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Catarina R. Gonzales, *Commissioner*  
Kelly Keel, *Executive Director*



Garrett T. Arthur, *Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

March 11, 2025

Honorable Pratibha J. Shenoy  
Honorable Shelly M. Doggett  
State Office of Administrative Hearings  
P.O. Box 13025  
Austin, Texas 78711-3085

RE: **IN THE MATTER OF THE APPLICATION BY MUNICIPAL  
OPERATIONS LLC FOR NEW TPDES PERMIT NO. WQ0016171001  
SOAH DOCKET NO. 582-25-01778  
TCEQ DOCKET NO. 2024-0670-MWD**

Dear Administrative Law Judges:

Enclosed for filing is the Office of Public Interest Counsel's Closing Argument in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Jennifer Jamison".

Jennifer Jamison  
Assistant Public Interest Counsel

A handwritten signature in cursive script that reads "Josiah Mercer".

Josiah T. Mercer  
Assistant Public Interest Counsel

SOAH DOCKET NO. 582-25-01778  
TCEQ DOCKET NO. 2024-0670-MWD

APPLICATION BY MUNICIPAL § BEFORE THE STATE OFFICE  
OPERATIONS, LLC § OF  
FOR NEW TPDES PERMIT § ADMINISTRATIVE HEARINGS  
NO. WQ0016171001 §

OFFICE OF PUBLIC INTEREST COUNSEL'S  
CLOSING ARGUMENT

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES:

The Office of Public Interest Counsel (OPIC) at the Texas Commission on Environmental Quality (TCEQ or Commission) files this closing argument and would respectfully show as follows:

**I. Introduction**

Municipal Operations, LLC (Municipal Operations or Applicant) has applied to the Commission for a permit to discharge a million gallons per day of treated domestic wastewater in the final phase. For the reasons stated herein, OPIC finds that Applicant has failed to show that the proposed total phosphorus limit of 0.15 mg/L would be sufficiently protective of water quality and wildlife. OPIC therefore respectfully recommends denial of the permit, or in the alternative, remand to the ED for further evaluation.

**II. Background**

Applicant Municipal Operations, LLC applied to the Commission for a new Texas Pollutant Discharge Elimination (TPDES) permit—Permit No. WQ0016171001. If issued, the draft permit would authorize discharge of treated domestic wastewater not to exceed 200,000 gallons per day (gpd) in the Interim

I Phase, a daily average flow not to exceed 400,000 gpd in the Interim II Phase, and an annual average flow not to exceed 1,000,000 gpd in the Final Phase.

The proposed wastewater treatment facility (the Facility) would serve the Guajolote Ranch Development. The permitted Facility would be located approximately 1.75 miles west-southwest of the intersection of Babcock Road and Scenic Loop Road, in Bexar County, and would be an activated sludge process plant operated in conventional mode with chemical phosphorous removal capability. The Facility has not been constructed. The draft permit states that the effluent will be discharged via pipe to Helotes Creek, then to a pond, then to Helotes Creek, then to Culebra Creek, then to Lower Leon Creek in Segment No. 1906 of the San Antonio River Basin. The unclassified receiving water use is minimal aquatic life use for Helotes Creek (upstream of unnamed tributary), and limited aquatic life use for the pond and for Helotes Creek (downstream of unnamed tributary). The designated uses for Segment No. 1906 are primary contact recreation, public water supply, and high aquatic life use.

During the TCEQ Agenda Meeting on August 14, 2024, the Commissioners considered the hearing requests and issues for referral in this proceeding. As outlined in the Interim Order, the Commissioners granted the hearing requests of the Greater Edwards Aquifer Alliance (GEAA), the San Antonio Metropolitan Health District (SAMHD), and Elizabeth Ann Toepperwein and referred seven issues to the State Office of Administrative Hearings (SOAH) for a contested case hearing:

- A. Whether the draft permit is adequately protective of water quality, including surface water, groundwater, and drinking water wells;
- B. Whether the draft permit is protective of wildlife, including endangered species, in accordance with the Texas Surface Water Quality Standards in 30 Texas Administrative Code (TAC) Chapter 307;
- C. Whether the draft permit adequately addresses nuisance odor, in accordance with 30 TAC § 309.13(e);
- D. Whether the draft permit complies with siting requirements regarding flood plains and wetlands, in accordance with 30 TAC Chapter 309;
- E. Whether Applicant substantially complied with applicable public notice requirements;
- F. Whether the Applicant adequately identified the operator in the application; and
- G. Whether the Commission should deny or alter the terms and conditions of the draft permit based on consideration of need, under TWC § 26.0282 and the general policy to promote regional or area-wide systems, under TWC § 26.081.

On November 21, 2024, the Administrative Law Judges (ALJs) convened a preliminary hearing in this matter by Zoom videoconference. The following parties appeared through counsel: Applicant; Executive Director (ED) of TCEQ; OPIC; San Antonio Metropolitan Health District; and Greater Edwards Aquifer Alliance. On November 26, 2024, GEAA submitted a filing clarifying that Ms. Toepperwein is a member of GEAA and would not participate as an individual party. On December 27, 2024, counsel for SAMHD filed a request to withdraw its hearing request—this request was later granted by the ALJs. Additionally, the ALJs partially granted Applicant’s motion for summary disposition on February

13, 2025—as to Issues C, E, and F. The hearing on the merits was conducted on February 18-20, 2025.

### **III. Burden of Proof**

By rule, the burden of proof is on the moving party by a preponderance of the evidence.<sup>1</sup> In a permit hearing, the applicant is the moving party. Therefore, Applicant bears the burden of proof. Regarding the burden of proof in an SB 709 case, 30 TAC § 80.117(b) states that an applicant’s presentation of evidence to meet its burden of proof may consist solely of the filing with SOAH, and admittance by the ALJ, of the administrative record. However, Section 80.17(c)(2) provides that a party may rebut an applicant’s prima facie demonstration by presenting evidence demonstrating that the draft permit violates a specifically applicable state or federal legal or technical requirement. If a rebuttal case is presented, Section 80.17(c)(3) states that the applicant and the ED may present additional evidence to support the ED’s draft permit.

### **IV. Discussion**

#### **a. Whether the draft permit is adequately protective of water quality, including surface water, groundwater, and drinking water wells**

OPIC notes that its analysis with respect to Issue A focuses on two specific sub-issues of particular importance to this application: (1) groundwater protection and (2) antidegradation. Further, OPIC has elected to discuss each of these sub-issues individually, while still acknowledging that each sub-issue relates directly to one or more of the issues referred by the Commission. For

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<sup>1</sup> 30 TAC § 80.17(a).

example, concerns regarding the imposition of a phosphorus limit based on reasonably achievable technology can have serious impacts on both water quality and aquatic life. For the reasons detailed below, OPIC finds that Applicant has failed to meet its burden of proof with respect to Issue A. Specifically, OPIC finds that Protestant has successfully rebutted the presumption that the proposed total phosphorus limit of 0.15 mg/L would be sufficiently protective of water quality and existing uses of the receiving waters.

### **Groundwater**

Protestant, through their expert, Ron Green, Ph.D. states that the draft permit is not adequately protective of water quality, including surface water, groundwater, and drinking water.<sup>2</sup> Specifically, Dr. Green asserts that because the upper reach of Helotes Creek has no baseflow, the portion of effluent that does not recharge into the dry riverbed will not be diluted due to the absence of perennial flow.<sup>3</sup> Dr. Green further explains that the Contributing Zone in the Bexar County area is hydraulically connected with the Edwards Aquifer Recharge Zone, and that a high rate of transport and limited dilution time will result in contamination moving so quickly within the subsurface that pathogens will not die off prior to reaching nearby groundwater wells.<sup>4</sup> This potential for contamination is of particular concern for Protestant given that the groundwater wells used for domestic supply at the Ann Toepperwein household and the Lynette Toepperwein Munson household are located within a half mile of where

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<sup>2</sup> GEAA-200, 5:11-13.

<sup>3</sup> GEAA-200, 5:15-17.

<sup>4</sup> GEAA-200, 5:7-10.

Helotes Creek exits on Guajolote Ranch.<sup>5</sup> In addition, Dr. Green asserts that wells owned by Grey Forest Utilities located within the Lower Glen Rose – Cow Creek Aquifer system will also be at risk of contaminated recharge to the creek bed at locations where faulting provides a conduit to flow from the surface to the Lower Glen Rose Aquifer.<sup>6</sup>

With respect to the Toepperwein wells, Applicant’s expert, Kaveh Khorzad, P.G., counters that there is no evidence to suggest that the groundwater wells located on their property were completed in the Upper Trinity Aquifer – where they would be susceptible to contamination.<sup>7</sup> When pressed for his reasoning for this assertion on cross-examination, Mr. Khorzad testified that his search of the state database of local wells within a mile and half of the discharge point revealed that all wells were located in the Middle Trinity.<sup>8</sup> Mr. Khorzad conceded that due to the fact well drillers were not required to submit state well reports until 2002, wells drilled prior to 2002 may not be listed in state databases.<sup>9</sup> However, as Applicant and Mr. Khorzad pointed out, there was no tangible evidence introduced to support the contention that the Toepperwein wells exist in the Upper Trinity. Mr. Khorzad then addressed Protestant’s contention that it is plausible to assume that the Toepperwein wells exist in the Upper Trinity as opposed to the Middle Trinity because they were completed in the early 1900’s. He testified:

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<sup>5</sup> GEAA-200, 11:16-17.

<sup>6</sup> GEAA-200, 12:13-15.

<sup>7</sup> Transcript, 203:20-22.

<sup>8</sup> Transcript, 204:6-10.

<sup>9</sup> Transcript,

Because they're -- the driller would have drilled to a depth such that he could have found -- find usable water, something that can be used as a well, and we don't know if the Upper Trinity would have met those conditions. So, we just don't know. There's no evidence to suggest it's an Upper Trinity or a Middle Trinity well; the geophysical log of the well would do that.<sup>10</sup>

OPIC is inclined to agree with Applicant's contention that there is not enough evidence in the record to conclude that the Toepperwein wells exist in the Upper Trinity and are thus susceptible to contamination.

Turning to the wells owned by Grey Forest Utilities (GFU), Mr. Khorzad testified that both of GFU's wells are completed in the Middle Trinity Aquifer.<sup>11</sup> Mr. Khorzad asserts that the Upper Trinity and Middle Trinity Aquifers are not hydraulically connected due to the lower sections of the Upper Trinity Aquifer acting as an aquitard restricting the downward migration of groundwater.<sup>12</sup> An aquitard, states Khorzad, is a formation which limits the ability of groundwater to flow through it, typically composed of clay with very low permeability.<sup>13</sup> Protestant, through their expert Dr. Green, maintained that the GFU wells are at risk to be contaminated through recharge to the creek bed at locations where faulting provides a conduit to flow from the surface to the Lower Glen Rose Aquifer.<sup>14</sup> For context, the Middle Trinity Aquifer includes the Cow Creek Limestone, Hensell Sand, and Lower Glen Rose.<sup>15</sup> When pressed on whether the existence of the faults in this particular case actually acted as conduit rather than

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<sup>10</sup> Transcript, 210;10-17.

<sup>11</sup> App. Exh. 12, 7:19-22.

<sup>12</sup> App. Exh. 12, 7:22.

<sup>13</sup> *Id.* at ln. 24-45.

<sup>14</sup> GEAA-200, 12: 14-16.

<sup>15</sup> *See* GEAA-106.



a barrier, Dr. Green acknowledged that there is much left unknown regarding the exact location and nature of faults in the area.<sup>16</sup> Dr. Green grounds these opinions in his review of relevant literature (Clark et. al., 2009; Clark et. Al., 2016) and a personal inspection of the area.<sup>17</sup> Ultimately, when asked to opine whether the presence of nearby faults could provide a potential pathway for contaminants to travel from the discharge point to GFU wells, Dr. Green stated:

Yes. All -- yes, all these faults do. And in likelihood, there are other faults along that transect that are not mapped because they were not discovered during mapping, that's just the nature of geology and the challenges in mapping. So, there could be additional faults between the discharge point and down in proximity of the wells. But as I mentioned, there's no firm way to anticipate what the flow paths are unless you put in a tracer.<sup>18</sup>

OPIC appreciates the difficulty involved in geological mapping, but OPIC cannot find that Protestant has successfully rebutted the prima facie demonstration without more direct evidence showing communication between the Middle and Upper Trinity Aquifers. Accordingly, OPIC must respectfully find that Applicant has met its burden with respect to groundwater.

### **Antidegradation**

Protestant's expert, D. Lauren Ross, Ph. D., P.E., also opined as to water quality, specifically the existing uses of receiving waters in accordance with applicable regulations, including Texas Surface Water Quality Standards in 30 TAC Chapter 307.<sup>19</sup> OPIC recognizes that there were a number of criticisms

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<sup>16</sup> Transcript, 88:23-25.

<sup>17</sup> GEAA-200, 12, 15-18.

<sup>18</sup> Transcript, 90:7-15.

<sup>19</sup> GEAA-1-100, 4:1-7.

raised by Protestant with respect to antidegradation, but OPIC has elected to focus its analysis on the issue of total phosphorus limits. Dr. Ross' opinions centered on the fact that the draft permit's total phosphorus effluent limit, a daily average of 0.15 mg/L, is not adequately stringent to prevent additional degradation of the receiving water.<sup>20</sup> Essentially, Protestant urges that the total phosphorus contributions to Helotes Creek in the effluent discharge at the concentration proposed in the application would degrade Helotes Creek water quality by more than a de minimis extent and result in excessive algae growth.

With respect to phosphorus, the draft permit proposes a daily average effluent limit of 0.15 mg/L for total phosphorus for the Interim I, Interim II, and Final permit phases.<sup>21</sup> Dr. Ross testified that the proposed total phosphorus effluent limit is significantly higher than existing Helotes Creek phosphorus concentrations, based on the available data, and in fact, the best available data indicates that the total phosphorus effluent limit in the draft permit is at least 7.5 times higher than existing typical concentrations in Helotes Creek.<sup>22</sup> Dr. Ross noted that the impact of an increase in Helotes Creek phosphorus concentration from 0.02 mg/L to 0.15 mg/L would significantly affect aquatic life because, due to naturally alkaline soils and associated lower phosphorus availability, aquatic life in Texas Hill Country streams have adapted to low-phosphorus concentrations.<sup>23</sup> Dr. Ross pointed to Protestant evidence which illustrates a

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<sup>20</sup> *Id.* at 5:8-9.

<sup>21</sup> GEAA 1-100, 15:24-25.

<sup>22</sup> GEAA 1-100, 16:10-11.

<sup>23</sup> GEAA 1-100, 16:15-18.

decline in species diversity when total phosphorus concentrations increase from less than 0.025 to 0.1 mg/L.<sup>24</sup> Likewise, Dr. Ross testified that Figure 4 on Protestant Exhibit GEAA-119 similarly summarizes research indicating significant changes in benthic algae when total phosphorus concentrations in Texas Hill Country streams increase to more than 0.02 to 0.05 mg/L. Accordingly, Dr. Ross concludes that the concentration of total phosphorus in Texas Hill Country streams like Helotes Creek should be maintained at 0.02 mg/L to maintain natural algae assemblages and to protect the most sensitive fish species.<sup>25</sup>

In response, Applicant's expert, Paul Price, attempted to challenge Dr. Ross' opinions as generally opposing *all* discharge into state waters stating, "if the TCEQ adopted her interpretation, no new discharge permits could be granted in Texas."<sup>26</sup> Speaking directly to Dr. Ross' concerns about phosphorus limits, Mr. Price stated that Dr. Ross' conclusions did not include effluent reuse as a factor that will influence phosphorus levels.<sup>27</sup> Mr. Price testified that because Applicant intends to reclaim treated effluent for beneficial reuse purposes by land irrigation at a very high rate, potentially 100%, these practices will dramatically reduce phosphorous levels discharged from the treatment plant.<sup>28</sup> On cross-examination, Dr. Ross conceded that she was previously unaware of Applicant's plans for beneficial reuse, and the fact that Applicant had already applied for the

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<sup>24</sup> GEAA 1-100, 16:22-28.

<sup>25</sup> *Id.* at 16.

<sup>26</sup> App. Exh. 20, 33:13-14.

<sup>27</sup> App. Exh. 18, 16:7-10.

<sup>28</sup> App. Exh. 18, 16:7-10.

requisite Chapter 210 Authorization required for such activity.<sup>29</sup> However, Dr. Ross later clarified that Applicant's beneficial reuse does not change her opinions regarding appropriate phosphorus limits because proper compliance with water quality standards requires one to examine critical conditions, and so, it is still necessary to look at the impact upon full discharge amounts.<sup>30</sup>

Executive Director witness Michelle Labrie testified about the ED's reasoning behind the decision to set a 0.15 mg/L limit for this permit and spoke to the lower limits achieved in the recently permitted *Liberty Hill* case.<sup>31</sup> When asked about *Liberty Hill*, Ms. Labrie acknowledged that the facility had been achieving a .05 mg/L limit, and accordingly, Ms. Labrie acknowledged that this limit was in fact a reasonably-achievable technology based limit.<sup>32</sup> However, Ms. Labrie went on to state that the ED did not consider whether a lower phosphorus limit was reasonably achievable here, because in the ED's view, such an inquiry was not necessary as the ED considered the standard .15mg/L limit to be sufficiently protective.<sup>33</sup> Ms. Labrie elaborated, stating this permit was distinct from *Liberty Hill* because of the site characteristics that would restrict algal growth present at Helotes Creek such as shallow, slow-moving perennial water, more tree canopy, and stagnant water.<sup>34</sup> However, Ms. Labrie acknowledged that the ED had no baseline information for which to compare phosphorus levels in

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<sup>29</sup> Transcript, 135:15-17.

<sup>30</sup> Transcript, 143-144.

<sup>31</sup> Transcript, 46-47.

<sup>32</sup> Transcript, 47:10-11.

<sup>33</sup> Transcript 47:17-20.

<sup>34</sup> Transcript 49:1-6.

the receiving waters, and that even small amounts of total phosphorus can have large effects – so the difference between .15mg/L and .05mg/L, when it comes to total phosphorus is significant.<sup>35</sup> When pressed for clarification as to the ED’s rationale for setting the .15mg/L limit, Ms. Labrie again confirmed that it was predominantly based on site characteristics such as receiving stream features and canopy cover.<sup>36</sup>

Upon consideration of all testimony regarding the proposed daily average effluent limit of 0.15 mg/L for total phosphorus for the Interim I, Interim II, and Final permit phases, OPIC agrees with Protestant’s contention that Applicant has failed to meet its burden to show that the draft permit is sufficiently protective of water quality. For one, ample evidence was introduced showing virtually no shading around Helotes creek immediately below the proposed outfall (a characteristic the ED identified as pertinent to its decision to select a .15mg/L limit).<sup>37</sup> Further, Dr. Ross, who performed a site visit in this case, testified that the relevant streambed is flat, similar to the South Fork San Gabriel River (from *Liberty Hill*), which would provide a larger surface area to receive sunlight and to stimulate that algae bloom.<sup>38</sup> Accordingly, OPIC agrees with Protestant’s contention that a lower total phosphorus limit should be evaluated, and would recommend a new limit based upon reasonably achievable technology. Accordingly, OPIC must respectfully find that Applicant has failed to meet its

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<sup>35</sup> Transcript 57:13-14.

<sup>36</sup> Transcript 58:1-2.

<sup>37</sup> See Exhibit GEAA-111; Transcript 138-139.

<sup>38</sup> Transcript 139:21-25.

burden with respect to Issue A, and recommend denial of the permit, or in the alternative, remand to the ED for further evaluation of the total phosphorus limit.

**b. Whether the draft permit is protective of wildlife, including endangered species in accordance with Texas Surface Water Quality Standards**

Protestant's expert, Jordan Crago, Ph.D., testified regarding impact upon the environment and the animals that rely upon the relevant watershed from the proposed discharge permit. Dr. Crago opined that his chief concerns include impact to threatened and endangered wildlife, failure to consider effects of contaminants such as household insecticide, pyrethroids and fipronil, as well as per- and polyfluoroalkyl substances (PFAS) concentrations in the proposed discharge, and failure to obtain and consider baseline concentrations of PFAS found within effluent discharge from similar wastewater discharge facilities that draw from a similar household demographic, such as those in the Austin suburban region.<sup>39</sup>

Dr. Crago testified that the proposed discharge would contribute to an increase in anthropogenic contaminants at the discharge site that would potentially affect a host of species, endangered, threatened, and native to the area.<sup>40</sup> This increase, he stated, is not expected to account for acute mortality of exposed species, but it is reasonable to expect chronic toxicity, especially as it relates to bioaccumulation and biomagnification in sensitive bird species and species undergoing sensitive life stages such as egg-larval development and

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<sup>39</sup> GEAA-3

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

metamorphosis.<sup>41</sup> For example, Dr. Crago testified that of all species that are part of the food web for this area, and therefore, it would be expected that there would be an increased risk of bioaccumulation and biomagnification of any PFAS compounds present in the proposed discharge throughout the food web.<sup>42</sup> Dr. Crago referenced a number of studies that have demonstrated that adult birds that nest downstream from a wastewater treatment plant have higher concentrations of PFAS compounds in their bodies and that they pass on some of the PFAS to the chick, as studies have recorded PFAS concentrations in the eggs.<sup>43</sup> That said, Dr. Crago admitted it was difficult to determine the ‘source’ of the PFAS.<sup>44</sup>

Since the crux of Protestant’s argument with respect to Issue B hinges on PFAS or contaminants of emerging concern (CEC), OPIC will address this issue directly. ED witness Michelle Labrie noted that currently, there is not yet established guidance from the EPA for PFAS, and as such, TCEQ does not account for these contaminants in evaluations of wastewater discharge permits.<sup>45</sup> Applicant’s expert, Kelly Tuttle, Ph.D., CIH, DABT, echoed the ED’s statement with respect to the current lack of meaningful regulation with respect to CECs or PFAS. She testified that due to the emerging nature of these compounds, there is often limited data on their toxicity and environmental fate, making it difficult to

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<sup>41</sup> GEAA-300, 6:1-4.

<sup>42</sup> GEAA-300, 13:12-14.

<sup>43</sup> GEAA-300, 13:17-21.

<sup>44</sup> *Id.* at 13:21.

<sup>45</sup> ED-ML-1, 7:29-31.

establish appropriate regulations and monitoring standards.<sup>46</sup> While OPIC shares Protestant's concerns regarding the potential for negative effects resulting from bioaccumulation and biomagnification of prolonged exposures to contaminants CECs, PFAS, and the like -- absent relevant regulations and quantitative knowledge regarding the source, fate, and effect of each substance, these contaminants cannot yet be claimed as a basis for permit denial since there is no pertinent regulatory framework addressing them. However, because OPIC has already found that the draft permit does not sufficiently protect surface water quality with respect to its total phosphorus limit, and recognizing that there is ample evidence in the record demonstrating that an increased phosphorus concentration would significantly impact aquatic life, OPIC concludes that Applicant cannot be found to have met its burden with respect to Issue B.

**c. Whether the draft permit complies with siting requirements regarding flood plains and wetlands.**

Part of the purpose of 30 TAC Chapter 309, Subchapter B is to prohibit the issuance of a permit for a domestic wastewater treatment facility in areas determined to be unsuitable or inappropriate for the facility, as designed.<sup>47</sup> The Commission may not issue a permit for a wastewater treatment plant that is located in wetlands or in a 100-year flood plain—subject to narrow exceptions.<sup>48</sup> Wetlands are defined as areas that are inundated or saturated by water and normally support vegetation typically adapted to such conditions.<sup>49</sup>

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<sup>46</sup> App. Ex. 18, 12:20-29.

<sup>47</sup> 30 TAC § 309.10(b)

<sup>48</sup> 30 TAC § 309.14(a). See also 30 TAC § 309.13(a) & (b).

<sup>49</sup> 30 TAC § 309.11(10).



Applicant witness, Mr. Hotchkiss, and ED witness, Mr. Rahim, both stated that the proposed plant location is not in a 100-year floodplain.<sup>50</sup> Protestant presented no evidence claiming that the plant would be located on a floodplain. Conversely, the Applicant provided a map that shows that there is limited 100-year floodplain on the proposed development site, but that none of it is proximate to the proposed locations of the plant or the outfall.<sup>51</sup> This map does show that the discharge route enters a 100-year floodplain area after it leaves the project site—more than a mile downstream from the outfall.<sup>52</sup> However it is Mr. Rahim’s opinion that it is only the location of the plant that is relevant to this analysis—not the location of the outfall or discharge route.<sup>53</sup>

Protestant witness, Mr. McEntire, admitted on cross-examination that he has no reason to believe there is a wetland in the area of the Facility, outfall, or discharge route.<sup>54</sup> Protestant presented little evidence that there is wetland anywhere in the vicinity of the proposed plant. The photos provided by the Applicant show that the area where the Facility would be located is mostly arid and does not have standing water or any vegetation associated with wetland conditions.<sup>55</sup> Mr. Rahim testified that the ED did no independent analysis to verify that the plant would not be located on a wetland.<sup>56</sup> Mr. Hotchkiss testified that further investigation into whether the area qualified as a wetland was not

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<sup>50</sup> App. Exh. 2, 9:17-18.

<sup>51</sup> App Exh. 10, Internal Exh. 3. APP000412.

<sup>52</sup> *Id.*

<sup>53</sup> Transcript3, 179:1-7.

<sup>54</sup> Transcript1, 41:5-18.

<sup>55</sup> See App. Exh. 10, Site Photographs No. 26, 28, 29. See also App. Exh. 1, APP000261.

<sup>56</sup> Transcript2, 181:6-22.

justified based on conditions he himself observed at the site and a review his firm performed of the National Wetlands Inventory Mapper and USDA NRCS Web Soil Survey tools.<sup>57</sup>

OPIC therefore finds that the preponderance of the evidence shows that neither the plant nor the outfall would be located in wetlands or a 100-year floodplain. Accordingly, OPIC finds that Applicant has met its burden of proof with respect to Issue D.

**d. Whether the draft permit should be denied or altered based on considerations of need or regionalization.**

Under Texas Water Code (TWC) § 26.081(a), it is “state policy to encourage and promote the development and use of regional and area-wide waste collection, treatment, and disposal systems ... to prevent pollution and maintain and enhance the quality of the water in the state.” Under TWC § 26.0282:

In considering the issuance ... of a permit to discharge waste, the commission may deny or alter the terms of the proposed permit ... based on consideration of need, including the expected volume and quality of the influent and the availability of existing or proposed areawide or regional waste collection, treatment, and disposal systems not designated as such by commission order.....

In order to show compliance with regionalization policy, the Commission requires Applicants to determine the following:

- (1) whether any portion of the proposed service area is located in an incorporated city;
- (2) whether any portion of the proposed service area is located inside another utility’s Certificate of Convenience and Necessity (CCN) area; and

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<sup>57</sup> App. Exh. 2 at 10:7-10.

(3) whether there are any domestic permitted wastewater treatment facilities or collection systems located within a three-mile radius of the proposed facility.

If an applicant's service area is located within another utility CCN area, then the ED demands that the applicant provide a justification for the proposed facility.<sup>58</sup> Similarly, to demonstrate need for the permit, the Commission asks an applicant to provide justification and cost comparisons between the cost of the proposed facility and the cost of connecting to local facilities or collection systems.<sup>59</sup>

Protestant witness and Mayor of Grey Forest, Paul Carro, testifies that the City of Grey Forest and its residents want to limit the area's density.<sup>60</sup> He opines that there is no need for such dense development, and it would be contrary to the City's goals to preserve the area's natural environment.<sup>61</sup> The application shows, and Applicant witnesses confirm, that there will be almost three thousand homes on the proposed development and a daily flow greater than five thousand gallons per day.<sup>62</sup> Applicant argues that the plant is needed to provide wastewater service to this proposed development.<sup>63</sup> It is Mr. Rahim's position that the Applicant can demonstrate need by providing details on why an applicant is applying for the permit and showing that there isn't another facility in the area that could provide the service to be provided by the proposed facility.<sup>64</sup>

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<sup>58</sup> See ED Exh. AR-1, 14:3-4.

<sup>59</sup> Texas Commission on Environmental Quality, Form TCEQ-10053-Instructions, Instructions for Completing Domestic Wastewater Permit Applications, Instructions for Domestic Technical Report 1.1 (hereinafter, Form TCEQ-10053-Instructions), at 64-65.

<sup>60</sup> GEAA-400, 8-9.

<sup>61</sup> *Id.*

<sup>62</sup> App. Exh. 1, APP000286. See also Transcript 1, 179:24.

<sup>63</sup> *Id.*

<sup>64</sup> App. Exh. 2 at 14:4-12.

The application correctly indicated that the proposed development is not in an incorporated city or within three miles of any permitted wastewater treatment facilities or collection systems.<sup>65</sup> However, the application does indicate that the proposed development is within the CCN of the San Antonio Water System (SAWS).<sup>66</sup> Mr. Hotchkiss admits that the site is within the certificated limits of the SAWS service area but claims that connection into the SAWS system is not feasible.<sup>67</sup> Applicant provided an attachment in the application that clarifies that the proposed development is within SAWS' water CCN but outside of their wastewater CCN.<sup>68</sup> This document claims that SAWS would have to develop infrastructure and possibly increase fees to provide service to the proposed development and Applicant is therefore not permitted to discharge into their wastewater system.<sup>69</sup> Mr. Hotchkiss opines that there is no other regional sewer provider that could serve this proposed development and that the proposed Facility is the only viable, sustainable solution.<sup>70</sup> In fact, he describes the proposed Facility as providing superior treatment to all feasible alternatives.<sup>71</sup>

Mr. Rahim testified that Applicant properly demonstrated the need for the proposed Facility and met the regionalization requirements.<sup>72</sup> He opined that Applicant properly demonstrated need by providing information on expected

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<sup>65</sup> App. Exh. 1, APP000286-287.

<sup>66</sup> *Id.*

<sup>67</sup> *See* App. Exh. 2, 12:3-8.

<sup>68</sup> App. Exh. 1, APP000303.

<sup>69</sup> *Id.* *See also* App. Exh. 2 at 14:24-26

<sup>70</sup> App. Exh. 2, 12:10-15.

<sup>71</sup> *Id.* *See also* Transcript1, 180:8-25.

<sup>72</sup> ED Exh. AR-1, 13-14.

flows, the lack of alternative facilities within 3 miles, and an analysis of whether it was economical to transport wastewater to any facility beyond that distance.<sup>73</sup> He claims that a detailed cost comparison was not necessary or possible because there were no feasible alternatives.<sup>74</sup> OPIC agrees with the ED that the Applicant need not show that there is currently a demand for wastewater service, but rather that the need will exist under current development plans.<sup>75</sup> Similarly, Mr. Rahim opined that the application provided adequate justification for the proposed Facility and therefore complies with Texas' regionalization policy.<sup>76</sup>

OPIC therefore agrees with the ED that Applicant has met its burden of proof with respect to Issue G.

#### **IV. Conclusion**

For the reasons discussed above, OPIC concludes that Applicant has met its burden with respect to all referred issues except for Issues A and B. Specifically, Applicant has not shown that the draft permit's total phosphorus limit would be protective of water quality or aquatic life. OPIC would therefore respectfully recommend denial of the permit, or in the alternative, remand to the ED for further evaluation.

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<sup>73</sup> ED Exh. AR-1, 14:20-24. See also Transcript3, 183-184.

<sup>74</sup> Transcript3, 188:11-16.

<sup>75</sup> ED Exh. AR-1, 14:4-12. See also Transcript3, 185-186.

<sup>76</sup> ED Exh. AR-1, 15-16. See also Transcript3, 188-189.

Respectfully submitted,

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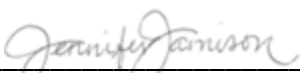
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### CERTIFICATE OF SERVICE

I hereby certify that March 11, 2025, the foregoing document was filed with SOAH, the TCEQ Chief Clerk, and copies were served to all parties on the attached mailing list via hand delivery, facsimile transmission, electronic mail, inter-agency mail, or by deposit in the U.S. Mail.

  
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