

Jon Niermann, *Chairman*
Bobby Janecka, *Commissioner*
Catarina R. Gonzales, *Commissioner*
Kelly Keel, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

February 26, 2024

Honorable ALJ Linda Brite
State Office of Administrative Hearings
P.O. Box 13025
Austin, Texas 78711-3025

RE: Undine Texas Environmental, LLC TPDES
Permit No. WQ0016046001
SOAH Docket No. 582-23-20937; TCEQ Docket No. 2023-0163-MWD

Honorable Administrative Law Judge Brite:

Enclosed please find a copy of the Executive Director's Exceptions to the Proposal for Decision for the Contested Case Hearing listed above.

If you have any questions, please do not hesitate to call me at (512) 239-3417 or email at Kathy.humphreys@tceq.texas.gov.

Sincerely,

A handwritten signature in cursive script that reads "Kathy J. Humphreys".

Kathy Humphreys
Staff Attorney
Texas Commission on Environmental Quality
Environmental Law Division
512-239-3417
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Enclosures

**SOAH DOCKET NO. 582-23-20937
TCEQ DOCKET NO. 2023-0163-MWD**

APPLICATION OF UNDINE TEXAS ENVIRONMENTAL, LLC FOR TPDES PERMIT NO. WQ0016046001	§ § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
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**EXECUTIVE DIRECTOR’S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE’S
PROPOSAL FOR DECISION**

I. OVERVIEW

The Executive Director of the Texas Commission on Environmental Quality (TCEQ or Commission) submits her Exceptions to the Proposal for Decision. The Executive Director supports the Administrative Law Judge’s (ALJs) conclusion that Undine Texas Environmental, LLC (Undine) met its burden of proof on all referred issues. However, the Executive Director recommends several corrections to the Proposal for Decision.

Procedural Background

TCEQ received the application for a new permit on September 24, 2021, and declared it administratively complete on January 13, 2022. Undine published the Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) in English and Spanish on January 29 -30, 2022, in *The Facts*. The application was determined technically complete on March 14, 2022. Undine published the Notice of Application and Preliminary Decision (NAPD) in English on March 24, 2022, in *The Facts*. The Notice of Public Meeting was published in *The Facts* on June 21, 2022. A Public Meeting was held in Angleton on July 28, 2022. The comment period for this application closed at the close of the public meeting. The Executive Director’s Response to Comments was mailed on November 16, 2022, the Hearing Request/Request for Reconsideration period ended on December 16, 2022.

During an Open Meeting on March 31, 2023, the Commission considered the hearing requests, responses to the hearing requests, all timely public comments, and the Executive Director’s Response to Comments.

The Commission found Brazoria County and Ronnie Gene Autry were affected persons and referred three issues to the SOAH for a Contested Case Hearing:

- A) Whether the draft permit will be protective of surface water quality and preserve the designated uses of the discharge route in accordance with the Texas Surface Water Quality Standards and be protective of groundwater in the area;
- B) Whether the draft permit is protective of human health of residents in the immediate vicinity of the proposed facility and discharge route; and
- C) Whether the draft permit is protective of aquatic life, wildlife, and livestock in the immediate vicinity of the proposed facility and discharge route.

The preliminary hearing was held on August 14, 2023, via Zoom. The Hearing on the Merits was conducted in person and via Zoom on November 15, 2023. The ALJ issued her Proposal for Decision (PFD) to the Commission on February 7, 2024.

Burden of Proof

Because the Undine application was received after September 1, 2015, the application is subject to the procedural requirements adopted pursuant to HB 801, 76th Legislature (1999) and Senate Bill (SB) 709, 84th Legislature (2015), both implemented by the Commission in its rules in 30 TAC Chapters 39, 50, and 55.¹ The Texas Legislature enacted SB 709, effective September 1, 2015, amending the requirements for comments and contested case hearings. This application is subject to those changes in the law. One of the major changes to the contested case hearing process as a result of SB 709 is that the filing of the administrative record with SOAH establishes a prima facie case that the draft permit meets all applicable state and federal legal and technical requirements and, if issued, will protect human health and safety and the environment. According to Commission rules at 30 TAC Section 80.118(c), the administrative record includes the application submitted by the applicant, including any revisions to the original application; the Executive Director's final draft permit, including any special provisions or conditions; the Executive Director's preliminary decision, or the Executive Director's decision on the permit application, if applicable; the summary of the technical review of the permit application; the compliance

¹ SB 709 was codified in Tex. Gov't. Code § 2003.047.

summary of the applicant; copies of the public notices relating to the permit application, as well as affidavits regarding public notices; and any agency document determined by the executive director to be necessary to reflect the administrative and technical review of the application.

The statute further provides that a party may rebut the prima facie case by presenting evidence relating to one of the issues referred by the Commission and demonstrating that the draft permit violates an applicable state or federal requirement.² The statute also provides that the applicant and the Executive Director may present additional evidence to support the draft permit.³ The Executive Director concurs with the ALJ that the prima facie case was not successfully rebutted.

II. EXCEPTIONS to the PROPOSAL for DECISION

A. Executive Director's Recommended Change throughout the Proposal for Decision

The Executive Director respectfully recommends that throughout the Proposal for Decision *e. coli* be changed to *E. coli* because *E. coli* is the commonly used abbreviation for *Escherichia coli*.⁴

B. Executive Director's Recommended Changes to II. A. Burden of Proof

The Executive Director respectfully recommends the ALJ amend footnote 5 to clarify that Applicant's Exhibit C was admitted.⁵

C. Executive Director's Recommended Changes to IV. Discussion. A.3 ED's and OPIC's Positions

The Executive Director respectfully recommends the ALJ clarify that the dissolved oxygen criteria for Angleton Drainage Ditch 7 and Angleton Drainage Ditch 22 (non-tidal) is 3.0 mg/L.⁶

D. Executive Director's Recommended Changes to Findings of Facts

The Executive Director respectfully recommends the following changes to the ALJ's Findings of Facts (FOF):

² Tex. Gov't. Code § 2003.047(i-2).

³ Tex. Gov't. Code § 2003.047(i-3).

⁴ 30 TAC § 307.3(23).

⁵ TR. Pg. 15, lines 1-3.

⁶ ED-XL-1, pg. 7.

1. FOF No. 6. There is a typographical error in the third sentence. “Treatment units in the Interim I phase will include . . . one final clarifier one ~~slug~~ sludge digester . . .”
2. FOF No. 8. There appears to be an inadvertent addition of an effluent limit for Phosphorus of 1.0 mg/L. The effluent pages of draft permit can be found at Tab C, pages 0001 to 0004. The draft permit includes effluent limits for three phases; however, effluent limits for Phosphorus are not included in any of the phases. The Executive Director respectfully recommends that the Effluent Characteristic for Phosphorus be deleted from the effluent limit table.
3. FOF No. 17. There appears to be a typographical error. The preliminary hearing was held on August 14, 2023, not August 21, 2023. The Executive Director respectfully recommends the date of the preliminary hearing be corrected to August 14, 2023.
4. FOF No. 21. The Executive Director recommends the following change to capture the goal of the Texas Surface Water Quality Standards: The Texas Surface Water Quality Standards (TSWQS) are found in 30 TAC Chapter 307 and establish that the policy of the state is to maintain the quality of water in the state. The TSWQS also ~~st~~ ~~uses for the state’s surface and~~ establish narrative and numerical water quality standards, ~~to protect those uses.~~
5. FOF No. 23. The Executive Director recommends the following change for clarification: The TSWQS and IPs are used, in part, to set permit limits for wastewater discharges.
6. FOF No. 27. The Executive Director recommends the following change for clarification: The discharge will be to receiving ditches, Angleton Drainage Ditches Nos. 7 and 22 non-tidal which are characterized as intermittent with pools and having limited aquatic life use.
7. FOF No. 29. The Executive Director recommends the following change for clarification: The Tier 1 antidegradation review preliminarily determined that existing water quality uses will not be impaired.
8. FOF No. 30. The Executive Director recommends the following change for clarification: A Tier 2 antidegradation review preliminarily determined that no significant degradation of water quality is expected in Angleton Drainage

District Ditch 22's tidal reach and Bastrop Bayou Tidal, which have been identified as having high aquatic life uses.

E. Executive Director's Recommended Changes to Conclusions of Law

The Executive Director respectfully recommends the following changes to the ALJ's Conclusions of Law (COL):

1. COL No. 9: The Executive Director recommends the following change for clarification: TCEQ's review analysis of the application was performed in accordance with TCEQ's rules, standard operating procedures and IPs.
2. COL No. 10. The Executive Director recommends the following change for accuracy: 30 Texas Administrative Code Chapter 290 does not apply to applications for TPDES permits. Additionally, the Executive Director recommends the COL include the entirety of Chapter 309, subchapter B: The draft permit complies with the location standards in of 30 Texas Administrative Code ~~sections 290.41(e) and Chapter 309, subchapter B-13.~~

III. Conclusion

The Executive Director maintains her position that the draft permit meets all applicable statutory and regulatory requirements and respectfully recommends the Administrative Law Judge issue a Revised Proposal for Decision with the Executive Director's recommended changes to accurately reflect the record and the provisions in the Draft Permit.

Respectfully submitted,

Texas Commission on Environmental Quality

Kelly Keel,
Executive Director

Erin E. Chancellor, Director
Office of Legal Services

Charmaine Backens, Deputy Director
Environmental Law Division



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REPRESENTING THE EXECUTIVE DIRECTOR
OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

IV. CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the following by U.S. Regular Mail, Certified Mail (return receipt requested), electronic mail, hand delivery and/or facsimile at the addresses listed below on this 26th day of February 2024.



Kathy Humphreys, Staff Attorney
Environmental Law Division

MAILING LIST - SOAH DOCKET NO. 582-23-20937

TCEQ DOCKET NO. 2023-0163-MWD

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