

SOAH HEARING - VOLUME 2 - August 16, 2023

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

R0400062, LP ) BEFORE THE STATE OFFICE  
 )  
 )  
 )  
 FOR TPDES PERMIT NO. ) OF  
 )  
 )  
 )  
 WQ0016008001 ) ADMINISTRATIVE HEARINGS

ACCEPTED  
 582-23-10368  
 11/16/2023 5:03:27 pm  
 STATE OFFICE OF  
 ADMINISTRATIVE HEARINGS  
 Carol Hale, CLERK

SOAH HEARING  
 AUGUST 16, 2023  
 VOLUME 2 OF 2

SOAH HEARING testimony was taken in the above  
 styled and numbered cause on Wednesday, August 16, 2023,  
 from 9:00 a.m. to 9:21 a.m., before Cherie' E. White,  
 CSR in and for the State of Texas, reported by  
 computerized stenotype machine, at the State Office of  
 Administrative Hearing Offices, 300 West 15th Street,  
 4th Floor, Austin, Texas, pursuant to the Texas Rules of  
 Civil Procedure and the provisions stated on the record  
 herein.

**SOAH HEARING - VOLUME 2 - August 16, 2023****A P P E A R A N C E S****FOR THE APPLICANT:**

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APP EX 07	Notice of Application & Preliminary Decision TCEQ, Limmer Loop JV, LLC (Permit No. WQ0016260001)	

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## APPLICANT'S EXHIBITS

NO.	DESCRIPTION	PAGE
APP EX 08	Notice of Receipt of Application & Intent to Obtain a Water Quality Permit, New Horizons Utility LLC (Permit No. WQ0016257001)	
APP EX 09	Notice of Approval of the Petition by the City of Hutto & the Jonah Water Special Utility District for Approval of a service-area Contract Under Texas	

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**SOAH HEARING - VOLUME 2 - August 16, 2023****P R O C E E D I N G S**

THE JUDGE: Let's go on the record.

Today's date is August 16th, 2023. It is now approximately 9:00 a.m., and this hearing is being held in the SOAH offices as well as via Zoom.

This is SOAH Docket No. 582-23-10368, and TCEQ Docket No. 2022-1731-MWD for the application by RO40062, LP for a TPDES permit.

My name is Holly Vandrovec, V-A-N-D-R-O-V-E-C, and I'm the administrative law judge assigned to this case.

At this time, I'll note this is Day 2 of our hearing; and at this point, we are to the point where applicant is going to be presenting its evidence. So before we get started, I'll get appearances and then we will start with the applicant. So just to get appearances, we'll start with the applicant.

MR. GREGG: Judge, Peter Gregg with Gregg Law, PC representing RO40062, LP.

THE JUDGE: And for the district?

MS. SELVERA: Good morning. Erin Salvera with the firm of The Carlton Law Firm representing Jonah Water Special Utility District.

THE JUDGE: Thank you. The executive director?

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1 MS. PAWELKA: Good morning, Your Honor.  
2 I'm Aubrey Pawelka with TCEQ representing the executive  
3 director.

4 THE JUDGE: And for OPIC?

5 MS. JAMESON: Good morning, Your Honor.  
6 I'm Jennifer Jameson on behalf of the Office of Public  
7 Interest Counsel sitting in for my counsel, Sheldon  
8 Wayne.

9 THE JUDGE: Thank you. Okay, Mr. Gregg.  
10 You may proceed.

11 MR. GREGG: Thank you, Judge. The  
12 applicant calls David --

13 MS. SELVERA: I'm sorry. I'm sorry, Your  
14 Honor. Can we address one procedural matter,  
15 housekeeping matter before we get into the applicant's  
16 case?

17 THE JUDGE: Sure.

18 MS. SELVERA: I wasn't aware that the  
19 applicant was not going to present their second rebuttal  
20 witness. They provided some rebuttal testimony from  
21 Ms. Sims, but, as I understand, she's not going to be  
22 here to be presented for cross-examination today.

23 THE JUDGE: Okay.

24 MS. SELVERA: Is that correct?

25 THE JUDGE: That is what I heard off the

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1 record before we got started. No exhibits of the  
2 applicants have been admitted at this time, so if the  
3 applicant chooses not to present that witness or any of  
4 that evidence, that would be the applicant's option to  
5 do so.

6 MS. SELVERA: That -- that's just a  
7 clarification that I want to understand --

8 THE JUDGE: Okay.

9 MS. SELVERA: -- that that evidence, that  
10 testimony will not be offered into the record in this  
11 case.

12 THE JUDGE: I don't know if he plans to  
13 offer it or not, but I would assume you would have an  
14 objection to that if he did, so -- okay. Thank you.  
15 And with that, Mr. Gregg.

16 MR. GREGG: The applicant calls its first  
17 and only witness, David Tuckfield.

18 THE JUDGE: Okay. Mr. Tuckfield, if you  
19 would approach the witness stand. Mr. Tuckfield, just  
20 so you know, you'll need to speak directly into the  
21 little microphone there.

22 THE WITNESS: Got it. Thank you.

23 THE JUDGE: And if -- Mr. Tuckfield, if you  
24 would raise your right hand?

25 DAVID JAMES TUCKFIELD,

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1 after having first been duly sworn by the  
2 above-mentioned Court Reporter did testify as follows:

3 THE JUDGE: Thank you. And could you state  
4 your full name for the record?

5 THE WITNESS: David James Tuckfield.

6 THE JUDGE: Thank you.

7 DIRECT EXAMINATION

8 BY MR. GREGG:

9 Q. Mr. Tuckfield, good morning. Do you have  
10 available to you or before you Applicant's Exhibits 1  
11 through 9?

12 A. I do.

13 Q. Okay. What is Applicant's Exhibit 1?

14 A. It is my direct testimony in this case.

15 Q. Okay. And just generally, Applicant's  
16 Exhibits 2 through 9, what are those?

17 A. They are identified in Exhibit 1, but let's go  
18 through them real quickly. Applicant's Exhibit 2 is my  
19 resume'; Exhibit 3 is the Crystal Clear decision;  
20 Applicant's Exhibit 4 is a TC -- a copy of the TCEQ  
21 regionalization web page; Exhibit 5 is an order from the  
22 Air-W case; Exhibit 6 is a PFD from the Air-W case. I  
23 don't have the entire PFD. I only have excerpts of that  
24 I believe. Exhibit 7 is a Notice of Application and  
25 Preliminary Decision, Limmer Loop Application; Exhibit 8

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1 is a Notice of Receipt of Application and Intent to  
2 Obtain Water Quality Permit for the New Horizons  
3 Utility, LLC permit; Exhibit 9 is a Notice of Approval  
4 for the Petition by the City of Hutto and the Jonah  
5 Water Special Utility District pursuant to the Texas  
6 Water Code 13.248 and to amend certificates of  
7 convenience and necessity.

8 Q. Thank you, Mr. Tuckfield. Let's start with  
9 Applicant's Exhibit 1. Is that a true and correct copy  
10 of your testimony as you would today if you were  
11 testifying live?

12 A. Yes, it is.

13 Q. Okay. And Applicant's Exhibits 2 through 9,  
14 are those exhibits you prepared or had prepared under  
15 your direct supervision?

16 A. Yes, they are.

17 Q. Okay. And those are true and correct copies of  
18 what they are intending to represent?

19 A. Yes.

20 MR. GREGG: Okay. Your Honor, at this  
21 point, we would like to offer Applicant's Exhibits 1  
22 through 9 into the record.

23 THE JUDGE: Okay. Let me ask if there are  
24 any objection to the exhibits.

25 MS. SELVERA: No objections.

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1 MS. PAWELKA: No objections.

2 THE JUDGE: Okay. Ms. Jameson, you have  
3 any objections?

4 MS. JAMESON: No objections, Your Honor.

5 THE JUDGE: Okay. Applicant's 1 through 9  
6 are admitted.

7 MR. GREGG: And, Judge, if I could, there  
8 were two changes. There were changes made to each  
9 protestant's pre-filed testimony yesterday. If I could  
10 ask just one or two questions of this witness on direct  
11 as those relate -- as those changes relate to his  
12 testimony?

13 THE JUDGE: Okay. Any objections to that?

14 MS. SELVERA: No.

15 MS. PAWELKA: No.

16 THE JUDGE: Ms. Jameson?

17 MS. JAMESON: No objection.

18 Q. (BY MR. GREGG) And they will be very brief and  
19 I think noncontroversial.

20 Mr. Tuckfield, are you familiar with  
21 changes -- first of all, are you familiar with the  
22 direct testimony of William Brown and the direct  
23 testimony of Miles Whitney?

24 A. Yes, I reviewed that.

25 Q. Are you aware that they each made a single

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1 change to their testimony yesterday?

2 A. I didn't see the testimony or hear it, but I  
3 was informed by you that there was, in fact, a change  
4 made in their testimony.

5 Q. Okay. And is it -- as you understand it, the  
6 change by Mr. Brown was that Jonah provides water  
7 service to approximately 13,500 customers and 35,000  
8 people in the service area -- and that was the wrong  
9 reference. I'm sorry. They made two changes. I  
10 apologize. I'm going to now take you to the correct  
11 change that's relevant to this discussion.

12 On page 5 of 15 of Mr. Brown's testimony,  
13 he says the permit is being sought for Indigo Water  
14 Resources -- Resource Recovery Facility. The facility  
15 that is being planned to serve the applicant's  
16 subdivision will consist of approximately 300, or he  
17 also referenced 281, manufactured housing units.

18 Do you understand that to be the change,  
19 from a 600 number to a 300 or 281?

20 A. That's what I understand to be the change, yes.

21 Q. Okay. And do you understand that Mr. Whitney  
22 made a similar change to his testimony?

23 A. Yes, I understand that.

24 Q. Okay. Let me take you to page 24 of your  
25 testimony, which again is at Applicant's Exhibit 1; and

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1 the question actually starts on page 23. The question  
2 is "Has the applicant provided sufficient information to  
3 justify a need for the Indigo WRRF?"

4 A. Yes.

5 Q. Do you discuss in that answer the number of  
6 housing units in essentially the phasing of this permit?

7 A. Yes. This comes simply from the review of the  
8 application appendix or attachment J of the application,  
9 which is tab D of the administrative record. The  
10 applicant stated that they were finding certs under  
11 manufacturing units, but this would be done in phases,  
12 and the first phase would be approximately 300 and the  
13 rest would come later.

14 Q. And does that remain your understanding of  
15 their intention with regard to this permit application?

16 A. I've heard nothing different that would  
17 indicate that it would be different. That's what my  
18 understanding is.

19 Q. Okay. Mr. Tuckfield, thank you. Judge, at  
20 this point, we will pass the witness.

21 THE JUDGE: Okay. We will start with the  
22 district.

## CROSS-EXAMINATION

23  
24 BY MS. SELVERA:

25 Q. Good morning, Mr. Tuckfield. Can you hear me



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1 okay?

2 A. Yes.

3 Q. Sometimes I have a tendency to talk a little  
4 loud, so I won't put the mic super close, but I'll move  
5 it just to make sure our court reporter and OPIC or TCEQ  
6 and OPIC can hear me.

7 MS. JAMESON: I can hear you.

8 MS. SELVERA: Great.

9 Q. (BY MS. SELVERA) Mr. Tuckfield, can you -- can  
10 you confirm for us who you're here to testify on behalf  
11 of?

12 A. The applicant.

13 Q. And so is it correct to say then that you're  
14 not here to testify on behalf of the executive director  
15 of TCEQ?

16 A. That's correct.

17 Q. And is it also correct that you're not  
18 currently employed by the State of Texas?

19 A. That's correct.

20 Q. And so is it -- would it be a true statement to  
21 say that it is not your role to -- to testify as to the  
22 state's interpretation of specific application of  
23 specific laws and rules?

24 A. I think my expertise lends -- lends credibility  
25 in providing testimony about --

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1 Q. That's not my question.

2 A. -- what the state does.

3 Q. That's not my question, sir. My question is is  
4 it your role --

5 MR. GREGG: Objection, Your Honor. She  
6 needs to give him an opportunity to complete his answer.  
7 I don't think it's an issue, but I think what he was  
8 stating was relevant to her question.

9 THE JUDGE: Mr. Tuckfield, were you done?

10 A. I'm here as an expert witness. I've been  
11 involved in numerous cases. I've been practicing for  
12 numerous cities, particularly the City Dripping Springs  
13 dealing with regionalization issues. I've dealt with  
14 the state many times, so in my expertise, I've talked to  
15 the state, state employees about how they implement  
16 regionalization. I've studied what they have done and  
17 so I think I can speak to what the state's policy is.

18 Q. But it's not your role to implement the policy  
19 as a state employee; is that right?

20 A. That's correct.

21 Q. Let's talk a little bit about some of the  
22 testimony that you have.

23 You discuss in your testimony and provide a  
24 copy or an excerpt of the state's regionalization policy  
25 beginning on page 4 at the bottom.

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1 A. You want me to look at it?

2 Q. If you would, that would be great.

3 THE JUDGE: Page 4 of his testimony or  
4 page 4 of one of the other exhibits?

5 MS. SELVERA: Page 4 of his testimony.

6 THE JUDGE: Got it. Thank you.

7 THE WITNESS: Yes.

8 Q. (BY MS. SELVERA) You're there. And in this  
9 testimony, you discuss or you provide an excerpt of  
10 Texas Water Code, Section 26.003; is that correct?

11 A. Correct.

12 Q. And would you mind please reading the policy as  
13 it's written on that page?

14 A. Sure. "Policy of this subchapter. It is the  
15 policy of this state and the purpose of this subchapter  
16 to maintain the quality of water in the state consistent  
17 with the public health and enjoyment, the propagation  
18 and protection of terrestrial and aquatic life, and the  
19 operation of existing industries, taking into  
20 consideration the economic development of the state; to  
21 encourage and promote the development and use of  
22 regional and areawide waste collection, treatment, and  
23 disposal systems to serve the waste disposal needs of  
24 the citizens of the state; and to require the use of all  
25 reasonable methods to implement this policy."

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1 Q. Thank you. Are you aware of any case law that  
2 discusses any interpretation of the term "all reasonable  
3 methods to implement this policy"?

4 A. I don't know of any case law that -- well, I  
5 mean, there's -- there's -- if you are talking about in  
6 district court or appellate courts, I'm not sure that  
7 any -- any judicial cases have been decided on this.

8 I know that certainly there's been numerous  
9 SOAH cases, Crystal Clear Air-W, Selinger recently. I  
10 mean, there's just a lot -- recent discussions about  
11 what -- what policy is and what this means.

12 Q. But are you aware of any specific cases,  
13 whether it be SOAH cases, decisions by the commission  
14 that specifically address reasonable, all reasonable  
15 methods to implement the policy?

16 A. I'm trying to think. I think it was addressed  
17 in -- in the Regal and Crystal Clear cases and certainly  
18 addressed in Air-W, but I can't point to the specific  
19 citations right now about that.

20 Q. Later in your testimony when discussing the  
21 Crystal Clear case and the PFD, you provide an excerpt  
22 from that case as -- as it relates to Texas Water Code  
23 Section 26.0282. I want to point you to your testimony  
24 on page 8 at the bottom.

25 A. Yes.

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1 Q. And, you know, wherein this conclusion of law  
2 indicates that it "does not require the Commission to  
3 deny a permit, even if the Commission concludes that an  
4 alternative system is available in the region." Did I  
5 read that correctly?

6 A. Correct.

7 Q. And, therefore, and so I want to make sure I  
8 understand or that that is clear for the record. This  
9 does not say that it would preclude the Commission from  
10 doing so, does it?

11 A. No. The Commission could deny it, the permit,  
12 but I think 26.0282 gives the Commission that right and  
13 authority.

14 Q. Let's move forward to page 9 of your testimony  
15 where you discuss how TCEQ, your interpretation of how  
16 TCEQ's informed -- implemented -- pardon me -- the  
17 state's regionalization policy. You indicate in -- on  
18 page 9 in that -- starting on line 16 that -- sorry,  
19 line 17 that there is no indication that this web page  
20 has been formally adopted TCEQ policy. Is that an  
21 accurate statement, sir?

22 A. That's correct.

23 Q. Are you aware if that has changed?

24 A. I don't think it's changed. I -- it's -- it  
25 appears to be what TCEQ implements as their policy, but

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1 there's been no formal rulemaking to that effect.

2 Q. You discuss application or your interpretation  
3 in the cases that TCEQ has considered with -- and with  
4 regards to regionalization in -- in your testimony in  
5 the exhibits that have been admitted into evidence, but  
6 is it also true that these cases do not discuss  
7 application or interpretation of Texas Water Code  
8 Section 13.244 C?

9 A. Chapter -- Section 13, I don't recall any  
10 discussion of 13, Chapter 13 of the Texas Water Code,  
11 but that deals with certificates of convenience and  
12 necessity, not -- well, it deals with certificates of  
13 convenience and necessity.

14 Q. And you discuss in -- so that's also referred  
15 to as a CCN; is that correct?

16 A. Yes. But I actually -- now that I think about  
17 it, I think Air-W discussed the CCNs as part of Air-W's  
18 -- part of their property was within generally the CCN.

19 Q. And is it also a fair statement to say that  
20 TCEQ's guidance document that you refer to on their  
21 website requires an analysis or an -- at least a review  
22 of whether a particular application is within a --  
23 another entity's CCN territory; is that correct?

24 A. Yeah, a wastewater CCN. It doesn't say  
25 wastewater, but it would make no sense to review whether

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1 it was in a water CCN. Those are very different.

2 Q. Is it also a correct statement then to say that  
3 it doesn't make reference to whether or not a particular  
4 facility is located within a utility district's district  
5 boundaries?

6 A. It doesn't say anything about district  
7 boundaries.

8 Q. You reference in your testimony discussion of  
9 the regionalization policy as it's laid out in  
10 Chapter 26 of the Water Code as -- as we have discussed  
11 earlier a moment ago.

12 Isn't it correct, though, that you -- there  
13 is no discussion in your testimony about application or  
14 analysis with regard to Chapter 49 of the Water Code?

15 A. Well, I don't think I discussed Chapter 49 of  
16 the Water Code. I did review your response to motion  
17 for summary disposition. That provision you cited in  
18 Chapter 49 talks about how the districts --

19 MS. SELVERA: Objection, Your Honor. This  
20 was a yes or no question.

21 THE JUDGE: Can you answer it with a yes or  
22 no response?

23 THE WITNESS: Okay. If the question is if  
24 I addressed Chapter 49 in my written testimony, the  
25 answer is no.

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1 MS. SELVERA: Thank you. No further  
2 questions.

3 THE JUDGE: Okay. Ms. Jameson?

4 MS. JAMESON: No questions from OPIC.

5 THE JUDGE: Ms. Pawelka?

6 MS. PAWELKA: No questions, Your Honor.

7 THE JUDGE: Okay. Redirect?

8 RE-DIRECT EXAMINATION

9 BY MR. GREGG:

10 Q. Mr. Tuckfield, referencing the question that  
11 counsel for protestant just asked you, why did you not  
12 address Chapter 49 in your testimony?

13 A. It's simply not relevant. The provision they  
14 cite in their response to motion for summary  
15 disposition, I think it's 49.244 or it might be 243. I  
16 can't remember, but it specifically says that the  
17 district's powers are subject to regionalization and,  
18 therefore, it -- it talks about how regionalization  
19 trumps over district powers that might be, so it's just  
20 not relevant to this case.

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



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1 regionalization requirement?

2 A. There's no doubt.

3 MR. GREGG: That's all I have.

4 THE JUDGE: Okay.

5 MS. SELVERA: No other questions.

6 THE JUDGE: Ms. Pawelka?

7 MS. PAWELKA: No questions.

8 THE JUDGE: Ms. Jameson?

9 MS. JAMESON: No questions.

10 THE JUDGE: Okay. You may step down.  
11 Okay. Anything else from the applicant?

12 MR. GREGG: No, Your Honor.

13 THE JUDGE: Okay. And with that, let me  
14 just take a moment to see what we went over with the  
15 exhibits. Let me just do that on the record.

16 The exhibits that have been admitted in  
17 this case, we will start in order of the -- how the  
18 parties presented the evidence. For the district, we  
19 have JSUD-1, EB-1, JSUD-2 and then MW-1. For the ED, we  
20 have ED-BL-1 through 4 and ED-SB-1, ED-SB-2. No  
21 exhibits from OPIC. For applicant, we have Exhibits 1  
22 through 9 admitted today and Exhibits A and B admitted  
23 at the prelim on April 24th, 2023.

24 Okay. Great. So we have that covered.  
25 Let's go off the record for a moment.

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1 (A short recess was taken.)

2 THE JUDGE: Okay. I think we are done  
3 then. Great. Thank you.

4 \* \* \*

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SOAH HEARING  
August 16, 2023

REPORTER'S CERTIFICATION

I, Cherie' E. White, Certified Shorthand Reporter  
in and for the State of Texas, hereby certify to the  
following:

That the this hearing and the transcript of the  
oral hearing is a true record of the testimony given at  
the hearing;

That pursuant to information given to the  
deposition officer at the time said testimony was taken,  
the following includes counsel for all parties of  
record:

Mr. Peter Gregg - Attorney for Applicant  
Ms. Erin Selvera - Attorney for Protestant  
Ms. Aubrey Pawelka - Attorney for Executive  
Director  
Mr. Sheldon Wayne - Attorney for OPIC

That a copy of this certificate was served on all  
parties shown herein on November 16, 2023 and filed with  
the Clerk.

I further certify that I am neither counsel for,  
related to, nor employed by any of the parties or  
attorneys in the action in which this proceeding was  
taken, and further that I am not financially or  
otherwise interested in the outcome of this action.

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1 Further certification requirements pursuant to Rule  
2 203 of the Texas Code of Civil Procedure will be  
3 complied with after they have occurred.

4 Certified to be me this 8th day of September 2023.

5  
6 *Cherie E. White*

7 CHERIE' E. WHITE, Texas CSR 10720

8 Expiration Date: 7/24/2024

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

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

**DIRECT TESTIMONY AND ATTACHMENTS**

**OF**

**DAVID TUCKFIELD, ESQ.**

**ON BEHALF OF**

**R040062, LP**

**JULY 7, 2023**

**APPLICANT'S EXHIBIT 01**



**DIRECT TESTIMONY AND ATTACHMENTS OF DAVID TUCKFIELD, ESQ.  
ON BEHALF OF R040062, LP**

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**DIRECT TESTIMONY OF DAVID TUCKFIELD, ESQ.  
ON BEHALF OF AIRW 2017-7, LP**

**I. INTRODUCTION**

**Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS FOR THE RECORD.**

**A.** My name is David J. Tuckfield, and my business address (for mailing) is 12400 West Highway 71, Suite 350-150, Bee Cave, Texas 78738.

**Q. WHAT SUBJECTS WERE YOU ASKED TO EVALUATE FOR THIS PROCEEDING?**

**A.** I was asked to review and comment upon the issues of regionalization and need for the Indigo Water Resource Recovery Facility. For purposes of this testimony, I am going to refer to the property or the development that that will be served by the Draft Permit in this case as the “Indigo Development.”

**II. QUALIFICATIONS**

**Q. DESCRIBE YOUR EDUCATIONAL BACKGROUND?**

**A.** I earned a Bachelor of Arts degree in International Relations from Brigham Young University in 1985 (*cum laude*). I graduated from the J. Reuben Clark Law School (Brigham Young University), J.D. *magna cum laude*, 1989 (Order of the Coif; lead articles editor, Brigham Young University Law Review; Board of Editors, International and Comparative Law Annual).

**Q. WHAT PROFESSIONAL LICENCES DO YOU HAVE?**

**A.** I have been admitted to the following Bar Associations: District of Columbia, 1989; the State of Texas, 1996; Southern District of Texas, 2018; United States Supreme Court, 2016; The US Fifth Circuit Court of Appeals, 2021.

**Q. IS APP EX. 2 A TRUE AND CORRECT COPY OF YOUR RESUME?**

**A.** Yes.



1  
2 **Q. IS THE INFORMATION IN YOUR RÉSUMÉ AT APP EX 2 AN ACCURATE**  
3 **REFLECTION OF YOUR EDUCATION, PROFESSIONAL HISTORY, AND**  
4 **QUALIFICATIONS?**

5 **A.** Yes.  
6

7 **Q. CAN YOU DESCRIBE YOUR EXPERIENCE AS IT RELATES TO**  
8 **REGIONALIZATION?**

9 **A.** My resume can be found at **APP. EX. 2.**  
10

11 I am the Owner and sole shareholder of the Law Offices of David J. Tuckfield, PC. I am  
12 also a Partner with the AL Law Group, PLLC. I have been an attorney practicing in  
13 environmental law since 1989. I started my career at Vinson & Elkins, LLP in 1989 straight  
14 out of law school. I began practicing in Washington DC but moved to Texas in 1992 and  
15 have been practicing here ever since that time.  
16

17 In 2000 I was made a partner at Vinson & Elkins. In 2006, I left Vinson and Elkins to start  
18 my own law firm. In 2009 I joined the AL Law Group, PLLC to practice with other  
19 attorneys that had left large firms. I am now a Partner at the AL Law Group, PLLC.  
20

21 For the last 33 years, I have practiced in all areas of environmental law. I have represented  
22 developers, municipalities, other governmental entities, and even protestants in  
23 environmental permitting cases.  
24

25 Over the last decade my practice has been primarily focused on wastewater issues and  
26 wastewater permitting (through TCEQ). I have represented the City of Dripping Springs  
27 since 2010 as special counsel for water and wastewater. In that capacity I have worked  
28 with the City through a time of significant growth. I represent the City of Dripping Springs  
29 in negotiating wastewater agreements with developers and municipal utility districts who  
30 either seek to build their own plant or who seek to connect with the City's system. Over

1 the last thirteen years there have been many such agreements (and negotiations for such  
2 agreements). The City of Dripping Springs is committed to Regionalization and my  
3 negotiations always implicate regionalization issues. At some point in every negotiation  
4 there is a question about when and how the City can be the regional provider, or when it  
5 makes more sense to at least temporarily allow a wastewater plant for a particular  
6 development.

7  
8 I have also represented and continue to represent the City of Dripping Springs in its efforts  
9 to obtain a TPDES permit for its South Regional Plant. When this case was referred to  
10 SOAH for a contested case hearing, one of the issues referred (issue “J”) was “Whether the  
11 Commission should deny or alter the terms and conditions of the draft permit based on  
12 consideration of need under Texas Water Code (TWC) § 26.0282, and the general policy  
13 to promote regional or area-wide systems under TWC § 26.081.”

14  
15 I have represented other municipalities and governmental entities on water and wastewater  
16 issues, including the City of Fairfield, the City of Clyde, the City of Bastrop, the City of  
17 Killeen, and Bell County Water Control and Improvement District No. 1.

18  
19 As shown on my resume, I have also represented developers in seeking wastewater permits.  
20 Every permit submitted to TCEQ, of course, implicates regionalization.

21  
22 In sum, I have spent 33 years practicing environmental law. For the last 13 years I have  
23 been heavily involved with wastewater contract negotiations and permitting, which has  
24 required me to understand and implement the State’s Regionalization Policy.

25  
26 **Q. WHAT HAVE YOU REVIEWED TO PREPARE YOUR TESTIMONY AND**  
27 **RENDER YOUR OPINIONS?**

28 **A.** I based my opinions on my knowledge and experience, including my 33 years of experience  
29 working in environmental law, the last 13 of which have been substantially devoted to  
30 obtaining wastewater permits from TCEQ and negotiating wastewater contracts on behalf

1 of Texas municipalities and developers. More specifically for this case, I have reviewed  
2 the materials admitted as part of the administrative record in this case, including the  
3 Application at **Tab D of the Administrative Record** and the Draft Permit at **Tab C of the**  
4 **Administrative Record**, and the Executive Director's Response to Comments at **Tab A**  
5 **of the Administrative Record**. I have also reviewed the TCEQ Commissioners'  
6 Integrated Database and documents found therein for the following: AIRW 2017-7 Permit  
7 No. WQ0015878001, Limmer Loop JV, LLC WQ0016260001, and New Horizons Utility  
8 LLC WQ0016257001. I have also reviewed the documents referenced in my testimony,  
9 the prefiled testimony of the witnesses presented by Jonah Water Special Utility District  
10 ("Jonah"). I have also reviewed the administrative records and testimonies in other  
11 contested cases that are referred to in my testimony that relate to the issue of  
12 regionalization.

### 13 14 **III. SUBSTANTIVE ISSUES**

15 **Q. DESCRIBE YOUR UNDERSTANDING OF THE "STATE'S REGIONALIZATION**  
16 **POLICY" AS IT MIGHT APPLY TO THIS CASE.**

17 **A.** Texas Water Code § 26.003 is the earliest expression of the State's Regionalization Policy  
18 that would apply to this case. It, along with several other policy directives, was adopted in  
19 1977 by the 65th Legislature. Section 26.003 provides as follows:

20  
21 POLICY OF THIS SUBCHAPTER. It is the policy of this state and the  
22 purpose of this subchapter to maintain the quality of water in the state  
23 consistent with the public health and enjoyment, the propagation and  
24 protection of terrestrial and aquatic life, and the operation of existing  
25 industries, taking into consideration the economic development of the state;  
26 to encourage and promote the development and use of regional and  
27 areawide waste collection, treatment, and disposal systems to serve the  
28 waste disposal needs of the citizens of the state; and to require the use of all  
29 reasonable methods to implement this policy.

1 This language was largely repeated by rule at 30 Tex. Admin. Code (“TAC”) § 307.1. Section  
2 26.003 is not exclusively a regionalization statute. There are numerous other policies expressed,  
3 such as the policy to “maintain the quality of water in the state consistent with the public health  
4 and enjoyment.”

5  
6 In 1989, twelve years after the Legislature enacted Section 26.003, the 71<sup>st</sup> Legislature followed-  
7 up enacting by Texas Water Code § 26.0282, which provides as follows:

8  
9 “CONSIDERATION OF NEED AND REGIONAL TREATMENT  
10 OPTIONS. In considering the issuance, amendment, or renewal of a permit  
11 to discharge waste, the commission may deny or alter the terms and  
12 conditions of the proposed permit, amendment, or renewal based on  
13 consideration of need, including the expected volume and quality of the  
14 influent and the availability of existing or proposed areawide or regional  
15 waste collection, treatment, and disposal systems not designated as such by  
16 commission order pursuant to provisions of this subchapter. This section is  
17 expressly directed to the control and treatment of conventional pollutants  
18 normally found in domestic wastewater.”

19  
20 **Q. DOES TEXAS WATER CODE § 26.081 APPLY TO THIS CASE?**

21 **A.** No. Texas Water Code § 26.081 (also adopted in 1977 by the 65th Legislature) is part of  
22 the State’s Regionalization Policy, but it does not apply to this case. Tex. Water Code §  
23 26.081 authorized the Commission to designate area-wide waste collections systems. To  
24 carry-out the provisions of Tex. Water Code §§ 26.003 and 26.081 the predecessor of the  
25 TCEQ designated eight regional areas and entities in 30 TAC Chapter 351. Service in  
26 those regional areas must be provided by the designated regional entity.

27  
28 Texas Water Code § 26.081 does not apply in this case because the facility proposed to be  
29 built in this case does not serve any regional area designated by the Commission in Chapter  
30 351 and there is no regional provider designated for the area where the Indigo Development

1 is located. Jonah has not been designated a regional provider under 30 TAC Chapter 351.  
2 I have confirmed this fact by reviewing the regional providers that have been identified in  
3 30 TAC Chapter 351. “Absent a designated regional provider, the State’s regionalization  
4 policy encourages, but does not compel, connection to a facility.”<sup>1</sup>  
5

6 **Q. IS REGIONALIZATION IMPORTANT?**

7 **A.** Yes. The Legislature has made it clear that regionalization should be encouraged and  
8 promoted. Reasonable methods to implement this policy are required. There are good  
9 reasons to encourage regionalization. Regionalization, however, should not be used as a  
10 tool for a utility to hold developers or applicants hostage – requiring the developer or  
11 applicant to connect at any cost, await the day when the utility actually has facilities as  
12 opposed to mere aspirations, and be subjected to additional non-wastewater requirements.  
13 In fact, the Commission recently adopted a Proposal for Decision (“PFD”) where the  
14 Administrative Law Judge (“ALJ”) made clear that “. . .[t]he purpose of regionalization  
15 review is to encourage Applicants to explore and give serious consideration to connection  
16 to such utilities – not to provide neighboring utilities leverage and means to require such  
17 connection.” *Crystal Clear Special Utility District and MCLB Land, LLC*, SOAH Docket  
18 No. 582-20-4141; TCEQ Docket No.2020-0411-MWD, 2021 TX SOAH LEXIS 26, \*49  
19 (Tex. St. Off. of Admin. Hearings March 22, 2021) (**APP EX. 03**) (this case is hereinafter  
20 referred to as “*Crystal Clear*”).  
21

22 **Q. HAS THE TCEQ ADOPTED ANY RULES TO IMPLEMENT THE STATE’S**  
23 **POLICY ON REGIONALIZATION?**

24 **A.** No.  
25

---

<sup>1</sup> *Crystal Clear Special Utility District and MCLB Land, LLC*, SOAH Docket No. 582-20-4141; TCEQ Docket No.2020-0411-MWD, 2021 TX SOAH LEXIS 26, \*68 (Tex. St. Off. of Admin. Hearings March 22, 2021) (Finding of Fact 48). *See also Id.* at \*67 (Finding of Fact 41 noted that “[n]o regional provider has been designated for the area where the Subdivision is located); An *Order Granting The Application By DMS Real Tree, LLC For TPDES Permit No. WQ0015293001*; TCEQ DOCKET NO. 2015-1264-MWD; SOAH DOCKET NO. 582-16-1442, 2017 TX Commn on Env’tl Quality LEXIS 232, \*16-17 (Conclusion of Law 7 stating that “[t]he City is not one of the listed authorized regional entities under 30 Texas Administrative Code Chapter 351.”).

1 **Q. HAS THE TCEQ ISSUED ANY GUIDANCE DOCUMENTS TO IMPLEMENT**  
2 **THE STATE’S POLICY ON REGIONALIZATION?**

3 **A.** As a result of the *Crystal Clear* case I mentioned above (where the permit for a stand-alone  
4 water resource recovery facility (“WRRF”) located in a city’s extraterritorial jurisdiction  
5 (“ETJ”) was issued over the objection of the nearby city), Chairman Nierman tasked the  
6 Executive Director’s staff to meet with him and develop new guidance on the State’s  
7 regionalization and need policy. This resulted in TCEQ posting a page on its website  
8 entitled “TCEQ Regionalization Policy for Wastewater Treatment” (hereafter referred to  
9 as “TCEQ Regionalization Web Page”) (attached as **APP EX. 04**). TCEQ’s  
10 Regionalization Web Page appeared online for the first time on July 30, 2021. It is  
11 informative, but this is not a formal articulation of Commission policy set forth in  
12 rulemaking, consistent with the Administrative Procedure Act affording notice and  
13 opportunity for comment. That is, the web page is not a rule and not legally enforceable,  
14 but it does show what the Executive Director looks at when considering the issues of  
15 regionalization and need.

16  
17 I will note that the application in this case was submitted in June 2021, prior to the  
18 appearance of TCEQ’s Regionalization Web Page. *See Tab D of the Administrative*  
19 **Record.**

20  
21 **Q. WHERE SHOULD ONE LOOK TO DETERMINE HOW TCEQ INTERPRETS**  
22 **AND APPLIES THE STATE’S POLICY ON REGIONALIZATION?**

23 **A.** TCEQ’s Regionalization Web Page is probably the best source. **APP EX. 04.** Also, in  
24 addition to the *Crystal Clear* case I cited above, there have been other recent SOAH cases  
25 involving regionalization. To fully understand how TCEQ implements the policy, it would  
26 be important to look at recent PFDs and Commission-issued Orders that discuss  
27 regionalization.

28  
29 **Q. WHAT CAN BE GLEANED FROM RECENT PFDS AND COMMISSION-ISSUED**  
30 **ORDERS?**

1     **A.**     *Crystal Clear Special Utility District and MCLB Land, LLC*, SOAH Docket No. 582-20-  
2             4141; TCEQ Docket No.2020-0411-MWD, 2021 TX SOAH LEXIS 26 (Tex. St. Off. of  
3             Admin. Hearings March 22, 2021) (Hereafter *Crystal Clear*”) (**APP EX. 03**) is very  
4             instructive. In that case, the following statements were made by the ALJ in his PFD  
5             (which the Commission accepted):

6  
7             “Section 26.0282 gives the TCEQ broad and permissive discretion in  
8             implementing the State’s regionalization policy.”<sup>2</sup>

9  
10            “The ALJ gives deference to the ED's interpretation that, with respect to  
11            utilities within three miles of the proposed facility, the purpose of the  
12            regionalization review is to encourage Applicants to explore and give  
13            serious consideration to connection to such utilities--not to provide  
14            neighboring utilities leverage and means to require such connection.”<sup>3</sup>

15  
16            TCEQ “may exercise discretion to encourage and promote regionalization  
17            based on the evidence presented on a case-by-case basis.”<sup>4</sup>

18  
19            As a result of the *Crystal Clear* PFD, the Commission made the following  
20            Conclusion of Law:

21  
22            13. Texas Water Code § 26.0282 does not require the Commission to reach  
23            specific conclusions before issuing a permit. Nor does it require the  
24            Commission to deny a permit even if the Commission concludes that an  
25            alternative system is available in the region. Instead, section 26.0282 gives  
26            the Commission several options that it may exercise in a permit case to  
27            encourage and promote regionalization based on the evidence presented

---

<sup>2</sup> *Crystal Clear*, 2021 TX SOAH LEXIS 26 at \*47 (**APP EX. 03**).

<sup>3</sup> *Id.* at \*48-49 (**APP EX. 03**).

<sup>4</sup> *Id.* at \*50 (**APP EX. 03**).

1 concerning the need for the permit and other systems, existing and  
2 proposed, in the geographical area.<sup>5</sup>  
3

4 These statements provide guidance on how the State Regionalization Policy should be  
5 applied.  
6

7 **Q. HOW HAS TCEQ IMPLEMENTED THE STATE'S REGIONALIZATION**  
8 **POLICY?**

9 **A.** It has taken two different and complementary approaches. First, as I mentioned, Chapter  
10 351 of its rules designates specific regional areas and, in some cases, requires that any  
11 applicant for a wastewater permit be in the name of the designated regional entity. This is  
12 the only policy implemented by rule that could apply in a wastewater permitting case.  
13 Because there is not a designated Regional provider for the area in which this Draft Permit  
14 has been issued, these Chapter 351 requirements do not apply to this case.  
15

16 The second approach I mentioned is the TCEQ's Regionalization Web Page. Again, while  
17 it is entitled "policy," there is no indication that this Web Page has been formally adopted  
18 TCEQ "policy," there has been no formal rulemaking nor formal adoption of the document  
19 as a "policy." It is, however, the most recent and instructive material TCEQ has issued  
20 with regard to any policy it might have regarding regionalization of wastewater permitting.  
21 Regardless of its status, deference should be given to the ED's interpretation of TCEQ's  
22 Regionalization Web Page and how TCEQ interprets the State's Regionalization Policy.<sup>6</sup>  
23

24 The TCEQ's Regionalization Web Page points out that "TCEQ requires that an applicant  
25 include justification of permit need in all wastewater permit applications for new facilities

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<sup>5</sup> *Crystal Clear*, 2021 TX SOAH LEXIS 26 at \*72 (**APP EX. 03**) (Conclusion of Law 13). This statement was repeated in Conclusion of Law 17 in *Application by Regal, LLC for issuance of New TPDES Permit No. WQ0015817001*, SOAH Docket No. 582-21-0576; TCEQ Docket No. 2020-0973-MWD, 2021 TX SOAH LEXIS 154 (Tex. St. Off. of Admin. Hearings August 4, 2021).

<sup>6</sup> *Crystal Clear*, 2021 TX SOAH LEXIS 26 at \*48 (**APP EX. 03**) ("The ALJ gives deference to the ED's interpretation . . .").



1 and all applications to amend an existing permit.” **APP EX. 04.** It then cites Section 1.1  
2 of the Domestic Technical Report for wastewater permit applications. The web page does  
3 not say that the application form or its instructions constitute TCEQ “policy,” but because  
4 the web page mentions the questions asked on the application (at Domestic Technical  
5 Report 1.1), such questions are instructive. The primary question to be addressed is  
6 whether “there are any domestic permitted wastewater treatment facilities or collection  
7 systems located within a three-mile radius of the proposed Facility.” **APP EX. 04 (page**  
8 **2).** If so, then the Applicant is to contact the “existing” facility and determine whether that  
9 facility has the capacity or is willing to accept the wastewater from the proposed  
10 development. **APP EX. 04 (page 3).** If the “existing” facility can and will accept the  
11 additional wastewater for treatment, the applicant still need not connect to that facility if  
12 an analysis of expenditures required to connect to the existing facility or collection system  
13 versus the cost of constructing and operating the proposed new facility or expansion.

14  
15 Deference should be given to the Executive Director in interpreting the response to these  
16 questions.<sup>7</sup>

17  
18 Other questions asked in the Domestic Technical Report 1.1 are: (1) “Is any portion of the  
19 proposed service area located in an incorporated city?”; and (2) “Is any portion of the  
20 proposed service area located inside another utility’s CCN area?”<sup>8</sup> **Tab D of the**  
21 **Administrative Record** (bates 046-047). In this case, both questions were appropriately  
22 answered in the negative. *Id.* Any analysis regarding those two questions, therefore, is  
23 irrelevant.

24  
25 Taken together, the questions posited on the TCEQ Web Page and Domestic Technical  
26 Report 1.1 demonstrates that TCEQ encourages and promotes regionalization by asking  
27 certain questions seeking information about the location of the proposed facility and any

---

<sup>7</sup> *Id.*

<sup>8</sup> It is clear that the question is about a wastewater CCN, not a water CCN. The questions are aimed at determine whether there are regional wastewater facilities to which the development should connect, not regional water facilities.

1 facilities or systems to which connection would be reasonable. TCEQ seeks some  
2 justification for why the Indigo Development doesn't connect to an existing facility or  
3 system.  
4

5 **Q. ARE THERE SPECIFIC REQUIREMENTS THAT APPLY TO ENSURE**  
6 **COMPLIANCE WITH THE STATE'S REGIONALIZATION POLICY?**

7 **A.** No. In fact, unless the facility is an area designated by Chapter 351 as a regional area, the  
8 policy by its very terms is permissive not mandatory (by using the term "may deny" instead  
9 of "must deny" in the statutory language). As Judge Ross Henderson decided in his  
10 proposal for decision in *Crystal Clear* "Section 26.0282 gives the TCEQ broad and  
11 permissive discretion in implementing the State's regionalization policy."<sup>9</sup> TCEQ's  
12 Regionalization Web Page states that "[t]he presence of a wastewater treatment facility or  
13 wastewater collection system within three miles of a proposed new wastewater treatment  
14 facility or the expansion of an existing facility is not an automatic basis to deny an  
15 application or to compel an applicant to connect to an existing facility." **APP EX. 04** (page  
16 1) (emphasis in original).  
17

18 **Q. WHEN SHOULD APPLICATIONS FOR DISCHARGES OF WASTEWATER BE**  
19 **APPROVED ON THE BASIS OF REGIONALIZATION?**

20 **A.** According to TCEQ's Regionalization Web Page the proposed permit should be granted  
21 in any one of the following four situations:  
22

23 "[1)] There is no wastewater treatment facility or collection system within  
24 three miles of the proposed facility.

25  
26 [(2)] The applicant requested service from wastewater treatment facilities  
27 within the 3 miles, and the request was denied.  
28

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<sup>9</sup> *Crystal Clear*, 2021 TX SOAH LEXIS 26 at \*47 (**APP EX. 03**).

1           [(3)] The applicant can successfully demonstrate that an exception to  
2           regionalization should be granted based on costs, affordable rates, and/or  
3           other relevant factors.

4  
5           [(4)] The applicant has obtained a Certificate of Convenience and Necessity  
6           (CCN) for the service area of the proposed new facility or the proposed  
7           expansion of the existing facility.”

8  
9           **APP EX. 04** (page 2). Throughout the remainder of my testimony, I shall refer to these  
10          four situations as “Approval Basis 1, 2, 3, or 4.” Because “any” of the Approval Bases  
11          justifies the granting of the Permit, just one of the Approval Bases must be satisfied for the  
12          permit to issue.

13  
14       **Q.     DO ANY OF THESE APPROVAL BASES APPLY IN THIS CASE?**

15       **A.**    Yes. Approval Bases 1, 2, and 3 all apply in this case and any one of them demonstrates  
16          that the Draft Permit is consistent with the State’s Regionalization Policy. In this case,  
17          Applicant satisfies not only one of the Approval Bases, but three (any one of which would  
18          have been sufficient). Approval Basis 4, (that the applicant has obtained a CCN) does not  
19          apply. Therefore, based on TCEQ’s Regionalization Web Page, there are three  
20          independent grounds upon which the application should be granted.

21  
22       **Q.     BASED ON THE TCEQ WEB PAGE WHAT FACILTIES WARRANT ANY**  
23          **ANALYSIS FOR PURPOSES OF EVALUATING REGIONALIZATION FOR THE**  
24          **INDIGO WRRF?**

25       **A.**    The City of Georgetown. Georgetown has a WRRF (called the “Dove Springs” facility)  
26          within 3 miles of the Indigo WRRF. **Tab D of the Administrative Record** (bates 086).

27  
28       **Q.     BESIDES THE DOVE SPRINGS WRRF, ARE THERE ANY OTHER FACILITIES**  
29          **THAT SHOULD BE ANALYZED BASED ON THE TCEQ WEB PAGE?**

1 A. No. The question to be addressed is whether there is a wastewater treatment facility or  
2 collection system within three miles of the proposed facility. As can be seen in the  
3 Administrative record, the only such facility that existed when the application was  
4 submitted is the Dove Springs Facility. **Tab D of the Administrative Record** (bates 086).

5  
6 **Q. HAVE YOU REVIEWED THE PREFILED TESTIMONY OF WILLIAM BROWN**  
7 **IN THIS CASE (EX JWSUD-1)?**

8 A. Yes.

9  
10 **Q. HAVE YOU REVIEWED THE PREFILED TESTIMONY OF MILES WHITNEY**  
11 **IN THIS CASE (EX JWSUD-2)?**

12 A. Yes.

13  
14 **Q. DO MESSERS. BROWN OR WHITNEY IDENTIFY FACILTIES OR ENTITIES**  
15 **TO WHICH THE INDIGO DEVELOPMENT SHOULD CONNECT?**

16 A. Yes. Neither make mention of the only relevant facility (the Dove Springs facility), but  
17 both Messrs. Brown and Whitney suggest (without identifying a specific facility) that  
18 Applicant should connect to Jonah, and Mr. Whitney suggests that the following permits  
19 are somehow relevant to a Regionalization inquiry: AIRW-2017-7 Permit No.  
20 WQ0015878001, Limmer Loop JV, LLC Permit No. WQ0016260001, and New Horizons  
21 Utility LLC Permit No. WQ0016257001.

22  
23 **Q. HOW SHOULD THE QUESTION OF WHETHER THE INDIGO**  
24 **DEVELOPMENT SHOULD CONNECT TO JONAH BE EVALUATED?**

25 A. The TCEQ Web Page is clear. The question is whether Jonah has a facility or a system  
26 within 3 miles of the proposed facility. **APP EX. 04** (page 2). If it does, then Applicant  
27 should have made an inquiry. **APP EX. 04** (page 2). There is no evidence that Jonah has  
28 a facility or system within three miles of the proposed facility. Neither Messrs. Brown or  
29 Whitney identifies a facility owned or operated by Jonah that that qualifies for further  
30 inquiry or analysis. Absent such a facility, Approval Basis 1 dictates that “the proposed

1 permit should be granted” because “[t]here is no [Jonah] wastewater treatment facility or  
2 collection system within three miles of the proposed facility.” **APP EX. 04** (page 2). With  
3 respect to Jonah, therefore, Approval Basis 1 dictates that the draft permit be issued.  
4

5 **Q. WITH RESPECT TO JONAH, IS ADDITIONAL ANALYSIS NEEDED?**

6 **A.** No. There is no Jonah wastewater treatment facility or collection system within three miles  
7 of the proposed facility, so pursuant to Approval Basis 1 the analysis is complete.  
8

9 **Q. HOW DOES APPLICANT SATISFY THE REGIONALIZATION INQUIRY WITH**  
10 **REGARD TO AIRW-2017-7 Permit No. WQ0015878001?**

11 **A.** AIRW-2017-7 (Permit No. WQ0015878001) (hereafter “AIR-W”) is not an existing  
12 facility. The TCEQ Web Page does not require an evaluation of permits, but an analysis  
13 regarding a wastewater treatment facility or wastewater collection system that is  
14 “presen[t].” **APP EX. 04** (page 1). Moreover, Approval Basis 1 doesn’t address the  
15 existence of a permit, but requires the proposed permit be granted when “[t]here is no  
16 wastewater treatment facility or collection system within three miles of the proposed  
17 facility.” **APP EX. 04** (page 2). Throughout the document, TCEQ uses the term “existing  
18 facility” **APP EX. 04** (pages 1, 2, and 3).<sup>10</sup> It makes sense that for regionalization purposes  
19 an applicant need only evaluate existing facilities rather than permits because just because  
20 a permit exists doesn’t mean that a facility for that permit will ever be built. Moreover, if  
21 an applicant has to revisit regionalization every time a permit is applied for or is issued,  
22 the applicant would be constantly having to stop and reevaluate regionalization –

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<sup>10</sup> “The presence of a wastewater treatment facility or wastewater collection system within three miles of a proposed new wastewater treatment facility or the expansion of an existing facility is not an automatic basis to deny an application or to compel an applicant to connect to an existing facility.” **APP EX. 04** (page 1) (emphasis added). “The applicant has obtained a Certificate of Convenience and Necessity (CCN) for the service area of the proposed new facility or the proposed expansion of the existing facility.” **APP EX. 04** (page 2) (emphasis added). “[T]he agency supports new applicants and existing facilities productively working together . . . .” **APP EX. 04** (page 2) (emphasis added). “[L]ack of thorough communication with existing facilities within a three-mile radius.” **APP EX. 04** (page 2) (emphasis added). “If an existing facility does have the capacity to accept the proposed wastewater, submit an analysis of expenditures required to connect to the existing facility or collection system versus the cost of constructing and operating the proposed new facility or expansion.” **APP EX. 04** (page 3) (emphasis added). Provide copies of all correspondence with the owners and/or operators of any existing permitted domestic wastewater treatment facilities and collection systems within a three-mile radius of the proposed facility.” **APP EX. 04** (page 3) (emphasis added).

1 potentially causing the administrative process to grind to a halt in fast growing areas. The  
2 TCEQ Web Page makes clear that the inquiry is regarding existing facilities and not  
3 permits.  
4

5 The AIR-W permit is not an existing facility. That permit was issued on November 28,  
6 2022. **APP EX. 06.** Despite its issuance, the AIR-W facility has not yet been built. The  
7 issuance of the permit has been appealed, and it is the subject of district court litigation  
8 (Travis County District Court Docket No. D-1-GN-23-001004) (filed on February 21,  
9 2023). I know these facts about the AIR-W permit because I testified as an expert witness  
10 in that case so I have personal knowledge of the AIR-W permit, and I continue to follow  
11 the progress of the AIR-W project.  
12

13 As there is no existing AIR-W facility, Approval Basis 1 dictates that the Indigo permit be  
14 granted because “[t]here is no [AIR-W] wastewater treatment facility or collection system  
15 within three miles of the proposed facility.” **APP EX. 04** (page 2).  
16

17 Even if only the existence of a permit (as opposed to a facility) is relevant (a contention  
18 with which I could not more strongly disagree), at the time the Indigo WRRF application  
19 was submitted (June 2021), the AIR-W Permit had not yet been issued (it was issued on  
20 November 28, 2022). Therefore, when submitting the application, there would have been  
21 no reason to evaluate the AIR-W permit. Approval Basis 1 once again dictates that that  
22 the Indigo permit be granted because “[t]here is no [AIR-W] wastewater treatment facility  
23 or collection system within three miles of the proposed facility.” **APP EX. 04** (page 2).  
24

25 Therefore, with respect to the AIR-W permit, Approval Basis 1 dictates that this permit  
26 should be issued under the State’s Regionalization Policy.  
27

28 **Q. HOW DOES APLICANT SATISFY THE REGIONALIZATION INQUIRY WITH**  
29 **REGARD TO LIMMER LOOP JV, LLC (PERMIT NO. WQ0016260001)?**  
30

1 A. According to Mr. Whitney's testimony, the Limmer Loop JV, LLC Permit (Permit No.  
2 WQ0016260001) (hereafter "Limmer Loop") is 3.37 miles away from the subject  
3 application. **EX. JWSUD-2 at page 6.** Because it is more than 3 miles away, Limmer  
4 Loop is irrelevant.

5  
6 Approval Basis 1 dictates that "the proposed permit should be granted" because "[t]here is  
7 no [Limmer Loop] wastewater treatment facility or collection system within three miles of  
8 the proposed facility." **APP EX. 04 (page 2).**

9  
10 Moreover, there is no Limmer Loop permit. Although a draft permit has been issued, the  
11 Notice of Application and Preliminary Decision was issued by TCEQ on May 5, 2023.  
12 **APP EX. 07.** I reviewed the TCEQ Commissioner's Integrated Database, there have been  
13 more than 700 comments submitted and numerous hearing requests. Before the permit is  
14 actually issued, it will likely be subjected to the contested case process at the State Office  
15 of Administrative Hearings.

16  
17 Even if only the existence of a permit application (as opposed to a facility) is relevant (a  
18 contention with which I could not more strongly disagree), at the time the Indigo WRRF  
19 application was submitted (June 2021), the Limmer Loop application had not yet been  
20 submitted. TCEQ received the Limmer Loop application on November 29, 2022. **APP**  
21 **EX. 07.** Therefore, when submitting the Indigo application, there would have been no  
22 reason to evaluate the Limmer Loop application. Approval Basis 1 once again dictates that  
23 that the Indigo permit be granted because "[t]here is no [Limmer Loop] wastewater  
24 treatment facility or collection system within three miles of the proposed facility." **APP**  
25 **EX. 04 (page 2).**

26  
27 Therefore, with respect to the Limmer Loop application, Approval Basis 1 dictates that this  
28 permit should be issued under the State's Regionalization Policy.  
29

1 **Q. HOW DOES APPLICANT SATISFY THE REGIONALIZATION INQUIRY WITH**  
2 **REGARD TO NEW HORIZONS UTILITY LLC (PERMIT NO. WQ0016257001)?**

3 **A.** The New Horizons Utility LLC (Permit No. WQ0016257001) (hereafter “New Horizons”)  
4 is not an existing facility. More importantly, like Limmer Loop, a permit does not even  
5 exist for the New Horizons facility.  
6

7 A draft permit has not even been issued for the New Horizons facility. The Notice of  
8 Receipt of Application and Intent to Obtain a Water Quality Permit was issued by TCEQ  
9 on February 14, 2023. **APP EX. 08.** I reviewed the TCEQ Commissioner’s Integrated  
10 Database and confirmed these facts. Before the permit is actually issued, a draft permit  
11 must be issued, additional notice must be given, and there will be an opportunity for a  
12 contested case hearing at the State Office of Administrative Hearings.  
13

14 Even if only the existence of a permit application (as opposed to a facility) is relevant (a  
15 contention with which I could not more strongly disagree), at the time the Indigo WRRF  
16 application was submitted (June 2021), the New Horizons application had not yet been  
17 submitted. TCEQ received the New Horizons application on November 22, 2022.  
18 Therefore, when submitting the Indigo application, there would have been no reason to  
19 evaluate the New Horizons application. Approval Basis 1 once again dictates that that the  
20 Indigo permit be granted because “[t]here is no [New Horizons] wastewater treatment  
21 facility or collection system within three miles of the proposed facility.” **APP EX. 04**  
22 (page 2).  
23

24 Therefore, with respect to the New Horizons application, Approval Basis 1 dictates that  
25 this permit should be issued under the State’s Regionalization Policy.  
26

27 **Q. HOW DOES APPLICANT SATISFY THE REGIONALIZATION INQUIRY WITH**  
28 **REGARD TO GEORGETOWN’S DOVE SPRINGS PLANT.**

29 **A.** The Georgetown Dove Springs facility is an existing facility within three miles of the  
30 proposed facility. Therefore, Approval Basis 1 does not apply.



1  
2 The Applicant appropriately reported in its application that there was a City of Georgetown  
3 facility within 3 miles of the proposed facility. **Tab D of the Administrative Record**  
4 **(bates 047 and 086-087)**. Consistent with the TCEQ Web Page, Applicant inquired of  
5 Georgetown whether it had the capacity and willingness to serve. **Tab D of the**  
6 **Administrative Record (bates 088-099)**. Georgetown responded that it would provide  
7 service for the proposed subdivision but the development must comply with various City  
8 requirements. **Tab D of the Administrative Record (bates 087-089)**. An argument could  
9 be made that because Georgetown conditioned service on additional non-wastewater  
10 requirements, that it effectively “denied” service. Notwithstanding, because Approval  
11 Basis 3 (which I will discuss shortly), has been satisfied, we need not analyze that  
12 argument. Therefore, for purposes of streamlining this analysis, we can assume that  
13 Approval Basis 2 does not apply.  
14

15 Having made appropriate inquiry, the Applicant undertook a cost analysis to determine the  
16 cost of connecting to the Dove Springs facility. This thorough cost analysis is in the record  
17 at **Tab D of the Administrative Record (bates 100-102)**. According to the cost-analysis,  
18 “it is clear that the cost of developing wastewater service in the immediate future is  
19 substantially less if a new treatment plant is built at the site proposed in the permit  
20 application as opposed to connecting to the City’s system.” **Tab D of the Administrative**  
21 **Record (bates 102)**.  
22

23 According to TCEQ’s Regionalization Web Page the proposed permit should be granted  
24 pursuant to Approval Basis 3 if “[t]he applicant can successfully demonstrate that an  
25 exception to regionalization should be granted based on costs, affordable rates, and/or other  
26 relevant factors.” The applicant demonstrated through the cost analysis that “it will require  
27 R040062, LP to spend greater than \$10 million and wait five years to obtain wastewater  
28 services from the City.” **Tab D of the Administrative Record (bates 087 and 100-102)**.  
29 Therefore, “the construction of an on-site treatment facility is an economically better  
30 alternative for providing wastewater services to the proposed subdivision.” **Tab D of the**

1       **Administrative Record (bates 087 and 100-102).** There is no prefiled testimony that  
2       disputes this analysis. In fact, there is no prefiled testimony in this case that suggests that  
3       Applicant should connect to the Dove Springs Facility.

4  
5       Tellingly, the City of Georgetown was a protestant in this case, but has withdrawn its  
6       protest. If the Dove Springs facility were a viable alternative, it is unlikely that Georgetown  
7       would have withdrawn from this proceeding.

8  
9       Based on the undisputed financial analysis undertaken by the Applicant, the proposed  
10      permit should be granted pursuant to Approval Basis 3 because “[t]he applicant [has]  
11      successfully demonstrate[d] that an exception to regionalization should be granted based  
12      on costs, affordable rates, and/or other relevant factors.”

13  
14   **Q.   MR. BROWN TESTIFIED ABOUT THE NUMBER OF CUSTOMERS AND**  
15   **PEOPLE FOR WHICH IT PROVIDES SERVICE (SEE EXHIBIT JWSUD-1 at 4).**  
16   **IS THAT RELEVANT FOR REGIONALIZATION?**

17   **A.**   No.

18  
19      Mr. Brown’s statement is misleading. I believe that all of those customers and people are  
20      water customers. It is my understanding that Jonah does not have a single wastewater  
21      customer. The regionalization inquiry deals with wastewater, not water.

22  
23      The Proposal for Decision that was sent to TCEQ in the AIR-W case contained the  
24      following proposed finding of fact:

25  
26           53. Jonah is an established political subdivision that provides water service  
27           to approximately 9,000 customers, and 30,000 people are in its  
28           approximately 275-mile service area.

29  
30      **APP EX. 06 at page 44.**

1 When considering the PFD and issuing the AIR-W permit, the Commissioners deleted this  
2 finding of fact, saying: “The Commission determined to delete Finding[] of Fact #53 . . .  
3 as unnecessary to the Commission’s regionalization policy consideration in this case.” It  
4 is simply irrelevant to the question of wastewater regionalization that Jonah has water  
5 customers.

6  
7 **Q. WHAT IS A CCN?**

8 **A.** A Certificate of Convenience and Necessity (“CCN”) grants a CCN holder the exclusive  
9 right to provide retail water and/or sewer utility service to an identified geographic area.  
10 Chapter 13 of the Texas Water Code requires a CCN holder to provide continuous and  
11 adequate service to the area within its CCN boundary. A CCN is exclusive and someone  
12 other than the CCN holder cannot provide retail service inside the CCN area of another  
13 without the CCN holder’s consent.

14  
15 **Q. IS THE INDIGO DEVELOPMENT THAT IS THE SUBJECT OF THIS**  
16 **PROCEEDING IN ANY JONAH CCN AREA?**

17 **A.** Yes, according to **Exhibit MW-1**, attached to the prefiled testimony of Miles Whitney, the  
18 Indigo WRRF is located in Jonah’s water CCN. It is not located within any wastewater  
19 CCN. **Tab D of the Administrative Record at 046-047.** I reviewed the Texas Public  
20 Utility Commission CCN Viewer to confirm that the Indigo Development is not in any  
21 wastewater CCN. It is not in any wastewater CCN and is not in any Jonah wastewater  
22 CCN. Being in a water CCN but not a wastewater CCN is an important distinction. A  
23 water CCN creates an exclusive service area for water, not for wastewater. For a utility to  
24 be the exclusive provider for wastewater in an area, it must apply for and obtain a  
25 wastewater CCN. Jonah has not done that for the area where the Indigo Development is  
26 located. Whether a development is in a water CCN of a utility is irrelevant for wastewater  
27 regionalization evaluation when that utility has no existing wastewater facilities or  
28 wastewater systems. A water plant and water facilities cannot provide wastewater  
29 treatment.

1 Interestingly, I researched the question of whether Jonah even has a sewer CCN. Although  
2 Jonah technically had a sewer CCN (Number 21053), the Indigo WRRF was never in that  
3 area. In addition, on November 22, 2022, the Texas Public Utilities Commission approved  
4 an agreement whereby Jonah transferred all of its sewer customers and all of its certificated  
5 area under that CCN number to the City of Hutto. **APP EX. 09.** Although Jonah had a  
6 sewer CCN number, it divested itself of all its customers and service area.

7  
8 **Q. MR. BROWN TESTIFIED THAT JONAH HAS AN INTEREST IN MAINTAINING**  
9 **ITS CCN AREA. SEE EXHIBIT JWSUD-1 at 4). IS THAT RELEVANT FOR**  
10 **REGIONALIZATION?**

11 **A.** Without any wastewater plant, wastewater facilities, or agreements to serve the specified  
12 area, there is no wastewater significance that a development is within another utilities'  
13 water CCN.

14  
15 Jonah's witnesses provided no testimony that there was a Jonah facility or a Jonah system  
16 within 3 miles of the Indigo WRRF.

17  
18 In fact, The Proposal for Decision that was sent to TCEQ in the AIR-W case contained  
19 the following proposed finding of fact:

20  
21 54. Jonah is negotiating to provide wastewater to other nearby  
22 developments and plans to expand its wastewater services within its  
23 certificated water service area.

24  
25 **APP EX. 06 at page 44 (emphasis added).**

26  
27 When considering the PFD and issuing the AIR-W permit, the Commissioners deleted this  
28 finding of fact, saying: "The Commission determined to delete Finding[] of Fact . . . #54  
29 as unnecessary to the Commission's regionalization policy consideration in this case." It

1 is simply irrelevant to the question of wastewater regionalization that Jonah desires to  
2 expand its wastewater services within its certificated water service area.

3  
4 **Q. SHOULD APPLICANT HAVE SOUGHT JONAH'S CONSENT TO PROVIDE**  
5 **WASTEWATER SERVICE IN JONAH'S WATER CCN SERVICE AREA?**

6 **A.** No. The TCEQ Web Page requires inquiries to be sent for facilities or systems within three  
7 miles of the proposed facility. **APP EX. 04.** Jonah has not identified any such facility or  
8 system.

9  
10 **Q. DOES JONAH HAVE TO PROVIDED CONSENT FOR APPLICANT TO**  
11 **PROVIDE WASTEWATER SERVICE IN JONAH'S WATER CCN SERVICE**  
12 **AREA?**

13 **A.** No. There is no requirement that such consent is required. **APP EX. 04.** Nor would it  
14 make any sense. If there is no facility, there can be no connection.

15  
16 **Q. DOES IT MATTER THAT JONAH MIGHT AGREE TO CONSTRUCT,**  
17 **OPERATE, AND MAINTAIN A WASTEWATER TREATMENT PLANT TO**  
18 **SERVE THE APPLICANT?**

19 **A.** No. Regionalization questions address existing facilities and systems, not whether some  
20 utility might enter into an agreement to build a facility. **APP EX. 04.**

21  
22 **Q. DOES IT MATTER THAT THE PROPOSED FACILITY MIGHT BE IN JONAH**  
23 **DISTRICT BOUNDARIES?**

24 **A.** No. The TCEQ Web Page makes no mention of any questions concerning the location of  
25 a facility vis-à-vis a district boundary. **APP EX. 04.** Unlike a CCN, a district boundary  
26 does not guaranty or require service. It is simply irrelevant. The question is whether there  
27 is an existing facility or system within 3 miles of the proposed facility. **APP EX. 04.**

1 **Q. IS THE APPLICATION INSUFFICIENT BECAUSE JONAH AND THE**  
2 **APPLICANT ENTERED INTO DISCUSSIONS REGARDING WASTEWATER**  
3 **SERVICE, AND NO AGREEMENT WAS REACHED?**

4 **A.** No. The TCEQ Web Page makes no mention of any questions concerning whether there  
5 had been attempts to negotiate an agreement with a local utility – much less when that that  
6 utility does not have a facility or system within three miles of the proposed facility. **APP**  
7 **EX. 04.**

8  
9 **Q. DOES JONAH OWN OR OPERATE ANY WASTEWATER TREATMENT**  
10 **PLANTS?**

11 **A.** I don't know of any wastewater treatment plants that are currently owned or operated by  
12 Jonah. I did not see any reference to any wastewater treatment plants that are currently  
13 owned or operated by Jonah in **Exhibit JWSUD-1 or JWSUD-2.**

14  
15 Specifically, there is no evidence that Jonah has a wastewater treatment facility or  
16 collection system within three miles of the proposed facility. In fact, the prefiled testimony  
17 of Mr. William Brown only says that Jonah “desires to construct, operate, and maintain [a]  
18 wastewater treatment” system. **EXHIBIT JWSUD-1 at 7:15.** A “desire” does not qualify  
19 as a facility or system that should be analyzed under the Regionalization Policy. Currently,  
20 although the Indigo WRRF is within Jonah's water CCN, it is outside Jonah's sewer CCN.  
21 Therefore, there can be no argument that the permit should be denied based on any existing  
22 Jonah facility or system.

23  
24 **Q. HAS THE APPLICANT PROVIDED SUFFICIENT INFORMATION TO JUSTIFY**  
25 **A NEED FOR THE INDIGO WRRF?**

26 **A.** Yes. Attachment J of the Application provides a justification for need. **Tab D of the**  
27 **Administrative Record (bates 084).** Central Texas is a fast-growing area. *Id.* The  
28 proposed subdivision is in Williamson County TX, outside the corporate limits of  
29 Georgetown. The site currently does not have wastewater treatment service. *Id.* In  
30 addition, the proposed subdivision is not in the area identified as the “future service area”

1 that was evaluated in the City's 2018 wastewater master plan. *Id.* The construction of  
2 approximately 600 manufactured housing units will be completed within the next five  
3 years. *Id.* The first phase of construction is for approximately 300 units to be completed  
4 within two years after receipt of the requested permit for the proposed Indigo WRRF. *Id.*  
5 These planned construction activities justify a need for the facility.  
6

7 **Q. MR. TUCKFIELD, BASED ON YOUR EXPERIENCE, DO YOU HAVE ANY**  
8 **OPINIONS REGARDING WHETHER THE APPLICATION SHOULD BE**  
9 **GRANTED AND THE DRAFT PERMIT ISSUED?**

10 **A.** Based on my review of documents cited above, my experience working with both  
11 developers and municipalities, my opinion is that the Draft Permit is consistent with the  
12 State's Regionalization Policy and demonstrates need and it should be issued.  
13

#### 14 **IV. CONCLUSION**

15

16 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

17 **A.** Yes, but I reserve the right to amend my testimony if additional information becomes  
18 available.

---

**DAVID J. TUCKFIELD**  
**Attorney Practicing Law Since 1989**  
**512-576-2481**  
[david@allawgp.com](mailto:david@allawgp.com)

**QUOTE FROM CLIENT**

*"We rely on David Tuckfield to assist with various issues, including risk avoidance, compliance, government relations, contract disputes, and litigation. We view him as a partner in achieving practical solutions to complex legal issues and in furthering our business interests."*

--Senior Attorney, Fortune 500 Company engaged in the transportation, storage, and distribution of refined petroleum products and ammonia.

**GENERAL**

1989-2006 Attorney and Equity Partner in the Administrative and Environmental Law Section of Vinson & Elkins, LLP (Washington, DC, Houston, and Austin).

2006 Solo practitioner at the Law Office of David J. Tuckfield, PC.

2010 to present Joined the AL Law Group, PLLC. Currently a Partner.

See [www.tuckfieldlaw.com](http://www.tuckfieldlaw.com)

- With 34 years of experience in the practice of law, has broad experience with compliance matters that includes, but is not limited to waste, water, air, natural resource damages, endangered species and historic preservation.
- Has advised large corporations and small entities in questions concerning compliance and risk management.
- Has represented municipalities on all aspects of water and wastewater, including permitting, contracting, and dealing with public.
- Has represented numerous entities in their formation
- Has represented municipalities, water districts, large corporations, and individuals in litigation involving contract disputes, products liability, and criminal investigations.
- Has assisted large corporations in assuring compliance with statutes and regulations, defending against enforcement actions, and obtaining or modifying permits for their operations.
- Has worked on the environmental aspects of large business transactions for multi-national corporations, including due diligence and contract negotiation.
- Has negotiated contracts for real estate transactions and mergers as well as for the purchase of water rights and employment.



- Has successfully defended energy companies in lawsuits and enforcement actions involving alleged contamination or non-compliance with laws and regulations.

## **EDUCATION & LICENSES**

Brigham Young University, B.A. cum laude in international relations, 1985

J. Reuben Clark Law School (Brigham Young University), J.D. magna cum laude, 1989 (Order of the Coif; lead articles editor, Brigham Young University Law Review; Board of Editors, International and Comparative Law Annual; numerous honor societies).

Admitted to the following Bar Associations:

District of Columbia, 1989  
State of Texas, 1996  
Southern District of Texas, 2018  
United States Supreme Court, 2016  
Fifth Circuit Court of Appeals, 2021

## **Representative** **List of Municipalities and Developers** **Represented on Water and Wastewater Issues**

1. **The City of Dripping Spring (2010-present).** Special Counsel representing the City in water and wastewater matters as well as general environmental matters. Addressed regionalization questions for over a decade when negotiating numerous water and wastewater agreements.
2. **The City of Fairfield (2018-present).** Represented City in litigation involving wastewater and water contract dispute with neighboring municipality (as well as Open Meeting Act litigation). Continue to represent the City on ongoing utility issues.
3. **The City of Bastrop (2019).** Advised City on contracts regarding Water and Wastewater Agreement with West Bastrop Municipal Utility District (City to provide wastewater services to MUD, City to provide wholesale water service to MUD).
4. **The City of Killeen (2015 and 2019).** In 2015, advised City with respect to PUC Docket 42861; SOAH Docket No. 473-14-5143.WS - *In the Matter of the Application from the City of Georgetown, Certificate of Convenience and Necessity (CCN) No. 12369, to Acquire Facilities and Transfer and Cancel CCN No. 11590 Held by Chisholm Trail Special Utility District in Bell, Burnet, and Williamson Counties, Texas*. In 2019, represented City in connection with *Kempner Water Supply Corporation and the City of*

*Georgetown, Texas Joint Petition for Approval and Enforcement of a CCN Transfer Agreement Designating Certificate of Convenience and Necessity Service Areas Bell County, Texas, pursuant to Texas Water Code § 13.248, and 16 Texas Administrative Code § 24.253.*

5. **The City of Clyde (2012-2022).** Represented City in acquisition of water rights and subsequent negotiations with neighboring City regarding those water rights.
6. **The City of Luling (2015-2017).** Represented the City in water contract dispute with Guadalupe-Blanco River Authority.
7. **The City of Malakoff (2020).** Represented the City in PUC Docket No. 50433 (wholesale sewer rate case).
8. **Member Cities (2000-2008).** Represented the Cities of New Boston, Hooks, DeKalb, Wake Village, Maud, Avery, and Annona, Texas in water contract dispute with the City of Texarkana, Texas.
9. **The City of Celina (2016-2017).** Represented the City In PUC Docket No. 45848 concerning compensation due as a result of the City's intent to provide retail water and sewer service to an area that was decertificated by the Commission in Docket No. 45329 from Aqua as requested by Sutton Fields.
10. **The City of Liberty Hill (2012 and 2015-2017).** In 2012, represented in City in Application from the City of Liberty Hill, to Amend Water Certificate of Convenience and Necessity (CCN) No. 10324, in Williamson County (SOAH Docket No. 582-12-7597 and TCEQ Docket No. 2012-1196-UCR). Beginning 2015, Represented City in contract dispute with former wastewater plant operator (U.S. Water Services Corporation d/b/a USW Utility Group).
11. **The City of DeKalb (2021-present).** Advise City on water supply issues.
12. **Bell County WCID #1 (2012-2021).** Advised WCID on various water and wastewater issues, including Wastewater Permit Application WQ0014387001.
13. **Regal, LLC (2021-present).** Represent Regal, LLC in *Application by Regal, LLC, for a new Texas Pollutant Discharge Elimination System Permit No. WQ0015817001* (TCEQ Docket No. 2020-0973-MWD).
14. **Silesia Properties, LP (2020-2021).** Represented Silesia Properties, LP Application for TPDES Permit No. WQ0015835001 in TCEQ Docket No. 2020-1246-MWD
15. **DTB Investments, L.P. (2018-2020).** Represented DTB Investments, L.P. in application for a major amendment to its existing Permit No. WQ0015092001 to change the method of disposal from land application to discharge to waters in the state via TPDES Permit

No. WQ0015092001 and to increase the discharge from a daily average flow not to exceed 180,000 gallons per day (gpd) to a daily average flow not to exceed 300,000 gpd in Comal County, Texas.

- 16. Camp Champions Texas LP (2019-2020).** Represented Camp Champions Texas LP in TCEQ Docket No. 2019-0901-MWD regarding the application for TCEQ Permit No. WQ0015643001 (Land Application Permit).
- 17. JPHD, Inc. (2015).** Represented JPHD, Inc. in TCEQ Docket No. 2015-0664-MWD (Application for Land Application Permit WQ0015201001).

### **Expert Witness Testimony**

- 1. Provided expert testimony on the issue of regionalization in: SOAH Docket No. 582-22-1016; TCEQ Docket No. 2021-1214-MWD; *Application by AIR-W 2017-7 L.P. For TPDES Permit No. WQ0015878001.***
- 2. Have been engaged to provide expert testimony on the issue of regionalization in: SOAH Docket No. 582-23-10368; TCEQ Docket No. 2022-1731-MWD; *Application of R040062, LP for TPDES Permit No. WQ0016008001.***

### **RERPESENTATIVE LITIGATION** **FEDERAL/STATE COURT** **AND ADMINISTRATIVE CONTESTED CASES** June 2023

#### **ACTIVE CASES**

- 3. Defending Municipality in appeal of the issuance of a TCEQ wastewater discharge permit (TPDES Permit) (Currently in Supreme Court of Texas)**
- 4. Representing Landowner in Contamination Case against Upstream Oil & Gas Company (Refugio County, Texas)**
- 5. Representing Developers in effort to obtain discharge permit from Texas Commission on Environmental Quality (Currently in Travis County District Court)**
- 6. Representing County and Municipal Utility District as Plaintiffs against the U.S. Army Corps of Engineers for arbitrary and capricious actions in operation and maintenance of reservoir (Federal Court, Fifth Circuit)**
- 7. Representing Plaintiff in Medical Malpractice Case (Travis County District Court)**
- 8. Representing Physician (Respondent) in administrative hearing against the Texas Medical Board (TMB) in disciplinary action for alleged standard of care violations**

(State Office of Administrative Hearings, Travis County District Court, currently in 3<sup>rd</sup> Court of Appeals)

**REPRESENTATIVE PAST LITIGATION**

1. Represented Developers in Comal County in effort to obtain land application permit from Texas Commission on Environmental Quality (State Office of Administrative Hearings) (2021)
2. Represented Municipality and its Mayor in lawsuit brought by another municipality for alleged breach of contract, breach of implied or fiduciary duties, violations of due process, violations of the Texas Open Meetings Act, and *ultra vires* claims (Freestone County District Court and Tenth Court of Appeals) (2021)
3. Represented Physician (Plaintiff) in *ultra vires* case against officials and employees of the Texas Medical Board (TMB) for the TMB's failure to carry-out its duties under Texas law (Travis County District Court and Third Court of Appeals, Petition for certiorari granted by the Texas Supreme Court). This case was the basis for the 2021 State Bar of Texas 24<sup>th</sup> Annual Mack Kidd Administrative Law Moot Court Competition (2021)
4. Represented Physician (Plaintiff) in case against hospital for retaliation-related causes of action (Travis County District Court) (2021)
5. Represented City in defense of utility rates (Texas Public Utilities Commission and State Office of Administrative Hearings) (2020)
6. Represented Commercial Property Owner as Plaintiff against large Oil & Gas Company for groundwater contamination (Harris County District Court) (2020)
7. Represented Developer against Public Utility Agency for breach of contract claims related to impact fee credits (Travis County District Court) (2020)
8. Represented owner of Camp facility near Lake Lyndon B. Johnson for new permit to authorize the disposal of treated domestic wastewater via surface irrigation (State Office of Administrative Hearings) (2020)
9. Represented Restaurant Company and its Owners as Defendants against the State of Texas (brought by the Attorney General) for alleged violations of the Texas Clean Air Act (Travis County District Court) (2020)
10. Represented Sign Company as Plaintiff in the appeal of revocation of permit (Thirteenth Circuit Court of Appeals) (2020)

- 11. Represented Physician in administrative investigation where it was alleged that Physician engaged in unprofessional conduct and provided patient with non-therapeutic prescriptions or treatment (Texas Medical Board Investigation) (2020)**
- 12. Represented Ranch as Plaintiff against Oil & Gas Service providers for surface and groundwater contamination (Refugio County District Court) (2019)**
- 13. Represented Municipality in a contested case for the issuance of a wastewater discharge permit (TPDES Permit) (Texas Commission on Environmental Quality/State Office of Administrative Hearings – first contested case with attorneys representing all parties under Senate Bill 709 Rules that went through the entire 709 process) (2019)**
- 14. Represented Improvement District (Defendant) against wastewater services provider for alleged breach of contract (Calhoun County District Court) (2019)**
- 15. Represented Mid-Stream Oil as Gas Company as Plaintiffs in a breach of warranty claim against the manufacturer of pipe scraper launchers and receivers (Federal District Court, Western District, Texas) (2018)**
- 16. Represented Mid-Stream Oil as Gas Company as Plaintiffs in suit for injunctive relief involving access to property to remediate contamination (McLennan County District Court) (2018)**
- 17. Represented Oil & Gas Company as Plaintiff in multi-party litigation (one of the Defendants is the State of Texas) in a groundwater contamination case (multi-forum litigation in Montague County District Court and administrative hearing before the Railroad Commission of Texas) (2018)**
- 18. Represented Wastewater Service Provider as Plaintiff against Bank for breach of contract and quantum meruit (Harris County District Court) (2018)**
- 19. Represented Energy Company as Plaintiff in breach of contract and quantum meruit against developer of large entertainment venue (Travis County District Court) (2018)**
- 20. Represented City (Defendant) against Wastewater Services provider for alleged breach of contract (Williamson County District Court) (2017)**
- 21. Represented Oil & Gas Company as Plaintiff in litigation against Company that had agreed to retain the remediation liabilities of a natural gas plant site (multi-forum litigation in Midland County District Court and administrative hearing before the Railroad Commission of Texas) (2017)**

- 22. Represented Company that operated a grease and grit trap processing business as Plaintiff against an environmental organization for business disparagement and tortious interference with contract (Cameron County District Court) (2017)**
- 23. Represented Municipal Utility District in a contested case for the issuance of a wastewater discharge permit (TPDES Permit) (Texas Commission on Environmental Quality/State Office of Administrative Hearings) (2017)**
- 24. Represented City (Plaintiff) against River Authority for breach of contract involving the sale of water (Caldwell County District Court) (2016)**
- 25. Represented Mid-Stream Oil as Gas Company as Defendant against landowner who challenged construction of a valve site along a pipeline (Travis County District Court) (2016)**
- 26. Represented voters contesting election (Hays County District Court) (2016)**
- 27. Represented Municipality in contested case concerning compensation due for decertification of CCN (Texas Public Utilities Commission/State Office of Administrative Hearings) (2016)**
- 28. Represented large Oil & Gas Company as Defendant against the State of Texas and the United States of America for natural resource damages (Federal District Court, Eastern District, Texas) (2015)**
- 29. Represented Oil & Gas Company as Defendant in multi-party litigation against Company that had agreed to assume the remediation liabilities of a natural gas plant site (multi-forum litigation in Coke County District Court and administrative hearing before the Railroad Commission of Texas) (2013)**
- 30. Represented Guarantors as Defendants against Bank for deficiency (Bell County District Court) (2013)**
- 31. Represented WCID in a contested case for the appointment of watermaster on the Brazos River (Texas Commission on Environmental Quality/State Office of Administrative Hearings) (2013)**
- 32. Represented Oil & Gas Company as Defendant in criminal case brought by United States for violations of the Clean Air Act (Federal District Court, Northern District, Texas) (2008)**

## 2021 TX SOAH LEXIS 26

Texas State Office of Administrative Hearings

March 22, 2021

SOAH DOCKET NO. 582-20-4141; TCEQ DOCKET NO. 2020-0411-MWD

*TX State Office Of Administrative*

*Hearings TX State Office Of Administrative*

*Hearings*

### Reporter

2021 TX SOAH LEXIS 26 \*

## APPLICATION BY THE CRYSTAL CLEAR SPECIAL UTILITY DISTRICT AND MCLB LAND, LLC FOR TPDES PERMIT NO. WQ0015266002 IN HAYS COUNTY, TEXAS

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### Subsequent History:

As Corrected April 12, 2021.

### Core Terms

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regionalization, wastewater, aquatic, water quality, tributary, staff, unnamed, compliance, effluent, reservoir, proposed facility, surface water, prima facie, administrative record, stream, domestic, rebut, groundwater, phase, antidegradation, preponderance, segment, notice, nearby resident, nuisance, basin, sewer, phosphorus, odor, protestant

**Panel:** ROSS HENDERSON, ADMINISTRATIVE LAW JUDGE, STATE OFFICE OF ADMINISTRATIVE HEARINGS

### Opinion

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#### PROPOSAL FOR DECISION [\*1]

On March 4, 2019, Crystal Clear Special Utility District (Crystal Clear) and MCLB Land, LLC (MCLB) (together Applicants) filed an application (the Application) with the Texas Commission on Environmental Quality (Commission or TCEQ) for new Texas Pollutant Discharge Elimination System (TPDES) permit No. WQ0015266002 (the Draft Permit) to release treated domestic wastewater from a proposed plant site (the Facility) located in Hays County, Texas. MCLB is the owner of the property to be served and Crystal Clear would operate the Facility as the provider of sewer service. On June 16, 2020, the Commission issued an Interim Order, naming the City of San Marcos (the City or San Marcos) and Chris Carson and Carson Select Investments, LP (Carson) as Protestants and referring the Application to the State Office of Administrative Hearings (SOAH) for a contested case hearing on nine issues.

Exhibit  
SOAH Hearing - 8/16/2023

**APP 03**

exhibitclear.com

The Executive Director (ED) and the Office of the Public Interest Counsel (OPIC) of the TCEQ argue the Application should be granted and the Draft Permit issued. As explained in more detail below, Carson argues that Applicants have not met their burden of proof on eight out of nine referred issues and [\*2] the Application should be denied. San Marcos argues that the Application should be denied because Applicants failed to meet their burden of proof on specific referred issues relating to Texas's regionalization policy. For reasons provided below, the Administrative Law Judge (ALJ) finds that Applicants have met their burden of proof on all nine referred issues and recommends that the TCEQ approve issuance of the Draft Permit with no changes.

## **I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION**

TCEQ received the Application on March 4, 2019, and declared it administratively complete on April 5, 2019. The Notice of Receipt of Application and Intent to Obtain Water Quality Permit was published on April 17, 2019, in English in the *San Marcos Daily Record* and in Spanish in *La Voz Newspaper* on May 1, 2019. On June 27, 2019, the ED issued the Draft Permit for the Application, with the proposed Permit No. WQ4015266002. Applicants published the Combined Notice of Public Meeting and the Notice of Application and Preliminary Decision on August 9, 2019, in the *San Marcos Daily Record* in English, and on August 18, 2019, in *La Prensa Texas* in Spanish. A public meeting was held on September 10, 2019, at the Courtyard by Marriott in San Marcos in San Marcos, Texas. The public comment period ended on September 17, [\*3] 2019.

San Marcos and Carson both timely filed hearing requests based upon issues raised during the public comment period. On June 10, 2020, the Commission considered the hearing requests at its open meeting, resulting in a June 16, 2020, Interim Order granting San Marcos's and Carson's hearing requests and referring the Application to SOAH for a contested case hearing on nine issues.

On September 21, 2020, a preliminary hearing was convened in this case via videoconference by SOAH ALJ Ross Henderson. Attorney Helen Gilbert appeared for MCLB; attorneys Shan Rutherford and Geoffrey Kirshbaum appeared for Crystal Clear; attorney Bobby Salehi appeared for the ED; attorney Dominique McLeggan-Brown appeared for OPIC; attorney Patrick Reznik appeared for Carson; and attorney Arturo Rodriguez Jr. appeared for San Marcos. The Administrative Record and Applicants' exhibits MLCB-1 through 5 were admitted. Jurisdiction was noted by the AU.

A second preliminary hearing was held telephonically on December 11, 2020, with SOAH ALJs Ross Henderson and Rudy Calderon presiding. All parties appeared through their respective representatives, and the ALJs ruled on all timely-filed motions.

On [\*4] December 18, 2020, ALJs Henderson and Calderon<sup>1</sup> convened the hearing on the merits via videoconference and all parties appeared through their respective representatives. The hearing continued on December 21, 2020, and closed that day. San Marcos filed a Motion to Certify a Question to the Commission on December 21, 2020, which was denied in SOAH Order No. 4. The record closed on January 20, 2021, after the parties filed post-hearing briefs.

## **II. PROPOSED FACILITY AND DRAFT PERMIT CONDITIONS**

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<sup>1</sup> ALJ Calderon departed SOAH after the conclusion of the hearing.



The following description of the Facility and the Draft Permit is based on descriptions in the Administrative Record. <sup>2</sup>New TPDES Permit No. WQ0415266002 would authorize discharge from the Facility of treated domestic wastewater at a daily average flow not to exceed 0.035 million gallons per day (MGD) in the Interim I phase, 0.065 MGD in the Interim II phase, and 0.10 MGD in the Final phase. The Facility, which has not been constructed, **will** be located approximately 1,000 feet west of Francis Harris Lane and 800 feet south of South Old Bastrop Highway, in Hays County, Texas 78666. The Facility would be built to serve the 410-lot, 73-acre Independence Trail single family residential subdivision owned by MCLB (the Subdivision). [\*5] The Subdivision is subject to an executed service agreement between Crystal Clear and MCLB for the provision of retail water and wastewater public service.

The Facility would be a microBLOX membrane bioreactor (MBR) system configured with one anoxic zone, and one aerobic zone and two isolatable MBR/aerobic zones. Processes outside of the MBR may include equalization and sludge storage. Treatment units will include a lift station, a fine screen, flow equalization, an anoxic basin, an aerobic basin, a membrane basin, a chlorine contact chamber, and a sludge holding tank.

The effluent limitations in all phases of the Draft Permit, based on a 30-day average, are 5 milligrams per liter (mg/L) five-day carbonaceous biochemical oxygen demand (CBOD5), 5 mg/L total suspended solids (TSS), 2 mg/L ammonia-nitrogen (NH3-N), 1 mg/L total phosphorus (TP), 126 colony forming units (CPU) or most probable number (MPN) of E. coli per 100 milliliters (ml), and 3.0 mg/L minimum dissolved oxygen (DO). The effluent shall contain a chlorine residual of at least 1.0 mg/l and shall not exceed a chlorine residual of 4.0 mg/L after a detention time of at least 20 minutes based on peak flow.

The treated [\*6] effluent will be discharged to an unnamed tributary of York Creek, then to a Soil Conservation Service Site 5 Reservoir (SCS Reservoir), then to an unnamed tributary of York Creek, then to York Creek, then to the Lower San Marcos River in Segment No. 1808 of the Guadalupe River Basin. According to the review performed by the ED, the unclassified receiving water uses are limited aquatic life use for the unnamed tributary of York Creek and York Creek and high aquatic life use for the SCS Reservoir. The designated uses for Segment No. 1808 are primary contact recreation, public water supply, and high aquatic life use. The ED issued the Draft Permit with effluent limitations intended to maintain and protect the existing instream uses.

### III. BURDEN OF PROOF

The Applicants, as the moving parties, bear the burden of proof by a preponderance of the evidence.

<sup>3</sup>The Application was filed after September 1, 2015, and the TCEQ referred it under Texas Water Code § 5.556, which governs referral of environmental permitting cases to SOAH based on a request for a contested case hearing. <sup>4</sup>Therefore, this case is subject to Texas Government Code § 2003.047(i-1)-

(i-3), <sup>5</sup>which provides:

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<sup>2</sup> MCLB Exs. 1-5 (Administrative Record). See SOAH Order No. 1 (the Administrative Record was provided to SOAH by the Office of the Chief Clerk of the TCEQ and was admitted into the record by the AU as exhibits MCLB 1-5 on September 21, 2020, during the Preliminary Hearing).

<sup>3</sup> 30 Tex. Admin. Code § 80.17(a); 1 Tex. Admin. Code § 155.427.

<sup>4</sup> Tex. Water Code §§ 5.551(a), .556.

<sup>5</sup> Acts 2015, 84th Leg., R.S., ch. 116 (S.B. 709), §§ 1 and 5, eff. Sept. 1, 2015.

(i-1) In a contested case regarding a permit application referred [\*7] under Section 5.556 ... [of the] Water Code, the filing with [SOAH] 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 ... 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. <sup>6</sup>

Although this law creates a presumption, sets up a method for rebutting that presumption, and shifts the burden of production on the rebuttal, it does not change the underlying burden of proof. The burden of proof remains with the Applicant to establish by a preponderance of the evidence that the Application would satisfy applicable requirements and that a permit, if issued consistent with the Draft Permit, would protect human health and safety, the environment, and physical property. <sup>7</sup>

In this case, the Application, the Draft Permit, and the other materials listed in Texas Government Code § 2003.047(i-1), which are collectively referred to as the "Prima Facie Demonstration," were offered and admitted into the record at the preliminary hearing. <sup>8</sup>

#### **IV. WASTEWATER DISCHARGE PERMIT REQUIREMENTS**

Chapter 26 of the Texas Water Code requires a person who seeks to discharge wastewater into water in the State to file an application with the TCEQ. <sup>9</sup>30 Texas Administrative Code, chapter 305, subchapter C contains the TCEQ's application filing requirements. Once an application is filed, staff of the TCEQ (Staff) reviews the application in accordance with 30 Texas Administrative Code chapter 281. [\*9] <sup>10</sup>Based on a technical review, Staff prepares a draft permit that is consistent with Environmental Protection Agency and TCEQ rules and a technical summary that discusses the application facts and

<sup>6</sup> The Commission [\*8] has implemented Texas Government Code § 2003.047 by adopting 30 Texas Administrative Code § 80.17.

<sup>7</sup> 30 Tex. Admin. Code § 80.17(a), (e).

<sup>8</sup> See Administrative Record; Supplemental Administrative Record.

<sup>9</sup> Tex. Water Code §§ 26.027, 121.

<sup>10</sup> 30 Tex. Admin. Code § 281.2(2).

significant factual, legal, methodological, and policy questions considered while preparing the Draft Permit.<sup>11</sup>

A domestic wastewater treatment facility in Texas is subject to wastewater discharge permit requirements.<sup>12</sup> 30 Texas Administrative Code, chapter 305, subchapter F contains the TCEQ's standard permit requirements, which the ED has adapted specifically for use in wastewater discharge permits.

All wastewater discharge permits are also subject to regulations found in 30 Texas Administrative Code, chapter 319, which require the permittee to monitor its effluent and report the results as required in the permit.

Finally, TCEQ has adopted water quality standards applicable to wastewater discharges in accordance with section 303 of the Clean Water Act<sup>13</sup> and section 26.023 of the Texas Water Code. These standards, known as the Texas Surface Water Quality Standards (TSWQS), are found in 30 Texas Administrative Code, Chapter 307.

Additional law specifically applicable to the nine issues [\*10] referred by the Commission will be discussed below.

## V. SUMMARY OF THE EVIDENCE

The Administrative Record, provided by the Chief Clerk of the TCEQ, was admitted at the September 21, 2020, preliminary hearing. The Administrative Record included the Application<sup>14</sup> (including all Technical Reports and attachments submitted by Applicants); the Draft Permit (made by Staff after Staff's review of the Application), Staff's Statement of Basis Technical Summary and Preliminary Decision, Compliance History Report, and Staff's Technical Memoranda;<sup>15</sup> and all associated jurisdictional documents (notices, affidavits, and the Commission's Interim Order).<sup>16</sup> The Administrative Record established 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.<sup>17</sup>

At the hearing on the merits, San Marcos and Carson offered evidence for the purpose of rebutting the Applicant's prima facie demonstration.<sup>18</sup> San Marcos offered Exhibits SM-1 to SM-14, which were admitted. San Marcos' exhibits [\*11] included the prefiled testimony of Thomas Taggart and Carlos Rubinstein.<sup>19</sup> Mr. Taggart, the Director of Public Services for San Marcos, testified as to San

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<sup>11</sup> 30 Tex. Admin. Code § 281.21(b)-(c).

<sup>12</sup> Tex. Water Code ch. 26; *E.g.* 30 Tex. Admin. Code chs. 217, 305 (applying to domestic wastewater systems), 307 (applying to all wastewater discharge permits), 319.

<sup>13</sup> 33 U.S.C. § 1313.

<sup>14</sup> Ex. MCLB 4.

<sup>15</sup> Ex. MCLB 3.

<sup>16</sup> Exs. MCLB 1, 2, and 5.

<sup>17</sup> Tex. Gov't Code § 2003.047(1-1).

<sup>18</sup> Tex. Gov't Code § 2003.047(i-1)-(i-3).

Marcos' capacity and desire to provide sewer service to the Subdivision. Mr. Rubinstein, a former TCEQ Commissioner, testified as a consultant for San Marcos on his understanding of the State's policies relating to regionalization. San Marcos also offered the testimony of Richard Reynosa for the purpose of rebutting Applicants' testimony relating to a comparative cost analysis of the construction of the Facility versus connection of the Subdivision to facilities operated by San Marcos, but such testimony, after objection, was not admitted because the testimony was impermissible rebuttal testimony and did not comport with the procedural schedule agreed to by the parties or the order of filing testimony as addressed in 30 Texas Administrative Code § 80.17. San Marcos subsequently filed the testimony as an Offer of Proof on December 21, 2021.

Carson offered Exhibits Carson 1 to 3, which were also admitted.<sup>20</sup> Carson's exhibits included the testimony of Chris Carson on the topic of Carson's opposition to the Draft Permit. Mr. Carson is the manager [\*12] of ranch property for Carson that is adjacent to the proposed discharge location. David Flores, an aquatic scientist, testified for Carson on the topic of his environmental assessment and analysis of the potential impacts of the Draft Permit on the water quality of the unnamed tributary of York Creek. Tim Osting, Principal Engineer at Aqua Strategies Inc., testified for Carson regarding his water quality modeling and expected impacts on water quality in the receiving tributary associated with the Draft Permit. Finally, Carson offered supplemental testimony of Mr. Osting and Mr. Flores, which included the underlying data to support their modeling, analysis and conclusions. The ALJs sustained Applicants' motion to strike Carson's supplemental testimony on the basis that the evidence was untimely.<sup>21</sup>

The ED and the Applicants presented additional evidence in response to evidence offered by San Marcos and Carson. At the hearing, the Applicants offered Exhibits Applicants 1 to 17, which were all admitted. Applicants' exhibits included the testimony of Allison Nieto, Mike Taylor, James Ingalls, and James Maehin.<sup>22</sup> Ms. Nieto, Senior Project Engineer for Southwest Engineers, [\*13] testified on the topics of the Draft Permit's impacts on surface water and groundwater quality, compliance with requirements to abate and control nuisance odors, the accuracy and completeness of the Application, whether the Draft Permit is protective of health of nearby residents, and whether the Draft Permit is contrary to the State's policy on regionalization. Mr. Taylor is the General Manager for Crystal Clear. He testified regarding Crystal Clear's compliance history and technical capabilities and regarding whether the Draft Permit is contrary to the State's policy on regionalization. Mr. Ingalls, Vice-President of Moeller & Ingalls, LLC, testified regarding the proposed Subdivision and on the topics of regionalization and need for the permit. Mr. Ingalls provided a comparative cost analysis of the construction of the Facility versus connection of the Subdivision to facilities operated by San Marcos. Lastly, Mr. Machin, owner of JLM Engineering, testified regarding: whether the proposed discharge will violate TCEQ's antidegradation policy and procedures or negatively impact aquatic or terrestrial wildlife species, including livestock; whether the draft permit will be protective [\*14] of surface water and groundwater quality; and whether the nutrient limits in the draft permit comply with applicable TSWQS.

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<sup>19</sup> Exs. SM-2 (Thomas Taggart Direct), SM-3 (Carlos Rubinstein Direct).

<sup>20</sup> Exs. Carson-1 (Chris Carson Direct), Carson 2 (David Allen Flores Direct), Carson 3 (Tim Osting Direct).

<sup>21</sup> See SOAH Order Nos. 2 and 3 (supplemental testimony was submitted on December 7, 2021, well after the deadline of October 23, 2020, provided in the Agreed Procedural Schedule, which was adopted in Order No. 2).

<sup>22</sup> Exs. Applicants-1 (Allison Nieto Direct), Applicants-2 (Mike Taylor Direct), Applicants-3 (James Ingalls Direct), and Applicants-4 (James Machin Direct).

The ED offered Exhibits GD-1 to 4, JL-1 to 3, and JO-1 to 2, which were all admitted. The ED's exhibits included the testimony of Gunnar Dubke, Jenna Lueg, and John Onyenobi.<sup>23</sup> Mr. Onyenobi is a Senior Engineer and Permit Coordinator for the Commission in the Water Quality Permitting Section. Mr. Onyenobi coordinated the review of the Application for Staff and performed certain specific reviews of the Application. He concluded that: the Draft Permit is protective of surface water and groundwater quality; the Draft Permit meets requirements for abatement and control of nuisance odor; the Application was accurate and complete; neither Applicants' compliance history nor technical capabilities raised any concerns with respect to compliance with the Draft Permit; the Draft Permit is not contrary to the State's policies on regionalization; the Application demonstrated a need for the Draft Permit; and the Draft Permit is protective of the health of nearby residents. Mr. Dubke is a General Engineering Specialist on the Water Quality Assessment Team at the [\*15] Commission. He provided testimony regarding Staff's review of dissolved oxygen modeling analysis for the Application. Finally, Ms. Lueg is an Aquatic Scientist on the Standards Implementation Team in the Water Quality Assessment Section of the Commission. She testified regarding Staff's review of the Application relating to water quality. She concluded that the Draft Permit complied with Commission's antidegradation policy and the nutrient limits in the Draft Permit comply with Commission's rules.

## VI. ANALYSIS

The Commission referred the following issues:<sup>24</sup>

- 1. Whether the proposed discharge will violate TCEQ's antidegradation policy and procedures, or negatively impact aquatic or terrestrial wildlife species, including livestock;**
- 2. Whether the Draft Permit will be protective of surface water and groundwater quality;**
- 3. Whether the nutrient limits in the Draft Permit comply with applicable TSWQS;**
- 4. Whether the Draft Permit complies with applicable requirements to abate and control nuisance odors, as set forth in 30 TAC § 309.13(e);**
- 5. Whether the application is complete and accurate;**
- 6. Whether the Applicants' compliance history or technical capabilities raise any issues regarding the Applicants' ability to comply with the material terms of the permit that warrant denying or altering the terms of the Draft Permit;**
- 7. Whether issuance of the draft permit is contrary to the State's regionalization policy or Texas Water Code § 26.0282;**
- 8. Whether the Commission should deny or alter the terms and conditions of the Draft Permit based on the consideration of need under Texas Water Code § 26.0282; and**
- 9. Whether the Draft Permit is protective of the health of nearby residents.**

<sup>23</sup> Exs. GD-1 (Gunnar Dubke Direct), JL-1 (Jenna Lueg Direct), JO-1 (John Onyenobi Direct).

<sup>24</sup> Ex, MCLB-1 (Commission's Interim Order dated June 16, 2020, admitted in SOAH Order No. 1).<sup>25</sup> See also Ex. Applicants-4 at Bates 74.

With respect to each of the nine referred issues, and for the reasons set forth below, the ALJ finds that the Applicants have met their burden to prove by a preponderance of the evidence that the Draft Permit should be issued without changes.

**A. Issue 1: Whether the Proposed Discharge Will Violate TCEQ's Antidegradation Policy and Procedures, or Negatively Impact Aquatic or Terrestrial Wildlife Species, Including Livestock.**

**1. Background and Prima Facie Demonstration**

The Commission's antidegradation rule at 30 Texas Administrative Code § 307.5 establishes a multi-tiered policy to ensure that existing water quality uses, including aquatic life uses, will be maintained and not impaired by increases in waste loading. <sup>25</sup>Only the first two tiers apply to the Application.

<sup>26</sup>There is no priority watershed of critical [\*16] concern in Segment 1808 of the Guadalupe River Basin. <sup>27</sup>

A Tier 1 review applies to waterbodies that have limited aquatic life uses and provides that existing site specific uses and water quality sufficient to protect those uses will be maintained. <sup>28</sup>The TSWQS includes numerical criteria for some parameters, such as DO, and narrative criteria for other parameters, such as nutrients (phosphorus, nitrogen) and aesthetic parameters (odor, taste). <sup>29</sup>

A Tier 2 review applies to water bodies that have fishable/swimmable waters. <sup>30</sup>"Fishable/swimmable waters are defined as waters that have quality sufficient to support propagation of indigenous fish, shellfish, terrestrial life, and recreation in and on the water." <sup>31</sup>Determinations about whether water bodies exceed fishable and swimmable quality, and about whether a proposed activity will impair existing uses or degrade water quality, are to be made in accordance with procedures set out in the TSWQS and the 2010 Procedures to Implement the TSWQS (IPs). <sup>32</sup>

ED witness Jenna Lueg performed the antidegradation review for the Application. Her review included verifying the proposed discharge [\*17] point and the receiving waters down to the first classified segment and within three miles of the outfall. Ms. Lueg testified that, in general for this type of case, she performs an aquatic life and human health assessment on unclassified receiving water bodies, finds the appropriate uses for the classified receiving water, identifies any endangered species in the watershed and performs an antidegradation review if appropriate. <sup>33</sup>

Following the procedure set out in the IPs, Ms. Lueg performed an Aquatic Life Use (ALU) assessment on the unclassified receiving waters at, and immediately below, the proposed discharge point (unnamed

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<sup>25</sup> See also Ex. Applicants-4 at Bates 74.

<sup>26</sup> Ex. JL-1 at Bates 9.

<sup>27</sup> Ex. JL-1 at Bates 8.

<sup>28</sup> 30 Tex. Admin. Code § 307.5(b)(1).

<sup>29</sup> Ex. JL-1 at Bates 8.

<sup>30</sup> 30 Tex. Admin. Code § 307.5(b)(2).

<sup>31</sup> *Id.*

<sup>32</sup> 30 Tex. Admin. Code § 307.5(c)(1)(a); Ex. GD-3.

<sup>33</sup> Ex. KL-1 at Bates 5.

tributary of York Creek) and determined the waterbody to be a perennial pool with limited aquatic life use. This conclusion was based on 30 Texas Administrative Code § 307.4(h)(4), which provides that unclassified intermittent streams with perennial pools are presumed to have a limited aquatic life use.

<sup>34</sup>She explained that intermittent streams with perennial pools receive a limited ALU (with 3.0 mg/L DO) subject to a Tier 1 review. She also determined that the SCS Reservoir, located approximately two miles downstream from the proposed discharge point, is subject to a Tier 2 review [\*18] because it has been designated as having high aquatic use (with 5.0 mg/L DO). <sup>35</sup>

Ms. Lueg relied upon Staff's modeling to verify that the appropriate DO levels would be maintained to support the existing uses in the stream segments. Mr. Dubke testified that Staff's modeling was performed using the Continuously Stirred Tank Reactor (CSTR) consistent with the IPs and past Commission practice. Staff's CSTR modeling was conducted using site-specific stream geometry data provided in the Application, which included multiple cells, 10 transects or cross-sections over 0.6 miles, a critical low flow of 0.6 and a critical summer high temperature of 30.5 degrees Celsius. water quality modeling performed by Staff to conduct her antidegradation review.

In applying Staff's modeling to her antidegradation review of the segments, Ms. Lueg determined the proposed discharge contemplated in the Draft Permit will maintain the appropriate DO levels, thus maintaining existing water quality uses, and that the proposed discharge will not negatively impact aquatic or terrestrial life. <sup>36</sup>

## **2. Rebuttal Evidence and Arguments of the Protestants; and Additional Responsive Evidence and Arguments from Applicants, Staff, and OPIC**

### **a. ALU Assessment of the Unnamed Tributary of York Creek**

Carson argued that the Draft Permit is fundamentally flawed because the ED misclassified [\*19] the ALU for the unnamed tributary of York Creek. Carson argues that the ED relied on the presumption that unclassified intermittent streams with perennial pools have a limited ALU, but that the unnamed tributary actually has a high ALU. <sup>37</sup>

Although Carson does not dispute this unnamed tributary is an "unclassified intermittent stream with perennial pools," Carson challenges the presumption of limited ALU. To rebut this presumption, Carson offered the testimony of Mr. Flores, who asserts, unlike Ms. Lueg, he performed an onsite stream assessment and concluded that the unnamed tributary of York Creek met TCEQ's criteria for a high aquatic life use designation.

<sup>38</sup>Carson argues its assessment of higher aquatic use necessitated a more stringent Tier 2 antidegradation analysis of the segment, which the ED did not perform.

In response, ED witness Jenna Lueg reiterated that her ALU designation of the unnamed Tributary of York Creek was presumptively limited ALU, in accordance with the IPs, and she was unconvinced that Mr. Flores's ALU assessment was conducted in accordance with IPs. Specifically, he did not show a

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<sup>34</sup> *Id.*

<sup>35</sup> Ex. JL-1 at Bates 7.

<sup>36</sup> Ex. JL-1 at Bates 9.

<sup>37</sup> 30 Tex. Admin. Code § 307.4(h)(4).

<sup>38</sup> Ex. Carson-2 at 13 (Flores Dir.).

regional Index of Biotic Integrity (IBI), calculations on [\*20] fish or macroinvertebrates sampled, or a Habitat Quality Index (HQI) score for habitat, all of which are required by the IPs. <sup>39</sup>Nor did he provide evidence that his sampling was performed in accordance with IPs, nor any site-specific data to support a high ALU designation. <sup>40</sup>

## **b. Water Quality Modeling**

Carson also argued that the ED's water quality modeling was incorrect and that the permit will not meet the TSWQS regarding DO. Carson's witness, Tim Osting, testified that the stream geometry used by Staff in its modeling was incorrect and that his modeling relied upon site-specific data that he gathered.

<sup>41</sup>He also testified that he performed water quality modeling using an alternative model (QUAL2K) to the CSTR used by Staff and that his alternative modeling demonstrated the permit would violate TSWQS regarding the limits for DO even if the limited aquatic use designation were used. <sup>42</sup>Mr. Osting

testified that given time constraints, he was not able to conduct a full model calibration, but did include site-specific data and that his inputs were nevertheless based on literature frequently relied on by water modelers. <sup>43</sup>To further support use of its QUAL2K model, [\*21] Carson points out that the ED's CSTR model was similarly uncalibrated,

<sup>44</sup>that neither the CSTR or the QUAL2K models are required by the IPs, but are only suggested, along with using "best professional judgment" or "other suitable technique." <sup>45</sup>Carson further explained he used a different averaging time frame (7-day average) from Staff in his modeling because the detention time of the receiving water body is less than seven days. <sup>46</sup>

The ED and Applicants responded that Ms. Lueg's review complied with TCEQ's antidegradation requirements and that the CSTR model used by Staff for the review is the well-established model to verify the standards will be met based on the TCEQ's methods and procedures. <sup>47</sup>In contrast, the ED and

the Applicants take issue with Carson's expert's modeling methodology. They point out that Mr. Osting's analysis is based on a modeling technology -- QUAL2K -- that is not often used for this type of permit application. <sup>48</sup>While conceding that the QUAL2K is a reliable model, Applicants witness James

Manchin testified that it requires more data and calibration than Mr. Osting included. <sup>49</sup>Mr. Dubke testified that [\*22] Mr. Osting's modeling inputs were not clear and that "it is difficult to comment on the results without a full understanding of what the assumptions (or field data) were used in the various fields

<sup>39</sup> Ex. JL-1 at Bates 10.

<sup>40</sup> *Id.*

<sup>41</sup> Ex. Carson-1.

<sup>42</sup> Ex. Carson-1 at 23-24.

<sup>43</sup> Ex. Carson-3 at 21-22.

<sup>44</sup> Tr. 221 (Machin Cross).

<sup>45</sup> Ex. GD-3 at 83-99 (2010 Procedures to Implement the Texas Surface Water Quality Standards, Modeling Dissolved Oxygen).

<sup>46</sup> Ex. Carson-1 at 24.

<sup>47</sup> Ex. GD-1 at 11.

<sup>48</sup> Ex. Carson-1 at 15; Ex. Carson-3 at 15; Ex. GD-1 at Bates 10.

<sup>49</sup> Ex. GD-1 at Bates 10; Ex. Applicants-4 at Bates 83; James Machin explained that calibration "generally involves collection of a lot of field data like dissolved oxygen, for example, such that the model results are close to the actual measured results under the conditions at which it was measured in the field." Tr. at 221 (Machin cross).



of the QUAL2K model." <sup>50</sup>Moreover, Mr. Dubke testified that Mr. Osting's use of a more a restrictive 7-day average daily minimum in their modeling is incorrect. He testified that a 7-day average is not intended to capture the water quality, but is mainly enforcement related, and inconsistent with IPs. <sup>51</sup>

OPIC agrees that a preponderance of the evidence in the record establishes that the proposed discharge complies with TCEQ's antidegradation requirements.

### **3. ALJ's Analysis**

#### **a. ALU Assessment of the Unnamed Tributary of York Creek**

The ALJ finds that the preponderance of the credible evidence supports the ED's ALU designation of the unnamed tributary. The limited ALU designation for the unnamed tributary was based upon a presumption codified in the Commission's rules. <sup>52</sup>Carson failed to rebut the established prima facie determination of a limited ALU because Carson's testimony was conclusory and unverifiable due to a lack of underlying data to support its conclusions.

#### **b. Water Quality Modeling**

The ALJ finds that the preponderance of the credible [\*23] evidence supports the Staff's CSTR water quality modeling. No party rebutted that the CSTR model is the standard model pursuant to the IPs and past Commission practice. The evidence established that the QUAL2k model used by Carson can be a reliable model; however, in this case, Carson failed to timely provide Mr. Osting's underlying site-collected stream geometry data, rendering the model unverifiable. Staff relied upon site-specific stream geometry data provided by the Applicants. Further, Mr. Osting conceded that he did not conduct a full model calibration, which further limited the credibility of the outputs. Finally, Carson did not provide sufficient basis for Mr. Osting's departure from the IPs in employing a 7-day average in his modeling of DO.

Therefore, the ALJ concludes that the Draft Permit meets the TCEQ's antidegradation requirements.

### **B. Issue 2: Whether the Draft Permit Will be Protective of Surface Water and Groundwater Quality.**

#### **1. Background and Prima Facie Demonstration**

The parties did not explain in detail how the review of this issue (whether the Draft Permit will be protective of surface water and groundwater quality) was discreet from the previous explanation of the antidegradation review. In fact, there was significant overlap in the arguments on both issues relating to the ALU assessment [\*24] and the water quality modeling. As noted above, the ALJ found that Ms. Lueg's ALU designation for the unnamed tributary of York Creek and Staff's water quality modeling were both supported by the record. <sup>53</sup>With respect to arguments first raised under this particular issue, as

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<sup>50</sup> Ex. GD-1 at Bates 10.

<sup>51</sup> Tr. at 239 (Dubke Cross).

<sup>52</sup> 30 Tex. Admin. Code § 307.4(h)(4).

<sup>53</sup> *Id.*

explained by Mr. Dubke, DO is a "primary indicator of the general biologic health of a water body and is essential for the survival of many forms of aquatic life."<sup>54</sup>The purpose of DO modeling is to

determine water quality based effluent limits for the major oxygen related constituents in a proposed wastewater discharge.<sup>55</sup>TCEQ's modeling analyses focuses on predicting the average conditions of

both 24-hour average as well as the 30-day average in the receiving water bodies as a result of the proposed discharge.<sup>56</sup>Based on this modeling, Staff included an effluent set of "5/5/2/1", or 5 mg/L

five-day CBOD5, 5 mg/L TSS, 2 mg/L NH3-N, 1 mg/L TP, 126 CFU of E. coli per 100 ml, and 3.0 mg/L minimum DO for all three phases in the draft permit to meet the TSWQS.<sup>57</sup>Commonly called

tertiary treatment, 5/5/2/1 is the most stringent effluent set that TCEQ normally uses. [\*25]<sup>58</sup>The

inclusion of a phosphorus limit is anomalous for this type of permit,<sup>59</sup>and, as the Applicants point out, was not imposed by the ED, but was proposed by the Applicants.<sup>60</sup>

With respect to groundwater quality, Staff concluded that because the Draft Permit is protective of surface water quality, groundwater quality will be maintained as well.<sup>61</sup>

## **2. Rebuttal Evidence and Arguments of the Protestants; and Additional Responsive Evidence and Arguments from Applicants, Staff, and OPIC**

Carson argues, as above in Issue 1, that the Draft Permit would not be protective of the surface water and groundwater quality because, based on Mr. Osting's previously discussed analysis, DO concentration levels would fall below the 3.0 mg/L DO criteria.<sup>62</sup>As discussed previously in Issue 1, above, the

ED, the Applicants, and OPIC take issue with Carson's ALU assessment for the unnamed tributary of York Creek and Mr. Osting's water quality modeling. Carson adds to the previous argument that the Draft Permit fails to evaluate the water quality impact on DO at the SCS Reservoir, which was assigned a high aquatic life use with 5.0 mg/L DO.<sup>63</sup>In response to Carson, the Applicants' witness Mr. Machin

testified that there was no need to model the DO at the SCS Reservoir two miles downstream [\*26] because the CSTR model performed by Staff showed that the DO will have already recovered less than 1000 feet downstream of the proposed discharge point (in a stock pond being no lower than 4.18 mg/L at the upper part of the stock pond).<sup>64</sup>

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<sup>54</sup> ED, Ex. GD-1 at Bates 5.

<sup>55</sup> *Id.*

<sup>56</sup> ED Ex, GD-1 at Bates 9.

<sup>57</sup> Ex. Applicants-1 (Nieto Dir.) at 12 (Bates 14).

<sup>58</sup> Tr. at 260-62 (Lucg Cross); Ex. JL-1 at Bates 7; Ex. MCLB 3 at 2 (Draft Permit).

<sup>59</sup> Ex. Applicants-4 at Bates 93.

<sup>60</sup> Ex. Applicants-1 at Bates 14; Ex. Applicants-4 at Bates 94.

<sup>61</sup> Ex. GD-1 at Bates 12.

<sup>62</sup> Ex. Carson-1.

<sup>63</sup> Ex. GD-1 at 5 (Dubke Dir.).

<sup>64</sup> Ex. Applicants-4 at Bates 92.

Carson also asserts, based on Mr. Osting's modeling, that the Draft Permit would contribute 0.3784 kg/day of TP into the receiving water bodies, adding 0.005 mg/L of phosphorus daily into the SCS Reservoir, thereby increasing aquatic growth and nuisance algae.<sup>65</sup>

Applicants counter, based on Mr. Machin's expert testimony, that Mr. Osting's estimate of an additional 0.005 mg/L of phosphorus per day into the SCS Reservoir is unfounded, given the unpredictable changes that phosphorus undergoes (interacting with limestone, absorbing onto suspended sediments, settling out, and removal by riparian vegetation) thereby not building up in the water column.<sup>66</sup>

Finally, Applicants add that the proposed effluent set is the most stringent issued for municipal wastewater permits and is the same effluent set as San Marcos's facility, which has ninety times greater flow.<sup>67</sup> Applicants witness James Machin testified that [\*27] the TSWQS would be met with even a less stringent treatment level. The ED, Applicants, and OPIC contend that the Draft Permit will be protective of surface water and groundwater quality.

### 3. ALJ's Analysis

The ALJ has already found that Mr. Osting's ALU assessment for the unnamed tributary of York Creek and the QUAL2K model are not credible and reliable and that Carson did not present any credible evidence to rebut the prima facie demonstration relating to the DO modeling. Carson's contention that the Draft Permit would contribute 0.3784 kg/day of TP into the receiving water bodies, adding 0.005 mg/L of phosphorus daily into the SCS Reservoir, thereby increasing aquatic growth and nuisance algae is based on the same unreliable modeling and, therefore, subject to the same conclusion that there is no evidence to rebut the prima facie demonstration relating to the modeling of TP.

With respect to Carson's contention that the Draft Permit failed to model DO at the SCS Reservoir, the ALJ is persuaded that the DO modeling was not needed because DO was shown by Staff's modeling to have recovered prior to reaching the reservoir.

The prima facie demonstration that the Draft Permit is protective of groundwater [\*28] quality was not rebutted with evidence or argument. Therefore, the ALJ finds that the Draft Permit complies with TCEQ's rules and procedures for the TPDES permit applications and finds that the effluent limits set out in the Draft Permit are protective of surface water and groundwater quality.

#### C. Issue 3: Whether the Nutrient Limits in the Draft Permit Comply with Applicable TSWQS.

On this issue, Carson repeated the arguments addressed above in Issue 2, relating to TP. The ALJ has found that Carson's contention that the Draft Permit would contribute 0.3784 kg/day of TP into the receiving water bodies, adding 0.005 mg/L of phosphorus daily into the SCS Reservoir is based on the same unreliable modeling and, therefore, subject to the same conclusion that there is no evidence to rebut the prima facie demonstration relating to the modeling of TP. Therefore, the ALJ finds that the Draft Permit complies with TCEQ's rules and procedures for the TPDES permit applications and finds that the nutrient limits set out in the Draft Permit will meet the TSWQS.

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<sup>65</sup> Ex. Carson-1; Tr. at 224 (Machin Cross).

<sup>66</sup> Ex. Applicants-4 at Bates 84.

<sup>67</sup> Ex. Applicants-4 at Bates 81-82.

**D. Issue 4: Whether the Draft Permit Complies with Applicable Requirements to Abate and Control Nuisance Odors, as Set Forth in 30 TAC § 309.13(e).**

No party contests that the draft permit complies with applicable requirements to abate and control nuisance odors, as provided by 30 Texas Administrative Code § 309.13(e). Accordingly, this issue is set out in the findings of fact and conclusions of law [\*29] without further discussion.

**E. Issue 5: Whether the Application is Complete and Accurate.**

**1. Background and Prima Facie Demonstration**

Mr. Oyenobi was the ED's permit coordinator for the Application. He testified that he performed a review of the Application and found it to be complete and accurate. <sup>68</sup>

**2. Rebuttal Evidence and Arguments of the Protestants; and Additional Responsive Evidence and Arguments from Applicants, Staff, and OPIC**

Carson and San Marcos incorporated their respective arguments relating to the other eight issues in this matter to argue the Application is not complete and accurate. Specifically, Carson re-urges that the stream geometry provided by the Applicant was incorrect and Staff has incorrectly presumed the limited ALU for the unnamed tributary of York Creek. San Marcos argues that the Application was not complete and accurate with respect to the regionalization review because Applicants did not provide a certified letter from San Marcos to MCLB regarding a request for service.

Applicants and the ED maintain that the Application was complete and accurate. OPIC did not provide argument on the issue.

**3. ALJ Analysis**

The parties did not raise any unique issues here that are not already addressed elsewhere in this Proposal for Decision (PFD). Carson's concerns regarding stream geometry and the ALU classification were previously addressed and the ALJ found that the preponderance [\*30] of the credible evidence supports the ED's ALU designation of the unnamed tributary and the use of Applicants' stream geometry data. Further, for the reasons addressed in more detail below in Issue 7, the ALJ concludes that Draft Permit is not contrary to the State's regionalization policy or Texas Water Code § 26.0282. Specifically, the ALJ agrees with ED witness Mr. Oyenobi that MCLB substantially complied with the Application's regionalization requirement to communicate with neighboring systems regarding obtaining service, and that a certified letter to prove such was not necessary.

**F. Issue 6: Whether the Applicants' compliance history or technical capabilities raise any issues regarding the Applicants' ability to comply with the material terms of the permit that warrant denying or altering the terms of the Draft Permit.**

**1. Background and Prima Facie Demonstration**

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<sup>68</sup> Ex. JO-1 at Rates 14.

Because Crystal Clear is the proposed operator of the Facility, Mr. Oyenobi performed a review of Crystal Clear's compliance history as required by 30 Texas Administrative Code, Chapter 60, and found no concerns with respect to Crystal Clear's compliance history or any technical concerns.<sup>69</sup>

## 2. Arguments

Carson did not rebut the prima facie demonstration that Crystal Clear has a satisfactory compliance history and the technical capability to operate the Facility. Instead, Carson expresses concerns that, in contrast to San Marcos' plant, the proposed Facility will not be continuously monitored and staffed. [\*31]<sup>70</sup>

On rebuttal, Applicants contend that Crystal Clear is well qualified to operate the proposed plant, because it has a "high compliance" rating, Crystal Clear's General Manager, Mr. Taylor, has almost 30 years of experience as a wastewater operator and has held a Class A TCEQ certificate for over 20 years, and Crystal Clear's staff includes at least six additional TCEQ-licensed operators.<sup>71</sup> Applicants noted that Mr. Oyenobi found Crystal Clear to have only a "satisfactory compliance" rating, but argue that Mr. Oyenobi's rating was based on a compliance history that was not introduced into the record and noted that regardless, Mr. Oyenobi had no concerns with Crystal Clear's compliance history.<sup>72</sup> In its Closing Argument, the ED appears to concede that Crystal Clear has a "high compliance" rating.<sup>73</sup>

## 3. ALJ Analysis

The ALJ finds that Carson did not present any evidence to rebut the prima facie demonstration on this issue. Carson's concerns that the proposed plant will not be continuously monitored or staffed do not specifically relate to Crystal Clear's compliance history, nor do those concerns negate Crystal Clear's technical capabilities established by a [\*32] preponderance of evidence in the record. Additionally, Carson provides no law or precedent to suggest that its concerns warrant alterations to the Draft Permit.

### G. Issue 7: Whether Issuance of the Draft Permit is Contrary to the State's Regionalization Policy or Texas Water Code § 26.0282.

#### 1. Background and Prima Facie Demonstration

Texas has adopted a 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."<sup>74</sup> The Commission is authorized to implement this policy by designating regional providers in accordance with the procedure provided in Texas Water Code Subchapter C. The Water Code also allows the Commission to make permitting decisions based on the existence and needs of a designated regional provider.<sup>75</sup> However, no regional provider has been designated for the area

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<sup>69</sup> Ex. JO-1 at Bates 15.

<sup>70</sup> Ex. Carson-1, Att. 1 at p. 12.

<sup>71</sup> Ex. Applicants-2 at Bates 40.

<sup>72</sup> Ex. JO-1 at Bates 12, 15.

<sup>73</sup> ED's Closing Arguments (not paginated) ("Crystal Clear . . . has an 0.00 rating . . .").

<sup>74</sup> Tex. Water Code §§ 26,003, .081(a).

<sup>75</sup> Tex. Water Code, Subchapter C.

where the proposed facility is located. Further, the Commission has not yet adopted rules implementing the State's regionalization policy. Although the Commission previously issued guidance on regionalization (RG-357 which is no longer an active publication from the TCEQ), this document was not consulted by Staff in its review. As will be discussed below in the rebuttal evidence and arguments of the protestants, the parties [\*33] disputed whether this document remains applicable and, if so, whether it pertains to wastewater permitting.<sup>76</sup>

Because San Marcos has raised the issue of regionalization, some relevant background information is provided here to give context to the later arguments and evidence. With respect to its location, the proposed Facility and its discharge into the unnamed tributary of York Creek would be located within the water certificate of convenience and necessity (CCN) of Crystal Clear and in the extraterritorial jurisdiction of San Marcos. The proposed Facility and its discharge are not within the sewer CCN of any retail public utility. No portion of the Facility is located within the corporate limits of San Marcos.

Returning now to the Application review, even though the TCEQ has no formal guidance or rules specific to implementation of the State's regionalization policy, in order to effectuate its policy of encouraging regionalization of wastewater services, TCEQ requires applicants to provide certain information to allow TCEQ to conduct a regionalization analysis of the application. In furtherance of this analysis, the application form for a new TPDES permit includes [\*34] Technical Reports 1 and 1.1, which call for information related to regionalization. In these Technical Reports, an applicant for a new domestic wastewater discharge permit is required to provide information regarding other wastewater systems that are located near the applicant's proposed facility.<sup>77</sup> Here, the responses submitted by the Applicants were deemed sufficient by the ED and used to perform a regionalization analysis.<sup>78</sup>

The answers to some of the questions are in dispute. To begin with, Question 1.B.3 on the Technical Report requests information regarding any domestic wastewater treatment facility or collection system located within three miles of the proposed facility.<sup>79</sup> In response, the Applicants provided information and a map showing San Marcos's waste water treatment plant (WWTP) located within three miles of the proposed subdivision.

Next, the Technical Report requires copies of certified letters to such a facility and the facility's responses concerning whether it has capacity and is willing to provide the applicant with service.

<sup>80</sup>In response to this requirement, the Applicants provided emails between MCLB and San Marcos, which [\*35] indicated that MCLB had submitted an Outside City Limits Utility Extension Request to San Marcos.

<sup>81</sup>After months of negotiation, MCLB balked at San Marcos's requirement that the Subdivision follow City lot dimensions and standards as a condition of service and MCLB requested a formal response from San Marcos regarding these requirements.<sup>82</sup> San Marcos responded via

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<sup>76</sup> Ex. SM-9 ( *The Feasibility of Regionalizing Water and Wastewater Utilities*, RG-357--Jan. 2003).

<sup>77</sup> *Id.*

<sup>78</sup> Administrative Record (Application, Domestic Technical Report 1.1, Section 1 at Bates MCLB 63-64).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Administrative Record (Application, Attachment 7).

email, stating, "Given this property's adjacency to City limits and the proposed density of the site, we will not support extension of City wastewater service without annexation. In order to move forward with developing the site as proposed, please submit an application for annexation." <sup>83</sup>

The Technical Report also inquires whether "a permitted domestic wastewater treatment facility or a collection system located within three miles of the proposed facility currently has the capacity to accept or is willing to expand to accept the volume of wastewater proposed in this application." Applicants responded "no" to this question. <sup>84</sup>

If the Applicants had answered that a facility had the capacity or was willing to expand, the Technical Report would have required that they provide justification [\*36] for their proposed facility and an analysis that shows the costs of connecting to the facility versus constructing the proposed facility.

<sup>85</sup>MCLB did not submit a justification or cost analysis because they concluded that San Marcos's requirement that it seek annexation constituted a denial of service. <sup>86</sup>The ED found this reasoning persuasive. Mr. Oyenobi reviewed the Application for the ED and determined that it met the TCEQ's policies relating to regionalization.

<sup>87</sup>With respect to a new wastewater treatment facility, Staff testified that the Application requirements further the State's policy of encouraging an Applicant to consider regionalization, but do not require an Applicant to connect to another facility. <sup>88</sup>

## **2. Rebuttal Evidence and Arguments of the Protestants; and Additional Responsive Evidence and Arguments from Applicants, Staff, and OPIC**

Applicants, the ED and OPIC all agree that issuance of the Permit would not violate the TCEQ's regionalization policy. On the other hand, San Marcos and Carson argue that the Applicants failed to correctly perform the required regionalization review. To some extent, the parties all combined Issue 7 (regionalization) and Issue 8 (need) into one argument in their respective briefs. While these issues have overlapping arguments, the [\*37] issue of regionalization is presented here and the issue of need is presented separately in Issue 8, below, to comport with the Commission's Interim Order of Referral.

In general, the parties differ as to whether issuance of the Draft Permit would be contrary to the State's regionalization policy. San Marcos and Carson appear to argue that where regionalization is feasible, an Applicant must show an exemption from the policy, whereas, the ED and Applicants argue that an Applicant substantially complies with the State's policy if it makes an effort to investigate potential regionalization.

San Marcos relies upon a 2007 Commission Order ( *MidTex*) as support for its contention that service is available from San Marcos and that issuing a permit to Applicants would be inconsistent with the State's

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Administrative Record (Application, Domestic Technical Report 1.1, Section 1(B)(1)(3)).

<sup>85</sup> *Id.*

<sup>86</sup> Ex. Applicants-3 at Bates 60.

<sup>87</sup> Ex. JO-1 at Bates 15.

<sup>88</sup> Ex. JO-1 at Bates 9-10.

policy favoring regionalization and TCEQ precedent on the issue.<sup>89</sup>In that case, the Commission found that the City of Pflugerville (Pflugerville) was willing and had capacity to provide service, and that the applicant in that case had not met its burden to prove that its proposed facility would meet TCEQ standards. San Marcos emphasized that the *MidTex* Order also included a Conclusion of [\*38] Law which stated "service from a qualified or willing municipality is not rendered unavailable because the municipality insists on compliance with its interpretation of other laws it administers."<sup>90</sup>

San Marcos witness Mr. Rubinstein testified that regionalization is encouraged in the TCEQ's Application unless infeasible. According to Mr. Rubinstein, regionalization is feasible unless one of the three exceptions apply:

1. There is not a system within a reasonable distance of a planned system;
2. Service was requested and the request for service was denied; or
3. An exception to regionalization is warranted based on costs, affordable rated [sic], financial, managerial and technical capabilities of the nearby system.<sup>91</sup>

Applicants responded that because TCEQ has never promulgated rules regarding regionalization, and to the extent that there is a Commission policy to encourage regionalization, there is no regulatory basis for TCEQ to compel regionalization in this case. Applicants argue they have complied with the TCEQ policy inasmuch as it exists, because they have shown that San Marcos's condition of requiring annexation or compliance [\*39] with its development standards was tantamount to a denial of service.

Applicants also argue that obtaining service from Crystal Clear is consistent with the State's preference for encouraging regionalization (as stated in now unpublished TCEQ RG-357). TCEQ RG-357 was relied upon by Mr. Rubinstein in his testimony but, San Marcos did not refer to RG-357 in its closing briefs.

<sup>92</sup>Nevertheless, Applicants dedicated significant portions of its argument as to whether RG-357 should be considered valid TCEQ guidance. Applicants' argue that the guidance is inapplicable to the proceeding because: (1) the guidance refers only to new public water systems and new water and wastewater CCNs and does not refer to wastewater permitting; and (2) it is no longer published by TCEQ since CCN regulation was transferred to the Public Utility Commission. Even if RG-357 is valid, Applicants argue that it would support a finding that Crystal Clear's provision of sewer service is consistent with the State's policy to encourage regionalization because Crystal Clear is an established political subdivision serving approximately 6,000 customers in stand-alone systems and because Crystal Clear holds the [\*40] water service CCN for the area of the proposed subdivision. Applicants also point out that the State has a countervailing policy to allow certain property owners the right to have control over who their service provider is by opting-out of a CCN, which MCLB has done at some point to remove the proposed subdivision from San Marcos's proposed sewer CCN expansion. Applicants also contend that the

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<sup>89</sup> *An Order Denying the Application of Midtex Partners, Ltd., for Water Quality Permit No. 14472-001, TCEQ Docket No. 2005-1720-MWD*, 2002 WL 34341425 (Dec. 2007).

<sup>90</sup> *Id.*

<sup>91</sup> Ex. SM-3 at 14.

<sup>92</sup> *See* Exs. SM-3 at 11-12, SM-9.



condition of annexation for service is an end-run around the Local Government Code, Chapter 43 requirements of consent from a landowner for annexation.

With regard to more specific arguments regarding regionalization, there are three main points of contention addressed below, including whether the Application was deficient because: (a) it did not include a certified request for service from San Marcos; (b) it incorrectly indicated there are no facilities with capacity or willingness to increase capacity within three miles of the Subdivision; and (c) it did not include a comparative cost analysis between the cost to obtain service from San Marcos versus the cost to construct the Facility.

#### **a. Request for Service**

Carson and San Marcos contend that the Application is deficient because Applicants failed to comply [\*41] with TCEQ Application requirements, in Technical Report 1.1, to submit a certified request for service (and response) and that Applicants falsely claimed that San Marcos denied them service, when the Applicants had actually chosen to withdraw the request for service. Mr. Taggart testified that MCLB had been in discussions with the City regarding the provision of sewer service, and when the City inquired about putting MCLB's Out of City request for service on the City Council Agenda, MCLB abruptly withdrew their request. Mr. Taggart stated that Applicants never requested a certified letter of denial, and none was provided.<sup>93</sup> Instead, San Marcos contends that Applicants were not denied, but simply do not wish to connect with the its system because MCLB did not want to comply with San Marcos' land use requirements. According to San Marcos, MCLB should have sought a waiver from those requirements. Even though San Marcos had conditions for service, it argues, such conditions are no different than conditions for service such as impact fees, which are typically required of an applicant, and should not excuse MCLB from fulfilling the regionalization requirements in the Application. [\*42] Allowing the Applicants to avoid the process of formally requesting service from an existing provider and performing a cost analysis, San Marcos contends, undermines the State's regionalization policy.

The ED maintains that the Applicants substantially complied with the TCEQ's regionalization policy and application requirements because Applicants provided emails between MCLB and San Marcos in which San Marcos stated that service was denied unless MCLB submitted an application to annex the Subdivision into the City. Mr. Onyenobi testified that the purpose of the certified letter is to prove that the Applicant took the necessary step of reaching out to the neighboring facility regarding obtaining service when, as is often the case, the neighboring facility has not provided a response to the request for service.

<sup>94</sup>Mr. Onyenobi states that a certified letter requesting service or certified letter of denial of service are not required under the TCEQ regionalization policy in all cases. Because Applicants provided evidence of email communication with San Marcos bearing the city seal, the certified letter is not needed to demonstrate that the effort was made. Mr. Onyenobi also [\*43] stated that the ED cannot compel an applicant to accept annexation as a condition of service and the Applicants may consider the fact that San Marcos placed such a condition as a denial of service.

OPIC agrees with Applicants and the ED, that San Marcos and Carson have not demonstrated that the issuance of the permit would violate the State's regionalization policy because San Marcos's response to a request for service did not constitute an agreement to provide service.

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<sup>93</sup> Ex. SM-2 at 6.

<sup>94</sup> Ex. JO-1 at Bates 9.

### **b. San Marcos's Capacity**

San Marcos and Carson argue that Applicants' misrepresented in the Application that there were no utilities within three miles with capacity, or willingness to increase capacity, to serve the Subdivision. Instead, according to San Marcos, city facilities are within three miles and have the capacity and desire to serve Applicants. To support this contention, San Marcos provided the testimony of Mr. Taggart, Director of Public Services for the City. Mr. Taggart testified that San Marcos operates a WWTP under TCEQ Permit No. WQ0010273002.<sup>95</sup> The facility is permitted to receive an average daily flow of 9 MGD of which, San Marcos currently has an excess capacity of 3.8 MGD--capacity sufficient to treat [\*44] Applicants' proposed discharge of 0.1 MGD.<sup>96</sup> Mr. Taggart also testified that there is a 15-inch line within 175 feet from the proposed Subdivision property line and there is a lift station approximately 300 feet from the Subdivision.<sup>97</sup> Mr. Taggart states that the lift station was constructed within the last two years and was specifically oversized to accommodate development in the area including the Subdivision.

Applicants and the ED maintain that San Marcos's capacity is irrelevant, because, as discussed above, it denied Applicants service (OPIC argues somewhat differently that San Marcos's response cannot be construed as an agreement to provide service). Further, Applicants and the ED contend that the Commission's implementation of the State's regionalization policy does not compel an Applicant to receive service from a provider. Nevertheless, Applicants provided evidence and argument to dispute San Marcos's contentions that it has capacity. Ms. Nieto and Mr. Ingalls both testified that the lift station 300 feet from the Subdivision does not have current existing capacity to serve the Subdivision and that based on Mr. Taggart's admissions on cross-examination, [\*45] it is unclear whether the existing lift station could accommodate the Subdivision once built out completely.<sup>98</sup>

### **c. Cost Analysis**

Finally, San Marcos and Carson argue the ED failed to require Applicants to perform an analysis of the cost to build the proposed facility versus the cost to connect to San Marcos's permitted facility, which is required by the Technical Report. As noted above, pursuant to Technical Report 1.1, if the Applicants had answered "yes" that a facility had the capacity or was willing to expand, the Technical Report would have required that they provide justification for their proposed facility and an analysis that shows the costs of connecting to the facility versus constructing the proposed facility. Also as noted above, MCLB did not submit a justification or cost analysis because they concluded that San Marcos's requirement that it seek annexation constituted a denial of service.

Applicants argue submittal of a comparative cost-analysis was not required by section 1.1 of the Technical Report because San Marcos lacks capacity and its condition of service on annexation was tantamount to a denial of service. In other words, Applicants argue that they truthfully [\*46] answered that there was not another service provider within three miles with capacity or a willingness to increase capacity and, in such a case, the Technical Report exempts the further step of conducting the cost analysis.

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<sup>95</sup> Ex. SM-2 at 5.

<sup>96</sup> *Id.*

<sup>97</sup> Ex. SM-2 at 9.

<sup>98</sup> Ex. Applicants-1 at Bates 20.

Nevertheless, in response to San Marcos's arguments, Mr. Ingalls performed such an analysis on behalf of Applicants and concluded that connection with San Marcos would cost \$ 3,176,555 more than the cost to construct a stand-alone system to be operated by Crystal Clear.<sup>99</sup> Mr. Ingalls testified that imposition of San Marcos's development standards would result in impact fees, loss of total buildable lots due to the requirement for alleyways, and increased paving costs for the alleyways.<sup>100</sup> Mr. Ingalls also provided testimony that MCLB and the homebuilders with whom they worked considered the additional costs of imposition of San Marcos's development standards and/or annexation on the proposed subdivision to be too onerous and costly and tantamount to a denial of service.<sup>101</sup>

Carson and San Marcos respond that the cost analysis performed by Applicants' witness Mr. Ingalls was deficient, inaccurate, and unreliable. San Marcos argues that [\*47] Mr. Ingalls did not calculate or provide the costs for the construction of the Facility (which was based on a bid) or the additional costs relating to annexation (additional paving of alleyways and roads), did not provide the basis for his estimate of the cost of impact fees, that he incorrectly calculated the cost of the impact fees because he used the wrong number of lots, that the basis for his cost to upsize San Marcos's lift station and the cost for an on-site lift station were based only on unverifiable opinion testimony.

### 3. ALJ Analysis

The ALJ agrees with Applicants, the ED, and OPIC that the Applicants met the requirements regarding regionalization and the ED's review of the Application was sufficient.

The ALJ concludes that Draft Permit is not contrary to the State's regionalization policy as stated in Texas Water Code § 26.0282. Section 26.0282 gives the TCEQ broad and permissive discretion in implementing the State's regionalization policy. The TCEQ has adopted no rules to implement the State's policy. While the ALJ finds that the regulatory guidance TCEQ previously adopted (RG-357) is probative on the issue, it does not appear the guidance is still in effect. Further, to the extent the [\*48] guidance is still in effect, it is not specific to wastewater permits and also tends to show that service from Crystal Clear could be considered regionalization under that document because Crystal Clear is a large provider of service to stand-alone systems and because Crystal Clear holds the water CCN for the proposed subdivision. The only TCEQ official guidance in the record clearly and specifically directed to wastewater permit applications is the Application Technical Report 1.1 and associated instructions.

With respect to the arguments that Applicants and the ED did not comply with the requirements of the Application's Technical Reports, the ALJ finds that because Section 26.0282 gives the TCEQ broad and permissive discretion to implement the State's regionalization policy and the TCEQ has not adopted any rules to implement the State's policy, the ED's interpretation of its own application and Technical Reports to allow Applicants to provide emails in lieu of a certified letter requesting service and to exempt Applicants from conducting a comparative cost-analysis is reasonable and does not violate the State's regionalization policy.

The ALJ gives deference to the ED's interpretation [\*49] that, with respect to utilities within three miles of the proposed facility, the purpose of the regionalization review is to encourage Applicants to explore

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<sup>99</sup> Ex. Applicants-13.

<sup>100</sup> *Id.*

<sup>101</sup> Ex. Applicants-3 at 58.

and give serious consideration to connection to such utilities--not to provide neighboring utilities leverage and means to require such connection. Thus, the preponderance of the evidence shows that MCLB spent significant time exploring and negotiating service from San Marcos and that San Marcos ultimately placed conditions on its willingness to serve the Subdivision. It required that Applicants comply with San Marcos's land-use codes and that the Subdivision to be annexed into the City. The evidence shows that the ED agreed with Applicants that MCLB could consider San Marcos's conditioning of service on annexation and more stringent development standards to be a denial of service. The ED also did not require a certified letter because the emails from the City indicated that Applicants has substantially complied with the Application requirement to reach out to San Marcos and explore the provision of sewer service. The ALJ finds the Staff's determinations are a reasonable interpretation of its own application form.

Finally, the [\*50] ALJ does not find the 2007 Commission Order in *MidTex* compels the result San Marcos desires. The Commission made clear in *MidTex* that its decision was not intended to be binding precedent (or ad hoc rulemaking), because it states that the Commission is not tied to a specific course of action relating to regionalization but may exercise discretion to encourage and promote regionalization based on the evidence presented on a case-by-case basis. <sup>102</sup>Specifically, Conclusion of Law No. 8 states:

Water Code § 26.0282 does not require the Commission to reach specific conclusions before issuing a permit. *Nor does it require the Commission to deny a permit even if the Commission concludes that an alternative system is available in the region. Instead, section 26.0282 gives the Commission several options that it may exercise in a permit case to encourage and promote regionalization based on the evidence presented concerning the need for the permit and other systems, existing and proposed in the geographical area.* <sup>103</sup>(emphasis added).

In the case of *MidTex*, as here, compliance with Pflugerville's development codes was an issue, but the posture of the issue was not identical to question in this Application. In *MidTex*, the developer argued that, even though the proposed development was within Pflugerville's jurisdiction, its development codes did not apply to the proposed development because previous approval from the county for the proposed development predated Pflugerville's annexation. In *MidTex*, the ALJ found that the question whether Pflugerville's development codes applied to the proposed [\*51] development was not within the Commission's jurisdiction to decide. Here, it is undisputed that San Marcos's more stringent development standards are inapplicable to the Subdivision, absent annexation of the Subdivision. In this case, there is ample evidence in the record to support the ED's conclusion that San Marcos's conditioning service on annexation and/or compliance with San Marcos's more stringent development standards could be considered a denial of service-which the ALJ has already determined to be with in the ED's discretion.

In sum, the preponderance of the evidence supports a finding that the Application was not contrary to the State's regionalization policy or Texas Water Code § 26.0282.

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<sup>102</sup> See *Texas State Board of Pharmacy v. Witcher*, 447 S.W.3d 520,536 (Tex. App.--Austin 2014, pet. granted) ("An ad hoc rule is a general statement of law or policy that is made in the context of a contested case and the impact of which will extend to persons beyond those who are parties to the proceeding at hand.").

<sup>103</sup> *Id.*

## **H. Issue 8: Whether the Commission Should Deny or Alter the Terms and Conditions of the Draft Permit Based on the Consideration of Need under Texas Water Code § 26.0282.**

### **1. Background and Prima Facie Demonstration**

As discussed above, Section 26.0282 of the Texas Water Code gives the Commission permissive authority to "deny or alter the terms and conditions of the proposed permit, amendment, or renewal based on 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 ..."

To address this issue, Technical Reports 1 and 1.1 of the permit application form request information regarding an applicant's proposed flows and need for the [\*52] facility.<sup>104</sup> The information requested includes the design flow and estimated construction start date of each phase; the wastewater source; population estimates and anticipated growth rate of the proposed service area; and the estimated start date for effluent disposal.<sup>105</sup>

The Application indicated that the proposed facility will serve the approximately 410 lots of the Subdivision. The Application estimated that waste disposal would begin in July 2020 and would be completed within five years in three phases, with a maximum design flow of .10 MGD and a maximum 2-hour peak flow of .20 MGD. Based in part on this information, Mr. Oyenobi reviewed the Application for the ED and found that there was a need for the Draft Permit.<sup>106</sup>

### **2. Rebuttal Evidence and Arguments of the Protestants; and Additional Responsive Evidence and Arguments from Applicants, Staff, and OPIC**

San Marcos and Carson argue that the Draft Permit is not needed, primarily because San Marcos has the desire to serve the subdivision, along with capacity and nearby facilities. These facilities, San Marcos and Carson argue, offer superior environmental protection. These arguments are duplicative of arguments addressed elsewhere in this PFD.<sup>107</sup>

### **3. ALJ Analysis**

The ALJ previously considered San Marcos's and Carson's regionalization [\*53] arguments and found that the Draft Permit is not contrary to the State's regionalization policy or Texas Water Code § 26.0282. The ALJ further finds the preponderance of the evidence shows the need for the Draft Permit because the Subdivision will have approximately 410 lots that will need to dispose of wastewater. The evidence showed that Applicants' waste disposal would begin in July 2020 and would be completed within five years in three phases, with a maximum design flow of .10 MGD and a maximum 2-hour peak flow of .20 MGD, and this evidence was unrebutted.

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<sup>104</sup> Administrative Record (Application, Domestic Technical Reports 1, 1.1).

<sup>105</sup> Administrative Record (Application, Domestic Technical Report 1, Section I and Domestic Technical Report 1.1, Section 1(A)).

<sup>106</sup> ED Ex. JO-1 at Bates 15-16.

<sup>107</sup> San Marcos also raised, for the first time in its Closing Reply Brief (after the close of the hearing), that the Application should be denied for the Applicant's failure to provide evidence regarding influent quality. Issues raised for the first time in a reply brief will not be considered. Further, San Marcos's argument would fail for evidentiary support because San Marcos did not cite any testimony or other evidence regarding the alleged failure of the ED or Applicants to consider the proposed influent quality.

Because the ALJ finds that the preponderance of the evidence supports a finding of need for the permit under Texas Water Code § 26.0282, the ALJ does not recommend denial or changes or alterations the terms and conditions of the Draft Permit.

## **I. Issue 9: Whether the Draft Permit is Protective of the Health of Nearby Residents.**

### **1. Background and Prima Fade Demonstration**

One of the purposes of the TSWQS is to "maintain the quality of water in the state consistent with public health and enjoyment."<sup>108</sup>This purpose has been implemented in both the narrative and numerical

requirements of the TSWQS. As part of the narrative requirements, water in the state must not be toxic to humans from ingesting the water or aquatic organisms, contacting the skin, or recreating in the water.

[\*54]<sup>109</sup>In addition, surface waters must not be toxic to terrestrial life, including livestock and domestic animals, due to contacting the water or ingesting the water or aquatic organisms.

<sup>110</sup>Therefore, insofar as the Permit complies with the TSWQS, the ED review concluded, it is protective of the health of nearby residents.<sup>111</sup>

### **2. Rebuttal Evidence and Arguments of the Protestants; and Additional Responsive Evidence and Arguments from Applicants, Staff, and OPIC**

As discussed previously, Carson argues that the Permit does not meet the TSWQS standards.

<sup>112</sup>Carson contends that the potential risk to the existing residents and livestock on its ranch would be minimized by instead interconnecting with the San Marcos system.

The Applicants and the ED contend that the Draft Permit is protective of the health of nearby residents because it meets the TSWQS. The ED maintains that the TSWQS and the IPs under which the application was reviewed, are designed to be protective of human health and the health of nearby residents.

<sup>113</sup>Similarly, the Applicants point out that this is particularly true when, as here, the Applicants have volunteered for treatment that is more stringent than typically required for a plant of this type.

### **3. ALJ Analysis**

The ALJ previously found that the evidence demonstrates that [\*55] the Draft Permit complies with the TSWQS and, as such, agrees with the Applicants and the ED that the Permit is protective of the health of nearby residents.

## **J. Summary**

The evidence established that the Draft Permit complies with the Texas Water Code and TCEQ rules and that no further conditions are required.

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<sup>108</sup> 30 Tex. Admin. Code § 307.1; accord Tex. Water Code § 26.003.

<sup>109</sup> 30 Tex. Admin. Code §§ 307.4(b)(7), (d); .6(b)(3).

<sup>110</sup> 30 Tex. Admin. Code §§ 307.4(b)(7), (d); .6(b)(4).

<sup>111</sup> Ex. JO-1 at Bates 16.

<sup>112</sup> Ex. Carson-1 at Att. C, Section 5.4.

<sup>113</sup> Ex. JL-1 at Bates 14.

## **VII. TRANSCRIPTION COSTS**

30 Texas Administrative Code § 80.23(d) provides for the allocation of transcript costs among the parties, excluding the ED and OPIC. In allocating those costs, the Commission is to consider the following applicable factors in allocating reporting and transcription costs among the other parties:

- . The party who requested the transcript;
- . The financial ability of the party to pay the costs;
- . The extent to which the party participated in the hearing;
- . The relative benefits to the various parties of having a transcript; and
- . Any other factor which is relevant to a just and reasonable assessment of costs.

The ALJs ordered Applicants to arrange for and pay the costs of having a court reporter attend the hearing and prepare a transcript, subject to allocation of such costs at the end of the proceeding. In a separate filing, Applicants have provided an invoice from Kennedy Court Reporting Service [\*56] reflecting the amount of transcript costs, totaling \$ 4,100. No party has disputed that amount.

Each of the parties participated in the proceedings and benefitted from having a transcript for use in preparing their respective briefs. Applicants requested that Applicants, San Marcos, and Carson each pay one-third of the transcript costs. Carson takes no position and San Marcos argues that it has already paid \$ 1,200 for the costs of receiving a transcript and it should not be required to pay more. There is no direct evidence concerning the respective financial abilities of the parties to pay the transcript cost, although Carson notes that it is the only non-public entity in the hearing and the costs it is assessed will be borne by a private landowner and rancher. It is reasonable to infer from the evidence, however, that each of the parties have the financial resources to pay the transcript cost.

Based on the above, the ALJs recommend that the Commission assess the Applicants, San Marcos, and Carson each one-third of the transcription costs.

## **VIII. RECOMMENDATION**

The ALJ recommends that the Commission adopt the attached proposed order containing Findings of Fact and Conclusions of Law and issue [\*57] the Draft Permit to the Applicants. Some Findings of Fact concern undisputed matters not discussed above. All requests for findings of fact that are not included in the Proposed Order are denied.

**SIGNED March 22, 2021.**

**ROSS HENDERSON**

**ADMINISTRATIVE LAW JUDGE**

**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

**AN ORDER**

**GRANTING THE APPLICATION BY**

**CRYSTAL CLEAR SPECIAL UTILITY DISTRICT AND MCLB LAND, LLC****FOR TPDES PERMIT NO. WQ0015266002****IN HAYS COUNTY, TEXAS;****SOAH DOCKET NO. 582-20-4141;****TCEQ DOCKET NO. 2020-0411-MWD**

On , the Texas Commission on Environmental Quality (TCEQ or Commission) considered the application of Crystal Clear Special Utility District (Crystal Clear) and MCLB Land, LLC (MCLB) (collectively, Applicants), for a new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0015266002 in Hays County, Texas. A Proposal for Decision (PFD) was presented by Ross Henderson, Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who, with ALJ Rudy Calderon, conducted an evidentiary hearing concerning the application on December 18 and 21, 2020, in Austin, Texas via Zoom video conferencing.

After considering the PFD, the Commission makes the following findings of fact and conclusions of law.

**I. FINDINGS OF FACT****Application**

1. Applicants filed their application (Application) for a new TPDES permit with the TCEQ on March 4, 2019.
2. The Application requested authorization to treat and discharge treated domestic wastewater [\*58] from the Independence Trail Wastewater Treatment Plant (Facility), SIC Code 4952, to be located approximately 1,000 feet west of Francis Harris Lane and 800 feet south of South Old Bastrop Highway in Hays County, Texas 78666, to an unnamed tributary of York Creek, thence to a Soil Conservation Service Site 5 Reservoir (SCS Reservoir), thence to an unnamed tributary of York Creek, thence to York Creek, thence to the Lower San Marcos River in Segment No. 1808 of the Guadalupe River Basin.
3. The Application requests authorization to treat and discharge treated domestic wastewater from the proposed Facility at a daily average flow not to exceed 0.035 million gallons per day (MGD) in the Interim I phase, 0.065 MGD in the Interim II phase, and 0.10 MGD in the Final phase for the purpose of serving the 410-lot, 73-acre Independence Trail single family residential subdivision (the Subdivision).
4. The Executive Director (ED) declared the Application administratively complete on April 5, 2019.
5. The ED completed the technical review of the Application, prepared a draft permit (Draft Permit) and made it available for public review and comment.

**The Draft Permit**

6. The Facility would be a microBLOX [\*59] membrane bioreactor (MBR) system configured with one anoxic zone, and one aerobic zone and two isolatable MBR/aerobic zones. Processes outside of the MBR may include equalization and sludge storage. Treatment units will include lift station, fine screen, flow



equalization, anoxic basin, aerobic basin, membrane basin, chlorine contact chamber, and sludge holding tank.

7. The effluent limitations in the Draft Permit, based on a thirty-day average, are as follows for all phases:

Five-Day Carbonaceous Biochemical Oxygen Demand	Total Suspended Solids	Ammonia Nitrogen	Total Phosphorous	E. coli	Dissolved Oxygen
5 milligrams per liter (mg/L) (1.5 lbs/day)	5 mg/L (1.5 lbs/day)	2 mg/L (0.6 lbs/day)	1 mg/L (0.3 lbs/day)	126 colony forming units (CFU) or most probable number (MPN) per 100 mL	3.0 mg/L minimum

8. The effluent shall contain a chlorine residual of at least 1.0 mg/L and shall not exceed a chlorine residual of 4.0 mg/L after a detention time of at least 20 minutes based on peak flow.

### **Notice and Jurisdiction**

9. The Notice of Receipt of Application and Intent to Obtain Water Quality Permit was published on April 17, 2019, in the *San Marcos Daily Record* in English, and on May 1, 2019, in *La Voz* Newspaper in Spanish.

10. The Combined Notice of Public Meeting [\*60] and Notice of Application and Preliminary Decision was published on August 9, 2019, in the *San Marcos Daily Record* in English, and on August 18, 2019, in *La Prensa Texas* in Spanish.

11. A public meeting was held on September 10, 2019, at the Courtyard by Marriott in San Marcos in San Marcos, Texas. The public comment period ended on September 17, 2019.

12. Chris Carson and Carson Select Investments, LP (Carson) and the City of San Marcos (City or San Marcos) (collectively, Protestants) timely filed a formal Public Comment and Request for Contested Case Hearing.

13. The ED filed its Response to Public Comment on January 31, 2020.

14. TCEQ considered hearing requests at its June 10, 2020 open meeting and issued an Interim Order on June 16, 2020, directing that the following nine issues be referred to SOAH, denying **all** issues not referred, and setting the maximum duration of the hearing at 180 days from the date of the preliminary hearing until the date the PFD is issued by SOAH:

A) Issue 1: Whether the proposed discharge will violate TCEQ's antidegradation policy and procedures, or negatively impact aquatic or terrestrial wildlife species, including livestock;

B) Issue 2: Whether the Draft Permit will [\*61] be protective of surface water and groundwater quality;

C) Issue 3: Whether the nutrient limits in the Draft Permit comply with applicable Texas Surface Water Quality Standards (TSQWS);

D) Issue 4: Whether the Draft Permit complies with applicable requirements to abate and control nuisance odors, as set forth in 30 Texas Administrative Code § 309.13(e);

E) Issue 5: Whether the Application is complete and accurate;

F) Issue 6: Whether the Applicants' compliance histories or technical capabilities raise any issues regarding the Applicants' ability to comply with the material terms of the permit that warrant denying or altering the terms of the Draft Permit;

G) Issue 7: Whether issuance of the Draft Permit is contrary to the State's regionalization policy or Texas Water Code § 26.0282;

H) Issue 8: Whether the Commission should deny or alter the terms and conditions of the Draft Permit based on the consideration of need under Texas Water Code § 26.0282; and

I) Issue 9: Whether the Draft Permit is protective of the health of nearby residents.

15. On August 20, 2020, notice of the preliminary hearing was published in English in the *San Marcos Daily Record* and in Spanish in *El Mundo Newspaper*. The notice included the time, date, and place of the hearing, as well as the matters asserted, in accordance [\*62] with the applicable statutes and rules.

### **Proceedings at SOAH**

16. On September 21, 2020, a preliminary hearing was convened in this case via videoconference by SOAH AU Ross Henderson. The following parties appeared and were admitted: attorney Helen Gilbert appeared for MCLB; attorneys Shan Rutherford and Geoffrey Kirshbaum appeared for Crystal Clear; attorney Bobby Salehi appeared for the ED; attorney Dominique McLeggan Brown appeared for the Office of Public Interest Counsel (OPIC); attorney Patrick Reznik appeared for Carson; and attorney Arturo Rodriguez Jr. appeared for San Marcos.

17. The Administrative Record and Applicants' exhibits MLCB-1 through 5 were admitted into the record and jurisdiction was noted by the ALJ.

18. A second preliminary hearing was held telephonically on December 11, 2020, with SOAH ALJs Ross Henderson and Rudy Calderon presiding. All parties appeared through their respective representatives and the ALJs ruled on all timely filed motions.

19. On December 18, 2020, ALJs Henderson and Calderon convened the hearing on the merits via videoconference and all parties appeared through their respective representatives. The hearing continued on December 21, 2020, and [\*63] closed that day. San Marcos filed a Motion to Certify a Question to the Commission on December 21, 2020, which was denied in SOAH Order No. 4. The record closed on January 20, 2021, after the parties filed post-hearing briefs. ALJ Henderson prepared the Proposal for Decision.

### **Antidegradation**

20. The unnamed tributary of York Creek is an unclassified receiving water with a perennial pool and limited aquatic life use. There is a high aquatic life use for the SCS Reservoir. The designated uses for the San Marcos River Segment 1808 are primary contact recreation, public water supply, and high aquatic life use. There is no priority watershed of critical concern in Segment 1808 of the Guadalupe River Basin.

21. The effluent limitations in the Draft Permit, based on a thirty-day average, are the most restrictive of any TPDES permit issued by TCEQ.

22. The effluent limitations in the Draft Permit will maintain and protect existing instream uses.

### **Surface Water/Groundwater Quality**

23. The prima facie demonstration that the Draft Permit is protective of groundwater quality was not rebutted with evidence or argument.

24. TSWQS apply to surface water in the state and are set by the Commission at levels designed to be protective [\*64] of public health, aquatic resources, terrestrial life, and other environmental and economic resources. The applicable water quality standards are the TSWQS in 30 Texas Administrative Code Chapter 307.

25. The TSWQS consist of general standards, narrative standards, surface water segment-specific numeric standards, numeric standards for toxic substances, and antidegradation review.

26. The TSWQS establish specific uses for each classified water body in the state and also provide numeric criteria for each classified stream.

27. To protect and maintain a stream's aquatic life use, TCEQ evaluates a discharge's effect on the dissolved oxygen (DO) in the received stream.

28. Pursuant to the TSWQS, the specified designated uses and DO criteria for Segment 1808 of the Lower San Marcos River in the Guadalupe River Basin are designated as limited aquatic life use and 3.0 mg/L DO.

29. Pursuant to the TSWQS screening procedures, the unnamed tributary of York Creek is designated limited aquatic life use and 3.0 mg/L DO, the SCS Reservoir is designated high aquatic life use and 5.0 mg/L DO, and York Creek is designated as limited aquatic life use and 3.0 mg/L DO.

30. The existing [\*65] water quality uses of the receiving waters of the unnamed tributary of York Creek, York Creek, SCS Reservoir and the San Marcos River will not be impaired by the Draft Permit as long as Crystal Clear complies with the Draft Permit, which will satisfy the antidegradation Tier 1 requirements.

31. The Draft Permit will not cause significant degradation of water quality in the receiving waters of the unnamed tributary of York Creek, York Creek, SCS Reservoir and the San Marcos River as long as Crystal Clear complies with the Draft Permit, which will satisfy the antidegradation Tier 2 requirements.

32. The ED used a Continuously Stirred Tank Reactor model (CSTR) to perform water quality modeling. CSTR is the well-established model to verify the standards will be met for uses in a segment like the receiving waters in this Application, namely, reservoirs, ponds, and pooled reaches of streams.

33. To ensure the effluent will be properly disinfected, the Draft Permit requires the effluent during both interim and final phases to contain a chlorine residual of at least 1.0 mg/L and not exceed a chlorine residual of 4.0 mg/L after a detention time of at least 20 minutes based on peak [\*66] flow, which shall be monitored five times per week by grab sample.

34. The testing required to ensure compliance with the Draft Permit's bacteria limits, including the daily average of 126 CPU or MPN of E. coli per 100 mL, will ensure that the Facility's disinfection processes are functioning properly and will protect the primary contact recreation use of the receiving waters.

### **Nutrient Limits**

35. The Draft Permit requires advanced wastewater treatment, commonly called tertiary treatment, as proposed by the Applicants with an effluent set of 5/5/2/1, or 5 mg/L five-day carbonaceous biochemical oxygen demand, 5 mg/L total suspended solids, 2 mg/L ammonia-nitrogen, and 1 mg/L total phosphorus. This set is the most stringent effluent set that TCEQ normally uses. This inclusion of a phosphorus limit is anomalous for this type of permit.

36. The Draft Permit treatment and limits are adequate to meet the TSWQS.

### **Nuisance Odors**

37. The Facility will be located at least 150 feet from the nearest property boundary. This buffer zone satisfies the TCEQ's nuisance odor abatement requirements.

### **Completeness and Accuracy of Application**

38. The Application included all required information, was complete, and was accurate.

### **State's Regionalization Policy/Tex. Water Code 26.0282**

39. The proposed [\*67] Facility and its discharge into the unnamed tributary of York Creek would be located within the water certificate of convenience and necessity (CCN) of Crystal Clear and in the extraterritorial jurisdiction of the City of San Marcos.

40. The proposed Facility and its discharge are not within the sewer CCN of any retail public utility.

41. No regional provider has been designated for the area where the Subdivision is located.

42. In order to effectuate its policy of encouraging regionalization of wastewater services, TCEQ requires applicants to provide certain information to allow TCEQ to conduct a regionalization analysis of the application.

43. TCEQ's Domestic Technical Report 1.1 requires an applicant to indicate if any portion of the proposed service area is located in an incorporated city. If the service area does overlap any city limits, the applicant must identify that city and provide correspondence from the city that discusses whether the city is willing to provide the applicant with service.

44. No portion of the Facility is located within the corporate limits of San Marcos.

45. San Marcos' collection system is located within three miles of the [\*68] Subdivision.

46. As part of its Application, MCLB provided email correspondence to and from San Marcos regarding whether San Marcos could provide sewer service. After months of discussion between MCLB and San Marcos, San Marcos provided the following response, "Given this property's adjacency to City limits and the proposed density of the site, we will not support extension of City wastewater service without annexation. In order to move forward with developing the site as proposed, please submit an application for annexation."

47. San Marcos's response requiring annexation of the Subdivision was properly considered a denial of service by Applicants and the ED's staff.

48. Absent a designated regional provider, the State's regionalization policy encourages, but does not compel, connection to a facility.

49. Crystal Clear is an established political subdivision serving approximately 6,000 customers.

50. The provision of sewer service from Crystal Clear to the Subdivision furthers the State's policy of encouraging regionalization because Crystal Clear is a large service provider in the region and because Crystal Clear holds the water CCN for the area where the Subdivision [\*69] is located.

51. Applicants were exempt from providing a comparative cost analysis of obtaining service from San Marcos versus constructing a new facility.

#### **Consideration of Need Under Tex. Water Code § 26.0282**

52. The Subdivision will require the provision of sewer service to accommodate the planned construction of single-family homes and associated wastewater to be produced by the inhabitants of those homes beginning in July 2020 and to be completed within five years in three phases, with a maximum design flow of .10 MGD and a maximum 2-hour peak flow of .20 MGD.

53. The Subdivision is subject to an executed service agreement between Crystal Clear and MCLB for the provision of retail water and wastewater public service.

#### **Compliance Histories and Technical Capabilities**

54. Crystal Clear is designated by TCEQ as having the highest level of compliance history with respect to TCEQ regulations pertaining to the operation of its existing wastewater treatment facility.

55. Crystal Clear has a wastewater operator on staff who has held a Class A TCEQ certificate for over 20 years and has at least six additional TCEQ-licensed operators on staff.

#### **Health of Nearby Residents**

56. The Draft Permit will not adversely affect the health of nearby residents, human health, including the health of residents [\*70] living within Crystal Clear's district boundaries or the City's extraterritorial jurisdiction.

#### **Transcription Costs**

57. Reporting and transcription of the hearing on the merits was warranted because the hearing lasted for two days.

58. All parties fully participated in the hearing by presenting witnesses and cross examining witnesses.

59. All parties benefitted from preparation of a transcript.

60. There was no evidence that any party subject to allocation of costs is financially unable to pay a share of the costs.

61. The total cost for recording and transcribing the preliminary hearing and the hearing on the merits was \$ 4,100.

62. Applicants, San Marcos, and Carson should each pay one-third of the transcription costs.

## **II. CONCLUSIONS OF LAW**

1. TCEQ has jurisdiction over this matter. Tex. Water Code, chs. 5 and 26.

2. SOAH has jurisdiction to conduct a hearing and to prepare a PFD in contested cases referred by the Commission under Texas Government Code § 2003.047.

3. Notice was provided in accordance with Texas Water Code § 5.115,26.028; Texas Government Code §§ 2001.051 and 2001.052, and 30 Texas Administrative Code §§ 39.405 and 39.551.

4. The Application is subject to the requirements in Senate Bill 709, effective September 1, 2015. Tex. Gov't Code § 2003.047(i-1)4i-3).

5. Applicants filing of the Administrative Record [\*71] established a prima facie case 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. Tex. Gov't Code § 2003.047(i-1); 30 Tex. Admin. Code § 80.17.

6. Applicant retains the burden of proof on the issues regarding the sufficiency of the Application and compliance with the necessary statutory and regulatory requirements. 30 Tex. Admin. Code § 80.17(a).

7. Carson and San Marcos did not rebut the prima facie demonstration by demonstrating that one or more provisions in the Draft Permit violate a specifically applicable state or federal requirement that relates to a matter referred by the TCEQ. 30 Tex. Admin. Code §§ 80.17(c), 80.117(c).

8. The Draft Permit complies with the TCEQ's antidegradation policy and would not adversely affect livestock and terrestrial wildlife. 30 Tex. Admin. Code §§ 307.4(b)(7), (d); 307.5; 307.6(b)(4).

9. The Draft Permit contains sufficient provisions to prevent nuisance odors. 30 Tex. Admin. Code §§ 217.38 and 309.13(e).

10. TCEQ may require all reasonable methods to encourage and promote the development of area-wide and regional wastewater systems to protect water quality. Tex. Water Code §§ 26.003, 26.081(a).

11. TCEQ has not adopted any formal rules requiring regionalization pursuant to Texas Water Code § 26.0282. [\*72]

12. The City is not a designated regional provider pursuant to 30 Texas Administrative Code, ch. 351.
13. Texas Water Code § 26.0282 does not require the Commission to reach specific conclusions before issuing a permit. Nor does it require the Commission to deny a permit even if the Commission concludes that an alternative system is available in the region. Instead, section 26.0282 gives the Commission several options that it may exercise in a permit case to encourage and promote regionalization based on the evidence presented concerning the need for the permit and other systems, existing and proposed, in the geographical area.
14. The Application demonstrates compliance with TCEQ's regionalization policy. Tex. Water Code §§ 26.003, 26.081(a)-(b), (d); 26.0282.
15. The Application demonstrates a need for the Draft Permit. Tex. Water Code § 26.0282.
16. No transcript costs may be assessed against the ED or OPIC because the TCEQ's rules prohibit the assessment of any cost to a statutory party who is precluded by law from appealing any ruling, decision, or other act of the Commission. 30 Tex. Admin. Code § 80.23(d)(2).
17. Factors to be considered in assessing transcript costs include: the party who requested the transcript; the financial ability of the party to pay the costs; the extent [\*73] to which the party participated in the hearing; the relative benefits to the various parties of having a transcript; the budgetary constraints of a state or federal administrative agency participating in the proceeding; and any other factor which is relevant to a just and reasonable assessment of the costs. 30 Tex. Admin. Code § 80.23(d)(1).
18. Considering the factors in 30 Texas Administrative Code § 80.23(d)(1), a reasonable assessment of hearing transcript costs against parties to the contested case proceeding is: one-third to Applicants, one-third to Carson, and one-third to San Marcos.

**NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:**

1. Applicants' Application for Texas Pollutant Discharge Elimination System Permit No. WQ0015266002 is granted as set forth in the Draft Permit.
2. Applicants, Carson, and San Marcos must each pay one-third of the transcription costs.
3. The Commission adopts the ED's Response to Public Comment in accordance with 30 Texas Administrative Code § 50.117.
4. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
5. The effective date of this Order is the date the Order is final, as provided by Texas Government Code § 2001.144 and 30 Texas Administrative Code § 80.273.
6. TCEQ's [\*74] Chief Clerk shall forward a copy of this Order to all parties.
7. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

**ISSUED:**

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

**Jon Niermann, Chairman, For the Commission**

TX State Office Of Administrative

Hearings TX State Office Of Administrative

Hearings

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End of Document



# TCEQ Regionalization Policy for Wastewater Treatment

**Information for applicants and the public about the requirements associated with regionalization and TCEQ's role in reviewing domestic wastewater permit applications.**

## On this page:

- **What is wastewater regionalization?**
- **When does TCEQ assess for wastewater regionalization?**
- **How has TCEQ decided on wastewater regionalization in the past?**
- **What do I need to provide as an applicant, for TCEQ to assess the need and availability of regionalization during the wastewater permitting process?**
- **How can the public participate in the wastewater permitting process?**

## What is wastewater regionalization?

Regionalization is the administrative or physical combination of two or more community wastewater systems for improved planning operation or management.

Texas Water Code (TWC) Section 26.081 provides Texas' regionalization policy for wastewater treatment. It states that TCEQ is to implement a 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 the water in the state".

In furtherance of that policy TWC Section 26.0282 authorizes TCEQ, when considering issuing a permit to discharge waste, to deny or alter the terms and conditions of a proposed permit based on need and the availability of existing or proposed area-wide or regional waste collection, treatment, and disposal systems.

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## When does TCEQ assess for wastewater regionalization?

TCEQ will assess for the need and availability of regionalization for wastewater during the permitting process. The presence of a wastewater treatment facility or wastewater collection system within three miles of a proposed new wastewater treatment facility or the expansion of an existing facility is not an automatic basis to deny an application or to compel an applicant to connect to an existing facility.

TCEQ may approve new, renewal, and major amendment applications for discharges of wastewater in any of the following situations where:

- There is no wastewater treatment facility or collection system within three miles of the proposed facility.
- The applicant requested service from wastewater treatment facilities within the 3 miles, and the request was denied.
- The applicant can successfully demonstrate that an exception to regionalization should be granted based on costs, affordable rates, and/or other relevant factors.
- The applicant has obtained a Certificate of Convenience and Necessity (CCN) for the service area of the proposed new facility or the proposed expansion of the existing facility.

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## How has TCEQ decided on wastewater regionalization in the past?

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TCEQ has not denied any wastewater permit actions based solely on regionalization, and the agency supports new applicants and existing facilities productively working together to provide quality and cost-effective service. The following concerns related to regionalization were raised during previous wastewater permit actions and subsequent legal proceedings:

- lack of timely and cost-efficient wastewater services within the surrounding area
- lack of detailed cost analysis and comparison
- lack of thorough communication with existing facilities within a three-mile radius
- discharges within the Cibolo Creek Watershed per Title 30 , Texas Administrative Code (30 TAC), Section 351.65



TCEQ has previously included agreed language between the applicant and protestants in the "Other Requirements" section of the proposed permit that contains requirements about future coordination if the existing wastewater provider is able to provide service to proposed area.

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## What do I need to provide as an applicant, for TCEQ to assess the need and availability of regionalization during the wastewater permitting process?

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TCEQ requires that you include justification of permit need in all wastewater permit applications for new facilities and all applications to amend an existing permit. Section 1.1 of the Domestic Technical Report for wastewater permit applications also requires the following information:

1. Determine whether or not there are any permitted domestic wastewater treatment facilities or collection systems within a three-mile radius of the proposed facility.
  - Tools to use:
    - [Wastewater Outfall Map Viewer](#) 
    - [PUC CCN Map Viewer](#) 

2. Contact any existing permitted domestic wastewater treatment facilities within a three-mile radius to inquire if they currently have the capacity to accept or are willing to expand to accept the volume of wastewater proposed.
  - If an existing facility does have the capacity to accept the proposed wastewater, submit an analysis of expenditures required to connect to the existing facility or collection system versus the cost of constructing and operating the proposed new facility or expansion.
3. Provide copies of all correspondence with the owners and/or operators of any existing permitted domestic wastewater treatment facilities and collection systems within a three-mile radius of the proposed facility.

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## How can the public participate in the wastewater permitting process?

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- [Environmental Permitting: Participating in the Process](#)
- [Permits for Municipal Wastewater Treatment Plants: Learning More](#)

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[Wastewater and Stormwater Home](#)

[Available Water Quality General Permits](#)

[Industrial Wastewater Discharges: Am I Regulated?](#)

[Sewage Sludge and Biosolids: Am I Regulated?](#)

[Wastewater Pretreatment](#)

[Water Quality Permits for Agriculture](#)

[Completing Water Quality Applications](#)



[How are we doing? Take our customer satisfaction survey](#)

### Related Content

- [Delinquent Fees and penalties](#)
- [Occupational Licensing](#)
- [State 401 Certification of Federal 404 Dredge and Fill Permits](#)
- [Advisory Groups](#)
- [Water Quality Management Plan](#)

## **Participating in the Process**

### **Wastewater Permit Applications Participating in the Review Process**

In our review of wastewater permit applications, the public's opportunity to participate is different for each type of application.

Jon Niermann, *Chairman*  
Emily Lindley, *Commissioner*  
Bobby Janecka, *Commissioner*  
Toby Baker, *Executive Director*



## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

November 30, 2022

TO: Persons on the attached mailing list.

RE: AIRW 2017-7, L.P.  
TCEQ Docket No. 2021-1214-MWD; SOAH Docket No. 582-22-1016  
TPDES Permit No. WQ0015878001

### **Decision of the Commission on Application.**

The Texas Commission on Environmental Quality ("TCEQ" or "Commission") has made a decision to grant the above-referenced application. Enclosed with this letter is a copy of the Commission's order. Unless a Motion for Rehearing ("MFR" or "motion") is timely filed with the chief clerk, this action of the Commission will become final. A MFR is a request for the Commission to review its decision on the matter. Any motion must explain why the Commission should review the decision.

### **Deadline for Filing Motion for Rehearing.**

A MFR must be received by the chief clerk's office no later than the 25<sup>th</sup> day after the date that the Commission's order on this application is signed. The date of signature is indicated on the last page of the enclosed order.

Motions may be filed in accordance with the requirements in Senate Bill 1267 (84th Regular Session, effective September 1, 2015) and Texas Government Code § 2001.146 with the chief clerk electronically at [www.tceq.texas.gov/goto/efilings](http://www.tceq.texas.gov/goto/efilings) or by filing an original and 7 copies with the Chief Clerk at the following address:

Laurie Gharis, Chief Clerk  
TCEQ, MC-105  
P.O. Box 13087  
Austin, Texas 78711-3087  
Fax: 512/239-3311

In addition, a copy of the motion must be sent on the same day to each of the individuals on the attached mailing list as indicated by an asterisk (\*). A certificate of service stating that copies of the motion were sent to those on the mailing list must also be sent to the chief clerk. The procedures for filing and serving a MFR and responses are located in 30 TAC § 80.272, Texas Governmental Code § 2001.146 as revised by Senate Bill 1267 (84th Regular Session, effective September 1, 2015), and 30 TAC §§ 1.10 and 1.11. The hardcopy filing requirement is waived by the General Counsel pursuant to 30 TAC § 1.10(h).

The written motion must contain (1) the name and representative capacity of the person filing the motion; (2) the style and official docket number assigned by SOAH and official docket number assigned by the Commission; (3) the date of the order; (4) the particular findings of fact or conclusions of law that are the subject of the complaint and any evidentiary or legal ruling claimed to be erroneous; and (5) the legal and factual basis for the claimed error.

Unless the time for the Commission to act on the MFR is extended, the MFR is overruled by operation of law at 5:00 p.m. on the 55th day after the date that the Commission's order on this matter is signed.

If you have any questions or need additional information about the procedures described in this letter, please call the Public Education Program, toll free, at 1-800-687-4040.

Sincerely,

A handwritten signature in black ink that reads "Laurie Gharis". The signature is written in a cursive, flowing style.

Laurie Gharis  
Chief Clerk

LG/mt

Enclosure

AIRW 2017-7, L.P.  
TCEQ Docket No. 2021-1214-MWD; SOAH Docket No. 582-22-1016  
TPDES Permit No. WQ0015878001

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INTERESTED PERSONS:

See attached list.

FOR THE EXECUTIVE DIRECTOR  
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FOR THE CHIEF CLERK  
via electronic mail:

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Office of Chief Clerk MC-105  
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FOR THE STATE OFFICE OF  
ADMINISTRATIVE HEARINGS  
via e-Filing:

The Honorable Andrew Lutostanski  
The Honorable Katerina DeAngelo  
Administrative Law Judge  
State Office of Administrative Hearings  
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# TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER** GRANTING THE APPLICATION BY AIR-W 2017-7 L.P. FOR TPDES PERMIT NO. WQ0015878001 IN WILLIAMSON COUNTY, TEXAS; SOAH DOCKET NO. 582-22-1016; TCEQ DOCKET NO. 2021-1214-MWD

On November 16, 2022, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the application of AIR-W 2017-7 L.P. (AIRW) for a new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0015878001 in Williamson County, Texas. A Proposal for Decision (PFD) was presented by Andrew Lutostanski and Katerina DeAngelo, Administrative Law Judges (ALJs) with the State Office of Administrative Hearings (SOAH), who conducted an evidentiary hearing concerning the application on May 23-25, 2022, in Austin, Texas via Zoom videoconferencing. After considering the PFD, the Commission makes the following findings of fact and conclusions of law.

## I. FINDINGS OF FACT

### Application

1. AIRW filed its application (Application) for a new TPDES permit with TCEQ on April 6, 2020.
2. The Application requested authorization to discharge treated domestic wastewater from a proposed plant site, the Rockride Lane Water Resource Reclamation Facility (Facility), to be located approximately 500 feet southeast of the intersection of Rockride Lane (County Road 110) and Westinghouse Road (County Road 111), in Williamson County, Texas 78626. AIRW proposes to build the Facility to serve the Mansions of Georgetown III development, an 880-house subdivision.

3. The treated effluent will be discharged via pipe, thence through a culvert, thence to an unnamed tributary, thence to Mankins Branch, thence 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.
4. The Executive Director (ED) declared the Application administratively complete on June 19, 2020, and technically complete on October 26, 2020.
5. The ED completed the technical review of the Application, prepared a draft permit (Draft Permit) and made it available for public review and comment.
6. AIRW currently owns the site at which the proposed Facility will be located.
7. AIRW, through its affiliate, entered into Non-Standard Service Agreements (NSSAs) with Jonah Water Special Utility District (Jonah) on April 20, 2022, for the provision of retail wastewater services to the development.
8. Under the NSSAs, Jonah will own and operate the Facility once the TPDES permit is issued and transferred to it under 30 Texas Administrative Code section 305.64.

### **The Draft Permit**

9. The Draft Permit would authorize a discharge of treated domestic wastewater at a daily average flow not to exceed 200,000 gallons per day (or 0.20 million gallons per day (MGD)).
10. The Facility will have treatment units including aeration basins, a final clarifier, a cloth effluent filter, chemical injection for phosphorus removal, aerated sludge holding and thickening tank, and a chlorine contact chamber. The Facility has not been constructed.
11. 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.

12. The effluent limitations in the Draft Permit, based on a 30 day average, include: 7 milligram per liter (mg/L) Five-Day Carbonaceous Biochemical Oxygen Demand; 10 mg/L Total Suspended Solids; 2 mg/L Ammonia Nitrogen; 0.5 mg/L Total Phosphorus; a minimum dissolved oxygen (DO) of 4.0 mg/L, pH in the range of 6.0 to 9.0, and *Escherichia coli* (*E. coli*) not to exceed 126 colony forming units/most probable number per 100 milliliter.
13. The effluent shall contain a chlorine residual of at least 1.0 mg/L and shall not exceed a chlorine residual of 4.0 mg/L after a detention of at least 20 minutes based on peak flow.

### **Notice and Jurisdiction**

14. The Notice of Receipt of the Application and Intent to Obtain Water Quality Permit was published on June 28, 2020, in the *Williamson County Sun* in English and, on June 25, 2020, in *El Mundo Newspaper* in Spanish.
15. The Combined Notice of Receipt and Intent to Obtain a Water Quality Permit and Notice of Application and Preliminary Decision was published on December 13, 2020, in the *Williamson County Sun* in English and, on December 17, 2020, in *El Mundo Newspaper* in Spanish.
16. The comment period for the Application closed on January 19, 2021.
17. TCEQ's Office of the Chief Clerk received timely comments from various individuals and the City of Georgetown (the City). The City also timely filed a request for a Contested Case Hearing based upon issues raised during the public comment period.
18. The ED filed his Response to Public Comments on August 6, 2021.
19. On November 3, 2021, the Commission considered the hearing request at its open meeting and, on November 9, 2021, issued an Interim Order, directing that the following eight issues be referred to SOAH, denying all issues not referred, and setting the maximum duration of the hearing at 180 days from the date of the preliminary hearing until the date the PFD is issued by SOAH:
  - A) Issue A: Whether the Draft Permit is protective of water quality and the existing uses of the receiving waters in accordance with applicable Texas Surface Water Quality

Standards (TSQWS), including protection of aquatic and terrestrial wildlife;

- B) Issue B: Whether the Draft Permit is consistent with the state's regionalization policy and demonstration of need for the volume requested in the application for a new discharge permit pursuant to Texas Water Code section 26.0282;
- C) Issue C: Whether the Draft Permit is protective of the health of the nearby residents;
- D) Issue D: Whether the Draft Permit complies with applicable requirements regarding nuisance odors;
- E) Issue E: Whether the Application is substantially complete and accurate;
- F) Issue F: Whether the Draft Permit complies with the TCEQ's antidegradation policy and procedures;
- G) Issue G: Whether the Draft Permit should be altered or denied based on the AIRW's compliance history; and
- H) Issue H: Whether the Draft Permit contains sufficient provisions to ensure protection of water quality, including necessary operational requirements.

20. On January 16, 2022, notice of the preliminary hearing was published in English in the *Williamson County Sun* and, on January 13, 2022, in Spanish in *El Mundo Newspaper*. The notice included the time, date, and place of the hearing, as well as the matters asserted, in accordance with the applicable statutes and rules.

#### **Proceedings at SOAH**

21. On February 24, 2022, a preliminary hearing was convened in this case via videoconference by SOAH ALJs Andrew Lutostanski and Ross Henderson. Attorney Helen Gilbert appeared for AIRW; attorney Patricia Carls appeared for the City; attorney Bobby Salehi appeared for the ED; attorney Jennifer Jamison appeared for the Office of Public Interest Counsel (OPIC); Jim Webb appeared for himself; and John Carlton appeared for Jonah.

22. Mr. Webb and Jonah sought party status at the preliminary hearing, and the ALJs granted those requests. Mr. Webb submitted his withdrawal from the proceeding on May 17, 2022.
23. Jurisdiction was noted by the ALJs and the Administrative Record, and AIRW's exhibits AIRW Exhibit 1-7 were admitted.
24. A second preliminary hearing was held via videoconference by SOAH ALJs Lutostanski and Katerina DeAngelo on May 12, 2022. All parties appeared through their respective representatives and the ALJs ruled on all timely-filed motions and objections.
25. On May 23-25, 2022, ALJs Lutostanski and DeAngelo convened the hearing on the merits via videoconference and all parties appeared through their respective representatives. The record closed on June 24, 2022, after the parties filed post-hearing briefs.

**Protection of Water Quality and Existing Uses, Including Aquatic and Terrestrial Wildlife**

26. The prima facie demonstration that the Draft Permit is protective of water quality and the existing uses of the receiving waters in accordance with applicable Texas Surface Water Quality Standards (TSWQS), including protection of aquatic and terrestrial wildlife, was not rebutted.
27. TSWQS apply to surface water in the state and are set by the Commission at levels designed to be protective of public health, aquatic resources, terrestrial life, and other environmental and economic resources. The applicable water quality standards are the TSWQS in 30 Texas Administrative Code Chapter 307.
28. The TSWQS consist of general standards, narrative standards, surface water segment-specific numeric standards, numeric standards for toxic substances, and antidegradation review.
29. The TSWQS establish specific uses for each classified water body in the state and also provide numeric criteria for each classified stream.
30. The provisions of the Draft Permit are protective of water quality and are in accordance with the TSWQS.
31. The Draft Permit is protective of water quality and existing uses of the receiving water.

32. The Draft Permit is protective of aquatic and terrestrial wildlife.

**Regionalization**

33. To effectuate its policy of encouraging regionalization of wastewater services, TCEQ requires an applicant to provide certain information to allow TCEQ to conduct a regionalization analysis.
34. No part of the Facility or development is within the City's corporate limits.
35. The proposed Facility and its discharge are within the City's extraterritorial jurisdiction.
36. Properties in the City's extraterritorial jurisdiction that desire wastewater services from the City must first submit a petition for voluntary annexation.
37. The ordinance requiring annexation for wastewater services may be waived by the City Council.
38. As part of its Application, AIRW provided email correspondence to and from nearby providers regarding whether they would provide sewer service.
39. AIRW's written communications with nearby providers were sufficient, and AIRW was not required to submit certified letters because the emails provide similar tracking and traceability.
40. AIRW explored securing wastewater services from the City, and the City placed conditions on providing service, including: the Facility site would have to be annexed into the City and comply with the City's land use restrictions.
41. There was no indication that the City was willing to waive the annexation and land use requirements.
42. AIRW received a conditional offer for sewer service from the City. The City denied AIRW's request for service unless AIRW agreed to annexation and land use restrictions.

43. The ED requested from AIRW a cost analysis of expenditures that includes the cost of connecting to the CCN facilities versus the cost of the proposed facility or expansion.
44. Constructing a new plant will cost approximately \$300,000 more than connecting to the City's system.
45. Because of the higher property tax rate inside the City than outside it in the unincorporated area and the City's condition of annexation to connect to its system, connecting carries with it an approximately \$20 million cost due to diminution in property value.
46. Costs weigh in favor of granting AIRW's application.
47. The evidence fails to show that easements and the delay inherent to acquiring them are impediments to connecting to the City's system.
48. Even if easements were needed, the evidence fails to show that AIRW tried and failed to secure them.
49. There is no regional provider designated for the area where the Facility is proposed to be located.
50. The proposed Facility and its discharge are not within the sewer CCN of any retail public utility.
51. The proposed Facility and its discharge are partially within Jonah's district boundaries and wholly within Jonah's water CCN area.
52. The City did not request Jonah's consent to provide wastewater service to the Facility, and Jonah has not given consent for the City to operate within its boundaries.
53. DELETED

54. DELETED

**Nearby Residents**

- 55. The prima facie demonstration that the Draft Permit is protective of the health of nearby residents was not rebutted.
- 56. The Draft Permit contains adequate permit limits and monitoring requirements to protect the health of nearby residents.
- 57. The monitoring and sampling requirements in the Draft Permit comply with the Commission rules.
- 58. The Draft Permit contains appropriate effluent limits.
- 59. The Draft Permit is protective of human health, including those of nearby residents.

**Nuisance Odors**

- 60. AIRW will control nuisance odors by owning the 150-foot buffer zone from the wastewater treatment plant units to the property line.
- 61. The evidence failed to show that the discharge will go into any body of water that crosses or abuts any park, playground, or schoolyard within one mile of the point of discharge.

**Completeness and Accuracy of Application**

- 62. The prima facie demonstration that the Application is substantially complete and accurate was not rebutted.
- 63. The Application went through both an administrative and a technical review.
- 64. The Application included all required information and was substantially complete and accurate.



### **Antidegradation**

65. The prima facie demonstration that the Draft Permit complies with TCEQ's antidegradation policy and procedures was not rebutted.
66. The ED performed a Tier 1 and Tier 2 antidegradation review of the receiving waters in accordance with 30 Texas Administrative Code section 307.5.
67. The narrative and numeric criteria to protect existing uses will be maintained throughout the receiving waters; therefore, existing water quality uses will be maintained and protected.
68. The existing water quality uses of the receiving waters of the unnamed tributary of unnamed tributary, Mankins Branch, the San Gabriel/North Fork San Gabriel River in Segment No. 1248 of the Brazos River Basin will not be impaired by the Draft Permit as long as AIRW complies with the Draft Permit, which will satisfy the antidegradation Tier 1 requirements.
69. The Draft Permit will not cause significant degradation of water quality in the receiving waters of the unnamed tributary, Mankins Branch, the San Gabriel/North Fork San Gabriel River in Segment No. 1248 of the Brazos River Basin as long as AIRW complies with the Draft Permit, which will satisfy the antidegradation Tier 2 requirements.
70. The Draft Permit complies with TCEQ's antidegradation policy and procedures.

### **Compliance History**

71. AIRW's compliance status is unclassified.
72. No evidence was presented that indicated that AIRW's compliance history should alter or result in permit denial.
73. AIRW's compliance history of unclassified does not serve as a basis for alteration or denial of the Draft Permit.

### **Operational Requirements**

74. The prima facie demonstration that the Draft Permit contains sufficient provisions to ensure protection of water quality, including necessary operational requirements, was not rebutted.
75. The operational requirements in the Draft Permit are sufficient to ensure protection of water quality.

### **Transcription Costs**

76. Reporting and transcription of the hearing on the merits was warranted because the hearing lasted for three days.
77. All parties fully participated in the hearing by presenting witnesses and cross-examining witnesses; however, Jonah's participation in the hearing was minor and disproportionate to the City and AIRW.
78. Both the City and AIRW participated roughly equally in the hearing and cited to the transcript in their closing arguments; therefore, both sides benefitted from having a transcript.
79. There was no evidence that any party subject to allocation of costs is financially unable to pay a share of the costs.
80. The total cost for recording and transcribing the preliminary hearing and the hearing on the merits was \$8,848.75.
81. AIRW and the City should each pay one-half of the transcription costs.

## **II. CONCLUSIONS OF LAW**

1. TCEQ has jurisdiction over this matter. Tex. Water Code, chs. 5, 26.
2. SOAH has jurisdiction to conduct a hearing and to prepare a PFD in contested cases referred by the Commission under Texas Government Code section 2003.047.

3. Notice was provided in accordance with Texas Water Code sections 5.114 and 26.028; Texas Government Code sections 2001.051 and 2001.052; and 30 Texas Administrative Code sections 39.405 and 39.551.
4. The Application is subject to the requirements in Senate Bill 709, effective September 1, 2015. Tex. Gov't Code § 2003.047(i-1)-(i-3).
5. AIRW's filing of the Administrative Record established a prima facie case 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. Tex. Gov't Code § 2003.047(i-1); 30 Tex. Admin. Code § 80.17.
6. AIRW retains the burden of proof on the issues regarding the sufficiency of the Application and compliance with the necessary statutory and regulatory requirements. 30 Tex. Admin. Code § 80.17(a).
7. The City did not rebut the prima facie demonstration by demonstrating that one or more provisions in the Draft Permit violate a specifically applicable state or federal requirement that relates to a matter referred by TCEQ. Tex. Gov't Code § 2003.047(i-2); 30 Tex. Admin. Code § 80.117(c).
8. The Draft Permit is protective of water quality and the existing uses of the receiving waters in accordance with applicable TSWQS, including protection of aquatic and terrestrial wildlife.
9. The Draft Permit is protective of the health of residents near the proposed Facility and discharge route.
10. The Application demonstrates compliance with TCEQ's regionalization policy. Tex. Water Code §§ 26.003, 26.081(a)-(b), (d); 26.0282.
11. The Application demonstrates a need for the Draft Permit. Tex. Water Code § 26.0282.
12. The Draft Permit contains sufficient provisions to prevent nuisance odors. 30 Tex. Admin. Code §§ 217.38, 309.13(e).
13. The Application is substantially complete and accurate.

14. The Draft Permit complies with TCEQ's antidegradation policy. 30 Texas Admin. Code §§ 307.5, 307.6(b)(4).
15. AIRW's compliance history does not raise issues regarding AIRW's ability to comply with the material terms of the Draft Permit or that would warrant altering the terms of the Draft Permit.
16. The Draft Permit contains sufficient provisions, including necessary operational requirements, to ensure protection of water quality.
17. No transcript costs may be assessed against the ED or OPIC because TCEQ's rules prohibit the assessment of any cost to a statutory party who is precluded by law from appealing any ruling, decision, or other act of the Commission. 30 Tex. Admin. Code § 80.23(d)(2).
18. Factors to be considered in assessing transcript costs include: the party who requested the transcript; the financial ability of the party to pay the costs; the extent to which the party participated in the hearing; the relative benefits to the various parties of having a transcript; the budgetary constraints of a state or federal administrative agency participating in the proceeding; and any other factor which is relevant to a just and reasonable assessment of the costs. 30 Tex. Admin. Code § 80.23(d)(1).
19. Considering the factors in 30 Texas Administrative Code section 80.23(d)(1), a reasonable assessment of hearing transcript costs against parties to the contested case proceeding is: one-half to AIRW and one-half to the City.

### **III. EXPLANATION OF CHANGES**


1. The Commission determined to adopt the Administrative Law Judges' proposed Order with changes.
2. The Commission determined to amend the second sentence in Finding of Fact #3 based on the Executive Director's Exceptions and agreed to by the Administrative Law Judges to read: "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)."

3. The Commission determined to amend Finding of Fact #51 based on Jonah's Exceptions and agreed to by the Administrative Law Judges to read: "The proposed Facility and its discharge are partially within Jonah's district boundaries and wholly within Jonah's water CCN area."
4. The Commission determined to delete Findings of Fact #53 and #54 as unnecessary to the Commission's regionalization policy consideration in this case.

**NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:**

1. AIRW's Application for Texas Pollutant Discharge Elimination System Permit No. WQ0015878001 is granted as set forth in the Draft Permit.
2. AIRW and the City must each pay one-half of the transcription costs.
3. The Commission adopts the ED's Response to Public Comment in accordance with 30 Texas Administrative Code section 50.117.
4. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
5. The effective date of this Order is the date the Order is final, as provided by Texas Government Code section 2001.144 and 30 Texas Administrative Code section 80.273.
6. TCEQ's Chief Clerk shall forward a copy of this Order to all parties.
7. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED: *November 28, 2022* TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

  
Jon Niermann, Chairman





TPDES PERMIT NO. WQ0015878001  
[For TCEQ office use only - EPA I.D.  
No. TX0140244]

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
P.O. Box 13087  
Austin, Texas 78711-3087

PERMIT TO DISCHARGE WASTES  
under provisions of  
Section 402 of the Clean Water Act  
and Chapter 26 of the Texas Water Code

AIRW 2017-7, L.P.

whose mailing address is

2505 North State Highway 360, Suite 800  
Grand Prairie, Texas 75050

is authorized to treat and discharge wastes from the Rockride Lane Water Resource Reclamation Facility, SIC Code 4952

located approximately 500 feet southeast of the intersection of Rockride Lane (County Road 110) and Westinghouse Road (County Road 111), in Williamson County, Texas 78626

via pipe, thence through a culvert, thence to an unnamed tributary, thence to Mankins Branch, thence the San Gabriel/North Fork San Gabriel River in Segment No. 1248 of the Brazos River Basin

only according to effluent limitations, monitoring requirements, and other conditions set forth in this permit, as well as the rules of the Texas Commission on Environmental Quality (TCEQ), the laws of the State of Texas, and other orders of the TCEQ. The issuance of this permit does not grant to the permittee the right to use private or public property for conveyance of wastewater along the discharge route described in this permit. This includes, but is not limited to, property belonging to any individual, partnership, corporation, or other entity. Neither does this permit authorize any invasion of personal rights nor any violation of federal, state, or local laws or regulations. It is the responsibility of the permittee to acquire property rights as may be necessary to use the discharge route.

This permit shall expire at midnight, **five years from the date of issuance.**

ISSUED DATE: *November 28, 2022*

A handwritten signature in blue ink, appearing to read "Jon L. ...", written over a horizontal line.  
For the Commission

EFFLUENT LIMITATIONS AND MONITORING REQUIREMENTSOutfall Number 001

1. During the period beginning upon the date of issuance and lasting through the date of expiration, the permittee is authorized to discharge subject to the following effluent limitations:

The daily average flow of effluent shall not exceed 0.20 million gallons per day (MGD), nor shall the average discharge during any two-hour period (2-hour peak) exceed 556 gallons per minute.

<u>Effluent Characteristic</u>	<u>Discharge Limitations</u>			<u>Min. Self-Monitoring Requirements</u>	
	Daily Avg mg/l (lbs/day)	7-day Avg mg/l	Daily Max mg/l	Single Grab mg/l	Report Daily Avg. & Max. Single Grab Measurement Frequency Sample Type
Flow, MGD	Report	N/A	Report	N/A	Continuous Totalizing Meter
Carbonaceous Biochemical Oxygen Demand (5-day)	7 (12)	12	22	32	One/week Grab
Total Suspended Solids	10 (17)	15	25	35	One/week Grab
Ammonia Nitrogen	2 (3.3)	5	10	15	One/week Grab
Total Phosphorus	0.5 (0.8)	1	2	3	One/week Grab
<i>E. coli</i> , CFU or MPN* per 100 ml	126	N/A	N/A	399	One/month Grab

\*CFU or MPN\* - colony-forming units or most probable number

2. The effluent shall contain a chlorine residual of at least 1.0 mg/l and shall not exceed a chlorine residual of 4.0 mg/l after a detention time of at least 20 minutes (based on peak flow), and shall be monitored five times per week by grab sample. An equivalent method of disinfection may be substituted only with prior approval of the Executive Director.
3. The pH shall not be less than 6.0 standard units nor greater than 9.0 standard units and shall be monitored once per month by grab sample.
4. There shall be no discharge of floating solids or visible foam in other than trace amounts and no discharge of visible oil.
5. Effluent monitoring samples shall be taken at the following location(s): Following the final treatment unit.
6. The effluent shall contain a minimum dissolved oxygen of 4.0 mg/l and shall be monitored once per week by grab sample.

## DEFINITIONS AND STANDARD PERMIT CONDITIONS

As required by Title 30 Texas Administrative Code (TAC) Chapter 305, certain regulations appear as standard conditions in waste discharge permits. 30 TAC § 305.121 - 305.129 (relating to Permit Characteristics and Conditions) as promulgated under the Texas Water Code (TWC) §§ 5.103 and 5.105, and the Texas Health and Safety Code (THSC) §§ 361.017 and 361.024(a), establish the characteristics and standards for waste discharge permits, including sewage sludge, and those sections of 40 Code of Federal Regulations (CFR) Part 122 adopted by reference by the Commission. The following text includes these conditions and incorporates them into this permit. All definitions in TWC § 26.001 and 30 TAC Chapter 305 shall apply to this permit and are incorporated by reference. Some specific definitions of words or phrases used in this permit are as follows:

### 1. Flow Measurements

- a. Annual average flow - the arithmetic average of all daily flow determinations taken within the preceding 12 consecutive calendar months. The annual average flow determination shall consist of daily flow volume determinations made by a totalizing meter, charted on a chart recorder and limited to major domestic wastewater discharge facilities with one million gallons per day or greater permitted flow.
- b. Daily average flow - the arithmetic average of all determinations of the daily flow within a period of one calendar month. The daily average flow determination shall consist of determinations made on at least four separate days. If instantaneous measurements are used to determine the daily flow, the determination shall be the arithmetic average of all instantaneous measurements taken during that month. Daily average flow determination for intermittent discharges shall consist of a minimum of three flow determinations on days of discharge.
- c. Daily maximum flow - the highest total flow for any 24-hour period in a calendar month.
- d. Instantaneous flow - the measured flow during the minimum time required to interpret the flow measuring device.
- e. 2-hour peak flow (domestic wastewater treatment plants) - the maximum flow sustained for a two-hour period during the period of daily discharge. The average of multiple measurements of instantaneous maximum flow within a two-hour period may be used to calculate the 2-hour peak flow.
- f. Maximum 2-hour peak flow (domestic wastewater treatment plants) - the highest 2-hour peak flow for any 24-hour period in a calendar month.

### 2. Concentration Measurements

- a. Daily average concentration - the arithmetic average of all effluent samples, composite or grab as required by this permit, within a period of one calendar month, consisting of at least four separate representative measurements.
  - i. For domestic wastewater treatment plants - When four samples are not available in a calendar month, the arithmetic average (weighted by flow) of all values in the previous four consecutive month period consisting of at least four measurements shall be utilized as the daily average concentration.



- ii. For all other wastewater treatment plants - When four samples are not available in a calendar month, the arithmetic average (weighted by flow) of all values taken during the month shall be utilized as the daily average concentration.
- b. 7-day average concentration - the arithmetic average of all effluent samples, composite or grab as required by this permit, within a period of one calendar week, Sunday through Saturday.
- c. Daily maximum concentration - the maximum concentration measured on a single day, by the sample type specified in the permit, within a period of one calendar month.
- d. Daily discharge - the discharge of a pollutant measured during a calendar day or any 24-hour period that reasonably represents the calendar day for purposes of sampling. For pollutants with limitations expressed in terms of mass, the daily discharge is calculated as the total mass of the pollutant discharged over the sampling day. For pollutants with limitations expressed in other units of measurement, the daily discharge is calculated as the average measurement of the pollutant over the sampling day.

The daily discharge determination of concentration made using a composite sample shall be the concentration of the composite sample. When grab samples are used, the daily discharge determination of concentration shall be the arithmetic average (weighted by flow value) of all samples collected during that day.

- e. Bacteria concentration (*E. coli* or Enterococci) - Colony Forming Units (CFU) or Most Probable Number (MPN) of bacteria per 100 milliliters effluent. The daily average bacteria concentration is a geometric mean of the values for the effluent samples collected in a calendar month. The geometric mean shall be determined by calculating the  $n$ th root of the product of all measurements made in a calendar month, where  $n$  equals the number of measurements made; or, computed as the antilogarithm of the arithmetic mean of the logarithms of all measurements made in a calendar month. For any measurement of bacteria equaling zero, a substituted value of one shall be made for input into either computation method. If specified, the 7-day average for bacteria is the geometric mean of the values for all effluent samples collected during a calendar week.
- f. Daily average loading (lbs/day) - the arithmetic average of all daily discharge loading calculations during a period of one calendar month. These calculations must be made for each day of the month that a parameter is analyzed. The daily discharge, in terms of mass (lbs/day), is calculated as (Flow, MGD x Concentration, mg/l x 8.34).
- g. Daily maximum loading (lbs/day) - the highest daily discharge, in terms of mass (lbs/day), within a period of one calendar month.

### 3. Sample Type

- a. Composite sample - For domestic wastewater, a composite sample is a sample made up of a minimum of three effluent portions collected in a continuous 24-hour period or during the period of daily discharge if less than 24 hours, and combined in volumes proportional to flow, and collected at the intervals required by 30 TAC § 319.9 (a). For industrial wastewater, a composite sample is a sample made up of a minimum of three effluent portions collected in a continuous 24-hour period or during the period of daily discharge if less than 24 hours, and combined in volumes proportional to flow, and collected at the intervals required by 30 TAC § 319.9 (b).

- b. Grab sample - an individual sample collected in less than 15 minutes.
- 4. Treatment Facility (facility) - wastewater facilities used in the conveyance, storage, treatment, recycling, reclamation and/or disposal of domestic sewage, industrial wastes, agricultural wastes, recreational wastes, or other wastes including sludge handling or disposal facilities under the jurisdiction of the Commission.
- 5. The term "sewage sludge" is defined as solid, semi-solid, or liquid residue generated during the treatment of domestic sewage in 30 TAC Chapter 312. This includes the solids that have not been classified as hazardous waste separated from wastewater by unit processes.
- 6. Bypass - the intentional diversion of a waste stream from any portion of a treatment facility.

## **MONITORING AND REPORTING REQUIREMENTS**

### **1. Self-Reporting**

Monitoring results shall be provided at the intervals specified in the permit. Unless otherwise specified in this permit or otherwise ordered by the Commission, the permittee shall conduct effluent sampling and reporting in accordance with 30 TAC §§ 319.4 - 319.12. Unless otherwise specified, effluent monitoring data shall be submitted each month, to the Compliance Monitoring Team of the Enforcement Division (MC 224), by the 20th day of the following month for each discharge which is described by this permit whether or not a discharge is made for that month. Monitoring results must be submitted online using the NetDMR reporting system available through the TCEQ website unless the permittee requests and obtains an electronic reporting waiver. Monitoring results must be signed and certified as required by Monitoring and Reporting Requirements No. 10.

As provided by state law, the permittee is subject to administrative, civil and criminal penalties, as applicable, for negligently or knowingly violating the Clean Water Act (CWA); TWC §§ 26, 27, and 28; and THSC § 361, including but not limited to knowingly making any false statement, representation, or certification on any report, record, or other document submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or noncompliance, or falsifying, tampering with or knowingly rendering inaccurate any monitoring device or method required by this permit or violating any other requirement imposed by state or federal regulations.

### **2. Test Procedures**

- a. Unless otherwise specified in this permit, test procedures for the analysis of pollutants shall comply with procedures specified in 30 TAC §§ 319.11 - 319.12. Measurements, tests, and calculations shall be accurately accomplished in a representative manner.
- b. All laboratory tests submitted to demonstrate compliance with this permit must meet the requirements of 30 TAC § 25, Environmental Testing Laboratory Accreditation and Certification.

### **3. Records of Results**

- a. Monitoring samples and measurements shall be taken at times and in a manner so as to be representative of the monitored activity.
- b. Except for records of monitoring information required by this permit related to the permittee's sewage sludge use and disposal activities, which shall be retained for a period

of at least five years (or longer as required by 40 CFR Part 503), monitoring and reporting records, including strip charts and records of calibration and maintenance, copies of all records required by this permit, records of all data used to complete the application for this permit, and the certification required by 40 CFR § 264.73(b)(9) shall be retained at the facility site, or shall be readily available for review by a TCEQ representative for a period of three years from the date of the record or sample, measurement, report, application or certification. This period shall be extended at the request of the Executive Director.

c. Records of monitoring activities shall include the following:

- i. date, time and place of sample or measurement;
- ii. identity of individual who collected the sample or made the measurement.
- iii. date and time of analysis;
- iv. identity of the individual and laboratory who performed the analysis;
- v. the technique or method of analysis; and
- vi. the results of the analysis or measurement and quality assurance/quality control records.

The period during which records are required to be kept shall be automatically extended to the date of the final disposition of any administrative or judicial enforcement action that may be instituted against the permittee.

4. Additional Monitoring by Permittee

If the permittee monitors any pollutant at the location(s) designated herein more frequently than required by this permit using approved analytical methods as specified above, all results of such monitoring shall be included in the calculation and reporting of the values submitted on the approved self-report form. Increased frequency of sampling shall be indicated on the self-report form.

5. Calibration of Instruments

All automatic flow measuring or recording devices and all totalizing meters for measuring flows shall be accurately calibrated by a trained person at plant start-up and as often thereafter as necessary to ensure accuracy, but not less often than annually unless authorized by the Executive Director for a longer period. Such person shall verify in writing that the device is operating properly and giving accurate results. Copies of the verification shall be retained at the facility site and/or shall be readily available for review by a TCEQ representative for a period of three years.

6. Compliance Schedule Reports

Reports of compliance or noncompliance with, or any progress reports on, interim and final requirements contained in any compliance schedule of the permit shall be submitted no later than 14 days following each schedule date to the Regional Office and the Compliance Monitoring Team of the Enforcement Division (MC 224).

## 7. Noncompliance Notification

- a. In accordance with 30 TAC § 305.125(9) any noncompliance which may endanger human health or safety, or the environment shall be reported by the permittee to the TCEQ. Except as allowed by 30 TAC § 305.132, report of such information shall be provided orally or by facsimile transmission (FAX) to the Regional Office within 24 hours of becoming aware of the noncompliance. A written submission of such information shall also be provided by the permittee to the Regional Office and the Compliance Monitoring Team of the Enforcement Division (MC 224) within five working days of becoming aware of the noncompliance. For Publicly Owned Treatment Works (POTWs), effective December 21, 2023, the permittee must submit the written report for unauthorized discharges and unanticipated bypasses that exceed any effluent limit in the permit using the online electronic reporting system available through the TCEQ website unless the permittee requests and obtains an electronic reporting waiver. The written submission shall contain a description of the noncompliance and its cause; the potential danger to human health or safety, or the environment; the period of noncompliance, including exact dates and times; if the noncompliance has not been corrected, the time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent recurrence of the noncompliance, and to mitigate its adverse effects.
- b. The following violations shall be reported under Monitoring and Reporting Requirement 7.a.:
  - i. Unauthorized discharges as defined in Permit Condition 2(g).
  - ii. Any unanticipated bypass that exceeds any effluent limitation in the permit.
  - iii. Violation of a permitted maximum daily discharge limitation for pollutants listed specifically in the Other Requirements section of an Industrial TPDES permit.
- c. In addition to the above, any effluent violation which deviates from the permitted effluent limitation by more than 40% shall be reported by the permittee in writing to the Regional Office and the Compliance Monitoring Team of the Enforcement Division (MC 224) within 5 working days of becoming aware of the noncompliance.
- d. Any noncompliance other than that specified in this section, or any required information not submitted or submitted incorrectly, shall be reported to the Compliance Monitoring Team of the Enforcement Division (MC 224) as promptly as possible. For effluent limitation violations, noncompliances shall be reported on the approved self-report form.

8. In accordance with the procedures described in 30 TAC §§ 35.301 - 35.303 (relating to Water Quality Emergency and Temporary Orders) if the permittee knows in advance of the need for a bypass, it shall submit prior notice by applying for such authorization.

## 9. Changes in Discharges of Toxic Substances

All existing manufacturing, commercial, mining, and silvicultural permittees shall notify the Regional Office, orally or by facsimile transmission within 24 hours, and both the Regional Office and the Compliance Monitoring Team of the Enforcement Division (MC 224) in writing within five (5) working days, after becoming aware of or having reason to believe:

- a. That any activity has occurred or will occur which would result in the discharge, on a routine or frequent basis, of any toxic pollutant listed at 40 CFR Part 122, Appendix D, Tables II and III (excluding Total Phenols) which is not limited in the permit, if that discharge will exceed the highest of the following "notification levels":
    - i. One hundred micrograms per liter (100 µg/L);
    - ii. Two hundred micrograms per liter (200 µg/L) for acrolein and acrylonitrile; five hundred micrograms per liter (500 µg/L) for 2,4-dinitrophenol and for 2-methyl-4,6-dinitrophenol; and one milligram per liter (1 mg/L) for antimony;
    - iii. Five (5) times the maximum concentration value reported for that pollutant in the permit application; or
    - iv. The level established by the TCEQ.
  - b. That any activity has occurred or will occur which would result in any discharge, on a nonroutine or infrequent basis, of a toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the following "notification levels":
    - i. Five hundred micrograms per liter (500 µg/L);
    - ii. One milligram per liter (1 mg/L) for antimony;
    - iii. Ten (10) times the maximum concentration value reported for that pollutant in the permit application; or
    - iv. The level established by the TCEQ.
10. Signatories to Reports
- All reports and other information requested by the Executive Director shall be signed by the person and in the manner required by 30 TAC § 305.128 (relating to Signatories to Reports).
11. All POTWs must provide adequate notice to the Executive Director of the following:
- a. Any new introduction of pollutants into the POTW from an indirect discharger which would be subject to CWA § 301 or § 306 if it were directly discharging those pollutants;
  - b. Any substantial change in the volume or character of pollutants being introduced into that POTW by a source introducing pollutants into the POTW at the time of issuance of the permit; and
  - c. For the purpose of this paragraph, adequate notice shall include information on:
    - i. The quality and quantity of effluent introduced into the POTW; and
    - ii. Any anticipated impact of the change on the quantity or quality of effluent to be discharged from the POTW.

**PERMIT CONDITIONS****1. General**

- a. When the permittee becomes aware that it failed to submit any relevant facts in a permit application, or submitted incorrect information in an application or in any report to the Executive Director, it shall promptly submit such facts or information.
- b. This permit is granted on the basis of the information supplied and representations made by the permittee during action on an application, and relying upon the accuracy and completeness of that information and those representations. After notice and opportunity for a hearing, this permit may be modified, suspended, or revoked, in whole or in part, in accordance with 30 TAC Chapter 305, Subchapter D, during its term for good cause including, but not limited to, the following:
  - i. Violation of any terms or conditions of this permit;
  - ii. Obtaining this permit by misrepresentation or failure to disclose fully all relevant facts; or
  - iii. A change in any condition that requires either a temporary or permanent reduction or elimination of the authorized discharge.
- c. The permittee shall furnish to the Executive Director, upon request and within a reasonable time, any information to determine whether cause exists for amending, revoking, suspending or terminating the permit. The permittee shall also furnish to the Executive Director, upon request, copies of records required to be kept by the permit.

**2. Compliance**

- a. Acceptance of the permit by the person to whom it is issued constitutes acknowledgment and agreement that such person will comply with all the terms and conditions embodied in the permit, and the rules and other orders of the Commission.
- b. The permittee has a duty to comply with all conditions of the permit. Failure to comply with any permit condition constitutes a violation of the permit and the Texas Water Code or the Texas Health and Safety Code, and is grounds for enforcement action, for permit amendment, revocation, or suspension, or for denial of a permit renewal application or an application for a permit for another facility.
- c. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of the permit.
- d. The permittee shall take all reasonable steps to minimize or prevent any discharge or sludge use or disposal or other permit violation that has a reasonable likelihood of adversely affecting human health or the environment.
- e. Authorization from the Commission is required before beginning any change in the permitted facility or activity that may result in noncompliance with any permit requirements.
- f. A permit may be amended, suspended and reissued, or revoked for cause in accordance



with 30 TAC §§ 305.62 and 305.66 and TWC§ 7.302. The filing of a request by the permittee for a permit amendment, suspension and reissuance, or termination, or a notification of planned changes or anticipated noncompliance, does not stay any permit condition.

- g. There shall be no unauthorized discharge of wastewater or any other waste. For the purpose of this permit, an unauthorized discharge is considered to be any discharge of wastewater into or adjacent to water in the state at any location not permitted as an outfall or otherwise defined in the Other Requirements section of this permit.
- h. In accordance with 30 TAC § 305.535(a), the permittee may allow any bypass to occur from a TPDES permitted facility which does not cause permitted effluent limitations to be exceeded or an unauthorized discharge to occur, but only if the bypass is also for essential maintenance to assure efficient operation.
- i. The permittee is subject to administrative, civil, and criminal penalties, as applicable, under TWC §§ 7.051 - 7.075 (relating to Administrative Penalties), 7.101 - 7.111 (relating to Civil Penalties), and 7.141 - 7.202 (relating to Criminal Offenses and Penalties) for violations including, but not limited to, negligently or knowingly violating the federal CWA §§ 301, 302, 306, 307, 308, 318, or 405, or any condition or limitation implementing any sections in a permit issued under the CWA § 402, or any requirement imposed in a pretreatment program approved under the CWA §§ 402 (a)(3) or 402 (b)(8).

### 3. Inspections and Entry

- a. Inspection and entry shall be allowed as prescribed in the TWC Chapters 26, 27, and 28, and THSC § 361.
- b. The members of the Commission and employees and agents of the Commission are entitled to enter any public or private property at any reasonable time for the purpose of inspecting and investigating conditions relating to the quality of water in the state or the compliance with any rule, regulation, permit or other order of the Commission. Members, employees, or agents of the Commission and Commission contractors are entitled to enter public or private property at any reasonable time to investigate or monitor or, if the responsible party is not responsive or there is an immediate danger to public health or the environment, to remove or remediate a condition related to the quality of water in the state. Members, employees, Commission contractors, or agents acting under this authority who enter private property shall observe the establishment's rules and regulations concerning safety, internal security, and fire protection, and if the property has management in residence, shall notify management or the person then in charge of his presence and shall exhibit proper credentials. If any member, employee, Commission contractor, or agent is refused the right to enter in or on public or private property under this authority, the Executive Director may invoke the remedies authorized in TWC § 7.002. The statement above, that Commission entry shall occur in accordance with an establishment's rules and regulations concerning safety, internal security, and fire protection, is not grounds for denial or restriction of entry to any part of the facility, but merely describes the Commission's duty to observe appropriate rules and regulations during an inspection.

### 4. Permit Amendment and/or Renewal

- a. The permittee shall give notice to the Executive Director as soon as possible of any planned physical alterations or additions to the permitted facility if such alterations or additions would require a permit amendment or result in a violation of permit requirements. Notice shall also be required under this paragraph when:
  - i. The alteration or addition to a permitted facility may meet one of the criteria for determining whether a facility is a new source in accordance with 30 TAC § 305.534 (relating to New Sources and New Dischargers); or
  - ii. The alteration or addition could significantly change the nature or increase the quantity of pollutants discharged. This notification applies to pollutants that are subject neither to effluent limitations in the permit, nor to notification requirements in Monitoring and Reporting Requirements No. 9; or
  - iii. The alteration or addition results in a significant change in the permittee's sludge use or disposal practices, and such alteration, addition, or change may justify the application of permit conditions that are different from or absent in the existing permit, including notification of additional use or disposal sites not reported during the permit application process or not reported pursuant to an approved land application plan.
- b. Prior to any facility modifications, additions, or expansions that will increase the plant capacity beyond the permitted flow, the permittee must apply for and obtain proper authorization from the Commission before commencing construction.
- c. The permittee must apply for an amendment or renewal at least 180 days prior to expiration of the existing permit in order to continue a permitted activity after the expiration date of the permit. If an application is submitted prior to the expiration date of the permit, the existing permit shall remain in effect until the application is approved, denied, or returned. If the application is returned or denied, authorization to continue such activity shall terminate upon the effective date of the action. If an application is not submitted prior to the expiration date of the permit, the permit shall expire and authorization to continue such activity shall terminate.
- d. Prior to accepting or generating wastes which are not described in the permit application or which would result in a significant change in the quantity or quality of the existing discharge, the permittee must report the proposed changes to the Commission. The permittee must apply for a permit amendment reflecting any necessary changes in permit conditions, including effluent limitations for pollutants not identified and limited by this permit.
- e. In accordance with the TWC § 26.029(b), after a public hearing, notice of which shall be given to the permittee, the Commission may require the permittee, from time to time, for good cause, in accordance with applicable laws, to conform to new or additional conditions.
- f. If any toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is promulgated under CWA § 307(a) for a toxic pollutant which is present in the discharge and that standard or prohibition is more stringent than any limitation on the pollutant in this permit, this permit shall be modified or revoked and reissued to conform to the toxic effluent standard or prohibition. The permittee shall comply with effluent standards or prohibitions established under CWA § 307(a) for toxic pollutants within the time provided in the



regulations that established those standards or prohibitions, even if the permit has not yet been modified to incorporate the requirement.

5. Permit Transfer

- a. Prior to any transfer of this permit, Commission approval must be obtained. The Commission shall be notified in writing of any change in control or ownership of facilities authorized by this permit. Such notification should be sent to the Applications Review and Processing Team (MC 148) of the Water Quality Division.
- b. A permit may be transferred only according to the provisions of 30 TAC § 305.64 (relating to Transfer of Permits) and 30 TAC § 50.133 (relating to Executive Director Action on Application or WQMP update).

6. Relationship to Hazardous Waste Activities

This permit does not authorize any activity of hazardous waste storage, processing, or disposal that requires a permit or other authorization pursuant to the Texas Health and Safety Code.

7. Relationship to Water Rights

Disposal of treated effluent by any means other than discharge directly to water in the state must be specifically authorized in this permit and may require a permit pursuant to TWC Chapter 11.

8. Property Rights

A permit does not convey any property rights of any sort, or any exclusive privilege.

9. Permit Enforceability

The conditions of this permit are severable, and if any provision of this permit, or the application of any provision of this permit to any circumstances, is held invalid, the application of such provision to other circumstances, and the remainder of this permit, shall not be affected thereby.

10. Relationship to Permit Application

The application pursuant to which the permit has been issued is incorporated herein; provided, however, that in the event of a conflict between the provisions of this permit and the application, the provisions of the permit shall control.

11. Notice of Bankruptcy

- a. Each permittee shall notify the Executive Director, in writing, immediately following the filing of a voluntary or involuntary petition for bankruptcy under any chapter of Title 11 (Bankruptcy) of the United States Code (11 USC) by or against:
  - i. the permittee;
  - ii. an entity (as that term is defined in 11 USC, § 101(14)) controlling the permittee or listing the permit or permittee as property of the estate; or
  - iii. an affiliate (as that term is defined in 11 USC, § 101(2)) of the permittee.

- b. This notification must indicate:
  - i. the name of the permittee;
  - ii. the permit number(s);
  - iii. the bankruptcy court in which the petition for bankruptcy was filed; and
  - iv. the date of filing of the petition.

## **OPERATIONAL REQUIREMENTS**

1. The permittee shall at all times ensure that the facility and all of its systems of collection, treatment, and disposal are properly operated and maintained. This includes, but is not limited to, the regular, periodic examination of wastewater solids within the treatment plant by the operator in order to maintain an appropriate quantity and quality of solids inventory as described in the various operator training manuals and according to accepted industry standards for process control. Process control, maintenance, and operations records shall be retained at the facility site, or shall be readily available for review by a TCEQ representative, for a period of three years.
2. Upon request by the Executive Director, the permittee shall take appropriate samples and provide proper analysis in order to demonstrate compliance with Commission rules. Unless otherwise specified in this permit or otherwise ordered by the Commission, the permittee shall comply with all applicable provisions of 30 TAC Chapter 312 concerning sewage sludge use and disposal and 30 TAC §§ 319.21 - 319.29 concerning the discharge of certain hazardous metals.
3. Domestic wastewater treatment facilities shall comply with the following provisions:
  - a. The permittee shall notify the Municipal Permits Team, Wastewater Permitting Section (MC 148) of the Water Quality Division, in writing, of any facility expansion at least 90 days prior to conducting such activity.
  - b. The permittee shall submit a closure plan for review and approval to the Municipal Permits Team, Wastewater Permitting Section (MC 148) of the Water Quality Division, for any closure activity at least 90 days prior to conducting such activity. Closure is the act of permanently taking a waste management unit or treatment facility out of service and includes the permanent removal from service of any pit, tank, pond, lagoon, surface impoundment and/or other treatment unit regulated by this permit.
4. The permittee is responsible for installing prior to plant start-up, and subsequently maintaining, adequate safeguards to prevent the discharge of untreated or inadequately treated wastes during electrical power failures by means of alternate power sources, standby generators, and/or retention of inadequately treated wastewater.
5. Unless otherwise specified, the permittee shall provide a readily accessible sampling point and, where applicable, an effluent flow measuring device or other acceptable means by which effluent flow may be determined.

6. The permittee shall remit an annual water quality fee to the Commission as required by 30 TAC Chapter 21. Failure to pay the fee may result in revocation of this permit under TWC § 7.302(b)(6).

7. Documentation

For all written notifications to the Commission required of the permittee by this permit, the permittee shall keep and make available a copy of each such notification under the same conditions as self-monitoring data are required to be kept and made available. Except for information required for TPDES permit applications, effluent data, including effluent data in permits, draft permits and permit applications, and other information specified as not confidential in 30 TAC §§ 1.5(d), any information submitted pursuant to this permit may be claimed as confidential by the submitter. Any such claim must be asserted in the manner prescribed in the application form or by stamping the words confidential business information on each page containing such information. If no claim is made at the time of submission, information may be made available to the public without further notice. If the Commission or Executive Director agrees with the designation of confidentiality, the TCEQ will not provide the information for public inspection unless required by the Texas Attorney General or a court pursuant to an open records request. If the Executive Director does not agree with the designation of confidentiality, the person submitting the information will be notified.

8. Facilities that generate domestic wastewater shall comply with the following provisions; domestic wastewater treatment facilities at permitted industrial sites are excluded.

- a. Whenever flow measurements for any domestic sewage treatment facility reach 75% of the permitted daily average or annual average flow for three consecutive months, the permittee must initiate engineering and financial planning for expansion and/or upgrading of the domestic wastewater treatment and/or collection facilities. Whenever the flow reaches 90% of the permitted daily average or annual average flow for three consecutive months, the permittee shall obtain necessary authorization from the Commission to commence construction of the necessary additional treatment and/or collection facilities. In the case of a domestic wastewater treatment facility which reaches 75% of the permitted daily average or annual average flow for three consecutive months, and the planned population to be served or the quantity of waste produced is not expected to exceed the design limitations of the treatment facility, the permittee shall submit an engineering report supporting this claim to the Executive Director of the Commission.

If in the judgment of the Executive Director the population to be served will not cause permit noncompliance, then the requirement of this section may be waived. To be effective, any waiver must be in writing and signed by the Director of the Enforcement Division (MC 219) of the Commission, and such waiver of these requirements will be reviewed upon expiration of the existing permit; however, any such waiver shall not be interpreted as condoning or excusing any violation of any permit parameter.

- b. The plans and specifications for domestic sewage collection and treatment works associated with any domestic permit must be approved by the Commission and failure to secure approval before commencing construction of such works or making a discharge is a violation of this permit and each day is an additional violation until approval has been secured.

- c. Permits for domestic wastewater treatment plants are granted subject to the policy of the Commission to encourage the development of area-wide waste collection, treatment, and disposal systems. The Commission reserves the right to amend any domestic wastewater permit in accordance with applicable procedural requirements to require the system covered by this permit to be integrated into an area-wide system, should such be developed; to require the delivery of the wastes authorized to be collected in, treated by or discharged from said system, to such area-wide system; or to amend this permit in any other particular to effectuate the Commission's policy. Such amendments may be made when the changes required are advisable for water quality control purposes and are feasible on the basis of waste treatment technology, engineering, financial, and related considerations existing at the time the changes are required, exclusive of the loss of investment in or revenues from any then existing or proposed waste collection, treatment or disposal system.
9. Domestic wastewater treatment plants shall be operated and maintained by sewage plant operators holding a valid certificate of competency at the required level as defined in 30 TAC Chapter 30.
10. For Publicly Owned Treatment Works (POTWs), the 30-day average (or monthly average) percent removal for BOD and TSS shall not be less than 85%, unless otherwise authorized by this permit.
11. Facilities that generate industrial solid waste as defined in 30 TAC § 335.1 shall comply with these provisions:
  - a. Any solid waste, as defined in 30 TAC § 335.1 (including but not limited to such wastes as garbage, refuse, sludge from a waste treatment, water supply treatment plant or air pollution control facility, discarded materials, discarded materials to be recycled, whether the waste is solid, liquid, or semisolid), generated by the permittee during the management and treatment of wastewater, must be managed in accordance with all applicable provisions of 30 TAC Chapter 335, relating to Industrial Solid Waste Management.
  - b. Industrial wastewater that is being collected, accumulated, stored, or processed before discharge through any final discharge outfall, specified by this permit, is considered to be industrial solid waste until the wastewater passes through the actual point source discharge and must be managed in accordance with all applicable provisions of 30 TAC Chapter 335.
  - c. The permittee shall provide written notification, pursuant to the requirements of 30 TAC § 335.8(b)(1), to the Corrective Action Section (MC 127) of the Remediation Division informing the Commission of any closure activity involving an Industrial Solid Waste Management Unit, at least 90 days prior to conducting such an activity.
  - d. Construction of any industrial solid waste management unit requires the prior written notification of the proposed activity to the Registration and Reporting Section (MC 129) of the Permitting and Registration Support Division. No person shall dispose of industrial solid waste, including sludge or other solids from wastewater treatment processes, prior to fulfilling the deed recordation requirements of 30 TAC § 335.5.

- e. The term "industrial solid waste management unit" means a landfill, surface impoundment, waste-pile, industrial furnace, incinerator, cement kiln, injection well, container, drum, salt dome waste containment cavern, or any other structure vessel, appurtenance, or other improvement on land used to manage industrial solid waste.
- f. The permittee shall keep management records for all sludge (or other waste) removed from any wastewater treatment process. These records shall fulfill all applicable requirements of 30 TAC § 335 and must include the following, as it pertains to wastewater treatment and discharge:
  - i. Volume of waste and date(s) generated from treatment process;
  - ii. Volume of waste disposed of on-site or shipped off-site;
  - iii. Date(s) of disposal;
  - iv. Identity of hauler or transporter;
  - v. Location of disposal site; and
  - vi. Method of final disposal.

The above records shall be maintained on a monthly basis. The records shall be retained at the facility site, or shall be readily available for review by authorized representatives of the TCEQ for at least five years.

- 12. For industrial facilities to which the requirements of 30 TAC § 335 do not apply, sludge and solid wastes, including tank cleaning and contaminated solids for disposal, shall be disposed of in accordance with THSC § 361.

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## SLUDGE PROVISIONS

The permittee is authorized to dispose of sludge only at a Texas Commission on Environmental Quality (TCEQ) authorized land application site, co-disposal landfill, wastewater treatment facility, or facility that further processes sludge. **The disposal of sludge by land application on property owned, leased or under the direct control of the permittee is a violation of the permit unless the site is authorized with the TCEQ. This provision does not authorize Distribution and Marketing of Class A or Class AB Sewage Sludge. This provision does not authorize the permittee to land apply sludge on property owned, leased or under the direct control of the permittee.**

### SECTION I. REQUIREMENTS APPLYING TO ALL SEWAGE SLUDGE LAND APPLICATION

#### A. General Requirements

1. The permittee shall handle and dispose of sewage sludge in accordance with 30 TAC § 312 and all other applicable state and federal regulations in a manner that protects public health and the environment from any reasonably anticipated adverse effects due to any toxic pollutants that may be present in the sludge.
2. In all cases, if the person (permit holder) who prepares the sewage sludge supplies the sewage sludge to another person for land application use or to the owner or lease holder of the land, the permit holder shall provide necessary information to the parties who receive the sludge to assure compliance with these regulations.

#### B. Testing Requirements

1. Sewage sludge shall be tested once during the term of this permit in accordance with the method specified in both 40 CFR Part 261, Appendix II and 40 CFR Part 268, Appendix I [Toxicity Characteristic Leaching Procedure (TCLP)] or other method that receives the prior approval of the TCEQ for the contaminants listed in 40 CFR Part 261.24, Table 1. Sewage sludge failing this test shall be managed according to RCRA standards for generators of hazardous waste, and the waste's disposition must be in accordance with all applicable requirements for hazardous waste processing, storage, or disposal. Following failure of any TCLP test, the management or disposal of sewage sludge at a facility other than an authorized hazardous waste processing, storage, or disposal facility shall be prohibited until such time as the permittee can demonstrate the sewage sludge no longer exhibits the hazardous waste toxicity characteristics (as demonstrated by the results of the TCLP tests). A written report shall be provided to both the TCEQ Registration and Reporting Section (MC 129) of the Permitting and Registration Support Division and the Regional Director (MC Region 11) within seven (7) days after failing the TCLP Test.



The report shall contain test results, certification that unauthorized waste management has stopped, and a summary of alternative disposal plans that comply with RCRA standards for the management of hazardous waste. The report shall be addressed to: Director, Permitting and Registration Support Division (MC 129), Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087. In addition, the permittee shall prepare an annual report on the results of all sludge toxicity testing. This annual report shall be submitted to the TCEQ Regional Office (MC Region 11) and the Compliance Monitoring Team (MC 224) of the Enforcement Division by September 30<sup>th</sup> of each year. The permittee must submit this annual report using the online electronic reporting system available through the TCEQ website unless the permittee requests and obtains an electronic reporting waiver.

2. Sewage sludge shall not be applied to the land if the concentration of the pollutants exceeds the pollutant concentration criteria in Table 1. The frequency of testing for pollutants in Table 1 is found in Section I.C. of this permit.

TABLE 1

<u>Pollutant</u>	<u>Ceiling Concentration</u> <u>(Milligrams per kilogram)*</u>
Arsenic	75
Cadmium	85
Chromium	3000
Copper	4300
Lead	840
Mercury	57
Molybdenum	75
Nickel	420
PCBs	49
Selenium	100
Zinc	7500

\* Dry weight basis

### 3. Pathogen Control

All sewage sludge that is applied to agricultural land, forest, a public contact site, or a reclamation site must be treated by one of the following methods to ensure that the sludge meets either the Class A, Class AB or Class B pathogen requirements.

- a. For sewage sludge to be classified as Class A with respect to pathogens, the density of fecal coliform in the sewage sludge must be less than 1,000 most probable number (MPN) per gram of total solids (dry weight basis), or the density of Salmonella sp. bacteria in the sewage sludge must be less than three MPN per four grams of total solids (dry weight basis) at the time the sewage sludge is used or disposed. In addition, one of the alternatives listed below must be met:

Alternative 1 - The temperature of the sewage sludge that is used or disposed shall be maintained at or above a specific value for a period of time. See 30 TAC § 312.82(a)(2)(A) for specific information;

Alternative 5 (PFRP) - Sewage sludge that is used or disposed of must be treated in one of the Processes to Further Reduce Pathogens (PFRP) described in 40 CFR Part 503, Appendix B. PFRP include composting, heat drying, heat treatment, and thermophilic aerobic digestion; or

Alternative 6 (PFRP Equivalent) - Sewage sludge that is used or disposed of must be treated in a process that has been approved by the U. S. Environmental Protection Agency as being equivalent to those in Alternative 5.

- b. For sewage sludge to be classified as Class AB with respect to pathogens, the density of fecal coliform in the sewage sludge must be less than 1,000 MPN per gram of total solids (dry weight basis), or the density of *Salmonella* sp. bacteria in the sewage sludge be less than three MPN per four grams of total solids (dry weight basis) at the time the sewage sludge is used or disposed. In addition, one of the alternatives listed below must be met:

Alternative 2 - The pH of the sewage sludge that is used or disposed shall be raised to above 12 std. units and shall remain above 12 std. units for 72 hours.

The temperature of the sewage sludge shall be above 52° Celsius for 12 hours or longer during the period that the pH of the sewage sludge is above 12 std. units.

At the end of the 72-hour period during which the pH of the sewage sludge is above 12 std. units, the sewage sludge shall be air dried to achieve a percent solids in the sewage sludge greater than 50%; or

Alternative 3 - The sewage sludge shall be analyzed for enteric viruses prior to pathogen treatment. The limit for enteric viruses is less than one Plaque-forming Unit per four grams of total solids (dry weight basis) either before or following pathogen treatment. See 30 TAC § 312.82(a)(2)(C)(i-iii) for specific information. The sewage sludge shall be analyzed for viable helminth ova prior to pathogen treatment. The limit for viable helminth ova is less than one per four grams of total solids (dry weight basis) either before or following pathogen treatment. See 30 TAC § 312.82(a)(2)(C)(iv-vi) for specific information; or

Alternative 4 - The density of enteric viruses in the sewage sludge shall be less than one Plaque-forming Unit per four grams of total solids (dry weight basis) at the time the sewage sludge is used or disposed. The density of viable helminth ova in the sewage sludge shall be less than one per four grams of total solids (dry weight basis) at the time the sewage sludge is used or disposed.

- c. Sewage sludge that meets the requirements of Class AB sewage sludge may be classified a Class A sewage sludge if a variance request is submitted in writing that is supported by substantial documentation demonstrating equivalent methods for reducing odors and written approval is granted by the executive director. The executive director may deny the variance request or revoke that approved variance if it is determined that the variance may potentially endanger human health or the environment, or create nuisance odor conditions.
- d. Three alternatives are available to demonstrate compliance with Class B criteria for sewage sludge.



Alternative 1

- i. A minimum of seven random samples of the sewage sludge shall be collected within 48 hours of the time the sewage sludge is used or disposed of during each monitoring episode for the sewage sludge.
- ii. The geometric mean of the density of fecal coliform in the samples collected shall be less than either 2,000,000 MPN per gram of total solids (dry weight basis) or 2,000,000 Colony Forming Units per gram of total solids (dry weight basis).

Alternative 2 - Sewage sludge that is used or disposed of shall be treated in one of the Processes to Significantly Reduce Pathogens (PSRP) described in 40 CFR Part 503, Appendix B, so long as all of the following requirements are met by the generator of the sewage sludge.

- i. Prior to use or disposal, all the sewage sludge must have been generated from a single location, except as provided in paragraph v. below;
- ii. An independent Texas Licensed Professional Engineer must make a certification to the generator of a sewage sludge that the wastewater treatment facility generating the sewage sludge is designed to achieve one of the PSRP at the permitted design loading of the facility. The certification need only be repeated if the design loading of the facility is increased. The certification shall include a statement indicating the design meets all the applicable standards specified in Appendix B of 40 CFR Part 503;
- iii. Prior to any off-site transportation or on-site use or disposal of any sewage sludge generated at a wastewater treatment facility, the chief certified operator of the wastewater treatment facility or other responsible official who manages the processes to significantly reduce pathogens at the wastewater treatment facility for the permittee, shall certify that the sewage sludge underwent at least the minimum operational requirements necessary in order to meet one of the PSRP. The acceptable processes and the minimum operational and record keeping requirements shall be in accordance with established U.S. Environmental Protection Agency final guidance;
- iv. All certification records and operational records describing how the requirements of this paragraph were met shall be kept by the generator for a minimum of three years and be available for inspection by commission staff for review; and
- v. If the sewage sludge is generated from a mixture of sources, resulting from a person who prepares sewage sludge from more than one wastewater treatment facility, the resulting derived product shall meet one of the PSRP, and shall meet the certification, operation, and record keeping requirements of this paragraph.

Alternative 3 - Sewage sludge shall be treated in an equivalent process that has been approved by the U.S. Environmental Protection Agency, so long as all of the following requirements are met by the generator of the sewage sludge.

- i. Prior to use or disposal, all the sewage sludge must have been generated from a single location, except as provided in paragraph v. below;

- ii. Prior to any off-site transportation or on-site use or disposal of any sewage sludge generated at a wastewater treatment facility, the chief certified operator of the wastewater treatment facility or other responsible official who manages the processes to significantly reduce pathogens at the wastewater treatment facility for the permittee, shall certify that the sewage sludge underwent at least the minimum operational requirements necessary in order to meet one of the PSRP. The acceptable processes and the minimum operational and record keeping requirements shall be in accordance with established U.S. Environmental Protection Agency final guidance;
- iii. All certification records and operational records describing how the requirements of this paragraph were met shall be kept by the generator for a minimum of three years and be available for inspection by commission staff for review;
- iv. The Executive Director will accept from the U.S. Environmental Protection Agency a finding of equivalency to the defined PSRP; and
- v. If the sewage sludge is generated from a mixture of sources resulting from a person who prepares sewage sludge from more than one wastewater treatment facility, the resulting derived product shall meet one of the Processes to Significantly Reduce Pathogens, and shall meet the certification, operation, and record keeping requirements of this paragraph.

In addition to the Alternatives 1 – 3, the following site restrictions must be met if Class B sludge is land applied:

- i. Food crops with harvested parts that touch the sewage sludge/soil mixture and are totally above the land surface shall not be harvested for 14 months after application of sewage sludge.
- ii. Food crops with harvested parts below the surface of the land shall not be harvested for 20 months after application of sewage sludge when the sewage sludge remains on the land surface for 4 months or longer prior to incorporation into the soil.
- iii. Food crops with harvested parts below the surface of the land shall not be harvested for 38 months after application of sewage sludge when the sewage sludge remains on the land surface for less than 4 months prior to incorporation into the soil.
- iv. Food crops, feed crops, and fiber crops shall not be harvested for 30 days after application of sewage sludge.
- v. Animals shall not be allowed to graze on the land for 30 days after application of sewage sludge.
- vi. Turf grown on land where sewage sludge is applied shall not be harvested for 1 year after application of the sewage sludge when the harvested turf is placed on either land with a high potential for public exposure or a lawn.
- vii. Public access to land with a high potential for public exposure shall be restricted for 1 year after application of sewage sludge.

viii. Public access to land with a low potential for public exposure shall be restricted for 30 days after application of sewage sludge.

ix. Land application of sludge shall be in accordance with the buffer zone requirements found in 30 TAC § 312.44.

#### 4. Vector Attraction Reduction Requirements

All bulk sewage sludge that is applied to agricultural land, forest, a public contact site, or a reclamation site shall be treated by one of the following Alternatives 1 through 10 for vector attraction reduction.

Alternative 1 - The mass of volatile solids in the sewage sludge shall be reduced by a minimum of 38%.

Alternative 2 - If Alternative 1 cannot be met for an anaerobically digested sludge, demonstration can be made by digesting a portion of the previously digested sludge anaerobically in the laboratory in a bench-scale unit for 40 additional days at a temperature between 30° and 37° Celsius. Volatile solids must be reduced by less than 17% to demonstrate compliance.

Alternative 3 - If Alternative 1 cannot be met for an aerobically digested sludge, demonstration can be made by digesting a portion of the previously digested sludge with percent solids of two percent or less aerobically in the laboratory in a bench-scale unit for 30 additional days at 20° Celsius. Volatile solids must be reduced by less than 15% to demonstrate compliance.

Alternative 4 - The specific oxygen uptake rate (SOUR) for sewage sludge treated in an aerobic process shall be equal to or less than 1.5 milligrams of oxygen per hour per gram of total solids (dry weight basis) at a temperature of 20° Celsius.

Alternative 5 - Sewage sludge shall be treated in an aerobic process for 14 days or longer. During that time, the temperature of the sewage sludge shall be higher than 40° Celsius and the average temperature of the sewage sludge shall be higher than 45° Celsius.

Alternative 6 - The pH of sewage sludge shall be raised to 12 or higher by alkali addition and, without the addition of more alkali shall remain at 12 or higher for two hours and then remain at a pH of 11.5 or higher for an additional 22 hours at the time the sewage sludge is prepared for sale or given away in a bag or other container.

Alternative 7 - The percent solids of sewage sludge that does not contain unstabilized solids generated in a primary wastewater treatment process shall be equal to or greater than 75% based on the moisture content and total solids prior to mixing with other materials. Unstabilized solids are defined as organic materials in sewage sludge that have not been treated in either an aerobic or anaerobic treatment process.

Alternative 8 - The percent solids of sewage sludge that contains unstabilized solids generated in a primary wastewater treatment process shall be equal to or greater than 90% based on the moisture content and total solids prior to mixing with other materials at the time the sludge is used. Unstabilized solids are defined as organic materials in sewage sludge that have not been treated in either an aerobic or anaerobic treatment process.

Alternative 9 -

- i. Sewage sludge shall be injected below the surface of the land.
- ii. No significant amount of the sewage sludge shall be present on the land surface within one hour after the sewage sludge is injected.
- iii. When sewage sludge that is injected below the surface of the land is Class A or Class AB with respect to pathogens, the sewage sludge shall be injected below the land surface within eight hours after being discharged from the pathogen treatment process.

Alternative 10 -

- i. Sewage sludge applied to the land surface or placed on a surface disposal site shall be incorporated into the soil within six hours after application to or placement on the land.
- ii. When sewage sludge that is incorporated into the soil is Class A or Class AB with respect to pathogens, the sewage sludge shall be applied to or placed on the land within eight hours after being discharged from the pathogen treatment process.

### C. Monitoring Requirements

Toxicity Characteristic Leaching Procedure (TCLP) Test	- once during the term of this permit
PCBs	- once during the term of this permit

All metal constituents and fecal coliform or *Salmonella* sp. bacteria shall be monitored at the appropriate frequency shown below, pursuant to 30 TAC § 312.46(a)(1):

<u>Amount of sewage sludge (*) metric tons per 365-day period</u>	<u>Monitoring Frequency</u>
0 to less than 290	Once/Year
290 to less than 1,500	Once/Quarter
1,500 to less than 15,000	Once/Two Months
15,000 or greater	Once/Month

(\*) *The amount of bulk sewage sludge applied to the land (dry wt. basis).*

Representative samples of sewage sludge shall be collected and analyzed in accordance with the methods referenced in 30 TAC § 312.7

Identify each of the analytic methods used by the facility to analyze enteric viruses, fecal coliforms, helminth ova, *Salmonella* sp., and other regulated parameters.

Identify in the following categories (as applicable) the sewage sludge treatment process or processes at the facility: preliminary operations (e.g., sludge grinding and degritting), thickening (concentration), stabilization, anaerobic digestion, aerobic digestion, composting, conditioning, disinfection (e.g., beta ray irradiation, gamma ray irradiation, pasteurization), dewatering (e.g., centrifugation, sludge drying beds, sludge lagoons), heat drying, thermal reduction, and methane or biogas capture and recovery.

Identify the nature of material generated by the facility (such as a biosolid for beneficial use or land-farming, or sewage sludge for disposal at a monofill) and whether the material is ultimately conveyed off-site in bulk or in bags.

**SECTION II. REQUIREMENTS SPECIFIC TO BULK SEWAGE SLUDGE FOR APPLICATION TO THE LAND MEETING CLASS A, CLASS AB or B PATHOGEN REDUCTION AND THE CUMULATIVE LOADING RATES IN TABLE 2, OR CLASS B PATHOGEN REDUCTION AND THE POLLUTANT CONCENTRATIONS IN TABLE 3**

For those permittees meeting Class A, Class AB or B pathogen reduction requirements and that meet the cumulative loading rates in Table 2 below, or the Class B pathogen reduction requirements and contain concentrations of pollutants below listed in Table 3, the following conditions apply:

**A. Pollutant Limits**

Table 2

<u>Pollutant</u>	<u>Cumulative Pollutant Loading Rate (pounds per acre)*</u>
Arsenic	36
Cadmium	35
Chromium	2677
Copper	1339
Lead	268
Mercury	15
Molybdenum	Report Only
Nickel	375
Selenium	89
Zinc	2500

Table 3

<u>Pollutant</u>	<u>Monthly Average Concentration (milligrams per kilogram)*</u>
Arsenic	41
Cadmium	39
Chromium	1200
Copper	1500
Lead	300
Mercury	17
Molybdenum	Report Only
Nickel	420
Selenium	36
Zinc	2800

\*Dry weight basis

**B. Pathogen Control**

All bulk sewage sludge that is applied to agricultural land, forest, a public contact site, a reclamation site, shall be treated by either Class A, Class AB or Class B pathogen reduction requirements as defined above in Section I.B.3.

**C. Management Practices**

1. Bulk sewage sludge shall not be applied to agricultural land, forest, a public contact site, or a reclamation site that is flooded, frozen, or snow-covered so that the bulk sewage sludge enters a wetland or other waters in the State.
2. Bulk sewage sludge not meeting Class A requirements shall be land applied in a manner which complies with Applicability in accordance with 30 TAC §312.41 and the Management Requirements in accordance with 30 TAC § 312.44.
3. Bulk sewage sludge shall be applied at or below the agronomic rate of the cover crop.
4. An information sheet shall be provided to the person who receives bulk sewage sludge sold or given away. The information sheet shall contain the following information:
  - a. The name and address of the person who prepared the sewage sludge that is sold or given away in a bag or other container for application to the land.
  - b. A statement that application of the sewage sludge to the land is prohibited except in accordance with the instruction on the label or information sheet.
  - c. The annual whole sludge application rate for the sewage sludge application rate for the sewage sludge that does not cause any of the cumulative pollutant loading rates in Table 2 above to be exceeded, unless the pollutant concentrations in Table 3 found in Section II above are met.

**D. Notification Requirements**

1. If bulk sewage sludge is applied to land in a State other than Texas, written notice shall be provided prior to the initial land application to the permitting authority for the State in which the bulk sewage sludge is proposed to be applied. The notice shall include:
  - a. The location, by street address, and specific latitude and longitude, of each land application site.
  - b. The approximate time period bulk sewage sludge will be applied to the site.
  - c. The name, address, telephone number, and National Pollutant Discharge Elimination System permit number (if appropriate) for the person who will apply the bulk sewage sludge.
2. The permittee shall give 180 days prior notice to the Executive Director in care of the Wastewater Permitting Section (MC 148) of the Water Quality Division of any change planned in the sewage sludge disposal practice.

**E. Record Keeping Requirements**

The sludge documents will be retained at the facility site and/or shall be readily available for review by a TCEQ representative. The person who prepares bulk sewage sludge or a sewage sludge material shall develop the following information and shall retain the information at



the facility site and/or shall be readily available for review by a TCEQ representative for a period of five years. If the permittee supplies the sludge to another person who land applies the sludge, the permittee shall notify the land applier of the requirements for record keeping found in 30 TAC § 312.47 for persons who land apply.

1. The concentration (mg/kg) in the sludge of each pollutant listed in Table 3 above and the applicable pollutant concentration criteria (mg/kg), or the applicable cumulative pollutant loading rate and the applicable cumulative pollutant loading rate limit (lbs/ac) listed in Table 2 above.
2. A description of how the pathogen reduction requirements are met (including site restrictions for Class AB and Class B sludge, if applicable).
3. A description of how the vector attraction reduction requirements are met.
4. A description of how the management practices listed above in Section II.C are being met.
5. The following certification statement:

“I certify, under penalty of law, that the applicable pathogen requirements in 30 TAC § 312.82(a) or (b) and the vector attraction reduction requirements in 30 TAC § 312.83(b) have been met for each site on which bulk sewage sludge is applied. This determination has been made under my direction and supervision in accordance with the system designed to ensure that qualified personnel properly gather and evaluate the information used to determine that the management practices have been met. I am aware that there are significant penalties for false certification including fine and imprisonment.”

6. The recommended agronomic loading rate from the references listed in Section II.C.3. above, as well as the actual agronomic loading rate shall be retained. The person who applies bulk sewage sludge or a sewage sludge material shall develop the following information and shall retain the information at the facility site and/or shall be readily available for review by a TCEQ representative indefinitely. If the permittee supplies the sludge to another person who land applies the sludge, the permittee shall notify the land applier of the requirements for record keeping found in 30 TAC § 312.47 for persons who land apply:
  - a. A certification statement that all applicable requirements (specifically listed) have been met, and that the permittee understands that there are significant penalties for false certification including fine and imprisonment. See 30 TAC § 312.47(a)(4)(A)(ii) or 30 TAC § 312.47(a)(5)(A)(ii), as applicable, and to the permittee's specific sludge treatment activities.
  - b. The location, by street address, and specific latitude and longitude, of each site on which sludge is applied.
  - c. The number of acres in each site on which bulk sludge is applied.
  - d. The date and time sludge is applied to each site.



- e. The cumulative amount of each pollutant in pounds/acre listed in Table 2 applied to each site.
- f. The total amount of sludge applied to each site in dry tons.

The above records shall be maintained on-site on a monthly basis and shall be made available to the Texas Commission on Environmental Quality upon request.

## **F. Reporting Requirements**

The permittee shall report annually to the TCEQ Regional Office (MC Region 11) and Compliance Monitoring Team (MC 224) of the Enforcement Division, by September 30<sup>th</sup> of each year the following information. The permittee must submit this annual report using the online electronic reporting system available through the TCEQ website unless the permittee requests and obtains an electronic reporting waiver.

1. Identify in the following categories (as applicable) the sewage sludge treatment process or processes at the facility: preliminary operations (e.g., sludge grinding and degritting), thickening (concentration), stabilization, anaerobic digestion, aerobic digestion, composting, conditioning, disinfection (e.g., beta ray irradiation, gamma ray irradiation, pasteurization), dewatering (e.g., centrifugation, sludge drying beds, sludge lagoons), heat drying, thermal reduction, and methane or biogas capture and recovery.
2. Identify the nature of material generated by the facility (such as a biosolid for beneficial use or land-farming, or sewage sludge for disposal at a monofill) and whether the material is ultimately conveyed off-site in bulk or in bags.
3. Results of tests performed for pollutants found in either Table 2 or 3 as appropriate for the permittee's land application practices.
4. The frequency of monitoring listed in Section I.C. that applies to the permittee.
5. Toxicity Characteristic Leaching Procedure (TCLP) results.
6. PCB concentration in sludge in mg/kg.
7. Identity of hauler(s) and TCEQ transporter number.
8. Date(s) of transport.
9. Texas Commission on Environmental Quality registration number, if applicable.
10. Amount of sludge disposal dry weight (lbs/acre) at each disposal site.
11. The concentration (mg/kg) in the sludge of each pollutant listed in Table 1 (defined as a monthly average) as well as the applicable pollutant concentration criteria (mg/kg) listed in Table 3 above, or the applicable pollutant loading rate limit (lbs/acre) listed in Table 2 above if it exceeds 90% of the limit.
12. Level of pathogen reduction achieved (Class A, Class AB or Class B).
13. Alternative used as listed in Section I.B.3.(a. or b.). Alternatives describe how the pathogen reduction requirements are met. If Class B sludge, include information on how site restrictions were met.

14. Identify each of the analytic methods used by the facility to analyze enteric viruses, fecal coliforms, helminth ova, *Salmonella* sp., and other regulated parameters.
15. Vector attraction reduction alternative used as listed in Section I.B.4.
16. Amount of sludge transported in dry tons/year.
17. The certification statement listed in either 30 TAC § 312.47(a)(4)(A)(ii) or 30 TAC § 312.47(a)(5)(A)(ii) as applicable to the permittee's sludge treatment activities, shall be attached to the annual reporting form.
18. When the amount of any pollutant applied to the land exceeds 90% of the cumulative pollutant loading rate for that pollutant, as described in Table 2, the permittee shall report the following information as an attachment to the annual reporting form.
  - a. The location, by street address, and specific latitude and longitude.
  - b. The number of acres in each site on which bulk sewage sludge is applied.
  - c. The date and time bulk sewage sludge is applied to each site.
  - d. The cumulative amount of each pollutant (i.e., pounds/acre) listed in Table 2 in the bulk sewage sludge applied to each site.
  - e. The amount of sewage sludge (i.e., dry tons) applied to each site.

The above records shall be maintained on a monthly basis and shall be made available to the Texas Commission on Environmental Quality upon request.

**SECTION III. REQUIREMENTS APPLYING TO ALL SEWAGE SLUDGE  
DISPOSED IN A MUNICIPAL SOLID WASTE LANDFILL**

- A. The permittee shall handle and dispose of sewage sludge in accordance with 30 TAC § 330 and all other applicable state and federal regulations to protect public health and the environment from any reasonably anticipated adverse effects due to any toxic pollutants that may be present. The permittee shall ensure that the sewage sludge meets the requirements in 30 TAC § 330 concerning the quality of the sludge disposed in a municipal solid waste landfill.
- B. If the permittee generates sewage sludge and supplies that sewage sludge to the owner or operator of a municipal solid waste landfill (MSWLF) for disposal, the permittee shall provide to the owner or operator of the MSWLF appropriate information needed to be in compliance with the provisions of this permit.
- C. The permittee shall give 180 days prior notice to the Executive Director in care of the Wastewater Permitting Section (MC 148) of the Water Quality Division of any change planned in the sewage sludge disposal practice.
- D. Sewage sludge shall be tested once during the term of this permit in accordance with the method specified in both 40 CFR Part 261, Appendix II and 40 CFR Part 268, Appendix I (Toxicity Characteristic Leaching Procedure) or other method, which receives the prior approval of the TCEQ for contaminants listed in Table 1 of 40 CFR § 261.24. Sewage sludge failing this test shall be managed according to RCRA standards for generators of hazardous waste, and the waste's disposition must be in accordance with all applicable requirements for hazardous waste processing, storage, or disposal.

Following failure of any TCLP test, the management or disposal of sewage sludge at a facility other than an authorized hazardous waste processing, storage, or disposal facility shall be prohibited until such time as the permittee can demonstrate the sewage sludge no longer exhibits the hazardous waste toxicity characteristics (as demonstrated by the results of the TCLP tests). A written report shall be provided to both the TCEQ Registration and Reporting Section (MC 129) of the Permitting and Registration Support Division and the Regional Director (MC Region 11) of the appropriate TCEQ field office within 7 days after failing the TCLP Test.

The report shall contain test results, certification that unauthorized waste management has stopped, and a summary of alternative disposal plans that comply with RCRA standards for the management of hazardous waste. The report shall be addressed to: Director, Permitting and Registration Support Division (MC 129), Texas Commission on Environmental Quality, P. O. Box 13087, Austin, Texas 78711-3087. In addition, the permittee shall prepare an annual report on the results of all sludge toxicity testing. This annual report shall be submitted to the TCEQ Regional Office (MC Region 11) and the Compliance Monitoring Team (MC 224) of the Enforcement Division by September 30 of each year.

- E. Sewage sludge shall be tested as needed, in accordance with the requirements of 30 TAC Chapter 330.
- F. Record Keeping Requirements

The permittee shall develop the following information and shall retain the information for five years.

1. The description (including procedures followed and the results) of all liquid Paint Filter Tests performed.
2. The description (including procedures followed and results) of all TCLP tests performed.

The above records shall be maintained on-site on a monthly basis and shall be made available to the Texas Commission on Environmental Quality upon request.

#### G. Reporting Requirements

The permittee shall report annually to the TCEQ Regional Office (MC Region 11) and Compliance Monitoring Team (MC 224) of the Enforcement Division by September 30<sup>th</sup> of each year the following information. The permittee must submit this annual report using the online electronic reporting system available through the TCEQ website unless the permittee requests and obtains an electronic reporting waiver.

1. Identify in the following categories (as applicable) the sewage sludge treatment process or processes at the facility: preliminary operations (e.g., sludge grinding and degritting), thickening (concentration), stabilization, anaerobic digestion, aerobic digestion, composting, conditioning, disinfection (e.g., beta ray irradiation, gamma ray irradiation, pasteurization), dewatering (e.g., centrifugation, sludge drying beds, sludge lagoons), heat drying, thermal reduction, and methane or biogas capture and recovery.
2. Toxicity Characteristic Leaching Procedure (TCLP) results.
3. Annual sludge production in dry tons/year.
4. Amount of sludge disposed in a municipal solid waste landfill in dry tons/year.
5. Amount of sludge transported interstate in dry tons/year.
6. A certification that the sewage sludge meets the requirements of 30 TAC § 330 concerning the quality of the sludge disposed in a municipal solid waste landfill.
7. Identity of hauler(s) and transporter registration number.
8. Owner of disposal site(s).
9. Location of disposal site(s).
10. Date(s) of disposal.

The above records shall be maintained on-site on a monthly basis and shall be made available to the Texas Commission on Environmental Quality upon request.

**SECTION IV. REQUIREMENTS APPLYING TO SLUDGE TRANSPORTED TO ANOTHER FACILITY FOR FURTHER PROCESSING**

These provisions apply to sludge that is transported to another wastewater treatment facility or facility that further processes sludge. These provisions are intended to allow transport of sludge to facilities that have been authorized to accept sludge. These provisions do not limit the ability of the receiving facility to determine whether to accept the sludge, nor do they limit the ability of the receiving facility to request additional testing or documentation.

**A. General Requirements**

1. The permittee shall handle and dispose of sewage sludge in accordance with 30 TAC Chapter 312 and all other applicable state and federal regulations in a manner that protects public health and the environment from any reasonably anticipated adverse effects due to any toxic pollutants that may be present in the sludge.
2. Sludge may only be transported using a registered transporter or using an approved pipeline.

**B. Record Keeping Requirements**

1. For sludge transported by an approved pipeline, the permittee must maintain records of the following:
  - a. the amount of sludge transported;
  - b. the date of transport;
  - c. the name and TCEQ permit number of the receiving facility or facilities;
  - d. the location of the receiving facility or facilities;
  - e. the name and TCEQ permit number of the facility that generated the waste; and
  - f. copy of the written agreement between the permittee and the receiving facility to accept sludge.
2. For sludge transported by a registered transporter, the permittee must maintain records of the completed trip tickets in accordance with 30 TAC § 312.145(a)(1)-(7) and amount of sludge transported.
3. The above records shall be maintained on-site on a monthly basis and shall be made available to the TCEQ upon request. These records shall be retained for at least five years.

**C. Reporting Requirements**

The permittee shall report the following information annually to the TCEQ Regional Office (MC Region 11) and Compliance Monitoring Team (MC 224) of the Enforcement Division, by September 30<sup>th</sup> of each year. The permittee must submit this annual report using the online electronic reporting system available through the TCEQ website unless the permittee requests and obtains an electronic reporting waiver.

1. Identify in the following categories (as applicable) the sewage sludge treatment process or processes at the facility: preliminary operations (e.g., sludge grinding and degritting), thickening (concentration), stabilization, anaerobic digestion, aerobic digestion, composting, conditioning, disinfection (e.g., beta ray irradiation, gamma ray irradiation, pasteurization), dewatering (e.g., centrifugation, sludge drying beds, sludge lagoons), heat drying, thermal reduction, and methane or biogas capture and recovery.
2. the annual sludge production;
3. the amount of sludge transported;
4. the owner of each receiving facility;
5. the location of each receiving facility; and
6. the date(s) of disposal at each receiving facility.

**OTHER REQUIREMENTS**

1. The permittee shall employ or contract with one or more licensed wastewater treatment facility operators or wastewater system operations companies holding a valid license or registration according to the requirements of 30 TAC Chapter 30, Occupational Licenses and Registrations, and in particular 30 TAC Chapter 30, Subchapter J, Wastewater Operators and Operations Companies.

This Category C facility must be operated by a chief operator or an operator holding a Class C license or higher. The facility must be operated a minimum of five days per week by the licensed chief operator or an operator holding the required level of license or higher. The licensed chief operator or operator holding the required level of license or higher must be available by telephone or pager seven days per week. Where shift operation of the wastewater treatment facility is necessary, each shift that does not have the on-site supervision of the licensed chief operator must be supervised by an operator in charge who is licensed not less than one level below the category for the facility.

2. The facility is not located in the Coastal Management Program boundary.
3. The permittee shall comply with the requirements of 30 TAC § 309.13(a) through (d). In addition, by ownership of the required buffer zone area, the permittee shall comply with the requirements of 30 TAC § 309.13(e).
4. The permittee shall provide facilities for the protection of its wastewater treatment facility from a 100-year flood.
5. In accordance with 30 TAC § 319.9, a permittee that has at least twelve months of uninterrupted compliance with its bacteria limit may notify the commission in writing of its compliance and request a less frequent measurement schedule. To request a less frequent schedule, the permittee shall submit a written request to the TCEQ Wastewater Permitting Section (MC 148) for each phase that includes a different monitoring frequency. The request must contain all of the reported bacteria values (Daily Avg. and Daily Max/Single Grab) for the twelve consecutive months immediately prior to the request. If the Executive Director finds that a less frequent measurement schedule is protective of human health and the environment, the permittee may be given a less frequent measurement schedule. For this permit, 1/month may be reduced to 1/quarter. **A violation of any bacteria limit by a facility that has been granted a less frequent measurement schedule will require the permittee to return to the standard frequency schedule and submit written notice to the TCEQ Wastewater Permitting Section (MC 148).** The permittee may not apply for another reduction in measurement frequency for at least 24 months from the date of the last violation. The Executive Director may establish a more frequent measurement schedule if necessary to protect human health or the environment.
6. Prior to construction of the treatment facility, the permittee shall submit to the TCEQ Wastewater Permitting Section (MC 148) a summary transmittal letter in accordance with the requirements in 30 TAC § 217.6(d). If requested by the Wastewater Permitting Section, the permittee shall submit plans and specifications and a final engineering design report which comply with 30 TAC Chapter 217, Design Criteria for Domestic Wastewater Systems. The permittee shall clearly show how the treatment system will meet the permitted effluent limitations required on Page 2 of this permit. A copy of the summary transmittal letter shall be available at the plant site for inspection by authorized representatives of the TCEQ.
7. Reporting requirements according to 30 TAC §§ 319.1-319.11 and any additional effluent reporting requirements contained in this permit are suspended from the effective date of the permit until plant startup or discharge from the facility described by this permit, whichever occurs first. The permittee shall provide written notice to the TCEQ Regional Office (MC Region 11) and the Applications Review

and Processing Team (MC 148) of the Water Quality Division at least forty-five (45) days prior to plant startup or anticipated discharge, whichever occurs first, on Notification of Completion Form 20007.





# State Office of Administrative Hearings

Kristofer S. Monson  
Chief Administrative Law Judge

August 23, 2022

Mary Smith  
General Counsel  
Texas Commission on Environmental Quality  
12100 Park 35 Circle, Bldg. F, Room 4225  
Austin Texas 78753

**VIA EFILE TEXAS**

**Re: SOAH Docket No. 582-22-1016; Texas Commission on Environmental Quality No. 2021-1214-MWD; Application by AIR-W 2017-7 L.P. For TPDES Permit No. WQ0015878001**

Dear Ms. Smith:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality (Commission) on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Commission no later than September 12, 2022. Any replies to exceptions or briefs must be filed in the same manner no later than September 22, 2022.

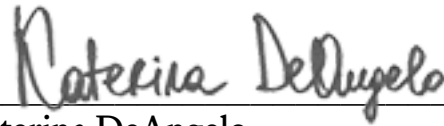
This matter has been designated **TCEQ Docket No. 2021-1214-MWD; SOAH Docket No. 582-22-1016**. All documents to be filed must clearly

reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the Commission electronically at <http://www14.tceq.texas.gov/epic/eFiling/> or by filing an original and seven copies with the Chief Clerk of the Commission. Failure to provide copies may be grounds for withholding consideration of the pleadings.



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Andrew Lutostanski  
Presiding Administrative Law Judge



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Katerina DeAngelo  
Co-Presiding Administrative Law Judge

CC: Service List

**BEFORE THE  
STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

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**APPLICATION BY AIR-W 2017-7 L.P.  
FOR TPDES PERMIT NO. WQ0015878001**

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**BEFORE THE  
STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

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**APPLICATION BY AIR-W 2017-7 L.P.  
FOR TPDES PERMIT NO. WQ0015878001**

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**PROPOSAL FOR DECISION**

AIR-W 2017-7 L.P. (AIRW) filed an application (Application) with the Texas Commission on Environmental Quality (Commission or TCEQ) for new Texas Pollutant Discharge Elimination System (TPDES) permit No. WQ0015878001 (Draft Permit) to release treated domestic wastewater from a proposed plant site (Facility) located in Williamson County, Texas.

The City of Georgetown (City) opposed the Application. The Commission determined that the City was an affected person, granted the hearing request, and referred the matter to the State Office of Administrative Hearings (SOAH) for hearing on eight issues.

The Commission's Executive Director (ED) and Office of Public Interest Counsel (OPIC) both recommend issuance of the permit. Based on the evidence in the record and the applicable law, the Administrative Law Judges (ALJs) find the Commission should issue the Draft Permit without alterations.

## **I. NOTICE, JURISDICTION, AND PROCEDURAL HISTORY**

No party contested the Commission's jurisdiction to act on the Application or SOAH's jurisdiction to convene a hearing and prepare a Proposal for Decision (PFD). The ALJs will address jurisdiction only in the findings of fact and conclusions of law in the Proposed Order attached to this PFD. The City contested the adequacy of notice regarding the Application, and the ALJs will address the notice issue in Section VI.E.

AIRW filed the Application on April 6, 2020. The ED determined the Application was administratively complete on June 19, 2020, and technically complete on November 19, 2020, and prepared the Draft Permit. On December 8, 2021, the Commission referred the Application to SOAH for a contested case hearing.

On February 24, 2022, a preliminary hearing was convened in this case via videoconference by SOAH ALJs Andrew Lutostanski and Ross Henderson. The

administrative record and jurisdictional documented were admitted into evidence.<sup>1</sup> Jurisdiction was noted by the ALJs, and the ALJs admitted AIRW, the ED, OPIC, the City, and two additional protestants, Jonah Water Special Utility District (Jonah) and Jimmy Webb,<sup>2</sup> as parties. A second preliminary hearing was convened via videoconference by ALJs Lutostanski and Katerina DeAngelo on May 12, 2022, at which the ALJs ruled on all timely-filed motions and objections.

On May 23-25, 2022, ALJs Lutostanski and DeAngelo convened the evidentiary hearing at SOAH via videoconference. Attorney Helen Gilbert appeared for AIRW; attorneys William A. “Cody” Faulk, Trish Carls, and Carlota Hopkins-Baul appeared for the City; attorneys John Carlton, Grayson McDaniel, and Kelsey Daugherty appeared for Jonah; attorney Bobby Salehi appeared for the ED; and attorney Sheldon Wayne appeared for OPIC. The record closed with the filing of post-hearing briefs on June 24, 2022.

## **II. PROPOSED FACILITY AND DRAFT PERMIT CONDITIONS**

The following description of the Facility and the Draft Permit is based on descriptions in the administrative record. New TPDES

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<sup>1</sup> AIRW Exs. 1-7. The administrative record included the Application (including all Technical Reports and attachments submitted by AIRW); the Draft Permit (made by TCEQ after its review of the Application), including TCEQ’s Statement of Basis Technical Summary and Preliminary Decision, Compliance History Report, and Technical Memoranda; and all associated jurisdictional documents (notices, affidavits, and the Commission’s Interim Order).

<sup>2</sup> Mr. Webb submitted his withdrawal from the proceeding on May 17, 2022. Jonah originally opposed the issuance of the Draft Permit; however, as of April 20, 2022, Jonah and affiliates of AIRW, 600 Westinghouse Investments, LLC (600 Westinghouse) and 800 Westinghouse Investment, LLC (800 Westinghouse), have entered into Non-Standard Service Agreements (NSSAs), providing that Jonah will be the future owner and operator of the Facility. AIRW Ex. 43. Jonah was henceforth aligned with AIRW on the Draft Permit Application.



Permit No. WQ0015878001 would authorize discharge from the Facility of treated domestic wastewater at a daily average flow not to exceed 200,000 gallons per day (or 0.20 million gallons per day (MGD)). The Facility, which has not been constructed, will be located approximately 500 feet southeast of the intersection of Rockride Lane (County Road (CR) 110) and Westinghouse Road (CR 111), in Williamson County, Texas 78626. The Facility would serve The Mansions of Georgetown III residential development, an 880-house subdivision.

The Facility would be an activated sludge with nitrification process plant operated in the conventional mode. Treatment units include aeration basins, a final clarifier, a cloth effluent filter, chemical injection for phosphorus removal, an aerated sludge holding and thickening tank, and a chlorine contact chamber. Sludge generated from the Facility would be hauled by a registered transporter and disposed of at a TCEQ-permitted solid waste processing facility, Austin Wastewater Processing Facility. The Draft Permit also authorizes the disposal of sludge at a TCEQ-authorized land application site, co-disposal landfill, wastewater treatment facility, or facility that further processes sludge.

The effluent limitations in the final phase of the Draft Permit, based on a 30-day average, are 7 milligrams per liter (mg/L) five-day carbonaceous biochemical oxygen demand (CBOD<sub>5</sub>), 10 mg/L total suspended solids, 2 mg/L ammonia-nitrogen (NH<sub>3</sub>-N), 0.5 mg/L total phosphorus (TP), 126 colony forming units (CFU) or most probable number (MPN) of *E. coli* per 100 milliliters (ml), and 4.0 mg/l minimum dissolved oxygen (DO). The effluent will contain a chlorine residual of at least 1.0 mg/L and shall not exceed a chlorine residual of 4.0 mg/L after a detention time of at least 20 minutes based on peak flow.

The treated effluent will be discharged via pipe, then through a culvert, then to an unnamed tributary,<sup>3</sup> 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 (ALU) for the unnamed tributary and Mankins Branch (intermittent with perennial pools) and high ALU 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. TCEQ issued the Draft Permit with effluent limitations intended to maintain and protect the existing instream uses.

TCEQ found that the end-of-pipe compliance with pH limits between 6.0 and 9.0 standard units reasonably assures instream compliance with the Texas Surface Water Quality Standards (TSWQS) for pH when the discharge authorized is from a minor facility and the unclassified waterbodies have minimal or limited ALU. TCEQ further found that the discharge from the Facility is not expected to have an effect on any federal endangered or threatened aquatic or aquatic-dependent species or proposed species or their critical habitat.

Mankins Branch is currently listed on the 2018 Clean Water Act section 303(d) list, specifically for elevated bacteria levels (recreational use) from the confluence with the San Gabriel River upstream to the intersection of CR 105 and CR 104 in Williamson County. TCEQ determined that the Facility would be designed to provide adequate disinfection and, when operated properly, should not add to the bacterial impairment of the segment. To ensure that the proposed

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<sup>3</sup> There are three on-channel stock ponds on the unnamed tributary.

discharge meets the stream bacterial standard, an effluent limitation of 126 CFU or MPN of *E. coli* per 100 ml was added to the Draft Permit.

### **III. BURDEN OF PROOF AND PRIMA FACIE CASE**

AIRW, as the moving party, bears the burden of proof by a preponderance of the evidence.<sup>4</sup> The Application was filed after September 1, 2015, and the Commission referred it to SOAH under Texas Water Code section 5.556, which governs referral of environmental permitting cases to SOAH.<sup>5</sup> Therefore, this case is subject to Texas Government Code section 2003.047(i-1)-(i-3), as enacted in 2015, which provides:

- (i-1) In a contested case regarding a permit application referred under Section 5.556 [of the] Water Code, the filing with [SOAH] 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:

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<sup>4</sup> 30 Tex. Admin. Code § 80.17(a); 1 Tex. Admin. Code § 155.427.

<sup>5</sup> Tex. Water Code §§ 5.551(a), .556.

- (1) relates to . . . 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.<sup>6</sup>

Although this law creates a presumption, sets up a method for rebutting that presumption, and shifts the burden of production on that rebuttal, it does not change the underlying burden of proof. The burden of proof remains with AIRW to establish by a preponderance of the evidence that the Application would not violate applicable requirements and that a permit, if issued consistent with the draft permit, would protect human health and safety, the environment, and physical property.<sup>7</sup>

In this case, the Application, the Draft Permit, and the other materials listed in Texas Government Code section 2003.047(i-1), which are collectively referred to as the prima facie demonstration, were offered and admitted into the record at the preliminary hearing.<sup>8</sup>

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<sup>6</sup> *Accord* 30 Tex. Admin. Code § 80.17(c).

<sup>7</sup> 30 Tex. Admin. Code § 80.17(a), (c).

<sup>8</sup> *See* AIRW Exs. 1-7.

## **IV. WASTEWATER DISCHARGE PERMIT REQUIREMENTS**

Chapter 26 of the Texas Water Code requires a person who seeks to discharge wastewater into water in the State to file an application with TCEQ. 30 Texas Administrative Code, chapter 305, subchapter C contains TCEQ's application filing requirements. Once an application is filed, TCEQ reviews the application in accordance with 30 Texas Administrative Code chapter 281. Based on a technical review, TCEQ prepares a draft permit that is consistent with Environmental Protection Agency (EPA) and TCEQ rules and a technical summary that discusses the application facts and significant factual, legal, methodological, and policy questions considered while preparing the draft permit.

A domestic wastewater treatment facility in Texas is subject to wastewater discharge permit requirements. 30 Texas Administrative Code, chapter 305, subchapter F contains standard permit requirements, which TCEQ has adapted specifically for use in wastewater discharge permits. All wastewater discharge permits are also subject to regulations found in 30 Texas Administrative Code, chapter 319, which require the permittee to monitor its effluent and report the results as required in the permit.

Finally, TCEQ has adopted water quality standards applicable to wastewater discharges in accordance with section 303 of the Clean Water Act and section 26.023 of the Texas Water Code. These standards, known as the TSWQS, are

found in 30 Texas Administrative Code, Chapter 307. Provisions for implementing the TSWQS are described in Procedures to Implement the TSWQS (IPs).<sup>9</sup>

Additional law specifically applicable to the eight issues referred by the Commission will be discussed below.

## **V. SUMMARY OF THE EVIDENCE**

The administrative record established 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.<sup>10</sup>

At the hearing on the merits, the City offered evidence for the purpose of rebutting AIRW's prima facie demonstration.<sup>11</sup> The City had 44 exhibits admitted, which included the prefiled testimony of Wayne Reed, Carol Rubinstein, and Allen D. Woelke.<sup>12</sup>

The ED, AIRW, and Jonah presented additional evidence in response to evidence offered by the City. At the hearing, AIRW had 46 exhibits admitted, which included the prefiled testimony of Janet Sims, Paul Price, Mark Perkins, and

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<sup>9</sup> ED Exhibit JL-3 contains the IPs (RG-194) (Jun. 2010).

<sup>10</sup> Tex. Gov't Code § 2003.047(i-1).

<sup>11</sup> Tex. Gov't Code § 2003.047(i-1)-(i-3).

<sup>12</sup> City Exs. 1, 1A, 2-4, 4A, 5-18, 20-43.

David Tuckfield.<sup>13</sup> The ED had seven exhibits admitted, which included the prefiled testimony of Gordon Cooper and Jenna Lueg.<sup>14</sup> Jonah had four exhibits admitted, which included the prefiled revised testimony of William Brown and Miles Whitney.<sup>15</sup> OPIC offered no testimony or exhibits.

## **VI. ANALYSIS**

The Commission referred this matter to SOAH for hearing on the following eight issues:

- A. Whether the Draft Permit is protective of water quality and the existing uses of the receiving waters in accordance with applicable TSWQS, including protection of aquatic and terrestrial wildlife;
- B. Whether the Draft Permit is consistent with the state's regionalization policy and demonstration of need for the volume requested in the Application for a new discharge permit, pursuant to Texas Water Code section 26.0282;
- C. Whether the Draft Permit is protective of the health of the nearby residents;
- D. Whether the Draft Permit complies with applicable requirements regarding nuisance odors;
- E. Whether the application is substantially complete and accurate;

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<sup>13</sup> AIRW Exs. 8-53.

<sup>14</sup> ED Exs. GC1-GC3, JL1-JL4.

<sup>15</sup> Jonah Exs. 3-6. The ALJs denied the City's motion to dismiss on the basis that Jonah's revised testimony established that Jonah should be classified as a co-applicant and the Application should be appropriately amended and re-filed to reflect such a material change.

- F. Whether the Draft Permit complies with TCEQ's antidegradation policy and procedures;
- G. Whether the Draft Permit should be altered or denied based on the AIRW's compliance history; and
- H. Whether the Draft Permit contains sufficient provisions to ensure protection of water quality, including necessary operational requirements.<sup>16</sup>

With respect to each of the eight referred issues, and for the reasons set forth below, the ALJs find that AIRW has met its burden to prove by a preponderance of the evidence that the Draft Permit should be issued without changes.

**A. Whether the Draft Permit is Protective of Water Quality and the Existing Uses of the Receiving Waters in Accordance with applicable TSWQS, Including Protection of Aquatic and Terrestrial Wildlife**

Under the TSWQS, the policy of the state is to maintain the quality of water consistent with public health and enjoyment, propagation and protection of terrestrial and aquatic life, operation of existing industries, and taking into consideration economic development of the state; to encourage and promote development and use of regional and area-wide wastewater collection, treatment, and disposal systems to serve the wastewater disposal needs of the citizens of the state; and to require the use of all reasonable methods to implement this policy.<sup>17</sup>

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<sup>16</sup> AIRW Ex. 1.

<sup>17</sup> Tex. Water Code § 26.003; 30 Tex. Admin. Code § 307.1.



All permit applicants are requested to provide information about the receiving water as part of the permit application. Determining general stream flow characteristics (perennial, intermittent, or intermittent with perennial pools) is of major importance in assigning uses to unclassified streams. TCEQ considers hydrological conditions, appropriate assessment location, and applicability when determining the aquatic life uses for water bodies that receive or may receive a permitted wastewater discharge. For facilities that have not yet discharged, TCEQ gives more weight to physical, hydrological, chemical, and biological conditions downstream of the proposed discharge point.<sup>18</sup>

New permit applications are reviewed to ensure that permitted effluent limits will maintain instream criteria for DO and other parameters such as bacteria, phosphorus, nitrogen, turbidity, dissolved solids, temperature, and toxic pollutants. TCEQ reviews all available information from sources that may include the application, stream surveys, route monitoring information, waste load evaluations, and total maximum daily loads. Additional information may be acquired from TCEQ's regional staff, applicant, adjacent landowners, river authorities, or governmental entities.<sup>19</sup>

Jenna Lueg, an aquatic scientist on the Standards Implementation Team in the Water Quality Assessment Section of the Water Quality Division of TCEQ, reviewed the Application, prepared a memorandum and the ALU assessment,<sup>20</sup>

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<sup>18</sup> ED Ex. JL-3 at Bates 0033-0034.

<sup>19</sup> ED Ex. JL-3 at Bates 0036.

<sup>20</sup> Ms. Lueg assesses the ALU based on the IPs and the flow of unclassified waterbodies. ED Ex. JL-1 at Bates 0004 (Lueg Dir.).

and performed an antidegradation review in accordance with TCEQ's rules, standards, and procedures.<sup>21</sup>

During her review of permit applications, Ms. Lueg evaluates the water quality criteria associated with the uses of the receiving waters of a proposed discharge; confirms or finds the discharge route; assigns the aquatic life and human health water quality criteria associated with the uses of the unclassified receiving streams; finds appropriate uses for the classified receiving water; identifies endangered species in the watershed; and performs antidegradation reviews.<sup>22</sup>

In this case, Ms. Lueg determined the discharge route of the treated effluent—it will be discharged via pipe, then through a culvert, then to an unnamed tributary, then to Mankins Branch, then the San Gabriel/North Fork San Gabriel River in Segment No. 1248 of the Brazos River Basin. To the unnamed tributary and Mankins Branch (intermittent with perennial pools), Ms. Lueg assigned limited ALU and 3.0 mg/L DO; to Mankins Branch (perennial), high ALU and 5.0 mg/L DO; and to Segment 1248, primary contact recreation, public water supply, aquifer protection, high ALU, and 5.0 mg/L DO.<sup>23</sup> Ms. Lueg recommended a TP limit of 0.5 mg/l, based on a nutrient screening. Overall, Ms. Lueg's review determined that: existing water quality uses will not be impaired by the proposed discharge; numerical and narrative criteria to protect existing uses

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<sup>21</sup> See ED Ex. JL-1 (Lueg Dir.).

<sup>22</sup> ED Ex. JL-1 at Bates 0004 (Lueg Dir.).

<sup>23</sup> AIRW Ex. 3 at Bates 0042. The memorandum states that the upper portion on Mankins Branch is in the transition zone of the Edwards Aquifer.

will be maintained; and there will be no significant degradation of water quality in Mankins Branch, which has high aquatic life use.<sup>24</sup>

Ms. Lueg determined that the Draft Permit will not negatively impact aquatic or terrestrial wildlife species.<sup>25</sup> She reviewed the United States Fish and Wildlife Service's (USFWS) biological opinion on the State of Texas authorization of the TPDES for the presence of critical habitat of federally listed endangered or threatened aquatic or aquatic-dependent species in the vicinity of the discharge, and determined that the proposed discharge is not expected to have an effect on any federally listed endangered or threatened aquatic or aquatic-dependent species or proposed species or their critical habitat.<sup>26</sup>

James Michalk, a water quality modeler on the Water Quality Assessment Team in the Water Quality Assessment Section of the Water Quality Division of TCEQ, performed DO modeling and determined that an effluent set at 7 mg/L CBOD<sub>5</sub>, 2 mg/L NH<sub>3</sub>-N, and 4.0 mg/L DO is predicted to be adequate to ensure that DO levels are maintained above the DO criteria established by Ms. Lueg's review of the Application.<sup>27</sup>

The City argues that the Draft Permit does not provide reasonable assurance that water quality and existing uses will be protected, due to the lack of information

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<sup>24</sup> ED Ex. JL-1 at Bates 0010 (Lueg Dir.); AIRW Ex. 3 at Bates 0042-0043.

<sup>25</sup> ED Ex. JL-1 at Bates 0010 (Lueg Dir.).

<sup>26</sup> AIRW Ex. 3 at Bates 00423.

<sup>27</sup> AIRW Ex. 3 at Bates 0044. City Exhibit 43 contains Mr. Michalk's DO Modeling Permit Review Checklist.

from AIRW regarding the receiving streams and existing<sup>28</sup> and known future uses, which precluded TCEQ from conducting an adequate investigation and review of the Application.<sup>29</sup>

The City cites TCEQ's Instructions for Completing Domestic Wastewater Permit Applications (Instructions).<sup>30</sup> For new applications, the Instructions require submittal of a U.S. Geological Survey (USGS) topographic map clearly outlining and labeling all ponds; all new and future commercial development, housing developments, industrial sites, parks, schools, and recreational areas; all springs, public water supply wells, and monitor wells; and all parks, playgrounds, and schoolyards around the point of discharge and one mile downstream of the discharge route.<sup>31</sup> The City identified the items that AIRW failed to include in its Application: the detention ponds for the tracts identified as part of AIRW's property;<sup>32</sup> the Patterson Ranch residential development;<sup>33</sup> Gateway College Preparatory school,<sup>34</sup> Everett Williams Elementary School,<sup>35</sup> and the schools' schoolyards and playgrounds; the open space associated with the drainageway, perennial pools, and intermittent tributary running through the Patterson Ranch

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<sup>28</sup> Existing use is a use that is currently being supported by a specific water body or that was attained on or after November 28, 1975. 30 Tex. Admin. Code § 307.3(a)(26).

<sup>29</sup> See City Br. at 3-12 and City Reply Br. at 2-9.

<sup>30</sup> City Ex. 14.

<sup>31</sup> City Ex. 14 at Bates 000219-000220.

<sup>32</sup> City Ex. 14 at Bates 00138-00139.

<sup>33</sup> City Ex. 30. According to the City, the development is currently under construction on the parcel immediately north of the Facility.

<sup>34</sup> According to the City, Gateway College Preparatory is a private school whose soccer fields are located one half mile to the southwest of the Facility. The location of the school is suggested on AIRW's map by a small flag southwest of the Facility. AIRW Ex. 4 at Bates 00061.

<sup>35</sup> According to the City, Everett Williams Elementary School is a public school whose schoolyard is approximately one quarter mile to the north of the Facility.

residential development;<sup>36</sup> and any spring(s) providing water flow into Pond 1.<sup>37</sup> The City argues that the Application was inaccurate and incomplete and TCEQ did not seek additional information from adjacent landowners, the City, Williamson County, or other sources to confirm the receiving streams and existing uses;<sup>38</sup> therefore, Ms. Lueg's review was not in accordance with the IPs and the Draft Permit does not ensure protection of water quality and existing uses of the receiving waters.

Moreover, the City states that TCEQ did not consider the information received from adjacent landowners during the public comment period regarding the "dry weather creek" characteristics of the receiving stream,<sup>39</sup> the livestock and fishing uses of the perennial pools associated with the receiving stream,<sup>40</sup> and the aesthetic use and enjoyment of the receiving stream and perennial pools.

The City further argues that TCEQ did not conduct a receiving water assessment; did not seek to develop information about physical, hydrological, chemical, and biological conditions immediately downstream of the proposed

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<sup>36</sup> See AIRW Ex. 45; City Ex. 12 at Bates 000163.

<sup>37</sup> The perennial pool that marks the headwaters of the unnamed intermittent tributary to Mankins Branch on the USGS maps and is the closest to CR 110 was denominated "Pond 1" and the next pool along the unnamed tributary was denominated "Pond 2." See, e.g. City Exs. 32, 43.

<sup>38</sup> Hearing Tr. at 694-695. Ms. Lueg testified that she did not visit the Facility site and did not contact adjacent landowners, the City, City of Round Rock, or Williamson County for additional information about the unnamed tributary. She did not consider the proximity of two schools within half a mile of the discharge point in considering potential recreational use or other exposure of school-aged children. In making its argument, the City also relied on an email from Mr. Michalk to Ms. Lueg, in which he had questions regarding Mankins Branch, including the differentiation between the intermittent and perennial stretches, and noted that Mankins Branch was not labeled on the submitted maps. City Ex. 42. Ms. Lueg testified that, in response to Mr. Michalk's email, she changed the portion of Mankins Branch to perennial, which gave it high ALU. Hearing Tr. at 692, 694.

<sup>39</sup> AIRW Ex. 51.

<sup>40</sup> AIRW Ex. 51. The comment indicated that the two ponds, which are stocked with fish to control algae growth, create a drinking source for cattle and fishing recreation.

discharge point; and did not conduct a fish survey in the receiving stream and perennial pools. The City asserts that TCEQ did not consider whether the discharge of treated effluent may degrade aesthetic values<sup>41</sup> despite the existence of a narrative aesthetic water quality standard,<sup>42</sup> the identification of aesthetic values in the IPs,<sup>43</sup> and the policy that the water quality be maintained consistent with the protection of public health and enjoyment of waters in the State.<sup>44</sup>

The ED, OPIC, and AIRW maintain their position that the Draft Permit is protective of water quality and the existing uses of the receiving waters, including protection of aquatic and terrestrial wildlife.<sup>45</sup> AIRW indicates that the City did not present any evidence to dispute TCEQ's ALU determination, DO standards, and established effluent limits and did not present any expert testimony to support its claim of a failure to provide information. AIRW witness Mr. Price, an expert aquatic ecologist, confirmed that the ALU and accompanying water quality standards were determined appropriately and the Draft Permit conditions will be sufficient to protect existing uses in the receiving waters.<sup>46</sup>

At the hearing, Ms. Lueg testified that the Draft Permit will maintain and protect existing uses and will not harm aquatic or terrestrial wildlife. AIRW

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<sup>41</sup> Hearing Tr. at 695. Ms. Lueg testified that she did not consider whether the discharge of treated effluent may degrade aesthetic values.

<sup>42</sup> 30 Tex. Admin. Code § 307.4(b).

<sup>43</sup> ED Ex. JL-3 at Bates 0073. Narrative criteria may also apply for aesthetic parameters such as: taste and odor; suspended solids; turbidity; foam and froth; and oil and grease.

<sup>44</sup> Tex. Water Code § 26.003.

<sup>45</sup> See ED Br. at 2-3; ED Reply Br. at 1-2; OPIC Br. at 5; AIRW Br. at 3-6; AIRW Reply Br. at 4-6.

<sup>46</sup> AIRW Ex. 14 at Bates 000046; 000051 (Price Dir.). Mr. Price also testified that he agreed with TCEQ's DO modeling methodology and findings.

witnesses Ms. Sims and Mr. Price, as well as Ms. Lueg, confirmed that the *E. coli* limit and the 1.0 mg/L chlorine residual (with 20 minutes of detention time) have long been established to be sufficient disinfection criteria for the protection of human health for primary contact recreational uses.<sup>47</sup> According to AIRW, there is no reason to further investigate and collect additional information where it is uncontroverted that the discharge is to a dry creek with intermittent flows and limited ALU. Because aquatic life is more sensitive to chemicals in water, if the water/effluent is protective of the limited aquatic life, it should also be protective of livestock and wildlife.

As to future uses, Ms. Lueg and Mr. Cooper, a TCEQ environmental permit specialist, testified that permit provisions are not imposed based on future, speculative downstream development conditions but on what site characteristics are at the time of filing.<sup>48</sup> According to AIRW, there is no evidence of parks, playgrounds, or schoolyards within one mile downstream, or of any spring(s) providing water flow into Pond 1.<sup>49</sup> AIRW states that the Draft Permit contains prohibitions on discharges of visible oil, visible grease, foam, froth, and suspended solids so that the aesthetic qualities and fish and wildlife uses of the receiving

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<sup>47</sup> AIRW Ex. 8 at Bates 000025 (Sims Dir.); AIRW Ex. 14 at Bates 000050, 000052 (Price Dir.); Hearing Tr. at 433, 703. Mr. Price testified that the maximum allowable concentration of coliform bacteria (126 *E. coli* CFU or MPN/100 ml) in the effluent is the same as the standard that supports contact recreation in the TSWQS and in the receiving water. This standard has been established through public health studies to be protective of contact recreation. Because the San Gabriel River (Segment 1248) and lower Mankins Branch are many miles downstream of the proposed discharge location, the effluent will dilute, and *E. coli* number will decrease, with downstream transport.

<sup>47</sup> Hearing Tr. at 680, 701.

<sup>48</sup> Hearing Tr. at 680, 701.

<sup>49</sup> According to AIRW, the City referenced a 1951 USGS topological map unrelated to evidence of spring flow.

waters are not impaired.<sup>50</sup> Finally, AIRW states that the City's allegations of detention ponds and housing development either were not known at the time of the filing or are not supported by transect data.

## **1. ALJs' Analysis**

The ALJs find that the preponderance of the credible evidence proves that the Draft Permit is protective of water quality and the existing uses of the receiving waters in accordance with applicable TSWQS, including protection of aquatic and terrestrial wildlife. The City failed to rebut the prima facie determination because its arguments were conclusory and unverifiable due to a lack of underlying data to support its conclusions. The City alleged that the Application lacked information regarding the receiving streams and existing and known future uses and that TCEQ's review of the Application was incorrect; however, the ALJs find that the City's allegations are not supported by any credible evidence. The City did not present evidence disputing the accuracy of the ALU, DO determinations, or effluent limits or how such determinations and limits are not protective of existing uses and wildlife.

TCEQ's and AIRW's witnesses credibly testified that the Application was reviewed in accordance with TCEQ's rules, standards, and procedures; and that the Draft Permit is protective of water quality and existing uses, as well as of aquatic and terrestrial wildlife. TCEQ's witnesses testified that TCEQ does not propose permit conditions based on how the land may be developed in the future

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<sup>50</sup> AIRW Ex. 3 at Bates 0002.



and that they consider the circumstances at the time the application is filed. Ms. Lueg testified that her findings would be the same had she known that the Patterson Ranch area was under residential development, since the established limits would be protective of human health. The issue referred to SOAH addresses the existing uses, not future uses, of the receiving waters; and the ALJs conclude that the evidence established that the existing uses of the receiving waters would be protected under the Draft Permit conditions. Finally, the evidence showed that the Draft Permit conditions address the aesthetic water quality standard. Therefore, the ALJs find that the Draft Permit complies with TCEQ's rules and procedures for TPDES permit applications and conclude that AIRW has met its burden regarding Issue A.

**B. Whether the Draft Permit is Consistent with the State's Regionalization Policy and Demonstration of Need for the Volume Requested in the Application for a New Discharge Permit Pursuant to Texas Water Code section 26.0282.**

**1. Legal Background**

The Texas Legislature adopted section 26.003 of the Texas Water Code to encourage and promote regionalization. Section 26.003 provides:

It is the policy of this state and the purpose of this subchapter to maintain the quality of water in the state consistent with the public health and enjoyment, the propagation and protection of terrestrial and aquatic life, and the operation of existing industries, taking into consideration the economic development of the state; to encourage and promote the development and use of regional and areawide waste

collection, treatment, and disposal systems to serve the waste disposal needs of the citizens of the state; and to require the use of all reasonable methods to implement this policy.<sup>51</sup>

TCEQ implements regionalization through section 26.0282 of the Texas Water Code, which provides:

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, amendment, or renewal based on 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.<sup>52</sup>

TCEQ has recently provided guidance about regionalization on its website.<sup>53</sup> The guidance states that TCEQ may approve applications for discharges of wastewater in four situations:

- There is no wastewater treatment facility or collection system within three miles of the proposed facility.
- The applicant requested service from wastewater treatment facilities within the three miles, and the request was denied.
- The applicant can successfully demonstrate that an exception to regionalization should be granted based on costs, affordable rates, and/or other relevant factors.

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<sup>51</sup> Tex. Water Code § 26.003.

<sup>52</sup> Tex. Water Code § 26.0282.

<sup>53</sup> AIRW Ex. 46.

- The applicant has obtained a Certificate of Convenience and Necessity (CCN) for the service area of the proposed new facility or the proposed expansion of the existing facility.<sup>54</sup>

In addition, there are three recent administrative decisions that the parties argue are relevant: *Crystal Clear*,<sup>55</sup> *Regal*,<sup>56</sup> and *DMS Real Tree*.<sup>57</sup>

## 2. AIRW's Application

TCEQ requires applicants to determine: (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 facilities or collection systems located within a three-mile radius of the proposed facility.<sup>58</sup> If there is another facility or system within three miles, applicants must provide information on whether the facility has sufficient capacity and is willing to expand to accept the additional wastewater and provide copies of relevant correspondence.<sup>59</sup>

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<sup>54</sup> AIRW Ex. 28; City Ex. 2 at 19.

<sup>55</sup> Tex. Comm'n on Env'tl. Quality, *Application by Crystal Clear Special Utility District and MCLB Land, LLC for TPDES Permit No. WQ0015266002*, SOAH Docket No. 582-20-4141, TCEQ Docket No. 2020-0411-MWD (June 14, 2021).

<sup>56</sup> Tex. Comm'n on Env'tl. Quality, *An Order Granting the Application by Regal, LLC for TPDES Permit No. WQ001581701 in Guadalupe County, Texas*, SOAH Docket No. 582-21-0576; TCEQ Docket No. 2020-0973-MWD (Nov. 29, 2021).

<sup>57</sup> Tex. Comm'n on Env'tl. Quality, *Order Granting the Application By DMS Real Tree, LLC for TPDES Permit*, SOAH Docket No. 582-16-1442, TCEQ Docket No. 2015-1264-MWD (Feb. 27, 2017).

<sup>58</sup> ED Ex. GC-1 at 4.

<sup>59</sup> ED Ex. GC-1 at 4.

The City operates a domestic permitted wastewater treatment facility and collection system within three miles of the Facility, and the City has capacity to receive AIRW's discharge.<sup>60</sup> When AIRW explored obtaining wastewater services from the City, the City conditioned supplying wastewater services on annexation of the Facility and its associated development.<sup>61</sup> AIRW proceeded to apply to TCEQ for a permit and supplied cost estimates showing why it believed it need not contract with the City.<sup>62</sup> Jonah is a nearby water provider. Most of the Facility and its associated development are within Jonah's district boundaries.<sup>63</sup> Recently, AIRW and Jonah have contracted for Jonah to own and operate the Facility.<sup>64</sup>

All the parties except for the City argue that AIRW's application complies with regionalization.

### **3. AIRW's Position**

AIRW states that its application for a permit should be approved under governing law and TCEQ's guidance concerning regionalization. AIRW argues that its application should be granted because: (1) it requested and was denied service because the City demanded annexation; (2) costs demonstrate that connection to the City's facilities is unreasonable; (3) the need to acquire third-party easements and the inherent delay in doing so are other relevant factors that justify granting the

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<sup>60</sup> City Ex. 1 at 18-19 (Reed Dir.).

<sup>61</sup> City Ex. 1 at 13.

<sup>62</sup> AIRW Exs. 21, 37, 38.

<sup>63</sup> AIRW Ex. 24 at 30.

<sup>64</sup> AIRW Ex. 24 at 32.

permit; and (4) its agreement to receive wastewater services through Jonah furthers regionalization.

AIRW argues that it requested service from the City's wastewater treatment facilities, and the City's condition of annexation was effectively a denial of the request for service. AIRW first asserts that the evidence shows that the City required annexation in order to receive wastewater services.<sup>65</sup> AIRW then relies on TCEQ's prior decision in *Crystal Clear* to show that requiring annexation is tantamount to a denial of service.<sup>66</sup> AIRW witness Mr. Tuckfield explained that this case is similar to *Crystal Clear* because (1) both proposed sites are located in the extra-territorial jurisdiction of a city, (2) both cities demanded annexation in exchange for sewer service, and (3) both applicants sought service from another provider.<sup>67</sup> AIRW argues that *Crystal Clear* indicates that forced annexation is effectively denial of service. AIRW adds that, even if the City's ordinance contains a provision permitting waiver of the annexation requirement, the City has not offered any evidence that waiving annexation has ever been done or that it would be done here.<sup>68</sup>

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<sup>65</sup> See AIRW Br. at 10-11; AIRW Ex. 30 (City Engineer: "using our wastewater will require voluntary annexation"); AIRW Ex. 31 (Assistant City Manager: "nothing Wes said on our call yesterday should have been construed as the City entertaining providing wastewater service to this project. . . . the City's position remains the same: annexation will be required in order to receive wastewater service from the City."); AIRW Ex. 34 (City Planning Manager: "The City may only provide [wastewater] services to property in the city limits. Please update or submit a request for voluntary annexation."); AIRW Ex. 37 (City Planning Director: "Should you desire to connect to the City wastewater system annexation will be required. We do not support a delayed annexation approach at this point.").

<sup>66</sup> *Crystal Clear* at \*7 (FOF 47: "San Marcos's response requiring annexation of the Subdivision was properly considered a denial of service by Applicants and the ED's staff.").

<sup>67</sup> Hearing Tr. at 578-79.

<sup>68</sup> AIRW Reply Br. at 9.

AIRW argues that costs demonstrate that connection to the City's facilities was not justified. After Mr. Cooper requested that AIRW provide "a cost analysis of expenditures that includes the cost of connecting to the CCN facilities versus the cost of the proposed facility or expansion,"<sup>69</sup> AIRW provided cost estimates. AIRW witness Mr. Perkins estimated that construction of a new treatment plant would cost approximately \$4.8 million, while connecting to the City's system would cost approximately \$4.5 million.<sup>70</sup> However, Mr. Perkins further estimated an additional approximately \$20 million cost of connecting to the City's system because of lost value due to City taxes.<sup>71</sup> AIRW witness Ms. Sims added further explanation.<sup>72</sup> She estimated that the costs of annexation reduced the value of the proposed development project "by over \$20 million" based on the lost value of the property when sold, payment of additional City taxes and fees, and costs to comply with the City's zoning requirements.<sup>73</sup> She explained that the annual cost of property taxes is an operating expense that would not otherwise be incurred, and zoning restrictions and other costs of connection further add to the total cost of service.<sup>74</sup> In particular, she noted that the City would require a change in land use contrary to AIRW's intentions: the City insisted that some land be dedicated to other than residential purposes—commercial use—and this different land use "represents further loss of value."<sup>75</sup> Overall, Ms. Sims expressed that the costs of

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<sup>69</sup> AIRW Ex. 4 at Bates 00103.

<sup>70</sup> AIRW Ex. 21.

<sup>71</sup> AIRW Ex. 21.

<sup>72</sup> AIRW Exs. 37-38.

<sup>73</sup> AIRW Ex. 37.

<sup>74</sup> AIRW Ex. 38.

<sup>75</sup> AIRW Ex. 37.

receiving wastewater service from the City were “not an economically viable alternative for AIRW.”<sup>76</sup>

AIRW argues that the need to acquire third-party easements is a relevant factor that justifies granting the permit. AIRW relies on a prior TCEQ decision, *DMS Real Tree*, where TCEQ found that the applicant could not connect to a city’s wastewater system because the route from the force main to the applicant’s property crossed private land, meaning the applicant would have to “acquire numerous private easements, which may or may not be possible.”<sup>77</sup> Here, AIRW likewise argues that acquiring private easements is a problem. AIRW witness Mr. Perkins testified that connecting to the City’s system would require easements from seven different landowners.<sup>78</sup> He said the closest feasible connection is approximately 0.41 miles away at a manhole near the intersection of Southwestern Boulevard and Rockride Lane,<sup>79</sup> and he provided a map showing that the probable route to convey wastewater to the City’s system crosses several properties.<sup>80</sup> Mr. Perkins opined that landowners do not derive a benefit from a pipeline carrying untreated wastewater across their property, so they often oppose an easement for a sewer force main.<sup>81</sup>

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<sup>76</sup> AIRW Ex. 38.

<sup>77</sup> Tex. Comm’n on Env’tl. Quality, *Order Granting the Application By DMS Real Tree, LLC for TPDES Permit*, SOAH Docket No. 582-16-1442, TCEQ Docket No. 2015-1264-MWD (Feb. 27, 2017).

<sup>78</sup> AIRW Ex. 17 at 10 (Perkins Dir.).

<sup>79</sup> AIRW Ex. 17 at 10 (Perkins Dir.).

<sup>80</sup> AIRW Ex. 20.

<sup>81</sup> AIRW Ex. 17 at 11 (Perkins Dir.).

AIRW also argues that the delay due to securing easements is another factor that justifies granting the permit. Mr. Perkins testified that it could take at least 12-18 months to acquire the seven different easements—even if the City assisted and exercised eminent domain.<sup>82</sup> AIRW argues that, as City witness Mr. Rubinstein and AIRW witness Mr. Tuckfield have acknowledged, timing should be considered when examining the feasibility of regionalization.<sup>83</sup> And here, AIRW asserts that the “protracted time to secure service” provides reason to grant the application.<sup>84</sup>

Last, AIRW argues that the Application should be approved because it has chosen Jonah as its utility provider, and service by Jonah furthers regionalization.<sup>85</sup> AIRW notes that Jonah is a regional utility provider with a significant customer base, a 275-mile service area, and a professional staff.<sup>86</sup> Jonah plans to expand to “regional facilities” and later remove from service the smaller interim facilities serving developments.<sup>87</sup>

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<sup>82</sup> AIRW Ex. 17 at 11 (Perkins Dir.).

<sup>83</sup> Hearing Tr. at 125 (City witness Mr. Rubinstein), 621 (AIRW witness Mr. Tuckfield).

<sup>84</sup> AIRW Br. at 10.

<sup>85</sup> AIRW Br. at 13.

<sup>86</sup> Jonah Ex. 5 at 2 (Brown Dir.); Hearing Tr. at 288, 619-20.

<sup>87</sup> Hearing Tr. at 301-02.



#### 4. Jonah's Position

Jonah argues that its ownership and operation of the wastewater treatment plant will encourage regionalization and maintain water quality.<sup>88</sup>

Jonah emphasizes that it seeks to maintain water quality within its area. Jonah is a water and sewer service for approximately 9,000 customers and 30,000 people.<sup>89</sup> Jonah has an interest in maintaining water quality, particularly regarding wastewater discharged from the proposed facility, because improperly treated wastewater could percolate into groundwater or flow into the surface water from which it obtains its water supply.<sup>90</sup> Jonah witness Mr. Brown explained that Jonah must maintain water quality in order to provide quality potable water to its customers.<sup>91</sup> To do this, Jonah runs a professional operation—35 full-time employees, 25 field staff, and employees with operator licenses for water and wastewater systems who will ensure water quality standards are met.<sup>92</sup> Also, Jonah has previously operated wastewater treatment plants, and its wastewater collection system has been approved by TCEQ.<sup>93</sup>

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<sup>88</sup> Tex. Water Code § 26.003 (making it the policy of this state “to maintain the quality of water in the state consistent with public health and enjoyment” and “to encourage and promote the development and use of regional and areawide waste collection, treatment, and disposal systems.”).

<sup>89</sup> Jonah Ex. 5 at 4 (Brown Dir.).

<sup>90</sup> Hearing Tr. at 297-98.

<sup>91</sup> Jonah Ex. 5 at 4 (Brown Dir.).

<sup>92</sup> Jonah Ex. 5 at 4 (Brown Dir.).

<sup>93</sup> Hearing Tr. at 253, 255.

Jonah asserts that its ownership and operation of the plant encourages regionalization because it already operates successfully in the area: Jonah's water service area encompasses the site of the Facility;<sup>94</sup> Jonah is willing and able to operate the Facility;<sup>95</sup> and Jonah's cost-based fees for service are reasonable.<sup>96</sup> Jonah adds that its operation of this plant will also further regionalization because it is in negotiations to provide wastewater to other nearby developments as well, and it plans to expand its wastewater services within its certificated water service area.<sup>97</sup>

Jonah argues it is the superior wastewater provider for three reasons. First, Jonah can provide utility service; the City cannot. 16 Texas Administrative Code section 24.225(c) states: "except as otherwise provided by this subchapter, a retail public utility may not provide retail water or sewer utility service within the boundaries of a district that provides the same type of retail water or sewer utility service without the district's consent, unless the retail public utility has a CCN to provide retail water or sewer utility service to that area."<sup>98</sup> The proposed development is inside Jonah's water CCN and outside the City's water and sewer CCNs.<sup>99</sup> And Jonah provides both water and sewer service for approximately 9,000 customers and 30,000 people in its service area.<sup>100</sup> Further, the City did not request Jonah's consent to provide wastewater service to the Facility, and Jonah has not

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<sup>94</sup> Hearing Tr. at 295.

<sup>95</sup> Jonah Ex. 5 at 3 (Brown Dir.).

<sup>96</sup> AIRW Ex. 43.

<sup>97</sup> Hearing Tr. at 288.

<sup>98</sup> 16 Tex. Admin. Code § 24.225(c).

<sup>99</sup> Hearing Tr. at 33

<sup>100</sup> Jonah Ex. 5 at 4 (Brown Dir.).

given consent for the City to operate within its boundaries.<sup>101</sup> As a result, the City cannot provide sewer services according to Rule 24.225(c).

Second, Jonah's interests are providing water and wastewater utility services and maintaining water quality, while the City wants to impose development restrictions.<sup>102</sup> AIRW witness Mr. Tuckfield opined that the City is hindering regionalization by requiring annexation.<sup>103</sup>

Finally, Jonah argues that TCEQ's prior decision in *Crystal Clear* supports using Jonah as the wastewater provider. There, TCEQ found that "the provision of sewer service from Crystal Clear to the Subdivision furthers the State's policy of encouraging regionalization because Crystal Clear is a large service provider in the region and because Crystal Clear holds the water CCN for the area where the Subdivision is located."<sup>104</sup> Here, Jonah has an even larger service area than Crystal Clear, and the Facility is within Jonah's certificated water service area.<sup>105</sup> So TCEQ should similarly conclude that selecting Jonah as the wastewater provider supports regionalization.

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<sup>101</sup> Hearing Tr. at 289; Jonah Reply Br. at 4.

<sup>102</sup> Jonah Br. at 7.

<sup>103</sup> Hearing Tr. at 590.

<sup>104</sup> *Crystal Clear* at \*7 (FOF 50: "The provision of sewer service from Crystal Clear to the Subdivision furthers the State's policy of encouraging regionalization because Crystal Clear is a large service provider in the region and because Crystal Clear holds the water CCN for the area where the Subdivision is located.").

<sup>105</sup> Hearing Tr. at 579.

## 5. The City's Position

The City argues that requiring annexation is not tantamount to a denial of services because the annexation requirement can be waived. The City explains that properties in its extraterritorial jurisdiction that desire wastewater services from the City must first submit a petition for voluntary annexation.<sup>106</sup> But the ordinance requiring annexation for wastewater services may be waived by the City Council.<sup>107</sup> Thus, as in *Regal*, because the annexation requirement can be waived, it is not tantamount to a denial of service.<sup>108</sup>

The City also argues that its land use restrictions are not a reason to grant the Application because its land use provisions allow for more density than the proposed 880-unit duplex project. City witness Mr. Reed testified that the City's future land use plan is not "set in stone": there is a process for an amendment, and AIRW did not apply to amend the future land use plan for the property.<sup>109</sup> Mr. Reed further opined that the City's future land use plan designated the property as a community center—predominately commercial use and up to 20 percent residential use.<sup>110</sup> He added that a community center designation permits up to fourteen dwelling units per acre, but he declined to provide an

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<sup>106</sup> City Ex. 1 at 11.

<sup>107</sup> City Ex. 35.

<sup>108</sup> *Regal* at \*6 (FOF 38: "The City's ordinance requiring annexation for wastewater service is not tantamount to a denial of service because the requirement may be waived by City Council.").

<sup>109</sup> Hearing Tr. at 77.

<sup>110</sup> Hearing Tr. at 77.

approximation of the number of dwelling units that would be permitted under that designation, saying only, “It’s very hard to say,” and “It depends.”<sup>111</sup>

The City argues that cost is not a reason to avoid connecting to its wastewater facility because the cost of constructing a facility is greater than the cost of connecting to the City’s wastewater services. The City notes that the ED requested a straightforward cost analysis: compare the cost of connecting to the CCN facilities versus the cost of building the proposed facility.<sup>112</sup> City witness Mr. Woelke testified that it would cost AIRW approximately \$3.1-3.5 million to connect to the City’s wastewater system and approximately \$5.0-6.0 million to construct the Facility.<sup>113</sup> The City emphasizes that AIRW’s own cost estimate reflects that connecting to the City is cheaper than the proposed facility. Thus, both sides agree that constructing the Facility is more expensive than connecting to the City’s system.<sup>114</sup> Additionally, neither party’s expert counts the \$2.4 million in connection fees AIRW will pay Jonah to connect to Jonah’s system: if those connection fees are considered, then the cost of the stand-alone plant exceeds the cost of connecting to the City’s system by approximately \$2.6 million.<sup>115</sup>

The City argues that the additional costs AIRW mentions—diminution in market value, lost value attributable to City taxes, and loss of value due to land use requirements imposed by the City—are not responsive to the ED’s request for

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<sup>111</sup> Hearing Tr. at 78.

<sup>112</sup> See AIRW Ex. 4 at Bates 00103.

<sup>113</sup> City Ex. 3 at 29.

<sup>114</sup> AIRW Ex. 21; City Ex. 3 at 29.

<sup>115</sup> City Br. at 27; AIRW Ex. 43 at Bates 00576, 00609.

“the cost of the proposed facility or expansion.” And this is not the type of cost information TCEQ has accepted in the past. For example, in *Crystal Clear*, the applicant estimated a stand-alone plant would cost \$2.0 million, connecting to the City of San Marcos’ wastewater system would cost \$2.9 million, and the costs of construction to meet San Marcos’ development regulations—pavement, curbs, gutters, and storm drains for additional roadways and alleyways—would cost \$2.9 million. In other words, the applicant specifically identified the cost if the project was built in conformance with the San Marcos’ development code.<sup>116</sup> Similarly, in *Regal*, no comparative cost analysis was done, and in another application case, only typical construction costs were used—no alleged economic losses from land use restrictions.<sup>117</sup> The City argues that, although cost is a factor to be considered in regionalization analyses, certain costs should not be considered—diminution in market value of property, economic loss claims, consideration of property taxes—because considering these economic factors is beyond TCEQ’s purview and the ED’s staff lacks the expertise to evaluate this information.

Even if these additional types of costs are considered, the City takes issue with AIRW’s calculation of loss due to property taxes and the appraisal estimating a diminution in land value due to annexation. Regarding property taxes, the City argues that AIRW will not incur any loss due to property taxes because different companies that own the property (not AIRW) will incur those costs.<sup>118</sup> The City also argues that AIRW’s appraisal estimating economic loss is not credible because AIRW’s witnesses were not qualified in appraisals, and the appraisal report did not

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<sup>116</sup> City Br. at 43-44.

<sup>117</sup> City Ex. 41; City Br. at 44-45.

<sup>118</sup> City Br. at 48.

provide a true comparison showing diminution in value because it only assessed the value of the property inside and outside the City—failing to consider the differing uses to which the property will be put if subject to or excluded from the City’s development code. On this point, AIRW’s appraisal compares the hypothetical as-is market value of the project assuming that the project (1) remains in an unincorporated area of Williamson County or (2) is annexed by the City.<sup>119</sup> The appraisal concludes that the property is \$20 million more valuable when remaining in an unincorporated area.<sup>120</sup> The cause of this \$20 million valuation difference is real estate taxes adjusted to a higher tax rate inside the City, even with water/sewer expenses adjusted downward inside the City because the property would receive those services through the City rather than using an on-site water treatment plant.<sup>121</sup>

The City argues that easements are not an issue; even if easements were an issue, AIRW has made no effort to acquire them; and delay is not due to easements. City witness Mr. Woelke testified that he evaluated whether an easement would be needed for the force main AIRW would have to construct to connect to the City’s system and determined that it could be placed in the right-of-way, eliminating easement acquisition costs.<sup>122</sup> Thus, the City argues, no force main easements are needed from landowners.<sup>123</sup> The City further argues that, even if easements from landowners were needed, AIRW made no attempts to contact landowners to secure

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<sup>119</sup> AIRW Ex. 23 at 2.

<sup>120</sup> AIRW Ex. 23 at 2.

<sup>121</sup> AIRW Ex. 23 at 48.

<sup>122</sup> City Ex. 3 at 28 (Woelke Dir.).

<sup>123</sup> City Br. at 24-25.

the easements.<sup>124</sup> AIRW's failure to try to secure easements distinguishes this case from *Regal*, where the parties tried but failed to obtain needed easements, the City asserts.<sup>125</sup> The City also argues that delay due to securing third-party easements is a non-factor because the time to connect to the City's wastewater system is less than the time AIRW has already taken to pursue the application.<sup>126</sup>

The City states that 16 Texas Administrative Code section 24.225(c) does not prevent it from providing wastewater service to AIRW's proposed service area.<sup>127</sup> Rule 24.225(c) states that "a retail public utility may not provide retail water or sewer utility service within the boundaries of a district that provides the same type of retail water or sewer service without the district's consent, unless the retail public utility has a CCN to provide retail water or sewer utility service to that area."<sup>128</sup> The City points out that "only a portion of Jonah's jurisdictional boundaries overlap with the proposed service area."<sup>129</sup> And, although Jonah has approximately 9,000 wastewater customers, Jonah does not own or operate any of its own wastewater treatment facilities but rather has wholesale wastewater agreements for treatment: the wastewater treatment is provided through others.<sup>130</sup> Therefore, the City does not need Jonah's consent.<sup>131</sup>

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<sup>124</sup> Hearing Tr. at 463.

<sup>125</sup> City Br. at 25.

<sup>126</sup> City Br. at 24.

<sup>127</sup> City Br. at 17.

<sup>128</sup> 16 Tex. Admin. Code § 24.225(c).

<sup>129</sup> AIRW Ex. 24 at 30 (Tuckfield Dir.); Jonah Ex. 6 at 5 (Whitney Dir.); Hearing Tr. at 255-56.

<sup>130</sup> Hearing Tr. at 253-56.

<sup>131</sup> City Reply Br. at 21.



Finally, the City argues that making Jonah the plant owner and operator does not further regionalization because Jonah does not already provide wastewater services. The City relies on TCEQ’s website, which provides that “regionalization is the administrative or physical combination of two or more community wastewater systems for improved planning, operation, or management.”<sup>132</sup> Because Jonah does not own or operate any wastewater treatment facilities,<sup>133</sup> using Jonah does not further regionalization. Additionally, only one Jonah employee has a current wastewater treatment plan operator license from TCEQ.<sup>134</sup> And Jonah’s wastewater treatment experience is very limited: it substituted as an operator when a nearby city was between operators for a few months, and it assisted Mauriceville with their plant for a few days in an emergency after Hurricane Harvey.<sup>135</sup> In short, neither Jonah nor AIRW is in the wastewater treatment business, and neither of their operations would further regionalization. Jonah is only “stepping into the shoes of single purpose entity that proposed to operate a package plant serving only a discrete apartment community.”<sup>136</sup>

## **6. The ED’s Position**

The ED argues that the Draft Permit complies with the state’s regionalization policy and demonstration of need in section 26.0282 of the Water Code.

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<sup>132</sup> City Ex. 15 at 1.

<sup>133</sup> Hearing Tr. 254-55.

<sup>134</sup> City Ex. 19.

<sup>135</sup> Hearing Tr. at 253-54.

<sup>136</sup> City Br. at 24.

The ED argues that AIRW requested service from nearby wastewater facilities and that AIRW's requests for service were denied. ED witness Mr. Cooper testified that AIRW provided communications with two nearby providers showing that it was unable to reach an agreement for service.<sup>137</sup> In particular, Mr. Cooper focused on an email from the City stating that annexation would be required if AIRW desired to connect to the City's wastewater system.<sup>138</sup> He explained that, although TCEQ can encourage and promote regional and area-wide wastewater systems, it cannot compel an applicant to connect with nearby facilities.<sup>139</sup> Rather, TCEQ looks for whether communication and negotiations took place, and here AIRW and the City were unable to reach an agreement because the City placed a condition on supplying service—annexation.<sup>140</sup> He opined that in this case the City's conditional requirement that AIRW accept annexation in order to receive service was a denial of service.<sup>141</sup> Moreover, the ED argues, although the City now asserts that it may have been willing to waive the annexation requirement,<sup>142</sup> the written communications show that the City was unwilling to consider a delayed annexation and that it would not provide service without annexation.<sup>143</sup>

The ED argues that AIRW was not required to submit a certified letter documenting its communications with nearby wastewater providers. City witness

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<sup>137</sup> ED Ex. GC-1 at 9.

<sup>138</sup> Hearing Tr. at 641.

<sup>139</sup> ED Ex. GC-1 at 7.

<sup>140</sup> ED Ex. GC-1 at 7-8.

<sup>141</sup> Hearing Tr. at 637-42.

<sup>142</sup> City Br. at 28.

<sup>143</sup> AIRW Ex. 4 at 77.

Mr. Rubenstein testified that the permit application requires an applicant to attach certified letters sent to nearby wastewater providers and the providers' responses, if any, and AIRW failed to attach such letters to the Application.<sup>144</sup> But ED witness Mr. Cooper responded that a certified letter is not required: lacking one is not "a fatal flaw."<sup>145</sup> He opined that AIRW was required to provide communications with nearby facilities about connections; AIRW did so, and the communications showed that AIRW would not be allowed to connect to the City's wastewater facilities without agreeing to annexation.<sup>146</sup> Moreover, the email communications were documented and provided similar "tracking and traceability" as a certified letter.<sup>147</sup> AIRW's communications were thus satisfactory, he opined.<sup>148</sup>

Finally, the ED asserts that AIRW provided satisfactory cost information to justify issuing the permit. Mr. Cooper opined that AIRW provided financial information about the costs to link to the City's wastewater facility, and the information AIRW provided satisfied the requirement to provide an analysis of expenditures for connecting to an adjacent collection system.<sup>149</sup> Applicants like AIRW are not required to accept a nearby facility's terms if the terms outweigh the costs of a new facility, he opined.<sup>150</sup>

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<sup>144</sup> City Ex. 2 at 54-55.

<sup>145</sup> ED Ex. GC-1 at 7.

<sup>146</sup> ED Ex. GC-1 at 7.

<sup>147</sup> ED Ex. GC-1 at 8.

<sup>148</sup> ED Ex. GC-1 at 8.

<sup>149</sup> ED Ex. GC-1 at 8.

<sup>150</sup> ED Ex. GC-1 at 8.

## 7. OPIC's Position

OPIC acknowledges that “*Regal* provides some support for the proposition that requiring annexation does not always amount to a denial of service.”<sup>151</sup> But OPIC points out that, although the annexation requirement can be waived by the city council, here there was no evidence that the City was willing to do so. Rather, the evidence shows the City was not receptive to issuing a waiver because it was unwilling to consider delayed annexation and because it insisted that service could not be provided without annexation.<sup>152</sup>

OPIC agrees with Jonah and AIRW that the City's lack of wastewater CCN in the area and failure to secure Jonah's consent to provide wastewater services is a legal impediment to the City providing wastewater services.<sup>153</sup> OPIC notes that most of the Facility and its associated development are within Jonah's district boundaries, and the City does not have Jonah's consent to provide wastewater services within its boundaries.<sup>154</sup>

OPIC agrees that, if easements are required to connect to the City's system, which AIRW witnesses testified they are, then TCEQ's regionalization policy should not compel connecting with the City and denying the application.<sup>155</sup> OPIC notes that, in *Regal*, the Commission concluded that the applicant had complied

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<sup>151</sup> OPIC Br. at 8.

<sup>152</sup> Hearing Tr. at 521; AIRW Ex. 4 at Bates 00077.

<sup>153</sup> OPIC Br. 8.

<sup>154</sup> AIRW Ex. 24 at 31 (Tuckfield Dir.).

<sup>155</sup> OPIC Br. 8-9.

with the regionalization policy because it was unable to obtain a necessary easement.<sup>156</sup>

Finally, OPIC argues that AIRW's cost analysis was adequate and the higher cost of connecting to the City's system favors granting AIRW's application.<sup>157</sup> OPIC notes that TCEQ's guidance provides that costs can be considered, and here cost estimates reflect that annexation would reduce the value of AIRW's development by approximately \$20 million.<sup>158</sup>

## **8. ALJs' Analysis**

The ALJs agree with AIRW, Jonah, the ED, and OPIC that AIRW met the requirements regarding regionalization and that the ED's review of the Application was sufficient. The ALJs conclude that costs and Jonah's involvement as the wastewater provider support granting the Application.

### **a) The City Made a Conditional Offer for Service**

Section 26.003 of the Texas Water Code provides it is the policy of this state to "encourage and promote" the development and use of regional and areawide wastewater systems, and "to require the use of all reasonable methods" to

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<sup>156</sup> OPIC Br. at 9.

<sup>157</sup> OPIC Br. 9.

<sup>158</sup> AIRW Ex. 24 at Bates 292.

implement this policy.<sup>159</sup> TCEQ has significant discretion under this statute, particularly in determining the “reasonable methods” to use to further regionalization.

The ALJs agree with the ED that, with respect to utilities within three miles of the proposed facility, the purpose of the regionalization review is to encourage applicants to explore and give serious consideration to connection to nearby utilities. The ALJs also agree with the ED that AIRW’s written communications with nearby providers were sufficient, and AIRW was not required to submit certified letters because the emails provided similar tracking and traceability. Here, communications show that AIRW explored securing wastewater services from the City and the City placed conditions on providing service—the property would have to be annexed into the City and comply with the City’s land use restrictions. And although the City’s ordinance requiring annexation for wastewater services may be waived by the city council, here a preponderance of the evidence gave no indication that the City was willing to waive the annexation requirement. The City would not consider delayed annexation, insisted that service could not be provided without annexation, and had time but failed to reach an agreement waiving annexation. Moreover, the City’s argument that AIRW was required to apply for wastewater services, thereby voluntarily agreeing to annexation, and then hope that later the City would waive the annexation and land use requirements is unconvincing. That possibility is not something a reasonable person would rely upon: it’s more illusory than reality. Thus, in the end, AIRW received a conditional offer for services from

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<sup>159</sup> Tex. Water Code § 26.003.

the City. Or, put another way, the City denied AIRW's request for services unless AIRW agreed to annexation and land use restrictions.

The ALJs conclude that conditional offers for service defy easy categorization—whether the provider “denied” a request for service or not. As a result, different conclusions have prevailed depending on the facts. Relatedly, because conditional offers for service vary with the circumstances, the ALJs agree with the ED's approach in this case to request cost information from AIRW and, ultimately, with OPIC's conclusion: this was a conditional offer for service, so costs and other relevant factors should be considered.

#### **b) Costs Support Granting the Application**

The ALJs agree with AIRW, the ED, and OPIC that costs support granting the Application.

The ED requested from AIRW “a cost analysis of expenditures that includes the cost of connecting to the CCN facilities versus the cost of the proposed facility or expansion.” The evidence shows that constructing a new plant will cost more than connecting to the City's system. Mr. Perkins estimated that constructing a new plant will cost approximately \$300,000 more than connecting, and Mr. Woelke likewise testified that constructing a new plant is more costly. But the cost estimates did not stop there.

Although the City argues that only the construction costs of building versus connecting should be considered, the governing law is not so limited; it gives TCEQ discretion, and TCEQ's guidance provides that an applicant can satisfy regionalization concerns "based on costs, affordable rates, or other relevant factors."<sup>160</sup> Here, Ms. Sims estimated that the costs of annexation reduced the value of the proposed development project "by over \$20 million" based on (1) lost value of the property when sold, (2) payment of additional City taxes and fees, and (3) costs to comply with the City's zoning requirements. But AIRW failed to prove its costs to comply with the City's zoning requirement (e.g., it provided no estimate of redesign costs, projected value of a redesigned development consistent with the City's land use restrictions, or costs of construction to comply with land use restrictions, such as alleys, curbs, or storm drains). Nor did AIRW prove lost value of the property when sold beyond taxes. Rather, AIRW's estimate of a \$20 million diminution in property value was attributable solely to a higher property tax rate inside the City than outside it in the unincorporated area. Although the City argues that AIRW's cost information fails to provide a true comparison due to lack of an accompanying estimated value of a hypothetical different development built in conformance with the City's land use requirements, that argument fails because a preponderance of the evidence failed to show that the value of a different property built in conformance with the City's land use regulations would in fact exceed that of AIRW's proposed development. Indeed, the City's own expert would not commit to what precisely could be built on the property under the City's land use regulations, let alone its value. As a result, a preponderance of the evidence shows that although constructing a new facility costs slightly more than

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<sup>160</sup> TCEQ webpage; AIRW Ex. 28.



connecting, the cost of connecting carries with it an approximately \$20 million cost to AIRW—highly burdensome and disproportionate to the cost of constructing a new facility from AIRW’s perspective. Costs weigh in favor of granting AIRW’s application.

### **c) Easements Are Not An Impediment Here**

The ALJs conclude that the evidence fails to show that easements and the delay inherent to acquiring them are an impediment to connecting to the City’s system. Mr. Perkins testified that connecting to the City’s system would require seven different easements. But Mr. Woelke testified in response that he evaluated whether an easement would be needed for the force main AIRW would have to construct to connect to the City’s system, and he determined that it could be placed in the City’s right-of-way, eliminating easement acquisition costs. Additionally, even if easements were needed, the ALJs agree with the City that the evidence fails to show that AIRW tried and failed to secure them. Unlike in *Regal* where a party tried and failed to obtain a necessary easement, the evidence here failed to show easements present an impediment to connection.<sup>161</sup>

### **d) Using Jonah Supports Regionalization**

The ALJs agree with AIRW and Jonah that making Jonah the plant owner and operator furthers regionalization. Jonah provides water service to

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<sup>161</sup> Cf. *Regal* at \*7 (FOFs 50-51: “The landowners of the JK Ranch Property have refused to grant an easement. Despite attempts by both Regal and the City, the City’s system is unavailable for a connection with Regal.”).

approximately 9,000 customers and 30,000 people, has a professional staff, and expects to provide wastewater to more nearby developments in a growing area. The circumstances here are similar to those in *Crystal Clear*, where regionalization was furthered when a large service provider in the region that holds a water CCN for the area provided services to the development.<sup>162</sup>

### **C. Whether The Draft Permit is Protective of the Health of the Nearby Residents**

One of the purposes of the TSWQS is to “maintain the quality of water in the state consistent with public health and enjoyment.”<sup>163</sup> This purpose has been implemented in both the narrative and numerical requirements of the TSWQS. As part of the narrative requirements, water in the state must not be toxic to humans from ingesting the water or aquatic organisms, contacting the skin, or recreating in the water.<sup>164</sup> In addition, surface waters must not be toxic to terrestrial life, including livestock and domestic animals, due to contacting the water or ingesting the water or aquatic organisms.<sup>165</sup> The Draft Permit authorizes the Facility to treat and discharge wastes only according to effluent limitation, monitoring requirements, and other conditions set forth in the permit, State laws, and TCEQ’s rules and regulations.<sup>166</sup> Therefore, insofar as the Draft Permit complies with the

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<sup>162</sup> *Crystal Clear* at \*7 (FOF 50: “The provision of sewer service from Crystal Clear to the Subdivision furthers the State’s policy of encouraging regionalization because Crystal Clear is a large service provider in the region and because Crystal Clear holds the water CCN for the area where the Subdivision is located.”).

<sup>163</sup> 30 Tex. Admin. Code § 307.1; *accord* Tex. Water Code § 26.003.

<sup>164</sup> 30 Tex. Admin. Code §§ 307.4(b)(7), (d); .6(b)(3).

<sup>165</sup> 30 Tex. Admin. Code §§ 307.4(b)(7), (d); .6(b)(4).

<sup>166</sup> AIRW Ex. 3.

TSWQS, the TCEQ review concluded, it is protective of the health of nearby residents.<sup>167</sup>

The ED's, AIRW's, and City's arguments for Issue C overlap with their arguments for Issue A. According to ED witness Ms. Lueg, the Draft Permit is protective of the health of nearby residents because it was developed to protect aquatic life and human health in accordance with the TSWQS. The Draft Permit terms ensure that no source will be allowed to discharge any wastewater that: (1) results in stream aquatic 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. If the Facility is operated in accordance with the approved terms, it will not negatively impact health of nearby residents.<sup>168</sup>

The City argues that because of a lack of sufficient information submitted by AIRW regarding the nature of the receiving stream and the uses thereof and deficiencies in TCEQ's review of the Application, there is no assurance that the Draft Permit is protective of recreational users, generally. The City argues that the discharge of treated effluent to the unnamed tributary that courses through the Patterson Ranch residential development would create potential exposure to pathogens, like *E. coli*, for nearby residents.<sup>169</sup> The City also asserts that the monitoring frequency for *E. coli* and nutrient levels that stimulate excessive algal

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<sup>167</sup> ED. Ex. JL-1 at Bates 0011 (Lueg Dir.).

<sup>168</sup> ED. Ex. JL-1 at Bates 0011 (Lueg Dir.).

<sup>169</sup> According to the City, appropriately treated domestic wastewater effluent may also contain enteric viruses, protozoa, etc.; however, the EPA has not developed criteria or guidance regarding such pathogens.

growth<sup>170</sup> is not frequent enough to promptly detect and eliminate discharges that violate those limits.<sup>171</sup> City witness Mr. Woelke testified that the monthly grab sampling requirement for *E. coli* is not adequate because a grab sample only reflects performance at the single, short point in time when the sample was collected and if the collection was proper; and the results can change depending on the time of day or whether the plant is operating near its average daily flow rate. Mr. Woelke believed that composite sampling is appropriate for *E. coli*.<sup>172</sup>

The ED and AIRW argue that the City did not present any evidence to support its contention that the proposed discharge would not be protective of health of nearby residents.<sup>173</sup> At the hearing, ED witness Ms. Lueg testified that the Draft Permit will maintain and protect human health, even given a hypothetical relating to viral pathogens causing illnesses. As mentioned above, Ms. Sims, Mr. Price, and Ms. Lueg testified that the *E. coli* limit and 1.0 mg/L chlorine residual (with 20 minutes of detention time) have long been established to be sufficient disinfection criteria for the protection of human health for primary contact recreational uses.<sup>174</sup> Ms. Lueg testified that the established 0.5 mg/L daily

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<sup>170</sup> To address his concern about nutrient levels, Mr. Woelke testified that the Draft Permit should require a Total Dissolved Solids (TDS) study from AIRW. City Ex. 3 at Bates 0000117 (Woelke Dir.). However, at the hearing, Mr. Woelke stated that TDS has nothing to do with nutrients and his concern was with water softeners that might be used in the development. Hearing Tr. at 219-220. Ms. Lueg testified that TDS is not required for the Application because TDS requirements do not apply to facilities with the permitted flow of 0.2 MGD.

<sup>171</sup> City Br. at 56-58; City Reply Br. at 30-33.

<sup>172</sup> City Ex. 3 at Bates 0000113-0000114 (Woelke Dir.).

<sup>173</sup> See ED Br. at 5; ED Reply Br. at 2-3; AIRW Br. at 15-16; AIRW Reply Br. at 16-17.

<sup>174</sup> AIRW Ex. 8 at Bates 000025 (Sims Dir.); AIRW Ex. 14 at Bates 000050, 000052 (Price Dir.); Hearing Tr. at 433, 703.

<sup>174</sup> Hearing Tr. at 680, 701.

average limit for TP<sup>175</sup> will prevent excessive growth of algae and other aquatic vegetation.<sup>176</sup> Furthermore, ED witness Mr. Cooper did not believe that composite sampling is more protective of water quality, because it does not provide a short-term, immediate reading but gives several samples over a period of time.<sup>177</sup> He stated that facilities with a 0.2 MGD flow should conduct sampling as required by Table 1 in 30 Texas Administrative Code section 319.9(a).<sup>178</sup> According to AIRW witness Mr. Price, absent any special circumstances applying to the Facility, there is no reason to require an unusual sampling method.<sup>179</sup> He stated that, because the chlorine residual in the effluent is to be maintained between 1.0 and 4.0 mg/L and be sampled and reported five times per week, the effluent will be free of significant numbers of pathogens and more frequent sampling for *E. coli* is unnecessary.<sup>180</sup>

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<sup>175</sup> Phosphorus is a nutrient that, in excess, can contribute to the undesirable growth of aquatic vegetation and impact uses. 30 Tex. Admin. Code § 307.3(a)(44).

<sup>176</sup> ED Ex. JL-1 at Bates 0006, 0008 (Lueg Dir.).

<sup>177</sup> Hearing Tr. at 654-655.

<sup>178</sup> Hearing Tr. at 670. Mr. Cooper explained that testing frequencies for pollutants limited in the permit are standardized based on rules located in 30 Texas Administrative Code section 319.9(a) and on the design capacity of the treatment facility. ED Ex. GC-1 at Bates 0010 (Cooper Dir.).

<sup>179</sup> AIRW Ex. 14 at Bates 000052 (Price Dir.).

<sup>180</sup> AIRW Ex. 14 at Bates 000052 (Price Dir.).

## 1. ALJs' Analysis

The ALJs previously found that the evidence demonstrates that the Draft Permit complies with the TSWQS and, as such, agree with AIRW and the ED that the Permit is protective of the health of nearby residents.

The City failed to rebut the *prima facie* determination because the City's arguments were conclusory and unverifiable due to a lack of underlying data to support its conclusions. Beyond a hypothetical about viral pathogens causing waterborne illnesses and a contact recreational risk, to which Ms. Lueg testified that her determinations would still be the same, the City did not provide any actual evidence to show that the Draft Permit would not be protective of the health of nearby residents.

With respect to the City's contention that the required *E. coli* sampling frequency is not adequate to protect the health of nearby residents, the ALJs are not persuaded that a variance from the standardized monitoring for the Facility is required. The ALJs find that the ED's and AIRW's evidence showed that the requirements for *E. coli* limitations and chlorine residual, as well as monitoring and sampling frequency, are sufficient to protect human health. The ALJs conclude that AIRW has met its burden regarding Issue C.

#### **D. Whether the Draft Permit Complies with Applicable Requirements Regarding Nuisance Odors**

Under 30 Texas Administrative Code section 309.13(e), applicants have three options to abate and control nuisance odor prior to construction of a new wastewater treatment plant unit.<sup>181</sup> One option is ownership of a buffer zone: wastewater treatment plant units may not be located closer than 150 feet from the nearest property line, and the applicant must hold legal title or have other sufficient property interest to a contiguous tract of land necessary to meet the distance requirement.<sup>182</sup>

The Application shows its plan for a buffer zone. AIRW submitted a map showing that all wastewater treatment plant units will be located to maintain a 150-foot buffer zone between the unit and the nearest property line.<sup>183</sup> In addition, Mr. Perkins testified that there is “ample space” to accommodate all the major treatment units and maintain the 150-foot buffer zone,<sup>184</sup> and Mr. Cooper testified that based on his review the draft permit complies with the 150-foot buffer zone requirement and the requirements to abate and control nuisance odors.<sup>185</sup>

The City argues that the buffer zone runs next to CR 110, which will be abandoned and replaced with a new realigned CR to be built south of the proposed

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<sup>181</sup> 30 Tex. Admin. Code § 309.13(e).

<sup>182</sup> 30 Tex. Admin. Code § 309.13(e)(1).

<sup>183</sup> AIRW Ex. 4 at Bates 00070.

<sup>184</sup> AIRW Ex. 17 at 7.

<sup>185</sup> ED Ex. GC-1 at 13.

facility.<sup>186</sup> The City states that AIRW will be unable to comply with the buffer zone requirement as a result of this road realignment.<sup>187</sup> AIRW replies that there is no evidence that it was relying on the roads as part of the buffer zone. The ALJs agree with AIRW. The maps provided do not indicate reliance on the roads or any problem with the buffer zone.<sup>188</sup>

The City also argues that TCEQ failed to comply with section 26.030(b) of the Texas Water Code because it did not consider “any unpleasant qualities of the effluent, including unpleasant odor, and any possible adverse effects that the discharge of the effluent might have on the recreational value of the park, playground, or schoolyard.”<sup>189</sup> TCEQ was required to do this, the City asserts, because the proposed discharge route goes through “green space” as well residential development.<sup>190</sup> AIRW replies that section 26.030(b) only applies if the discharge will go “into any body of water that crosses or abuts any park, playground, or schoolyard within one mile of the point of discharge,”<sup>191</sup> and here there are no parks, playgrounds, or schools on the Patterson Ranch property at issue.<sup>192</sup> And even if further development will lead to new amenities nearby in the future, the proposed permit requires renewal within five years, and the discharge route will be assessed then. The ALJs again agree with AIRW. A preponderance of the evidence failed to show that the discharge will go into any body of water that

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<sup>186</sup> Hearing Tr. at 452-53; AIRW Ex. 19 at Bates 000143.

<sup>187</sup> City Reply at 34.

<sup>188</sup> AIRW Ex. 4 at Bates 00070; AIRW Ex. 19 at Bates 000143.

<sup>189</sup> Tex. Water Code § 26.030(b).

<sup>190</sup> City Reply at 34.

<sup>191</sup> Tex. Water Code § 26.030(b).

<sup>192</sup> Hearing Tr. at 417-18.



crosses or abuts any park, playground, or schoolyard within one mile of the point of discharge. Therefore, section 26.030(b) does not apply.

### **E. Whether the Application is Substantially Complete and Accurate**

ED witness Mr. Cooper testified that the Application is complete and accurate—it went through both an administrative and a technical review. During such reviews TCEQ determines whether the administrative and technical portions of the application are missing any information and requests more information if the application is confusing or incorrect. During the Application review, TCEQ sent AIRW a request for information, including a notice of deficiency dated May 12, 2020. After AIRW provided the requested information, the Application was declared administratively and technically complete and TCEQ composed the Draft Permit.<sup>193</sup>

The City argues that, because AIRW and Jonah entered into Non-Standard Service Agreements (NSSAs) whereby Jonah will own and operate the Facility and will assume overall responsibility of the Facility, Jonah must be listed as a co-applicant.<sup>194</sup> Moreover, because 600 Westinghouse owns the land on which the

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<sup>193</sup> ED Ex. GC-1 at Bates 0010-0012 (Cooper Dir.). Ms. Lueg also confirmed that the Application is complete and accurate. ED Ex. JL-1 at Bates 0012.

<sup>194</sup> If the facility is owned by one person and operated by another and the ED determines that special circumstances exist where the operator or the operator and the owner should both apply for a permit or a post-closure order, and for all TPDES permits, it is the duty of the operator and the owner to submit an application for a permit. 30 Tex. Admin. Code § 305.43(a). The Instructions provide that, for TPDES permits, whoever has overall responsibility for the operation of the facility must apply for the permit as a co-applicant with the facility owner. City Ex. 14 at Bates 0000215. The City stated that AIRW failed to update the name of the operator in the Application even after it included the NSSAs in its prefiled testimony.

12-inch effluent pipe that is part of the proposed package plant would be located,<sup>195</sup> and because AIRW did not include a copy of an executed easement for the land, 600 Westinghouse must be listed as a co-applicant.<sup>196</sup> The City contends that because Jonah and 600 Westinghouse were not included in the Application, TCEQ and the public were deprived of important information necessary to process and comment on the Application and TCEQ did not perform a compliance report on these entities.<sup>197</sup>

The City also argues that AIRW failed to provide required information addressing the permit need—there was no detailed discussion of the need for the Facility.<sup>198</sup> Mr. Rubinstein and Mr. Woelke testified that, because the Application does not list the population estimates, occupancy schedule, projections used to derive the flow estimates, anticipated growth rates for development, and supporting sources for the minimal information provided, the Application is incomplete and inconsistent with the Instructions.<sup>199</sup>

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<sup>195</sup> See City Ex. 37 at 1-3 and 5-37; City Ex. 8 at Bates 0000139; City Ex. 34; AIRW Ex. 43. The City states that AIRW misrepresented the extent of its property ownership on the Application. See, e.g. AIRW Ex. 4 at Bates 00063-00064.

<sup>196</sup> The Instructions provide that, if the facility is considered a fixture of the land, the owner of the land can apply for the permit as a co-applicant, or a copy of an executed deed recorded easement must be provided. City Ex. 14 at Bates 0000215.

<sup>197</sup> See City Br. at 61-66; City Reply Br. at 36-37.

<sup>198</sup> AIRW Ex. 4 at Bates 00044. The following is provided for the justification of permit need: “Central Texas is a fast-growing area. The construction of 880 residential housing units in the proposed service is planned to be completed in the next two years. The proposed [Facility] will provide services to the residential population that is expected to average 2.5 persons per unit. The [Facility] will be designed to support Type I reuse for irrigation throughout the development, minimizing potable water consumption.” AIRW Ex. 4 at Bates 00044.

<sup>199</sup> City Ex. 2 at Bates 000053-000054 (Rubinstein Dir.); City Ex. 3 at Bates 000080-000081 (Woelke Dir.). The Instructions require applicants to provide information such as the size of the development (number of lots), the date of construction, the anticipated growth rate of population estimates and projections used to derive the flow estimates, and population projections at the end of the design life of the facility (usually 50+ years), and to include the sources and basis upon which population figures were derived. City Ex. 14 at Bates 0000232.

Moreover, according to the City, AIRW failed to provide required information addressing regionalization. Parties' arguments for the regionalization section in the Application overlap with their arguments for Issue B.<sup>200</sup> City witnesses Mr. Rubinstein and Mr. Woelke testified that AIRW did not include a list and a map of the facilities within a three-mile radius of the Facility as well as the actual permittee's name and permit number of those nearby facilities, making the Application inaccurate and incomplete.<sup>201</sup> The Application stated that there were no facilities within a three-mile radius that have capacity or are willing to accept the proposed wastewater.<sup>202</sup>

Mr. Woelke also testified that the buffer zone map<sup>203</sup> in the Application did not show all treatment units, like blower/electrical building, influent lift station, Return Activated Sludge pump system or headwork; the proper 150-foot distance between the treatment unit and the property line; and the distance to the property line from each treatment unit. However, at the hearing, Mr. Woelke admitted that there is no requirement to show the blower building or electrical building on the buffer zone map and that there is sufficient space between the treatment units and the nearest property line.<sup>204</sup>

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<sup>200</sup> Parties' specific arguments concerning the City's denial of services and need for certified letters were already addressed by the ALJs in Issue B.

<sup>201</sup> City Ex. 2 at Bates 000049-000052 (Rubinstein Dir.); City Ex. 3 at Bates 000085 (Woelke Dir.). The map submitted as Attachment H to the Application identifies the location of the proposed service area, the boundaries of the City of Round Rock's Sewer CCN, and a statement that the proposed service area is outside of the city limits. AIRW Ex. 4 at Bates 00076.

<sup>202</sup> AIRW Ex. 4 at Bates 00045. Mr. Perkins testified that, after reviewing the City's prefiled testimony, exhibits, and discovery, it appears that the City has sufficient capacity to serve the proposed development but the connection to the City's system is cost prohibitive. AIRW Ex. 17 at Bates 000135-000136 (Perkins Dir.).

<sup>203</sup> City Ex. 3 at Bates 000089 (Woelke Dir.). AIRW Exhibit 3 at Bates 00070 contains the buffer zone map.

<sup>204</sup> Hearing Tr. at 205; 208-209.

The City argues that only one of the 45 current individual owners of lots in the Fairview Subdivision, located across CR 110 and within less than 100 feet from the Facility, received mailed notice of the Application. According to the City, after reviewing the Williamson County Appraisal District (WCAD) records, it appears that several landowners were not on the mailing list, making the Application and notice defective.<sup>205</sup> The City added that the discharge route includes both a pipe and a culvert under the City's right-of-way for CR 110 but the Application stated that the treated wastewater will not discharge to a city right-of-way.<sup>206</sup> Finally, Mr. Woelke stated that the Application is not accurate with regard to whether the Facility will be above the 100-year floodplain level, as there have been not sufficient studies to make that determination.<sup>207</sup>

The ED, AIRW, OPIC, and Jonah maintain their position that the Application is substantially complete and accurate.<sup>208</sup> AIRW argues that the difference in ownership of the Facility and the development is a non-issue. Jonah witness Mr. Brown and ED witness Mr. Cooper testified that it is typical for the ownership of a residential development to change, sometimes before the permit is

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<sup>205</sup> City Ex. 3 at Bates 000089-000091 (Woelke Dir.). AIRW Exhibit 3 at Bates 00063 contains the affected landowner list and maps.

<sup>206</sup> Mr. Woelke also noted that the topographic map in the Application does not show that the part of the proposed discharge route between CR 110 and the first impoundment is a watercourse and that the Application mentions no easements for that area. Ex. 3 at Bates 000091-000092 (Woelke Dir.)

<sup>207</sup> City Ex. 3 at Bates 000092-000093 (Woelke Dir.). At the hearing, Mr. Woelke testified that, while the floodplain map in the Application does not show a floodplain, that does not mean there is no floodplain there. It just means that the limits of the floodplain study were not taken as far upstream as the AIRW's property. He said he believes that a further study is needed, as good engineering practice, but admitted that it is not required by TCEQ rules. Hearing Tr. at 189-191; 210.

<sup>208</sup> See ED Br. at 6; ED Reply Br. at 3-4; OPIC Br. at 11-13; Jonah Reply Br. at 5-6; AIRW Br. at 19-25; AIRW Reply Br. at 19-22.

issued or afterwards.<sup>209</sup> It is also typical for a residential developer to hire a professional utility operations company.<sup>210</sup> AIRW explains that 600 Westinghouse, an affiliated or “sister” company of AIRW, originally purchased 129.37 acres and the 21.29-acre site for the Facility was conveyed to AIRW.<sup>211</sup> Mr. Cooper testified that he understood all three entities were related and that Matthew Hiles was the common denominator.<sup>212</sup> Mr. Brown also agreed that it was “the same developer, same owner . . . It’s just the names have changed.”<sup>213</sup>

Jonah and AIRW argue that 30 Texas Administrative Code section 305.43 does not apply to the Facility because it is not, has not been, and will not be owned by one person and operated by other—Jonah will become the owner and operator after the permit is issued and transferred to Jonah<sup>214</sup>—and because the ED determined that no special circumstances exist where the operator or the operator and the owner should both apply for a permit or a post-closure order.<sup>215</sup> OPIC argues that the Draft Permit contains a condition requiring TCEQ approval for any permit transfer and the transfer to be in accordance with 30 Texas Administrative Code sections 50.133 (relating to ED Action on Application or WQMP update) and 305.64 (relating to Transfer of Permits).<sup>216</sup> OPIC opined that the Draft Permit

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<sup>209</sup> Hearing Tr. at 299, 674-675.

<sup>210</sup> Hearing Tr. at 672; AIRW Ex. 8 at 000009.

<sup>211</sup> City Ex. 37. AIRW further explained that Matthew Hiles serves as vice president of all three affiliated entities, AIRW, 600 Westinghouse, and 800 Westinghouse, and Mr. Hiles executed the signature page on the Application and the NSSAs.

<sup>212</sup> Hearing Tr. at 639-640.

<sup>213</sup> Hearing Tr. at 299.

<sup>214</sup> See AIRW Ex. 43.

<sup>215</sup> Jonah Reply Br. at 5-6; AIRW Br. at 24

<sup>216</sup> AIRW Ex. 3 at Bates 0012.

adequately addresses any concerns regarding future transfer of permit ownership.<sup>217</sup>

AIRW argues that it is not a fatal flaw if every element of every application is not rigidly followed. The Instructions include over 550 questions and 124 pages of instructions.<sup>218</sup> It is a one-size-fit-all document that contains numerous questions that do not pertain to the Facility.<sup>219</sup> According to AIRW, the City is playing a “game of gotcha” and ignores TCEQ discretion to review the application, interpret the instructions, declare completion, or request additional information as needed.<sup>220</sup> Ms. Sims testified that the need for the Facility exists, as the future development of 880 housing units with 2 to 3 persons per unit will require wastewater services. AIRW argues that population estimates and expected growth projections are not applicable to the Facility because the construction is planned to be completed in two years.<sup>221</sup> Mr. Cooper testified that AIRW provided an anticipated start and completion date for construction of the Facility and the proposed number of residential units. The project is planned to be completed in one phase. AIRW informed TCEQ that there will be 880 units constructed in two years, satisfying the anticipated growth rate for the development.<sup>222</sup>

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<sup>217</sup> OPIC Br. at 11.

<sup>218</sup> AIRW Ex. 8 at Bates 000018 (Sims Dir.).

<sup>219</sup> Hearing Tr. at 671.

<sup>220</sup> AIRW Br. at 20. The City further argued that allowing an applicant to substitute its own judgment about what information is required to be submitted by the application form, and to ignore the instructions for the application form, diminishes the integrity of the Commission’s permitting process and results in both a lack of confidence in the agency and significant mistrust in its ability to protect water quality in the State. City Reply Br. at 35.

<sup>221</sup> AIRW Ex. 8 at Bates 000016-000017 (Sims Dir.).

<sup>222</sup> ED Ex. GC-1 at Bates 0008-0009 (Cooper Dir.).

Ms. Sims testified that the Facility is above the 100-year floodplain, which was confirmed by the Federal Emergency Management Agency (FEMA) National Flood Hazard Layer interactive mapping tool.<sup>223</sup> Mr. Cooper confirmed that the FEMA map used in the Application was an acceptable and verifiable way to identify the 100-year floodplain, with which he had no concerns.<sup>224</sup>

AIRW and OPIC argue that the City has no standing to raise a third-party notice complaint on nearby landowners' behalves and that the City itself has proper notice. OPIC noted that no landowners attempted to seek party status at the preliminary hearing, except for Mr. Webb and that, as a general rule, a party does not have standing to complain about lack of notice to another party.<sup>225</sup> According to OPIC, because of the absence of any landowner attempt to intervene and the fact that the City has not complained that it directly suffered any harm by lack of notice, the alleged notice deficiency does not rise to the level of rendering the Application substantially incomplete or inaccurate.<sup>226</sup> Ms. Sims testified that, consistent with her past practice, she conducted a search of the WCAD records a few weeks prior to submittal of the application to TCEQ and included the only landowner she found.<sup>227</sup>

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<sup>223</sup> Ms. Sims stated that FEMA is the standard source for determining if an area is within a flood hazard area. No flood hazard was identified by FEMA in the area of the proposed project. AIRW Ex. 8 at Bates 000021 (Sims Dir.). An email provided in the City's discovery documents shows that the same FEMA map was used by the Williamson County Engineering Division and accepted by the City Planning Department in January 2020. AIRW Ex. 13.

<sup>224</sup> Hearing Tr. at 662-663.

<sup>225</sup> See *Tex. Comm'n on Envtl. Quality v. Denbury Onshore, LLC*, No. 03-11-00891-CV, 2014 WL 3055912, at \*10 (Tex. App.—Austin 2014, no pet.).

<sup>226</sup> OPIC Br. at 12.

<sup>227</sup> AIRW Ex. 8 at Bates 000021 (Sims Dir.). Ms. Sims also noted that deeds were not being recorded promptly in the WCAD records because that was the beginning of the COVID-19 pandemic.

AIRW argues that before and after the realignment of CR 110, treated effluent will be discharged on its own property. The effluent will flow through a drainage easement conveyed to Williamson County through a ditch,<sup>228</sup> through a culvert and north onto the Patterson Ranch property, through a pond, downstream to Mankins Branch, and so on. According to AIRW, the City provided no evidence that the discharge is within the City's right-of-way for CR 110 and, on the contrary, Ms. Sims provided multiple independent sources to prove that the discharge will be into an intermittent stream—a water in the state.<sup>229</sup> According to AIRW, the USGS map in the Application and the 1951 USGC topographical map clearly show the direction of the flow.<sup>230</sup> AIRW also stated that the Williamson County Drainage Easement provided authorization if the wastewater discharge would be to a city, county, state highway right-of-way, or flood control district drainage ditch.<sup>231</sup>

Ms. Sims stated that the purpose of the buffer zone map is to show how an applicant will comply with the requirements related to the abatement of nuisance odors. She testified that the submitted map is correct as it shows that there is a buffer zone of more than 150 feet between the property boundary and the proposed treatment units and, since buildings and blowers are not considered treatment units and are not sources of odor, they do not need to be indicated on the map.<sup>232</sup>

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<sup>228</sup> City Ex. 34.

<sup>229</sup> Hearing Tr. at 418-420. Ms. Sims testified that there was a dry creek that runs all the way across Mr. Patterson's land. She stated that AIRW Exhibit 11 depicts the existence and trajectory of the intermittent stream as of December 2002.

<sup>230</sup> AIRW Ex. 4 at 0061; City Ex. 32; Hearing Tr. at 386, 402, 421. Ms. Sims personally confirmed this information during her visits to the area. Hearing Tr. at 402. Mr. Patterson also makes several references to the "dry weather creek" on his property. AIRW Ex. 51.

<sup>231</sup> City Ex. 34; AIRW Br. at 22.

<sup>232</sup> AIRW Ex. 8 at Bates 000020 (Sims Dir.).



Moreover, 600 Westinghouse owns the property on the other side of the solid property line.<sup>233</sup>

## **1. ALJs' Analysis**

The issue before the ALJs is whether the Application is substantially complete and accurate. No evidence was offered to demonstrate what “substantially” means; therefore, the ALJs relied on the definition that applies to the common usage of “substantial,” which is in this context means considerable in extent, amount, or value; large in volume or number.<sup>234</sup> Based on this common usage and understanding of “substantial,” the ALJs conclude that the preponderance of the credible evidence proves that the Application is substantially complete and accurate.

The ALJs already denied, at the hearing, the City’s motion to dismiss this action and remand the Application back to TCEQ so Jonah can be added as a co-applicant. No parties disputed that 600 Westinghouse is an affiliate of AIRW and that the entities are under common control. The ALJs find that AIRW complied with its duty under 30 Texas Administrative Code section 305.43 to submit an application, and that the NSSAs contain sufficient provisions to ensure

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<sup>233</sup> City Ex. 34.

<sup>234</sup> Words and phrases in Texas law “shall be read in context and construed according to the rules of grammar and common usage.” Tex. Gov’t Code § 311.011. The most recent version of Black’s Law Dictionary defines substantial as “1. Of, relating to, or involving substance; material. 2. Real and not imaginary; having actual, not fictitious, existence. 3. Important, essential, and material; of real worth and importance. 4. Strong, solid, and firm; large and strongly constructed. 5. At least moderately wealthy; possessed of sufficient financial means. 6. Considerable in extent, amount, or value; large in volume or number. 7. Having permanence or near-permanence; long-lasting. 8. Containing the essence of a thing; conveying the right idea even if not the exact details. 9. Nourishing; affording sufficient nutriment.” *Substantial*, Black’s Law Dictionary (11th ed. 2019).

that, if the permit is issued, it will be transferred to Jonah only upon TCEQ approval and in accordance with applicable TCEQ rules.

Further, the ALJs find that the credible evidence shows AIRW provided substantially sufficient information, as required by applicable portions of the Instructions, and shows the need for the permit and compliance with regionalization requirements.

The ALJs agree with AIRW and OPIC that the City lacks standing to challenge other people's possible lack of notice.<sup>235</sup> The City presented no evidence that someone entitled to receive notice did not receive it and the City has not challenged its own notice; therefore, the ALJs conclude that the City has not rebutted the prima facie demonstration on notice.

The ALJs find that the preponderance of the evidence showed that the Application contains substantially accurate information concerning the buffer zone map, the floodplain, and the discharge route. The City has not identified any special site characteristic that warrants an independent floodplain study and the evidence showed that the floodplain in the Application was indicated by using a verifiable and accurate method. Mr. Woelke admitted that the treatment units and the space between them and the nearest property line was indicated correctly in the Application. The City did not meet its burden to prove that the City's right-of-way for CR 110 is on the treated effluent discharge route. Therefore, the ALJs conclude that AIRW has met its burden regarding Issue E.

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<sup>235</sup> *McDaniel v. Tex. Nat. Res. Conservation Comm'n*, 982 S.W.2d 650, 654 (Tex. App.—Austin 1998, pet. denied).

## **F. Whether the Draft Permit Complies with TCEQ's Antidegradation Policy and Procedures**

The Commission's antidegradation rule at 30 Texas Administrative Code section 307.5 establishes a multi-tiered policy to ensure that existing water quality uses, including aquatic life uses, will be maintained and not impaired by increases in waste loading. The purpose of an antidegradation review is to ensure that the existing water quality uses will be maintained in accordance with 30 Texas Administrative Code section 307.5 and the IPs.<sup>236</sup> The first two tiers apply to the Application.

The first tier (Tier 1) requires that existing instream water uses and water quality sufficient to protect the existing uses be maintained.<sup>237</sup> A Tier 1 review applies to waterbodies that have limited or minimal aquatic life uses.<sup>238</sup> The second tier (Tier 2) requires that authorized discharges cannot cause degradation of waters that exceed fishable and swimmable quality, unless it can be shown that the lowering of water quality is necessary for important economic and social development.<sup>239</sup> Tier 2 review is required for waterbodies that have an intermediate, high, or exceptional aquatic life use.<sup>240</sup>

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<sup>236</sup> ED Ex. JL-1 at Bates 0006 (Lueg Dir.).

<sup>237</sup> 30 Tex. Admin. Code § 307.5(b)(1); ED Ex. JL-3 at Bates 0071.

<sup>238</sup> ED Ex. JL-1 at Bates 0006 (Lueg Dir.).

<sup>239</sup> 30 Tex. Admin. Code § 307.5(b)(2); ED Ex. JL-3 at Bates 0071. Degradation is defined as a lowering of water quality by more than a de minimis extent, but not to the extent that an existing use is impaired. Fishable/swimmable waters are defined as waters that have quality sufficient to support propagation of indigenous fish, shellfish, terrestrial life, and recreation in and on the water.

<sup>240</sup> ED Ex. JL-1 at Bates 0006 (Lueg Dir.); ED Ex. JL-3 at Bates 0077.

Ms. Lueg testified that she performed a preliminary antidegradation review<sup>241</sup> of the Application in accordance with 30 Texas Administrative Code section 307.5 and the IPs. The results of her review are incorporated into a memorandum included in the permit file.<sup>242</sup> The Tier 1 review determined that existing water quality uses will not be impaired by the Draft Permit and that numerical and narrative criteria to protect existing uses will be maintained. The Tier 2 review determined that no significant degradation of water quality is expected in Mankins Branch, which has been identified as having high ALU, and that existing use will be maintained and protected. As part of the Tier 2 review, Ms. Lueg performed a nutrient screening<sup>243</sup> and recommended a TP limit of 0.5 mg/L to prevent degradation and excessive growth of algae and other aquatic vegetation because Mankins Branch has a concern for nitrate and TP.<sup>244</sup>

The ED, OPIC, AIRW, and City's arguments for Issue F overlap with their arguments for Issues A and C. The City argues that the Draft Permit does not comply with the antidegradation policy because (1) the Application is inaccurate and incomplete and TCEQ failed to gather sufficient data to correctly identify and consider receiving water and existing uses and to evaluate relevant water quality standards; (2) phosphorus loading in the proposed discharge may impair aquatic

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<sup>241</sup> Ms. Lueg conducted a preliminary review, which may be re-examined and modified if new information is received. ED Ex. JL-1 at Bates 0008 (Lueg Dir.).

<sup>242</sup> AIRW Ex. 3 at Bates 0042-0043.

<sup>243</sup> ED Exhibit JL-4 contains Ms. Lueg's nutrient screening. Ms. Lueg stated that TCEQ evaluates applications for new or expanding domestic discharges to reservoirs, streams, and rivers to determine if an effluent limit is needed for TP to prevent violation of numerical nutrient criteria and/or preclude excessive growth of aquatic vegetation. She testified that the nutrient screening included the proposed discharge flow rates, instream dilution, substrate type, depth, stream type, shading, impoundments, water clarity, sensitivity to growth of aquatic vegetation, existing water quality concerns and impairments, and consistency with other permits in the area. ED Ex. JL-1 at Bates 0008-0009.

<sup>244</sup> ED Ex. JL-1 at Bates 0008-0009 (Lueg Dir.).

life use in the unnamed tributary and may degrade water quality in Mankins Branch; and (3) the Tier 2 review used an incorrect standard.<sup>245</sup>

Specifically, the City claims that Ms. Lueg did not confirm the description of the receiving water, citing Mr. Michalk's email to Ms. Lueg;<sup>246</sup> did not conduct a site visit; and did not gather information from available resources; therefore, she did not consider all existing uses for which water quality should be protected, like livestock and other wildlife watering and aesthetic values. Further, the City argues that Ms. Lueg's failure to seek information from adjacent landowners and government entities precluded the consideration of site-specific information needed to accurately derive a TP limit for the proposed discharge. Because of the intermittent nature of the receiving stream and presence of three downstream ponds, there is a strong likelihood that the discharge will cause algal blooms, which can lead to a reduction in DO during high temperature periods when water levels are low, which can affect some aquatic species, including fish, that may be present in the ponds.<sup>247</sup> Since Ms. Lueg did not conduct a survey to determine the fish species present in the ponds, the sensitivity of fish to the increased algal growth was never evaluated by TCEQ.<sup>248</sup> Finally, the City argues that TCEQ did not use the correct standard in its Tier 2 review—TCEQ's review determined no significant degradation of water quality but did not evaluate the necessity of economic development or social development in considering the lowering of water quality in Mankins Branch.

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<sup>245</sup> See City Br. at 72-78; City Reply Br. at 41-45.

<sup>246</sup> City Ex. 42.

<sup>247</sup> The City relied on Mr. Price's testimony in making this argument. Hearing Tr. at 437-440.

<sup>248</sup> City Ex. 3 at Bates 0000118.

The ED, OPIC, and AIRW maintain their position that the Draft Permit complies with TCEQ's antidegradation policy and procedures.<sup>249</sup> As previously discussed, Ms. Lueg determined the treated effluent discharge route and assessed the ALUs. Mr. Price testified that the Draft Permit conditions are sufficient to protect existing uses in the receiving waters.<sup>250</sup> The 0.5 mg/L daily average limit for TP is more stringent than the 1.0 mg/L assumed for most small (less than 0.25 MGD) discharges. Mr. Price added that, based on physical and habitat characteristics of the stream channel and riparian zone, and the proximity of an impound downstream of the proposed outfall, this limit would be protective of the ALU and preclude the excessive growth of algae and other aquatic vegetation.<sup>251</sup> Based on information provided by the USFWS, TCEQ accurately concluded that there would be no adverse effects to federally listed species or their critical habitat.<sup>252</sup> Mr. Price stated that the only listed species of potential occurrence in the project area is a mollusk, but its occurrence in Segment 1248 has not been confirmed; however, even if mollusks were present, the Draft Permit would be protective of the species.<sup>253</sup>

AIRW argues that the expert testimony unanimously concluded that TCEQ properly conducted the antidegradation review, the water quality will be maintained, and existing use will be protected. Additionally, AIRW argues that the

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<sup>249</sup> See ED Br. at 7; ED Reply Br. at 4; OPIC Br. at 13; AIRW Br. at 26; AIRW Reply Br. at 23-29.

<sup>250</sup> AIRW Ex. 14 at Bates 000046 (Price Dir.).

<sup>251</sup> AIRW Ex. 14 at Bates 000046 (Price Dir.); ED Ex. JL-1 at Bates 0006, 0008 (Lueg Dir.).

<sup>252</sup> AIRW Ex. 14 at Bates 000048 (Price Dir.). Mr. Price reviewed the Rare, Threatened, and Endangered Species of Texas by County online application compiled and maintained by the Texas Parks and Wildlife Department's Wildlife Habitat Assessment Program.

<sup>253</sup> Hearing Tr. at 442; AIRW Ex. 14 at Bates 000049 (Price Dir.).

City presented no evidence that the proposed discharge would cause degradation of water quality. According to Mr. Price, limits of oxygen demanding constituents and the required DO level in the effluent would maintain the perennial reach of Mankins Branch and Segment 1248 of the San Gabriel River above the 5.0 mg/L average daily DO concentration and continue to support the existing use. Moreover, the chlorine disinfection of the effluent and concentration of viable *E. coli* in the effluent is protective of primary recreational uses of those waters.<sup>254</sup>

## 1. ALJs' Analysis

The ALJs find that the preponderance of the credible evidence shows that the Draft Permit complies with TCEQ's antidegradation policy. According to Ms. Lueg, the Tier 2 review determined that no significant degradation of water quality is expected in Mankins Branch, which has been identified as having high ALU, and that the existing use will be maintained and protected.<sup>255</sup> This testimony addressed the incorrect standard: the inquiry for a Tier 2 review is not whether existing uses will be maintained—that is the inquiry under a Tier 1 review and the floor for all permits under the antidegradation policy.<sup>256</sup> A Tier 2 review provides additional safeguards for waters that exceed fishable/swimmable quality, and considers whether the requested discharge will lower the water quality by more than a de minimis extent.<sup>257</sup> If the discharge will not lower the water quality by more than a de minimis amount, then there is no degradation, and the review ends there. If,

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<sup>254</sup> AIRW Ex. 14 at Bates 000048 (Price Dir.).

<sup>255</sup> ED Ex. JL-1 at Bates 0008 (Lueg Dir.).

<sup>256</sup> 30 Tex. Admin. Code § 307.5(b)(1), (4).

<sup>257</sup> 30 Tex. Admin. Code § 307.5(b)(2).

however, the discharge will lower the water quality by more than a de minimis amount, then it may still be permitted if it can be shown that the lowering of water quality is necessary for important economic or social development, and that the existing uses will not be impaired.<sup>258</sup> At all times, water quality sufficient to protect existing uses must be maintained.<sup>259</sup>

Ms. Lueg made a preliminary determination that no significant degradation of water quality is expected and there was no evidence presented as to the meaning of “no significant degradation of water quality” and whether it is the same as “no lowering of water quality by more than a de minimis extent.”<sup>260</sup> The ALJs are not persuaded that Ms. Lueg failed to consider whether discharge would cause degradation of waters that exceed fishable/swimmable quality because she testified that her antidegradation review was in compliance with all applicable TCEQ rules and regulations and the existing uses will be maintained, her findings were confirmed by Mr. Price, and the City presented no evidence to show that the discharge would cause degradation.<sup>261</sup>

After considering the evidence and arguments, the ALJs conclude that the City did not rebut the prima facie demonstration, and the evidence supports Ms. Lueg’s conclusion that the proposed discharge will maintain existing uses and will not lower water quality by more than a de minimis amount. Accordingly,

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<sup>258</sup> 30 Tex. Admin. Code § 307.5(b)(2).

<sup>259</sup> 30 Tex. Admin. Code § 307.5(b).

<sup>260</sup> 30 Tex. Admin. Code § 307.5(b)(2).

<sup>261</sup> Mr. Woelke, Mr. Reed, and Mr. Rubinstein did not testify about TCEQ’s antidegradation policy. Mr. Woelke stated in his direct testimony that he would testify on this issue but admitted at the hearing that he was not a water quality or modeling expert. City Ex. 3 at Bates 000079 (Woelke Dir.); Hearing Tr. at 197, 199.



AIRW met its burden of proof to show that TCEQ's antidegradation review was accurate.

**G. Whether the Draft Permit Should be Altered or Denied Based on the AIRW's Compliance History**

TCEQ compiles compliance history information in accordance with the requirements of 30 Texas Administrative Code, Chapter 60. According to TCEQ's compliance history report for the period from September 1, 2015, through August 31, 2020, AIRW had "unclassified" classification status and no compliance rating. Mr. Cooper and Ms. Sims confirmed that the "unclassified" status is typical for sites that do not exist yet.<sup>262</sup>

The City argues that the lack of compliance history for Jonah, who will be the ultimate owner and operator of the Facility, and the lack of information about AIRW's compliance history and its financial, technical, and managerial experience warrant denying the Application.<sup>263</sup>

The ED and AIRW maintain their position that the Draft Permit should not be altered or denied based on AIRW's compliance history.<sup>264</sup> Mr. Cooper testified that AIRW's compliance history does not give him any cause for concern regarding its ability to operate the Facility.<sup>265</sup> AIRW argues that Jonah, the future owner and

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<sup>262</sup> AIRW Ex. 3 at Bates 0040-0041 (Sims Dir.); ED Ex. GC-1 at 0006 (Cooper Dir.); AIRW Ex. 8 at 000023.

<sup>263</sup> See City Br. at 78-79; City Reply Br. at 45-47.

<sup>264</sup> See ED Br. at 7-8; ED Reply Br. at 4; AIRW Br. at 26-28.

<sup>265</sup> ED Ex. GC-1 at 0006 (Cooper Dir.).

operator of the Facility, currently holds water and sewer CCNs in Williamson County, Texas, and its general manager, has over 30 years of experience operating sewer systems (along with the experience of 25 field staff).<sup>266</sup> AIRW also argues that the City's own compliance history is concerning.<sup>267</sup>

## **1. ALJs' Analysis**

The issue referred to SOAH specifically asks whether the Draft Permit should be altered or denied based on the AIRW's compliance history. The ALJs already ruled on the City's motion to dismiss based on the NSSAs.<sup>268</sup> The City presented no evidence to contradict TCEQ's conclusion that the AIRW's compliance history should not alter or result in the Draft Permit being denied, and the City did not meet its burden of production to rebut the initial presumption.

### **H. Whether the Draft Permit Contains Sufficient Provisions to Ensure Protection of Water Quality, Including Necessary Operational Requirements**

The Draft Permit contains numerous operational requirements.<sup>269</sup> The following are relevant to the City's argument for Issue H: (1) AIRW is required to install and maintain adequate safeguards to prevent the discharge of untreated or

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<sup>266</sup> AIRW 8 at 000023. AIRW argued that Jonah is more than qualified to provide sewer service to the development because it currently provides water service for approximately 9,000 customers and 30,000 people in its approximately 275-mile service area. AIRW Br. at 27-28.

<sup>267</sup> AIRW Br. at 28. Ms. Sims testified that the City has two ongoing enforcement actions. AIRW 8 at 000024.

<sup>268</sup> If ownership of the site changes during the five-year compliance period, a distinction of compliance history of the site under each owner during that five-year period shall be made. 30 Tex. Admin. Code § 60.1(d).

<sup>269</sup> AIRW Ex. 3 at Bates 0013-0016.

inadequately treated wastes during electrical power failures by means of alternate power sources, standby generators, and/or retention of inadequately treated wastewater; and (2) AIRW is required to ensure that the Facility is operated by an operator with a valid certificate of competency.<sup>270</sup>

The City's argument for Issue H mainly overlaps with its argument for Issues A and C.<sup>271</sup> The City's arguments concerning existing uses, sampling frequency, and the PT concentrating in the ponds were already addressed in this PFD. With respect to the operational requirements, the City argues that the Draft Permit should contain a requirement to ensure that, during any treatment system upsets or other problematic operations that may cause permit limit violations, untreated or inadequately treated wastewater is retained on-site for later treatment or off-site disposal (e.g., in a tank or surface impoundment with a capacity equal to at least the maximum daily flow).

Mr. Woelke testified that the Facility presents operational challenges because there are several components that are singular and, if that component experiences a failure or needs routine maintenance requiring down time, there will be a spill or release of untreated sewage. He stated that the Facility does not have a back-up unit or other means of managing wastewater in a way that prevents discharge into the receiving waters. For example, AIRW is only proposing to construct one clarifier with one clarifier drive, and if the clarifier drive malfunctions, there is no second clarifier to divert the untreated waste into.

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<sup>270</sup> Operational Requirements 4 and 9. AIRW Ex. 3 at Bates 0013, 0015.

<sup>271</sup> See City Br. at 79-83; City Reply Br. at 47-52.

Furthermore, the package plant tankage will be constructed of steel,<sup>272</sup> rather than concrete, which means that painting is required to maintain integrity. However, if the basin cannot be taken out of service for painting because there is no back-up unit, it cannot be properly maintained.<sup>273</sup> Mr. Woelke admitted that multiple clarifiers and concrete construction are not required by TCEQ rules, but it was his preference and good general practice.<sup>274</sup>

Mr. Woelke also was concerned that there is no so-called “bonus feature”<sup>275</sup> that would capture the discharge of untreated or partially treated wastewaters prior to it leaving the AIRW’s property and crossing other private property. He stated that, even for larger facilities with redundant features, when there are concerns that untreated or partially treated wastewater could be discharged, TCEQ requires a bonus feature. The “bonus feature” will be a significant benefit and would work to improve the health and safety of the residents.<sup>276</sup>

Furthermore, Mr. Woelke was concerned that only a Class C licensed operator is required for the Facility—this license requires a high school degree and only two years of experience where only one year is in the field in which the license

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<sup>272</sup> Steel units that are not properly maintained are known to fail after 20 years in service under normal operating conditions. City Ex. 3 at Bates 0000107 (Woelke Dir.).

<sup>273</sup> City Ex. 3 at Bates 0000106-0000107 (Woelke Dir.).

<sup>274</sup> Hearing Tr. at 214-216.

<sup>275</sup> According to Mr. Woelke, the “bonus feature” is a pond that has enough volume to store the volume from a single day at permitted flows and provides a place to capture and attenuate the impact of untreated wastewater in the receiving stream. City Ex. 3 at Bates 0000108 (Woelke Dir.). He admitted that “bonus feature” is not defined by TCEQ rules. Hearing Tr. at 215.

<sup>276</sup> City Ex. 3 at Bates 0000108 (Woelke Dir.); Hearing Tr. at 194. Mr. Woelke mentioned another facility where a retention pond was negotiated during a settlement between an applicant and protesters but admitted that it was not required by TCEQ rules. Hearing Tr. at 215.

is requested.<sup>277</sup> Mr. Woelke stated that the requirement that the operator must be at the Facility five days per week and otherwise be available by phone or pager was concerning because of the lack of redundancies to prevent unauthorized discharges in the event of failure or malfunction. Moreover, there is nothing in the Application about how the Facility will communicate with the operators when they are off-site. Mr. Woelke did not know if an automated alert system is required by TCEQ rules but stated it would be good practice for personnel to be alerted. He admitted that an automated alert system may not be required in the application phase and that, in his experience, he has not seen TCEQ deny a permit based on what might occur in the future operationally.<sup>278</sup>

The ED, OPIC, and AIRW maintain their position that the Draft Permit contains sufficient provisions to ensure protection of water quality, including necessary operational requirements.<sup>279</sup> Mr. Cooper testified that, under TCEQ rules, the Facility requires a minimum of a Class C licensed operator.<sup>280</sup> He was not familiar with any rules that require a “bonus feature.”<sup>281</sup> According to Mr. Cooper, the Draft Permit establishes the limits based on the conditions of the receiving streams and AIRW is required to build a plant to meet the limits.<sup>282</sup> He was not concerned about the Facility having only one clarifier because AIRW is

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<sup>277</sup> Mr. Woelke compared the Facility’s operator license requirements to the City’s Class B licensed operators that have more extensive requirements for education and experience. City Ex. 3 at Bates 0000108-0000109 (Woelke Dir.).

<sup>278</sup> City Ex. 3 at Bates 0000108-0000109 (Woelke Dir.); Hearing Tr. at 216-217, 223.

<sup>279</sup> See ED Br. at 8-9; ED Reply Br. at 8-9; OPIC Br. at 14; AIRW Br. at 29-30; AIRW Reply Br. at 30-31.

<sup>280</sup> ED Ex. GC-1 at Bates 0009 (Cooper Dir.). Activated sludge facilities with a flow limit range of 0.050 MGD to 1.0 MGD must have an operator with a valid Class C or higher license. 30 Tex. Admin. Code § 30.350(e).

<sup>281</sup> Mr. Cooper stated that he was not qualified to say if the Facility is required to have a “bonus feature” but said that a TCEQ modeler would have included it if it was necessary. Hearing Tr. at 668.

<sup>282</sup> Hearing Tr. at 667.

required to submit the plans and specifications for the treatment system for the Facility to TCEQ for review once the permit is issued and TCEQ may require changes to the system. The Facility will not be constructed until the plans and specifications are approved by TCEQ.<sup>283</sup>

Mr. Perkins confirmed that TCEQ rules do not require redundant clarifiers until average daily flow exceeds 400,000 gallon per day and the Facility will not exceed half of that amount. He stated that aeration basins are exempt from this requirement if the aeration equipment is removable without taking the aeration basin out of service. Circular clarifiers normally have one drive per clarifier. TCEQ does not have design criteria requiring redundant drives on a single basin and installing redundant drives would be highly unusual for a facility with a minor flow volume.<sup>284</sup> Mr. Perkins also confirmed that the design details are normally more thoroughly reviewed by TCEQ during plan submittals after a permit is issued. It is very rare for detailed plans to be completed at the time a permit application is submitted. Identifying all the treatment units during the permitting process is neither required nor practical. The plans and specification review and approval process occurs after permit issuance and is not subject to review and comment by the public.<sup>285</sup>

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<sup>283</sup> ED Ex. GC-1 at Bates 0011 (Cooper Dir.); Hearing Tr. at 668.

<sup>284</sup> AIRW Ex. 17 at Bates 000134 (Perkins Dir.). Mr. Perkins cited 30 Texas Administrative Code section 217.153(c)(1).

<sup>285</sup> AIRW Ex. 17 at Bates 000133 (Perkins Dir.).

## **1. ALJs' Analysis**

The ALJs have already found that the Draft Permit is protective of water quality. With respect to the operational requirements in dispute, the ALJs agree with the ED, OPIC, and AIRW that the Draft Permit contains sufficient operational requirements to ensure protection of water quality. The ALJs are not persuaded that a non-standard operator licensing requirement should be required for the Facility. Furthermore, many of the City's concerns about the engineering details will be addressed, as testified by Mr. Cooper and Mr. Perkins, after the permit is issued during the construction phase and, if TCEQ then determines that any bonus or redundant features are necessary to meet the established limits, it will require those changes before approving the construction of the Facility. Moreover, the City's own witness admitted that those features are not required by TCEQ rules but were merely his preferences and would be good practice. Therefore, the ALJs find that AIRW has met its burden regarding Issue H.

## **VII. TRANSCRIPT COSTS**

30 Texas Administrative Code section 80.23(d) provides for the allocation of transcript costs among the parties, excluding the ED and OPIC. In allocating those costs, the Commission is to consider the following applicable factors in allocating reporting and transcription costs among the other parties:

- The party who requested the transcript;
- The financial ability of the party to pay the costs;

- The extent to which the party participated in the hearing;
- The relative benefits to the various parties of having a transcript; and
- Any other factor which is relevant to a just and reasonable assessment of costs.

The ALJs ordered AIRW to arrange for and pay the costs of having a court reporter attend the hearing and prepare a transcript, subject to allocation of such costs at the end of the proceeding. AIRW argued that Jonah's participation in the hearing was minor and disproportionate to the City's and AIRW's participation, and that there was no evidence that the City is financially unable to pay its share of the costs. AIRW requested that itself and the City each pay one-half of the transcript costs, totaling \$8,848.75. No party has disputed that amount or filed a response to AIRW's request.

The City and AIRW participated roughly equally in the hearing. Moreover, both sides cited to the transcript in their closing arguments; therefore, both sides benefitted from having a transcript. There is no direct evidence concerning the respective financial abilities of the parties to pay the transcript cost. Based on the above, the ALJs recommend that the Commission assess the City and AIRW each one-half of the transcript costs.

## **VIII. RECOMMENDATION**

The ALJs recommend that the Commission adopt the attached proposed order containing Findings of Fact and Conclusions of Law and issue the



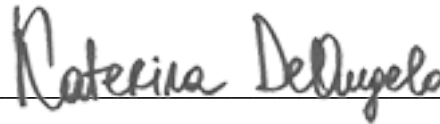
Draft Permit to AIRW. All requests for findings of fact that are not included in the Proposed Order are denied.

**SIGNED AUGUST 23, 2022.**

ALJ Signatures:

A handwritten signature in black ink, appearing to read "Andrew Lutostanski", written over a horizontal line.

Andrew Lutostanski  
Presiding Administrative Law Judge

A handwritten signature in black ink, appearing to read "Katerina DeAngelo", written over a horizontal line.

Katerina DeAngelo  
Co-Presiding Administrative Law Judge



**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

**AN ORDER  
GRANTING THE APPLICATION BY  
AIR-W 2017-7 L.P. FOR TPDES PERMIT NO. WQ0015878001  
IN WILLIAMSON COUNTY, TEXAS;  
SOAH DOCKET NO. 582-22-1016;  
TCEQ DOCKET NO. 2021-1214-MWD**

On \_\_\_\_\_, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the application of AIR-W 2017-7 L.P. (AIRW) for a new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0015878001 in Williamson County, Texas. A Proposal for Decision (PFD) was presented by Andrew Lutostanski and Katerina DeAngelo, Administrative Law Judges (ALJs) with the State Office of Administrative Hearings (SOAH), who conducted an evidentiary hearing concerning the application on May 23-25, 2022, in Austin, Texas via Zoom videoconferencing. After considering the PFD, the Commission makes the following findings of fact and conclusions of law.

## **I. FINDINGS OF FACT**

### **Application**

1. AIRW filed its application (Application) for a new TPDES permit with TCEQ on April 6, 2020.
2. The Application requested authorization to discharge treated domestic wastewater from a proposed plant site, the Rockride Lane Water Resource Reclamation Facility (Facility), to be located approximately 500 feet southeast of the intersection of Rockride Lane (County Road 110) and Westinghouse Road (County Road 111), in Williamson County, Texas 78626. AIRW proposes to build the Facility to serve the Mansions of Georgetown III development, an 880-house subdivision.
3. The treated effluent will be discharged via pipe, thence through a culvert, thence to an unnamed tributary, thence to Mankins Branch, thence 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, and high aquatic life use for Mankins Branch. The designated uses for Segment No. 1248 are primary contact recreation, public water supply, aquifer protection, and high aquatic life use.
4. The Executive Director (ED) declared the Application administratively complete on June 19, 2020, and technically complete on October 26, 2020.
5. The ED completed the technical review of the Application, prepared a draft permit (Draft Permit) and made it available for public review and comment.
6. AIRW currently owns the site at which the proposed Facility will be located.
7. AIRW, through its affiliate, entered into Non-Standard Service Agreements (NSSAs) with Jonah Water Special Utility District (Jonah) on April 20, 2022, for the provision of retail wastewater services to the development.

8. Under the NSSAs, Jonah will own and operate the Facility once the TPDES permit is issued and transferred to it under 30 Texas Administrative Code section 305.64.

### **The Draft Permit**

9. The Draft Permit would authorize a discharge of treated domestic wastewater at a daily average flow not to exceed 200,000 gallons per day (or 0.20 million gallons per day (MGD)).
10. The Facility will have treatment units including aeration basins, a final clarifier, a cloth effluent filter, chemical injection for phosphorus removal, aerated sludge holding and thickening tank, and a chlorine contact chamber. The Facility has not been constructed.
11. 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.
12. The effluent limitations in the Draft Permit, based on a 30 day average, include: 7 milligram per liter (mg/L) Five-Day Carbonaceous Biochemical Oxygen Demand; 10 mg/L Total Suspended Solids; 2 mg/L Ammonia Nitrogen; 0.5 mg/L Total Phosphorus; a minimum dissolved oxygen (DO) of 4.0 mg/L, pH in the range of 6.0 to 9.0, and *Escherichia coli* (*E. coli*) not to exceed 126 colony forming units/most probable number per 100 milliliter.
13. The effluent shall contain a chlorine residual of at least 1.0 mg/L and shall not exceed a chlorine residual of 4.0 mg/L after a detention of at least 20 minutes based on peak flow.

### **Notice and Jurisdiction**

14. The Notice of Receipt of the Application and Intent to Obtain Water Quality Permit was published on June 28, 2020, in the *Williamson County Sun* in English and, on June 25, 2020, in *El Mundo Newspaper* in Spanish.

15. The Combined Notice of Receipt and Intent to Obtain a Water Quality Permit and Notice of Application and Preliminary Decision was published on December 13, 2020, in the *Williamson County Sun* in English and, on December 17, 2020, in *El Mundo Newspaper* in Spanish.
16. The comment period for the Application closed on January 19, 2021.
17. TCEQ's Office of the Chief Clerk received timely comments from various individuals and the City of Georgetown (the City). The City also timely filed a request for a Contested Case Hearing based upon issues raised during the public comment period.
18. The ED filed his Response to Public Comments on August 6, 2021.
19. On November 3, 2021, the Commission considered the hearing request at its open meeting and, on November 9, 2021, issued an Interim Order, directing that the following eight issues be referred to SOAH, denying all issues not referred, and setting the maximum duration of the hearing at 180 days from the date of the preliminary hearing until the date the PFD is issued by SOAH:
  - A) Issue A: Whether the Draft Permit is protective of water quality and the existing uses of the receiving waters in accordance with applicable Texas Surface Water Quality Standards (TSQWS), including protection of aquatic and terrestrial wildlife;
  - B) Issue B: Whether the Draft Permit is consistent with the state's regionalization policy and demonstration of need for the volume requested in the application for a new discharge permit pursuant to Texas Water Code section 26.0282;
  - C) Issue C: Whether the Draft Permit is protective of the health of the nearby residents;
  - D) Issue D: Whether the Draft Permit complies with applicable requirements regarding nuisance odors;

- E) Issue E: Whether the Application is substantially complete and accurate;
  - F) Issue F: Whether the Draft Permit complies with the TCEQ's antidegradation policy and procedures;
  - G) Issue G: Whether the Draft Permit should be altered or denied based on the AIRW's compliance history; and
  - H) Issue H: Whether the Draft Permit contains sufficient provisions to ensure protection of water quality, including necessary operational requirements.
20. On January 16, 2022, notice of the preliminary hearing was published in English in the *Williamson County Sun* and, on January 13, 2022, in Spanish in *El Mundo Newspaper*. The notice included the time, date, and place of the hearing, as well as the matters asserted, in accordance with the applicable statutes and rules.

### **Proceedings at SOAH**

21. On February 24, 2022, a preliminary hearing was convened in this case via videoconference by SOAH ALJs Andrew Lutostanski and Ross Henderson. Attorney Helen Gilbert appeared for AIRW; attorney Patricia Carls appeared for the City; attorney Bobby Salehi appeared for the ED; attorney Jennifer Jamison appeared for the Office of Public Interest Counsel (OPIC); Jim Webb appeared for himself; and John Carlton appeared for Jonah.
22. Mr. Webb and Jonah sought party status at the preliminary hearing, and the ALJs granted those requests. Mr. Webb submitted his withdrawal from the proceeding on May 17, 2022.
23. Jurisdiction was noted by the ALJs and the Administrative Record, and AIRW's exhibits AIRW Exhibit 1-7 were admitted.
24. A second preliminary hearing was held via videoconference by SOAH ALJs Lutostanski and Katerina DeAngelo on May 12, 2022. All parties appeared

through their respective representatives and the ALJs ruled on all timely-filed motions and objections.

25. On May 23-25, 2022, ALJs Lutostanski and DeAngelo convened the hearing on the merits via videoconference and all parties appeared through their respective representatives. The record closed on June 24, 2022, after the parties filed post-hearing briefs.

### **Protection of Water Quality and Existing Uses, Including Aquatic and Terrestrial Wildlife**

26. The prima facie demonstration that the Draft Permit is protective of water quality and the existing uses of the receiving waters in accordance with applicable Texas Surface Water Quality Standards (TSWQS), including protection of aquatic and terrestrial wildlife, was not rebutted.
27. TSWQS apply to surface water in the state and are set by the Commission at levels designed to be protective of public health, aquatic resources, terrestrial life, and other environmental and economic resources. The applicable water quality standards are the TSWQS in 30 Texas Administrative Code Chapter 307.
28. The TSWQS consist of general standards, narrative standards, surface water segment-specific numeric standards, numeric standards for toxic substances, and antidegradation review.
29. The TSWQS establish specific uses for each classified water body in the state and also provide numeric criteria for each classified stream.
30. The provisions of the Draft Permit are protective of water quality and are in accordance with the TSWQS.
31. The Draft Permit is protective of water quality and existing uses of the receiving water.
32. The Draft Permit is protective of aquatic and terrestrial wildlife.

## **Regionalization**

33. To effectuate its policy of encouraging regionalization of wastewater services, TCEQ requires an applicant to provide certain information to allow TCEQ to conduct a regionalization analysis.
34. No part of the Facility or development is within the City's corporate limits.
35. The proposed Facility and its discharge are within the City's extraterritorial jurisdiction.
36. Properties in the City's extraterritorial jurisdiction that desire wastewater services from the City must first submit a petition for voluntary annexation.
37. The ordinance requiring annexation for wastewater services may be waived by the City Council.
38. As part of its Application, AIRW provided email correspondence to and from nearby providers regarding whether they would provide sewer service.
39. AIRW's written communications with nearby providers were sufficient, and AIRW was not required to submit certified letters because the emails provide similar tracking and traceability.
40. AIRW explored securing wastewater services from the City, and the City placed conditions on providing service, including: the Facility site would have to be annexed into the City and comply with the City's land use restrictions.
41. There was no indication that the City was willing to waive the annexation and land use requirements.
42. AIRW received a conditional offer for sewer service from the City. The City denied AIRW's request for service unless AIRW agreed to annexation and land use restrictions.



43. The ED requested from AIRW a cost analysis of expenditures that includes the cost of connecting to the CCN facilities versus the cost of the proposed facility or expansion.
44. Constructing a new plant will cost approximately \$300,000 more than connecting to the City's system.
45. Because of the higher property tax rate inside the City than outside it in the unincorporated area and the City's condition of annexation to connect to its system, connecting carries with it an approximately \$20 million cost due to diminution in property value.
46. Costs weigh in favor of granting AIRW's application.
47. The evidence fails to show that easements and the delay inherent to acquiring them are impediments to connecting to the City's system.
48. Even if easements were needed, the evidence fails to show that AIRW tried and failed to secure them.
49. There is no regional provider designated for the area where the Facility is proposed to be located.
50. The proposed Facility and its discharge are not within the sewer CCN of any retail public utility.
51. The proposed Facility and its discharge are partially within Jonah's district boundaries and partially within Jonah's water CCN.
52. The City did not request Jonah's consent to provide wastewater service to the Facility, and Jonah has not given consent for the City to operate within its boundaries.
53. Jonah is an established political subdivision that provides water service to approximately 9,000 customers, and 30,000 people are in its approximately 275-mile service area.

54. Jonah is negotiating to provide wastewater to other nearby developments and plans to expand its wastewater services within its certificated water service area.

### **Nearby Residents**

55. The prima facie demonstration that the Draft Permit is protective of the health of nearby residents was not rebutted.
56. The Draft Permit contains adequate permit limits and monitoring requirements to protect the health of nearby residents.
57. The monitoring and sampling requirements in the Draft Permit comply with the Commission rules.
58. The Draft Permit contains appropriate effluent limits.
59. The Draft Permit is protective of human health, including those of nearby residents.

### **Nuisance Odors**

60. AIRW will control nuisance odors by owning the 150-foot buffer zone from the wastewater treatment plant units to the property line.
61. The evidence failed to show that the discharge will go into any body of water that crosses or abuts any park, playground, or schoolyard within one mile of the point of discharge.

### **Completeness and Accuracy of Application**

62. The prima facie demonstration that the Application is substantially complete and accurate was not rebutted.
63. The Application went through both an administrative and a technical review.
64. The Application included all required information and was substantially complete and accurate.

### **Antidegradation**

65. The prima facie demonstration that the Draft Permit complies with TCEQ's antidegradation policy and procedures was not rebutted.
66. The ED performed a Tier 1 and Tier 2 antidegradation review of the receiving waters in accordance with 30 Texas Administrative Code section 307.5.
67. The narrative and numeric criteria to protect existing uses will be maintained throughout the receiving waters; therefore, existing water quality uses will be maintained and protected.
68. The existing water quality uses of the receiving waters of the unnamed tributary of unnamed tributary, Mankins Branch, the San Gabriel/North Fork San Gabriel River in Segment No. 1248 of the Brazos River Basin will not be impaired by the Draft Permit as long as AIRW complies with the Draft Permit, which will satisfy the antidegradation Tier 1 requirements.
69. The Draft Permit will not cause significant degradation of water quality in the receiving waters of the unnamed tributary, Mankins Branch, the San Gabriel/North Fork San Gabriel River in Segment No. 1248 of the Brazos River Basin as long as AIRW complies with the Draft Permit, which will satisfy the antidegradation Tier 2 requirements.
70. The Draft Permit complies with TCEQ's antidegradation policy and procedures.

### **Compliance History**

71. AIRW's compliance status is unclassified.
72. No evidence was presented that indicated that AIRW's compliance history should alter or result in permit denial.
73. AIRW's compliance history of unclassified does not serve as a basis for alteration or denial of the Draft Permit.

### **Operational Requirements**

74. The prima facie demonstration that the Draft Permit contains sufficient provisions to ensure protection of water quality, including necessary operational requirements, was not rebutted.
75. The operational requirements in the Draft Permit are sufficient to ensure protection of water quality.

### **Transcription Costs**

76. Reporting and transcription of the hearing on the merits was warranted because the hearing lasted for three days.
77. All parties fully participated in the hearing by presenting witnesses and cross-examining witnesses; however, Jonah's participation in the hearing was minor and disproportionate to the City and AIRW.
78. Both the City and AIRW participated roughly equally in the hearing and cited to the transcript in their closing arguments; therefore, both sides benefitted from having a transcript.
79. There was no evidence that any party subject to allocation of costs is financially unable to pay a share of the costs.
80. The total cost for recording and transcribing the preliminary hearing and the hearing on the merits was \$8,848.75.
81. AIRW and the City should each pay one-half of the transcription costs.

## **II. CONCLUSIONS OF LAW**

1. TCEQ has jurisdiction over this matter. Tex. Water Code, chs. 5, 26.
2. SOAH has jurisdiction to conduct a hearing and to prepare a PFD in contested cases referred by the Commission under Texas Government Code section 2003.047.

3. Notice was provided in accordance with Texas Water Code sections 5.114 and 26.028; Texas Government Code sections 2001.051 and 2001.052; and 30 Texas Administrative Code sections 39.405 and 39.551.
4. The Application is subject to the requirements in Senate Bill 709, effective September 1, 2015. Tex. Gov't Code § 2003.047(i-1)-(i-3).
5. AIRW's filing of the Administrative Record established a prima facie case 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. Tex. Gov't Code § 2003.047(i-1); 30 Tex. Admin. Code § 80.17.
6. AIRW retains the burden of proof on the issues regarding the sufficiency of the Application and compliance with the necessary statutory and regulatory requirements. 30 Tex. Admin. Code § 80.17(a).
7. The City did not rebut the prima facie demonstration by demonstrating that one or more provisions in the Draft Permit violate a specifically applicable state or federal requirement that relates to a matter referred by TCEQ. Tex. Gov't Code § 2003.047(i-2); 30 Tex. Admin. Code § 80.117(c).
8. The Draft Permit is protective of water quality and the existing uses of the receiving waters in accordance with applicable TSWQS, including protection of aquatic and terrestrial wildlife.
9. The Draft Permit is protective of the health of residents near the proposed Facility and discharge route.
10. The Application demonstrates compliance with TCEQ's regionalization policy. Tex. Water Code §§ 26.003, 26.081(a)-(b), (d); 26.0282.
11. The Application demonstrates a need for the Draft Permit. Tex. Water Code § 26.0282.
12. The Draft Permit contains sufficient provisions to prevent nuisance odors. 30 Tex. Admin. Code §§ 217.38, 309.13(e).
13. The Application is substantially complete and accurate.

14. The Draft Permit complies with TCEQ's antidegradation policy. 30 Texas Admin. Code §§ 307.5, 307.6(b)(4).
15. AIRW's compliance history does not raise issues regarding AIRW's ability to comply with the material terms of the Draft Permit or that would warrant altering the terms of the Draft Permit.
16. The Draft Permit contains sufficient provisions, including necessary operational requirements, to ensure protection of water quality.
17. No transcript costs may be assessed against the ED or OPIC because TCEQ's rules prohibit the assessment of any cost to a statutory party who is precluded by law from appealing any ruling, decision, or other act of the Commission. 30 Tex. Admin. Code § 80.23(d)(2).
18. Factors to be considered in assessing transcript costs include: the party who requested the transcript; the financial ability of the party to pay the costs; the extent to which the party participated in the hearing; the relative benefits to the various parties of having a transcript; the budgetary constraints of a state or federal administrative agency participating in the proceeding; and any other factor which is relevant to a just and reasonable assessment of the costs. 30 Tex. Admin. Code § 80.23(d)(1).
19. Considering the factors in 30 Texas Administrative Code section 80.23(d)(1), a reasonable assessment of hearing transcript costs against parties to the contested case proceeding is: one-half to AIRW and one-half to the City.

**NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:**

1. AIRW's Application for Texas Pollutant Discharge Elimination System Permit No. WQ0015878001 is granted as set forth in the Draft Permit.
2. AIRW and the City must each pay one-half of the transcription costs.
3. The Commission adopts the ED's Response to Public Comment in accordance with 30 Texas Administrative Code section 50.117.

4. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
5. The effective date of this Order is the date the Order is final, as provided by Texas Government Code section 2001.144 and 30 Texas Administrative Code section 80.273.
6. TCEQ's Chief Clerk shall forward a copy of this Order to all parties.
7. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

**ISSUED:**

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

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**Jon Niermann, Chairman, For the Commission**

# Texas Commission on Environmental Quality



## NOTICE OF APPLICATION AND PRELIMINARY DECISION FOR TPDES PERMIT FOR MUNICIPAL WASTEWATER

NEW

**PERMIT NO. WQ0016260001**

**APPLICATION AND PRELIMINARY DECISION.** 705 Limmerloop JV LLC, 13018 Research Boulevard, Suite A, Austin, Texas 78750, has applied to the Texas Commission on Environmental Quality (TCEQ) for a new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0016260001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 50,000 gallons per day. TCEQ received this application on November 29, 2022.

The facility will be located approximately 650 feet northeast of the intersection of Etna Way and Limmer Loop (County Road 109), in Williamson County, Texas 78634. This link to an electronic map of the site or facility's general location is provided as a public courtesy and is not part of the application or notice. For the exact location, refer to the application.

<https://gisweb.tceq.texas.gov/LocationMapper/?marker=-97.594469,30.563358&level=18>

The treated effluent will be discharged to an unnamed ditch, thence to an unnamed tributary, thence to McNutt Creek, thence to Brushy Creek in Segment No. 1244 of the Brazos River Basin. The unclassified receiving water uses are minimal aquatic life use for the unnamed ditch, limited aquatic life use for the unnamed tributary, and high aquatic life use for the McNutt Creek. The designated uses for Segment No. 1244 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. However, this facility is downstream of these areas.

In accordance with 30 Texas Administrative Code §307.5 and TCEQ's *Procedures to Implement the Texas Surface Water Quality Standards* (June 2010), an antidegradation review of the receiving waters was performed. A Tier 1 antidegradation review has preliminarily determined that existing water quality uses will not be impaired by this permit action. Numerical and narrative criteria to protect existing uses will be maintained. A Tier 2 review has preliminarily determined that no significant degradation of water quality is expected in McNutt Creek, which has been identified as having high aquatic life use. Existing uses will be maintained and protected. The preliminary determination can be reexamined and may be modified if new information is received.

Exhibit  
SOAH Hearing - 8/16/2023

**APP 07**

exhibits.tceq.com



The TCEQ Executive Director has completed the technical review of the application and prepared a draft permit. The draft permit, if approved, would establish the conditions under which the facility must operate. The Executive Director has made a preliminary decision that this permit, if issued, meets all statutory and regulatory requirements. The permit application, Executive Director's preliminary decision, and draft permit are available for viewing and copying at Hutto Public Library, 500 West Live Oak Street, Hutto, Texas.

**ALTERNATIVE LANGUAGE NOTICE.** Alternative language notice in Spanish is available at <https://www.tceq.texas.gov/permitting/wastewater/plain-language-summaries-and-public-notices>. El aviso de idioma alternativo en español está disponible en <https://www.tceq.texas.gov/permitting/wastewater/plain-language-summaries-and-public-notices>.

**PUBLIC COMMENT / PUBLIC MEETING** You may submit public comments or request a public meeting about this application. The purpose of a public meeting is to provide the opportunity to submit comments or to ask questions about the application. TCEQ holds a public meeting if the Executive Director determines that there is a significant degree of public interest in the application or if requested by a local legislator. A public meeting is not a contested case hearing.

**OPPORTUNITY FOR A CONTESTED CASE HEARING.** After the deadline for submitting public comments, the Executive Director will consider all timely comments and prepare a response to all relevant and material or significant public comments. **Unless the application is directly referred for a contested case hearing, the response to comments will be mailed to everyone who submitted public comments and to those persons who are on the mailing list for this application. If comments are received, the mailing will also provide instructions for requesting a contested case hearing or reconsideration of the Executive Director's decision.** A contested case hearing is a legal proceeding similar to a civil trial in a state district court.

**TO REQUEST A CONTESTED CASE HEARING, YOU MUST INCLUDE THE FOLLOWING ITEMS IN YOUR REQUEST:** your name, address, phone number; applicant's name and proposed permit number; the location and distance of your property/activities relative to the proposed facility; a specific description of how you would be adversely affected by the facility in a way not common to the general public; a list of all disputed issues of fact that you submit during the comment period; and the statement "[I/we] request a contested case hearing." If the request for contested case hearing is filed on behalf of a group or association, the request must designate the group's representative for receiving future correspondence; identify by name and physical address an individual member of the group who would be adversely affected by the proposed facility or activity; provide the information discussed above regarding the affected member's location and distance from the facility or activity; explain how and why the member would be affected; and explain how the interests the group seeks to protect are relevant to the group's purpose.

Following the close of all applicable comment and request periods, the Executive Director will forward the application and any requests for reconsideration or for a contested case hearing to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

The Commission may only grant a request for a contested case hearing on issues the requestor submitted in their timely comments that were not subsequently withdrawn. **If a hearing is granted, the subject of a hearing will be limited to disputed issues of fact or mixed questions of fact and law relating to relevant and material water quality concerns submitted during the comment period.**

**EXECUTIVE DIRECTOR ACTION.** The Executive Director may issue final approval of the application unless a timely contested case hearing request or request for reconsideration is filed. If a timely hearing request or request for reconsideration is filed, the Executive Director will not issue final approval of the permit and will forward the application and request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

**MAILING LIST.** If you submit public comments, a request for a contested case hearing or a reconsideration of the Executive Director's decision, you will be added to the mailing list for this specific application to receive future public notices mailed by the Office of the Chief Clerk. In addition, you may request to be placed on: (1) the permanent mailing list for a specific applicant name and permit number; and/or (2) the mailing list for a specific county. If you wish to be placed on the permanent and/or the county mailing list, clearly specify which list(s) and send your request to TCEQ Office of the Chief Clerk at the address below.

**All written public comments and public meeting requests must be submitted to the Office of the Chief Clerk, MC 105, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, TX 78711-3087 or electronically at [www.tceq.texas.gov/goto/comment](http://www.tceq.texas.gov/goto/comment) within 30 days from the date of newspaper publication of this notice.**

**INFORMATION AVAILABLE ONLINE.** For details about the status of the application, visit the Commissioners' Integrated Database at [www.tceq.texas.gov/goto/cid](http://www.tceq.texas.gov/goto/cid). Search the database using the permit number for this application, which is provided at the top of this notice.

**AGENCY CONTACTS AND INFORMATION.** Public comments and requests must be submitted either electronically at [www.tceq.texas.gov/goto/comment](http://www.tceq.texas.gov/goto/comment), or in writing to the Texas Commission on Environmental Quality, Office of the Chief Clerk, MC 105, P.O. Box 13087, Austin, Texas 78711-3087. Any personal information you submit to the TCEQ will become part of the agency's record; this includes email addresses. For more information about this permit application or the permitting process, please call the TCEQ Public Education Program, Toll Free, at 1-800-687-4040 or visit their website at [www.tceq.texas.gov/goto/pep](http://www.tceq.texas.gov/goto/pep). Si desea información en Español, puede llamar al 1-800-687-4040.

Further information may also be obtained from 705 Limmerloop JV LLC at the address stated above or by calling Mr. Brian Tucker, Senior Vice President of Development, at 512-675-6864.

Issuance Date: May 5, 2023

# Comisión De Calidad Ambiental Del Estado De Texas



## AVISO DE LA SOLICITUD Y DECISIÓN PRELIMINAR PARA EL PERMISO DEL SISTEMA DE ELIMINACION DE DESCARGAS DE CONTAMINANTES DE TEXAS (TPDES) PARA AGUAS RESIDUALES MUNICIPALES

NUEVO

PERMISO PROPUESTO NO. WQ0016260001

**SOLICITUD Y DECISIÓN PRELIMINAR.** 705 Limmerloop JV LLC, 13018 Research Boulevard, Suite A, Austin, Texas 78750, ha solicitado a la Comisión de Calidad Ambiental del Estado de Texas (TCEQ) por un nuevo Permiso No. WQ0016260001 del Sistema de Eliminación de Descargas de Contaminantes de Texas (TPDES) , que autoriza la descarga de aguas residuales tratadas en un volumen que no sobrepasa un flujo promedio diario de 50,000 galones por día. La TCEQ recibió esta solicitud el 29 de noviembre de 2022.

La planta estará ubicada aproximadamente a 650 pies al noreste de la intersección de Etna Way y Limmer Loop (County Road 109), en el Condado de Williamson, Texas 78634. Este enlace a un mapa electrónico de la ubicación general del sitio o de la instalación es proporcionado como una cortesía y no es parte de la solicitud o del aviso. Para la ubicación exacta, consulte la solicitud.  
<https://gisweb.tceq.texas.gov/LocationMapper/?marker=-97.594469,30.563358&level=18>

El efluente tratado será descargado a una zanja de drenaje sin nombre, de allí a un afluente sin nombre, de allí a McNutt Creek, de allí a Brushy Creek en el Segmento No. 1244 de la Cuenca del Río Brazos. Los usos no clasificados de las aguas receptoras son uso mínimo de vida acuática para la zanja sin nombre, uso limitado de vida acuática para el afluente sin nombre y uso alto de vida acuática para McNutt Creek. Los usos designados para el Segmento No. 1244 son recreación de contacto primario, abastecimiento de agua público, protección de acuíferos y alto uso de vida acuática. El uso de protección del acuífero se aplica a las zonas de contribución, recarga y transición del Acuífero Edwards. Sin embargo, esta instalación se encuentra aguas abajo de estas áreas.

**Option 1:** De acuerdo con la 30 TAC §307.5 y los procedimientos de implementación de la TCEQ (Enero 2010) para las Normas de Calidad de Aguas Superficiales en Texas, fue realizada una revisión de la antidegradación de las aguas recibidas. Una revisión de antidegradación del Nivel 1 ha determinado preliminarmente que los usos de la calidad del agua existente no serán perjudicados por la acción de este permiso. Se mantendrá un criterio narrativo y numérico para proteger los usos existentes. Una revisión del Nivel 2 ha determinado preliminarmente que no se espera ninguna degradación significativa en McNutt Creek, el cual se ha identificado que tiene usos altos de la vida acuática. Los usos existentes serán mantenidos y protegidos. La determinación preliminar puede ser reexaminada y puede ser modificada, si se recibe alguna información nueva.

El Director Ejecutivo de la TCEQ ha completado la revisión técnica de la solicitud y ha preparado un borrador del permiso. El borrador del permiso, si es aprobado, establecería las condiciones bajo las cuales la instalación debe operar. El Director Ejecutivo ha tomado una decisión preliminar que si este permiso es emitido, cumple con todos los requisitos normativos y legales. La solicitud del permiso, la decisión preliminar del Director Ejecutivo y el borrador del permiso están disponibles para leer y copiar en la Biblioteca Pública de Hutto, 500 West Live Oak Street, Hutto, Texas.

**AVISO DE IDIOMA ALTERNATIVO.** El aviso de idioma alternativo en español está disponible en <https://www.tceq.texas.gov/permitting/wastewater/plain-language-summaries-and-public-notice>.

**COMENTARIO PUBLICO / REUNION PUBLICA. Usted puede presentar comentarios públicos o pedir una reunión pública sobre esta solicitud.** El propósito de una reunión pública es dar la oportunidad de presentar comentarios o hacer preguntas acerca de la solicitud. La TCEQ realiza una reunión pública si el Director Ejecutivo determina que hay un grado de interés público suficiente en la solicitud o si un legislador local lo pide. Una reunión pública no es una audiencia administrativa de lo contencioso.

**OPORTUNIDAD DE UNA AUDIENCIA ADMINISTRATIVA DE LO CONTENCIOSO.** Después de la fecha límite para presentar comentarios públicos, el Director Ejecutivo considerará los comentarios y preparará una respuesta a todos los comentarios públicos relevantes y materiales, o significativos. **A menos que la solicitud sea remitida directamente para una audiencia de caso impugnado, la respuesta a los comentarios se enviará por correo a todos los que enviaron comentarios públicos y a aquellas personas que estén en la lista de correo para esta solicitud. Si se reciben comentarios, el correo también proporcionará instrucciones para solicitar una audiencia de caso impugnado o reconsiderar la decisión del Director Ejecutivo.** Una audiencia de caso impugnado es un procedimiento legal similar a un juicio civil en un tribunal de distrito estatal.

**PARA SOLICITAR UNA AUDIENCIA DE CASO IMPUGNADO, USTED DEBE INCLUIR EN SU SOLICITUD LOS SIGUIENTES DATOS:** su nombre, dirección, y número de teléfono; el nombre del solicitante y número del permiso; la ubicación y distancia de su propiedad/actividad con respecto a la instalación; una descripción específica de la forma cómo usted sería afectado adversamente por el sitio de una manera no común al público en general; una lista de todas las cuestiones de hecho en disputa que usted presente durante el período de comentarios; y la declaración "[Yo/nosotros] solicito/solicitamos una audiencia de caso impugnado". Si presenta la petición para una audiencia de caso impugnado de parte de un grupo o asociación, debe identificar una persona que representa al grupo para recibir correspondencia en el futuro; identificar el nombre y la dirección de un miembro del grupo que sería afectado adversamente por la planta o la actividad propuesta; proveer la información indicada anteriormente con respecto a la ubicación del miembro afectado y su distancia de la planta o actividad propuesta; explicar cómo y por qué el miembro sería afectado; y explicar cómo los intereses que el grupo desea proteger son pertinentes al propósito del grupo.

Tras el cierre de todos los periodos de comentarios y solicitudes aplicables, el Director Ejecutivo remitirá la solicitud y cualquier solicitud de reconsideración o de una audiencia de caso impugnado a los Comisionados de la TCEQ para su consideración en una reunión programada de la Comisión.

La Comisión sólo puede conceder una solicitud de una audiencia de caso impugnado sobre los temas que el solicitante haya presentado en sus comentarios oportunos que no fueron retirados posteriormente. **Si se concede una audiencia, el tema de la audiencia estará limitado a cuestiones de hecho en disputa o cuestiones mixtas de hecho y de derecho relacionadas a intereses pertinentes y materiales de calidad del agua que se hayan presentado durante el período de comentarios.**

**ACCIÓN DEL DIRECTOR EJECUTIVO.** El Director Ejecutivo puede emitir la aprobación final de la solicitud a menos que se presente una solicitud de audiencia de caso impugnado oportunamente o una solicitud de reconsideración. Si se presenta una solicitud de audiencia oportuna o una solicitud de reconsideración, el Director Ejecutivo no emitirá la aprobación final del permiso y enviará la solicitud y la solicitud a los Comisionados de TCEQ para su consideración en una reunión programada de la Comisión.

**LISTA DE CORREO.** Si envía comentarios públicos, una solicitud de una audiencia de caso impugnado o una reconsideración de la decisión del Director Ejecutivo, se le agregará a la lista de correo de esta solicitud específica para recibir futuros avisos públicos enviados por correo por la Oficina del Secretario Oficial. Además, puede solicitar ser colocado en: (1) la lista de correo permanente para un nombre de solicitante específico y número de permiso; y/o (2) la lista de correo para un condado específico. Si desea ser colocado en la lista de correo permanente y / o del condado, especifique claramente qué lista (s) y envíe su solicitud a la Oficina del Secretario Oficial de la TCEQ a la dirección a continuación.

**Todos los comentarios públicos escritos y las solicitudes de reunión pública deben enviarse a Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087 o electrónicamente a [www.tceq.texas.gov/goto/comment](http://www.tceq.texas.gov/goto/comment) dentro de los 30 días a partir de la fecha de publicación de este aviso en el periódico.**

**INFORMACIÓN DISPONIBLE EN LÍNEA.** Para obtener detalles sobre el estado de la solicitud, visite la base de datos integrada de los comisionados en [www.tceq.texas.gov/goto/cid](http://www.tceq.texas.gov/goto/cid). Busque en la base de datos utilizando el número de permiso para esta solicitud, que se proporciona en la parte superior de este aviso.

**CONTACTOS E INFORMACIÓN DE LA AGENCIA.** Los comentarios y solicitudes públicas deben enviarse electrónicamente a [www.tceq.texas.gov/goto/comment](http://www.tceq.texas.gov/goto/comment), o por escrito a Texas Commission on Environmental Quality, Office of the Chief Clerk, MC-105, P.O. Box 13087, Austin, Texas 78711-3087. Cualquier información personal que envíe a la TCEQ pasará a formar parte del registro de la agencia; esto incluye las direcciones de correo electrónico. Para obtener más información sobre esta solicitud de permiso o el proceso de permisos, llame al Programa de Educación Pública de TCEQ, línea gratuita, al 1-800-687-4040 o visite su sitio web en [www.tceq.texas.gov/goto/pep](http://www.tceq.texas.gov/goto/pep). Si desea información en español, puede llamar al 1-800-687-4040.

También se puede obtener información adicional de 705 Limmerloop JV LLC a la dirección indicada arriba o llamando al Sr. Brian Tucker, vicepresidente sénior de desarrollo, al 512-675-6864.



# TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



## NOTICE OF RECEIPT OF APPLICATION AND INTENT TO OBTAIN WATER QUALITY PERMIT

### PROPOSED PERMIT NO. WQ0016257001

**APPLICATION.** New Horizons Utility, LLC and OptiN Holdings 1 LLC, 4925 Greenville Avenue, Suite 1400, Dallas, Texas 75206, had applied to the Texas Commission on Environmental Quality (TCEQ) for proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0016257001 (EPA I.D. No. TX0143804) to authorize the discharge of treated wastewater at a volume not to exceed an annual average flow of 1,340,000 gallons per day. The domestic wastewater treatment facility will be located approximately 0.5 miles northeast of the intersection of County Road 107 and County Road 110, in Williamson County, Texas 78626. The discharge route will be from the plant site to unnamed tributary of Huddleston Branch, thence to Huddleston Branch, thence to Mankins Branch, thence to San Gabriel/ North Fork San Gabriel River. TCEQ received this application on November 22, 2022. The permit application will be available for viewing and copying at Georgetown Public Library 402 West 8<sup>th</sup> Street, Georgetown, Texas prior to the date it is published in the newspaper. This link to an electronic map of the site or facility's general location is provided as a public courtesy and not part of the application or notice. For the exact location, refer to the application.  
<https://gisweb.tceq.texas.gov/LocationMapper/?marker=-97.61137,30.59521&level=18>

**ALTERNATIVE LANGUAGE NOTICE.** Alternative language notice in Spanish is available at <https://www.tceq.texas.gov/permitting/wastewater/plain-language-summaries-and-public-notices>. El aviso de idioma alternativo en español está disponible en <https://www.tceq.texas.gov/permitting/wastewater/plain-language-summaries-and-public-notices>.

**ADDITIONAL NOTICE.** TCEQ's Executive Director has determined the application is administratively complete and will conduct a technical review of the application. After technical review of the application is complete, the Executive Director may prepare a draft permit and will issue a preliminary decision on the application. **Notice of the Application and Preliminary Decision will be published and mailed to those who are on the county-wide mailing list and to those who are on the mailing list for this application. That notice will contain the deadline for submitting public comments.**

**PUBLIC COMMENT / PUBLIC MEETING.** You may submit public comments or request a public meeting on this application. The purpose of a public meeting is to provide the opportunity to submit comments or to ask questions about the application. TCEQ will hold a public meeting if the Executive Director determines that there is a significant degree of public interest in the application or if requested by a local legislator. A public meeting is not a contested case hearing.

**OPPORTUNITY FOR A CONTESTED CASE HEARING.** After the deadline for submitting public comments, the Executive Director will consider all timely comments and prepare a response to all relevant and material, or significant public comments. **Unless the application is directly referred for a contested case hearing, the response to comments, and the Executive Director's decision on the application, will be mailed to everyone who submitted public comments and to those persons who are on the mailing list for this application. If comments are received, the mailing will also provide instructions for requesting reconsideration of the Executive Director's decision and for requesting a contested case hearing.** A contested case hearing is a legal proceeding similar to a civil trial in state district court.

**TO REQUEST A CONTESTED CASE HEARING, YOU MUST INCLUDE THE FOLLOWING ITEMS IN YOUR REQUEST:** your name, address, phone number; applicant's name and proposed permit number; the location and distance of your property/activities relative to the proposed facility; a specific description of how you would be adversely affected by the facility in a way not common to the general public; a list of all disputed issues of fact that you submit during the comment period and, the statement "[I/we] request a contested case hearing." If the request for contested case hearing is filed on behalf of a group or association, the request must designate the group's representative for receiving future correspondence; identify by name and physical address an individual member of the group who would be adversely affected by the proposed facility or activity; provide the information discussed above regarding the affected member's location and distance from the facility or activity; explain how and why the member would be affected; and explain how the interests the group seeks to protect are relevant to the group's purpose.

Following the close of all applicable comment and request periods, the Executive Director will forward the application and any requests for reconsideration or for a contested case hearing to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

The Commission may only grant a request for a contested case hearing on issues the requestor submitted in their timely comments that were not subsequently withdrawn. **If a hearing is granted, the subject of a hearing will be limited to disputed issues of fact or mixed questions of fact and law relating to relevant and material water quality concerns submitted during the comment period.**

**MAILING LIST.** If you submit public comments, a request for a contested case hearing or a reconsideration of the Executive Director's decision, you will be added to the mailing list for this specific application to receive future public notices mailed by the Office of the Chief Clerk. In addition, you may request to be placed on: (1) the permanent mailing list for a specific applicant name and permit number; and/or (2) the mailing list for a specific county. If you wish to be placed on the permanent and/or the county mailing list, clearly specify which list(s) and send your request to TCEQ Office of the Chief Clerk at the address below.

**INFORMATION AVAILABLE ONLINE.** For details about the status of the application, visit the Commissioners' Integrated Database at [www.tceq.texas.gov/goto/cid](http://www.tceq.texas.gov/goto/cid). Search the database using the permit number for this application, which is provided at the top of this notice.

**AGENCY CONTACTS AND INFORMATION.** Public comments and requests must be submitted either electronically at <https://www14.tceq.texas.gov/epic/eComment/>, or in writing

to the Texas Commission on Environmental Quality, Office of the Chief Clerk, MC-105, P.O. Box 13087, Austin, Texas 78711-3087. Please be aware that any contact information you provide, including your name, phone number, email address, and physical address will become part of the agency's public record. For more information about this permit application or the permitting process, please call the TCEQ Public Education Program, Toll Free, at 1-800-687-4040 or visit their website at [www.tceq.texas.gov/goto/pep](http://www.tceq.texas.gov/goto/pep). Si desea información en Español, puede llamar al 1-800-687-4040.

Further information may also be obtained from New Horizons Utility, LLC and OptiN Holdings 1, LLC at the address stated above or by calling Mr. Troy Hotchkiss, P.E., Senior Engineering Manager, Integrated Water Services, Inc. at 214-957-1357.

Issuance Date: February 14, 2023



# Comisión de Calidad Ambiental del Estado de Texas



## AVISO DE RECIBO DE LA SOLICITUD Y EL INTENTO DE OBTENER PERMISO PARA LA CALIDAD DEL AGUA

### PERMISO PROPUESTO NO. WQ0016257001

**SOLICITUD.** New Horizons Utility, LLC y OptiN Holdings 1, LLC, 4925 Greenville Avenue, Suite 1400, Dallas, Texas 75206 ha solicitado a la Comisión de Calidad Ambiental del Estado de Texas (TCEQ) para el propuesto Permiso No. WQ0016257001 (EPA I.D. No. TX0143804) del Sistema de Eliminación de Descargas de Contaminantes de Texas (TPDES) para autorizar la descarga de aguas residuales tratadas en un volumen que no sobrepasa un flujo promedio diario de 1,340,000 galones por día. La planta está ubicada aproximadamente a 0.5 millas al noreste de la intersección de County Road 107 y County Road 110 en el condado de Williamson, Texas 75206. La ruta de descarga es del sitio de la planta a al afluente sin nombre de Huddleston Branch, de allí a Huddleston Branch, de allí a Mankins Branch, de allí a San Gabriel/North Fork San Gabriel River. La TCEQ recibió esta solicitud el 22 de noviembre de 2022. La solicitud para el permiso estará disponible para leerla y copiarla en Georgetown Public Library 402 W. 8th Street, Georgetown, Texas antes de la fecha de publicación de este aviso en el periódico. Este enlace a un mapa electrónico de la ubicación general del sitio o de la instalación es proporcionado como una cortesía y no es parte de la solicitud o del aviso. Para la ubicación exacta, consulte la solicitud.

<https://gisweb.tceq.texas.gov/LocationMapper/?marker=-97.61137,30.59521&level=18>

**AVISO ADICIONAL.** El Director Ejecutivo de la TCEQ ha determinado que la solicitud es administrativamente completa y conducirá una revisión técnica de la solicitud. Después de completar la revisión técnica, el Director Ejecutivo puede preparar un borrador del permiso y emitirá una Decisión Preliminar sobre la solicitud. **El aviso de la solicitud y la decisión preliminar serán publicados y enviado a los que están en la lista de correo de las personas a lo largo del condado que desean recibir los avisos y los que están en la lista de correo que desean recibir avisos de esta solicitud. El aviso dará la fecha límite para someter comentarios públicos.**

**COMENTARIO PUBLICO / REUNION PUBLICA.** Usted puede presentar **comentarios públicos o pedir una reunión pública sobre esta solicitud.** El propósito de una reunión pública es dar la oportunidad de presentar comentarios o hacer preguntas acerca de la solicitud. La TCEQ realiza una reunión pública si el Director Ejecutivo determina que hay un grado de interés público suficiente en la solicitud o si un legislador local lo pide. Una reunión pública no es una audiencia administrativa de lo contencioso.

**OPORTUNIDAD DE UNA AUDIENCIA ADMINISTRATIVA DE LO CONTENCIOSO.** Después del plazo para presentar comentarios públicos, el Director Ejecutivo considerará todos los comentarios apropiados y preparará una respuesta a todo los comentarios públicos

esenciales, pertinentes, o significativos. **A menos que la solicitud haya sido referida directamente a una audiencia administrativa de lo contencioso, la respuesta a los comentarios y la decisión del Director Ejecutivo sobre la solicitud serán enviados por correo a todos los que presentaron un comentario público y a las personas que están en la lista para recibir avisos sobre esta solicitud. Si se reciben comentarios, el aviso también proveerá instrucciones para pedir una reconsideración de la decisión del Director Ejecutivo y para pedir una audiencia administrativa de lo contencioso.** Una audiencia administrativa de lo contencioso es un procedimiento legal similar a un procedimiento legal civil en un tribunal de distrito del estado.

**PARA SOLICITAR UNA AUDIENCIA DE CASO IMPUGNADO, USTED DEBE INCLUIR EN SU SOLICITUD LOS SIGUIENTES DATOS:** su nombre, dirección, y número de teléfono; el nombre del solicitante y número del permiso; la ubicación y distancia de su propiedad/actividad con respecto a la instalación; una descripción específica de la forma cómo usted sería afectado adversamente por el sitio de una manera no común al público en general; una lista de todas las cuestiones de hecho en disputa que usted presente durante el período de comentarios; y la declaración "[Yo/nosotros] solicito/solicitamos una audiencia de caso impugnado". Si presenta la petición para una audiencia de caso impugnado de parte de un grupo o asociación, debe identificar una persona que representa al grupo para recibir correspondencia en el futuro; identificar el nombre y la dirección de un miembro del grupo que sería afectado adversamente por la planta o la actividad propuesta; proveer la información indicada anteriormente con respecto a la ubicación del miembro afectado y su distancia de la planta o actividad propuesta; explicar cómo y porqué el miembro sería afectado; y explicar cómo los intereses que el grupo desea proteger son pertinentes al propósito del grupo.

Después del cierre de todos los períodos de comentarios y de petición que aplican, el Director Ejecutivo enviará la solicitud y cualquier petición para reconsideración o para una audiencia de caso impugnado a los Comisionados de la TCEQ para su consideración durante una reunión programada de la Comisión. La Comisión sólo puede conceder una solicitud de una audiencia de caso impugnado sobre los temas que el solicitante haya presentado en sus comentarios oportunos que no fueron retirados posteriormente. Si se concede una audiencia, el tema de la audiencia estará limitado a cuestiones de hecho en disputa o cuestiones mixtas de hecho y de derecho relacionadas a intereses pertinentes y materiales de calidad del agua que se hayan presentado durante el período de comentarios.

**LISTA DE CORREO.** Si somete comentarios públicos, un pedido para una audiencia administrativa de lo contencioso o una reconsideración de la decisión del Director Ejecutivo, la Oficina del Secretario Principal enviará por correo los avisos públicos en relación con la solicitud. Además, puede pedir que la TCEQ ponga su nombre en una o más de las listas de correos siguientes (1) la lista de correo permanente para recibir los avisos de el solicitante indicado por nombre y número del permiso específico y/o (2) la lista de correo de todas las solicitudes en un condado específico. Si desea que se agregue su nombre en una de las listas designe cual lista(s) y envía por correo su pedido a la Oficina del Secretario Principal de la TCEQ.

**CONTACTOS E INFORMACIÓN A LA AGENCIA.** Todos los comentarios públicos y solicitudes deben ser presentadas electrónicamente vía <http://www14.tceq.texas.gov/epic/eComment/> o por escrito dirigidos a la

**Comisión de Texas de Calidad Ambiental, Oficial de la Secretaría (Office of Chief Clerk), MC-105, P.O. Box 13087, Austin, Texas 78711-3087.** Tenga en cuenta que cualquier información personal que usted proporcione, incluyendo su nombre, número de teléfono, dirección de correo electrónico y dirección física pasarán a formar parte del registro público de la Agencia. Para obtener más información acerca de esta solicitud de permiso o el proceso de permisos, llame al programa de educación pública de la TCEQ, gratis, al 1-800-687-4040. Si desea información en Español, puede llamar al 1-800-687-4040.

También se puede obtener información adicional del New Horizons Utility, LLC y OptiN Holdings 1 LLC a la dirección indicada arriba o llamando a Mr. Troy Hotchkiss, P.E., Integrated Water Services, Inc. al 512-930-2513.

Fecha de emisión 14 de febrero de 2023



## Filing Receipt

**Received - 2022-11-22 12:16:03 PM**  
**Control Number - 53870**  
**ItemNumber - 13**

Exhibit  
SOAH Hearing - 8/16/2023

**APP 09**

exhibitsticker.com

**DOCKET NO. 53870**

<b>PETITION OF THE CITY OF HUTTO</b>	<b>§</b>	<b>PUBLIC UTILITY COMMISSION</b>
<b>AND JONAH WATER SPECIAL</b>	<b>§</b>	
<b>UTILITY DISTRICT FOR APPROVAL</b>	<b>§</b>	<b>OF TEXAS</b>
<b>OF A SERVICE AREA CONTRACT</b>	<b>§</b>	
<b>UNDER TEXAS WATER CODE § 13.248</b>	<b>§</b>	
<b>AND TO AMEND CERTIFICATES OF</b>	<b>§</b>	
<b>CONVENIENCE AND NECESSITY IN</b>	<b>§</b>	
<b>WILLIAMSON COUNTY</b>	<b>§</b>	

**NOTICE OF APPROVAL**

This Notice of Approval addresses the petition by the City of Hutto and the Jonah Water Special Utility District for approval of a service-area contract under Texas Water Code (TWC) § 13.248 and to amend certificates of convenience and necessity (CCNs) in Williamson County. The petitioners seek to transfer approximately 1,485 acres of certificated service area and 2,989 sewer customer connections from Jonah Water SUD under CCN number 21053 to Hutto under CCN number 20122 and to dually certificate approximately 1,410 acres of certificated service area between Jonah Water SUD under CCN number 10970 and Hutto under CCN number 10321. The Commission approves the service-area contract and amends CCN numbers 10321, 10970, 20122, and 21053 to the extent provided in this Notice of Approval.

**I. Findings of Fact**

The Commission makes the following findings of fact.

**Petitioners**

1. Hutto is a municipality located in Williamson County.
2. Hutto operates, maintains, and controls facilities for providing retail water service in Williamson County under CCN number 10321.
3. Hutto operates, maintains, and controls facilities for providing retail sewer service in Williamson County under CCN number 20122.
4. Jonah Water SUD is a special utility district organized under chapters 49 and 65 of the Texas Water Code (TWC).

5. Jonah Water SUD operates, maintains, and controls facilities for providing retail water service in Williamson County under CCN number 10970.
6. Jonah Water SUD operates, maintains, and controls facilities for providing retail sewer service in Williamson County under CCN number 21053.

**Petition**

7. On May 13, 2022, Jonah Water SUD and Hutto executed a service-area contract to:  
(a) transfer approximately 1,485 acres of sewer service area and 2,989 sewer customer connections from Jonah Water SUD under CCN number 21053 to Hutto under CCN number 20122; and (b) dually certificate approximately 1,410 acres of water service area between Jonah Water SUD under CCN number 10970 and Hutto under CCN number 10321.
8. On July 25, 2022, Hutto and Jonah Water SUD filed the petition at issue in this proceeding for approval of the service-area contract and to amend CCN numbers 10321, 10970, 20122, and 21053.
9. The petition included a copy of the service-area contract executed by Hutto and Jonah Water SUD.
10. On August 6, 2022, Hutto filed a supplement to the petition, which included revised maps.
11. In Order No. 2 filed on August 30, 2022, the administrative law judge (ALJ) found the petition, as supplemented, administratively complete.

**Notice**

12. At an open meeting held on April 7, 2022, Jonah Water SUD's board of directors considered and approved the service-area contract.
13. The petition included the affidavit of William Brown, general manager of Jonah Water SUD, attesting that notice of the service-area contract was mailed to affected customers on July 14, 2022.
14. At an open meeting held on May 5, 2022, Hutto's city council approved the service-area contract.

15. The petition included the affidavit from Isaac Turner, interim city manager of Hutto, attesting that public notice of the May 5, 2022 open meeting was provided.
16. In Order No. 2 filed on August 30, 2022, the ALJ found the notice sufficient.

**Map and Certificates**

17. On September 26, 2022, Commission Staff emailed its proposed maps and certificates to Hutto and Jonah Water SUD.
18. On October 4, 2022, Hutto and Jonah Water SUD filed their consent to the proposed maps and certificates.
19. On November 7, 2022, the proposed maps, the water CCNs for Hutto and Jonah Water SUD, and the sewer CCN for Hutto were filed as attachments to the parties' joint motion to admit evidence and proposed notice of approval.
20. On November 9, 2022, the sewer CCN for Jonah Water SUD was filed as an attachment to the parties' supplemental joint request to admit evidence.

**Evidentiary Record**

21. In Order No. 3 filed on November 22, 2022, the ALJ admitted the following evidence into the record of this proceeding:
  - (a) the petition and all exhibits filed on July 25, 2022;
  - (b) the petitioners' confidential list of Jonah Water SUD wastewater customers transferred to Hutto filed on July 25, 2022;
  - (c) Hutto's supplement to the application filed on August 6, 2022;
  - (d) Commission Staff's recommendation on administrative completeness and proposed schedule filed on August 25, 2022;
  - (e) the petitioners' executed consent forms filed on October 4, 2022;
  - (f) Commission Staff's final recommendation and all attachments filed on October 24, 2022;
  - (g) the maps and certificates attached to the parties' joint motion to admit evidence and proposed notice of approval filed on November 7, 2022; and

- (h) the sewer CCN for Jonah Water SUD attached to the supplemental joint request to admit evidence filed on November 9, 2022.

**Informal Disposition**

22. More than 15 days have passed since the completion of the notice provided in this docket.
23. No person filed a protest or motion to intervene.
24. Hutto, Jonah Water SUD, and Commission Staff are the only parties to this proceeding.
25. No party requested a hearing, and no hearing is needed.
26. Commission Staff recommends approval of this petition.
27. This decision is not adverse to any party.

**II. Conclusions of Law**

The Commission makes the following conclusions of law.

1. Hutto and Jonah Water SUD are retail public utilities as defined by TWC § 13.002(19) and 16 Texas Administrative Code (TAC) § 24.3(31).
2. The Commission has authority over the petition under TWC §§ 13.041 and 13.248.
3. Under TWC § 13.248, contracts between retail public utilities designating areas to be served and customers to be served by those retail public utilities, when approved by the Commission, are valid and enforceable and incorporated into the affected CCNs.
4. The petition meets the requirements of TWC § 13.248 and 16 TAC § 24.253.
5. Public notice of the application was provided in compliance with TWC § 13.248 and 16 TAC § 24.253(c).
6. The petition was processed in accordance with the TWC, the Administrative Procedure Act,<sup>1</sup> and Commission rules.
7. Under TWC § 13.257(r) and (s), Hutto and Jonah Water SUD are required to record a certified copy of the approved maps and certificates, along with a boundary description of their respective service areas, in the real property records of Williamson County within 31

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<sup>1</sup> Tex. Gov't Code §§ 2001.001-.903



days of receiving this Notice of Approval and to submit evidence of the recording to the Commission.

8. The requirements for informal disposition under 16 TAC § 22.35 have been met in this proceeding.

### **III. Ordering Paragraphs**

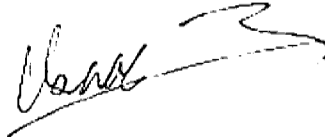
In accordance with these findings of fact and conclusions of law, the Commission issues the following orders.

1. The Commission approves the service-area contract to the extent provided in this Notice of Approval.
2. The Commission amends Hutto's CCN numbers 10321 and 20122, as described in this Notice of Approval, and shown in the maps attached to this Notice of Approval.
3. The Commission amends Jonah Water SUD's CCN numbers 10970 and 21053, as described in this Notice of Approval, and shown in the maps attached to this Notice of Approval.
4. The Commission approves the maps attached to this Notice of Approval.
5. The Commission issues the certificates attached to this Notice of Approval.
6. Hutto must provide service to every customer and qualified service applicant for water service within the approved service areas under CCN number 10321 who requests water service and meets the terms of Hutto's water service policies, and such service must be continuous and adequate.
7. Hutto must provide service to every customer and qualified service applicant for sewer service within the approved service areas under CCN number 20122 who requests sewer service and meets the terms of Hutto's sewer service policies and such service must be continuous and adequate.
8. Jonah Water SUD must provide service to every customer and qualified service applicant for water service within the approved service areas under CCN number 10970 who requests water service and meets the terms of Jonah Water SUD's water service policies, and such service must be continuous and adequate.

9. Jonah Water SUD must provide service to every customer and qualified service applicant for sewer service within the approved service areas under CCN number 21053 who requests sewer service and meets the terms of Jonah Water SUD's sewer service policies, and such service must be continuous and adequate.
10. Hutto and Jonah Water SUD must each comply with the recording requirements in TWC § 13.257(r) and (s) for the areas in Williamson County affected by the petition and file in this docket proof of the recording no later than 45 days after the date of this Notice of Approval.
11. The Commission denies all other motions and any other requests for general or specific relief that have not been expressly granted.

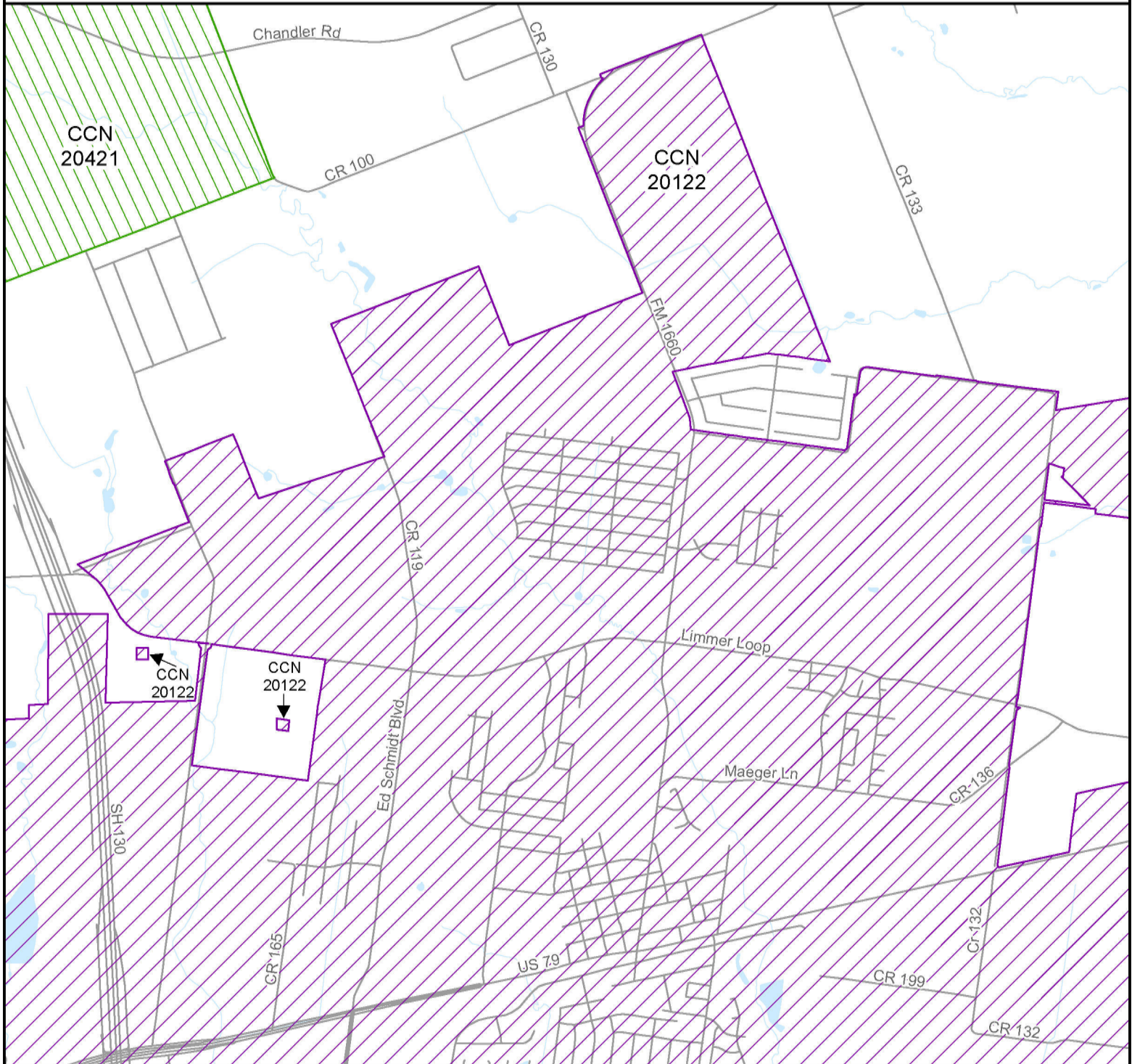
**Signed at Austin, Texas the 22nd day of November 2022.**

**PUBLIC UTILITY COMMISSION OF TEXAS**



A handwritten signature in black ink, appearing to read 'Isaac TA', is written over a horizontal line.

**ISAAC TA  
ADMINISTRATIVE LAW JUDGE**

City of Hutto  
Portion of Sewer CCN No. 20122  
PUC Docket No. 53870  
13.248 Agreement Amended CCN No. 20122 and  
Transferred all of Jonah Water Special Utility District, CCN No. 21053 in Williamson County



**Sewer CCN**

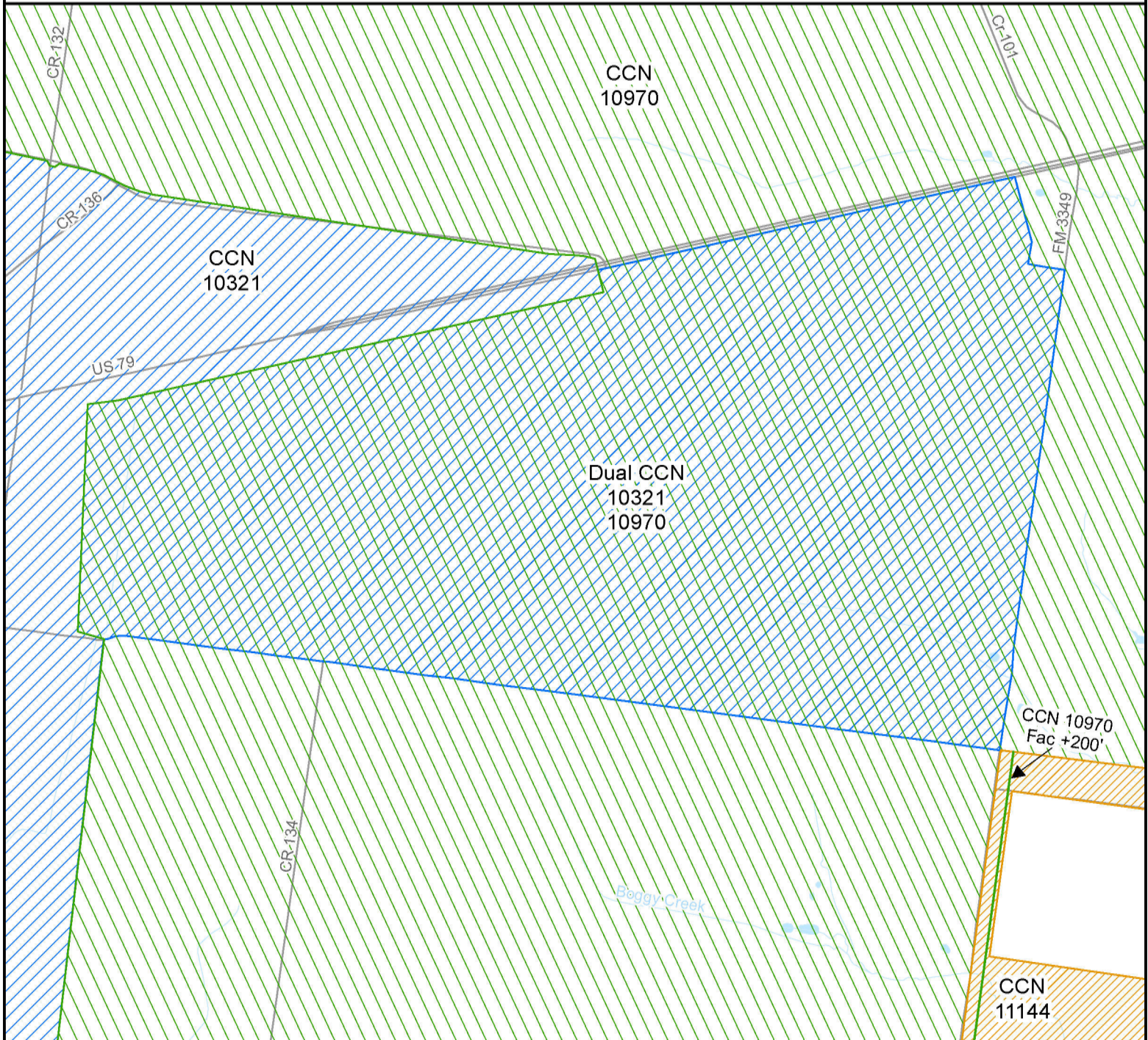
-  20122 - City of Hutto
-  20421 - City of Round Rock

0 1,250 2,500  
Feet








City of Hutto  
Portion of Water CCN No. 10321  
PUC Docket No. 53870  
13.248 Agreement Amended CCN No. 10321 and  
Obtained Dual Certification with Jonah Water Special Utility District, CCN No. 10970 in Williamson County



**Water CCN**

-  10321 - City of Hutto
-  10970 - Jonah Water SUD
-  11144 - Manville WSC

**Water CCN Facilities +200'**

-  10970 - Jonah Water SUD



Public Utility Commission of Texas  
1701 N. Congress Ave  
Austin, TX 78701

0 900 1,800  
Feet



Map by: Komal Patel  
Date: September 20, 2022  
Project: 53870CityofHuttoWater.mxd



# **Public Utility Commission of Texas**

**By These Presents Be It Known To All That**

## **City of Hutto**

having obtained certification to provide sewer utility service for the convenience and necessity of the public, and it having been determined by this Commission that the public convenience and necessity would in fact be advanced by the provision of such service, the City of Hutto is entitled to this

### **Certificate of Convenience and Necessity No. 20122**

to provide continuous and adequate sewer utility service to that service area or those service areas in Travis and Williamson County as by final Order or Orders duly entered by this Commission, which Order or Orders resulting from Docket No. 53870 are on file at the Commission offices in Austin, Texas; and are matters of official record available for public inspection; and be it known further that these presents do evidence the authority and the duty of the City of Hutto to provide such utility service in accordance with the laws of this State and Rules of this Commission, subject only to any power and responsibility of this Commission to revoke or amend this Certificate in whole or in part upon a subsequent showing that the public convenience and necessity would be better served thereby.



# **Public Utility Commission of Texas**

**By These Presents Be It Known To All That**

## **City of Hutto**

having obtained certification to provide water utility service for the convenience and necessity of the public, and it having been determined by this Commission that the public convenience and necessity would in fact be advanced by the provision of such service, the City of Hutto is entitled to this

### **Certificate of Convenience and Necessity No. 10321**

to provide continuous and adequate water utility service to that service area or those service areas in Williamson County as by final Order or Orders duly entered by this Commission, which Order or Orders resulting from Docket No. 53870 are on file at the Commission offices in Austin, Texas; and are matters of official record available for public inspection; and be it known further that these presents do evidence the authority and the duty of the City of Hutto to provide such utility service in accordance with the laws of this State and Rules of this Commission, subject only to any power and responsibility of this Commission to revoke or amend this Certificate in whole or in part upon a subsequent showing that the public convenience and necessity would be better served thereby.





# **Public Utility Commission of Texas**

**By These Presents Be It Known To All That**

## **Jonah Special Utility District**

having obtained certification to provide water utility service for the convenience and necessity of the public, and it having been determined by this Commission that the public convenience and necessity would in fact be advanced by the provision of such service, Jonah Special Utility District is entitled to this

### **Certificate of Convenience and Necessity No. 10970**

to provide continuous and adequate water utility service to that service area or those service areas in Williamson County as by final Order or Orders duly entered by this Commission, which Order or Orders resulting from Docket No. 53870 are on file at the Commission offices in Austin, Texas; and are matters of official record available for public inspection; and be it known further that these presents do evidence the authority and the duty of the Jonah Special Utility District to provide such utility service in accordance with the laws of this State and Rules of this Commission, subject only to any power and responsibility of this Commission to revoke or amend this Certificate in whole or in part upon a subsequent showing that the public convenience and necessity would be better served thereby.

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Status as of 11/16/2023 5:04 PM CST

Associated Case Party: Executive Director

Name	BarNumber	Email	TimestampSubmitted	Status
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Associated Case Party: Jonah Water Special Utility District

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John Carlton		john@carltonlawaustin.com	11/16/2023 3:37:33 PM	SENT

Associated Case Party: Public Interest Counsel

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Associated Case Party: Public Interest Counsel

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