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**SOAH DOCKET NO. 582-22-09101
TCEQ DOCKET NO. 2022-0610-MWD**

APPLICATION BY CITY OF BRYAN § BEFORE THE STATE OFFICE
FOR TPDES PERMIT NO. WQ0015930001 § OF
§ ADMINISTRATIVE HEARINGS

HYDEN PROTESTANTS’ EXCEPTIONS TO THE PROPOSAL FOR DECISION

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES (“ALJs”):

David and Gail Hyden (the “Hyden Protestants” or “Hydens”) file these Exceptions to the Proposal for Decision (“PFD”) submitted by the Administrative Law Judges (“ALJs”) in the above referenced dockets.

**I.
SUMMARY OF THE ARGUMENT**

The PFD recommends that the TCEQ Commissioners grant the application and issue the Draft Permit without changes. In doing so, the ALJs have failed to implement TCEQ rules that prohibit construction of wastewater treatment plants inside the 100-year floodplain (the “Floodplain”). Adopting the PFD would be an arbitrary and capricious act by the TCEQ as it would fail to follow its own rules and would also fail to protect Brushy Creek and the Hydens from migration of untreated wastewater during a flood event.

As an initial matter, the ALJs misstate that the “main point of contention” regarding the proposed wastewater treatment plant (the “Plant”) is the interpretation of TCEQ rules under Chapter 217 (“Wastewater Treatment Facility Design Requirements”).¹ The fatal flaw with the Application is *not* Chapter 217 but rather that the City’s application failed to demonstrate that the proposed Plant is outside of the 100-year floodplain and, therefore, TCEQ is expressly prohibited

¹ PFD at 23.

under 30 Tex. Admin. Code § 309.14(a) (“TCEQ Rule 309.14”) from approving the application. The ALJs, without citing any legal authority, ignored TCEQ’s siting requirements in Chapter 309. The ALJs misapplied TCEQ rules and accepting the ALJs’ interpretation would render TCEQ Rule 309.14 meaningless. TCEQ, however, requires an applicant for a treatment plant to demonstrate that the plant is outside of the Floodplain, and the agency cannot ignore its own rules that establish mandatory siting requirements that were adopted to protect receiving water bodies and nearby landowners.

II. TCEQ CANNOT APPROVE THE APPLICATION BECAUSE THE CITY FAILED TO MEET TCEQ’S SITING REQUIREMENTS

The Hydens’ experience with frequent flooding at their property and the proposed Plant site makes it critical for the TCEQ to ensure the City has accurately delineated the Floodplain. Mrs. Hyden testified that she has seen the City’s property flood several times over the last few months,² including at higher elevations than depicted by the Zone A Map. Mrs. Hydens’ eye-witness testimony adds important evidence to Mr. Dunbar’s expert testimony that, taken together, prove the City’s sole reliance on the FEMA Zone A Floodplain Map fails to prove its treatment units are not in the Floodplain.

i. Chapter 309 prohibits wastewater treatment plants in the 100-year floodplain unless they are protected from inundation and damage during a flood event.

Chapter 309 of the Texas Administrative Code sets forth clear siting requirements for new wastewater treatment plants.³ The purpose of Chapter 309 is to establish the minimum standards for the location of treatment facilities and these “standards *are to be applied in the evaluation of an application for a permit* to treat and dispose of domestic wastewater.” 30 Tex. Admin. Code §

² Tr. at 25:4-18.

³ 30 Tex. Admin. Code § 309, *et seq* (“Domestic Wastewater Effluent Limitation and Plant Siting”).

309.10(a) (emphasis added) (“TCEQ Rule 309.10”). TCEQ Rule 309.10(b) makes these minimum siting standards preconditions to issuance of a permit. 30 Tex. Admin. Code 309.13, “Unsuitable Site Characteristics,” states that “[a] wastewater treatment plant unit 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.”⁴ It is undisputed that the City offered no evidence in its Application or at hearing how the treatment units will be constructed or elevated in a manner to be protected from a 100-year flood.⁵ Nor does the Zone A Map prove that the treatment units are not in the Floodplain. TCEQ Rule 309.14 unequivocally establishes that “the Commission *may not issue*” a permit for the Plant if the City fails to meet the siting requirements.⁶ The TCEQ is prohibited, therefore, from approving the Application.

ii. Future enforcement of the Draft Permit does not protect Brushy Creek or the Hydens from untreated migration of wastewater during a flood event.

The ALJs conclude that the Draft Permit, on its face, “*appears to meet*” TCEQ’s siting requirements in Chapter 309 of the Texas Administrative Code because if the Plant is constructed in the Floodplain then the City would be “subject to enforcement actions.”⁷ Future enforcement does not satisfy TCEQ’s siting requirements. The Executive Director’s expert witness responsible for the Application’s technical review unequivocally testified that the City must demonstrate the Plant is outside of the Floodplain *before* a permit can be issued.⁸ If the ALJs were correct that satisfying Chapter 309’s siting requirements only required a draft permit condition subject to future enforcement, then there would be no reason for Domestic Technical Report 1.1 in TCEQ’s form application, which requires the applicant to demonstrate that the plant is outside the Floodplain.

⁴ 30 Tex. Admin. Code § 309.13(a).

⁵ Tr. at p.112: 13-23 (Woelke testifying “...there’s nothing about what the elevation of the units will be” and that elevation is what’s critical to know whether they’re protected from a 100-year flood”); Tr. at p. 217:3-11.

⁶ 30 Tex. Admin. Code § 309.14(a) (emphasis added).

⁷ PFD at 30-31 (emphasis added).

⁸ Tr. at p. 216:1-9.

The point of Domestic Technical Report 1.1, however, is so the TCEQ can “make sure that [plants] aren’t at risk of being damaged and releasing untreated or partially treated wastewater.”⁹ The City cannot skirt this important obligation simply because it may be subject to enforcement *after* it contaminates Brushy Creek and the Hyden’s property.

iii. TCEQ’s future Floodplain review under Chapter 217 does not relieve the City from complying with TCEQ’s Chapter 309 siting requirements prior to obtaining a permit.

The ALJs invite the TCEQ Commissioners to ignore the important siting requirements for a wastewater treatment plant of TCEQ’s Chapter 309. Specifically, ALJs incorrectly suggest that, under 30 Tex. Admin. § 217.6, an applicant for a new treatment plant does not have to submit facility plans and specifications prior to the TCEQ issuing a wastewater permit.¹⁰ Contrary to the ALJs’ position, however, the City’s own expert witness conceded that: (a) Chapter 309 tells applicants “where they cannot build a wastewater treatment plant;”¹¹ (b) “the Commission may not issue the permit until [309.13(a)] is satisfied;”¹² and (c) the ALJs need to decide whether the Application satisfies the Chapter 309 siting requirements.¹³ The Executive Director also agreed that “before the permit can be issued, the [City] must demonstrate the proposed treatment plant and its units are not in the floodplain” and “that demonstration must be shown *now during the application process*.”¹⁴ The Executive Director’s expert further explained that the purpose for this demonstration is “to make sure that those units aren’t at risk of being damaged and releasing untreated or partially treated wastewater.”¹⁵

⁹ Tr. at p. 216:16-20.

¹⁰ PFD at 32.

¹¹ Tr. at p. 108:13-23.

¹² Tr. at p. 118:22-24.

¹³ Tr. at p. 108:21-23.

¹⁴ Tr. at p. 216:1-9 (emphasis added).

¹⁵ Tr. at p. 216:16-20.

Referred “Issue F” in the Commissioners’ Interim Order specifically asks the ALJs to answer whether the City’s Application met the siting requirements.¹⁶ The Interim Order reflects TCEQ Rules in Chapter 309 and underscores the importance of making sure the siting requirements are met before the Commission decides whether to issue the permit. The ALJs wrongly suggest that the City is not required to include a map depicting in detail where the facility will be located unless the applicant admits the Plant is in the Floodplain.¹⁷ Section 5 of Domestic Technical Report 1.1 (“Report 1.1”) requires an applicant to prove its plant is not in the Floodplain and cite its sources. The demonstration cannot be made if an applicant fails to provide reasonable specificity of the facility’s location—the Executive Director staff would have no way to confirm the accuracy of the applicant’s claim that it is outside of the Floodplain. While Report 1.1 may require *additional* specificity of the site layout if the applicant concedes its facility will be constructed in the Floodplain, the applicant must provide sufficient specificity of the facility’s location to prove a claim that its facility is outside of the Floodplain is truly outside the Floodplain.

Instead of determining whether the Application satisfies TCEQ Rule 309’s prudent prohibition on constructing treatment plants in the Floodplain, the ALJs misinterpreted TCEQ rules to allow such a determination regarding the location of a plant to occur under Chapter 217 *after* the permit is issued.¹⁸ Chapter 217 has no bearing on whether an application satisfies the siting requirements of Chapter 309. If it did, then the application for a new treatment plant would not need to include Section 5 of Report 1.1. The ALJs have rendered TCEQ Rules 309.10, 309.13(a), 309.14 and Section 5 of Report 1.1 meaningless and have left Brushy Creek and the Hydens exposed during a flood.

¹⁶ Protestants Cross Ex. 1 at p. 3 (Referred Issue F).

¹⁷ PFD at 32.

¹⁸ *Id.*

iv. TCEQ Rules require more evidence than the unreliable Zone A Map to meet its siting requirements.

The ALJ accepted the City's position that nothing more than the Zone A Map was required to demonstrate the Plant was not in the Floodplain. As support for its determination, the ALJs state that relying solely on the Zone A Map is "not prohibited" by TCEQ rules.¹⁹ While relying solely on the Zone A Map may not be prohibited, no TCEQ rule establishes that a Zone A Map, by itself, is *always* sufficient to satisfy TCEQ Rule 309.14. Tellingly, neither the City's nor Executive Director's expert witnesses could cite a TCEQ rule or TCEQ instruction to support that position.²⁰ This is because TCEQ Rule 309.13 does not specify what evidence to submit, instead it requires an applicant to submit whatever evidence is *necessary* to prove the treatment units are protected from a 100-year flood.

Moreover, TCEQ Instructions for Completing Domestic Wastewater Permit Applications (the "Instructions") mirror TCEQ Rule 309.13(a). The Instructions do not tell the applicant what evidence to submit for proving the treatment units are protected. The Instructions simply tell the applicant that whatever sources of evidence are used "should be verifiable."²¹ Report 1.1 also does not specify what type of evidence should be used, but merely directs the applicant to "[p]rovide the *source(s)* used to determine 100-year frequency flood plain."²² The requirement under TCEQ Rule 309.13(a), the Instructions and the TCEQ Application are consistent—the City must prove its treatment units are not in the Floodplain and cite all of the sources, but nowhere does TCEQ tell the City that it needs to only submit the Zone A Map to meet the siting requirements. TCEQ clearly contemplates potentially relying on multiple sources of information, and an applicant must

¹⁹ PFD at 31.

²⁰ Tr. at p. 135:3-6; Tr. at p. 156:22-157:3; Tr. at p. 227:16-19.

²¹ Protestants Cross Ex. 4

²² Protestants Cross Ex. 2 at p. 2 ("Section 5. Facility Site) (emphasis added).

submit sufficient evidence under the circumstances of the particular treatment plant being proposed.

v. The Zone A Map does not prove treatment units are not in the Floodplain.

By designating the map as “Zone A,” FEMA is disclosing that the map is not based on flood elevations.²³ A FEMA map, by itself, may be sufficient evidence to satisfy TCEQ Rule 309.13(a) map if base flood elevations have been calculated. That is not the case with the City’s Application. The City’s decision to rely solely on a Zone A Map is problematic and, by itself, far from sufficient to prove the Application satisfies TCEQ siting requirements.

Mr. Dunbar, a flood engineer with forty years of experience, including extensive experience creating and reviewing FEMA flood plain maps,²⁴ explained that a Zone A Map is only an approximation with no detailed analysis to back it up.²⁵ Mr. Dunbar elaborated at the hearing that the Zone A map is a “rough guess” by an individual drawing a map they believe “looks pretty good.”²⁶ While the Zone A Map may constitute prima facie evidence, it is far too unreliable to overcome the overwhelming competing evidence to prove by the preponderance of evidence that the treatment units are not in the Floodplain and that the Hydens are protected.

Mr. Dunbar also laid the Site Layout on top of two-foot contour lines to gauge whether the Zone A Map accurately depicted the Floodplain.²⁷ He found that the Zone A Map’s estimated Floodplain did not logically follow contours.²⁸ From his map, you can see the estimated Floodplain (labeled “Zone A” and shaded in blue) jumps back and forth between lower and higher elevations

²³ Protestants Ex. 203.

²⁴ Protestants Ex. 200_002:6-15.

²⁵ Protestants Ex. 200_010:29-31.

²⁶ Tr. at 61:11-19.

²⁷ Protestants Ex. 204.

²⁸ Tr. at p. 57:11-20.

near the Plant (depicted by various shades of green to the west and north of the Plant, and then shades of orange as you get east and south of the Plant).

The ALJs incorrectly concluded that Mr. Dunbar conceded that there is sufficient space on the City's property to design and construct the Plant above the Floodplain.²⁹ The crux of Mr. Dunbar's testimony is that, in his expert opinion, the City has no idea whether its treatment units can be located outside of the Floodplain until FEMA issues a scientifically based map. While he conceded the property "may"³⁰ have some higher elevations, he did not do a detailed analysis to determine whether the entire Plant would fit outside of the yet to be determined Floodplain. The City does not know what the new—and likely larger—Floodplain will look like when FEMA finally acts on the City's requested map revision. Mr. Dunbar never testified that the treatment units can be located on the City's property outside of the Floodplain. The entire point of Mr. Dunbar's testimony was that nobody knows if that can be done without a FEMA map with base flood elevations.³¹

The City is required to prove that the Hydens and Brushy Creek are protected from untreated wastewater. The City failed to carry this burden because it chose to rely entirely on an unreliable, unsubstantiated Zone A Map, and the totality of the evidence overwhelmingly establishes that more analysis is needed. The ALJs improperly accepted the City's position that the unreliable FEMA Zone A Map, coupled with an unreliable site layout of the Plant that will be scrutinized at a later time under Chapter 217, was sufficient to satisfy Chapter 309's prohibition on issuing a permit for wastewater treatment plant located in the Floodplain.

²⁹ PFD at 28.

³⁰ Tr. at p.69:17-25.

³¹ Protestants Ex. 200_014:7-13.

**III.
CONCLUSION**

For the foregoing reasons, Protestants respectfully request that the ALJs revise their PFD and find that the City failed to meet its burden of proof on TCEQ referred issue (F) and recommend that the TCEQ remand the Application to TCEQ staff to conduct further analysis of the Floodplain or, alternatively, that the Application be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 16, 2023, Hyden Protestants' Exceptions to the Proposal for Decision was filed with the State Office of Administrative Hearings, and a copy was served on the following parties via electronic mail in accordance with the Texas Rules of Civil Procedure, TCEQ Rules, and any Court order in this matter.

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