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Emily Lindley, *Commissioner*
Bobby Janecka, *Commissioner*
Toby Baker, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

June 24, 2022

Laurie Gharis
Texas Commission on Environmental Quality
Office of the Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087

Re: Application from Kendall West Utility, LLC for new TPDES Permit No.
WQ0015787001, TCEQ Docket No. 2021-0755-MWD;
SOAH Docket No. 582-22-0489

Dear Ms. Gharis:

I have enclosed the Executive Director's Reply to Exceptions to the Proposal for Decision. Please contact me if you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "Stefanie Skogen".

Stefanie Skogen
Staff Attorney
Environmental Law Division

Enclosure

cc: Mailing list

SOAH Docket No. 582-22-0489
TCEQ Docket No. 2021-0755-MWD

Application from Kendall West	§	Before the State Office of
Utility, LLC for new Texas Pollutant	§	
Discharge Elimination System Permit	§	
No. WQ0015787001	§	Administrative Hearings

Executive Director’s Reply to Exceptions to the Proposal for Decision

I. Introduction

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ) provides the following reply to the exceptions to the proposal for decision (PFD) filed by the Protestants. The Applicant, Kendall West Utility, LLC (KWU) did not file any exceptions to the PFD. While the ED’s recommendation as detailed in its closing argument, reply to closing arguments, and exceptions to the PFD has not changed, the ED offers the following based on the record to respond to arguments made by the Protestants.

II. Water Quality

While 30 Tex. Admin. Code § 307.4 does not expressly define water quality, it goes describes in detail the criteria and attributes that effluent and receiving waters must meet to comply with the Texas Surface Water Quality Standards. Additionally, as expressed in the ED’s closing arguments, these standards were adopted in accordance with the Clean Water Act and the Texas Water Code¹, and therefore should be in agreement with the Clean Water Act, including the “definition” of water quality the Protestants refer to in 33 U.S.C. § 1251(a). However, the ED notes that this “definition” is not an explicit definition either.

As discussed throughout this Reply and the ED’s closing arguments, the effluent parameters are designed to protect surface water quality in the receiving waters, and the draft permit is in compliance with 30 Tex. Admin. Code § 307.4, and other relevant rules.² Furthermore, as stated in the ED’s closing arguments, “The regulatory scheme for discharge permitting largely focuses on the discharge’s potential impacts on surface water. However, this does not mean groundwater is being ignored. It simply means that, as far as the outfall discharges are concerned, groundwater will be protected when surface water is protected.”³

III. Existing Uses and Human Health

As stated in the ED’s closing arguments, “ED staff took all the necessary steps to make sure the draft permit will protect the assigned recreation and aquatic life uses and water quality. While this does not mean water quality will necessarily remain

¹ ED’s Closing Arg. 7.

² See ED Ex. 1, at 9:1-5.

³ ED’s Closing Arg. 8.

exactly as it currently is, at least with regard to the initial receiving waters before ambient quality levels return downstream, it does mean both discharge routes will remain safe for humans to recreate in and aquatic organisms to live in at their current use levels.”⁴ This preservation of existing uses, including recreation, along with the general protection of water quality discussed in Section II, is expected to preserve the Protestants use and enjoyment of their property.

Additionally, as stated in the ED’s closing arguments, “one of the purposes of the Standards is to “maintain the quality of water in the state consistent with public health.”⁵ This purpose has been implemented in both the narrative and numerical requirements in the Standards.”⁶

IV. Algae and Aesthetics

(A) Dissolved Oxygen:

As explained in the ED’s closing argument, the Dissolved Oxygen criteria was determined using Table 3 in the Standards, which is the same as Table 1 in the IPs, and is based on the assigned aquatic life use.⁷ The IPs explicitly state that “Effects on dissolved oxygen due to the presence of aquatic plants are usually not considered.”⁸ Considering algae effects on dissolved oxygen as the Protestants recommended would require extensive data collection from the water body evaluated and there was not any available. The protestants frequently reference available data for background water quality, however the referenced data was from other water bodies a significant distance downstream from the discharge or from a different watershed altogether.⁹

(B) Total Phosphorus

As stated in the ED’s closing argument, “Using the dissolved oxygen criteria, dissolved oxygen modeling was used to determine what levels of ... pollutants can be present in the effluent but still maintain the receiving waters’ needed dissolved oxygen levels.”¹⁰ A total Phosphorus limit was recommended, and the ED reiterates that “Based on the proposed flow volumes and guidance in the IPs ... will help prevent the growth of excessive aquatic vegetation, including algae.”¹¹ Because the Protestants’ primary aesthetic concern is related to algae, this will in turn alleviate any aesthetic concerns, as well as other concerns including but not limited to the Protestants concern regarding algae consuming dissolved oxygen and negatively affecting human health. Finally, the ED notes that, as explained in the dissolved oxygen discussion above, the Protestants similarly used data from waterbodies that were a significant distance from the discharge route.¹²

⁴ ED’s Closing Arg. 16.

⁵ 30 TEX. ADMIN. CODE § 307.1 (West 2021); *accord* TEX. WATER CODE ANN. § 26.003 (West 2018).

⁶ ED’s Closing Arg. 10.

⁷ *Id.* at 14.

⁸ Ex. ED-5 at 84.

⁹ *See* ED’s Response to Closing Arg. 7.

¹⁰ ED’s Closing Arg. 14.

¹¹ *Id.* at 15.

¹² ED’s Response to Closing Arg. 5.

V. Antidegradation Review

The ED's antidegradation review is described in detail in the ED's pre-filed testimony, closing arguments, and other documents. However, the ED notes that all relevant federal and state statutes, rules, and regulations were complied with, and the related required actions and reviews taken by the ED in its permit application review were performed in compliance with those statutes, rules, and regulations. No violation of Texas Surface Water Quality Standards related to either tier of the antidegradation review is expected in the receiving waters if the facility is operated in accordance with the draft permit and TCEQ's rules. This is supported by the evidence presented by the ED throughout this proceeding and the ALJ's PFD.

As expressed in Section II, TCEQ's rules were adopted in accordance with the Clean Water Act and the Texas Water Code. Therefore, all state statutes and rules, as currently adopted, are compliant with all federal requirements, including the requirement for the TCEQ antidegradation review to be as protective as the EPA's. Furthermore, as stated in Jeff Paull's testimony, TCEQ does not propose to include the term "harm" as part of any antidegradation standard, but rather those standards are as laid out in TCEQ rules and in the ED's testimony and closing arguments.¹³

Regarding the tier 2 review specifically, as is stated in the ED's closing argument, "In addition to considering available information, evaluating potential parameters of concern, and applying the water quality screening that was performed for the application, [ED Staff] used the Tier 2 review guidance in the IPs, which includes examples of when degradation is or is not likely to occur, to conduct a Tier 2 review"¹⁴and determined that no degradation of the receiving waters is expected.

IV. Conclusion

As the ED has asserted throughout this case, KWU's application and the draft permit comply with the applicable federal and state rules and statutes and TCEQ policies, and all the referred issues should be settled in favor of granting the application. After examining the other parties' exceptions to the PFD, the ED continues to support this position. Therefore, the ED again requests that the Commission adopt the ALJ's proposed order with the ED's recommended changes in its exceptions to the PFD and issue the draft permit.

¹³ See, Tr. Vol. 2 at 232-233.

¹⁴ ED's Closing Arg. 18.

Respectfully submitted,

TEXAS COMMISSION ON ENVIRONMENTAL
QUALITY

Toby Baker, Executive Director

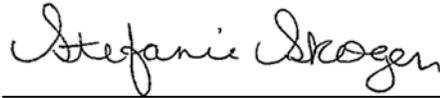
Charmaine Backens, Deputy Director
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By:  _____

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Certificate of Service

I certify that on June 24, 2022, a copy of the foregoing document was sent by electronic mail to the persons on the attached mailing list.



Stefanie Skogen, Staff Attorney
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