

**SOAH DOCKET NO. 582-23-23818  
TCEQ DOCKET NO. 2023-0844-MWD**

<b>APPLICATION OF HIGHLAND LAKES MIDLOTHIAN I, LLC FOR NEW TEXAS POLLUTION DISCHARGE ELIMINATION SYSTEM PERMIT NO. WQ0015999001</b>	<b>§ § § § §</b>	<b>BEFORE THE  STATE OFFICE OF  ADMINISTRATIVE HEARINGS</b>
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**HIGHLAND LAKES MIDLOTHIAN I, LLC’S REPLY TO EXCEPTIONS TO THE  
PROPOSAL FOR DECISION**

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<b>APPLICATION OF HIGHLAND</b>	§	<b>BEFORE THE</b>
<b>LAKES MIDLOTHIAN I, LLC FOR</b>	§	
<b>NEW TEXAS POLLUTION</b>	§	<b>STATE OFFICE OF</b>
<b>DISCHARGE ELIMINATION SYSTEM</b>	§	
<b>PERMIT NO. WQ0015999001</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**HIGHLAND LAKES MIDLOTHIAN I, LLC’S REPLY TO EXCEPTIONS TO THE  
PROPOSAL FOR DECISION**

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW, Highland Lakes Midlothian I, LLC (Applicant) and files its Reply to Exceptions to the Proposal for Decision (PFD) and would respectfully show the following.<sup>1</sup>

**I. SUMMARY OF REPLY TO EXCEPTIONS TO PFD**

Despite the PFD’s well-reasoned and comprehensive assessment of the evidence, the Protestants’ Exceptions repeat the same arguments the Administrative Law Judge (ALJ) rightly rejected.<sup>2</sup> The ALJ, Executive Director (ED), and Office of Public Interest Counsel (OPIC) all rejected Protestants’ arguments because they fundamentally misapply the law and do not qualify as rebuttal evidence sufficient to overcome Applicant’s prima facie demonstration. Protestants would replace the ED’s tried and true computer modeling analysis with one invalid data set taken during a one-day site visit supported by one witness. Protestants would also subject Applicant to *ad hoc* requirements for notice and CECs not imposed on any other permit applicant statewide.

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<sup>1</sup> Applicant’s Reply is in response to the cities of Waxahachie and Midlothian and Ellis County’s (Protestants) Exceptions to the Proposal for Decision only, except to the extent it addresses points of agreement with the TCEQ parties. Applicant incorporates its Closing Arguments and Reply to Closing Arguments herein, as if set out in full.

<sup>2</sup> Since this docket was a direct referral, the parties submitted an agreed list of five issues to be addressed, three of which the ALJ dismissed on Applicant’s Motion for Summary Disposition leaving two remaining issues – whether the Draft Permit is adequately protective of water quality and whether the permit would protect human health and safety relating to the discharge of Contaminants of Emerging Concern (CECs). However, because Protestants reurged their notice issue in post-hearing pleadings, Applicant has also addressed notice herein at Section III.B of this Reply.

Contrary to Protestants' claims, the preponderance of the credible and reliable evidence demonstrates that the Draft Permit prepared by the ED meets all state and federal legal and technical requirements, and a final permit would protect human health and safety, the environment, and physical property.<sup>3</sup> The Commission should overrule Protestants' Exceptions in their entirety, as their Exceptions failed to show a factual or legal basis to disregard or change the ALJ's thorough fact-finding and analysis.<sup>4</sup> Accordingly, Applicant urges the Commission to overrule all of Protestants' exceptions, grant the Application, and issue the final permit in this case without changes.

## II. BURDEN OF PROOF

Protestants stated repeatedly that they "have provided sufficient evidence to rebut the presumption that the Draft Permit is adequately protective of water quality . . . in accordance with applicable [rules] including the Texas Service Water Quality Standards (TSWQS)."<sup>5</sup> However, such self-serving and conclusory statements indicate that Protestants misunderstand their burden of proof and the burden-shifting scheme foundational to S.B. 709 cases.

Texas Government Code § 2003.047(i-2) specifically defines what kind of evidence is necessary to rebut an applicant's prima facie case:

- (i-2) A party may rebut a demonstration under Subsection (i-1) by presenting evidence that:
  - (1) relates to a matter referred under Section 5.557, Water Code, or an issue included in a list submitted under Subsection (e) in connection with a matter referred under Section 5.556, Water Code; and
  - (2) ***demonstrates that one or more provisions in the draft permit violate a specifically applicable state or federal requirement.***<sup>6</sup>

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<sup>3</sup> Tex. Gov't Code § 2003.047(i-1).

<sup>4</sup> Per Tex. Gov't Code § 2003.047(m), the legal bar to overturn the PFD is very high and there is no basis in the evidentiary record to substantively amend the PFD, its findings of fact or its conclusions of law, or refer this matter back to the State Office of Administrative Hearings to take additional evidence.

<sup>5</sup> Protestants' Exceptions at 1-2; *see also* Protestants' Closing Arguments at 2, 4, 6, and 10.

<sup>6</sup> Tex. Gov't Code § 2003.047(i-2) (emphasis added). Texas Administrative Code (TAC) § 80.17(c)(2) implements section 2003.047(i-2) in nearly identical language.

In practice, this means that to overcome the prima facie case established in section 2003.047(i-1), a protestant must not just put on evidence that contradicts the applicant's evidence, but its evidence *must demonstrate* that one or more draft permit provisions violate a state or federal requirement.

As explained more fully in Applicant's closing and reply briefs and herein, Protestants' witness Tim Osting P.E. did not demonstrate that any specific Draft Permit provision violated Chapter 307 or any other applicable law.<sup>7</sup> Mr. Osting conceded that the results of the ED's model met the TSWQS for DO.<sup>8</sup> In the absence of a demonstrated violation, it is not enough for Protestants to merely assert that Mr. Osting's modeling results would "serve to better protect the receiving water bodies [than the ED's model]."<sup>9</sup> Texas Government Code § 2003.047(i-2) requires actual evidence that the permit provisions would violate state or federal law, a requirement Protestants did not meet.<sup>10</sup>

Even though Protestants did not offer evidence that rose to the level of rebuttal evidence to sufficiently rebut the presumption under Texas Government Code § 2003.047(i-1), Applicant (and the ED) still presented additional evidence showing the weaknesses in Protestants' evidence and in Mr. Osting's opinion.<sup>11</sup> The ALJ, as fact finder, thoroughly reviewed the entire evidentiary record including Protestants' evidence, weighed all evidence, and determined that the credible, preponderant evidence weighed in favor of permit issuance.

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<sup>7</sup> Mr. Osting claimed a reduction of ammonia from 1.0 mg/L to 0.5 mg/L was necessary to meet the Dissolved Oxygen (DO) standard in the SCS Site 17 Reservoir, but that is only through his substitution of input data which was invalid.

<sup>8</sup> Protestants' Ex. 1 at 13:21-14:3 (Direct Testimony of Tim Osting, P.E.).

<sup>9</sup> January 22, 2024 Protestants' Closing Arguments at 5.

<sup>10</sup> *Tex. Comm'n on Envtl. Quality v. Save Our Springs Alliance, Inc.*, 668 S.W.3d 710 (Tex. App. – El Paso 2022, pet. pending) (protesting party must provide some controverting evidence which raises a question of fact on the issue of whether the permit violates a state or federal rule or regulation).

<sup>11</sup> Tex. Gov't Code § 2003.047(i-3).

### III. REPLY TO PROTESTANTS

#### A. **Whether the Draft Permit is Adequately Protective of Water Quality, Including the Protection of Surface Water in South Prong Creek and Lake Waxahachie, in Accordance with Applicable Regulations Including the Texas Surface Water Quality Standards**

In the PFD, the ALJ accurately set out the evidence and arguments on this issue, and there is little Applicant can add to her analysis.<sup>12</sup> However, Protestants urge the Commission to reject the ALJ's analysis and rely instead on Mr. Osting's opinions derived from one site visit, one-off sampling, "pencil engineering," and improper measurements taken on one morning's walk down portions of a variable and meandering dry streambed. Not only is there no basis to do so, substituting Mr. Osting's unverifiable and unreliable methodology for the TCEQ- and EPA-approved modeling methodologies would also contradict the Commission's Procedures to Implement the Texas Surface Water Quality Standards (RG-194, June 2010) (IPs) and the Commission's long-standing practice of applying default hydraulic coefficients.<sup>13</sup>

The ALJ considered Protestants' arguments relative to the protection of water quality and properly rejected them. The preponderant, credible, and common-sense evidence outweigh Mr. Osting's opinion.<sup>14</sup> The evidence showed that the ED performed modeling using the appropriate inputs, while Protestants failed to show why the Commission should reject a Draft Permit that complies with all aspects of the TSWQS and IPs. For these reasons, Applicant requests that the Commission overrule all of Protestants' Exceptions on this issue.

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<sup>12</sup> PFD at 16 (finding that Applicant's expert Price "testified persuasively that a stream-specific reach model requires an 'extremely labor intensive' process" and Protestants' measurements do not meet this standard).

<sup>13</sup> Tr. at 101:20-22, 113:8-11 (to alter input data it must include numerous cross sections of width, depth and slope at numerous locations taken in a flowing or steady state stream (not dry creek) utilizing a Quality Assurance Project Plan (QA/QC), none of which Protestants' provided). *See also* Domestic Worksheet 2.1, Table 2.1(1) (stream physical characteristics) and ED-JR-11.

<sup>14</sup> Tellingly, Mr. Osting never referred to his own evidence as "site-specific," that term only appeared later in legal argument.

## 1. Stream Geometry

The evidentiary record established multiple reasons why Mr. Osting's opinions based on his one-time site visit are unreliable and inappropriate to alter the ED's QUAL-TX DO modeling. One example is the issue of stream geometry used in the Protestants' modeling. Protestants argued that Mr. Osting "clearly shows" that the ED's use of a 28-foot-wide stream width for Reach 1, but that argument was not supported by either Applicant's witnesses or Protestants' witness.<sup>15</sup> Protestants attempted to support their assertion, not by any expert testimony in the record, but rather through legal argument claiming a 27% and 40% discrepancy where one does not occur. Not only is Protestants' after-the-fact allegation refuted by the testimony of Applicant's Experts Machin and Price,<sup>16</sup> but it underscores the whole fallacy of Protestants' position – it is simply not reasonable to substitute some measurements in a dry intermittent stream for all measurements in a model based on flowing water.<sup>17</sup>

Protestants' channel slope data of 0.0036 ft/ft was another example where Mr. Osting's conclusions were debunked by the actual USGS map showing a flatter/gentler slope of 0.0025 ft/ft with a drop of 10 ft (instead of Protestants' 0.0036).<sup>18</sup> Utilizing the actual USGS map data, the modeling results in a slower velocity consistent with the ED's analysis. Expert Machin testified that the velocities derived from the actual USGA data were not too slow but altogether reasonable. Still another example was Protestants' reiterated assertion that 80% DO saturation in the ED's model was too high. Again, not only did Protestants' measurements lack any QA/QC, but the 80% saturation in the model is only applied to the headwater flow. Under the Commission's modeling, these saturation levels would be applied to the upstream flow. However, the problem with Protestants' argument is that during critical conditions, there is zero headwater flow; thus, headwater DO makes no difference. Protestants' argument shows clear lack of understanding of TCEQ modeling and is irrelevant.

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<sup>15</sup> Protestants' Exceptions at 2.

<sup>16</sup> Applicant's experts Machin and Price who have over 75 years of combined experience in water quality analysis, including stream geometry and computer modeling, testified that Mr. Osting's measurements were improper and the ED agreed. *See* ED Ex. JR-1 at 340; App. Ex. 2 at 17:1-11 and 22-25; App. Ex. 8 at 8:17-24; Tr. at 31:8-9, 2:12-13, 56:2-8, 88:1-89:4.

<sup>17</sup> Protestants could not refute the Reach 2 coefficients which were based on Applicant's actual measurements of South Prong Creek when flowing.

<sup>18</sup> App. Ex. 8 at 9:3-12.

## 2. “On-Channel Impoundment”

Protestants also excepted to the ALJ’s finding that a temporary pool at Location 215 was likely caused by a heavy rainfall, and that it is not a perennial pool.<sup>19</sup> Even though Protestants conceded that a 2.24” rainfall occurred the week before Mr. Osting’s single site-visit, they argued that it is speculative that the standing water at Location 215 was there because of that rainfall and not because the pond is a permanent feature. Protestants further contended that there was no “credible” evidence to show that the water is *not* persistent. This argument misstates the evidentiary record.

Applicant Exhibit 12 shows almost 7” of rainfall in the month preceding the Mr. Osting’s site visit on October 13, 2023 while Exhibit ED-JR-12 show **17 years** of a dry creek at Location 215 without the alleged “impoundment.”<sup>20</sup> Although Protestants contend that the record does not contain the “actual Google Earth data” and timestamps, Protestants did not object to the admission of Exhibit ED-JR-12.<sup>21</sup> More importantly, each Google Earth image in Exhibit ED-JR-12 shows the date and the location of each image. Protestants also did not impeach or disprove the sworn testimony that during Applicant’s multiple site visits, the stream bed was always dry, it is classified as an intermittent stream, and one would expect a two-inch rainfall the week preceding (and another 4.54” in September) to create a temporary pool.<sup>22</sup> Given the evidentiary record, the preponderant evidence supports the ALJ’s finding that the temporary pool is not perennial and that the ED’s model properly excluded the temporary pool.

## 3. Baseline DO Saturation

Protestants argued that the ALJ improperly “relied on the Applicant’s speculation regarding the low DO measurements taken by Mr. Osting on site.”<sup>23</sup> What the evidence shows is that Mr. Osting’s one-time sampling event resulted in highly unusual DO levels that experts with

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

<sup>20</sup> App. Ex. 12 (with the exception of one image in 2018); App. Ex. 2 at 18:1-6; Tr. at 20:1-18; ED-JR-1 at 13:25-31 and ED-JR-12.

<sup>21</sup> December 18, 2023 Protestants’ Objections and Motions to Strike Prefiled Testimony.

<sup>22</sup> Tr. at 39-40.

<sup>23</sup> Protestants’ Exceptions at 3.

years of experience called into question. It is not speculation that Mr. Osting took one of his samples in the stagnant, sediment- and debris-filled temporary pool at Location 215 and obtained the expected low DO level. It is not speculation that Mr. Osting's measurements were "snapshots" in time, "not the average 24-hour average DO measurements the IPs prioritize."<sup>24</sup> Likewise, it is not speculation that the ED's models assumed worst case temperature scenarios and were more conservative by omitting algae photosynthesis considerations. The ALJ properly weighed the evidence and found that the ED used the appropriate default DO saturation of 80% in his models, and the Applicant urges the Commission to overrule Protestants' Exceptions on this issue.

#### **4. Phosphorus**

In their Closing Arguments, Protestants devoted all of one sentence to phosphorus.<sup>25</sup> In their Exceptions, Protestants make a similarly feeble attempt to argue the ALJ's findings regarding phosphorus were in error. Again, the preponderance of the evidence shows that a single value from a single sampling event is insufficient to show that the ED's proposed Total Phosphorus (TP) limit of 0.5 mg/L violates any requirement or is not protective of water quality. This is especially true where Protestants' sampling lacked QA/QC, lab results often exceeded appropriate hold times, and samples were taken in stagnant debris-filled water. Further, Protestants did not show that the ED's nutrient screening did not comply with the TSWQS, IPs, or relied on improper factors and considerations. Meanwhile, Protestant Waxahachie's own WWTP has no TP limit in its permit at all, although the plant treats a much higher volume than that proposed by Applicant.<sup>26</sup> The Commission should overrule Protestants' Exceptions on this issue.

#### **5. Antidegradation**

Regarding antidegradation, the ALJ found that the entirety of Protestants' antidegradation evidence hinged on Mr. Osting's testimony that "changes resulting from the proposed discharge *may* constitute a lowering of water quality that exceeds the Tier 2 criteria."<sup>27</sup> The ALJ recognized that the basis for Mr. Osting's opinion was one sample that did not show a violation of any standard

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<sup>24</sup> PFD at 23-24.

<sup>25</sup> January 22, 2024 Protestants' Closing Arguments at 5.

<sup>26</sup> App. Ex. 8 at 14:23-24. The City of Waxahachie currently has no TP limit in its TPDES permit for a WWTP with a permitted flow of 8.0 MGD.

<sup>27</sup> PFD at 31 (emphasis added by PFD); *see also* Protestants' Ex. 1 at 21.



or requirement, and that the Protestants failed to meet their burden under Texas Government Code § 2003.047(i-2).

In their Exceptions, Protestants stated: “In incorrectly dismissing Mr. Osting’s onsite measurements and testing results, the ALJ dismissed the supporting evidence that does show this provision of the draft permit will violate the law.”<sup>28</sup> However, Protestants did not elaborate on what that “supporting evidence” may be or what law would be violated. They did not question the ED’s nutrient screening showing that the water quality in the receiving waters would be maintained. Likewise, they did not show any violation of the narrative criteria in the TSWQS.

Nor did Protestants dispute the stringency of the Draft Permit’s TP limits in the various phases. It is also important to note that just prior to the hearing on the merits, Mr. Osting withdrew a significant portion of his testimony on TP and his entire antidegradation claim related to one questionable TP sample of .0756 mg/L. A review of his testimony shows that Mr. Osting never addressed the 1.0 mg/L TP (Interim I and II) and 0.5 mg/L (Final Phase) TP limits proposed in the Draft Permit. As the ALJ found, Mr. Osting’s single phosphorus sample did not qualify as a demonstration of violation any applicable standard or law. As the ALJ’s analysis shows, the ED’s antidegradation review complied with the TCEQ’s IPs, and there will be no significant degradation of water quality anywhere along the receiving stream. The Commission should overrule Protestants’ Exceptions on this issue.

#### **B. Whether the Application was Properly Noticed**

As Applicant has previously stated in its closing and reply briefs, the ALJ properly granted Applicant’s Motion for Partial Summary Disposition on notice. Moreover, the ALJ is correct that Protestants waived their opportunity to raise this issue now, since they failed to preserve error of the ALJ’s ruling on summary disposition, let alone present any evidence of deficient notice in testimony to which Applicant and the ED could respond. Despite the fact that she already ruled on the issue, the ALJ still re-examined the notices in this case at Protestants’ insistence. However,

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<sup>28</sup> Protestants’ Exceptions at 4.

as explained in Applicant’s reply brief and in the PFD, no basis exists to conclude that notice in this case was in any way deficient.

In their Exceptions, Protestants criticized the ALJ’s analysis, but they failed to discuss or acknowledge the very law that controls the issue: 30 TAC § 39.405(d). This rule expressly allows combined notices: “[n]otice *may be combined* to satisfy more than one applicable section of chapter [39].”<sup>29</sup> As the ED points out, the TCEQ often combines Notice of Receipt of Application and Intent to Obtain a Water Quality Permit (NORI) and Notice of Application and Preliminary Decision (NAPD), and this common practice has never run afoul of federal NPDES delegation or raised public participation problems. Furthermore, although the Protestants’ exceptions cited a case for the proposition that an “administrative construction” cannot violate “a statutory scheme,” Protestants conspicuously omit any citation to the statute that may have been violated in this case (nor, TCEQ implementing rules).<sup>30</sup>

Protestants also attempted to impermissibly shift the burden to Applicant by stating there was no record evidence to prove whether a party who wished to protest was harmed by the combined notice.<sup>31</sup> Proving this negative, after successive mailed, published, and translated notices, is not required under TPDES or S.B. 709 generally. Moreover, Protestants cannot claim deficient notice on behalf of third parties, let alone unidentified ones.<sup>32</sup> Protestants had all the process they were due, especially considering this case was a direct referral at Applicant’s request. Applicant urges the Commission to overrule Protestants’ exceptions on the issue of notice.

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<sup>29</sup> 30 TAC § 39.405(d) (emphasis added).

<sup>30</sup> In their Closing Arguments, Protestants argued they did not need to present evidence on the issue as notice was deficient on its face. Now in their Exceptions, Protestants inexplicably argue that “they have provided sufficient evidence that the Draft Permit was not properly noticed.” See Protestants’ Exceptions at 7 (citing *Texas Citrus Exch. v. Sharp*, 955 S.W.2d 164, 170 (Tex. App. – Austin, no pet.)). However, Protestants do not indicate what evidence they provided.

<sup>31</sup> Protestants’ Exceptions at 7.

<sup>32</sup> *McDaniel v. Tex. Nat. Res. Conservation Comm’n.*, 982 S.W.2d 650, 654 (Tex. App. – Austin 1998, pet. denied). *Tex. Comm’n on Env’tl. Quality v. Denbury Onshore, LLC*, No. 03-11-00891-CV, 2014 WL 3055912, at \*10).

**C. Whether the Permit, if Issued Consistent with the Draft Permit, Would Protect Human Health and Safety, the Environment, and Physical Property, Relating to the Discharge of Emerging Contaminants in the Effluent**

Protestants disagreed with the ALJ’s analysis regarding CECs. However, the best argument Protestants could muster on the issue was that “granting this permit *creates the potential* for low concentrations of emerging contaminants” to be discharged into Lake Waxahachie.<sup>33</sup> This argument obviously falls far short of Protestants’ burden to “demonstrate[] that one or more provisions in the draft permit violate a specifically applicable state or federal requirement.”<sup>34</sup> Clearly, Protestants cannot identify such requirement because there is none. No federal or state CEC rules exist at this time;<sup>35</sup> however, if and when EPA or TCEQ ever set CEC limits in the future, those limits would be imposed in any subsequent amendment or renewal, as appropriate. For now, there is no basis to include *ad hoc* sampling and reporting requirements for constituents Protestants cannot even identify, certainly no basis to deny the Draft Permit on this issue in the absence of any CEC rules. Applicant urges the Commission to overrule Protestants’ Exceptions on the issue of CECs.

**IV. TRANSCRIPT COSTS**

Protestants did not except to the reasonable allocation of transcript costs in the PFD. Applicant agrees with the PFD that Protestants should pay one-half of the total \$2,055.50 costs as this is fair, reasonable, and consistent with 30 TAC § 80.23(d).

**V. REPLY TO THE ED**

Applicant agrees with the ED’s minor change to proposed Finding of Fact Nos. 4 and 24. The proposed correction of dates will result in a clearer Final Order.

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<sup>33</sup> Protestants’ Exceptions at 8 (emphasis added).

<sup>34</sup> Tex. Gov’t Code § 2003.047(i-2).

<sup>35</sup> January 22, 2024 Protestants’ Closing Arguments at 10; App. Ex. 2 at 20:8-15.

## VI. CONCLUSION

Applicant Highland Lakes Midlothian I, LLC respectfully requests that the Commission overrule Protestants' Exceptions in their entirety, amend Findings of Fact Nos. 4 and 24 as recommended by the ED, grant the Application in this case, issue the Draft Permit without changes as recommended in the PFD, and grant all other relief to which it has shown itself to be entitled.

Respectfully submitted,

*Helen S. Gilbert*

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**CERTIFICATE OF SERVICE**

I hereby certify that I have served or will serve a true and correct copy of the foregoing document via hand delivery, facsimile, electronic mail, overnight mail, U.S. mail, or Certified Mail Return Receipt Requested on all parties on this 25th day of April 2024:

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