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ADMINISTRATIVE HEARINGS  
April Bermea , CLERK

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ADMINISTRATIVE HEARINGS  
April Bermea , CLERK

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

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

**EXECUTIVE DIRECTOR'S CLOSING ARGUMENTS**

**To the Honorable Administrative Law Judge Holly Vandrovec:**

COMES NOW, the Executive Director of the Texas Commission on Environmental Quality (TCEQ or Commission) and files this, her Closing Arguments.

**I. Introduction**

The TCEQ received an application from R040062, LP (R040062) for a new Texas Pollutant Discharge Elimination System (TPDES) permit on June 11, 2021. As required by the Texas Water Code (TWC) and the Texas Administrative Code (TAC), the Executive Director reviewed the comments submitted during the comment period and prepared a Response to Comments. A Response to Comments was mailed to everyone who commented and the persons on the mailing list maintained by the Office of Chief Clerk. This matter was directly referred to the State Office of Administrative Hearings on November 17, 2022.

The proceeding for the R040062 new TPDES permit application is governed by Title 30 Texas Administrative Code ("TAC") § 80.17(c), which provides as follows: (c) In contested cases regarding a permit application filed with the commission on or after September 1, 2015, and referred under Texas Water Code, § 5.556 or § 5.557: (1) the filing of the administrative record as described in § 80.118(c) of this title (relating to Administrative Record) establishes a prima facie demonstration that the executive director's draft permit meets all state and federal legal and technical requirements, and, if issued consistent with the executive director's draft permit, would protect human health and safety, the environment, and physical property; (2) a party may rebut the presumption in paragraph (1) of this subsection by presenting evidence regarding the referred issues demonstrating that the draft permit violates a specifically applicable state or federal legal or technical requirement; and (3) if a rebuttal case is

presented by a party under paragraph (2) of this subsection, the applicant and executive director may present additional evidence to support the executive director's draft permit.

One of the major changes to the contested case hearing process as a result of SB 709 is that the filing of the draft permit, the preliminary decision issued by the executive director and any other documentation, establishes a prima facie case that the draft permit meets all applicable state and federal legal and technical requirements and if issued will protect human health and safety and the environment.<sup>1</sup> The statute goes on to provide that a party may rebut the prima facie case by presenting evidence relating to one of the issues the Commission referred and demonstrating that the draft permit violates an applicable state or federal requirement.<sup>2</sup> Finally, the statute also provides that the applicant and the executive director may present additional evidence to support the draft permit.<sup>3</sup>

After considering the comments received and the evidence presented at the Hearing, the Executive Director maintains her position that the draft permit complies with all statutory and regulatory requirements. Under the foregoing, Applicant established a prima facie case that the Draft Permit meets all statutory and regulatory requirements. The burden of proof then shifted to Protestants to rebut this prima facie demonstration by a preponderance of the evidence by establishing that the Draft Permit violates a specifically applicable state or federal requirement. The protestants did not provide any credible evidence that the draft permit does not comply with all applicable statutory and regulatory requirements. The protestants failed to demonstrate that the Executive Director's review was incomplete or inaccurate in any way. The protestants did not provide any testimony that the Executive Director's review of the R040062 application failed to comply with any of the applicable rules or was flawed in any respect.

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<sup>1</sup> Tex. Govt. Code § 2003.047(i-1)(1-2).

<sup>2</sup> Tex. Govt. Code § 2003.047(i-2).

<sup>3</sup> Tex. Govt. Code § 2003.047(i-3).

## **II. Issues Raised by the Protestants**

### **A. Regionalization**

The Executive Director maintains her position that the draft permit, if issued, complies with the state's regionalization policy and demonstration of need pursuant to TWC § 26.0282.

Ms. Sonia Bhuiya testified on behalf of the Executive Director and conducted the regionalization review on the R040062 permit application. Ms. Bhuiya testified that she conducted her review for this application in the same manner she conducts her review for all applications for wastewater permits and followed the same standard procedures all permit coordinators must follow to comply with TCEQ rules.<sup>4</sup> Ms. Bhuiya further testified that the State's policy on regionalization does not require TCEQ to automatically deny an application or to compel an applicant to connect to a facility that is within a three miles radius of a proposed facility.<sup>5</sup> Ms. Bhuiya testified that she has reviewed over 300 applications and has never seen an application denied based solely on regionalization.<sup>6</sup> Furthermore, Ms. Bhuiya testified how Applicant demonstrated a need for a wastewater treatment facility. She testified that the planned development would have 600 living unit equivalents (LUE) with a total of 0.200 million gallons per day (GPD).<sup>7</sup>

The protestants did not provide any evidence to rebut the prima facie demonstration that the draft permit complies with TCEQ's regionalization policy. The protestants cited TWC § 26.0282 as a basis to demonstrate their "concerns" regarding regionalization for this permit application.<sup>8</sup> However, this section demonstrates that regionalization is not compulsory even if facilities exist within a reasonable distance from the proposed facility. It is in the discretion of the Commission to require regionalization when the circumstances demonstrate that regionalization would be reasonable.

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<sup>4</sup> ED-SB-1 at 0312:1-6.

<sup>5</sup> ED-SB-1 at 0312:26-29.

<sup>6</sup> ED-SB-1 at 0315:1-4.

<sup>6</sup> ED-SB-1 at 0314:9-30.

<sup>7</sup> Exhibit JW-SUD-1 at 6:14-19; See also JW-SUD-2 at 6:7-11.

Statutory provision:

TWC § 26.0282. Consideration of Need and Regional Treatment Options.

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. This section is expressly directed to the control and treatment of conventional pollutants normally found in domestic wastewater.

Protestants offered testimony that Applicant should connect to Jonah because Jonah is the “superior choice.”<sup>9</sup> Yet Protestants fail to identify a Jonah facility within three miles of Applicant’s proposed facility and conceded at the hearing that none exists.<sup>10</sup> Thus, Applicant was not required to contact Jonah regarding regionalization. Ms. Bhuiya testified that Applicant complied with TCEQ’s regionalization policy by providing to TCEQ the necessary correspondence from owners of existing facilities within a three-mile radius.<sup>11</sup> Protestants testify regarding their “desire to construct, operate, and maintain wastewater treatment within Jonah’s CCN.”<sup>12</sup> Yet, TCEQ’s regionalization policy is only relevant to existing facilities.<sup>13</sup>

The Executive Director respectfully recommends that the ALJ find that 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 TWC § 26.0282.

**B. Degradation of Water quality if the Facility is Not Adequately Operated.**

The Executive Director maintains her position that the draft permit is protective of water quality and the existing uses of the receiving water, in accordance with applicable Texas Surface Water Quality Standards (TSWQS).<sup>14</sup> Protestants did not provide any reliable evidence that the water quality of the San Gabriel/North San Gabriel will be impaired by the discharge. The testimonies of the Protestant’s witnesses

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<sup>9</sup> Exhibit JW SUD-2 at 8:5.

<sup>10</sup> 582-23-10368 at 17:15-17.

<sup>11</sup> ED-SB-1 at 0315:29-31.

<sup>12</sup> Protestants Exhibit JWSUD-1 at 7:15-16.

<sup>13</sup> APP EX. 04.

<sup>14</sup> ED-SB-1 at 0316:15-17.

raised general concerns regarding the impacts of water quality if the facility is not properly operated. Additionally, Protestants were unaware of any rules or laws to support their claims regarding the operator of the facility.<sup>15</sup> No evidence was raised by Protestants to rebut the prima facie demonstration that the draft permit is protective of water quality and meets the requirements of the TSWQS.

Regarding the Operator of the facility, Jonah's position is simply that Jonah would be a more qualified operator for the facility rather than the Applicant.<sup>16</sup> A Class C licensed operator is required for this facility.<sup>17</sup> This operator level complies with TCEQ requirements as found in 30 TAC § 30.350.<sup>18</sup> Protestants testified that Applicant has little or no experience in constructing or operating a wastewater treatment facility; however, they were not able to identify a TCEQ rule that says an Applicant has to previously constructed or operated a WWTP in order to obtain a new permit.<sup>19</sup> Rather, the Applicant must comply with the requirements for the operator of the facility as found in 30 TAC § 30.350. Protestants offered no testimony claiming that the Applicant failed to meet the requirements for the operator of the facility.

Protestants offered no evidence in their prefiled testimony or at the hearing to rebut the prima facie demonstration that the draft permit will be protective of water quality. The testimony provided by the Executive Director's witnesses confirmed that the effluent limitations in the draft permit will be protective of water quality and the uses of the receiving water.<sup>20</sup> Ms. Brittany Lee performed the antidegradation review for this application and has worked on over 1,600 permit applications during her career.<sup>21</sup> Ms. Lee testified that she performed a Tier 1 antidegradation review for the proposed discharge in San Gabriel/North San Gabriel.<sup>22</sup> Ms. Lee performed her antidegradation review in a manner that complies with applicable TCEQ rules and regulations.<sup>23</sup> The protestants did not demonstrate that Ms. Lee deviated from standard TCEQ procedures when she performed his review. Ms. Lee testified that the Tier 1 review will maintain

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<sup>15</sup> 582-23-10368 at 30:13-16.

<sup>16</sup> Exhibit JW-SUD 2 at 8:3-12.

<sup>17</sup> ED-SB-1 at 0316:23-24.

<sup>18</sup> ED-SB-1 at 0316:25-26.

<sup>19</sup> 582-23-10368 at 20:13-21, See also 30:9-16.

<sup>20</sup> ED-SB-1 at 0316:15-19.

<sup>21</sup> ED-BL-1 at 0004:25-27.

<sup>22</sup> ED-BL-1 at 0011:9-13

<sup>23</sup> ED-BL-1 at 0010:25-31- 0011:1-8

water quality uses.<sup>24</sup> Additionally, Ms. Lee testified that the Tier 2 review demonstrated that the existing uses will not be impaired.<sup>25</sup> The Protestants failed to demonstrate that the effluent limitations violated any TCEQ rules.

The evidence on the record supports the conclusion that the Executive Director has properly applied the agency's antidegradation review for the proposed discharge. The Executive Director respectfully recommends that the ALJ find that the draft permit complies with TCEQ's antidegradation policy and procedures.

### **III. Conclusion**

The Executive Director maintains her position that the draft permit meets all applicable statutory and regulatory requirements and respectfully recommends the Administrative Law Judges issue a Proposal for Decision recommending the Commission issue the draft permit without changes.

Respectfully submitted,

Texas Commission on Environmental Quality

Kelly Keel  
Interim Executive Director

Charmaine Backens, Deputy Director  
Environmental Law Division



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REPRESENTING THE EXECUTIVE DIRECTOR  
OF THE TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

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<sup>24</sup> ED-BL-1 at 0014:7-9.

<sup>25</sup> ED-BL-1 at 011:17-19.

## CERTIFICATE OF SERVICE

I certify that on the 18<sup>th</sup> of September 2023, the Executive Director's Closing Arguments for TPDES Permit No. WQ0016008001 was served electronically to:

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Brenda Kouri on behalf of Aubrey Pawelka

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