CAUSE NO. D-1-GN-15-005510

PATRICIA GRAHAM, TERRELL GRAHAM, ET AL **Plaintiffs,** **v.** **TEXAS COMMISSION ON ENVIRONMENTAL QUALITY** **Defendant.**	§ § § § § § § § § § §	**IN THE DISTRICT COURT OF** **TRAVIS COUNTY, TEXAS** **53RD JUDICIAL DISTRICT COURT**

COMBINED INTERVENORS' INITIAL BRIEF BY INTERVENORS DHJB DEVELOPMENT LLC, & THE JOHNSON RANCH MUNICIPAL UTILITY DISTRICT

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COMBINED INTERVENORS' INITIAL BRIEF BY INTERVENORS DHJB DEVELOPMENT LLC, & THE JOHNSON RANCH MUNICIPAL UTILITY DISTRICT

COMES NOW, DHJB Development LLC, Applicant in the original proceeding, and, Johnson Ranch Municipal Utility District Intervenor in the original proceeding, and collectively Intervenors in the above referenced proceeding (collectively referred to herein as the "Applicant" or "Intervenors), and file this their Combined Intervenors' Initial Brief in support of the Texas Commission on Environmental Quality's ("TCEQ" or "Commission") Order granting the Application to Amend TPDES Permit No. WQ0014975001 to increase its flow and authorize a discharge and, in support thereof, would show as follows:

I.
INTRODUCTION

This lawsuit is an administrative appeal of the Commission's decision to grant DHJB's Application to Amend TPDES Permit No. WQ0014975001. That hearing had a very narrow focus. Specifically, the Commission referred the matter to the State Office of Administrative Hearing (SOAH), for the sole purpose of addressing the following four (4) narrow issues:

a. Whether the proposed permit will adversely impact use and enjoyment of adjacent and downstream property or create nuisance conditions;

b. Whether the discharge route has been properly characterized;

c. Whether the proposed permit complies with TCEQ siting regulations found in 30 TAC Chapter 309; or

d. Whether the treated effluent will adversely impact the cattle that currently graze in the area.

See TCEQ's Interim Order dated April 21, 2014 (the "Interim Order"). Notwithstanding the narrow scope of the Commission's Interim Order, the Protestants, now Plaintiffs, throughout the hearing process repeatedly attempted to expand the scope of the Commission's Order and/or the issues to be addressed in the hearing on the theory that the Interim Order did not include any

limitations in its direction, or definition of terms used in the Interim Order. Here, the Plaintiffs have once again gone outside of the narrow scope of the Commission's Interim Order, as well as the record of the contested case hearing, to accuse the Commission of a litany of procedural and substantive claims which did not take place.

As a creature of statute the Commission possesses only those powers expressly conferred upon it by the Legislature, or necessarily implied from the statutory authority conferred or duties imposed by the Legislature.[1] It derives its powers from its organic statutes enacted by the Legislature,[2] and exercises its specialized judgment, knowledge and expertise to implement and, where necessary, interpret those statutes to achieve the intended legislative purposes.[3] Accordingly, when the Commission issues an Order, such as the Interim Order which sets out the scope of the Contested Case Hearing, or the Final Order granting the Application, the language of the Order necessarily must be interpreted consistent with the powers and jurisdiction conferred upon the Commission by the Legislature.[4] So long as the agency's interpretation of the statute(s) is reasonable, Texas Courts traditionally have held that they are entitled to judicial "respect" and "deference."[5]

As discussed herein, the evidence presented at the hearing by the Applicant and the

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[1] *See Public Util. Comm'n v. GTE-Southwest, Inc.*, 901 S.W.2d 401, 407 (Tex. 1995); *Railroad Comm'n of Texas v. Lone Star Gas Co*., 884 S.W.2d 679, 685 (Tex. 1992); *State Bd. of Ins. v. Deffebach*, 631 S.W.2d 794, 798 (Tex. App. – Austin 1982, writ ref n.r.e.); *Dallas County Bail Bd. v. Stein*, 771 S.W.2d 577, 580 (Tex. App. – Dallas 1989, writ denied); *Railroad Comm'n of Texas v. Atchison, Topeka R.R.*, 609 S.W. 2d 641, 643 (Tex. App. – Austin 1980; writ ref'd n.r.e.).

[2] *See Public Util. Comm'n, supra*, 901 S.W.2d at 407; *see generally* TEXAS WATER CODE Chs. 1, 5, 7 11, 26.

[3] *See First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 632 (Tex. 2008); *Tarrant Appraisal Dist. v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993).

[4] *Railroad Com'n of Texas v. Texas Citizens for a Safe Future and Clean Water*, 336 S.W.3d 619 (Tex. 2011).

[5] *Id.; see generally First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 632 (Tex. 2008); *Tarrant Appraisal Dist. v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993); *Railroad Comm'n of Texas v. Torch Operating Co.*, 912 S.W.2d 790, 792 (Tex. 1995); *Public Util. Comm'n, supra*, 901 S.W.2d at 407; *Tarrant Appraisal Dist. v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993); *Railroad Comm'n of Tex. v. Lone Star Gas Co.*, 844 S.W.2d 679, 687, 689 (Tex. 1992); *Stanford v. Butler*, 181 S.W.2d 269, 273 (Tex. 1944); *Berkley v. Railroad Comm'n of Tex.*, 282 S.W.3d 240, 242 (Tex. App. – Amarillo 2009, no pet.); *Public Util. Comm'n v. Tex. Tel. Ass'n*, 163 S.W.3d 204, 213 (Tex. App. – Austin 2005, no pet.); *Hammack v. Public Util. Comm'n*, 131 S.W.3d 713, 723 (Tex. App. – Austin 2004, pet. denied).

Executive Director establish that in recommending that the Applicant's amended permit be granted that the Executive Director (i) followed established protocols and interpretations of the Commission's statutory authority relating to the granting of permits to discharge treated wastewater into and/or near waters of the state under rules adopted by the Commission to implement its statutory authority to conclude that the Application complied with the requirements of Texas law, and (ii) properly concluded that the proposed permit amendment would be protective of the waters of the state, the environment and the public health and safety. Additionally, the evidence demonstrates that the additional issues raised by the Protestants, including challenging the TCEQ standards, were both beyond the scope of the narrow four (4) issues referred to SOAH, and/or raise matters outside of the jurisdiction of the Commission.[6]

II.
STATEMENT OF FACTS

The Applicant holds TPDES Permit No. WQ0014975001. That permit, known as a "TLAP" or Texas Land Application Permit as originally issued, authorizes the Applicant to treat and discharge by subsurface irrigation onsite up to 37,500 gallons of treated effluent per day (.00375 MGD) pursuant to criteria established in the permit. (*See* Application to Amend TPDES Permit No. WQ0014975001 – Exhibit DHJB 1.2A (the "Application")). Currently, the Applicant has not yet generated sufficient volume of effluent for collection and treatment within its service area to facilitate operation of its existing wastewater treatment plant and to dispose of the treated effluent in accordance with the permit. (*See* TR 1:19-20). Instead, as authorized by law, the Applicant has a contract with a qualified "pump and haul operator" to collect untreated effluent pumped from at a lift station owned and operated by the Applicant to storage tanks on the site of the proposed treatment plant in the Contributing Zone pursuant to its permit, and hauled offsite

[6] *Railroad Com'n of Texas v. Texas Citizens for a Safe Future and Clean Water*, 336 S.W.3d 619 (Tex. 2011).

for appropriate treatment and disposal. (*See* TR 1:21-24; 1:36 (lines 10-13)). The lift station, authorized by the existing permit, is located within the "Contributing Zone" of the Edwards Aquifer, not the "Recharge Zone."[7]

In August, 2012, the Applicant filed its application for a major amendment to its permit. Pursuant to the proposed amendment, the Applicant would be authorized to treat and dispose of up to a maximum of 0.35 million gallons per day (mgd) and to dispose of the same by direct discharge at an outfall on the Applicant's property into an unnamed tributary of Cibolo Creek and allow the same to flow down the unnamed tributary into Cibolo Creek. (*See* Application - Exhibit DHJB 1.2A).

The location of the Applicant's treatment plant and its point of discharge or "outfall" are both located on property owned by the Applicant. (*See* Application - Exhibit DHJB 1.2A). Additionally, the location of the treatment plant site, including the discharge outfall, is in a geographic and topographic area known as the Edwards Aquifer Contributing Zone – *not* the Edwards Aquifer Recharge Zone. The lower fifty acres of property owned by the Applicant, which is outside of the "project site," is "mapped" as being within the Edwards Aquifer "Recharge Zone." According to Dr. Kemble White,[8] the inclusion of Applicant's property, including the proposed Wastewater Treatment Plant Site, in the designated "Contributing Zone" and "Recharge Zone" is based *not* upon the geologic or hydrogeologic characteristics of the property, but rather its geographic proximity to downstream geologic identified recharge feature some eight to ten miles downstream. (*See* TR 1:241-246; Exhibit 4.0 at 4-5, 8-9; Exhibit 4.3 at 1).

[7] The terms "Contributing Zone" and "Recharge Zone" of the Edwards Aquifer are defined in Chapter 213 of the Commission's Regulations (30 TAC). *See* 30 TAC §§ 213.3(27) (Recharge Zone), 213.22(2) (Contributing Zone).
[8] Dr. White is a Phd and recognized expert in hydrogeology and, in particular, the Edwards Aquifer.

Accordingly, in addition to the other rules generally applicable to wastewater treatment permits, *e.g.*, 30 TAC Chapters 305, 307 and 309, the Application was also subject to a special set of rules applicable to the region overlying the Edwards Aquifer contributing and recharge zones codified as TAC Chapter 213. (*See* 30 TAC Chapters 213, 305, 307 and 309).

On August 19, 2014, the Administrative Law Judge conducted a preliminary hearing in the matter of this application for purposes of establishing jurisdiction, and admitting parties to the proceeding. During that hearing, the Executive Director presented evidence in the form of the affidavits of published and mailed notice for the purpose of establishing "jurisdiction" over the Application. *See* Exhibits ED-A through ED-F, inclusive. The Applicant, Executive Director and Office of Public Interest Counsel were admitted as statutory parties. The ALJ admitted Patricia Graham, Terrell Graham, Margie Hastings, Asa Dunn and the greater Edwards Aquifer Alliance as Protesting Parties. The Johnson Ranch Municipal Utility District, a MUD operating with jurisdiction over the service area of the Applicant's proposed wastewater plant, was also admitted as a party. The Johnson Ranch MUD is statutorily authorized to provide wastewater services, including collection, treatment and disposal, within and outside of its boundaries, and was aligned with the Applicant in the proceedings, and all of the Protestants were aligned. At the August 19th hearing, the ALJ also established a discovery and hearing schedule for the proceedings. *See* SOAH Order No. 2.

On October 22nd and November 14th, the Administrative Law Judge conducted preliminary hearings to address discovery issues and objections to prefiled testimony. The hearing on the merits of the case was conducted from November 17th through November 19th. The Administrative Law Judge issued a Proposal for Decision on March 9, 2015, and then an amended Proposal for Decision on June 2, 2015. At its monthly agenda meeting on July 1, 2015,

the Commission considered and acted to overturn the Proposal for Decision, in part, and ordered the Application be granted. The final Permit was issued on December 17, 2015.

The *unnamed tributary* of Cibolo Creek into which the Applicant is authorized by the amended Permit to discharge treated effluent, both as it passes across and through the Applicant's property and downstream on its way toward Cibolo Creek when it passes through the property of the Protestants/Plaintiffs Patricia Lux Graham and Margie Hastings, is classified as an intermittent stream and a state watercourse, but not a navigable stream. This watercourse, and the proximity of the Plaintiff/Protestants' properties downstream of the proposed wastewater treatment plant, form the foundation of the Protestants' complaints.

Because the unnamed tributary in which the effluent will be discharged is not a navigable stream, the bed and banks of the watercourse are presumptively owned by the owner of the property through which the watercourse passes. On the basis of this presumption, the Plaintiff/Protestants assert that they own the watercourse, and that the Applicant's treated wastewater effluent cannot be transported in that portion of the watercourse in route to Cibolo Creek that crosses their property without separate prior authorization directly from the Protestants.

Based upon the original protest and complaints by the Plaintiff/Protestants, and the second issue identified in the Commission's Interim Order related to the proper "characterization" of the discharge route, it appeared that the Plaintiff/Protestants were contesting whether or not the watercourse was in fact a "watercourse" at all. The evidence adduced during the hearing, including the direct testimony of the Plaintiff/Protestants' representative, Mr. Terrell Graham, and Plaintiff/Protestants' expert witnesses, confirmed that

they acknowledge that the unnamed tributary was in fact a "watercourse" as that term is defined by Texas law.

III.
LIMITED ISSUES PRESENTED & ARGUMENTS

The four (4) narrow issues referred to SOAH by the Commission in this hearing are as follows:

a. Whether the proposed permit will adversely impact use and enjoyment of adjacent and downstream property or create nuisance conditions;

b. Whether the discharge route has been properly characterized;

c. Whether the proposed permit complies with TCEQ siting regulations found in 30 TAC Chapter 309; or

d. Whether the treated effluent will adversely impact the cattle that currently graze in the area.

See TCEQ**'s** Interim Order dated April 21, 2014. They are separately addressed below.

Issue 1: Whether the proposed permit will adversely impact use and enjoyment of adjacent and downstream property or create nuisance conditions:

The evidence of record supports the conclusion that the permit will not adversely impact the use and enjoyment of adjacent and downstream property or create nuisance conditions. As noted, this issue must be interpreted within the powers and jurisdiction of the Commission as conferred by the Texas Legislature. This includes the effluent standards included in the TCEQ rules at the time this Application was being adjudicated. The proposed permit would authorize a discharge of a maximum daily average rate of .350 million gallons per day with effluent criteria established in the proposed permit and commonly referred to as a "5-5-2-.5" criteria. The proposed effluent limitations will generate a very high quality, colorless and odorless liquid effluent. (*See* Urrutia Exhibit DHJB 5.0 at 8; Hill TR 1:41-44; DHJB Exhibit 1.0 at 11). The effluent will be discharged on the Applicant's property approximately 2,000 feet from the

property line of any downstream or adjacent landowner. The effluent will flow through a state watercourse across the Applicant's and the Plaintiff/Protestants' property on its way to Cibolo Creek and the San Antonio River Basin. (*See* Application - Exhibit DHJB 1.2A).

Over time as Applicant's property is developed as a residential subdivision, the effluent will be discharged in a growing, phased-in volume. Both the Applicant and Executive Director provided testimony that the Application had been developed in a manner to insure compliance with all relevant rules and statutes, including siting criteria applicable under Chapter 309, as well as the state's water quality standards criteria established for Segment 1908 of the San Antonio River Basin applicable to the Upper Cibolo Creek segment in which Applicant's discharge would flow established under Chapter 307 of the Commission's Rules. (*See* TR 1:71, 233-129, 136; TR 3:22-23, 26, 21, 33, 40). The Executive Director acknowledged that Segment 1908 is currently listed on the state's inventory of impaired and threatened waters under Clean Water Act § 303(d) due to "elevated levels of bacteria" (sic). (*See* Exhibit ED-4 at 000068). The Executive Director testified, however, that the Applicant's facility will be designed to operate and provide adequate disinfection by chlorination which should not add to the bacterial impairment of the Segment 1908. Additionally, to insure that the proposed discharge meets the stream bacterial standard, the proposed permit included an effluent limitation of 126 CFU or MPN of *E. Coli per 100 ml* in the permit draft. (*See* TR 3:14-15; - Exhibit ED-7, "Statement of Basis/Technical Summary and Executive Director's Preliminary Decision" at 000080).

The Executive Director noted that the unnamed tributary of Cibolo Creek to which the Applicant's effluent would initially be discharged is an "unclassified receiving water" which is categorized as having "limited aquatic life use" in it. Downstream of the unnamed tributary, specifically in Segment 1908 of the Cibolo Creek, the classification of the receiving water is

"contact recreation, public water supply, aquifer protection and high aquatic life use. For these reasons, Staff included effluent limitations in the proposed permit that would be adequate to maintain and protect those existing instream uses." (*See* Exhibit ED-7, "Statement of Basis/Technical Summary and Executive Director's Preliminary Decision"; 30 TAC § 213.6(c) (mandating a minimum effluent standard of 5-5-2-1)).

In addition to addressing the water quality issues and instream uses for Segment 1908, Staff also addressed the requirements of Chapter 213 regarding the Edwards Aquifer and discharges in the contributing zone, *i.e.*, Section 213.6(c), which mandates that the minimum effluent criteria contained in a permit be a "5-5-2-1" standard where the constituents based upon a 30-day average are: "5 milligrams per liter of carbonaceous biochemical oxygen demand," "5 milligrams per liter of total suspended solids," "2 milligrams per liter of ammonia nitrogen," and "1 milligram per liter of phosphorus." *See* 30 TAC § 213.6(c)(1). In fact, the Applicant requested, and the Executive Director Staff is recommending, that a more stringent criterion be included in the permit such that it will have a "5-5-2-.5" criteria imposed, thereby being more protective than the minimum standard mandated by the Commission's Chapter 213 Rules. This alone answers the question that the Plaintiff/Protestants have raised as to whether or not the the effluent standards are sufficiently protective.

In addition to the high quality of effluent established by the proposed permit, testimony was given to the effect that on average in the absence of rainfall events, very little of the effluent would reach the downstream property owners and/or cause a continuous flow creating problems for those properties. (*See* Bratton, TR 1:175-176). The Applicant's witness, Engineer, Mr. Bratton, testified that the distance between the point of the proposed outfall and the downstream property line where the watercourse unnamed tributary of Cibolo Creek leaves the Applicant's

property and enters the Protestant's property downstream is almost 2,000 feet. (*See* Bratton, TR 1:176; DHJB Exhibit 3.0 at 008; Urrutia, TR 2:34).

Based upon the level of proposed discharge, beginning at .0375 mgd and growing to a maximum of .350 mgd, much of the effluent discharged will likely be taken up either in seepage into the bed and banks of the watercourse, evapotranspiration from the plants and natural growth along the discharge route and/or evaporate prior to reaching the property line. (*See* Urrutia, TR 2:50 (lines 9-18)). This is particularly true given the hot climate usually associated with the central Texas region of the Hill Country experienced in Comal County.

In addition, the Applicant, and the Applicant's witnesses testified about the Applicant's intent to beneficially reuse as much of the effluent as possible to meet non-potable irrigation needs within the development. (*See* Hill, TR 1:97-99; DHJB Exhibit 1.0 at 010 (lines 4-15)). Applicant representative, Mr. Hill, testified that, at the time, the Applicant was working on an application for beneficial reuse pursuant to Chapter 210 of the Commission's rules. (*See* Hill, TR 1:97). DHJB did file its beneficial reuse Chapter 210 application on August 4, 2015. The TCEQ issued the beneficial reuse Chapter 210 application on October 27, 2015, Authorization No. R14975-001. The Applicant's Project Engineer for development, Tracy Bratton, testified that he was aware of the Applicant's plans for beneficial reuse and had incorporated in the design of infrastructure for roads, streets and drainage "sleeves" allowing "purple pipe" for reuse distribution of effluent to be incorporated and installed post-construction of the infrastructure once the Chapter 210 beneficial reuse authorization was granted. (*See* Bratton TR 1:207-208). The Applicant testified as to its experience in beneficial reuse in other developments, including Cordillera Ranch in Kendall County and that it expected to be able to use most of the effluent

onsite assuming a Chapter 210 beneficial reuse authorization is granted by the Commission, which it now has been. (*See* Hill TR 1:97-99; DHJB Exhibit 1.0 at 10).

With respect to Plaintiff/Protestants' complaints about the effect of the effluent allegedly causing impacts or reduction of enjoyment, or nuisance conditions on its property downstream, those complaints largely involved the Protestants' ability to walk across the unnamed tributary bed without the same being wet due to the potential presence of water in the watercourse. (*See* Graham, TR 2:90). There were no complaints about nuisance odors or issues related to nuisance normally considered by TCEQ. (*See* Urbany, TR 2:255-257; TR 3:20-21) (ED's testimony on nuisance odor issues. *See also* Testimony of Mike Urrutia regarding nuisance at DHJB Exhibit 5.0 at 8; and Gil Gregory at TR 1:124-128; DHJB Exhibit 2.0 at 007). The potential presence of water in the watercourse is not an adverse impact or nuisance cognizable by or within the jurisdiction of TCEQ. Moreover, the transport of the effluent in the watercourse is a lawful use of the watercourse for the transport of state water by the state.[9]

In *Domel v. Georgetown*, the courts were confronted with an issue almost identical to the complaint by Plaintiff/Protestants here.[10] Specifically, downstream landowners from the City of Georgetown's wastewater treatment plant complained that the discharge of effluent from the plant, which would travel through a non-navigable unnamed tributary of the Mankins Creek across their property was a trespass and violated their rights and impaired their use and enjoyment of the land. The Court held that under Texas law, the state has a right superior to the private landowners to use a watercourse for the transport of state-owned water.[11] The Court further held that the treated effluent, once discharged into a watercourse became state water which was eligible and qualified to be flowed through that state watercourse irrespective of the

[9] *See Domel v. Georgetown*, 6 S.W.3d 349, 358 (Tex. App. – Austin 1999, pet. denied).
[10] *Id*.
[11] *Id*. at 360-362.

ownership of the underlying bed and banks of the watercourse and that therefore there was no basis for complaint or a violation of rights in the property owners.[12]

The testimony in this hearing is uncontroverted that the effluent proposed to be discharged by the Applicant will be discharged on the Applicant's property and will flow into an unnamed tributary of the Cibolo Creek, a watercourse, before it leaves the property of the Applicant. If it flows downstream onto the property of the Plaintiff/Protestants, it will be flowing as state water in a watercourse, still part of the unnamed tributary of Cibolo Creek, in route to Cibolo Creek in the San Antonio River Basin. As a matter of law, the state has a right for that effluent as state water to be transported in the watercourse as it crosses through the Plaintiff/Protestants' property.[13] That right is legal, it is not an adverse impact that impairs the use or enjoyment of the downstream property rights. Moreover, to the extent that the Protestants may consider the same to be inconvenient or undesirable, it is not a "nuisance condition" within the jurisdiction of the Commission or cognizable by the Commission in these proceedings.[14]

As made clear by the witnesses of the Applicant, Mr. Gregory, former wastewater operator and license holder, and Mr. Urrutia, Chief of the Guadalupe-Blanco Water Quality Services Division, a Class A wastewater operator and supervisor of multiple water and wastewater plants, "nuisance conditions" associated with wastewater plant operations are generally limited to issues of smell or odor generated by a wastewater plant. There is no evidence of any odor, or anticipated odor from the wastewater treatment plant to be permitted in these proceedings. (*See* Gregory, TR 1:126-127; Urrutia, TR 2:29-30; DHJB Exhibit 5.0 at 008). Similarly, the Executive Director's witnesses, Mr. Urbany and Mr. Lee, both testified that in their experience, the limited consideration of nuisance conditions by the Commission in the normal

[12] *Id.* at 361 (citing Texas Water Code § 11.046(1).
[13] *See Id.* at 358-359.
[14] *See Railroad Com'n of Texas v. Texas Citizens for a Safe Future and Clean Water*, 336 S.W.3d 619 (Tex. 2011).

handling of wastewater treatment plants is a consideration related to odor issues. (*See* Urbany, TR 2:257-261; TR 3:22-23 and Lee, TR 3:66-67). Accordingly, the permit, with its high quality mandated effluent, much of which will be beneficially reused, will not adversely impact the use and enjoyment of the adjacent and downstream property or create nuisance conditions.

Plaintiff/Protestants' complaints that the effluent discharged through their property could either adversely impact the property value and/or increase erosion are both issues which exceed the jurisdiction and authority of the Commission to consider.[15] Moreover, the Plaintiff/Protestants provided no evidence of any decreased property value. With respect to erosion, the nominal flow levels of the Applicant's effluent, assuming it crosses the property line and enters into Plaintiff/Protestant's downstream property, reflects that the effluent will be maintained in a watercourse which is largely a rock limestone bed which is not susceptible to erosion.

The testimony of record also demonstrates that this Hill Country area is susceptible to storm and flood events for which historic erosion has already occurred and is the major contributing factor related to erosion. Accordingly, the Plaintiff/Protestants' claims are without merit and, assuming the Commission had jurisdiction, should be denied. Due to the Commission's lack of jurisdiction, however, there is no basis for addressing the issue in these proceedings.[16]

The Executive Director properly concluded in its responses to issues raised regarding erosion that "the TPDES permitting process is limited to controlling the discharge of pollutants into water in the state and protecting the water quality of the state's rivers, lakes and coastal waters. A proposed facility's potential impact on erosion or soil conservation is outside the

[15] *Id.*
[16] *Id.*

scope of the evaluation of a wastewater discharge permit application." *See* Executive Director's response to comments at p. 9 (Exhibit 13, testimony of ED witness Urbany).[17]

No evidence was presented that the Applicant's discharge of its effluent into a watercourse on its property, and allowing the effluent as state water to continue to flow through the watercourse through the property of the downstream protestants would constitute an invasion of personal rights or a violation of any federal, state or local law or regulation. To the contrary, as state water, the effluent which had been discharged pursuant to a lawfully issued permit by TCEQ, would be transported through the watercourse and the Protestants' property as a right of the sovereign not an invasion of personal property rights by the Applicant.[18]

Issue 2: Whether the discharge route has been properly characterized:

The Applicant has interpreted the issue presented here, and believes that the Executive Director has interpreted it similarly, as to address questions as to whether or not the transport route through the Plaintiff/Protestants' downstream property is a watercourse to which the state is entitled to transport state water and, possibly, to determine whether or not the Applicant's discharge is into the contributing zone or the recharge zone of the Edward's Aquifer which would affect the Commission's ability to authorize discharge as described herein. Based on this understanding, the Applicant believes that the Executive Director properly characterized the discharge route as being a watercourse in which state water is entitled to be transported irrespective of the ownership of the bed and banks of that watercourse and that the discharge route begins at an outfall which is located within the Edwards Aquifer contributing zone, not the recharge zone and, therefore, is a proper point of discharge assuming appropriate protections are

[17] *Id.*
[18] *See Domel v. Georgetown, supra; Goldsmith v. State*, 159 S.W.2d 534, 535 (Tex. Civ. App. – Dallas 1942); *cf., South Texas Water v. Bieri* 247 S.W.2d 268 (Tex. Civ. App. – Galveston 1952) (water returned to the stream is state water).

in included in the permit as have been recommended by the Executive Director in this case. Alternatively, if the issue of "characterization" is interpreted to mean whether the watercourse is an "intermittent stream" or "intermittent stream with personal pools," the unnamed tributary was properly characterized. The testimony is uncontroverted that on available mapping from the USGS shows the unnamed tributary as an intermittent stream (dashed blue line versus continuous blue line). Moreover, the testimony is uncontroverted that the unnamed tributary as it crosses the Applicant's property and the Protestants' properties is usually a "dry creek," but flows during and after rainfall events.

The testimony with respect to the stream being classified as being intermittent "with perennial pools" is more of a red-herring than a substantive permitting issue. The testimony was that in reviewing the USGS mapping and aerial mapping and photography viewed at least by the Applicant's experts and the Executive Director that perennial pools were identified. (*See* TR 3:70-71). The entire reach segment does not have to have perennial pools to have such a classification. Moreover, irrespective of that classification the critical issue is addressed by the level of treatment imposed in the Applicant's proposed permit.

The Executive Director correctly characterized or classified the unnamed tributary as supporting limited aquatic life due to its unquestioned intermittent nature. The effluent limits in the permit standards, however, were established to protect the higher standards applicable to Segment 1908 of the whole, *i.e.*, contact recreation, high aquatic life use, public water supply and aquifer protection. Accordingly, assuming an error in the Executive Director's classification of the unnamed tributary, the imposition of the higher quality or more stringent effluent limitations are fully protective of the unnamed tributary reach above Cibolo Creek.

The discharge route is a watercourse. As noted in the application, the Executive Director's evaluations of the application, and the testimony of the witnesses of the Applicant and the Executive Director, as well as of the Plaintiff/Protestants, the "path" that the Applicant's effluent will travel as it leaves the Applicant's property and continues downstream through the property of the Protestants in route to Cibolo Creek is a watercourse. While the watercourse may be non-navigable, and ownership of the bed and banks in the property owner, not the state, the state as a matter of law has the superior right to transport state water through the watercourse without any requirement for consent or other permission from the landowner.[19] Moreover, the Applicant's effluent, once discharged and allowed to flow into a watercourse becomes state water. While Plaintiff/Protestants dispute the degree to which the area on the Applicant's permitted site may constitute a watercourse, the evidence presented by the Applicant and the Executive Director demonstrate that before the proposed effluent would enter the Protestants' property it will be contained in a watercourse, which watercourse will continue to flow through the Protestants' property. (*See* Exhibit ED 20 at pp. 20-22, 25-26, 000181-000183, 000`86-000187; Bratton, TR 1:210-212; Lee, TR 3:50-51).

Plaintiff/Protestants' attempt to base its claim of "mischaracterization" of the discharge route on the basis of the Applicant's reconfiguration of a portion of the unnamed tributary solely on the Applicant's property to ensure that stormwater flows do not create a flooding issue at the wastewater treatment plant in accordance with TCEQ requirements. The Applicant's activities to adjust a portion of the watercourse proximate to the wastewater treatment plant site on the Applicant's property to insure that the plant site was protected from flooding during rainfall events is consistent with the requirements of the siting criteria in Section 309.13(a) of the Commission's Rules (30 TAC). The Applicant's minor redirection of the unnamed tributary on

[19]*See Domel v. Georgetown, supra* at 6 S.W.3d. at 358.

its property near the plant site does not change the testimony that the proposed outfall and the point of discharge from the wastewater treatment plant is into or adjacent to the watercourse, *i.e.*, the unnamed tributary. Moreover, that modification does not change the fact that once discharged the effluent will continue to flow down the watercourse in the unnamed tributary to the extent it is not beneficially reused, taken up in seepage or evaporative losses or evapotranspiration during its travel until it reaches the property line and continues down the watercourse through the Plaintiff/Protestants' downstream property.[20]

Section 26.07(a), Texas Water Code, expressly authorizes the Commission to "issue permits and amendments to permits for the discharge of waste or pollutants into *or adjacent to* the water in the state." *See* Texas Water Code § 26.027(a) (emphasis added). Accordingly, assuming that the actual point of the permitted outfall where the discharge would occur is not directly into the natural watercourse, but adjacent to the watercourse on the Applicant's property in a portion of the reconfigured stream which facilitates the flow of the discharged effluent into the watercourse to continue downstream in the watercourse across the property line and through the Plaintiff/Protestants' property in the watercourse as state water, such action is authorized by Section 26.027(a).

Additionally, assuming that the point of actual discharge before the effluent makes its way into the watercourse on the Applicant's property is not an actual watercourse, the law does not prohibit the discharge, but requires that the Applicant have a legal right to discharge at that point, and to maintain adequate control over the area as prescribed by any permit conditions. The evidence is uncontroverted, that the Applicant has the ability to do all of those things. The evidence is further uncontroverted that the Applicant has the same control of the entire area from the discharge point to the point the effluent enters the watercourse.

[20] *Domel v. Georgetown, supra* at 358-362.

There is no evidence that the Applicant is attempting to use any portion of the Plaintiff/Protestants' property to which the Applicant is not entitled, as a matter of law, to have the effluent travel. Specifically, the Applicant's transport of effluent through the watercourse is not the Applicant's action, but, in fact, the state's action of using the watercourse pursuant to its entitlement as the sovereign to transport state owned water.[21] Additionally, the Plaintiff/Protestant representative, Mr. Graham, and Protestants' witnesses, Dr. Ross, Mr. Rice and Mr. Dunbar all testified about the watercourse as it existed from the property line adjacent to the Applicant throughout its property. There was no evidence, nor any contention that the area in which the effluent would flow, assuming it made it to the Protestants' property, was in fact not a watercourse. (*See* testimony of Mr. Graham at TR 2:70-119, Mr. Rice at TR 2:182-204, Dr. Ross at TR 2:119-182 and Mr. Dunbar at TR 2:204-227). Accordingly, there is no basis for finding that the Commission failed to properly characterize the discharge route as a "watercourse" in which "state water" could be transported as a matter of law.

Assuming that the requirement to properly characterize the discharge route had to do with whether or not the point of discharge was in the Contributing Zone or the Recharge Zone of the Edwards Aquifer, the Applicant assumes that this consideration would be based upon the provision of Section 213.6(a) which prohibits the discharge of treated effluent in the Recharge Zone. Alternatively, with respect to the discharge of effluent within the Contributing Zone, Section 213.6(c) would control. Section 213.6(c), however, allows the discharge of effluent into the Contributing Zone, subject to specified minimum effluent quality criteria. Specifically, Section 213.6(c)(1) provides that discharge of effluent within the contributing zone within five miles of the recharge zone must meet the following minimum 5-5-2-1 effluent standards. (*See* 30 TAC Section 213.6(c)(1)). As noted above, the Applicant's proposed permit not only meets

[21] *See Domel v. Georgetown, supra* at 6 S.W.3d at 353; 358-359.

that criteria, but it exceeds it with the inclusion of a .5 mg/L of phosphorous as one of its criteria. Accordingly, there is no mischaracterization of the discharge route with respect to whether or not the discharge would occur in the Contributing Zone versus the Recharge Zone and/or whether or not the proper standards were imposed by the Commission in the proposed permit. Plaintiff/Protestants have raised a new substantive issue in this proceeding, claiming that the TCEQ may have failed to follow the clear language of the Edwards Aquifer Rules to prohibit wastewater discharges on the Edwards Aquifer Recharge Zone. However, the evidence was clear that the discharge takes place over the Contributing Zone. The Executive Director's witness Brittany Lee was clear in both her prefiled testimony and during the hearing that the discharge point was located in the Contributing Zone. (*See* testimony of Ms. Lee at TR 3:71—78; ED Ex. 20:28-34)

Plaintiff/Protestants' contentions that the discharge route was not properly characterized, therefore, are without merit. The Court should affirm the Commission's finding that the discharge route is a watercourse, that the effluent once discharged into the watercourse will be state water, and that as a matter of law, state water is entitled to be transported through the watercourse, including that portion which constitutes the private property of the downstream Protestants. Moreover, the Court should affirm the Commission's finding that the discharge will occur at an outfall located in the Contributing Zone of the Edwards Aquifer, not the recharge zone, and that the minimum requirements for protection of the Edwards Aquifer established by the Commission in Section 213.6(c)(1) (30 TAC) of the Commission's rules applicable to the Edwards Aquifer have been both met, and exceeded by the proposed treatment levels recommended by the Executive Director, and later issued by the Commission for this permit.

Issue 3: Whether the proposed permit complies with TCEQ siting regulations found in 30 TAC Chapter 309:

The evidence demonstrates that the application and the proposed permit comply with the siting criteria of Chapter 309 of the Commission's Rules (30 TAC). In addition to Chapter 309, the evidence also demonstrates that the proposed permit will comply with the requirements of Chapter 213 (30 TAC), regarding the siting of a wastewater treatment plant and proposed discharge outfall in the Contributing Zone of the Edwards Aquifer. The evidence demonstrates that the application meets the standards established for Segment 1908 of Cibolo Creek, in the San Antonio River Basin, as prescribed by Chapter 307 of the State Water Quality Standards. Moreover, with a 5-5-2-.5 effluent standard in the permit, the permit also meets, and exceeds, the criteria for discharges into the Contributing Zone above the Recharge Zone of the Edwards Aquifer as prescribed by Section 213.6(c) (30 TAC).

The evidence also establishes that the proposed permit includes a requirement for chlorination as a method of disinfection to protect against bacteria. The permit provides as an *E. coli* limit not to exceed 126 Colony Forming Units (CFU) per 100 milliliters.

With respect to "location standards" as set forth in Subchapter B of Chapter 309, the evidence also demonstrates that the application and the proposed permit satisfy those requirements. Testimony presented by the witnesses for the Executive Director also established that the Commission properly evaluated the application, its location, design, construction, and operational features so as to determine that they would minimize possible contamination of surface water and groundwater as prescribed by Section 309.12. (*See* Urbany, TR 2:247, 250-254, 261-265 and TR 3:20-21).

The record also demonstrates that there was no evidence presented of "unsuitable site characteristics" as prescribed in Section 309.13 that would limit the Commission's ability to issue

the proposed permit. The evidence established that the proposed wastewater treatment plant unit would not be located in a 100-year floodplain that was unprotected from inundation and damage by a flood event. In fact, in its effort to discredit the Applicant's and Executive Director's characterization of the discharge route, the Plaintiff/Protestants confirmed that the wastewater treatment plant unit would not be built in a 100-year floodplain where it was subject to inundation or damage from a flood event. There was no evidence presented that the wastewater treatment plant unit was being proposed to be located in a wetlands. Moreover, the application and other evidence adduced that the treatment plant unit would not be located within 500 feet of a public water well nor would it be located within 250 feet of a private water well. (*See* DHJB Exhibit 1.2A at 0053-00541, 0060; DHJB Exhibits 4.6 and 4.7). The treatment plant is also buffered by at least 150 feet of Applicant's property from neighboring landowners. (*See* DHJB 1.2A at 0053-0054).

As noted, the Applicant did provide testimony of its plans in the future to seek a beneficial reuse authorization under Chapter 210 of the Commission's Rules, and that authorization has been granted to the Applicant since the hearing took place. That beneficial reuse could include the use of treated effluent for irrigation purposes. At this time, however, the Applicant is not seeking in this proceeding authorization for irrigation use. Accordingly, the siting criteria related to spacing and buffer zones associated with surface irrigation using wastewater effluent are not applicable. *See* 30 TAC § 309.13(c); s*ee generally* Urbany at TR 2:262). Finally, as evidenced by the Application, there is no proposal for a wastewater treatment facility surface impoundment to be located in any area overlying a recharge zone of any major or minor aquifer.

With respect to Section 309.13(e) related to abatement and control of nuisance odor, no evidence was presented that the proposed plant would generate or result in a nuisance. Additionally, the application demonstrates that there is a sufficient buffer zone from the nearest property lines from the treatment unit to protect against nuisance odor. The Applicant also provided testimony, including testimony from Mr. Urrutia, a Class A licensed operator currently in charge of the Wastewater Services Division of the Guadalupe-Blanco River Authority which is under contract to operate the plant for the Applicant, of its ability to be operated in compliance with Commission Rules and standards. The Applicant will comply with the requirements of the Commission, including an ongoing monitoring of any nuisance odors and address them as needed if and when the same occur or become actionable. As evidenced by the Application, the proposed wastewater treatment plant unit will have a minimum 150-foot buffer from the nearest property line as prescribed by Section 309.13(e). (*See* DHJB Exhibit 1.2A at 0053-0054).

As noted, the Executive Director also considered the applicability of Chapter 213 and the location of the proposed wastewater treatment plant in the Contributing Zone. The effluent criteria in the proposed permit, as noted, not only meets, but exceeds the minimum standards established for discharges onto the Contributing Zone. As the proposed effluent limitations meet the standards for both the Contributing Zone, as well as Segment 1908 of the receiving stream, as being protective of waters of the state (both surface water and groundwater) human health, aquatic and terrestrial habitat and wildlife, the Executive Director properly determined that the proposed permit meets the siting criteria of Chapter 309, and the applicable portions of Chapter 213 (30 TAC).

With respect to Plaintiff/Protestant's concerns about groundwater contamination to the Glen Rose and/or the Edwards Aquifer resulting from the proposed discharge of effluent, Dr.

Kemble White, the only expert to have conducted any on-site investigations and studies, addressed those issues both in his prefiled and live testimony. In his prefiled he squarely addressed questions about contamination through seepage and infiltration as follows:

> [N]o portion of the Johnson Ranch is actually physically within the Recharge Zone only the mapped Recharge Zone. The nearest recharge feature is approximately 5 to 6 river miles away downstream on Cibolo Creek to the east. The effluent would have to travel from the proposed discharge point down the unnamed tributary of Cibolo Creek, which is an intermittent stream, and thereafter, enter Cibolo Creek where it would be diluted then travel several miles further downstream to the location of the recharge feature. By the time any portion of the effluent reached the recharge feature on Cibolo Creek it would be significantly diluted and in most likelihood have little or no discernable effect on the Aquifer.
>
> *See* Exhibit DHJB 5.0 at 10 (lines 6-15).
>
> Based upon the investigations and research we conducted and documented in Exhibits DHJB 4.2 through 4.10, inclusive, the characteristics of the Glen Rose Aquifer are such that infiltration beyond the root zone would be minimal and the ability to produce effluent which did reach the Upper Trinity would be unlikely, particularly given the distance of the wells from the Johnson Ranch discharge route.
>
> *See Id.* (lines 19-22). Moreover, with respect to the geologic location of the Edwards Recharge Zone, Dr. White testified that it is actually located some distance from Johnson Ranch:
>
> It would begin as you follow Cibolo Creek downstream towards sort of the Shertz/Garden Ridge area. There's a fault that passes under the bed of Cibolo Creek; and from that point, south, there on the Edwards Aquifer itself, that would be recharge zone. . . . It's 6 or 8 channel miles. As the crow flies it's probably a little less than that.
>
> TR. 261 (lines 1-9).
>
> Accordingly, Protestants' complaints are without merit and should be denied.

Issue 4: Whether the treated effluent will adversely impact the cattle that currently graze in the area:

The evidence does not support a conclusion that the proposed effluent will adversely impact the cattle which graze in the area. While Plaintiff/Protestants have attempted to adjust this referred issue in their brief, the evidence also does not support any conclusion that the proposed effluent will adversely impact children or cattle pursuant to the TCEQ's rules. The evidence demonstrates that the effluent will be limited to the bed and banks of the watercourse. The evidence also shows that there is a good possibility that little or none of the effluent will even reach the Plaintiff/Protestant's property in the area where cattle currently graze. (*See* Bratton, TR 1:175-176). Further, now that DHJB has obtained a Chapter 210 beneficial reuse permit, the amount of effluent that would reach Plaintiff/Protestant's property is even less.

The evidence also demonstrates that the watercourse is a well-worn Hill Country-type watercourse with steep bed and banks. The bed and banks of the stream have been eroded over time by rainfall events. The Applicant's engineer, who was also the engineer for the MUD in connection with stormwater studies and drainage studies which have included the unnamed tributary of Cibolo Creek as it crosses and travels through the Plaintiff/Protestants' property, provided the amount of the potential effluent to be discharged pursuant to the permit adverse impacts such as erosion are not realistic factors. (*See* Bratton DHJB Exhibit 3.0 at 007). Again, now that DHJB has obtained a Chapter 210 beneficial reuse permit, the amount of effluent that would reach Plaintiff/Protestant's property will be even less, making erosion even less of a realistic factor.

Plaintiff/Protestant Graham's testimony about concerns that the cattle might drink from the creek containing the effluent and be harmed by the content of the effluent, are also without merit. Mr. Graham testified that he provides the water supply in troughs up gradient from the

dry creek where the cattle have been trained to drink for years. To the extent that the cattle might stand in the creek bed and drink from the water, Mr. Graham also testified and acknowledged that the cattle, which are attracted to water, would continue to drink the water they are standing in even as they carry on their bodily functions and discharge their own bodily waste directly into the water in an untreated form, directly causing pollution to the stream. (*See* Graham, TR 2:93-94). He also acknowledged that water in the stream would be influenced by runoff from rainfall events which carry the products of both cattle grazing on the Applicant's property and the Plaintiff/Protestants' property, as well as wildlife into the stream, increasing the fecal coliform counts in the water. (*See* Graham, TR 2:98-99). Mr. Urrutia, GBRA's head of water quality services, also testified about how rainfall events dramatically increase the introduction of such waste products, untreated, directly into the stream. (*See* Urrutia, TR 2:63). Accordingly, the evidence does not support a conclusion that the discharge of high quality effluent under the proposed permit from the Applicant's plant, assuming it makes it to the Plaintiff/Protestant's property, will create any adverse impacts to the Plaintiff/Protestant's cattle which are within the jurisdiction of the Commission. Accordingly, the proper answer to Issue No. 4 is: "No, the treated effluent will not adversely impact the cattle that currently graze in the area."

IV.
ARGUMENTS ADDRESSING ADDITIONAL ISSUES ERRONEOUSLY RAISED BY PLAINTIFF/PROTESTANTS

While both the Contested Case Hearing and this proceeding should be limited to the four issues referred to SOAH by the Commission's Interim Order, the Plaintiff/Protestants have again tried to expand this proceeding to include other issues. In their initial brief, the Plaintiff/Protestants raise "procedural issues" claiming that the TCEQ 1) sought evidence outside

of the record; 2) the TCEQ redefined the issues referred to SOAH; and 3) that the TCEQ violated the Plaintiff/Protestants' constitutional due process rights.

The TCEQ did not solicit or consider evidence outside of the administrative record in violation the APA. At the hearing on July 1, 2015, the Commissioners asked questions of Brittany Lee, the Executive Director's Expert Witnesses, related to her testimony about the "watercourse". Nothing about this questioning was outside of the administrative record. Ms. Lee was asked questions about her review, her site visit, and her characterization of the watercourse used as the discharge route; all issues which were part of the administrative record and included, *inter alia*, in both Ms. Lee's prefiled and live testimony.

No evidence outside of the record was introduced, discussed, referenced, or considered by the Commission. This is confirmed by the fact that Plaintiff/Protestants do not directly cite to any specific "outside evidence" they claim was solicited and considered. Ms. Lee's responses to the Commissioner's questions about whether the discharge route had been properly characterized as a watercourse, and related issues, was consistent with both her prefiled and live testimony in the administrative record. Additionally, contrary to the Plaintiff/Protestants claims, they had ample opportunity during the Commission proceedings to rebut the testimony of Ms. Lee, as well as throughout the contested case hearing. The Commission seeking clarification of Ms. Lee's testimony at the July 1, 2015 agenda meeting was merely that, seeking clarification of testimony and evidence clearly within the administrative record.

Plaintiff/Protestants further claim that the TCEQ somehow redefined the issues referred to SOAH. However, simply by looking at the conclusions of law in the Final Order issued on September 15, 2015, it is clear that the four issues referred to SOAH were all answered.

The first issue: "Whether the proposed permit will adversely impact use and enjoyment of adjacent and downstream property or create nuisance conditions," was answered by finding of fact numbers 82 and 84, conclusion of law numbers 13, 14, 17, and discussed in the explanation of changes section required by Texas Government Code 2001.058.

The second issue: "Whether the discharge route has been properly characterized," was answered by findings of fact numbers 91-98, conclusions of law numbers 10, 11, and 20, and discussed in the explanation of changes section required by Texas Government Code §2001.058.

The third issue: "Whether the proposed permit complies with TCEQ siting regulations found in 30 TAC Chapter 309," was answered by finding of fact number 86, conclusions of law number 5.

The fourth referred: "Whether the treated effluent will adversely impact the cattle that currently graze in the area," was answered by findings of fact numbers 87, 88, 90, conclusions of law numbers 8, 9, 14 and 19, and discussed in the explanation of changes section required by Texas Government Code 2001.058. While "children" were not explicitly mentioned in one of the referred issues, Plaintiff/Protestants in their initial brief, once again, attempted to expand the referred issue. However, even if one were to add "children" to the last referred issue, that would have been explicitly answered by finding of fact number 89, and conclusions of law 8, 9, and 13.

The Commission, the body charged by the Legislature to be the ultimate adjudicator and decision maker in the implementation and application of the applicable state statutes and its own Rules, followed all proper procedures in making its decision and issuing its final order, including its decision to overturn, in part, the erroneous aspects of the ALJ's Proposal For Decision.

With respect to the Commission's action to overturn a portion of the on the ALJ's Proposal For Decision, Texas Government Code §2001.058(e) states that:

> (e) A state agency may change a finding of fact or conclusion of law made by the administrative law judge, or may vacate or modify an order issued by the administrative judge, only if the agency determines:
>
> (1) that the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies provided under Subsection (c), or prior administrative decisions;
>
> (2) that a prior administrative decision on which the administrative law judge relied is incorrect or should be changed; or
>
> (3) that a technical error in a finding of fact should be changed.

The Explanation of Changes section of the Final Order clearly states that changes were made due to the errors of law and fact contained in the ALJ's Proposal For Decision:

> It is evident that the ALJ misapplied or misinterpreted the law, Commission Rules, and longstanding TCEQ policies. Specifically the ALJ improperly applied TCEQ policy, relevant rules, and the law related to the determinations that the proposed permit would not be protective of children and cattle coming into contact with, or ingesting the effluent. The ALJ also improperly applied TCEQ policy, relevant rules, and the law with regard to the implementation of the TPDES program and implementing procedures found in 30 TAC Chapter 307 related to implementation of the TSWQS…In looking at the applicable case law, specifically the *Hoefs*, *Big Lake*, and *Domel* decisions, as well as the evidence and testimony present in the hearing, the ALJ incorrectly held that the discharge route was improperly characterized.

See TCEQ Final Order, 12-13

The Commission clearly answered the four issues which were originally referred to SOAH, and rightfully overturned the ALJ's Proposal For Decision in accordance with Texas Government Code §2001.058.

With respect to Plaintiffs/Protestants' issue related to TCEQ's interpretation of its own rule 30 TAC 309.12, as discussed above, the testimony presented by the Executive Director's expert witnesses, including Phillip Urbany, established that the Commission interpreted its rules consistently in its evaluation of the application so as to determine that the Amended Permit

would minimize possible contamination of surface water and groundwater as prescribed by Section 309.12 (30 TAC). (*See* Urbany, TR 2:247, 250-254, 261-265 and TR 3:20-21).

Mr. Urbany testified that Section 309.12 of the Commission's Rules that Plaintiffs/Protestants complain about, provides criteria and factors that the TCEQ considers applicable in evaluating a TLAP permit, not a TPDES discharge permit such as the one at issue in this case. (*See* ED Ex. 1 22:9-13). So long as the agency's interpretation of the statute(s) is reasonable, Texas Courts traditionally have held that they are entitled to judicial "respect" and "deference."[22]

Mr. Urbany clearly explained why that section was not explicitly used, and whether or not that section was explicitly used to evaluate Applicant's discharge permit amendment, does not change the rest of the review, or interpretation, and decisions made by the TCEQ in evaluating whether or not the permit amendment would be consistent with State law, including the ultimate conclusion that the amendment would minimize possible contamination of surface water and groundwater. According to Mr. Urbany's testimony, the standards which were used to evaluate the permit are put in place to evaluate the very same and assure compliance with state law and Commission Rules. (*See* Urbany, TR 2:247, 250-254, 261-265 and TR 3:20-21). Further, if it is standard TCEQ policy to only invoke this rule for TLAP permits, not a TPDES permit such as here (*Id*.), the TCEQ should be given deference in this interpretation of its rules.[23]

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[22] *Railroad Com'n of Texas v. Texas Citizens for a Safe Future and Clean Water*, 336 S.W.3d 619 (Tex. 2011).*; see generally First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 632 (Tex. 2008); *Tarrant Appraisal Dist. v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993); *Railroad Comm'n of Texas v. Torch Operating Co.*, 912 S.W.2d 790, 792 (Tex. 1995); *Public Util. Comm'n, supra*, 901 S.W.2d at 407; *Tarrant Appraisal Dist. v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993); *Railroad Comm'n of Tex. v. Lone Star Gas Co.*, 844 S.W.2d 679, 687, 689 (Tex. 1992); *Stanford v. Butler*, 181 S.W.2d 269, 273 (Tex. 1944); *Berkley v. Railroad Comm'n of Tex.*, 282 S.W.3d 240, 242 (Tex. App. – Amarillo 2009, no pet.); *Public Util. Comm'n v. Tex. Tel. Ass'n*, 163 S.W.3d 204, 213 (Tex. App. – Austin 2005, no pet.); *Hammack v. Public Util. Comm'n*, 131 S.W.3d 713, 723 (Tex. App. – Austin 2004, pet. denied).

[23] *Id.*

Section 309.12 of the Commission's Rules is merely a more general version of the specific site characteristics laid out in 30 TAC §309.13, which must be met for the amendment to be granted. There was vast testimony from the Executive Director's witnesses about their evaluation the permit amendment under this more specific Rule 209.13.

In their next issue outside the scope of the referred issues and, therefore, the record, the Plaintiff/Protestants attempt to argue that the Applicant's discharge should be barred by 30 TAC 213.6(a)(1). Plaintiff/Protestants erroneous argument is premised upon their misinterpretation of the Rules relating to the definition of a "site." Pursuant to their erroneous theory, the waste water treatment site, physically located in the Contributing Zone, must be treated as if it physically were within the Recharge Zone. Plaintiff/Protestants claim that the "site" includes the entirety of Johnson Ranch, not just the portion where the wastewater treatment plant is located. Because a part of Johnson Ranch overlies the Recharge Zone, Plaintiff/Protestants erroneously argue that Rule 213.22(7) requires the site, on a portion of the larger Johnson Ranch subdivision, but physically over the Contributory Zone, should be considered in the Recharge Zone.

The Commission's Rule, 30 TAC 213.22(7), states in full:

> Site--The entire area within the legal boundaries of the property described in the application. Regulated activities on a site located partially on the recharge zone and the contributing zone must be treated as if the entire site is located on the recharge zone, subject to the requirements under Subchapter A of this chapter (relating to Edwards Aquifer in Medina, Bexar, Comal, Kinney, Uvalde, Hays, Travis, and Williamson Counties).

Plaintiff/Protestants interpret the Rule erroneously by ignoring a part of this definition which limits the broader language to the "entire area ***within the legal boundaries of the property described in the application.***" *Id.* (emphasis added). When looking at the wastewater treatment plant project site as defined in the application, the only "legal boundaries of the property described in the application" were wholly within the Contributing Zone. Under

Plaintiff/Protestants erroneous interpretation, the Recharge Zone and the application of the Rule could be extrapolated to include all of the legally defined boundaries of Comal County, Texas.

All of the testimony at the hearing made clear that the wastewater treatment plant and discharge point are physically located in the Contributing Zone. Arguing that the wastewater plant sites location within the boundaries of the subdivision of Johnson Ranch makes the "site" located "technically" within the Recharge Zone is an untenable meritless position. Accordingly, Plaintiff/Protestants arguments attempting to paint the treatment plant as being in the Recharge Zone are incorrect, irrelevant, and should be dismissed. Similarly, Plaintiff/Protestants discussion related to Edwards Aquifer Protection Plans and Water Pollution Abatement Plans are equally meritless and irrelevant to this proceeding, which is merely focused on the TPDES Permit Application.

The Protestants attempts to mischaracterize the testimony of Applicant's witness Charlie Hill's testimony as a stipulation that the site of the treatment plant itself is partially in the Recharge Zone is just another attempt by the Protestants to confuse the facts of the case.[24] As it says in the Protestants' own footnote, Mr. Hill was asked a question about The Johnson Ranch property as a whole. When asked if the permit application covered the entire ranch, Mr. Hill, taking the question in context as whether or not the plant would *service* the entire ranch, said yes.[25] The entire ranch does in fact touch both the Contributing Zone and the Recharge Zone. However, Protestants' attempts to misconstrue Mr. Hill's testimony aside, the permit application speaks for itself. The actual wastewater plant project site is a very small footprint within the 475 acre Johnson Ranch Subdivision. As noted above, the project site's physical footprint and the outfall are wholly located in the Contributory Zone.

[24] Protestants' Closing Brief, Pg. 57
[25] Hearing Tr. Vol. I, 34

The legal description for the boundaries of the site from the Application is solely "0.7 miles north of Farm-to-Market Road 1863 and 0.5 miles east of US Highway 281."[26] Mr. Hill's testimony does not broaden or change the application in anyway. The only legal boundary of the property described in the application is the treatment plant site itself, "0.7 miles north of Farm-to-Market Road 1863 and 0.5 miles east of US Highway 281."[27] As this property is solely in the Contributing Zone, 30 Tex. Admin. Code §213.22(7) has no bearing on any part of this application and, therefore, no bearing on any part of this hearing. Plaintiff/Protestants arguments are without merit and should be dismissed. This hearing is solely on the TPDES Permit Application, and all of the unrelated matters the Protestant has tried to bring up to confuse matters such as the EAPP and WPAP have no bearing on the issues referred by the TCEQ.[28] The Commission's Final Order granting the amended Permit is properly based upon the evidence of record and the Commission's interpretation of the law and its own Rules, and should be affirmed.

V.
CONCLUSION & PRAYER

For all the foregoing reasons, DHJB Development LLC and Johnson Ranch Municipal Utility District respectfully request that the Court deny all of Plaintiff/Protestants claims, and affirm the TCEQ decision to issue the amendment to TPDES permit No. WQ0014975001.

[26] DHJB Ex. 1.2 - 014
[27] Id.
[28] *See* TCEQ Interim Order No. 2

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Initial Brief contains 10,204 words in the pertinent part of the document, as calculated by the computer program used to prepare this document.

/s/ Edmond R. McCarthy, Jr.
Edmond R. McCarthy, Jr.

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the above and foregoing Combined Initial Brief by Intervenors was electronically e-filed with Court and that copies were sent via e-mail and/or facsimile transmission as available and/or by Regular U.S. Mail to the following attorneys and/or party representatives on this the 30th day of September, 2016.

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