

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

APPLICATION BY CITY OF § BEFORE THE STATE OFFICE
LIBERTY HILL FOR RENEWAL OF §
TEXAS POLLUTANT DISCHARGE § OF
ELIMINATION SYSTEM PERMIT §
NO. WQ0014477001 § ADMINISTRATIVE HEARINGS

PROTESTANT STEPHANIE RYDER MORRIS'S
REPLY TO EXCEPTIONS TO SUPPLEMENTAL
PROPOSAL FOR DECISION ON REMAND

December 11, 2023

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**PROTESTANT MORRIS’S REPLY TO EXCEPTIONS TO THE SUPPLEMENTAL
PROPOSAL FOR DECISION ON REMAND**

TO THE HONORABLE CHAIRMAN AND COMMISSIONERS:

Protestant Stephanie Ryder Morris (“Morris”) submits this Reply to the Exceptions to the Supplemental Proposal for Decision on Remand filed by Applicant City of Liberty Hill (“Liberty Hill” or “Applicant”) and the Executive Director (“ED”) regarding the Application by the City of Liberty Hill for Renewal of TPDES Permit No. WQ0014477001. Protestant Morris urges the Commissioners to adopt the ALJs’ Supplemental PFD on Remand and modify the permit to include, among other a Total Phosphorus limit of 0.015 mg/L, which is the limit necessary to comply with the Texas Surface Water Quality Standards. For support, Protestant Morris respectfully offers the following:

I. SUMMARY OF THE EVIDENCE ON REMAND

The Commission remanded this matter to SOAH for the parties to present additional evidence to determine the TP effluent limit necessary to comply with the Texas Surface Water Quality Standards (TSWQS). On remand, Liberty Hill did not revise the Application and continues to seek an effluent limit of 0.15 mg/L TP, which the ED continues to support. Liberty Hill produced no witness who addressed the question remanded for hearing. The ED produced Mr. Peter Schaefer; in his direct testimony, Mr. Schaefer testified that “through a policy decision made above my level, it has been determined that a 0.15 mg/L TP limit is sufficient to maintain instream water

quality and meet TSWQS.”¹ However, at the hearing, Mr. Schaefer qualified this testimony, stating that a range of 0.02 to 0.05 mg/L of TP would be protective of the River. Mr. Schaefer also agreed with Protestant Morris witness Dr. Ryan King that the presence of more than 0.02 mg/L results in increased algae growth, indicating that there is a threshold level of TP that facilitates excessive algae presence in the River. Mr. Schaefer was clear that these lower concentration levels are based on his professional opinion and do not reflect the ED’s position.

Protestant Morris produced three experts, two of whom addressed the remanded question. Dr. Ryan King recommended a TP limit of 0.015 mg/L. Dr. Jan Stephenson would set a lower limit of 0.01 mg/L TP to ensure protection of aquatic life uses, as opposed to recreational uses, during periods of low river flow. He testified 0.02 mg/L TP would protect recreational uses. Dr. Lauren Ross examined whether there is any modeling that demonstrates what the TP limit should be and ultimately opined that the data just are not good enough to do that confidently. Her view was that discharge concentrations at some level less than 0.05 mg/L might be modeled to show downstream algal growth in a range that is acceptable for recreational river uses, but none of the currently available surface water quality modeling would support a TP limit any higher in the South Fork San Gabriel River.

II. TOTAL PHOSPHORUS EFFLUENT LIMIT NECESSARY TO COMPLY WITH THE TEXAS SURFACE WATER QUALITY STANDARDS

A. A TP limit of 0.015 mg/L is measurable and enforceable.

a. Liberty Hill would have the Commission upend the evidentiary standard for contested case hearings in violation of due process.

The TSWQS are meant to protect the public health, and effluent limitations for TP must be set to prevent the degradation of water quality by more than a *de minimis* amount and prevent

¹ Ex. ED-PS-1-R, p. 12.

excessive algal growth that impairs existing uses.² The TSWQS provide various factors for TCEQ to consider in setting TP limitations, but the ability of a NELAP-certified laboratory to measure the TP limitation is not and has never been a factor. 30 Tex. Admin. Code § 25.1 has limited applicability and does not constrain the ability of the ALJ to recommend—and the Commission to adopt—a stricter TP limitation.

Contrary to Applicant’s claim, it is not “infeasible” to apply a TP effluent limit of 0.015 mg/L. The TSWQS provide Applicant with a viable and legally permissible route to sample for TP with non-NELAP labs. Generally, sampling must comply with the requirements of § 25.1, but Chapter 319 carves out a clear exception. 30 Tex. Admin. Code § 319.11(f) provides that “[s]hould the procedures specified in this section not be suitable to any particular situation, alternate sampling and testing techniques may be employed in accordance with the procedures outlined in § 319.12 of this title (relating to Alternate Sampling and Laboratory Testing Methods).” Thus, if a permittee cannot apply the “procedures specified,” that is, the NELAP-certified lab requirement, to a “particular situation” such as a more stringent TP limitation, then the regulations detail a simple procedure:

For Texas Pollutant Discharge Elimination System (TPDES) permits, if a permittee determines the sampling and testing methods required by § 319.11 of this title (relating to Sampling and Laboratory Testing Methods) are not suited to its particular situation, the permittee shall make a written request for authorization to use alternate sampling and testing procedures.³ As already noted by Protestant Morris, there are highly esteemed laboratories that have the ability to reliably test for TP limits below the NELAP laboratory threshold.⁴ The Commission

² 30 Tex. Admin. Code § 307.4(e); *see also* 30 Tex. Admin. Code § 307.5(b)(1)-(2).

³ 30 Tex. Admin. Code § 319.12(a).

⁴ Ex. SM-King-9-R at 6:20-7:19; Tr. Vol. 2 at 18-19; 54:13-57:4.

can and should maintain the 0.015 mg/L TP limit and instruct Applicant to seek authorization to utilize the appropriate sampling and testing procedures necessary to demonstrate compliance with this permit limit.

Relatedly, Applicant incorrectly argues that § 25.1 extends to the evidence the ALJs and Commission can consider in a contested case hearing and thus renders any evidence backed by non-NELAP laboratory data either inadmissible or less persuasive. Applicant does not clarify whether expert testimony grounded on non-NELAP laboratory testing cannot be considered at all by the Commission or should only be accorded less weight, but both interpretations misconstrue the applicability of § 25.1 and the relevant evidentiary standard in contested case hearings.⁵

As has been demonstrated previously, the Applicant continues to seek to overturn approximately two decades of SOAH precedent, the Texas Rules of Evidence, and the underlying due process foundations of the contested case hearing process, which provide the rights of parties to examine and rebut all evidence before a neutral decision-maker.⁶ In an attempt to superimpose Chapter 25 onto SOAH's contested case hearing process, the Applicant ignores the language of the statute itself and the legislative history.

As Protestant Morris briefed fully in response to Applicant's Objections and Motion to Strike,⁷ in 1995, the Texas Legislature transferred contested case hearings from hearings examiners at the Texas Natural Resource Conservation Commission (TCEQ's predecessor agency) to the recently created State Office of Administrative Hearings.⁸ TCEQ must now use

⁵ Applicant's Exceptions at 6-7.

⁶ See *Flores v. Employees Ret. Sys. of Tex.*, 74 S.W.3d 532, 539 (Tex. App.—Austin 2002, pet. denied).

⁷ Morris's Responses to Applicant's Objections and Motion to Strike Portions of Protestant's Prefiled Testimony (July 17, 2023), at 4-8.

⁸ Tex. S.B. 12, 74th Leg., R.S. (1995) (By transferring TNRCC's hearing functions to SOAH, the Legislature transferred the determination of questions of fact in contested case hearings to an independent decision-maker.).

SOAH to conduct all contested case hearings unless a majority of the TCEQ Commissioners decide to conduct a contested case hearing.⁹ Later, in 1999, the Legislature authorized the Texas Department of Health (TDH) “to develop and implement a voluntary accreditation program for environmental testing laboratories consistent with national standards.”¹⁰ At the time, other states had such programs in place already, and the lack of standards here put “laboratories in Texas at a competitive disadvantage for federal fund contracts.”¹¹

Ultimately, the 2000 Sunset Advisory Commission Staff Report recommended that management of the accreditation program be transferred from TDH to TNRCC, noting that “[t]he intent of these recommendations is to provide a system that would increase the reliability and defensibility of data provided to the agency *for compliance purposes*.”¹² And the next year, the legislature moved the relevant sections of the Health and Safety Code into the Water Code,¹³ though the prominence of “compliance purposes” did not change.¹⁴

Also important is that though the 2000 Sunset Report, written five years after TNRCC transferred contested case hearings to SOAH, makes other recommendations regarding the contested case hearing process, the recommendations regarding the accreditation program do not mention SOAH or contested permits at all. When the Commission finally adopted its rule in 2002, it also contained no language related to SOAH, contested permit applications, or the rules of evidence applied pursuant to Tex. Gov’t Code § 2001.081.

⁹ Tex. Gov’t Code Ann. § 2003.047(a)-(b).

¹⁰ S. Rsch. Ctr., Bill Analysis, Tex. C.S.S.B. 1238, 76th Leg., R.S. (1999).

¹¹ *Id.* See also, Sunset Advisory Comm’n Staff Rep. for Tex. Nat. Res. Cons. Comm’n, 49 (2000). (“Uniform standards provided by a national accreditation program would allow Texas labs to effectively compete with accredited labs in other states.”).

¹² Sunset Advisory Comm’n Staff Rep. for Tex. Nat. Res. Cons. Comm’n, 54 (2000) (emphasis added).

¹³ Acts eff. Sept. 1, 2001, 77th Leg., R.S., ch. 965, § 6.01.

¹⁴ See e.g., Tex. Water Code Ann. § 5.801 (defining a lab in relation to “regulatory compliance purposes”); 30 Tex. Admin. Code § 25.2 (defining a lab in relation to “regulatory compliance”).

Applicant ignores this history and instead continues to argue for a position that would, if taken to its logical end, actually lead to absurd results, wherein no scientific expert testifying in a contested case, including an expert testifying on behalf of the ED, would be capable of reviewing scientific literature published by leading academic researchers.¹⁵ In short, Chapter 25 is about uniformity and regulatory compliance, not the evidentiary standards to apply to a contested application—and especially not about restricting the Commission’s access and ability to consider relevant and reliable evidence already admitted by ALJs. Applicant cites no such precedent for applying Chapter 25 to evidence in a contested case hearing, because there is none. In the Supplemental PFD on Remand, the ALJ’s properly distinguishes the applicability of § 25.1 in TCEQ permitting decisions and the separate evidentiary standard in contested case hearings.¹⁶

b. Impracticability is not a factor under the TSWQS.

Under the TSWQS, a TP effluent limit must be set to prevent excessive growth of aquatic vegetation that impairs an existing use of the receiving water¹⁷ and that prevents the degradation of water quality by more than a *de minimis* amount.¹⁸ The ALJs made their finding based on what the state water quality standards require. It is also worth noting that the Commission, when remanding the matter, also recognized the precise inquiry demanded by the TSWQS—as well as the limitations involved. The Applicant’s purported consideration of “practicability” has no role in this analysis.

¹⁵ See Remand Tr. Vol. 2 at 56:10-57:4 (testimony from Ryan King that the academic research community publishes results in journals that are relied on despite not being subject to NELAP labs).

¹⁶ Supp. PFD at 48-9 (noting that “Applicant conflates the requirements for information considered in a permit application and the reliability of expert witness testimony in a contested case hearing at SOAH) (citing *In the Matter of the Application of Port of Corpus Christi Authority of Nueces County for TPDES Permit No. WQ0005253000*, SOAH Docket No. 582-20-1895, TCEQ Docket No. 2019-1156-IWD).

¹⁷ 30 Tex. Admin. Code § 307.4(e); See also 30 Tex. Admin. Code § 307.5(b)(1).

¹⁸ 30 Tex. Admin. Code § 307.5(b)(2).

The TSWQS do not contain any provisions that allow TCEQ to consider cost effectiveness in setting a TP standard protective of water quality. Neither does TCEQ standards implementation team consider what is achievable when setting a TP limit.¹⁹

40 C.F.R. § 122.44 states:

Where a State has not established a water quality criterion for a specific chemical pollutant that is present in an effluent at a concentration that causes, has the reasonable potential to cause, or contributes to an excursion above a narrative criterion within an applicable State water quality standard, the permitting authority must establish effluent limits²⁰

This obligation “may not be waived,” and requires the agency to incorporate a permit limit protective of water quality standards regardless of “‘treatability’ or analytical method detection levels.”²¹

Protestant Morris has provided a mountain of evidence, based on years of academic research in the field of nutrient enrichment in freshwater streams, review of peer-reviewed literature on the subject, site-specific data collected on the South Fork San Gabriel over several years, observed and documented changes in the River conditions over time as compared to effluent quality being discharged, and on independent laboratory experiments that identified the threshold level of TP concentration that leads to exponential algae growth. This is precisely the kind of evidence that the Commission must consider in adopting a TP limit that is protective of state water quality standards. Just as evidence behind reasonably available technology and costs was not relevant on remand in determining the TP limit necessary to protect water quality standards, it cannot form a basis for the Commission’s ultimate decision on the appropriate TP limit.

¹⁹ Remand Tr. Vol. 3 at 50:15-51:3

²⁰ 40 C.F.R. § 122.44(d)(1)(vi).

²¹ EPA, Central Tenets of the NPDES Permitting Program at 3, *available at*: <https://www.epa.gov/sites/default/files/2015-09/documents/tenets.pdf> (“The final calculated limit placed in the permit MUST be protective of water quality standards, and MAY NOT be adjusted to account for “treatability” or analytical method detection levels.”).

Though Applicant makes the argument that it would be automatically be in noncompliance with the Commission's rules should a limit of 0.015 mg/L TP be adopted, this argument fails to take seriously its ongoing noncompliance. The City's effluent discharge is degrading water quality in the South Fork San Gabriel River such that it is already violating TSWQS, and the evidence shows these violations would continue even if the City regularly achieved 0.15 mg/L TP. Even considering practicability of achieving compliance (because ultimately compliance is paramount), Applicant fails to address—and despite ample opportunity during permitting and on remand—failed to explore any practical means toward achieving compliance. For example, a concentration of 0.015 mg/L of TP in 4.0 MGD totals approximately 0.50 lbs/day. The City could have explored capping its total daily loading of TP and trucking away effluent once it would exceed the total loading. Also, the evidence shows that the City is currently discharging well below 2.0 MGD. Other municipalities, when faced with constraints, have instituted development moratoriums. The City could have explored capping its total permitted flow, as Protestant Morris argued in the initial hearing on the merits. In short, the City's arguments as to practicality are not based in the TSWQS nor are they intended to achieve compliance with the Clean Water Act—in fact, they are in an effort to justify ongoing noncompliance.

B. The Commission's decision on the Liberty Hill permit cannot invalidate all other TPDES permits in the State under the Clean Water Act.

As an initial matter, the lowering of an effluent limitation in a single TPDES permit does not “call into question” “the validity of every other TPDES permit in the State,” as Applicant exaggeratedly fears.²² Applicant's permit applies only to Applicant and not to any other entity that currently has coverage under the TPDES program.

²² Applicant Exceptions at 10.

While the TP limits in existing TPDES permits are a factor to consider in setting TP limits in a new or renewed TPDES permit, it does not hold the controlling weight Applicant claims. The IPs screening factor regarding “consistency with other permits” simply directs the standards reviewer to conduct an assessment “to determine *whether* TP limits have been required for other wastewater permits with similar characteristics and locations in this area.”²³ It does not, as Applicant suggests, direct the standards reviewer to set TP at the same limits as other permits.²⁴ Even the ED’s witness, Mr. Schaefer, confirmed that the standards reviewers do not consider what is a “fair” effluent limit as compared to other nearby sites, but rather, what is needed to protect the specific water body in question.²⁵

C. Liberty Hill failed to present expert testimony on the TP concentrations that would prevent degradation of the river by more than a *de minimis* amount.

Liberty Hill did not meet its burden during the initial hearing for this case to demonstrate that the TP limit set in the Draft Permit met the requirements of the TSWQS.²⁶ The remand order found that “[u]nder the Standards, the TP effluent limit should prevent the excessive algal growth that impairs an existing use of the receiving water and should prevent the degradation of water quality by more than a *de minimis* amount.”²⁷ Put another way, the TCEQ Commissioners directed parties to provide evidence that would answer the question: What TP effluent limit is necessary to meet Tier 1 and Tier 2 review under the State’s antidegradation policy?

²³ Ex. ED-JL-3 (IPs) at 41; *see also* 46, 54 (two examples of applying screening criteria provided in IPs only answer the question of whether any other permits in the area have TP limits for purposes of ranking low, medium, or high).

²⁴ Liberty Hill Closing Args. on Remand, at 16.

²⁵ Remand Tr. Vol. 2 at 190:17-23.

²⁶ Tex. Comm. on Env’tl. Quality, Application by City of Liberty Hill for Renewal of TPDES Permit No. WQ0014477001, TCEQ Docket No. 2021-0999-MWD; SOAH Docket No. 582-22-1222, An Interim Order concerning the ALJs’ PFD and Order at 1 (Feb. 13, 2023).

²⁷ TCEQ Remand Order at 2.

However, during the hearing on remand, instead of answering this question, Liberty Hill continued to rely on the antidegradation review performed in 2013 by Peter Schaefer. The ED failed to perform a new antidegradation review, arguing in its Exceptions to the Supplemental PFD on Remand that “[t]he 2013 antidegradation review remains valid and applicable.”²⁸ The ED and City’s reliance on the 2013 review is striking, given the ALJs’ finding during the initial hearing that the review was: (1) outdated, (2) founded on a mathematical error, and (3) shown to be inadequate based on the widespread degradation of the South Fork San Gabriel River at and downstream of the City’s effluent discharge point since the permit analyzed in the 2013 review became effective.²⁹ In their Supplemental PFD on Remand, the ALJs reiterate these findings.³⁰

Liberty Hill argues in its Exceptions that the ED’s failure to conduct a new antidegradation review “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 minimis* effect on the water quality of the SFGS River.”³¹ However, no witness for Liberty Hill or the ED actually offered a consistent opinion as to what TP effluent limit would maintain existing uses and prevent degradation beyond a *de minimis* amount. Mr. Peter Schaefer, a new witness on remand for the ED, stated during his prefiled testimony on remand that “.15 mg/L is intended to prevent the excess accumulation of algae”³² but then stated during the hearing on the merits that a TP concentration of 0.02-0.05 mg/L is necessary to meet water quality

²⁸ ED’s Exceptions at 2.

²⁹ Initial PFD at 15 (Findings of Fact 95-97) (“The 2013 antidegradation review involved a mathematical error. The 7Q2 flow used was 0.15 cubic feet per second (cfs) instead of 0.1 cfs, and the harmonic mean flow used was 0.4 cfs instead of 0.2 cfs. The effect of the effluent on the stream was therefore underestimated in the 2013 antidegradation review. The 2013 antidegradation review has also been shown to be inadequate, based upon the widespread degradation of the South Fork San Gabriel River at and downstream of the City’s effluent discharge point since the permit analyzed in the 2013 review became effective.”)

³⁰ Supp. PFD at 67 (Findings of Fact 100-103).

³¹ Applicant’s Exceptions at 11.

³² Ex. ED-PS-1-R, 11 (Prefiled Testimony of Peter Schaefer).

standards.³³ David Buzan, expert for Liberty Hill, testified that he did not “have an opinion as to what the TP effluent limit should be in the Liberty Hill permit necessary to prevent degradation beyond a *de minimis* amount of water quality.”³⁴

However, experts for Protestant Morris presented uncontested opinion that a TP effluent concentration greater than 0.02 mg/L would impair primary contact recreational uses and harm the aesthetic condition of the South Fork San Gabriel River in the area below the Liberty Hill outfall,³⁵ and a discharge greater than 0.015 mg/L would impair high aquatic life uses.³⁶ Certainly, if existing or designated uses are impaired, then the degradation has gone beyond a *de minimis*—or insignificant—lowering of water quality.

Though the ED failed to conduct a new antidegradation review, this is not an excuse for the City’s utter failure to meet its burden to provide a TP limit that would prevent *de minimis* lowering of water quality and a TP that would maintain existing and designated uses, as instructed by the Commission on remand. Thus, the City’s argument that it was the ED’s obligation to conduct an antidegradation review improperly distracts from the core issue that the ALJs consider in their Supplemental PFD on Remand: that the City presented no evidence on what TP limit would comply with all TSWQS.

D. The ALJs’ PFD does not create new standards of improving water quality.

In its Exceptions to the PFD, the City argues that “[t]he PFD improperly creates a new standard of improving water quality instead of applying the law which is designed to prevent degradation of water quality.”³⁷ The City claims that the PFD “adopt[s] a significantly lower

³³ Remand Tr. Vol. 2, 147:148 (Cross Examination of Peter Schaefer).

³⁴ See Remand Tr. Vol 1, 109:19-23.

³⁵ See SM-Stevenson-1-R at 13:16-18.

³⁶ See SM-King-9-R at 17:22-28; 22:31-23:2.

³⁷ Applicant’s Exceptions at 5.

standard based upon alleged existing conditions” and that the ALJs are “not seeking to prevent degradation, but are trying to force this permit to improve water quality from current conditions.”³⁸ This argument reveals the City’s fundamental misunderstanding of what the Clean Water Act requires.

As the IPs acknowledge, under the Clean Water Act, “[t]he effect of a proposed discharge is compared to baseline water quality conditions in order to assess the potential for degradation of water quality,” where “[t]he applicable date for establishing baseline water quality conditions is November 28, 1975, in accordance with 40 CFR Part 131.”³⁹ The City would like to frame the current condition of the South Fork San Gabriel—which has been degraded by years of the City’s wastewater discharge—as the “baseline” condition that cannot be further degraded. In fact, the “baseline” conditions are markedly different from the current condition of the River below the Liberty Hill outfall. The South Fork San Gabriel is naturally low in nutrients, such as nitrogen and phosphorus, and because of this, has limited aquatic vegetation compared to many other bodies of water.⁴⁰ In its natural state, the River has clear water flowing over a white limestone bottom.⁴¹ Upstream of the outfall where the River is not impacted by the City’s effluent, there is very little filamentous algae, as depicted by voluminous photographic evidence over time:

³⁸ Applicant’s Exceptions at 5.

³⁹ Ex. ED-JL-3 (IPs) at 63.

⁴⁰ Ex. SM-King at 29:21-30:20.

⁴¹ Ex. SM-King at 29:12.



Photo taken May 26, 2022 by Protestant Morris, upstream of outfall.⁴²

03/23/2023
100-200 meters upstream of Outfall (US_200m)
TP (mg/L): 0.0075 (3/15/23), 0.0055 (3/23/23)
Average TP 03/15/23-05/09/23: **0.0084 mg/L**
Highest recorded value 2020-2023: **0.0105 mg/L (3 labs)**



Photo taken May 23, 2023 by Dr. King 100-200 meters upstream of the outfall.⁴³

⁴² Ex. SM-Morris at 48 (photo 64).

⁴³ Ex. SM-King-12-R at 1.

The City previously did not dispute this characterization of South Fork San Gabriel baseline conditions both in terms of the observable characteristics and of the measurable TP concentrations. Experts for all parties largely agree that the conditions above the outfall are generally representative of baseline conditions. Mr. Machin (expert for the City) agreed that the River upstream of the outfall is likely oligotrophic and that in the photos it appears to “be very low in nutrients and aquatic vegetation growth.”⁴⁴ Mr. Machin also stated that Hill Country streams typically have very low levels of phosphorus, and Mr. Buzan (also an expert for the City) agreed that the South Fork San Gabriel River specifically is naturally low in phosphorus.⁴⁵

Below the Outfall, Dr. King has observed that conditions “have changed over time, partly due to cleaning events, weather and rain events, and likely even reduced phosphorus loading from the Outfall,” yet he has “always observed a noticeable difference in the area at the Outfall as compared to the area 200 meters upstream.”⁴⁶ The difference in algal blooms above and below the outfall is demonstrated by the voluminous photographic evidence:

⁴⁴ Initial HOM Tr. Vol. 2 at 511:4-24.

⁴⁵ Initial HOM Tr. Vol. 3, 602:23-603:1 (Lueg); *id.* at Vol. 2, 512:21-22 (Machin); *id.* at 374:15-18 (Buzan).

⁴⁶ Ex. SM-King-9-R at 10:12-15.

05/09/2023
 100 m Downstream of Outfall following 2 rain events (high flows)
 Average Outfall TP (DMRs) 01/01/2023-04/30/2023: **0.0674 mg/L***
 Average Outfall TP (DMRs) 03/15/2023-04/30/2023: **0.0679 mg/L****
 Average Outfall TP (CRASR): 03/15/2023-05/09/2023: **0.0462 mg/L**

*underestimate because 18 observations were below method reporting limit of 0.05 mg/L, n=34
 **3 of 13 observations below reporting limit of 0.05 mg/L; Source: LH WWTP DMRs



Photo taken May 9, 2023 by Dr. King at the outfall following two high flow events within two weeks.⁴⁷

03/23/2023
 Outfall Zone
 TP (mg/L): 0.0331 (3/15), 0.0843 (3/23)
 Average Outfall TP (DMRs) 01/01/2023-03/23/2023: **0.0667 mg/L***

*underestimate because 15 observations were below method reporting limit of 0.05 mg/L
 Source: LH WWTP DMRs; n=23



Photo taken May 23, 2023 by Dr. King directly downstream of the outfall.⁴⁸

⁴⁷ Ex. SM-King-12-R at 4.

⁴⁸ Ex. SM-King-12-R at 1.

Therefore, the baseline conditions of the South Fork San Gabriel that must be considered during the permit review are *not* synonymous with the current condition of the River below the outfall. It is the City, not the ALJs, that would have the Commission alter the long-established standard under the Clean Water Act.

Liberty Hill also argues that “[t]here is no such thing as a “tipping point” under TCEQ’s rules.”⁴⁹ “Tipping point” is simply a term that Protestant Morris’ experts use to describe the TP effluent limit under which algal growth occurs at an exponential rate and therefore will result in degradation.⁵⁰ This argument by the City is another straw man used to distract from the core issue on remand: that the City did not meet its burden to demonstrate what TP effluent limit should prevent the excessive algal growth that impairs an existing use of the receiving water and should prevent the degradation of water quality by more than a *de minimis* amount.⁵¹

E. The findings of fact and conclusions of law in the Supplemental PFD on Remand are comprehensive.

The City argues that the following findings of fact and conclusions of law relate to issues not remanded by the Commission and thus should be rejected: Findings of Fact 122, 123, 140, 141, 142, 143, 154, and 155, and Conclusions of Law 7, 20, 22, 23. The findings of fact and conclusions of law of which the City complains are part of a comprehensive set recommended by the ALJs to resolve all the issues in this docket. The complained-of findings and conclusions are not new and do not address only remanded issues; they were among the recommended findings and conclusions made following the initial hearing in this docket 17 months ago. Any changes simply ensure consistency among the final comprehensive set provided in the Supplemental PFD on Remand.

⁴⁹ Applicant’s Exceptions at 17.

⁵⁰ Remand Tr. Vol. 2 at 38-39.

⁵¹ See TCEQ Remand Order at 2.

III. ALLOCATION OF TRANSCRIPT COSTS

Protestant Morris agrees with the ALJs' recommendation that all transcript and recording costs be allocated to the Applicant;⁵² the Applicant did not provide any Exceptions to this recommendation by the ALJs.

IV. CONCLUSION

For the foregoing reasons, Protestant Morris urges the Commissioners to adopt the ALJs' Supplemental PFD on Remand and modify the permit to include, among other a Total Phosphorus limit of 0.015 mg/L.

Respectfully submitted,

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⁵² Supp. PFD at 51.

CERTIFICATE OF SERVICE

I hereby certify that on this day, December 11, 2023, a true and correct copy of the foregoing document was served on all parties of record listed below via electronic service and/or email.

/s/ Lauren Ice
Lauren Ice

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