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ADMINISTRATIVE HEARINGS  
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## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

September 18, 2023

The Honorable Holly Vandrovec  
Administrative Law Judges  
State Office of Administrative Hearings  
P.O. Box 13025  
Austin, Texas 78711-3025

RE: **APPLICATION BY R040062, LP FOR TPDES PERMIT  
NO. WQ0016008001  
SOAH DOCKET NO. 582-23-10368  
TCEQ DOCKET NO. 2022-1731-MWD**

Dear Honorable Administrative Law Judge:

Enclosed for filing is the Office of Public Interest Counsel's Closing Argument in the above-entitled matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Sheldon P. Wayne".

Sheldon P. Wayne, Attorney  
Assistant Public Interest Counsel

**SOAH DOCKET NO. 582-23-10368  
TCEQ DOCKET NO. 2022-1731-MWD**

<b>APPLICATION BY</b>	<b>§</b>	<b>BEFORE THE STATE OFFICE</b>
<b>R040062, LP</b>	<b>§</b>	<b>OF</b>
<b>FOR NEW TPDES PERMIT</b>	<b>§</b>	<b>ADMINISTRATIVE HEARINGS</b>
<b>NO. WQ0016008001</b>	<b>§</b>	

**OFFICE OF PUBLIC INTEREST COUNSEL’S CLOSING ARGUMENT**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES:

The Office of Public Interest Counsel (OPIC) at the Texas Commission on Environmental Quality (TCEQ) files this closing argument and would respectfully show as follows:

**I. Introduction**

OPIC finds that R040062, LP (Applicant) met its burden of proof, and a preponderance of evidence in the record shows that the application complies with applicable legal and technical requirements and would protect human health and safety, the environment, and physical property. Therefore, the permit should be issued.

**A. Background of Facility**

Applicant applied to the TCEQ for new Texas Pollutant Discharge Elimination Permit (TPDES) No. WQ0016008001 to authorize the discharge of treated domestic wastewater at an interim volume not to exceed a daily average flow of 75,000 gallons and a final volume not to exceed a daily average flow of 200,000 gallons per day. If built, the Indigo Water Resource Recovery Facility will

be located off the west end of Madison Drive, approximately 1,500 feet northwest of the intersection of County Road 105 and Jacobs Way, in Williamson County.

The treated effluent would be discharged to an unnamed tributary of Mankins Branch, then to Mankins Branch, then to the San Gabriel/North Fork San Gabriel River in Segment no. 1248 of the Brazos River Basin. The unclassified receiving water uses are limited aquatic life use for the unnamed tributary and Mankins Branch (intermittent with perennial pools), and high aquatic life use for Mankins Branch (perennial). The designated uses for Segment no. 1248 are primary contact recreation, public water supply, aquifer protection, and high aquatic life use. The aquifer protection use applies to the contributing, recharge, and transition zones of the Edwards Aquifer. Portions of the discharge route are within the transition zone.

## **B. Procedural History**

Applicant filed its permit application on June 11, 2021. The TCEQ declared the application administratively complete on August 24, 2021. Applicant published the Notice of Receipt and Intent to Obtain a Water Quality Permit in English on August 29, 2021 in the *Williamson County Sun* and in Spanish on September 2, 2021 in *El Mundo*. Following the Executive Director's (ED) technical review and issuance of a draft permit, Applicant published the Notice of Application and Preliminary Decision in English on May 18, 2022 in the *Williamson County Sun* and in Spanish on May 19, 2022 in *El Mundo*. The Chief Clerk mailed the ED's Decision and Response to Comments on September 7, 2022. The deadline to request a contested case hearing was October 7, 2022.

On November 17, 2022, the TCEQ received a request from Applicant to directly refer this matter to the State Office of Administrative Hearings (SOAH) for a contested case hearing on the application. After receipt of this request, TCEQ's Chief Clerk referred the application to SOAH for a hearing on whether the application complies with all applicable statutory and regulatory requirements.<sup>1</sup> A preliminary hearing was held in this matter on April 24, 2023. At the hearing, the following parties were named as protestants in this matter: the City of Georgetown, Jonah Special Utility District (Jonah), Shawn Bichsel, and Alex Cifuentes. On July 12, 2023, the City of Georgetown withdrew as a party in this matter. Jonah was the only Protestant to provide pre-filed direct testimony and participate at the hearing on the merits.

## **II. Applicable Law**

This application was filed after September 1, 2015, and is therefore subject to Senate Bill 709, Tex. S.B. 709, 84th Leg., R.S. (2015) (SB 709). Regarding the administrative record, TCEQ Rule 80.118(c) provides that the administrative record includes the application, including revisions to the original submittal, and certified copies of the following documents:

- (1) the ED's final draft permit, including any special provisions or conditions;
- (2) the ED's preliminary decision, or the ED's decision on the permit application, if applicable;
- (3) the summary of the technical review of the permit application;
- (4) the compliance summary of the Applicant;

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<sup>1</sup> 30 TAC § 55.210(b).

- (5) copies of the public notices relating to the permit application, as well as affidavits regarding public notices; and
- (6) any agency document determined by the ED to be necessary to reflect the administrative and technical review of the application.

Section 80.118(c) also specifies that the administrative record may include technical memoranda that demonstrate the draft permit meets all applicable requirements and, if issued, would protect human health and safety, the environment, and physical property.

Under 30 TAC § 80.17, Applicant bears the burden of proving, by a preponderance of the evidence, that its application complies with applicable legal and technical requirements. Regarding the burden of proof in an S.B. 709 case, Section 80.17(c)(1) states that the filing of the administrative record establishes a prima facie demonstration that the ED's draft permit meets all state and federal legal and technical requirements, and, if issued consistent with the ED's draft permit, would protect human health and safety, the environment, and physical property. Section 80.117(b) states that for applications subject to subsection (c) of this section, the applicant's presentation of evidence to meet its burden of proof may consist solely of the filing with the State Office of Administrative Hearings (SOAH), and admittance by the judge, of the administrative record as described in subsection (c) of this section. Section 80.17(c)(2) further states that a party may rebut this presumption by presenting evidence demonstrating that the draft permit violates a specifically applicable state or federal legal or technical requirement. If a rebuttal case is presented, Section 80.17(c)(3) states

that the Applicant and the ED may present additional evidence to support the ED's draft permit.

### **III. Discussion**

This was a direct referral, and thus, any issue relevant to the application or draft permit could have been raised at the hearing. However, Protestant Jonah focused their evidence and argument on issues related to water quality, regionalization, sufficiency of the application, and the Applicant's lack of experience.

#### **A. Water Quality**

Protestant Jonah testified that if the facility is poorly constructed or operated, it could pollute, contaminate, create algal blooms, and otherwise degrade the water quality along the discharge route.<sup>2</sup>

For the ED, Brittany Lee testified that as part of her duties, she evaluates water quality criteria associated with the uses of the receiving waters to ensure that the discharge will not violate surface water quality standards (TSWQS).<sup>3</sup> She noted that the general criteria for the TSWQS state that "surface waters must not be toxic to man from ingestion of water, consumption of aquatic organisms, or contact with the skin, or to terrestrial or aquatic life."<sup>4</sup> Likewise, TCEQ's Procedures to Implement the TSWQS are "designed to ensure that no source will be allowed to discharge any wastewater that: (1) results in instream aquatic

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<sup>2</sup> Direct Testimony of William Brown, Jonah SUD, p. 7, ln. 17-19; p. 8, ln. 17-21; Direct Testimony of Miles Whitney, Jonah SUD, p. 7, ln. 15-16.

<sup>3</sup> Direct Testimony of Brittany Lee, ED, p. 5 (internal pagination), ln. 25-27.

<sup>4</sup> Direct Testimony of Brittany Lee, ED, p. 8, ln. 29-1; 30 TAC § 307.4.

toxicity; (2) causes a violation of an applicable narrative or numerical state water quality standard; (3) results in the endangerment of a drinking water supply; or (4) results in aquatic bioaccumulation that threatens human health.”<sup>5</sup>

Ms. Lee also testified that the antidegradation review she performed in connection with this application consisted of two tiers.<sup>6</sup> The Tier 1 review ensures that water quality uses will not be impaired.<sup>7</sup> The Tier 2 review applies to water bodies that have intermediate, high, or exceptional aquatic life uses, such as Segment no. 1248, and is performed to ensure that where water quality exceeds the normal range of fishable or swimmable quality, it will be maintained.<sup>8</sup> Her Tier 1 review determined that uses of the receiving waters will be maintained, and her Tier 2 review preliminarily determined that the existing uses of Mankins Branch and Segment no. 1248 will not be impaired provided that the Applicant complies with the limitations recommended in her memorandum.<sup>9</sup>

Ms. Lee also conducted a site visit and performed a nutrient screening designed to determine if an effluent limit is needed for total phosphorus to comply with numerical nutrient criteria or preclude excessive growth of aquatic vegetation.<sup>10</sup> As a result of this screening she determined that a 0.5 milligrams per liter (mg/L) total phosphorus limit was necessary, which is more stringent than the 1.0 mg/L total phosphorous limit applicable to Edwards Aquifer.<sup>11</sup>

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<sup>5</sup> Direct Testimony of Brittany Lee, ED, p. 9, ln. 1-8.

<sup>6</sup> Direct Testimony of Brittany Lee, ED, p. 7, ln. 5, p. 9, ln. 9-16.

<sup>7</sup> Direct Testimony of Brittany Lee, ED, p. 7, ln. 5-7.

<sup>8</sup> Direct Testimony of Brittany Lee, ED, p. 7, ln. 9-12.

<sup>9</sup> Direct Testimony of Brittany Lee, ED, p. 9, ln. 10-21.

<sup>10</sup> Direct Testimony of Brittany Lee, ED, p. 12, ln. 11-15; p. 13, ln. 6-10.

<sup>11</sup> Direct Testimony of Brittany Lee, ED, p. 12, ln. 28-30; p. 14, ln. 20-23.

Additionally, Ms. Lee determined that there are no endangered species present in the San Gabriel/North Fork San Gabriel River.<sup>12</sup>

Finally, in response to Jonah's concerns about construction and operation of the facility, the ED testified that the facility's plans and specifications must be approved prior to construction in accordance with 30 TAC, Chapter 217, and that the draft permit requires a Class C licensed operator.<sup>13</sup>

It appears that Applicant took the position that Jonah's evidence did not show that the draft permit violated a specifically applicable state or federal water quality requirement, thus Jonah failed to rebut the prima facie demonstration provided by the filing of the administrative record in this matter.

In OPIC's view, the ED's evidence supports a conclusion that if the discharge meets the effluent limits in the draft permit, the applicable water quality criteria should be met, and the uses of the receiving waters should be protected. Jonah's concerns about water quality rest on the premise that the facility would be poorly constructed or operated. The ED sufficiently addressed the concerns about construction and operation, and more importantly, Jonah's concerns were so general in nature that they did not rebut the prima facie demonstration afforded to Applicant by statute. Therefore, based on the evidence in the record, OPIC finds that the draft permit would protect water quality and the uses of the receiving waters under the applicable TSWQS.

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<sup>12</sup> Direct Testimony of Brittany Lee, ED, p. 7, ln. 28-30.

<sup>13</sup> Direct Testimony of Sonia Bhuiya, ED, p. 9 (internal pagination), ln. 19-24.



## **B. Regionalization**

Texas Water Code § 26.081(a) provides:

The legislature finds and declares it is necessary to the health, safety, and welfare of the people of this state to implement the state policy to encourage and promote the development and use of regional and area-wide waste collection, treatment, and disposal systems to serve the waste disposal needs of the citizens of the state and to prevent pollution and maintain and enhance the quality of water in this state.

Additionally, Texas Water Code § 26.0282 articulates the state's policy on wastewater treatment regionalization and addresses the issue of need as follows:

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 ... based on the 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.

Protestant Jonah explained that it is a political subdivision of the State of Texas that holds a Certificate of Convenience and Necessity (CCN) for water and provides water service to approximately 13,500 customers.<sup>14</sup> Jonah noted the population within its service area is growing exponentially and that there is a need for long-term planning, including regional wastewater treatment to comply with the state's regionalization policy.<sup>15</sup> Jonah witness Miles Whitney testified that there are currently ten pending TCEQ wastewater applications and three pending permits within or near Jonah's boundary and CCN area.<sup>16</sup> Jonah argued

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<sup>14</sup> Direct Testimony of William Brown, Jonah SUD, p. 4, ln. 2-7; Hearing Transcript, Vol. 1, p. 24, ln. 3-5.

<sup>15</sup> Direct Testimony of William Brown, Jonah SUD, p. 7, ln. 5-10.

<sup>16</sup> Direct Testimony of Miles Whitney, Jonah SUD, p. 5, ln. 20-2.

that insufficient attention has been paid to regionalization, which favors consolidation of wastewater treatment in the area with water supply.<sup>17</sup> According to Jonah, the Applicant is a single-purpose entity that does not own or operate any other wastewater treatment plants.<sup>18</sup> Additionally, Jonah claims that the Applicant has not explained why the area would not be best served by Jonah, as the existing water utility, providing wastewater treatment.<sup>19</sup> William Brown testified that Jonah holds a CCN for the service area which includes the facility, and Jonah does not consent to the Applicant providing wastewater service.<sup>20</sup>

Finally, Jonah testified that the TCEQ's regionalization policy will be better served by allowing Jonah to act as the provider of wastewater services in the area sought by the Applicant because Jonah desires to pursue the construction and operation of wastewater treatment plants within its boundaries, thereby combining water and wastewater service under a single provider.<sup>21</sup>

For the ED, Sonia Bhuiya testified that to determine compliance with regionalization, Applicants must provide the ED with information about: (1) whether any portion of the proposed service area is located in an incorporated city; (2) whether any portion of the proposed service area is located inside another utility's CCN area; and (3) whether there are any domestic permitted wastewater treatment facilities or collection systems located within a three-mile radius of the proposed facility.<sup>22</sup> Here, the Applicant listed nearby collection

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<sup>17</sup> Direct Testimony of William Brown, Jonah SUD, p. 7, ln. 7-14.

<sup>18</sup> Direct Testimony of Miles Whitney, Jonah SUD, p. 6, ln. 20-22.

<sup>19</sup> Direct Testimony of William Brown, Jonah SUD, p. 7, ln. 19-21.

<sup>20</sup> Direct Testimony of William Brown, Jonah SUD, p. 4, ln. 12-18.

<sup>21</sup> Direct Testimony of Miles Whitney, Jonah SUD, p. 7, ln. 2-5, p. 8, ln. 7-9.

<sup>22</sup> Direct Testimony of Sonia Bhuiya, ED, p. 4, ln. 12-20.

systems and wastewater treatment facilities and an analysis of expenditures.<sup>23</sup>

The list did not include any Jonah facilities and Jonah confirmed that it does not presently have any treatment facilities.<sup>24</sup>

Regarding need, the ED found that the Applicant demonstrated need for the Facility by submitting information on the planned development that will be served by the Facility.<sup>25</sup> The ED concluded that the Applicant provided the information required by the application.<sup>26</sup> Further, it was not necessary to contact Jonah because Jonah only holds a water CCN and does not have any wastewater facilities within three miles.<sup>27</sup>

For the Applicant, David Tuckfield opined that issuance of the draft permit is consistent with the state's regionalization policy and in accordance with TCEQ's guidance on regionalization.<sup>28</sup> He testified that Jonah does not have a facility or system within three miles of the proposed facility.<sup>29</sup> He also observed that Jonah does not currently have any wastewater customers and argued that its water customers are irrelevant to the regionalization inquiry.<sup>30</sup> Additionally, the Applicant contacted the only wastewater treatment plant (Georgetown's Dove Springs plant) located within three miles of the proposed facility and provided a cost analysis showing that at the time the application was submitted the cost of

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<sup>23</sup> Direct Testimony of Sonia Bhuiya, ED, p.5, ln. 27-30.

<sup>24</sup> Direct Testimony of Sonia Bhuiya, ED, p. 5, ln. 30-31; Hearing Transcript, Vol. 1, p. 17, ln. 15-21.

<sup>25</sup> Direct Testimony of Sonia Bhuiya, ED, p. 7, ln. 17-21.

<sup>26</sup> Direct Testimony of Sonia Bhuiya, ED, p. 8, ln. 29-31.

<sup>27</sup> Direct Testimony of Sonia Bhuiya, ED, p. 8, ln. 31-5.

<sup>28</sup> Direct Testimony of David Tuckfield, Applicant, p. 12 (internal pagination), ln. 15-16.

<sup>29</sup> Direct Testimony of David Tuckfield, Applicant, p. 13, ln. 27-28.

<sup>30</sup> Direct Testimony of David Tuckfield, Applicant, p. 19, ln. 20-21, p. 20, ln. 3-5.

building the facility was significantly less than connecting to Dove Springs.<sup>31</sup> Mr. Tuckfield also noted that Jonah's testimony did not suggest that Applicant should connect to the Dove Springs plant.<sup>32</sup>

The witness further explained that, while Jonah had referenced a number of pending wastewater applications and permits, those facilities have not been constructed.<sup>33</sup> In Mr. Tuckfield's opinion, it makes sense that an applicant only evaluate existing facilities because the fact that an application has been submitted or a permit exists does not mean that a facility will ever be built.<sup>34</sup>

Finally, regarding need for the facility, Mr. Tuckfield testified that central Texas is fast-growing and that the development to be served by the proposed facility will consist of approximately 600 manufactured housing units—to be completed within the next five years.<sup>35</sup>

In OPIC's view, the evidence presented supports the conclusion that issuance of the draft permit is consistent with Texas' regionalization policy and that the Applicant has sufficiently demonstrated a need for the proposed facility. As required, the Applicant reached out to the only facility within three miles of the proposed facility and provided a cost analysis justifying the construction of the facility.

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<sup>31</sup> Direct Testimony of David Tuckfield, Applicant, p. 12, ln. 25-26, p. 18, ln. 15-20; Administrative Record, Tab D, Attachment K.1, p. A000372-A000385.

<sup>32</sup> Direct Testimony of David Tuckfield, Applicant, p. 19, ln. 1-3.

<sup>33</sup> Direct Testimony of David Tuckfield, Applicant, p. 14, ln. 11-12, p. 15, ln. 5-6, p. 16, ln. 10-15, p. 17, ln. 7-12.

<sup>34</sup> Direct Testimony of David Tuckfield, Applicant, p. 14, ln. 18-20, p. 17, ln. 14-17.

<sup>35</sup> Direct Testimony of David Tuckfield, Applicant, p. 23, ln. 26-3; Administrative Record, Tab D, Attachment J, p. 000370.

While OPIC believes that a proposed facility could be considered when evaluating whether an application is consistent with the State policy to encourage and promote regionalization, here, based on the evidence presented, OPIC accepts the Applicant's argument that the nearby pending permit applications, issued permits, and Jonah's future wastewater aspirations are too uncertain to rely on for regionalization purposes. Also, OPIC found it significant that there was no evidence in the record that if any facility proposed to be located nearby is ultimately constructed, it would have the capacity or be willing to accept Applicant's wastewater. Additionally, OPIC agrees with the ED that Jonah's water CCN is irrelevant to the issue of regionalization. The language of both TWC § 26.081(a) and § 26.0282 is confined to the consideration of wastewater systems and does not include water systems.

Finally, the Applicant justified the need for the proposed facility based on the development it will serve—consisting of 600 manufactured houses to be constructed in two phases over the next five years.<sup>36</sup> The ED found this justification adequate and OPIC agrees.

### **C. Sufficiency of the Application**

Jonah argued that the application is insufficient because it has entered into discussions with the Applicant regarding wastewater service, but no agreement has been reached—a fact confirmed at the hearing on the merits.<sup>37</sup> Jonah offered that it is the “best utility choice to construct, own, and operate the proposed

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<sup>36</sup> Administrative Record, Tab D, Attachment J, p. 000370.

<sup>37</sup> Direct Testimony of William Brown, Jonah SUD, p. 6, ln. 6-8; Hearing Transcript, Vol. 1, p. 28, ln. 17-2.

Facility and is ready and willing to provide wastewater service within the proposed area, pursuant to Jonah's rate order."<sup>38</sup>

For the ED, Sonia Bhuiya testified that TCEQ requires all providers within three miles to be considered and that the application did not show that Jonah had any facilities within three miles.<sup>39</sup> As discussed earlier, the Applicant was not required to contact or contract with Jonah regarding wastewater services.<sup>40</sup>

In OPIC's view, the evidence presented by Jonah did not rebut the prima facie demonstration that the application and related draft permit meets all applicable requirements. Jonah did not present evidence that the lack of agreement violated any applicable legal or technical requirement, and the ED testified that the Applicant was not required to reach any agreement with Jonah. Therefore, OPIC finds that the Applicant has carried its burden with respect to this issue.

#### **D. Applicant's Experience**

Jonah argued that the Applicant has little to no experience constructing or operating a utility, and if mismanaged, the facility could pollute areas within Jonah's water CCN.<sup>41</sup> In Jonah's view, R040062, LP was created for the sole purpose of being the retail sewer provider for the development and does not have the experience and background to meet TCEQ permit standards.<sup>42</sup>

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<sup>38</sup> Direct Testimony of William Brown, Jonah SUD, p. 6, ln. 3-8.

<sup>39</sup> Direct Testimony of Sonia Bhuiya, ED, p. 5, ln. 30-31, p. 6, ln. 9-13.

<sup>40</sup> Direct Testimony of Sonia Bhuiya, ED, p. 8, ln. 31-7.

<sup>41</sup> Direct Testimony of William Brown, Jonah SUD, p. 8, ln. 3-6.

<sup>42</sup> Direct Testimony of William Brown, Jonah SUD, p. 8, ln. 7-10.

As discussed earlier, the ED testified that the facility's plans and specifications must be approved prior to construction in accordance with 30 TAC, Chapter 217, and the draft permit requires a Class C licensed operator.<sup>43</sup>

In OPIC's view, the evidence presented by Jonah did not rebut the prima facie demonstration that the application and ensuing draft permit meets all applicable requirements. TCEQ must approve the proposed facility's plans prior to construction, and the facility must be operated by a licensed operator. Therefore, OPIC finds that the Applicant has carried its burden with respect to this issue.

#### **IV. Conclusion**

As this matter is a direct referral, Applicant bears the burden of proving, by a preponderance of the evidence, that its application complies with all applicable legal and technical requirements. To meet its burden of proof, Applicant relied on the prima facie demonstration established by the administrative record that the ED's draft permit meets all state and federal legal and technical requirements, and, if issued consistent with the ED's draft permit, would protect human health and safety, the environment, and physical property. Protestant Jonah presented evidence and argument on the issues related to water quality, regionalization, sufficiency of the application, and the Applicant's lack of experience. OPIC acknowledges that the Applicant relied on the administrative record to meet its burden on uncontested issues related to the draft permit. Additionally, OPIC finds that the Applicant has met its burden on the issues

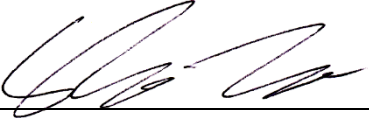
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<sup>43</sup> Direct Testimony of Sonia Bhuiya, ED, p. 9, ln. 19-24.

contested by Jonah. Therefore, OPIC concludes that Applicant met its burden of proof on all applicable legal and technical requirements.

Respectfully submitted,

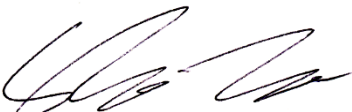
Garrett T. Arthur  
Public Interest Counsel

By: 

Sheldon P. Wayne  
Assistant Public Interest Counsel  
State Bar No. 24098581  
P.O. Box 13087, MC 103  
Austin, Texas 78711-3087  
(512) 239-3144 Phone

#### **CERTIFICATE OF SERVICE**

I hereby certify that on September 18, 2023, this Closing Argument was filed with the State Office of Administrative Hearings, the Chief Clerk of the TCEQ, and a true and correct copy was served to all persons on the attached mailing list via electronic mail.

  
Sheldon P. Wayne



SERVICE LIST  
R040062, LP  
SOAH DOCKET NO. 582-23-10368  
TCEQ DOCKET NO. 2022-1731-MWD

**For the Applicant:**

Peter Gregg

[pgregg@gregglawp.com](mailto:pgregg@gregglawp.com)

**For the Executive Director:**

Aubrey Pawelka, Staff Attorney

[aubrey.pawelka@tceq.texas.gov](mailto:aubrey.pawelka@tceq.texas.gov)

**For the Protestants:**

Jonah Water Special Utility District

Erin Selvera

[erin@carltonlawaustin.com](mailto:erin@carltonlawaustin.com)

Shawn Bichsel

[sbichsel@gmail.com](mailto:sbichsel@gmail.com)

Alex Cifuentes

[alex@interiorhomesolutions.com](mailto:alex@interiorhomesolutions.com)

**For the TCEQ Chief Clerk:**

*via eFiling*

Laurie Gharis, Chief Clerk –

<https://www14.tceq.texas.gov/epic/eFiling/>