D-1-GN-15-005510

CAUSE NO. _____

PATRICIA GRAHAM, TERRELL GRAHAM, MARGIE HASTINGS, ASA DUNN, & GREATER EDWARDS AQUIFER ALLIANCE,	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	
	§	TRAVIS COUNTY, TEXAS
v.	§	
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY	§	
	§	53RD
Defendant.	§	_____ JUDICIAL DISTRICT COURT

PLAINTIFFS' ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Patricia Graham, Terrell Graham, Margie Hastings, Asa Dunn, and Greater Edwards Aquifer Alliance ("Plaintiffs") and file this Original Petition against the Texas Commission on Environmental Quality ("Commission" or "TCEQ"), and for cause of action would respectfully show the Court as follows:

I. DISCOVERY CONTROL PLAN

This case involves a review of a final action by an administrative agency, and therefore is based on the administrative record. Designation of a level of discovery is not applicable.

II. VENUE

Venue properly exists in Travis County, Texas, pursuant to Texas Government Code § 2001.176 and Texas Water Code § 5.354.

III. PROCEDURAL BACKGROUND

This lawsuit arises out of the decision by the TCEQ to issue an Amendment to a Texas Land Application Permit (TLAP) Permit No. WQ0014975001 to DHJB Development, LLC

("DHJB" or "Applicant"); the amendment changes the permit from a TLAP to a direct discharge of treated domestic wastewater from a wastewater treatment facility in Comal County, directly impacting neighboring properties.

On August 20, 2012, DHJB filed an application with the TCEQ requesting an amendment of its permit. The TLAP permit authorized the disposal of treated domestic wastewater via a public access subsurface drip irrigation system. The technical review of the application for the new amendment was completed on May 2, 2013 by the TCEQ, and the Executive Director ("ED") made a preliminary decision to issue the permit.

The public comment period ended on September 30, 2013. The Commission considered Ms. Patricia Graham's hearing request at its regularly scheduled meeting on April 9, 2014. The Commission granted Ms. Graham's hearing request and referred four issues to the State Office of Administrative Hearings ("SOAH"). Administrative Law Judge Sarah Ramos ("ALJ") conducted a preliminary hearing on August 19, 2014, at which time Mr. Terrell Graham, Ms. Margie Hastings, Mr. Asa Dunn, and the Greater Edwards Aquifer Alliance requested and were granted party status opposing the permit; Johnson Ranch Municipal Utility District was granted party status and was aligned with DHJB.

A contested case hearing on the merits was held November 17, 2014 through November 19, 2014 in Austin, Texas. Post-hearing briefing began on December 22, 2014. On March 9, 2015, the Administrative Law judge issued a Proposal for Decision ("PFD") recommending that the permit should be denied. On June 2, 2015, after giving all parties a chance to take exceptions to the PFD and to respond to these exceptions, the ALJ issued an Amended PFD, which still recommended that the permit should be denied.[1]

[1] In their exceptions, the Commission and the Applicant were critical of the ALJ's finding that the proposed discharge would not be into a watercourse. The Commission argued that the finding should be

The matter was heard by the Commission at its Agenda Meeting held on July 1, 2015. On September 15, 2015, the Commission issued an order granting DHJB's application. Plaintiffs timely filed their Motion for Rehearing on October 9, 2015. Plaintiffs waited until the Motion for Rehearing was overruled by operation of law prior to the filing of this Petition. All conditions precedent to the filing of this review of a final administrative action have been accomplished.

Plaintiffs seek judicial review of the decision by TCEQ in this matter pursuant to the Administrative Procedure Act ("APA") (Texas Government Code § 2001.171) and the Texas Water Code § 5.351.

IV. PARTIES

Plaintiffs Patricia Graham, Terrell Graham, Margie Hastings, and Asa Dunn are individual land owners who participated as parties in the underlying proceeding. Plaintiff the Greater Edwards Aquifer Alliance ("GEAA") is a 501(c)(3) nonprofit organization that advocates for the protection and preservation of the Edwards Aquifer, its springs, watersheds, and the Texas Hill Country. GEAA participated as a party in the underlying proceeding.

Defendant the TCEQ is an agency of the State of Texas whose responsibilities include administration and conservation of natural resources and protection of the environment. Service on the Commission may be accomplished by delivering a copy of this instrument to Mr. Richard A. Hyde, P.E., Executive Director of the TCEQ, at 12100 Park 35 Circle, Austin, Texas 78753.

Other parties to the underlying administrative hearing were as follows:

DHJB Development, LLC, ("DHJB") is the Applicant and was represented at the SOAH proceeding by Mr. Edmond R. McCarthy, Jr., of Jackson, Sjoberg, McCarthy, & Townsend LLP, 711 West 7th Street, Austin, Texas 78701.

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whether the discharge would be into waters in the state. In the amended PFD, the ALJ included findings that the proposed discharge would not be into waters in the state.

The TCEQ Office of Public Interest Counsel ("OPIC") was a party, and was represented by Mr. Rudy Calderon, P.O. Box 13087, MC-103, Austin, Texas 78711.

The TCEQ Executive Director was a party, and was represented by Ms. Kathy Humphreys, P.O. Box 13087, MC-173, Austin, Texas 78711.

The Johnson Ranch Municipal Utility District was a party, and was represented by Mr. Phil Haag of McGinnis Lochridge & Kilgore LLP, 600 Congress Avenue, Suite 2100, Austin Texas 78701. Plaintiffs do not hereby concede that Johnson Ranch Municipal Utility District is a rightful party in this matter. As a matter of judicial economy, Plaintiffs simply chose not to litigate the party status of the JR-MUD as part of the contested case.

V. GROUNDS FOR REVERSAL OR REMAND

Plaintiffs would show that the decision of the Commission is in violation of statutory provisions, is in excess of the agency's statutory authority, is contrary to the TCEQ's rules, is not reasonably supported by substantial evidence, and is arbitrary, capricious, and characterized by abuse of discretion or clearly unwarranted exercise of discretion. Substantial rights of Plaintiffs have been prejudiced because of TCEQ's decision to grant DHJB's application.

VI. COMMISSION ERRORS

The Commission decision below was littered with errors, both procedural and substantive. Due to the numerous and significant errors, this case raises an important issue about the integrity of the TCEQ contested case hearing process. Judicial review of this agency decision is essential.

As a summary, first, the record evidence demonstrated that the discharge will not be into "water in the state" or a legal watercourse, and the Commission's decision was arbitrary and capricious and not supported by substantial evidence on this basis. The Commission ignored or

discarded the ALJ's careful factfindings based on the record evidence that the discharge will not be into "water in the state" or a legal watercourse, ignored or misunderstood applicable case law on this issue, and made extra-record factfindings in order to modify the PFD.

Additionally, the Commission acted in excess of its statutory authority and through unlawful procedure by considering evidence that is outside of the record made before the ALJ. In particular, statements made during the July 1, 2015 agenda meeting evidence these irregularities.

Moreover, the Commission acted in an arbitrary and capricious manner by failing to consider nuisance impacts specifically contemplated by its own rules; by redefining the relevant and material issues referred by it to SOAH; by allowing the ED to completely ignore an applicable rule in 30 Texas Administrative Code Section 309.12 in its review of this Application; and by ignoring the plain language of the Edwards Aquifer Rules prohibiting the discharge allowed by the granting of this Application.

In this matter, the TCEQ failed to follow its own rules for issuing a TPDES permit and failed to protect the health, safety, and welfare of the citizens of Texas. This is most evident in the fact that OPIC agreed with the ALJ's findings and noted that the issuance of this permit amendment would not be in the public interest. The issuance of the permit amendment in this case is in violation of statutory provisions, in excess of the agency's statutory authority, contrary to TCEQ's own rules, in contravention of clear legislative intent to protect the Edwards Aquifer, not reasonably supported by substantial evidence, and arbitrary and capricious.

All of these error warrant careful review. Specifically, the Commission, through its issuance of an Order granting the Application of DHJB for an amendment to TLAP Permit No. WQ0014975001, erred as follows:

A. The Commission's decision to issue the permit amendment is arbitrary and capricious where significant record evidence demonstrated that the discharge will not be into a watercourse.

The Amended PFD found that an amendment should not be issued to TLAP Permit No. WQ0014975001 because, among other things, the discharge would not be into "water in the state."[2] In its Order, the Commission modified this finding.[3] However, the Commission's decision is arbitrary and capricious because the record clearly established (contrary to the Commission's modified finding) that the discharge would not be into water in the state.

Texas law categorizes surface water into one of two types: diffuse surface water and water in a watercourse. Discharging wastewater into watercourses of the State is allowed under Texas law pursuant to a lawful permit. This is because water in watercourses, as categorized under Texas law, is the property of the state. But before the State may burden a watercourse, it must be determined whether a watercourse exists. If an applicant is discharging outside of a watercourse, a discharge permit is not authorized by law.

The ALJ carefully analyzed the evidence on record and made a significant number of findings of fact supporting the conclusion that the proposed discharge would not be into water in the state. The ALJ considered Ms. Lee's hearing testimony on the characterization of the discharge route, but found that she had relied on exhibits that were unclear or did not actually support a finding that a watercourse existed.[4] The ALJ found that maps prepared by DHJB's own consultant, SWCA, were more convincing.[5] These maps showed large areas of disturbancethat interrupted any evidence of water in the state.[6] These maps showing disturbances were produced

[2] PFD at 1 (all citations to the PFD are to the Amended PFD).
[3] Order at 13.
[4] *Id.* at 25.
[5] *Id.*
[6] *Id*.

from data gathered by SWCA in January 2014.[7] The ALJ further compared the facts as applicable to DHJB's proposed discharge route with those in other cases.

The ALJ made specific findings of fact based on the evidence in the record to support her decision, including the following: several portions of the discharge route do not have defined beds and banks; the outfall location did not have the beds or banks of a channel; no aquatic resources on the Johnson Ranch are permanent; the maps in evidence show a land feature that is "significantly interrupted" in several places; the connectivity of the discharge route is completely severed at several places; the discharge route is dry under normal conditions; the grassy swale at the property line has native grasses growing in it; the discharge route on the Graham property is best characterized as a grassy swale with smooth banks and upon which cattle graze; and on the southern end of the discharge route, the soil is relatively flat and there is no regular flow of water.[8]

The Commission's decision to modify these findings and conclude that DHJB had met its burden to prove that the discharge is into water in the state is arbitrary and capricious for two reasons.

First, the Commission's decision, as articulated in its Order, is arbitrary and capricious because the record clearly established that the discharge route was not a watercourse. The Commission's explanation of changes lists two reasons for the modification: the Commission cited to Ms. Lee's characterization that the route was an intermittent watercourse with perennial pools; and the Commission makes a cursory statement that the discharge route was something more than a wide valley or mere surface drainage. These findings are not supported by the record

[7] *See* Protestants' Exhibit 1.9.
[8] PFD, Findings of Fact Nos. 87–96.

and disregard the ALJ's more specific factfindings based on the actual record. Moreover, the Commission should not make its own factfindings.

Second, the Commission's decision, as articulated in its Order, is arbitrary and capricious because it relies on an interpretation contrary to case law. Specifically, the Commission's reliance on Ms. Lee's interpretation that a discharge is into water in the state as long as it flows generally in a given direction is arbitrary or capricious, or is characterized by an abuse of discretion, because Texas case law clearly requires that watercourses have a defined bed and banks, a current of water, and a permanent source of supply. Ms. Lee's interpretation also ignores clear case law that grassy swales—in this case, low spots in pasture surface areas—are generally not watercourses. In short, Ms. Lee's interpretation, and the Commission's endorsement thereof, lacked any rational basis for the conclusion that this feature had any of the distinguishing features that could make it a legal watercourse.

Finally, DHJB judicially admitted in filings during the contested case hearing that a watercourse did not exist on the Graham property. Specifically, the Applicant pled that Plaintiff Terrell Graham had built a dam (actually an earthen berm) on the Graham's property in violation of Texas Water Code § 11.086.[9] DHJB also filed suit in Comal County District Court against the Grahams alleging the same. Plaintiff Mr. Graham denies that the berm he built, which diverts and impounds diffuse surface water outside a watercourse, caused any damages and has demanded strict proof thereof. But Plaintiffs are unclear as to why DHJB brought the

[9] Combined Objection of the Applicant, DHJB Development LLC, & The Johnson Ranch Municipal Utility District to Protestant's Response to Closing Arguments and Attachment "A" Thereto, 2.

construction of the berm on the Graham's property into this permit proceeding. Violation of Texas Water Code §11.086 is otherwise unrelated to TPDES permitting proceedings.[10]

In the proceeding below, DHJB judicially admitted that a legal watercourse does not exist on the Graham property. The Commission's decision to issue the permit amendment in spite of this admission is arbitrary, capricious, and an abuse of discretion.

B. The Commission acted in violation of a statutory provision and through unlawful procedure by considering evidence outside of the record.

The Texas Administrative Procedure Act requires that a final decision or order must be solely based on the evidence or those matters officially noticed within the record.[11] When the Commission is considering a PFD prepared by an ALJ, a statutory requirement states that "any amendment [to a PFD] and order shall be based solely on the record made before the administrative law judge."[12] During the July 1, 2015, agenda meeting, the Commission discussed and considered evidence outside of the record. The statements made by Commissioner Baker and Chairman Shaw at this meeting indicate that they were considering new evidence that was not and is not supported by the record. For this reason, substantial rights of the Plaintiffs have been prejudiced because the Commission acted in violation of its statutory authority and through unlawful procedure.

For example, during the agenda meeting, the Commission's Commissioner Baker asked TCEQ employee Ms. Lee to testify, after Protestants had already used up their allotted time for oral presentation, about what she saw when she walked the property.[13] The Commission would have comported with the statutory requirements to make decisions based "solely on the record"

[10] *Domel v. Georgetown*, 6 S.W.3d 349, 360 (Tex. App.—Austin 1999) ("[s]ection 11.086 and the above cases all concern the diversion of surface water *before* it enters a watercourse, which has nothing to do with the body of law governing water in a watercourse.")
[11] TEX. GOV'T CODE § 2001.141(c).
[12] TEX. GOV'T CODE § 2003.047(m).
[13] TCEQ, Open Meeting (July 1, 2015), http://www.texasadmin.com/tx/tceq/open_meeting/20150701/.

before the ALJ if it had had Ms. Lee read her testimony from the hearing. However, this is not what took place. In fact, Ms. Lee's testimony at the open meeting was different from that at the hearing (and, therefore, in the record). For example, Ms. Lee testified at the meeting that portions of the discharge route became:

> just, kind of, low depressions in a discharge route that are overgrown with grass but in the general direction, you can look at the vegetation patterns and you can also see that the depression is there and the bed and banks may not be as defined as where the ditch is . . .[14]

But in her prefiled testimony, Ms. Lee testified that "[s]everal areas upstream of the concrete culvert *do not depict a defined bed and banks of a channel*."[15] The record evidence all tended to show that portions of the discharge route completely lacked a defined bed and banks. Ms. Lee's testimony at the contested case hearing supported this finding. Her testimony at the agenda meeting, that the bed and banks "may not be as defined" as where the ditch is, is new evidence that should not have been allowed for the first time before the Commission. Additionally, Chairman Shaw solicited an opinion, through a leading question, on whether it was Ms. Lee's opinion that what she saw met one prong of the legal test for a watercourse, despite the fact that there was no specific testimony at the hearing from Ms. Lee that similar conditions would produce a flow of water that recurred with some degree of regularity. This form of procedure is not lawful under the Texas APA or Section 2003.047(m) of the Texas Government Code.

As a second example, Chairman Shaw discussed the characterization of the stream as an intermittent stream or an intermittent stream with perennial pools. During this discussion, he speculated that the discharge route was dry and there were not pools because of the drought.[16] But there was no testimony during the contested case hearing, and no evidence whatsoever in the

[14] *Id*.
[15] ED-20, 19:1–2 (Ms. Lee's prefiled testimony).
[16] *Id*.

record, that supported this conclusion. The alleged existence of a drought in the Bulverde area was simply an unprompted, speculative factfinding by the Commission, unsupported by any facts, and without any basis in the record. In fact, this characterization, which served as a basis for the Commission's determination that the discharge route was properly characterized and was a water in the state, is contrary to the substantial evidence offered at the hearing and in the record.

One of the main purposes of referring issues to an independent ALJ is to preserve fairness through the use of an impartial factfinder.[17] An agency acts arbitrary, contrary to law, and through unlawful procedure when it modified a PFD and bases an Order on evidence outside of the record.

When new or inconsistent evidence is considered by the Commission at an open meeting and forms the basis for its Order, this prejudices substantial rights of the Plaintiffs, because they may be denied their statutory rights to (1) object that the evidence was inadmissible under the Texas Rules of Evidence, (2) to cross-examine the person presenting the evidence, and (3) to present its own evidence to rebut the same. In this case, Plaintiffs did not have the opportunity to cross-examine Ms. Lee's or the Commissioners' new evidence in a contested case hearing context and, furthermore, had already used their allowed time prior to the Commission soliciting new testimony from Ms. Lee and discussing additional facts that were outside the record.

Plaintiffs allege that these unlawful procedures are arbitrary, contrary to the law, and prejudice their rights.

[17] *See Report on the Advantages and Disadvantages to the State of Creating a Central Panel of Administrative Law Judges*, Committee on the Judiciary, house of Representatives, State of Texas, 69th Leg., Nov. 1986, at 98.

C. The Commission acted arbitrarily, capriciously, abused its discretion, and through unlawful procedure by redefining issues it referred to SOAH and by ignoring evidence and findings in support of these issues.

The Commission acted in an arbitrary and capricious manner, and abused its discretion by redefining the referred issues, ignoring its own rules, and ignoring the evidentiary record and findings based on those rules. The Commission may only refer an issue for a contested case hearing if it determines that the issue involves a disputed question of fact that was raised during the public comment period and "is relevant and material to the decision on the application."[18] The Commission, in referring four specific issues to SOAH, correctly determined that nuisance impacts ("Referred Issue A") and impacts to cattle ("Referred Issue D") were relevant and material to the decision on the Application. But the Commission subsequently redefined the issues in its final Order to simply exclude these referred issues—as if they were never referred to SOAH. In so doing, the Commission ignored its own rules and ignored the related factfindings made by the ALJ supporting those two referred issues. This action is arbitrary, capricious, and an abuse of discretion.

The Commission specifically referred four issues to SOAH for consideration at the contested case hearing.[19] Referred Issue A asked: "Whether the proposed permit will adversely impact use and enjoyment of adjacent and downstream property or create nuisance conditions." Referred Issue D asked: "Whether the treated effluent will adversely impact the cattle that currently graze in the area." However, the Commission's actions at its agenda meetings and in its Order indicate that it determined that Referred Issues A and D should be redefined to only encompass issues related to the TCEQ's current implementation of the Texas Surface Water

[18] 30 TEX. ADMIN. CODE § 50.115(c).
[19] PFD at 4.

Quality Standards ("TSWQS").[20] It is prejudicial to Plaintiff's rights for the Commission to have specifically referred Issues A and D for consideration by SOAH at a contested case hearing, which induced Plaintiffs to expend considerable resources to address these issues, if the Commission was simply going to redefine or eliminate these issues at its agenda meetings and in its final Order.

In so acting, the Commission acted in an arbitrary and capricious manner, abused its discretion, and also ignored its own applicable rules. The TSWQS in 30 TAC Chapter 307 require the proposed amended permit "maintain the quality of water in the state consistent with public health and enjoyment."[21] Further, the proposed permit must comply with 30 Texas Administrative Code Sections 305.122(c), 307.1, and 309.10, which prohibit injury to private property and the invasion of the property rights and require minimization of exposure to nuisance conditions. These rules, which mirror the broader language in Referred Issue A on nuisance impacts, encompass a broader set of issues for consideration by the ALJ and the Commission. The Commission acts arbitrarily by redefining these issues and failing to consider nuisance impacts in its Order. The Commission did not refute that these issues existed. To the contrary, they admitted they existed. Instead, the Commission simply refused to take responsibility for the nuisance impacts of issuing the permit amendment.

The Commission also abdicated any authority over impacts related to erosion, stormwater, and access to the western portion of Graham-Hastings properties and fences. But erosion is an analyzable issue under the TSWQS: these standards require that surface waters "must be essentially free of settleable solids conducive to changes in flow characteristics of

[20] *See, e.g.*, Order at 12.
[21] 30 TEX. ADMIN. CODE § 307.1.

stream channels"[22] and that waste discharges "must not cause substantial and persistent changes from ambient conditions of turbidity[.]"[23] Erosion caused by the proposed discharge will potentially violate both of these standards, but the Commission failed to even consider these impacts.

The ALJ made numerous findings in Protestants' favor in the PFD on these issues. The Commission's redefinition of the scope of these issues at the agenda meetings and in its Order has the effect, whether intentional or not, of overturning a number of the ALJ's factfindings that have broad support in the record. The Commission's deletion or omission of the PFD's Findings of Fact Nos. 38, 39, and 41–45 was arbitrary.

The Referred Issues are submitted as part of the contested case hearing process for a reason: so that the parties can fairly develop evidence on them and attempt to demonstrate that the application does or does not meet its burden of complying with all relevant statutory and regulatory requirements implicated by the referred issues. Based on the issues that were actually referred, Plaintiffs proved up the facts of the issues, and the ALJ determined that the Applicant did not meet its burden. When the Commission effectively eliminates, rewrites or crafts new versions of referred issues, then all of the hard work by the parties and the ALJ at the contested case is undermined.

These actions by the Commission are procedurally unlawful, violate the Plaintiff's constitutional due process rights, and are arbitrary, capricious, and characterized by an abuse of discretion.

[22] 30 TEX. ADMIN. CODE § 307.4(b)(3).
[23] 30 TEX. ADMIN. CODE § 307.4(b)(5).

D. The Commission's decision to issue the permit amendment is arbitrary and capricious where significant record evidence demonstrated that the discharge route was mischaracterized.

In its April 21, 2014 Interim Order, the Commission specifically referred the following issue: "Whether the discharge route has been properly characterized."[24] In its Application, DHJB failed to properly characterize the discharge route. DHJB repeatedly mischaracterized the outfall location and the discharge route, including its location, its general characteristics, and its uses. The Commission similarly mischaracterized the outfall and discharge route in its findings of fact. Significant record evidence demonstrates that the discharge route was mischaracterized. For this reason, the Commission's decision to issue the permit amendment is arbitrary and capricious.

First, DHJB mischaracterized the immediate receiving waters in Domestic Technical Report Worksheet 2.0.[25] On this worksheet, DHJB inaccurately described the immediate receiving waters as a "stream."[26] But all parties at the hearing agreed that a berm has been constructed on the north side of the proposed plant.[27] At the foot of the berm is a manmade channel;[28] thus, the "receiving waters" are a manmade, dug ditch. DHJB's own witness testified that the situation had changed since the application was filled out and that he would check a different box ("man-made ditch or channel") if he were filling out the application now.[29]

[24] Applicant Exhibit 1.8 at 2.
[25] Applicant Exhibit 1.2A, 40–42.
[26] *Id*. at 40.
[27] Hearing Tr. vol. I, 80:13–19 (Mr. Hill testifying that a berm had been constructed); Hearing Tr. vol. I, 212:25 – 213:16 (Mr. Bratton testifying about construction of a berm); Protestants Exhibit 1, 23:5 – 24:15 (Mr. Graham testifying that an earthen berm has been constructed on the north side of the plant, rerouting the flow of the creek); Hearing Tr. vol. III, 56:24 – 57:4 Nov. 19, 2014 (Ms. Lee testifying that she recalls walking along the berm depicted in Protestants Exhibit 9); Hearing Tr. vol. III, 58:11–24 (Ms. Lee testifying that there is a berm and a new route running next to it).
[28] Protestants' Exhibit 9; Hearing Tr. vol. I, 141:16 – 142:16 (Mr. Gregory testifying that the outfall location is into a dug ditch that flows into the creek).
[29] Hearing Tr. vol. I, 143:6–9.

Second, given these facts, the Applicant also mischaracterized the discharge route in the buffer zone map included in its Application. The buffer zone map depicts the discharge point into a rerouted channel and fails to depict either the berm or the manmade channel that is the immediate receiving water body.[30] Ms. Brittany Lee stated that it was her understanding that the buffer zone map is different from the actual site conditions.[31] She agreed that there was a "new route next to [the constructed berm]."[32] Nothing in the permit amendment application accurately reflects this change.

For these reasons, the discharge route was straightforwardly mischaracterized in the Application. These mischaracterizations were not discussed by the Commission at its agenda meetings or in the Order. Given these mischaracterizations, which are based on uncontroverted facts, a number of the Commission's findings of fact are not supported by the record.

As additional legal error, the construction of the berm on the north side of DHJB's plant and the construction of a defined channel with adequate gradient to carry effluent away from the plant have forced DHJB to move the plant southward on its property. During the hearing, Plaintiffs introduced as an exhibit a site plan produced by DHJB subsequent to the submission of their permit amendment application.[33] This updated plan identifies the existing private water well to the south of the proposed plant site, demonstrating that the proposed wastewater plant will violate the siting requirements found in Rule 309.13. The Commission has failed to discuss this error or its basis for concluding that DHJB has met its burden of proving compliance with these siting requirements.

[30] Applicant Exhibit 1.2A, 54.
[31] Hearing Tr. vol. III, 56:23.
[32] Hearing Tr. vol. III, 58:24.
[33] Protestants' Exhibit 8.

For these reasons, the Commission's decision to approve the application is arbitrary, capricious, and affected by error of law.

E. The Commission's decision to issue the permit amendment is arbitrary, capricious, and unlawful where significant record evidence demonstrated that the discharged effluent will not be protective of children or cattle ingesting the effluent.

Among the issues specifically referred to SOAH by the Commission were the following: "Whether the proposed permit will adversely impact use and enjoyment of adjacent and downstream property or create nuisance conditions"; and "Whether the treated effluent will adversely impact the cattle that currently graze in the area." In her Amended PFD, the ALJ found that the proposed permit would adversely impact the Protestants' use and enjoyment of their properties, that the permit would not be protective of children, and that the permit would not be protective of cattle that would come into contact with and ingest the effluent.[34] The Commission's decision to issue the permit in spite of this record evidence is arbitrary, capricious, and violates its own rules.

Based on the evidence in the record, the ALJ found that the effluent would reach the Graham-Hastings property, that there was no evidence that it is safe for children to play in or ingest effluent treated at the levels the Applicant has proposed, and that there was no evidence that it is safe for cattle to come into contact with or ingest effluent treated at the proposed levels.[35] The facts underlying these findings were well supported. At the crux of the ALJ's findings was the understanding that this is a grassy swale or low spot in a pasture area into which undiluted effluent would flow.[36] The TCEQ has promulgated standards that are considered safe for unintentional human contact with undiluted effluent that are much stricter than those found in the proposed permit. For this reason, giving effect to these TCEQ standards requires findings that

[34] PFD at 16; 48-49.
[35] *Id*.
[36] *See id* at 16.

the proposed permit will not be protective of existing uses of the discharge route (including, but not limited to, human contact or livestock ingestion).

The Commission's decision to issue the permit and change these findings of fact disregards the TCEQ's own rules that require stricter standards in functionally identical situations to this one. The Commission fails to even discuss or consider the standards for land application of undiluted wastewater effluent, even though these standards were one of the central reasons for the ALJ's findings. In particular, given Chapter 210 of the TCEQ rules, neither the Applicant nor the TCEQ has established that undiluted effluent is safe for cattle or children to ingest. The proposed permit amendment allows for a single grab of 399 CFUs/100ml per grab sample of *E. coli*.[37] This is more than three times what is considered safe for unintentional human contact with undiluted effluent.[38] The standards for so-called Type 1 effluent are even stricter. Type 1 effluent uses include irrigation "or other uses in areas *where the public may be present* during the time when irrigation takes place or other uses where the public may come in contact with the reclaimed water."[39] Among these other specific uses are for "[i]rrigation of pastures for milking animals."[40] The water quality standards for such uses include limits of 20 CFU/100ml for a 30-day mean of *E. coli* and 75 CFU/100ml for a single grab.[41] Turbidity limits and limits for *Enterococci* also exist and are stricter than in the proposed permit amendment.[42] Type 1 standards are what the Commission has determined would be safe for human contact with undiluted wastewater effluent on dry land and DHJB's permit does not meet them.

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[37] *See* ED-1.
[38] *See* 30 TEX. ADMIN. CODE § 309.3(g)(4) ("All effluent discharged to land via a subsurface area drip dispersal system *to which there is a potential for human contact* shall be disinfected and shall comply with an [*E. coli*] bacteria effluent limitation of 126 colony forming units per 100 milliliters of water") (emphasis added).
[39] 30 TEX. ADMIN. CODE § 210.32(1) (emphasis added).
[40] *Id*.
[41] 30 TEX. ADMIN. CODE 210.33(1).
[42] *Id*.

In fact, the effluent that will be discharged under DHJB's permit amendment will not even meet Type 2 standards. Type 2 effluent standards, which are intended for unintentional human contact, are much less stringent than Type 1 standards.

These TCEQ-approved standards are specifically protective of irrigation of areas in which livestock are fed and other areas in which human contact is possible. Because the Applicant is proposing to discharge effluent into a low spot in a pasture surface area (*i.e.*, a grassy swale), without any dilution, the proposed discharge is functionally equivalent to the undiluted discharge of effluent to dry land. Because the permit amendment's effluent limitations do not meet the Type 1 effluent standards (or the Rule 309.3(g)(4) standards), there is a presumption that the effluent will not be protective for these uses.

In its Order, the Commission simply ignores the purpose of these rules and the structure of specific rules that protect for effluent's application to land to which both the public and livestock will have access. For this reason, the decision is arbitrary, capricious, and unlawful.

F. The Commission acted arbitrary by failing to consider legally required factors in 30 Texas Administrative Code Section 309.12.

The Commission cannot ignore what is required in its own rules. However, this is exactly what the Commission did in this case. The Commission specifically referred an issue of whether the proposed permit complies with TCEQ siting regulations found in 30 Texas Administrative Code Chapter 309. During the hearing, TCEQ staff admitted that they did not review the Application against the Rule 309.12 requirements. Given this failure to follow the clear, unambiguous language of its own regulations, the Commission has acted arbitrary by approving the permit amendment.

Rule 309.12 prohibits the TCEQ from issuing a permit "unless it finds that the proposed site . . . minimizes possible contamination of surface water and groundwater."[43] The rule lists specific factors the TCEQ may consider during this review.[44] Mr. Urbany of the TCEQ testified that he did not review the TPDES permit applications against the Rule 309.12 requirements,[45] even though there is nothing in the language of the rule stating that Rule 309.12 is not applicable to a TPDES permit.[46]

Rule 309.12 clearly requires that the TCEQ itself make an affirmative finding about protection of surface water and groundwater: "The commission may not issue a permit . . . *unless it finds* that the proposed site, when evaluated in light of the proposed design, construction or operational features, minimizes possible contamination of surface water and groundwater."[47] The TCEQ made no such determination in this case. Nothing in the record supports a finding that the TCEQ found or made a determination that the site "minimizes possible contamination" of surface water and groundwater. During the contested case hearing process, OPIC agreed with Plaintiffs that the Commission failed to consider Rule 309.12.

An agency abuses its discretion when it fails to consider legally relevant factors. An agency decision—here, a decision to approve the permit amendment—is arbitrary if it fails to follow the clear, unambiguous language of its own regulations. Possible contamination of surface water and groundwater is clearly a legally relevant factor to the TCEQ's decision, as evidenced by Rule 309.12. The clear, unambiguous language of this regulation requires the agency to make a determination that the proposed site for a wastewater treatment plant minimizes possible contamination. The agency's failure to do so is arbitrary.

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[43] 30 TEX. ADMIN. CODE § 309.12.
[44] *Id*.
[45] ED-1, 22:9–11.
[46] Hearing Tr. vol. III, 29:9–13.
[47] 30 TEX. ADMIN. CODE § 309.12 (emphasis added).

G. The Commission's decision to issue the permit amendment is arbitrary, capricious, and unlawful because the discharge violates the Edwards Aquifer Rules.

The proposed discharge violates Chapter 213's prohibition against new municipal wastewater discharges that would create additional pollutant loading on the Edwards Aquifer recharge zone.[48] The Commission acted in an arbitrary and capricious manner, and in violation of its own rules when it decided to issue a permit amendment that would violate this prohibition.

All parties involved in the contested case agreed that the rules in Subchapter A of Chapter 213 prohibit discharges on the recharge zone.[49] This prohibition is found in two separate sections in Subchapter A. First, in the rule specific to wastewater treatment and disposal systems, new industrial and municipal wastewater discharges "into or adjacent to water in the state that would create additional pollutant loading are prohibited on the recharge zone."[50] Second, this prohibition is also specifically found in the rule on prohibited activities, which prohibits new municipal and industrial wastewater discharges "into or adjacent to water in the state that would create additional pollutant loading" on the recharge zone.[51]

The parties agreed, and the Commission has found, that the site is mapped partially on the recharge zone and partially on the contributing zone.[52] The Edwards Aquifer Rules provide that a site includes "[t]he entire area within the legal boundaries of the property described in the

[48] 30 TEX. ADMIN. CODE § 213.6(a)(1).
[49] Hearing Tr. vol. II, 173:4–5 (Dr. Ross testifying that you cannot discharge anything on the recharge zone that would be an additional pollution loading); Hearing Tr. vol. II, 253:10–12 (Mr. Urbany testifying that if a discharge "goes into the recharge zone, then it would be prohibited"); Hearing Tr. vol. III, 17:18 – 18:22 (Mr. Urbany discussing the prohibition against discharges from wastewater treatment plants on the recharge zone); Hearing Tr. vol. III, 72:17–18 (Ms. Lee testifying that she would consider the prohibition against discharge points located in the recharge zone).
[50] 30 TEX. ADMIN. CODE § 213.6(a)(1).
[51] 30 TEX. ADMIN. CODE § 213.8(a)(6).
[52] Hearing Tr. vol. I, 34:15–18 (Mr. Hill testifying that part of the property is mapped as recharge zone and part is mapped as contributing zone); Hearing Tr. vol. I, 233:4 (Dr. White testifying that the Johnson Ranch property is designated in part as being in the recharge zone and in part as being in the contributing zone); Protestant Exhibit 2, 24:9–13 (Dr. Ross testifying that the development straddles the boundary between recharge and contributing zones); Hearing Tr. vol. III, 71:22 – 72:3 (Ms. Lee stating that the outfall is in the contributing zone and that the recharge zone is 565 feet from this location).

[Edwards Aquifer Protection Plan]."[53] This definition clarifies that "[r]egulated 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)."[54] Thus, when a site spans both the recharge zone and the contributing zone, the site owner must operate under the requirements of Subchapter A.

The evidence in the record clearly established that the "site" for DHJB's Edwards Aquifer Protection Plan is the entire approximately 750 acres of land that makes up the Johnson Ranch Development. The "site," therefore lies partially on the recharge zone and partially on the contributing zone. For this reason, regulated activities on the site must be treated as if the entire site is located on the recharge zone.[55] Discharges are prohibited on the recharge zone.

Additionally, at the hearing the new outfall location that resulted from the Applicant's manmade ditch was not established. In the PFD, the ALJ noted that the "Applicant reconfigured a portion of the unnamed tributary on its property and thus moved the outfall location."[56] For a manmade ditch, the point source, as defined in 30 Texas Administrative Code 307.3(a)(47), is the downstream end of the ditch. The Commission acted arbitrary because the record evidence clearly established that DHJB failed to meet its burden of proving whether the new outfall location was on the Edwards Aquifer Contributing Zone or the Recharge Zone.

New municipal waste discharges on the recharge zone are prohibited by TCEQ rules. The Commission was arbitrary, capricious, and unlawful by failing to give effect to this prohibition

[53] 30 TEX. ADMIN. CODE § 213.21(7); *see also* 30 TEX. ADMIN. CODE § 213.3(31) (same definition of "site" in Subchapter A).
[54] *Id*. (emphasis added).
[55] 30 TEX. ADMIN. CODE § 213.21(7).
[56] PFD at 17.

through its issuance of a permit amendment authorizing discharge on a "site" on the recharge zone.

H. The Plaintiffs' due process rights were violated by Defendants.

As demonstrated above, there were numerous and significant procedural and substantive errors in this case. For example, as stated, the Commission took new evidence at the agenda meeting that was not presented in the contested case. The Plaintiffs had no opportunity to dispute this new evidence or to cross-examine the TCEQ witness who provided this new testimony. These and other errors outlined above violate Plaintiffs' due process rights.

VII. TRANSMISSION OF RECORD

Pursuant to Texas Government Code § 2001.175(b), demand is hereby made that the Commission transmit the original or a certified copy of the entire record of the proceeding to the Court within the time permitted by law.

VIII. CONCLUSION

Plaintiffs contend that the Commission Order granting the Application of DHJB for an amendment to TLAP Permit No. WQ0014975001 in Comal County, Texas, is unlawful for the reasons set forth herein.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs request that the Commission be cited and required to answer and appear herein, that a hearing be held, and that on final hearing hereof, Plaintiffs have judgment of the Court as follows:

1. Reversing and vacating the decisions of the Commission, and ordering that the requested amendment cannot be granted; or
2. Alternatively, reversing and vacating the decisions of the Commission, and remanding the matter back to the Commission for further proceedings; and

3. Awarding Plaintiffs costs incurred together with all other relief to which Plaintiffs may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 3rd day of December, 2015, a true and correct copy of the foregoing instrument was served on all attorneys of record by the undersigned via regular U.S. mail and/or electronic mail.

/s/ Charles W. Irvine

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