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

APPLICATION BY R040062, LP § BEFORE THE STATE OFFICE
FOR § OF
TPDES PERMIT NO. WQ0016008001 § ADMINISTRATIVE HEARINGS

JONAH WATER SPECIAL UTILITY DISTRICT'S
REPLY TO CLOSING ARGUMENTS

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

COMES NOW, Jonah Water Special Utility District, Protestant in the above-referenced proceeding (“Jonah”), and files this its Reply to Closing Arguments pursuant to the Order Granting Motion to Extend Deadlines¹ and, in support thereof, would show the following:

I. INTRODUCTION

A two-day hearing on the merits was conducted in this proceeding from August 15, 2023 to August 16, 2023 (the “Hearing”), with R040062, LP (“Applicant”), Jonah, TCEQ Executive Director (“Executive Director”), and the Office of the Public Interest Counsel (“OPIC”) (collectively, the “Parties”), presenting evidence and arguments in support of and in opposition to the draft permit at issue in this proceeding, TPDES Permit No. WQ0016008001 (the “Permit”). On September 18, 2023, Closing Arguments were filed by Applicant, Jonah and the Executive Director.

II. LEGAL STANDARD

The Applicant opted to direct refer this application to SOAH for a contested hearing under Texas Water Code (“TWC”) § 5.557, and thus the purpose of the contested case hearing is to determine whether the application complies with all applicable statutory and regulatory requirements.²

¹ See SOAH Order Granting Motion to Extend Deadlines (Sept. 15, 2023).

² TWC § 5.557

Texas Government Code § 2003.047 guides how SOAH’s review of these requirements is conducted.³ More specifically, subsections (i-1) through (i-3) of Section 2003.047 describe the procedural process in a contested case hearing at SOAH and the rights of the parties, as follows:

(i-1) In a contested case regarding a permit application referred under Section 5.556 or 5.557, Water Code, the filing with the office of the application, the draft permit prepared by the executive director of the commission, the preliminary decision issued by the executive director, and other sufficient supporting documentation in the administrative record of the permit application establishes a prima facie demonstration that:

- (1) the draft permit meets all state and federal legal and technical requirements; and
- (2) a permit, if issued consistent with the draft permit, would protect human health and safety, the environment, and physical property.

(i-2) A party may rebut a demonstration under Subsection (i-1) by presenting evidence that:

- (1) relates to a matter referred under Section 5.557, Water Code, or 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.⁴

III. REPLY TO ARGUMENTS

The Applicant’s closing arguments rely almost exclusively on the filing of the administrative record that, if complete and accurate, pursuant to Title 30 Texas Administrative Code (“TAC”) § 80.17(c)(1), establishes a prima facie demonstration that the executive director’s draft permit meets all state and federal legal and technical requirements.⁵ However, testimony and evidence presented by Jonah confirms that the application and its analysis by the Executive Director is incomplete and thus fatally flawed.

³ Tex. Govt. Code § 2003.047.

⁴ *Id.*

⁵ *See* Applicant’s Closing Arguments.

In accordance with 30 TAC § 80.17(c)(2), a party may rebut the presumption that the Executive Director's draft permit meets all state and federal legal and technical requirements by presenting evidence regarding the referred issues demonstrating that the draft permit violates a specifically applicable state or federal legal or technical requirement⁶ – which is exactly what Jonah has done. During the contested case hearing, and as reflected in Jonah's Closing Arguments, Jonah presented evidence through its witnesses, as well as through the Executive Director's witnesses and the Applicant's own witness that Applicant failed to provide evidence to support its claim that the Executive Director failed to analyze two state laws applicable to this application, TWC § 13.044(c), requiring Applicant to obtain consent from Jonah and provide evidence of Jonah's consent as part of the Application, and TWC § 49.230, applicable when a district is affected by an application for wastewater permit. These failures are fatal to the application.

A. Applicant's Closing Arguments ignore the testimony presented during the hearing and the record as a whole.

First, Applicant's closing arguments ignore testimony by Jonah witness Bill Brown that the Applicant has not requested consent from Jonah, a requirement of TWC § 13.044(c). The administrative record is devoid of any information related to an analysis of the Applicant's compliance with TWC § 13.044(c). The administrative record includes the application which, among other things, requests information concerning two types of entities for which an applicant could potentially need consent. However, the application fails to include information regarding the third type of entity from which consent may be required before service can be provided in a particular area.⁷ Regardless of whether it is TCEQ's failure to include the question in the application or the Applicant's failure to address the issue, omission of this analysis is a fatal flaw because it leaves a void in the record regarding the Applicant's compliance with all applicable statutory and regulatory requirements. This omission prejudices Jonah's rights under TWC § 13.044(c). Moreover, as allowed under 30 TAC § 80.17(c)(3), the Applicant had the opportunity to provide additional evidence to support the Executive Director's draft permit regarding compliance with this requirement, and simply failed to do so. This is fatal flaw number one.

⁶ 30 TAC § 80.17(c)(2)

⁷ See Applicant's **Exhibit A**, APP. EXHIBIT A000332-000333 (TCEQ 10054 (06/01/2017) Domestic Wastewater Permit Application Technical Reports Pages 21-22 of 80; Bates 046-47).

Second, the Applicant's assertion that neither Jonah nor the other parties to the hearing called into question Mr. Tuckfield's opinion on regionalization is incorrect. The Applicant's closing arguments also ignore the Executive Director's testimony and that of its own witness with regard to the analysis required under TWC § 49.230. When asked about the state law applicable to regionalization in Chapter 49, the Executive Director's witness, Ms. Bhuiya, testifies that "for this application, I did not review those things."⁸ Moreover, Mr. Tuckfield also testified he did not address TWC Chapter 49 in his written testimony.

Instead, in an attempt to bolster its posture, the Applicant provides circular arguments from its own witness, indicating that he had no doubt that the Applicant satisfied the regionalization requirements.⁹ However, this is in direct contravention with Mr. Tuckfield's testimony on cross examination. Furthermore, the Applicant provides no additional supporting evidence in law or guidance for this statement. Again, the administrative record is devoid of any information related to an analysis of TWC § 49.230. This lack of evidence coupled with direct and cross examination testimony by the Executive Director's witness and Applicant's witness confirm the existence of fatal flaw number two.

B. The Executive Director's Closing Arguments also ignore testimony and evidence.

Similarly, the Executive Director's Closing Arguments also ignore the direct testimony presented in the hearing. Instead, the Executive Director maintains her position that the draft permit complies with all statutory and regulatory requirements asserting that "the protestants failed to demonstrate that the Executive Director's review was incomplete or inaccurate in any way."¹⁰ To find this assertion credible, the ALJs would have to ignore testimony from the Executive Director's own witness. As noted above, Ms. Bhuiya testified that she did not review the application for compliance with TWC § 49.230. This is direct evidence that Executive Director's review of the Applicant's application is not only flawed, but fatally so.¹¹

The Executive Director's arguments with regard to regionalization focus solely on compliance with TWC § 26.0282. However, omitted from this application and the analysis by the

⁸ Transcript Vol. 1 at 47, lines 5-6 (Aug. 15, 2023).

⁹ See Applicant's Closing Arguments at 3.

¹⁰ Executive Director's Closing Arguments at 2.

¹¹ Id.

Executive Director was any mention of TWC § 49.230. While an analysis under TWC § 26.0282 is a required element of the case, Jonah asserts that it is not the only analysis regarding regionalization required for this application, As TWC § 49.230 states:

Sec. 49.230. AREA-WIDE WASTEWATER TREATMENT. The powers and duties conferred on the district are granted subject to the policy of the state to encourage the development and use of integrated area-wide wastewater collection, treatment, and disposal systems to serve the wastewater disposal needs of the citizens of the state whenever economically feasible and competitive to do so, it being an objective of the policy to avoid the economic burden to the people and the impact on the quality of the water in the state that result from the construction and operation of numerous small wastewater collection, treatment, and disposal facilities to serve an area when an integrated area-wide wastewater collection, treatment, and disposal system for the area *can be reasonably provided*.¹²

Evidence in the record demonstrates that numerous wastewater applications are pending in the area.¹³ Section 49.230 requires the commission to consider whether an integrated area-wide wastewater collection, treatment, and disposal system for the area can be reasonably provided. Only looking at whether there are existing facilities within a three-mile radius would not be determinative regarding whether an integrated area-wide system could reasonably be provided. Evidence in the record indicates that Jonah has legal authority and is capable of providing this service. However, neither the Applicant nor the Executive Director analyzed whether Jonah could reasonably provide such a system. This omission leaves the record deficient and fatally flawed.

C. The ALJ must consider the entire record.

The Court of Appeals in *Tex. Comm'n on Env'tl. Quality v. Save Our Springs Alliance*, discussed what an ALJ must consider when there is a challenge to the prime facie demonstration, stating:

Section 2003.047 does not elaborate on the type of evidence the protesting party (in this case SOS) must present to rebut the TCEQ's prima facie case. The concept of a prima facie case, however, is not a new one, and we agree with the ALJ that if the protesting party does not present *any* controverting evidence to rebut the TCEQ's prima facie demonstration, the ALJ's inquiry would stop there. In that case, the ALJ would have to uphold the TCEQ's

¹² TWC § 49.230 (emphasis added).

¹³ Exhibit JWSUD-4 District/Water CCN Map (also labeled as Exhibit MW-1).

decision to grant the permit. *See generally In re Lipsky*, 460 S.W.3d 579, 590 (Tex. 2015) (a prima facie case refers to evidence “sufficient as a matter of law to establish a given fact if it is not rebutted or contradicted.”); *Serafine v. Blunt*, 466 S.W.3d 352, 358 (Tex.App.--Austin 2015, no pet.) (recognizing that a prima facie case is one that will entitle a party to recover if no evidence to the contrary is offered by the opposite party). But if the protesting party provides some controverting evidence which raises a question of fact on the issue of whether the permit violates a state or federal rule or regulation, then the ALJ must consider the entire record to determine whether such a violation occurred, or conversely, whether the TCEQ has submitted sufficient evidence to support its decision to grant the permit.¹⁴

In this case, Jonah has provided controverting evidence which raises a question of fact on the issue of whether the permit violates both TWC § 13.044(c) and TWC § 49.230. Therefore, the ALJ must consider the entire record to determine whether the TCEQ has submitted sufficient evidence to support its decision to grant the Permit. Direct testimony of Jonah’s witnesses and cross examination testimony from the Executive Director’s and Applicant’s witnesses, coupled with the failure of the Executive Director and Applicant to provide additional evidence to support the Executive Director’s draft permit regarding these two state statutes leads to only one conclusion. The draft permit fails to meet all state and federal legal and technical requirements.

IV. CONCLUSION AND PRAYER

Neither the Applicant, nor the Executive Director’s closing arguments address the testimony by Jonah and their own witnesses, which demonstrate two independent analyses required under state law were not conducted. Instead, both Applicant and the Executive Director ignore the evidence in the record supporting this fact. Moreover, Jonah has provided the requisite controverting evidence, raising a question of fact on the issue of whether the Permit violates both TWC § 13.044(c) and TWC § 49.230. Both the Executive Director and Applicant have failed to address these two applicable statutory requirements. This failure prejudices Jonah’s rights under TWC § 13.044(c) and omits the critical regionalization analysis under TWC § 49.230, leaving the area vulnerable to potential negative impacts of construction and operation of the numerous small wastewater collection, treatment, and disposal facilities.

¹⁴ [Tex. Comm’n on Envtl. Quality v. Save Our Springs Alliance](#), 668 S.W.3d 710, 726, 2022 Tex. App. LEXIS 9053, *24-25, 2022 AMC 445, 2022 WL 17659907.

WHEREFORE, PREMISES CONSIDERED, Jonah Water Special Utility District, Protestant in this proceeding, hereby prays that the Honorable Administrative Law Judge recommend denial of the Permit and award any such other and further relief to which it may show itself to be granted, at law or in equity.

Respectfully submitted,



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I hereby certify that I have served or will serve a true and correct copy of the foregoing document on all parties of record on this 25th day of September 2023, as follows:

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