

State Office of Administrative Hearings

Kristofer S. Monson
Chief Administrative Law Judge

January 4, 2023

Mary Smith
General Counsel
Texas Commission on Environmental Quality
12100 Park 35 Circle, Bldg. F, Room 4225
Austin Texas 78753

VIA EMAIL

**RE: SOAH Docket No. 582-22-1222; TCEQ Docket No. 2021-0999-MWD;
Application by City of Liberty Hill for Renewal of Texas Pollutant
Discharge Elimination System Permit No. WQ0014477001**

Dear Ms. Smith:

This letter constitutes our response to the exceptions and replies to exceptions that have been filed in response to our Proposal for Decision (PFD) in this case.

Water Quality Standards

In the PFD, the Administrative Law Judges (ALJs) determined that the preponderance of the evidence established that a Total Phosphorus (TP) limit of 0.15 mg/L, as proposed in the Draft Permit, is not sufficiently protective of the receiving waters in accordance with the Texas Surface Water Quality Standards (TSWQS). Based on the evidence, the ALJs found that a TP limit of 0.05 mg/L would meet the TSWQS as implemented by the TCEQ through the Implementation Procedures (IPs).

Protestant Morris excepts to the TP limit of 0.05 mg/L as not sufficiently protective of the receiving waters; and asserts that 0.02 mg/L is a more appropriate TP limit. Protestant Morris contends that 0.02 mg/L TP is a reasonably achievable technology-based limit (RAT), and that a limit of 0.05 mg/L does not take into consideration the sensitivity of the site, as required by the IPs. Protestant Morris also

excepts to the lack of a limit on total nitrogen (TN) or the reduction of the nitrate-nitrogen limit in the Draft Permit.

The ALJs considered the evidence presented on these issues and determined that although evidence concerning the sensitivity of the site indicates that algal blooms occur at concentrations above 0.02 mg/L TP, a limit of 0.05 mg/L TP was demonstrated as RAT. The ALJs did not recommend a limit on TN or a reduction of the nitrate-nitrogen limit in the Draft Permit, relying instead on the reduction of the TP limit to 0.05 mg/L to prevent excess algal growth. Whether the sensitivity of the site necessitates going beyond RAT, or whether limits on TN or nitrate-nitrogen should be implemented in lieu of a lower TP limit to guard against such algal growth, are possibilities the Commission may consider.

The Executive Director (ED) excepts to the recommended 0.05 mg/L TP limit for all phases. The limited arguments raised in the ED's exceptions were all presented at the contested case hearing and were considered by the ALJs in drafting the PFD. As such, the ED's exceptions do not contain any new information that would warrant a change in the PFD.

Applicant excepts to the recommended 0.05 mg/L TP limit as not supported by sufficient evidence. Specifically, Applicant re-urges the same arguments that were considered by the ALJs in drafting the PFD—namely that the CLEARAS technology could present problems with the ammonia-nitrogen limits, and that Applicant has not reviewed other treatment technologies. Protestant Morris's reply to the Applicant's exceptions accurately notes that the burden of proof remains with Applicant. As indicated in the PFD, the Protestants rebutted the prima facie demonstration on this issue, and the preponderance of the evidence demonstrated that an effluent limit of 0.05 mg/L TP has been demonstrated as a reasonably achievable technology in this case.

In their exceptions, the Applicants assert that the ALJs have adopted trophic boundaries as a TSWQS. This is incorrect. The ALJs merely used the terms as the parties and experts did throughout the hearing—to describe the characteristics of bodies of water. To the extent this causes confusion for any party, the ALJs recommend amending the following Findings of Fact (FOF) to replace the terms with the characteristics set forth in the PFD that they are intended to describe:

FOF 80. Based on a maximum effluent discharge of 1.2 MGD at 0.1 mg/L TP, the WASP model concluded that the River will be eutrophic high in nutrients and algae and have lower dissolved oxygen below the outfall, and that nuisance benthic algae levels are predicted to occur most of the time.

FOF 90. The best available information indicates that a TP limit of no more than 0.02 mg/L would be necessary to maintain oligotrophic high quality, clear water, high dissolved oxygen, and excellent aquatic animal habitat conditions.

With regard to Applicant's exceptions concerning the excessive algal growth, they were all presented at the contested case hearing and were considered by the ALJs in drafting the PFD. As such, they do not contain any new information that would warrant a change in the PFD.

With regard to antidegradation, Protestant Morris identifies a paragraph on page 58 of the PFD that she believes may be misleading to the reader that only a Tier 2 analysis is required, instead of both a Tier 1 and Tier 2 analysis. As stated on page 52 of the PFD, both a Tier 1 and a Tier 2 analysis are applicable. While the ALJs do not believe the PFD needs to be modified in response to this exception, the ALJs do recommend that the following FOF be added for clarification:

FOF 99A. The Application is subject to a review by the TCEQ under Tier 1 and Tier 2 of the antidegradation policy.

Nuisance Issues

As discussed in the PFD, the ALJs found that the Applicant met the narrow requirements of 30 Texas Administrative Code § 309.13(e). In response, Protestant Morris excepts to the PFD's "overly narrow" reading of the rule. Protestant Morris does not argue that the ALJs improperly applied to provisions in the rule, instead pointing to the purpose of the rule and Commission's authority to require changes to the permit in order to align the requirements of the permit according to the purpose of the rule.

The ALJs considered Protestant Morris's arguments in their PFD and will not re-state their analysis here. Protestant Morris proposes to include provisions that go beyond the Commission's regulatory process, and, as stated in the PFD, the ALJs decline to recommend provisions that do not comport with Commission rules.

Compliance History and Regionalization Policy

In the PFD, the ALJs determined that the Protestants failed to rebut the presumption that Applicant requires the level requested in the Draft Permit, and did not recommend changing the total capacity to 2.4 MGD, as requested by the Protestants, from 4.0 MGD, as requested by Applicant.

Protestant Morris argues that the PFD misunderstands Protestant Morris's argument regarding the rationale for reducing the total flow allowable in the Draft Permit. As discussed in the PFD, Protestants failed to rebut the prima facie demonstration that it is reasonable for Applicant to request 4.0 MGD as the total capacity, in order to serve the needs of a growing area. Thus, the ALJs considered Protestant Morris's arguments in their PFD, and decline to amend their recommendation on this issue.

Facility Management and Monitoring

In the PFD, the ALJs recommended that the Draft Permit be amended to require both the facility operator and the third-party operator to hold a Class A license. In response, the Applicant and the ED argue that the 30 Texas Administrative Code Section 30.350 only requires a Class B license, and that it already employs a Class A license holder. The ALJs considered these arguments in their PFD and will not re-state their analysis here. Accordingly, the ALJs recommend that the Commission overrule the Applicant's and ED's exception on this issue.

Protestant Morris recommended a clarification to the PFD to insert FOF 126 into the ALJs analysis in the body of the PFD. While the ALJs do not disagree that the obligations set forth in FOF 126 are the "certain obligations" referenced on page 94 of the PFD, the ALJs do not believe such modification to the body of the PFD is necessary.

In the PFD, the ALJs recommended that the Draft Permit be amended to require additional monitoring and reporting requirements: requiring the Applicant to complete a nutrient sampling plan and to publicly post and notify the public of certain reported information. The Applicant and ED argue that requiring Applicant to complete a nutrient sampling plan is unnecessary, as it has already recently completed one. However, as stated in the PFD, the ALJs did take note of the fact that, at the time of writing the PFD, Applicant was already in the process of performing a nutrient sampling plan, and the fact that it was already in the midst of performing that type of study would only facilitate its compliance with that requirement. Protestant Morris excepts to interpreting the sampling plan completed after the hearing in this case, in November 2022, as satisfying this requirement and urges the sampling plan to be an ongoing requirement, or at least required for two years after the new phosphorus limits are implemented.

The ALJs clarify that the nutrient sampling plan completed by the Applicant in November 2022, and referred to in footnote 421 of the PFD, may satisfy the requirement that the permittee conduct a study of nutrients and algal growth in the receiving stream *prior to* discharge; however, it does not satisfy the second half of the required sampling plan—which requires the permittee to continue the study for at least two years *after* discharge.¹ For clarity, the ALJs recommend amending the proposed order as follows:

1. The Application by the City of Liberty Hill for Texas Pollutant Discharge Elimination System Permit No. WQ0014477001 is approved and the attached permit is issued with the following modifications:
 - a TP effluent limit of 0.05 mg/L for all phases;
 - both the operator and third-party operator must have a Class A license;
 - a modification of the study outlined in “Other Requirements” Item No. 9, to include a nutrient sampling plan that mirrors language in the 2004 permit, which requires the permittee to conduct a study of nutrients and algal growth in the receiving stream prior to discharge,

¹ The study referenced by Applicant was not part of the record and is not in evidence.

and for at least two years after discharge under the terms of this permit; and

- public posting and notification of Monitoring and Reporting Requirements Nos. 1 and 7a on a public website dedicated to providing information about the wastewater treatment plant and discharge.

With respect to requiring Applicant to publicly post certain reported information on its website, Protestant Morris argues that these reports must be provided contemporaneously with being provided to the Commission, in addition to the public receiving an email and text regarding the same information. Applicant did not except to providing the information on the website, as prescribed by the PFD, but it does take issue with expanding the requirement to provide personal notice. The ED excepts to the requirement altogether, stating that there are no rules requiring the publication and maintenance of website by a permittee. The ALJs considered the parties' arguments in their PFD, and decline to impose further requirements than the recommendations made in the PFD on this particular issue.

Summary

The undersigned ALJs recommend that the Commission adopt the changes set out in this letter; specifically, the addition of FOF no. 99A, and changes to FOF nos. 80 and 90, and to Proposed Ordering provision no. 1. The ALJs further recommend that the Commission overrule all other exceptions. The PFD is ready for your consideration.

Sincerely,



Meitra Farhadi
Administrative Law Judge



Rachelle Nicolette Robles
Administrative Law Judge

CC: Service List