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

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

APPLICANT'S CLOSING STATEMENT

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE

COMES NOW, R040062, LP ("R040062" or "Applicant") and files its Closing Statement, and in support thereof would show the following:

I. SUMMARY OF CLOSING ARGUMENT

Johan, as the only Protestant to participate in the hearing, presented pre-filed testimony of William Brown and Miles Whitney. As discussed in detail below, the prefiled testimony of those two witnesses put forth no substantive evidence challenging the Applicant's prima facie demonstration. And, neither Jonah nor the other parties to the hearing otherwise called the prima facie demonstration into question during examination pursuant to the hearing on the merits. The Applicant has demonstrated that the draft permit meets all state and federal legal and technical requirements. Accordingly, Applicant asserts the ALJ should issue a Proposal for Decision ("PFD") recommending issuance of the draft permit without changes.

II. BURDEN OF PROOF

This Texas Pollutant Discharge Elimination System ("TPDES") permit application proceeding is governed by Title 30 Texas Administrative Code ("TAC") § 80.17(c), which provides as follows:

In contested cases regarding a permit application filed with the commission on or after September 1, 2015, and referred under Texas Water Code, §5.556 or §5.557:

- (1) the filing of the administrative record as described in §80.118(c) of this title (relating to Administrative Record) establishes a prima facie demonstration that the executive director's draft permit meets all state and federal legal and technical requirements, and, if issued consistent with the executive director's draft permit, would protect human health and safety, the environment, and physical property;

- (2) a party may rebut the presumption in paragraph (1) of this subsection by presenting evidence regarding the referred issues demonstrating that the draft permit violates a specifically applicable state or federal legal or technical requirement; and
- (3) if a rebuttal case is presented by a party under paragraph (2) of this subsection, the applicant and executive director may present additional evidence to support the executive director's draft permit.¹

Applicant established a prima facie demonstration that the draft permit should be issued through the offer and admission of the administrative record on April 18, 2023. The burden then shifted to Protestants to rebut this prima facie demonstration by a preponderance of the evidence by establishing that the draft permit violates a specifically applicable state or federal requirement as it relates to one the agreed issues. As discussed herein, the limited evidence the Protestants presented in their challenge to the draft permit failed to call into question the Applicant's prima facie demonstration and was otherwise thoroughly rebutted through the Applicant's and Executive Director's direct testimony and exhibits and the testimony offered at hearing.

III. ARGUMENT

Protestant Johan raised two general concerns about the draft permit: regionalization and water quality. Regarding Johan's regionalization concerns, Jonah failed to present any relevant evidence in its prefiled testimony. On page 6 of his testimony, Jonah witness William Brown states that "Jonah is the best utility choice to **construct** ... the proposed facility."² Additionally, on page 8 of the direct testimony of Miles Whitney, Mr. Whitney states that he feels "Jonah is a superior choice to **construct** and operate the facility[.]"³ Mr. Brown and Mr. Whitney's direct testimony simply reference Jonah's desire to *construct* a new facility. Neither witness presented any testimony in their prefiled testimony that there is an existing Jonah facility in the 3-mile area.

Nor did either witness present any testimony suggesting there are any other existing wastewater treatment facilities within the three-mile area. On page 5 of his prefiled testimony, Mr. Whitney states, that "[t]here are three other **pending** wastewater treatment plant permits within **3.3 miles** of the subject application."⁴ However, all three wastewater treatment plants identified

¹ 30 TAC § 80.17(c).

² EX. JWSUD-1, Direct Testimony of William Brown, p. 6.

³ EX. JWSUD-2, Direct Testimony of Miles Whitney, p. 8.

⁴ *Id.* at p. 5.

are merely pending, not presently existing, and all three fall outside of a three-mile radius of the Proposed Facility.

Despite Jonah's failure to move the needle on the Applicant's prima facie demonstration on the issue, the Applicant presented the testimony of regionalization expert David Tuckfield.⁵ Mr. Tuckfield was unequivocal in his opinion that the Applicant satisfied the regionalization requirements:

21 **Q.** Given your expertise on regionalization, is
22 there any question in your mind having reviewed all that
23 you've reviewed, having heard the testimony that you've
24 heard, reviewed the testimony that you reviewed, is
25 there any doubt that this applicant has satisfied the
1 regionalization requirement?

2 **A.** There's no doubt.⁶

Neither Jonah nor the other parties to the hearing called that opinion into doubt.

The second concern Jonah voiced was related to water quality. Jonah's prefiled testimony failed to present any evidence seeking to rebut Applicant's prima facie case on that issue. The testimony failed to even assert that the Application is deficient as it relates to the protection of water quality. Mr. Brown and Mr. Whitney's testimony is similar on the issue. They both raise a contingent concern about the facility if the proposed facility is poorly constructed or operated.⁷ Neither individual asserts, much less provides supporting evidence, that the facility will be poorly constructed or operated. The conclusion of both witnesses in their testimony on water quality is simply that Jonah would be a superior operator of a wastewater system. Ultimately, neither witness provided any sort of rebuttal evidence that draws into question the draft permit's protection of

⁵ App. Ex. 1

⁶ Transcript, Volume II at 20:21-21:2

⁷ Ex. JWSUD-1, p. 8; Ex. JWSUD-2, p. 7.

water quality.⁸ And the witnesses did not present any supporting evidence at trial on cross-examination or on redirect examination.

Because no party presented a challenge to the Applicant's prima facie demonstration as it relates to issues of water quality, Applicant elected not to present its expert on water quality. The Executive Director did present testimony, from Brittany Lee and Sonia Bhuiya, which fully supported the prima facie demonstration.

IV. CONCLUSION

Pursuant to Applicant's prima facie demonstration and the evidence presented at hearing, the record establishes that the draft permit is consistent with the State's regionalization policy and is protective of water quality, and that it otherwise complies with all applicable state and federal requirements. Accordingly, Applicant respectfully requests that the ALJ issue a PFD recommending that the TCEQ issue the draft permit based on the Protestants' failure to meet their statutory burden of proof to demonstrate that any provision of the draft permit violates any specifically applicable state or federal requirements.

⁸ EX. JWSUD-1, Direct Testimony of William Brown, p. 8; EX. JWSUD-2, Direct Testimony of Miles Whitney, p. 7

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that on September 18, 2023, a true and accurate copy of the foregoing document has been served on the following counsel electronically through an electronic filing manager or by email.


Peter T. Gregg

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Peter Gregg on behalf of Peter Gregg
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Envelope ID: 79669044
Filing Code Description: Pleading
Filing Description: Applicant's Closing Statement
Status as of 9/18/2023 4:00 PM CST

Associated Case Party: Executive Director

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Peter Gregg on behalf of Peter Gregg
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Status as of 9/18/2023 4:00 PM CST

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