

**SOAH DOCKET NO. 582-22-1222  
TCEQ DOCKET NO. 2021-0999-MWD**

<b>APPLICATION BY CITY OF LIBERTY HILL FOR RENEWAL OF TEXAS POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT NO. WQ0014477001</b>	<b>§ § § § §</b>	<b>BEFORE THE STATE OFFICE  OF  ADMINISTRATIVE HEARINGS</b>
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**CITY OF LIBERTY HILL’S REPLY TO  
EXCEPTIONS TO THE PROPOSAL FOR DECISION AND PROPOSED ORDER**

City of Liberty Hill (“Applicant”) files this their Reply to Exceptions to the Proposal for Decision and Proposed Order (the “PFD”) filed by the Executive Director of the Texas Commission on Environmental Quality (“ED”) and Protestant Stephanie Morris (“Morris”).

While the TCEQ ED’s exceptions request denial of the ALJ’s recommended changes to the Draft Permit, Morris’ exceptions advocate an outright reconsideration of the PFD’s fundamental reasoning and conclusions. The TCEQ ED’s exceptions have merit, but Morris’ do not.

**I. Reply to TCEQ ED’s Exceptions to the PFD**

Applicant does not object to any of the ED’s Exceptions and offers no reply to the ED’s Exceptions.

**II. Reply to Morris’ Exceptions to the PFD**

**A. A majority of Morris’s exceptions are beyond the scope of relief requested, they do not constitute errors made by the ALJs, or they are not supported by record evidence.**

This matter commenced in 2018 when the City was faced with the monumental task of ensuring that it could meet the demands of the growth occurring in the Liberty Hill area. The City has had to consider, among other matters, how to provide continuous and adequate water and wastewater service to newcomers and existing residents in its certificate of convenience and

necessity—a legislative requirement under Chapter 13 of the Texas Water Code that the City cannot ignore. To meet this statutory obligation, the City must determine the proper means of handling the increasing demand for wastewater service, treatment, and disposal. Many subdivisions have sprouted since 2010a and more are in early stages of building or finalizing approvals to build. As the City reminded the Commission in its Response to Hearing Requests and Requests for Reconsideration in this case, the City’s population has exploded by 308% since the 2010 census.<sup>1</sup> Put simply, the need for this facility cannot be overstated.

The City filed its application for this permit on September 5, 2018. This application has gone through a lengthy and thorough review by TCEQ and the public. This includes a public meeting on August 17, 2020. It also includes over 100 public comments<sup>2</sup> that were so voluminous it took the ED almost one year to respond from the date the comment period closed. Many parties requested a contested case hearing, but few had standing.

In this Reply to Protestant Morris’s Exceptions, the City will show that Morris does not and cannot argue on the merits for any error by the ALJ. Instead, Morris uses its exceptions to the PFD to seek relief beyond what she requested at the hearing and in some cases beyond the scope of the 10 issues referred to SOAH; claim the ALJs erred by relying on arguments not supported by record evidence, and would have the ALJs rely on standards that the Texas Commission on

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<sup>1</sup> See Applicant’s Response to Hearing Requests and Requests for Reconsideration (TCEQ Commissioner’s Filing No. 3) at 30 (providing growth statistics over the last 10 years: in the last 2 – 3 years the City’s population has doubled, the population has grown 308.58% since 2010, and 43 requests for wastewater service were submitted in one month alone.)

<sup>2</sup> TCEQ Commissioners’ Integrated Database is accessible at <https://www14.tceq.texas.gov/epic/eCID/index.cfm?fuseaction=main.MoreResults&StartRow=6&EndRow=10&Step=5&requesttimeout=5000> (last accessed November 28, 2022) (showing 116 comments received, 60 hearing requests received, and 5 public meeting requests received after searching "WQ0014477001" and selecting "Include all correspondence from the public on this Item."); see also "Request(s)" filed under TCEQ Agenda Backup Materials, Docket No. 2021-0999-MWD, providing documentation for 32 contested case hearing requests, with some requestors submitting supplemental documents and comments.

Environmental Quality (“TCEQ”) has not adopted into any rule or policy (e.g., trophic states or baseline concentrations driving TP limits). If the ALJs granted Morris’s exceptions on the bases argued, there would certainly be judicial error.

With regard to the general arguments made in Morris’s exceptions, Applicant adopts and incorporates by reference Applicant’s Closing Arguments (filed August 12, 2022), its Reply Brief to Closing Arguments (filed August 23, 2022), and its Exceptions (filed November 14, 2022). For the reasons reflected in Applicant’s previous briefing, and in this Reply, the ALJs are urged to reject Morris’s exceptions, grant the City’s exceptions, and recommend issuance of the permit to the TCEQ.

## **B. Reply to Morris’s Specific Exceptions**

Listed below are the specific Findings of Fact and Conclusions of Law to which Morris provided exceptions,<sup>3</sup> followed by Applicant’s reply.

### **Issues A, D, and G**

- Protestant Morris excepts to Finding of Fact 92 and would alter it to read as follows: “An effluent limit of 0.02 mg/L TP has been demonstrated as a reasonably achievable technology-based effluent limitation, with consideration of the sensitivity of the site, in this case.”

**REPLY:** Morris pushes for an unreasonably low total phosphorous limit and the record evidence does not support it. 0.02 mg/L TP is not a Reasonably Achievable Technology (“RAT”) limit. Furthermore, no discharge on any other sensitive site in Texas is held to this limit. TCEQ’s *Procedures to Implement the Texas Surface Water Quality Standards* (the “IPs”) give practically no definition for a RAT limit, and Morris is trying to fill in the gaps. The only mention of a RAT limit in the IPs is: “When screening indicates that a reduction of effluent TP is needed, an effluent

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<sup>3</sup> Morris Exceptions at 23-26.

limit is recommended based on reasonably achievable technology-based limits, with consideration of the sensitivity of the site.”<sup>4</sup> The City does not debate that the IPs warrant a TP limit. However, before applying RAT, the IPs direct the TCEQ to conduct screening using site-specific factors. One of those factors has been largely ignored by Morris: whether the TP limit is consistent with other permits.<sup>5</sup> The ALJs must consider the sensitivity of the site *and* whether “TP limits have been required for other wastewater permits with similar characteristics and locations in this area.”<sup>6</sup> The ALJs must consider record evidence on this issue, and not Morris’s trophic standards or the background/baseline concentrations, both of which do not appear in the IPs.

First, other discharge permits on similar streams are not held to limits as low as 0.02 or 0.05 mg/L. The only legally applicable interpretation of the IPs is TCEQ’s interpretation. Looking at TCEQ Orders on this issue, the record shows that there are only two other discharge permits where TCEQ determined the RAT limit to be 0.15 mg/L.<sup>7</sup> One of those permits Mr. Machin refers to is the City of Dripping Springs permit, also discharging on a sensitive site. Applying the IPs to that application, TCEQ issued the permit with a TP limit of 0.15 mg/L.<sup>8</sup> In the same area as the City’s discharge on the South Fork San Gabriel River, TCEQ issued a permit to the City of Leander to discharge into Brushy Creek with a TP limit of 1 mg/L.<sup>9</sup> The City’s discharge is similar in characteristic and location to these other plants. Morris has presented no record evidence to support a TP effluent limit more than six times lower than TCEQ’s current precedent for other similarly

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<sup>4</sup> IPs at 29 (available at <https://www.tceq.texas.gov/downloads/permitting/water-quality-standards-implementation/june-2010-ip.pdf>).

<sup>5</sup> *Id.* at 48.

<sup>6</sup> *Id.* at 51.

<sup>7</sup> Machin Prefiled at 16:26-28.

<sup>8</sup> See TCEQ Order Granting the Application by the City of Dripping Springs for TPDES Permit No WQ0014488003; SOAH Docket No. 582-18-3000, p. 5, FOF No. 32.

<sup>9</sup> See TCEQ Order concerning the application by the City of Leander for TPDES Permit No WQ0012644001; TCEQ Docket No. 2019-1536-MWD, at p. 2 of TPDES Permit attached to Order.

situated discharge plants. Setting the standard any lower than 0.15 mg/L is not consistent with other discharge permits on sensitive streams in Texas (looking outside of Texas as Morris will have the ALJs do contradicts the IPs), and is inconsistent with the RAT limits provided for in the IPs.

Furthermore, CLEARAS cannot be used to support a RAT limit. For the reasons stated in Applicant's Reply Brief<sup>10</sup> and Applicant's Exceptions,<sup>11</sup> the CLEARAS technology is not RAT and the pilot showed that it cannot be relied upon to set permit standards. Even more concerning, Morris relies on record evidence for 0.02 mg/L TP from a company that will not guarantee that limit.<sup>12</sup> CLEARAS itself admits that it cannot consistently get that low by its guarantee.

Further, there is nothing "reasonable" or "achievable" about setting the standard 0.02 mg/L and 0.05 mg/L—the City would basically be operating a reverse osmosis plant, which the City's water quality expert tells us is prohibitively expensive and is treating wastewater to drinking water standards<sup>13</sup> Instead of turning wastewater plants into water treatment plants, the ED recommended a limit that could be achieved using widely accepted MBR technology.

Finally, Morris attempts to fill the gaps in the definition of RAT by suggesting there is an affordability factor. Even if there was an affordability factor, Morris enters no evidence on affordability into the record. She suggests that CLEARAS and the other technologies evaluated by the EPA nationwide are affordable, but compared to what? Morris has not presented evidence evaluating Liberty Hill's budget, service rates, nor capital improvement financing options. Morris has also not undertaken an analysis of the cost to upgrade the system to achieve 0.02 or 0.05

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<sup>10</sup> Applicant's Reply Brief at 12.

<sup>11</sup> Applicant's Exceptions at 2-5.

<sup>12</sup> PFD at 32.

<sup>13</sup> Tr. at 497:22-498:20 (Machin cross)

mg/L/TP and compared that cost to the City's wastewater revenue. Without any supporting evidence, any suggestion that these methods are affordable and thus satisfy RAT should be rejected.

The City maintains that 0.05 mg/L is too low, and further excepts to the limit being set at 0.02 mg/L. After all, the City's biologist with more than 40 years of experience in algae is certain that there is no bottom number that will prevent excessive algae growth.<sup>14</sup> Setting the limit at 0.02 or 0.05 could be an economically dangerous precedent to set for this City, and other municipal dischargers as the TCEQ must look at consistency with its permits, without any guarantee of a benefit to the river.

- Protestant Morris excepts to Finding of Fact 93 and would alter it to read as follows: "The Applicant has failed to demonstrate that the effluent limits in the Draft Permit are protective of groundwater."

Protestant Morris would also add the following Finding of Fact:

- No separate analysis was conducted to determine if the groundwater would be protected under the terms of the Draft Permit, except to conclude that if surface water is protected, then groundwater will also be protected as well.

**REPLY:** With the proposed revision and the proposed addition, Morris does not allege that the ALJs erred. As explained by the ALJs in the PFD, Morris failed to rebut the prima facie demonstration on this issue.<sup>15</sup> That is because she entered no record evidence challenging groundwater.<sup>16</sup> She cannot try to fix their error in briefing.

Regardless, the record supports the ALJs conclusion that groundwater is protected. As the ALJs properly point out, Mr. Machin testified that the effluent limits are protective because they

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<sup>14</sup> Buzan Prefiled at 18:12-14.

<sup>15</sup> PFD at 36.

<sup>16</sup> *Id.* at 27.

are more protective than the limits required for the Edwards Aquifer rules for the contributing zone.<sup>17</sup> No separate analysis was needed here. The PFD correctly concludes that groundwater is protected.

- Protestant Morris would add the following Findings of Fact under Referred Issue A:
  - The Draft Permit is not protective of the surface water quality of the South Fork San Gabriel River.

**REPLY:** This Finding of Fact is contrary to TCEQ rules. Morris bases this argument on the notion that the TCEQ is required to include effluent limits based on the background concentrations of the receiving stream and trophic boundaries. Neither of those notions are the rule.<sup>18</sup>

- Effluent limits for total nitrogen can be considered in certain situations when existing or projected nitrogen levels would result in growth of nuisance aquatic vegetation.
- To help address the growth of nuisance aquatic vegetation, the nitrate-nitrogen limit in the Draft Permit should be lowered to 4.0 mg/L.

**REPLY:** There is no reason to add these two findings. Nitrogen is not the limiting nutrient for algae growth, phosphorus is.<sup>19</sup> His conclusion is consistent with the IPs that expressly address why the focus is on phosphorus instead of nitrogen. Because there is substantially less data on the impacts of nitrogen in Texas, phosphorus is the primary nutrient in freshwaters, nitrogen can be fixed directly from the atmosphere by most blue green algae, and available treatment technologies make reducing phosphorus more effective than reducing nitrogen, the focus lies on phosphorus.<sup>20</sup> The PFD has properly excluded any findings focusing on nitrogen.

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<sup>17</sup> *Id.*

<sup>18</sup> Tr. at 499:1-7 (Machin cross, re trophic states); see also Tr. at 258:24 – 259:3 (Ross cross, re baseline)

<sup>19</sup> Machin Prefiled at 23:8-11.

<sup>20</sup> IPs at 29-30.

## **Issue B**

- Protestant Morris excepts to Finding of Fact 102 and would alter it to read as follows: “The proposed discharge will adversely impact the health of the requesters, their families, and aquatic and terrestrial wildlife.”

Protestant Morris would also add the following proposed finding:

- The negative impacts to the requesters, their families, and aquatic and terrestrial wildlife will continue to occur under the terms of the Draft Permit.

**REPLY:** The ALJs properly concluded that Morris did not meet her burden on this issue. Morris uses lay testimony of downstream landowners to suggest there will be health impacts from the discharge. She also relies on presumptions from her engineer instead of a medical expert to prove health is an issue. There is no credible evidence to rebut the prima facie case nor the City’s rebuttal case that the effluent limits are developed to protect health and safety of wildlife and the requestors.<sup>21</sup>

As such, there is record evidence to support Finding of Fact 102 without any changes. Further, because there is no evidence to support the proposed revision to Finding of Fact 102, Morris’ additional finding on health impacts should be rejected.

Protestant Morris would also add the following finding:

- A drastic and persistent change in the kind and quantities of wildlife living in and along the river downstream of the outfall has occurred since the City began discharging effluent into the river.

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<sup>21</sup> Machin Prefiled at 20:24-22:24



**REPLY:** There is no support in the record for a finding like this. No wildlife biologist has explained that any shift in wildlife has been drastic or persistent. On the contrary, the City's biologist with 40 years in aquatic wildlife experience testified that he observed native wildlife in and around the outfall and downstream.<sup>22</sup> Further, he testified that he does not expect any changes to aquatic and terrestrial life based on the proposed discharge.<sup>23</sup> The ALJs properly excluded any findings like this from the PFD.

Protestant Morris would also add the following proposed findings:

- Excessive algae growth in the South Fork San Gabriel River is causing negative impacts to aquatic and terrestrial wildlife, including: the crowding out of native species of algae and microbial communities by nuisance algae; shading of the river, river bottom, and organisms within the river; the accumulation of decaying algae on the riverbed which fills the spaces where native wildlife live; more extreme fluctuations in dissolved oxygen; dissolved oxygen lows that can drop below the 24-hour minimum criterion; the presence of large quantities of invasive snails (*Melanoides tuberculata*) that may crowd out native species or negatively affect the balance of the ecosystem's trophic structure; and other effects that disrupt natural conditions and negatively impact the native ecosystem.
- The invasive snail, *Melanoides tuberculata*, carries a fluke that can be dangerous to humans.

**REPLY:** There is no support in the record for these findings. The only reference to snails carrying a fluke in the record was during Dr. King's cross-examination, as he sought to explain the basis for his prefiled testimony that algae at and below the outfall was excessive.<sup>24</sup> But Dr. King laid no predicate for his testimony relating to snails or any flukes that they may carry. In fact, Dr. King's qualifications do not extend to expert testimony regarding snails or their diseases. The ALJs properly excluded these findings from the PFD.

Protestant Morris would also add the following proposed findings:

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<sup>22</sup> Buzan Prefiled at 12:2-5.

<sup>23</sup> *Id.* at 11:17-23.

<sup>24</sup> Tr. at 216-17.

- The native wildlife in and around the South Fork San Gabriel River are adapted to the low flow of the stream.
- Adding additional, constant flow to the river allows species that would not normally be able to survive to invade, in addition to changing the water temperature of the river, which can alter the life cycles of native species living the in the river.

**REPLY:** There is no support in the record for these findings. The only reference in the record to wildlife being adapted to low-flow streams is in Dr. King’s prefiled testimony.<sup>25</sup> But again, Dr. King qualifications do not extend to expert testimony regarding aquatic wildlife’s reliance on the low-flow quality of a stream. The ALJs therefore properly excluded these findings from the PFD.

Protestant Morris would also add the following proposed finding:

- The extensive algae makes it difficult and dangerous to wade or swim in the river, as the bottom of the river is slippery and difficult to see; the algae can entangle people in the water; and the algae, including the decayed algae on the bottom of the river, could get in the mouths of those wading, swimming, or playing in the water, especially children.

**REPLY:** A fact issue was presented by evidence in the record regarding Protestants’ above assertions. As the PFD noted, TCEQ’s Jenna Lueg testified that the amount of algae at issue was insufficient to render the water unswimmable.<sup>26</sup> Thus, the ALJs did not err by excluding Protestants’ factual assertions on this issue.

Protestant Morris would also add the following proposed finding:

- The Draft Permit will cause extensive algal blooms, which can cause blooms of cyanobacteria, which may release cyanotoxins that are harmful to humans, pets, and wildlife, both aquatic and terrestrial.

**REPLY:** Morris’ proposed factual finding is not supported by the record or sound reasoning. As previously noted by the City in its Exceptions, if a lawn is fertilized, it will grow. But if fertilizer is reduced or eliminated, the grass will not disappear—its growth will merely be

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<sup>25</sup> Exh. SM-King at 37:5–9.

<sup>26</sup> PFD at 39–40 (citing Tr. at 617).

reduced. Moreover, no one disputed the City's claim that other contributing sources add nutrients to the river and can contribute to algae growth. The ALJs have not erred by excluding Morris' proposed factual findings on this issue.

### **Issue C**

- Protestant Morris would add the following Finding of Fact:
  - Applicant's wastewater treatment plant has a history of odor complaints.

**REPLY:** Protestants Morris's proposed factual finding is disputed by the record. As David Wayne Thomison, the City's wastewater treatment plant superintendent, testified, "there's actually no odor at the plant."<sup>27</sup> Instead, "[t]he odor actually comes from what's actually being delivered to the plant via the collection system," including "organics, grease, fats and oils" that the City's plant aims "to remove . . . before the treatment process." *Id.* at 422–23. An odor complaint from 2019, which was addressed by the City, is hardly a history. The ALJs therefore did not err by excluding Morris's proposed factual finding on this issue.

### **Issues E and F**

- Protestant Morris excepts to Finding of Fact 116 and would alter it to read as follows: "Considering the Applicant's compliance history and the sensitive nature of the South Fork San Gabriel to phosphorus loading, a revision to the permit is warranted so that total flow is limited in the Final phase to 2.4 MGD."
- Protestant Morris would delete Finding of Fact 120.
- Protestant Morris would add the following Finding of Fact:
  - The City's wastewater plant has the actual capacity to treat 2.4 MGD.

**REPLY:** These factual findings challenged by Protestant Morris were the subject of competing evidence, *see, e.g.*, PFD at 87 & nn.382–84, which the ALJs resolved in favor of the

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<sup>27</sup> Tr. at 422.

City. Protestant Morris's legal arguments related to these findings are addressed below. See arguments below in this Reply on the need for the 4.0 MGD limit on page 18.

#### **Issues H and J**

- Protestant Morris excepts to Finding of Fact 127 and would alter it to read as follows: "Considering Applicant's compliance history, the history of algae growth at and below the outfall, and the ecologically sensitive nature of the River, particularly to nutrient enrichment, the addition of another requirement in the "Other Requirements" section in the Draft Permit is warranted, requiring Applicant to conduct nutrient input and response monitoring in a manner similar to the nutrient study required by the 2004 permit, but with the monitoring being a permanent and ongoing requirement of the permit."

**REPLY:** Protestant Morris's above exception improperly seeks even more relief than was sought during closing arguments. Prior to issuance of the PFD, Protestant Morris requested only that the ALJs make the following factual finding: "Considering Applicant's compliance history, history of algae growth at and below the outfall, and the ecologically sensitive nature of the South Fork San Gabriel River, particularly to nutrient enrichment, a revision to the Draft Permit is warranted requiring Applicant to conduct a nutrient sampling plan." Protestant Morris's Proposed Findings of Fact and Conclusions of Law at 16. The ALJs granted Protestant Morris the relief sought: "Considering Applicant's compliance history, history of algae growth at and below the outfall, and the ecologically sensitive nature of the River, particularly to nutrient enrichment, a revision to Item No. 9 in the 'Other Requirements' section in the Draft Permit is warranted, modifying the language to require Applicant to include parameters from the initial permit issued in 2003."<sup>28</sup> Protestant Morris may not now levy exceptions to the PFD to request relief that should have been requested during closing arguments.

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<sup>28</sup> PFD at 19.

- Protestant Morris excepts to Finding of Fact 128 and would alter it to read as follows:  
“Considering Applicant’s compliance history, a revision to the Draft Permit is

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warranted requiring that information provided to TCEQ under Monitoring and Reporting Requirements Nos. 1 and 7a also be made publicly available by posting this information on a public website and notifying the public through an email/text alert list, with both posting and notification done contemporaneously with the relevant reporting being made to TCEQ.”

**REPLY:** Once again, Protestant Morris’s above exception improperly seeks even more relief than was sought during closing arguments. Prior to issuance of the PFD, Protestant Morris requested only that the ALJs make the following factual finding: “Considering Applicant’s compliance history, a revision to the Draft Permit is warranted requiring that certain information that is collected and reported to TCEQ also be made publicly available, including notification of the public within 24 hours of instances of noncompliance that the Draft Permit requires be reported to TCEQ within 24 hours.” Protestant Morris’s Proposed Findings of Fact and Conclusions of Law at 16. The ALJs granted Protestant Morris the relief sought: “Considering Applicant’s compliance history, a revision to the Draft Permit is warranted requiring that certain information that is collected and reported to TCEQ also be made publicly available, including notification to the public, within 24 hours of instances of noncompliance that the Draft Permit requires be reported to TCEQ within 24 hours.”<sup>29</sup> Protestant Morris may not now levy exceptions to the PFD to request relief that should have been requested during closing arguments.

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<sup>29</sup> PFD at 19.



## **B. Conclusions of Law**

- Protestant Morris excepts to the following Conclusions of Law and would rewrite them as follows:
  - Conclusion of Law 11: The Applicant did not establish by a preponderance of the evidence that the terms of the Draft Permit would be protective of groundwater.
  - Conclusion of Law 15: The Draft Permit does not adequately address nuisance odor in accordance with 30 Texas Administrative Code § 309.13(e).
  - Conclusion of Law 17: The Applicant did not establish by a preponderance of the evidence that the Draft Permit includes adequate provisions to protect the health of the requesters and their families and aquatic and terrestrial wildlife.
  - Conclusion of Law 20: The Applicant has not shown the need to be able to discharge a maximum amount of 4.0 MGD.

**REPLY:** Protestant Morris's requested conclusions of law lack factual and legal support.

### ***A. The PFD's Conclusion of Law 11 is correct as written.***

The Draft Permit ensures groundwater will be protected. According to TCEQ's Water Quality Division, if surface water is protected by the effluent limits in the Draft Permit, groundwater has the same protections.<sup>30</sup> The Administrative Record, which includes the Draft Permit, establishes the low effluent limits imposed consistent with the Texas Surface Water Quality Standards.<sup>31</sup>

The Protestants failed to present any evidence disputing that the effluent limits in the Draft Permit are protective of groundwater. Dr. Lauren Ross, without any support attempted to argue that the draft permit was "inadequate" to protect groundwater.<sup>32</sup> This is the only reference to groundwater in Dr. Ross' testimony other than in her qualifications. There is no rebuttal of the

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<sup>30</sup> Executive Director's Prefiled Testimony of Alfonso Martinez, III (Martinez Prefiled) at 6 ("TCEQ's Water Quality Division has determined that if surface water quality will be protected by a draft permit, then groundwater quality in the vicinity will not be impacted by the discharge.")

<sup>31</sup> Administrative Record (AR) at Tab C at 0002-5.

<sup>32</sup> Exhibit SM-Ross (revised), Prefiled Testimony of Dr. Lauren Ross (Ross Prefiled) at 8:14.

prima facie demonstration by the Protestants.<sup>33</sup> Although the Protestants failed to meet their burden of challenging the Administrative Record, the City and the ED filed testimony supporting the conclusion that groundwater will be protected. The City's water quality expert James Machin with over 40 years of experience testified that the effluent limits for all phases at 5/5/2/0.15, or 5 mg/L five-day carbonaceous biochemical oxygen demand ("CBOD5"), 5 mg/L Total Suspended Solids (TSS), 2.0 mg/L ammonia-nitrogen (NH3-N), and 0.15 mg/L total phosphorus (TP) are stringent limits which exceed the Texas Surface Water Quality Standards.<sup>34</sup> If TSWQS is met, and surface water will be protected, groundwater will be protected as well from the proposed discharge.<sup>35</sup> Likewise, the TCEQ ED's witnesses Alfonso Martinez and James Michalk testified that based on TCEQ's standard that groundwater will be protected.<sup>36</sup>

Further, Mr. Machin testified that these stringent limits exceed TCEQ's standards regulating effluent limits in the Edwards Aquifer Contributing Zone – where this discharge is located.<sup>37</sup> The plant is more than 10 miles upstream of the Recharge Zone, where TCEQ has determined that no effluent minimum are required by rule.<sup>38</sup> Although not required according to the rule, the Draft Permit requires the discharge to meet the effluent requirements for a discharge 5 miles upstream of the recharge zone. Hence the Draft Permit is more protective of groundwater than the rules require.<sup>39</sup>

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<sup>33</sup> Since the Bunnell Protestants adopted the testimony of Stephanie Morris' witnesses (*see* Prefiled Testimony of David Bunnell at 5:25-6:4) and none of their witnesses testified regarding groundwater, their testimony also fails to rebut the prima facie demonstration.

<sup>34</sup>Exhibit APP-1, Liberty Hill's Prefiled Testimony of James Machin, P.E. (Machin Prefiled) at 16:20-22.

<sup>35</sup> *Id.* at 18:1-2.

<sup>36</sup> Martinez Prefiled at 6, 11; *see also* Executive Director's Prefiled Testimony of James Michalk (Michalk Prefiled) at 20:14-25.

<sup>37</sup> Machin Prefiled at 18:3-9.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

This testimony together with the Administrative Record are supportive of the prima facie demonstration. Protestants minimal evidence filed on groundwater fails to rebut the prima facie demonstration – they have not shown that the Draft Permit violates a specifically applicable state or federal requirement with respect to groundwater.

***B. The PFD's Conclusion of Law 15 is correct as written.***

The Application, Draft Permit, and Administrative Record prove by a preponderance of the evidence that the Draft Permit complies with applicable requirements to abate and control nuisance odors in accordance with 30 TAC § 309.13(e). This evidence was uncontroverted, because like several of the Commission's referred issues, the Protestants' prefiled testimony and hearing testimony only raised generalized concerns regarding the potential for nuisance odors from the wastewater-treatment plant and failed to consider the measures to be implemented at this proposed facility. Applicant and the ED thoroughly rebutted Protestants' generalized statements. Applicant's witness David Thomison, a Class A water and wastewater Licensee with over 33 years of experience in this field, who is in fact certified to teach water and wastewater management and operations in Texas, with wastewater permitting, testified that the city's use of bioxide set to mitigate any odor and additionally has utilized odor masking plants, both techniques are in line and approved by TCEQ.<sup>40</sup> Mr. Thomison further testified that there is in fact no odor due to the wastewater plant itself, but instead is due to what the public is putting down respective drains that causes odor. The City engineer also testified that the Draft Permit meets the state's requirements for odors and that the City has undertaken more than required to ensure that odors are not a concern.<sup>41</sup> Consequently, the draft permit complies with applicable requirements to "abate and

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<sup>40</sup> Tr. at 422:9-19 (Thomison cross).

<sup>41</sup> Laughlin Prefiled at 11:27 – 12:29.



control nuisance odors” as the result of its incorporation of the TCEQ’s requirements under 30 TAC § 309.13(e) and the actions taken by Applicant.

***C. The PFD’s Conclusion of Law 17 is correct as written.***

The Application, Draft Permit, and the Administrative Record prove by a preponderance of the evidence that the Draft Permit is protective of the health of the requesters and aquatic and terrestrial wildlife. This evidence was uncontroverted as Protestants only addressed this issue based on generalized statements. Looking at impacts to the Requestors specifically, and local aquatic and terrestrial wildlife, the City’s witness Dave Buzan testified that the Draft Permit complies with all applicable surface water quality rules intended to be protective of the health of the requestors and aquatic and terrestrial wildlife.<sup>42</sup> The TSWQS specifically designate criteria for the protection of aquatic life and human health in water in the state and the Draft Permit complies with the TSWQS.<sup>43</sup> As noted above, the TSWQS for the Application were met the proposed effluent limits.<sup>44</sup> Regarding human health, Protestants’ witness Dr. Ross points to a general concern about algal blooms creating cyanotoxins. This testimony is refuted by Mr. Machin as speculative as not all filamentous green algae cause cyanotoxins.<sup>45</sup>

***D. The PFD’s Conclusion of Law 20 correct as written.***

Morris has submitted no record evidence supporting altering the permit based on need. Further, the full permit is not an issue in this proceeding. The TCEQ referred to SOAH the issue of whether the Draft Permit should be altered in consideration of need. The Draft Permit only makes a minor change to the interim phase 1.2 MGD to 2.0 MGD – not a change to the final phase.

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<sup>42</sup> Buzan Prefiled at 11:4-23.

<sup>43</sup> *Id.* at 9-10; *see also* Machin Prefiled at 20:26 – 22:24.

<sup>44</sup> Machin Prefiled at 21:12-17.

<sup>45</sup> Machin Prefiled at 22:17-24.

Despite Morris not entering any evidence on need, which the PFD properly acknowledges, the City filed evidence showing that the interim phase was necessary due to quickly rising growth projections. The City's engineer testified that at the time of the application, the City's growth project was 29.8% annually.<sup>46</sup> At this rate, the Mr. Laughlin predicted that the City would outgrow its 1.2 MGD permit in 2021,<sup>47</sup> which it did during the pendency of this proceeding according to the City's current operator Mr. Thomison.<sup>48</sup> Using Mr. Laughlin's projections of an annual growth of approximately 30% per year, which were proven to be accurate based on current flow, it is reasonable to expect that the City will quickly arrive at a flow of 4.0 MGD. The PFD properly acknowledges that no witness entered any sufficient evidence into the record to support cutting back the City.<sup>49</sup> Doing so would drastically damage the City in its ability to provide continuous and adequate service to the explosive population growth, which the Protestants have admitted is happening in the area. Regardless, no evidence was submitted to counter the record evidence demonstrating demand is growing by 30% per year and is expected to continue.

Furthermore, the ALJs properly conclude that a buffer on flow is needed in this rapidly growing area. As Mr. Thomison put it "as far as development and growth, the flow's going to keep coming in, and we're going to keep treating."<sup>50</sup> That is what the City is legally required to do for all customers in its certificated area. Unreasonably cutting back the permit without any record evidence to support it would put the City at risk of not meeting this statutory requirement.

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<sup>46</sup> Laughlin Prefiled at 16:22-17:5.

<sup>47</sup> *Id.*

<sup>48</sup> Tr. at 427:18-21 (Thomison cross).

<sup>49</sup> PFD at 89.

<sup>50</sup> Tr. at 428:6-8 (Thomison cross).

### **C. Reply to Morris' Proposed Amendments to the Permit**

Listed below are the modifications Morris has requested to the permit,<sup>51</sup> followed by Applicant's reply.

- **A total phosphorus effluent limit of 0.02 mg/L for all phases;**

**REPLY:** This permit condition is unreasonable and discriminatory. For the reasons stated above in this Reply, a limit of 0.02 mg/L is not justified by RAT and is inconsistent with agency precedent on sensitive streams. Imposing this limit to the draft permit would be arbitrary and capricious and not supported by evidence in the record. Furthermore, imposing this limit on Liberty Hill and no other sensitive stream dischargers is discriminatory treatment. The ALJs are urged to deny this exception to the PFD and to further revisit the 0.05 mg/L limit in the PFD as both are unreasonable, not RAT, and are discriminatory.

- **A nitrate-nitrogen effluent limit of 4.0 mg/L for all phases;**

**REPLY:** This permit condition is unnecessary and discriminatory. For the reasons stated above in this Reply, a nitrate-nitrogen limit is not justified by any TCEQ rule and would do nothing to prevent excessive growth of algae. Nitrogen is not the contributing nutrient for algal growth. Imposing this limit to the draft permit would be arbitrary and capricious and not supported by evidence in the record. Furthermore, imposing this limit on Liberty Hill and no other sensitive stream dischargers is discriminatory treatment. The ALJs are urged to deny this exception to the PFD.

- **Both the operator and third-party operator must have a Class A license;**

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<sup>51</sup> Morris Exceptions at 26-27.

**REPLY:** This permit condition is unnecessary. On page 24 of the Proposed Order, the ALJs already recommend that “both the operator and third-party operator must have a Class A license.” This change is repetitive and should be denied.

- The addition of another “Other Requirement” to the permit, requiring the Applicant to conduct nutrient input and response monitoring similar to the nutrient study required by the 2004 permit, but with the monitoring being a permanent and ongoing requirement;

**REPLY:** This permit condition is unnecessary. As explained in Applicant’s Exceptions, the nutrient is complete. Furthermore, as explained by the ED’s Exceptions, the effluent limits, including TP, will already be sampled and monitored under the Draft Permit. This change is repetitive as the study is complete and has been provided to the TCEQ, as such, this exception should be denied and the recommendation removed.

- Posting of information provided to TCEQ under Monitoring and Reporting Requirements Nos. 1 and 7a on a public website dedicated to providing information about the wastewater treatment plant and discharge, and public notification of this information via an email/text alert list, with both posting and notification done

**REPLY:** Morris raises new issues in this exception that have not been litigated. There is no evidence in the record to support a requirement to email, text, or otherwise personally notify individuals of monitoring results. The City does not object to the website posting, however, there is no rule or policy or evidence to support expanding this requirement to personal notice. Given the various factors that could prevent such a notice from being delivered, failure to sign up, glitches with email or phone deliveries, the City objects to condition like this that will be overly burdensome for compliance.

- The City be required to submit a nuisance odor prevention request to the ED for approval, in order to address nuisance odors at the facility; and

**REPLY:** This is an unnecessary condition. Morris points to an out-of-date odor complaint from 2019 in an attempt to argue that odor is presently an issue. The ALJs properly concluded that the City has met the state's odor abatement standards, and acknowledged that the City is currently doing more than the minimum to abate odor. Contrary to what Morris' claims, there is no record evidence of nuisance odors at the facility to address and the ALJs should deny this exception.

- Signage in English and Spanish be placed and maintained at the outfall, identifying the discharge to be the City of Liberty Hill's treated wastewater effluent outfall and providing certain information about where the public can obtain more information and register any concerns.

**REPLY:** This exception should be disregarded because it raises an issue that has not been litigated. As the ED properly points out in the Exceptions, the City is not required to post signs at the outfall. Furthermore, in response to this newly raised issue, the City adds that the City has posted signage at the outfall before which was either vandalized or stolen. The City is evaluating options for surveillance of the area to help identify persons that sump trash at the outfall or steal signage. Morris has proposed a condition that will be impossible for the City to maintain compliance given these circumstances. Contrary to what Morris' claims, there is no record evidence to support this signage requirement and the ALJs should deny this exception.

### **III. Conclusion & Prayer**

For the reasons stated above, and in Applicant's previously filed Exceptions to the PFD, Applicant respectfully requests that the ALJs deny Protestant Morris' exceptions, and grant Applicant's exceptions and recommend issuance of the permit to the TCEQ. Applicant requests any further relief to which it is entitled.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of City of Liberty Hill's Reply to Exceptions to the Proposal for Decision has been forwarded via electronic mail or U.S. Mail to the persons on the attached Service List on this the 28<sup>th</sup> day of November 2022.

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