prima facie demonstration that the Draft Permit complies with applicable siting requirements in 30 Texas Administrative Code Chapter 309. Specifically, Ms. Hyden’s personal knowledge, and Mr. Dunbar’s expert opinion, showed essentially that the floodplain depicted on the most recent FEMA flood map was not certain. Additionally, the City conceded that the proposed Facility would be within 1,000 feet of the floodplain.

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<sup>82</sup> *Draft Permit*, Administrative Record, Tab C at 0052.

<sup>83</sup> Ex. ED-AR-1 (Rahim Dir.) at bates 0319; *see also* Tr. at 230:1-8; *but see* Tr. at 233:19-25. Notwithstanding Mr. Rahim’s apparently inconsistent statements on the matter at the hearing, the ALJ gave substantially more weight to Mr. Rahim’s Direct Testimony and responses on redirect because Mr. Rahim appeared somewhat confused by the questions when posed at the hearing due to English not being his first language.

Nevertheless, Mr. Dunbar’s opinion that the proposed Facility may either be in, or near the floodplain, was based on his overlaying the Zone A map and the Site Layout from the Application over two-foot contours generated by the Texas Natural Resources Information System—a conclusion that presumes that the Site Layout depicts the exact location and design of the Facility. Such precision is not required by the Commission’s application form, which only requests a map depicting the location of the Facility in relation to the floodplain if the Applicant intends to build a facility that is not above the floodplain.<sup>84</sup>

Further, the evidence does not show that the Site Layout that the City included in the Application was intended to be precise. The Commission’s application form is consistent with the express language of Chapter 217, which states: “an owner is not required to submit collection system or wastewater treatment facility plans and specifications to the [ED] for approval prior to the [C]ommission issuing the wastewater treatment facility’s wastewater permit.”<sup>85</sup> The Hydens’ and OPIC’s demand that the City identify the exact location of the Facility in relation to the floodplain prior to the issuance of the Permit would also depart from the Commission’s historic treatment of applicants for this type of Permit. In sum, both in rule and historically, the Commission has required such detail only after a permit has been granted.

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<sup>84</sup> *Application*, Administrative Record, Tab D, at 000048.

<sup>85</sup> 30 Tex. Admin. Code § 217.6(a).

The Hydens and OPIC also argue that the floodplain should be verified before the Draft Permit is issued because the public will not be able to participate in the ED's Chapter 217 review of the Facility's design and location specifications, or be able to review any updated maps depicting the floodplain. The argument that the Commission should depart from its rules and historic treatment of applicants to allow public participation in the design and specifications review is unwarranted in this case because the evidence shows that the Facility can be built outside of the floodplain while still avoiding the buffer zones. If the Hydens' evidence had shown that the Facility necessarily must be built in the floodplain due to the constraints of the property, then the Application *might* have been deficient for failing to describe measures used to protect the facility during a flood event, and failing to include a site map showing the location of the treatment plant within the 100-year frequency flood level—both requested in the application form if the Applicant indicates the Facility will not be above the floodplain. But the ALJ need not decide that issue, because, as stated, the evidence demonstrates that the Applicant can, and intends to build the Facility above the floodplain using a more accurate flood map and designs and specifications to be reviewed by the ED under its standard practice, and following the Chapter 217 rules.

Based on the evidence, the ALJ finds that the City met its burden to prove the Draft Permit complies with applicable siting requirements in 30 Texas Administrative Code Chapter 309.

**G. WHETHER THE COMMISSION SHOULD DENY OR ALTER THE TERMS AND CONDITIONS OF THE DRAFT PERMIT BASED ON CONSIDERATION OF NEED UNDER TEXAS WATER CODE § 26.0282.**

Texas Water Code § 26.0282 states:

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

The City's Application states that it needs an additional WWTP because the existing WWTP experiences peak wet weather flows in excess of the plant's peak 2-hour discharge capacity of 19.2 mgd.<sup>86</sup> It also states that growth in the City is moving eastward, increasing the need for expanding treatment capacity on the City's east side.<sup>87</sup> The Application notes that there are no permitted WWTPs located within three miles of the Facility with the capacity and willing to accept the volume of wastewater proposed in the Application.<sup>88</sup> The City also commissioned a study to determine the amount of capacity needed to meet building demands in the area, and the construction of this Facility was one of the options proposed to meet the capacity demands.<sup>89</sup>

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<sup>86</sup> *Application*, Administrative Record, Tab D at 000043-44.

<sup>87</sup> *Application*, Administrative Record, Tab D at 000043-44.

<sup>88</sup> Ex. COB-1 (Woelke Dir.) at 15.

<sup>89</sup> Ex. COB-1 (Woelke Dir.) at 15.

No party offered contrary evidence regarding this issue. The prima facie demonstration of need is un rebutted, therefore, ALJ does not recommend that the Commission deny or alter the terms and conditions of the Draft Permit based on the consideration of need.

#### **IV. TRANSCRIPTION COSTS**

30 Texas Administrative Code section 80.23(d) addresses the assessment of reporting and transcription costs and allows for the division of transcription costs among the parties, excluding the ED and OPIC. The Commission shall consider the following applicable factors to assess division of transcription costs:

- the party who requested the transcript;
- the financial ability of the party to pay the costs;
- the extent to which the party participated in the hearing;
- the relative benefits to the various parties of having a transcript;
- . . . and
- any other factor which is relevant to a just and reasonable assessment of costs.<sup>90</sup>

The City requested that itself and the Hydens each pay for one-half of the transcript costs, which totaled \$3,315.60. The Hydens argue that, since they are individuals who have already undertaken significant costs to secure counsel and an expert witness in this case, and since they will not recoup their litigation costs

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<sup>90</sup> 30 Tex. Admin. Code § 80.23(d)(1).

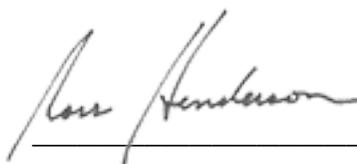
regardless of the outcome, it is just and reasonable for the City to bear the full transcription costs.

The City and the Hydens both participated roughly equally in the hearing and cited to the transcript in their closing arguments. Both parties benefitted from the transcript. The Hydens began this hearing process and understood the costs related to such proceedings. As such, the ALJs recommend that the Commission assess the City and the Hydens each one-half of the transcript costs.

## V. CONCLUSION

Based on the analysis above, the ALJ recommends that the Commission adopt the attached proposed order containing Findings of Fact and Conclusions of Law and issue the Draft Permit to the City without changes.

**Signed April 26, 2023.**



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Ross Henderson

Presiding Administrative Law Judge



**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

**AN ORDER  
GRANTING THE APPLICATION BY  
THE CITY OF BRYAN FOR TPDES PERMIT NO. WQ0015930001  
IN BRAZOS COUNTY, TEXAS;  
SOAH DOCKET NO. 582-22-09101;  
TCEQ DOCKET NO. 2022-0610-MWD**

On \_\_\_\_\_, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the application of the City of Bryan (the City) for a new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0015930001 in Brazos County, Texas. A Proposal for Decision (PFD) was presented by Ross Henderson, Administrative Law Judges (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted an evidentiary hearing concerning the application on February 2, 2023, in Austin, Texas via Zoom videoconferencing. After considering the PFD, the Commission makes the following findings of fact and conclusions of law.

## **I. FINDINGS OF FACT**

### **Application**

1. The City filed its application (Application) for a new TPDES permit with TCEQ on September 25, 2020.
2. The Application requested authorization to discharge treated wastewater from a proposed plant site, the Brushy Creek Wastewater Discharge Plant (Facility), to be located approximately 1,400 feet northeast of the intersection of Australia Lane and Cole Lane in Brazos County, Texas.
3. The treated effluent will be discharged to Brushy Creek, then to Wickson Creek, then to the Navasota River Below Lake Limestone Segment No. 1209 of the Brazos River Basin. The unclassified receiving water uses are limited aquatic life use for Brushy Creek and presumed high aquatic life uses for Wickson Creek. The designated uses for Segment No. 1209 are primary contact recreation, public water supply, and high aquatic life use.
4. The Executive Director (ED) declared the Application administratively complete on January 14, 2021, and technically complete on May 21, 2021.
5. The ED completed technical review of the Application, prepared a draft permit (Draft Permit) and made it available for public review and comment.
6. The City currently owns the site at which the proposed Facility will be located.

### **The Draft Permit**

7. The Draft Permit would authorize a discharge of treated domestic wastewater at an annual average flow not to exceed 6,000,000 gallons per day (or 6 MGD) in the Interim Phase and an annual average flow not to exceed 12,000,000 gallons per day (or 12 MGD) in the Final Phase. The Initial Phase would begin upon the date of issuance and lasting through the completion of expansion to the 12 MGD Facility, and the Final Phase would begin upon the completion of expansion to the 12 MGD Facility and lasting through the date of expiration of the permit.

8. The Facility will be designed as an active sludge package plant with process units including Headworks (Bar Screen and Grit Removal), Aeration Basins, Waste Sludge Holding Tanks, Belt Press Sludge Dewatering, Final Clarifiers, and Tertiary Treatment Facility (UV Disinfection and Cascade Aeration). Other than a conceptual design and layout, the Facility has not been designed or constructed.
9. The unclassified receiving water uses are limited aquatic life uses for Brushy Creek and presumed high aquatic life uses for Wickson Creek. The designated uses for Segment No. 1209 are primary contact recreation, public water supply, and high aquatic life use.
10. In the Interim Phase, the effluent limitations in the Draft Permit, based on a 30 day average, include: 5 milligram per liter (mg/L) Five-Day Carbonaceous Biochemical Oxygen Demand; 15 mg/L Total Suspended Solids; 2 mg/L Ammonia Nitrogen; a minimum dissolved oxygen (DO) of 6 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 probably number per 100 milliliters. In the Final Phase, the effluent limitations in the Draft Permit, based on a 30 day average, include: 5 milligram per liter (mg/L) Five-Day Carbonaceous Biochemical Oxygen Demand; 15 mg/L Total Suspended Solids; 1.7 mg/L Ammonia Nitrogen; a minimum dissolved oxygen (DO) of 6 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 probably number per 100 milliliters.
11. The Facility shall utilize an Ultraviolet Light (UV) system for disinfection purposes. An equivalent method of disinfection may be substituted only with prior approval of the Executive Director.

### **Notice and Jurisdiction**

12. The Notice of Receipt of the Application and Intent to Obtain Water Quality Permit was published in English on January 20, 2021, in *The Eagle* and in Spanish on January 22, 2021, in *La Voz Hispania*.

13. The Notice of Application and Preliminary Decision was published in English on September 9, 2021, in *The Eagle* and in Spanish on September 10, 2021, in *La Voz Hispania*.
14. The comment period for the Application closed on January 20, 2022.
15. The ED filed his Response to Public Comments on June 6, 2022.
16. On June 29, 2022, the Commission considered during its open meeting the requests for hearing and requests for reconsideration. After evaluation of all relevant findings, the Commission granted the hearing requests of Glynda Bricker, Anne Cecile Daleon, Jenny Gallagher, Neil Ryan Gallagher, David and Margaret Gail Hyden (the Hydens), Bobbie Meyer, and Mary Louise Sims.
17. On July 7, 2022, issued an Interim Order, directing that the following seven 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 complies with the Texas Water Quality Standards and is protective of surface water quality;
  - B. Issue B: Whether the Draft Permit is protective of groundwater and nearby water wells in the area;
  - C. Issue C: Whether the antidegradation review complies with applicable requirements and the draft permit contains adequate nutrient limits;
  - D. Issue D: Whether the Draft Permit is protective of the health of the requesters, their families, and other individuals who reside in the immediate vicinity of the proposed Facility and discharge route;
  - E. Issue E: Whether the Draft Permit is protective of livestock, wildlife, and aquatic life;
  - F. Issue F: Whether the Draft Permit complies with applicable siting requirements in 30 Texas Administrative Code Chapter 309, including adequate prevention of nuisance odors and vectors and compliance with floodplain and wetland siting requirements; and

- G. Issue G: Whether the Commission should deny or alter the terms and conditions of the Draft Permit based on consideration of need under TWC § 26.0282.
18. On September 16, 2022, Notice of Hearing was published in Spanish in *La Voz Hispania* and in English on September 22, 2022, in *The Eagle*. The notice included the time, date, and place of the hearing, as well as matters asserted, in accordance with the applicable statute and rules.

### **SOAH Proceedings**

19. On October 31, 2022, a preliminary hearing was held with Administrative Law Judges Andrew Lutostanski and Ross Henderson presiding. Aubrey Pawelka appeared representing the ED. Jim and Benjamin Mathews appeared on behalf of the City. Eli Martinez appeared for the Office of Public Interest Counsel (OPIC). For the protesting parties, Adam Friedman appeared on behalf of the Hydens, and Mary Louise Sims and Anne Celine Daleon appeared for themselves and they were all admitted as parties. Jurisdiction was noted by the ALJs.
20. On November 9, 2022, the ALJs entered an order taking notice of the Administrative Record, naming parties, and establishing a procedural schedule for the case.
21. On February 2, 2023, Administrative Law Judge Henderson convened the hearing on the merits via videoconference and all parties appeared through their respective representatives. The record closed on February 28, 2023, after the parties filed post-hearing briefs.

### **Issue A: Whether the Draft Permit complies with the Texas Surface Water Quality Standards and is protective of surface water quality.**

22. The prima facie demonstration that the Draft Permit complies with the Texas Surface Water Quality Standards (TSWQS) and is protective of surface water quality was not rebutted.

23. 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 standards are the TSWQS in 30 Texas Administrative Code Chapter 307.
24. The TSWQS consist of general standards, narrative standards, surface water segment- specific numeric standards, numeric standards for toxic substances, and antidegradation review.
25. The TSWQS establish specific uses for each classified water body in the state and also provide numeric criteria for each classified stream.
26. The provisions of the Draft Permit are protective of surface water quality and are in accordance with the TSWQS.

**Issue B: Whether the Draft Permit is protective of groundwater and nearby water wells in the area.**

27. The prima facie demonstration that the Draft Permit is protective of groundwater and nearby water wells in the area was not rebutted.
28. The Draft Permit is protective of groundwater and nearby water wells in the area by requiring that treatment units be located no closer than 500 feet from a public water well and no closer than 250 feet from a private water well.
29. No public water wells are located in the area, and the nearest private water well is located more than 500 feet from all treatment units in the conceptual layout of the Facility.
30. The provisions of the Draft Permit are protective of groundwater and nearby water wells in the area.

**Issue C: Whether the antidegradation review complies with applicable requirements and the draft permit contains adequate nutrient limits.**

31. The prima facie demonstration that the antidegradation review complied with applicable requirements and that the Draft Permit contains adequate nutrient limits was not rebutted.
32. The antidegradation review was conducted using the standard procedure for an antidegradation review, and that the review complied with applicable requirements. Based on the Tier 1 and Tier 2 Antidegradation Review, no existing uses will be impaired.
33. Based on the fact that the receiving stream has a mud or sand bottom, shallow areas near banks, semi-turbid water clarity, little aquatic vegetation, extensive shading, and no state inventory or federal concerns, no nutrient limit is needed for discharge from the proposed facility.
34. The antidegradation review complied with applicable requirements, and the Draft Permit contains adequate nutrient limits.

**Issue D: Whether the Draft Permit is protective of the health of the requesters, their families, and other individuals who reside in the immediate vicinity of the proposed Facility and discharge route.**

35. The prima facie demonstration that the Draft Permit is protective of the health of the requesters, their families, and other individuals who reside in the immediate vicinity of the proposed Facility and discharge route was not rebutted.
36. The Draft Permit contains adequate permit limits and monitoring requirements to protect the health of nearby residents.
37. The Draft Permit contains appropriate effluent limits in accordance with the TSWQS.
38. The Draft Permit requires that the City maintain a buffer zone of at least 150 feet between any treatment unit and the City's property line.
39. The provisions of the Draft Permit are protective of the health of the requesters, their families, and other individuals who reside in the immediate vicinity of the proposed Facility and discharge route.

**Issue E: Whether the Draft Permit is protective of livestock, wildlife, and aquatic life.**

40. The prima facie demonstration that the Draft Permit is protective of livestock, wildlife, and aquatic life was not rebutted.
41. One of the purposes of the TSWQS is to maintain the quality of water in the state consistent public health and enjoyment, and the Draft Permit contains appropriate effluent limits in accordance with the TSWQS.
42. In addition to conventional effluent limits, the Draft Permit contains Biomonitoring requirements that provide an additional level of protection for livestock, wildlife, and aquatic life.
43. The Draft Permit is not expected to impact the Houston Toad, an endangered aquatic-dependent species of critical concern, that occurs within the Segment No. 1209 watershed as well as the United States Geological Survey hydrologic unit code 12030201. Nor is it expected to have an effect on any other federal endangered or threatened aquatic or aquatic dependent species or proposed species or their critical habitat.
44. The provisions of the Draft Permit are protective of livestock, wildlife, and aquatic life.

**Issue F: Whether the Draft Permit complies with applicable siting requirements in 30 Texas Administrative Code Chapter 309, including adequate prevention of nuisance odors and vectors and compliance with floodplain and wetland siting requirements.**

45. The City will control nuisance odors and vectors by owning at least a 150-foot buffer zone between the wastewater treatment plant units and the nearest property line.
46. The City's Application identified the most current 100-year floodplain for the proposed site as shown on FEMA FIRM Panel 48041C0250E and the City stated the proposed treatment units will be located above the current 100-year floodplain.

47. TCEQ considers FEMA floodplain maps to be prima facie evidence of floodplain locations.
48. The Hydens presented evidence that a different floodplain might exist based on the inherent inaccuracy associated with using a FEMA Zone A map as opposed to a FEMA Zone AE map, but the Hydens did not perform a detailed floodplain study.
49. Under TCEQ's permitting process, any potential inaccuracy associated with using a FEMA Zone A map to determine the 100-year flood elevation will be addressed during the ED's subsequent review of the detailed plans and specifications for the detailed design of the actual Facility to be built.
50. The Draft Permit and TCEQ requirements in 30 Texas Administrative Code section 217.35 require that when the City designs the actual Facility, the City must comply with floodplain siting requirements in 30 Texas Administrative Code chapter 309 based on the FEMA Flood Insurance Study in effect at the time that the design site plan is prepared, and using specified methodologies if the FEMA map does not identify the 100-year flood elevation. The City was not required to submit detailed collection system or wastewater treatment facility plans and specifications to the ED for approval prior to the Commission issuing the Facility's wastewater permit.
51. The Commission's rules do not provide for public participation in the ED's review of plans and specifications pursuant to 30 Texas Administrative Code chapter 217.
52. There is sufficient space on the City's property to design and construct the Facility above the floodplain and still maintain the 150-foot buffer with surrounding properties.
53. The Application demonstrated that the construction of the City's proposed treatment units will not cause any wetland or part of wetland to be filled.
54. The Draft Permit contains provisions prohibiting locating treatment units in a wetland.
55. The Draft Permit contains a provision requiring the City to provide facilities for the protection of its wastewater treatment facility from a 100-year flood.

56. The provisions of the Draft Permit comply with applicable siting requirements in 30 Texas Administrative Code Chapter 309, including adequate prevention of nuisance odors and vectors and compliance with floodplain and wetland siting requirements.

**Issue G: Whether the Commission should deny or alter the terms and conditions of the Draft Permit based on consideration of need under TWC § 26.0282.**

57. The prima facie demonstration that the terms and conditions of the Draft Permit should not be denied or altered based on consideration of need under Texas Water Code § 26.0282 was not rebutted.
58. The City's existing wastewater treatment plant serving the east side of the City's service area is at capacity and needs to be replaced.
59. There are no permitted WWTPs located within three miles of the Facility with the capacity and willing to accept the volume of wastewater proposed in the Application.
60. The proposed Facility was sized to treat all anticipated wastewater flow from the City's east side service area at build out.
61. The terms and conditions of the Draft Permit should not be denied or altered based on consideration of need under Texas Water Code § 26.0282

**Transcript Costs**

62. Reporting and transcription of the hearing on the merits was warranted.
63. The City and the Hydens fully participated in the hearing by presenting witnesses and cross-examining witnesses.

64. Both the City and the Hydens participated roughly equally in the hearing and cited to the transcript in their closing arguments; therefore, both sides benefitted from having a transcript.
65. Self-represented litigants, Mary Louise Sims and Anne Celine Daleon, had minimal participation in the hearing.
66. There is no evidence that any party subject to allocation of costs is financially unable to pay a share of the costs.
67. Transcript costs cannot be assessed against the ED or OPIC because they are statutory parties who are precluded from appealing the decision of the Commission.
68. The total cost for recording and transcribing the hearing on the merits is \$3,315.60.
69. The City and the Hydens should each pay one-half of the transcription costs.

## **II. CONCLUSIONS OF LAW**

1. TCEQ has jurisdiction over this matter. Tex. Water Code, chs. 5, 26.
2. SOAH has jurisdiction to conduct a hearing and to prepare a PFD in contested cases referred by the Commission under Texas Government Code section 2003.047.
3. Notice was provided in accordance with Texas Water Code sections 5.115 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. The City'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(a).

6. A party may present evidence to rebut the prima facie demonstration by demonstrating that one or more provisions in the Draft Permit violate a specifically applicable state or federal requirement that relates to a matter referred by TCEQ. Tex. Gov't Code § 2003.047(i-2); 30 Tex. Admin. Code § 80.117(c).
7. The City 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). The City met its burden to prove that the Draft Permit meets all applicable state and federal requirements on all issues referred by the TCEQ.
8. The Application is substantially complete and accurate.
9. The Draft Permit complies with the TSWQS and is protective of surface water quality.
10. The Draft Permit is protective of groundwater and nearby water wells in the area.
11. The antidegradation review conducted by the ED complies with applicable requirements and the Draft Permit contains adequate nutrient limits.
12. The Draft Permit is protective of the health of the requesters, their families, and other individuals who reside in the immediate vicinity of the proposed Facility and discharge route.
13. The Draft Permit is protective of livestock, wildlife, and aquatic life.
14. The Draft Permit complies with applicable siting requirements in 30 Texas Administrative Code chapter 309, including adequate prevention of nuisance odors and vectors, and compliance with floodplain and wetland siting requirements.
15. The City was not required to submit collection system or wastewater treatment facility plans and specifications to the ED for approval prior to the

Commission issuing the wastewater treatment facility's wastewater permit. 30 Tex. Admin. Code § 217.35(a).

16. The terms and conditions of the Draft Permit should not be altered or denied based on consideration of need under Texas Water Code section 26.0282.
17. No transcript cost 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 the parties to the contested case proceeding is: one-half to the City and one-half to the Hydens.

### **III. ORDER**

**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 City's application for a new Texas Pollutant Discharge Elimination System Permit No. WQ0015930001 is granted as set forth in the Draft Permit.
2. The City and the Hydens must each pay one-half of the transcription costs.

3. The Commission adopts the ED's Response to Public Comment in accordance with 30 Texas Administrative Code section 50.117.
4. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
5. The effective date of this Order is the date the Order is final, as provided by Texas Government Code section 2001.144 and 30 Texas Administrative Code section 80.273.
6. TCEQ's Chief Clerk shall forward a copy of this Order to all parties.
7. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

**ISSUED:**

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

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**Jon Niermann, Chairman, For the Commission**