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	**§**	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

CITY OF LIBERTY HILL'S EXCEPTIONS TO THE REMAND SUPPLEMENTAL PROPOSAL FOR DECISION AND PROPOSED ORDER

City of Liberty Hill ("City" or "Applicant") files these Exceptions to the Proposal for Decision ("PFD") issued on November 10, 2023, by the Administrative Law Judges ("ALJs") in this case. City excepts to the ALJs' recommended action, proposed Findings of Fact, proposed Conclusions of Law, and proposed Ordering Provisions concerning the recommendation that the Draft Permit's total phosphorous ("TP") limit be revised downward to 0.015 mg/L, and any recommendation relying on standards that have not been adopted in any rule or policy of the Texas Commission on Environmental Quality ("TCEQ" or "Commission").

At their heart, the ALJs' recommendations are based on a fundamentally incorrect and improper application of applicable law. Instead of focusing on whether the proposed permit and the limits contained therein would result in degradation to existing uses or harm to existing conditions, the ALJs instead use this proceeding as a vehicle to try to force City to ***improve*** existing environmental conditions from their current state. This is a complete misapplication of existing statutes, agency rules, written policies, and prior administrative decisions, and is based upon no existing authority at all.

The City has gone above and beyond to lower the TP concentration in its effluent. As the PFD points out, for four months between December 2021 and March 2022, Applicant discharged effluent with a monthly average TP concentration of 0.060 and 0.081 mg/L. *See, e.g., proposed*

findings at 75. In 2023, between January to June, the City has operated the plant with a TP discharge average between .054 mg/L and 0.091 mg/L TP each month, which is well below the limits allowed in its existing permit. Exs. SM-27-R to SM-32-R. Most plants in Texas cannot achieve these low limits, and they don't have to because the TCEQ has given them TP permit limits much higher than these averages. The City has operated at this exceptionally low level of TP on its own to acknowledge localized concerns about algae growth and try to work with the community to address such concerns. The City, voluntarily, took major steps to lower the TP limit: it hired a Double A licensed wastewater operator to run the plant, switched from a less efficient SBR treatment system to the high efficiency MBR system, invested in increasing the licensing classifications of its operators, pilot-tested methods to reduce TP in the effluent, and is continuing to consider other alternatives given the characteristics of the location of the outfall.

In the vein of "no good deed goes unpunished," rather than acknowledging the City's efforts toward algae reduction, the ALJs instead use the City's efforts to achieve TP concentrations like 0.05, 0.06, and 0.07 mg/L against the City, by recommending an unprecedentedly low TP limit of 0.015 mg/L—which is well below the TP limit contained in *any discharge permit issued by the TCEQ to date*. Such a recommendation by the ALJs is unfounded in any law or TCEQ policy. In doing so, the PFD establishes a standard where improving water quality is the goal rather than preventing the degradation of water quality. This is not consistent with the law.

The City's exceptions identified herein are an effort to ensure the TCEQ properly applies the law and facts in the record, leading to a final permit that will be consistent with the law and TCEQ's standards. The City respectfully requests that the ALJs' recommendations for the permit be modified to include the changes requested by these exceptions.

I. BACKGROUND AND SUMMARY OF EXCEPTIONS

A. A TP limit of 0.015 mg/L will cause absurd results because it is below the accredited laboratory detection limit.

Because the recommended permit limit of 0.015 mg/L TP is below what any accredited lab in Texas can detect, it is infeasible of implementation. Under the Commission's regulations, compliance data must be provided by an accredited environmental testing lab. 30 Tex. Admin. Code § 25.1. By adopting a limit below the threshold for accredited labs, the TCEQ is adopting a standard incapable of implementation. The TCEQ should never adopt a standard incapable of actual implementation under the rules.

Liberty Hill will be forced to use a non-accredited lab to test a limit below the detection limit of accredited labs. The TCEQ will not accept lab results for demonstration of compliance from a non-accredited lab. Setting the limit below the accredited lab threshold will set the City up for failure from day one. There will be no reliable or approved way for the City to show it is meeting the permit limit. Even worse, there is no explanation in the PFD about how the City will comply with 30 TAC sec. 25.1 once the permit is issued and monthly lab reports must be submitted to TCEQ using a non-accredited lab.

It is not appropriate to treat the City in such a discriminatory manner, when all other permits in the state have permit limits above the detection limit such that those permittees can readily show they are in compliance under the TCEQ's rules using accredited labs. The ALJs' recommendation violates TCEQ's own rules and will put the City in an impossible scenario, where it will not be able to legally demonstrate compliance.

Moreover, the immediate reduction from current permit limits to 0.015 mg/L TP when the permit is issued will be impossible to comply with. A reduction of such an extent, if implemented, needs to be phased in over at least three to four years. If the reduction is immediate, and the plant

is physically unable to operate within the effluent limits without a phase-in period, the plant will exceed effluent limits each month and incur violations. The ALJs' proposal would be impossible to meet initially and would result in potential harm to public health as the City would be unable to operate its treatment facility under such a standard.

B. A TP limit of 0.015 mg/L will set a terrible precedent for all future TPDES permit limits, and will invalidate all other TPDES permits in the State under the Clean Water Act.

A limit of 0.015 mg/L TP is 1/10 of the lowest permit limit required by TCEQ in any other wastewater discharge permit. That merits being stated again: ***the ALJs' recommendation not only would be the lowest TP limit in any permit in the state, it would be only 10% of the lowest limit adopted for any permit throughout the state.*** Adopting such a low standard will set an impossible precedent for other permits to achieve and will draw into question the validity of all other permits in the state under the Clean Water Act. If the TCEQ is shown issuing a permit with a TP limit of 0.015 mg/L to prevent excessive algae growth, then arguably every other permit in the state (all of which have TP limits at least 10 times the proposed 0.015 mg/L limit) violates the Texas Surface Water Quality Standards ("TSWQS").

C. The ED is responsible for conducting antidegradation reviews, not the Applicant.

The ED is the party charged with conducting an antidegradation review. The Applicant has no part in conducting that review and the Applicant was not the one who made the decision to not perform a new antidegradation review. The Applicant should not be punished for the lack of an antidegradation review by the ED. If the TCEQ determines that one is necessary, the appropriate remedy is to remand again and require the ED to conduct the antidegradation review, not to punish the Applicant by adopting a TP limit that is impossible to achieve.

D. The PFD improperly creates a new standard of improving water quality instead of applying the law which is designed to prevent degradation of water quality.

By adopting a significantly lower standard based upon alleged existing conditions, the ALJs are not seeking to prevent degradation, but are trying to force this permit to improve water quality from current conditions, which is not appropriate when the law requires only the prevention of future degradation and the maintenance of existing water quality. The PFD alleges that nutrient loading to the San Gabriel River under the Draft Permit will increase, when instead the record demonstrates that nutrient loading will decrease at the requested interim phase and be no more than currently permitted at the final phase. Any suggestion that nutrient loading will increase is false. In fact, the ALJs' proposed Findings of Fact reflect this point, noting that ultimate nutrient loading at the final phase under the Draft Permit would be no more than currently permitted. *See, e.g., proposed findings 93 and 94.*

E. Additional Exceptions to the PFD.

The PFD includes findings and conclusions on issues not remanded to SOAH by the Commission. For example, in proposed findings 141, 142, and 143, the ALJs base their recommendations on the Applicant's compliance history – an issue not remanded by the Commission so there was no argument or evidence admitted by the parties on remand. In fact, the City's compliance history has improved since the original case from 42.14 to 39.46 due to the significant strides to City has taken since 2021 described above. *See* Ex. APP 8 (September 2021 compliance rating); *compare to* Exhibit A to these Exceptions (September 2023 compliance rating). Any findings or conclusions related to issues the Commission did not ask SOAH to review on remand must be struck.

II. DETAILED DISCUSSION OF EXCEPTIONS

A. The ALJs' recommendation that the permit's TP limit be set at 0.015 mg/L violates TCEQ's rules, making it infeasible of application, and creates absurd results.

1. The Commission may only consider data and analyses from accredited laboratories, which cannot detect TP at the magnitude of the proposed TP effluent limit.

The Commission cannot adopt a TP limit of 0.015 mg/L because such a limit would violate its own rules. When the Commission decides matters under its jurisdiction "relating to permits" or relating to "compliance matters," the Commission may accept data and analyses from an environmental testing laboratory for use in its decision "only if the data and analyses are prepared by an environmental testing laboratory accredited by the [C]ommission." 30 Tex. Admin. Code § 25.1. Conventional laboratories accredited by the Commission have a detection limit of 0.02 mg/L for TP. Ex. APP-R-1 at 22. If an accredited laboratory finds TP present at less than 0.02 mg/L, then the laboratory is supposed to report the level as "< 0.02 mg/L". Ex. APP-R-6 at 13. By adopting a TP effluent limit of 0.015 mg/L, the PFD adopts a standard incapable of implementation. In other words, setting a TP effluent limit of 0.015 mg/L would lead to a clear inability to comply with the permit limit, as accredited environmental testing laboratories cannot report a level below 0.02 mg/L with accuracy. The Commission should never adopt a standard that is incapable of actual implementation under its own rules.

In the same vein, the PFD also places too much weight on Dr. Ryan King's testimony because it relied on data from an environmental testing laboratory that is not accredited. PFD at 48–49. Here, the Commission remanded this matter for additional evidence to determine the TP effluent limit necessary to comply with the TSWQS. This determination is one component of the City's application for renewal of its TPDES permit. Because the Commission's decision relates to a permit, it may only consider data and analyses from an accredited environmental testing

laboratory. 30 Tex. Admin. Code § 25.1. Dr. King, however, tested water samples at a laboratory that is not accredited by the Commission. Exs. SM-King-9-R at 6–7, 9–10; APP-R-6 at 12. Significantly, Dr. King admitted that the data used for the papers he has published and relied on was never tested using NELAP approved labs. Remand Tr. Vol. 2 at 56:18–22 (King Cross); *see* 30 Tex. Admin. Code § 25.9 ("[A]ccreditation must be based on an environmental testing laboratory's conformance to the most current standards adopted by the National Environmental Laboratory Accreditation Program and the requirements of this chapter."). So, while Dr. King's testimony may be "credible and persuasive," as the ALJs found,[1] any testimony or expert opinion made in reliance on this laboratory testing—as opposed to those made in reliance on Dr. King's observations—must be given less weight as the Commission cannot rely on data or analyses for compliance purposes from a laboratory that has not been accredited.

2. Adopting a TP effluent limit of 0.015 mg/L would automatically put the City into non-compliance with the Commission's rules, an absurd result.

If the Commission adopts the PFD's TP effluent limit of 0.015 mg/L, then the City would automatically be in non-compliance with the Commission's rules. As described above, an environmental testing laboratory accredited by the Commission does not report TP below 0.02 mg/L. So, the City will be forced to turn to a non-accredited laboratory to test for TP at a magnitude below the detection limit of an accredited laboratory. However, using a non-accredited laboratory creates a reporting issue for the City as the Commission will not consider data and analyses from a non-accredited laboratory. *See* 30 Tex. Admin. Code § 25.1. The PFD fails to thoroughly explain why it treats the City's facility differently from other facilities in the State, which all have a TP effluent limit, if any, above the detection limits of accredited laboratories.

[1] PFD at 49.

The PFD thus sets the City up for failure by proposing a TP effluent limit below the detection capabilities of accredited laboratories and without explaining how the City can comply with 30 Tex. Admin. Code § 25.1.

Moreover, even if an accredited laboratory could detect TP as low as 0.015 mg/L, the City could not comply with such a limit immediately, as such would require significant and costly modifications to its facilities and processes. Because the plant was designed and constructed to achieve a TP effluent limit of 0.15 mg/L, it cannot consistently achieve a limit that is only 1/10 of that. Ex. APP-R-4 at 9:25–26. To achieve an effluent limit even as low as 0.05 mg/L on a regular basis, the City has limited options. It could invest in a reverse-osmosis filtration system. Ex. APP-R-4 at 9:27–28. However, a reverse-osmosis system has an estimated cost of $12.6 million, making it unfeasible for the City to implement currently. Exs. APP-R-4 at 10:22–25, 11:15–17; APP-R-4-02. Although the City is working diligently towards implementing a direct potable reuse system at the plant, such a system would take years to complete. Ex. APP-R-4 at 11:27–12:6. In short, there is no reasonable way for the City to comply with a TP effluent limit of 0.015 mg/L. Because the proposed TP effluent limit yields a "completely unreasonable result"—with respect to compliance and implementation—it should be set aside. *See Tex. Comm'n on Env't Quality v. Friends of Dry Comal Creek*, 669 S.W.3d 506, 517 (Tex. App.—Austin 2023, pet. denied) (noting that an agency order is arbitrary or capricious when the agency considers all relevant statutory factors "but reach[es] a completely unreasonable result").

Accordingly, the City excepts to and recommends rejection of proposed Findings of Fact 66, 109, 110, 112, 114, and 115 and Ordering Provision 1, bullet 1, which would implement the ALJs' analysis.

B. A TP limit of 0.015 mg/L will set a terrible precedent for all future TPDES permit limits, and will invalidate all other TPDES permits in the State under the Clean Water Act.

The proposed TP effluent limit of 0.015 mg/L is erroneous because it is inconsistent with other TP effluent limits found in other TDPES permits issued by TCEQ. When nutrient screening in the IPs indicates that a TP effluent limit is necessary, the Commission considers "consistency with similar permits." Ex. ED-JL-3 at 48 (hereinafter, "IP"). None of the five wastewater treatment facilities in the City of Georgetown that Aaron Laughlin, a TPDES permitting engineer and expert retained by the City, reviewed had a TP effluent limit comparable to 0.015 mg/L. Three of those facilities have no TP limit. Exs. APP-R-4 at 12:23–24, 12:28–13:1, 13:4–6; APP-R-4-03. The other two facilities have TP limits of 1.0 mg/L and 0.5 mg/L. Exs. APP-R-4 at 12:25–27, 13:1–3; APP-R-4-03. All these facilities are permitted to discharge into the San Gabriel River watershed or directly into the South Fork San Gabriel River ("SFSG River"). Ex. APP-R-4 at 12:23–13:6. And notably, there is no evidence that these other permits are causing geographic or environmental issues. Yet here, the PFD concludes that the TP effluent limit should be 0.015 mg/L, **magnitudes smaller** than the facilities described above. Such a conclusion is inconsistent with similar permits.

Not only is the proposed TP effluent limit inconsistent with permits in the area, adopting the proposed limit will affect other TDPES permits and set an unachievable precedent for future applicants. Peter Schaefer, the team leader of the Standards Implementation Team in the Water Quality Assessment Section of the Water Quality Division, testified that 0.15 mg/L is the lowest

limit that has been approved for a TDPES permit at the time of his testimony. Tr. Vol. 2 at 166:20–24 (Schaefer Cross). As a result, the proposed TP effluent limit of 0.015 mg/L is a tenth of the lowest TP effluent limit required by the Commission in any other TPDES permit. If the Commission issues a permit with such a low TP effluent limit to prevent excessive algae growth and/or prevent the lowering of water quality by more than a *de minimis* amount, then the validity of every other TPDES permit in the State—all of which have TP limits at least ten times greater than the ALJs' proposed limit—is called into question under the TSWQS. In addition, future TPDES-permit applicants may be required to achieve the same or a similarly low TP effluent limit—one which is not detectable by accredited labs and is infeasible in most instances. Not only would every TPDES permit in the State become uncertain under the TSWQS, no municipal dischargers will be able to achieve 0.015 mg/L—as an affordable technology is just not available. *See* Ex. APP-R-2 at 8:4–7, 10:15–19 (Machin Prefiled Testimony). According to Mr. Schaefer, TCEQ's Plans and Specifications Team agrees, "they've told me that…what can be achieved by a wastewater facility on a regular basis is roughly around .15." Remand Tr. Vol. 3 at 14:20–15:1 (Schaefer Redirect). Such a low precedent of 0.015 mg/L will make the development of wastewater treatment facilities far more difficult and costly, resulting in potential harm to public health for the sake of achieving a TP level that accredited laboratories cannot even detect. This is an absurd and untenable result.

Further, forcing the City's existing plant to convert into a brand new facility for a renewal is also beyond reason. As Mr. Schaefer testified, it would only be feasible to impose a low limit like 0.05 mg/L on a new facility, not an existing one, "because they can plan for that, budget for that and just design it from the ground up in order to achieve something like that." *Id*. at 15:20–16:3 (Schaefer Redirect).

Accordingly, the City excepts to and recommends rejection of proposed Findings of Fact 96, 97, 98, 112, 114, and 115, Conclusions of Law 13, 14, and 27, and Ordering Provision 1, bullet 1, which would implement the ALJs' analysis.

C. The PFD improperly assigns the antidegradation review to the Applicant, when the TCEQ ED is responsible for conducting antidegradation reviews.

An issue that the ALJs have brought to the forefront of their decision is that of the antidegradation review, or alleged lack thereof. This is an issue that was originally brought up by the Applicant to the ED even before this remand hearing took place. The Commissioners stated on the dais that another antidegradation review would be helpful for their assessment of the Application. The City understands the Commission's request, because the last antidegradation review was performed in 2013—which is over a decade ago—at a time when the growth and development in the area was dramatically different than now. On remand, however, the ED declined to do another review and instead leaned on the original review done in 2013. This left the City with no other option but to be creative and find other sound, scientifically based evidence to demonstrate that any impact of the requested permit limits would have no more than a *de mininis* effect on the water quality of the SFSG River. The City asked its own expert witnesses to conduct an antidegradation review for the pending Application. However, TCEQ has limited published methodologies on the review and its own staff has equated it to "looking through a gazing ball." *An Order Granting the Application of Port of Corpus Christi Authority of Nueces County for TPDES Permit No. WQ0005253000;* TCEQ Docket No. 2019-1156-IWD; SOAH Docket No. 582-20-1895; Proposal for Decision on Remand at 53 (Jun. 20, 2022). With limited published guidance, it is not possible for applicants to replicate the antidegradation review. Consequently, this is when the City enlisted the testimony of Peter Schaefer, a TCEQ employee who did the antidegradation review in 2013, to testify as to not only that review, but also why one was not done

for this pending application. The City also solicited the opinion of the its water quality expert James Machin to conduct a review of the only antidegradation review conducted by the TCEQ.

The rationale conveyed by Mr. Schaefer specifically denoted that the reason TCEQ declined to do another antidegradation review is because there is not an increase in flow or pollution in this renewal application and, therefore, TCEQ's own rules do not mandate another antidegradation review in this situation. Ex. ED-PS-1 at 23–24; Remand Tr. Vol. 2 at 122:1–23 (Schaefer Cross). This is consistent with TCEQ rules and the IPs which state that the antidegradation policy applies only when actions "increase pollution of water in the state." 30 TAC §307.5(a); *see also* IPs at 55. The record demonstrates that there is no increase in pollution or nutrient loading from the draft Permit – in fact, loading is going down in the interim phase and staying the same in the final phase. Mr. Schaefer further testified that this decision was not out of line with similar decisions made by the ED in other TPDES permit renewal applications where there was no increase in discharge permit flow. Ex. ED-PS-1 at 24.

Additionally, although the ED relies on the antidegradation review from 2013, both Mr. Schaefer and Mr. Machin walked through the site-specific factors in the narrative analysis in their respective testimony for the pending application this year. Even given the consideration of updated 2023 conditions, when asked at the remand hearing, Mr. Schaefer **still** agreed that the ED would support a TP limit of 0.15 mg/L on the City (just as he did in 2013). Ex. ED-PS-1 at 25; Remand Tr. Vol. 2 at 166:20–167:15, 169:14–24 (Schaefer Cross). Mr. Machin, with over 40 years of experience with TPDES permits and water quality analyses on Texas streams, also testified that TCEQ properly applied the screening based on the totality of the factors and agreed with the 0.15 mg/L TP effluent limit. Ex. APP-R-2 (Machin Prefiled Remand) at 9:19–10:26.

Nonetheless, the ALJs made it abundantly clear that the ED's failure to perform a new antidegradation review materially affected their decision in this matter and was a reason to not approve the permit as presented. Thus, under the ALJs' recommendation, the City would be punished for the ED's alleged failure to perform a duty that only the ED can perform. This is improper. If the Commissioners are inclined to believe that the lack of an antidegradation review justifies imposing the exceptionally low TP limit proposed by the ALJs, the proper remedy is to remand and require the ED to perform the review, not to adopt an untenable standard that puts the City in the impossible position of being unable to comply with the standard under the Commission's own rules.

The criticism levied by the ALJs is faulty in its placement. The Applicant does not have the tools, ability, or permission to conduct an antidegradation review. That is all specifically in the purview of TCEQ and its ED. The Applicant welcomes any opportunity to demonstrate that its proposed lower limits do not result in antidegradation, although such is not actually necessary according to the ALJs' own Findings of Fact. As noted previously, even the ALJs' findings determined that there would be no degradation from existing conditions and uses. For example, consider ALJs' proposed Findings of Fact 93, 94, and 95:

> 93. Under Applicant's current permit, at the Interim phase of 1.2 MGD and 0.5 mg/L total phosphorus, the phosphorus loading amounts to 5 pounds per day.
>
> 94. Under the Draft Permit, total loading of phosphorus will increase from the Interim phase at 2.0 MGD and 2.5 pounds per day of phosphorus, to 5 pounds per day in the Final phase at 4.0 MGD.
>
> 95. Effluent discharge pursuant to the limitations of the Draft Permit will cause algae to continue to grow in similar quantities and to persist for a similar distance downstream as is present today and under Applicant's current permit.

Thus, the ALJs acknowledge that current TP loading is 5 pounds per day and will decrease to 2.5 pounds per day in the initial phase under the permit renewal, and then cap out at 5 pounds

per day in the final phase—the exact same loading as currently permitted. Further, fact finding 95 notes that the proposed discharge under the Draft Permit would not result in any increase in algae growth, but simply would cause algae to "grow in similar quantities and to persist for a similar distance downstream as is present today." Thus, the ALJs own fact finding demonstrates no degradation from current conditions, a fact discussed in more detail in the next section.

The Applicant is sensitive about any environmental impacts that may be detrimental for its citizens and the entire region, which is why it is seeking permit changes in this proceeding. Allowing a permit renewal with the proposed lower permit limit in the Draft Permit is a far better outcome for the environment than if the City's discharge facility is not allowed to operate at all. That scenario would likely result in batch plants, septic tanks, and other facilities that would present other dangerous environmental issues.

Instead of relying on TCEQ's approved method to demonstrate compliance with the TSWQS, the ALJs relied on models and methods that have not been adopted by the TCEQ, such as the Water Quality Analysis Simulation Program (WASP) model and literature presented by the Protestants claiming that the river has a "tipping point." These unadopted materials are not applicable authorities and cannot be relied upon by the ALJs or the TCEQ. Instead, an antidegradation review is appropriate and, if the prior antidegradation review is not considered reliable, the proper remedy is to require the ED to conduct such a review.

Accordingly, the City excepts to and recommends rejection of proposed Findings of Fact 68, 69, 71, 72, 73, 84, 86, 88, 89, 96, 97, 98, 101, 102, 103, 122, 123, 130, Conclusions of Law 15, and 17, and Ordering Provision 1, bullet 1, which would implement the ALJs' analysis.

D. The PFD misapplies the TSWQS by requiring that the City improve water quality instead of preventing the degradation of water quality.

TCEQ's rules and policies are applicable to this proceeding. Through Sections 2001.058 and 2003.047(n) of the Government Code, the Legislature mandates that the ALJs "consider applicable agency rules or policies in conducting the hearing" for TCEQ. The ALJs have improperly reached outside of the TCEQ regulatory framework by applying two standards or policies that have never been adopted by the TCEQ: (1) regulating to *improve* existing water quality, and (2) regulating to some imaginary "tipping point." Each of these is discussed below.

1. The law requires Applicant to prevent degradation of water quality; it is not required to improve water quality.

The TSWQS do not require an applicant to improve water quality; they require an applicant to prevent degradation of water quality and to maintain existing water quality. As explained in the PFD, the TSWQS are intended to "maintain the quality of water in the state consistent with public health and enjoyment, propagation and protection of terrestrial and aquatic life, operation of existing industries, and taking into consideration economic development of the state; to encourage and promote development and use of regional and area-wide wastewater collection, treatment, and disposal systems to serve the wastewater disposal needs of the citizens of the state; and to require the use of all reasonable methods to implement this policy." 30 Tex. Admin. Code § 307.1; *see also proposed findings* at 42. This intention is implemented through Tiers 1 and 2 of TCEQ's Antidegradation policy.

Under Tier 1, "existing uses and water quality sufficient to protect those existing uses must be **maintained**." *Id.* § 307.5(b)(1) (emphasis added). Under Tier 2, "no activities subject to regulatory action that would cause **degradation of waters** that exceed fishable/swimmable quality are allowed unless it can be shown to the commission's satisfaction that the lowering of water quality is necessary for important economic or social development." *Id.* § 307.5(b)(2) (Emphasis

added). The PFD properly cites these regulations at Finding of Fact 55. The rule goes further to define "degradation" as the "lowering of water quality by more than a de minimis extent, but not to the extent that an existing use is impaired." *Id.* It is clear that Tier 2 requires that the existing condition of the water body cannot be made worse from the discharge by more than a *de minimis* amount. But the PFD seeks the opposite here and is contrary to the existing law.

Instead of preventing more than *de minimis* degradation of the existing conditions, the PFD seeks to improve the condition of the SFSG River. Wastewater discharges have existed under permit for more than 20 years and represent both an existing use and current condition. The proper analysis cannot ignore these existing uses and conditions, yet that is what the ALJs have done. The discharge proposed under the renewal permit will not degrade existing conditions nor result in a failure to maintain current conditions. The ALJs' Findings of Fact 93 and 94 demonstrate this: the allowed phosphorus loading under the Draft permit at full buildout, the final phase, is NO MORE than the current permit allows (5 lbs), and is less than half the existing amount during the interim phase. Further, Finding of Fact 95 also demonstrates this: "Effluent discharge pursuant to the limitations of the Draft Permit will cause algae to continue to grow in similar quantities and to persist for a similar distance downstream <u>as is present today</u> and under Applicant's current permit." The test is not whether algae will grow in "similar quantities . . . as is present today"; rather, it is whether the proposed permit will result in <u>more</u> algae and/or whether the current conditions in the river will be maintained. Algae growing in "similar quantities," as the ALJs point out, passes both tests (it does not result in degradation and it results in maintenance of current uses), thus satisfying the TSWQS.

Forcing the City to decrease discharges to improve, rather than maintain, current conditions violates the TSWQS. Any permit issued by the TCEQ using the ALJs' improper reading of the

TSWQS will not only be contrary to the Clean Water Act but amount to *ad hoc* rulemaking that will require all future discharge permits to improve conditions not from what they actually are, but to improve them to "ideal" or "target" conditions. This would be a seismic change in water law and is not a precedent the TCEQ should establish.

2. There is no such thing as a "tipping point" under TCEQ's rules.

The ALJs' recommendation is also predicated on the concept of a "tipping point." This "tipping point" concept is both factually wrong (because the testing to show this threshold cannot be relied upon) and legally wrong (because this concept is found nowhere in established law). There is no such thing in the regulations as a "tipping point." Quantitatively, the standards require that effluent will not cause a lowering of water quality by no more than a *de minimis* amount; the standards do not require that the effluent avoid approaching or surpassing an undefined threshold. Even if there is a scientific tipping point, TCEQ has not adopted it as part of the TSQWS. As Mr. Schaefer testified, before such a number is put in place for the SFSG River, TCEQ must go through a public participation process of notice and comment to vet the standard created. Ex. ED-PS-1-R (Schaefer Prefiled Remand) at 11. TCEQ cannot start relying on a tipping point now without following the proper procedures.

Further, the ALJs are relying on non-NELAP lab data to establish a tipping point of 0.02 mg/L. The problem with Dr. King's ideology is that you cannot pick a low numeric value and simply expect the river will grow a corresponding amount of algae. Mr. Buzan, who managed the same TSWQS program now implemented by the TCEQ, opined in the original case that there is no known effluent limit that will ensure that there is no excessive algal growth. Ex. APP-12 at 18:12-14.

Accordingly, the City further excepts to and recommends rejection of proposed Findings of Fact 109, 110, 112, 113, 114, 115, which would implement the ALJs' analysis.

E. Additional Exceptions to the PFD.

The City also excepts to the following Findings of Fact and Conclusions of Law as issues not remanded by the Commission: Findings of Fact 122, 123, 140, 141, 142, 143, 154, and 155, and Conclusions of Law 7, 20, 22, 23. The Supplemental PFD should not have addressed these issues, and these findings and conclusions should be rejected.

III. CONCLUSION

The City excepts to the PFD's recommendations on the basis that the ALJs misapply applicable law, and the PFD would erroneously cause immediate non-compliance upon issuance.

If adopted, the ALJs' recommendation would implement untenable and unachievably low standards for TP that will immediately result in the validity of other discharge permits being called into question. Because the City cannot implement the ALJs' proposed standard immediately, such a standard would prevent the safe processing of waste, resulting in potential harm to human health and, consequently, the environment. Further, the ALJs' proposed standard would implement a new requirement that applicants effectively must demonstrate achievement of some target or optimal conditions, rather than simply no degradation to, or maintenance of, them. The ALJs appear to consider this "target" goal justified because they apparently subscribe to the notion that the 2013 antidegradation review was faulty. However, if the Commission seeks to revisit the 2013 review, the remedy is not to impose a permit limit that violates their rules. Rather, the answer is to follow the TCEQ's policies and the IPs and set a limit that is achievable and impose stream monitoring provisions to allow the Commission to determine the appropriate TP—like it has done for many other permits, including the City of Georgetown's permit that allows discharges into the same

river. Further, the record shows that there are other sources of TP to the river, *e.g.* namely natural spring flow and subdivision runoff, which must be studied before any limit below the TCEQ's lowest standard of 0.15 mg/L is set.

For the reasons stated in this brief, the City respectfully requests that the ALJs' recommendations be rejected and the excepted-to findings and conclusions be rejected or modified accordingly. The City also requests any other relief to which it is entitled.

Respectfully submitted,

GRAVES, DOUGHERTY, HEARON & MOODY, P.C.
401 Congress Avenue, Suite 2700
Austin, Texas 78701
(512) 480-5639 (telephone)
(512) 536-9939 (facsimile)

By: */s/ Natasha J. Martin*
Natasha J. Martin
Texas Bar No. 24083255
nmartin@gdhm.com
Rudy Metayer
Texas Bar No. 24052105
rmetayer@gdhm.com
Daniela Peinado Welsh
State Bar No. 24127300
dwelsh@gdhm.com
Mark A. Stahl
State Bar No. 24125420
mstahl@gdhm.com
ATTORNEYS FOR
THE CITY OF LIBERTY HILL

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of City of Liberty Hill's Exceptions to the Remand Proposal for Decision has been forwarded via electronic mail or U.S. Mail to the persons on the attached Service List on this the 30th day of November 2023.

Aubrey Pawelka, Staff Attorney
Aubrey.Pawelka@tceq.texas.gov
TCEQ ENVIRONMENTAL LAW DIVISION
MC-173
P.O. Box 13087
Austin, Texas 78711-3087
ATTORNEY FOR TCEQ EXECUTIVE DIRECTOR

Pranjal M. Mehta,
Assistant Public Interest Counsel
Pranjal.Mehta@Tceq.Texas.Gov
MC-103
P.O. Box 13087
Austin, Texas 78711-3087
ATTORNEY FOR OFFICE OF PUBLIC INTEREST COUNSEL

Jessica Mendoza
jmendoza@msmtx.com
Adam M. Friedman
afriedman@msmtx.com
MCELROY, SULLIVAN, MILLER & WEBER, LLP
P.O. Box 12127
Austin, Texas 78711
ATTORNEYS FOR BUNNELL PROTESTANTS

Lauren Ice
lauren@txenvirolaw.com
David O. Frederick
dof@lf-lawfirm.com
PERALES, ALLMON & ICE, PC
1206 San Antonio
Austin, Texas 78701
Veronica Carbajal
vcarbajal@trla.org
TEXAS RIO GRANDE LEGAL AID, INC.
1331 Texas Avenue
El Paso, Texas 79901
ATTORNEYS FOR PROTESTANT, STEPHANIE MORRIS

/s/ *Natasha J. Martin*
Natasha J. Martin

TCEQ Compliance History Search

Compliance History - RN104102132

Regulated Entity Information

RN: RN104102132
Name: LIBERTY HILL REGIONAL WWTP
Location: located approximately 5,000 feet north of the South Fork San Gabriel River and 2,000 feet east of US Highway 183 in Williamson County, Texas 78641
County: WILLIAMSON
Region: REGION 11 - AUSTIN

Compliance History by Customer

There is 1 customer associated to this site. The Customer's compliance history for the site is displayed below.

1-1 of 1 Records

CN	Customer Name	Related Program IDs	Rating	Classification	Date Rated
CN602959033	CITY OF LIBERTY HILL	EAPP 11002534 EAPP 11003385 STORM TXR05FI74 WWPERMIT R14477001 WWPERMIT WQ0014477001	39.46	SATISFACTORY	09/01/2023

1-1 of 1 Records

Back to top

Exhibit A