

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

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

**PROTESTANTS’ EXCEPTIONS TO THE PROPOSAL FOR DECISION**

COMES NOW Protestants Ellis County, Texas, the City of Midlothian, Texas, and the City of Waxahachie, Texas (“Protestants”) and file this Exceptions to the Proposal for Decision (PFD) and, in support thereof, would show the following:

**I. INTRODUCTION**

The Protestants except to the Administrative Law Judge’s (ALJ) recommended actions, proposed Findings of Fact, and proposed Conclusions of law. The proposed Texas Pollution Discharge Elimination Program (TPDES) permit that is the subject of this proceeding would allow Highland Lakes Midlothian I, LLC (Applicant) to discharge a daily average flow of 2,760,000 gallons per day of treated wastewater (Draft Permit) that is not protective of water quality and is not adequately protective of human health, safety, the environment, and physical property relating to the discharge of emerging contaminants. Further, the application was not properly noticed.

**II. EXCEPTIONS AND CORRECTIONS**

**A. Exceptions to the PFD’s analysis and recommendations regarding whether the Draft Permit is adequately protective of water quality in accordance with the Texas Surface Water Quality Standards.**

The Protestants disagree with the ALJ’s analysis because the Protestants have presented sufficient evidence to rebut the presumption that 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 (TSWQS).

Regarding the ALJ's analysis of the improper modeling assumptions, the Protestants maintain that its expert Tim Osting's testimony presented compelling evidence that the Draft Permit relied on incorrect modeling assumptions rather than site-specific information. The ALJ rejects Mr. Osting's measurements, even though the observable and measurable data clearly shows that the stream in Reach 1 was not 28 feet wide. Even the Applicant's expert stated that his "reasonable" calculations for the stream width would result in only approximately 20 or 22 feet across, meaning the TCEQ's model default equation width of 28 feet would result in somewhere between a 27% and 40% discrepancy from his approximate calculation. Tr. 56:2 – 60:10 (Machin). Contrary to the ALJ's assertions in the PFD, on cross examination, Mr. Machin could not show why he believed Mr. Osting's measurement of 10 feet was the bottom of the streambed rather than the top. PFD at 15; Tr. 49:15 – 52:14 (Machin). Just because 10 feet happens to coincide with the incorrect measurements from a default equation does not mean that the logical conclusion is to discount expert testimony from a water resources engineer who has visited the site in person. The width used in the model was incorrect and unreasonable. The Protestants provided sufficient evidence to show that the model inputs for the Reach 1 stream width as well as the Reach 2 stream depth and velocity were inaccurate.

The Protestants likewise disagree with the ALJ's analysis regarding the on-channel impoundment. PFD pg. 20. While it is true that there was a rainfall event a week and a half prior to the site visit, it is speculative to draw the conclusion that the impoundment was only there once due to that rainfall rather than in the stream as a persistent feature. All present parties observed the on-channel pool on the site visit, and there is no credible evidence to show that the pool is *not*

persistent. There was no evidence presented to show the rainfall measurements or drought conditions before the Applicant's other visits to the site. Similarly, there was no evidence presented to show the actual Google Earth data or the timestamps on the images relied upon, or even the frequency of the images. Lastly, it is irrelevant whether the future discharge will change the conditions of the stream; the analysis at hand is designed to address the stream in its *present* condition, and whether it meets the Texas Water Quality Standards.

Relatedly, the ALJ relied on the Applicant's speculation regarding the low dissolved oxygen (DO) measurements taken by Mr. Osting on site. The Applicant's rebuttal attempting to show that the measurements were inaccurate was purely conjecture – the Applicant's experts have no evidence or basis to show that the multiprobe was improperly placed into soft sediment, that there was abnormally high turbidity, or that the equipment used was uncalibrated or otherwise faulty. (Tr. 32:22 – 33:5 (Price) (acknowledging that chronic low dissolved oxygen could be reoccurring for multiple reasons); 33:9-25 (Price) (“the measurements made were not – you know, not impossible. They’re not that [] unusual”)). A comparison to historical data taken far downstream in Lake Waxahachie is not a relevant comparison considering Lake Waxahachie collects a much larger watershed than does the SCS 17 reservoir. The ED's models clearly do not actually model the worse-case scenario, because the actual measurements taken by Mr. Osting indicated a worse condition. Further, there was no evidence presented that says the ED cannot consider a contrary measurement taken on site if it is not obtained from a SWQM station over a number of years. Based on the evidence, the ALJ should not have concluded that the ED's use of a default DO saturation was proper.

Regarding the total phosphorous measurements, the ALJ relied on Mr. Machin's testimony that the water samples were delivered past the proscribed holding time and concluded that is why

the readings were higher than expected by the Applicant and TCEQ. PFD at 27, 28. However, on cross examination during the hearing, Mr. Machin made a correction to his statements about some of the hold times. Specifically, that the hold time does not affect the results for ammonia nitrogen, TKN, or *total phosphorus*. Tr. 52:15 – 53:3 (Machin) (emphasis added). Again, the Applicant's argument that readings taken on Lake Waxahachie differ from the readings Mr. Osting took are not persuasive; measurements from a large body of water taken downstream are not relevant. The ALJ did not properly consider the evidence in the record regarding phosphorous.

Lastly, regarding the antidegradation review, the evidence shows through Mr. Osting's testimony that the modeled changes resulting from the proposed discharge may constitute a lowering of water quality that exceeds the Tier 2 criteria. 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. The Applicant did not meet its burden to show that water quality and uses in the receiving bodies will be maintained. Therefore, the Protestants except to and recommend the following amendments and rejections to the Findings of Fact enumerated below, which state that:

29. Pursuant to the TSWQS, the unclassified portions of the receiving water were ~~properly~~ assigned uses and criteria as follows: unnamed tributary: intermittent, minimal aquatic life use, 2.0 mg/L DO; South Prong Creek: intermittent with perennial pools, limited aquatic life use, 3.0 mg/L DO; and the SCS Site 17 Reservoir: high aquatic life use, 5.0 mg/L DO.

33. ~~Based on the evidence presented by the Protestants, the~~ The ED did not use the proper models to assess the impacts of the proposed discharge on the receiving waters.

38. The ED's modeled depth in Reach 2 is 5 inches with a velocity of 0.27 ft/s ~~and is very reasonable for a stream of that size and slope at a Final phase flow of 2.76 MGD.~~

39. ~~As shown by the ED's modeling, the~~ The effluent limitations in the Draft Permit will not maintain water quality above the TSWQS in all three phases.

~~42. The rainfall events immediately prior to the site visit created and filled temporary pools in the watercourse.~~

~~43. Applicant's representatives made multiple site visits to the unnamed tributary and found the tributary to be in a consistently dry condition.~~

~~44. The pool at Location 215 is visible from Google Earth data on only one date, March 21, 2018, over five years prior to Mr. Osting's site visit.~~

~~45. The pool observed at Location 215 on October 13, 2023, is not a perennial pool and would not exist during critical conditions as used in the QUAL-TX model.~~

~~46. If present during flow conditions once discharge commences from the Facility, the pool would not be isolated and stagnant.~~

~~47. An impoundment is a body of water confined within an enclosure, such as a reservoir.~~

~~48. There is no an on-channel impoundment located on the unnamed tributary.~~

~~49. The ED therefore did not properly characterized the unnamed tributary as an intermittent stream with a minimal aquatic life use.~~

~~52. Per the IPs and QUAL-TX standard operating procedures (SOPs), a default DO saturation of 80% is assumed unless sufficient and robust site specific data exists for 24-hour average DO, typically obtained from surface water quality monitoring (SWQM) stations over a number of years.~~

~~53. There are no SWQM stations along the unnamed tributary, South Prong Creek, or the SCS Site 17 Reservoir.~~

~~55. Mr. Osting's DO reading of 0.78 mg/L at Location 215 was taken in stagnant water full of debris and sediment after the rainfall event. Under discharge flow, the pool if present will not be stagnant or isolated.~~

~~57. Mr. Osting measured specific conductance of 55 microsiemens per centimeter ( $\mu\text{S}/\text{cm}$ ) in the SCS Site 17 Reservoir, but the 50-year average specific conductance taken at the SWQM station for Lake Waxahachie is 227  $\mu\text{S}/\text{cm}$ . The comparison indicates Mr. Osting's measurements may be unreliable. On the whole, Mr. Osting's three DO measurements fall far short of the data required to develop site specific daily average DO saturation values.~~

~~58. The ED's modeling complied with the IPs and QUAL-TX SOPs by using a default DO saturation of 80%: was unreasonable in light of Mr. Osting's measurements taken on site.~~

~~61. Mr. Osting took a water sample during his October 13, 2023 site visit that produced a TP result of 0.0756 mg/L. However, the sample was analyzed past its EPA-established hold time and the integrity of the sample and validity of the results are in doubt.~~

~~62. Even if the 0.0756 mg/L value was accurate, there is no numeric standard for phosphorus in the TSWQS for any water body in the proposed discharge route.~~

66. The TP limits in the Draft Permit are not appropriate and do not protect water quality in the receiving stream as required by the TSWQS: in light of Mr. Osting's measurements taken on site.

~~69. As shown by the ED's Tier 1 antidegradation review, numerical and narrative criteria to protect existing uses will be maintained throughout the receiving waters. Existing water uses will not be impaired by discharges under the Draft Permit.~~

~~70. As shown by the ED's Tier 2 antidegradation review, discharges under the Draft Permit will not cause significant degradation of water quality in the SCS Site 17 Reservoir which has been identified as having a high aquatic life use and existing uses will be maintained and protected with the TP limits. Also, chlorine disinfection as required by the Draft Permit will limit the concentration of viable E. coli in the effluent to a level that will not impair primary recreational uses of those waters.~~

71. The ED did not properly performed a Tier 1 and Tier 2 antidegradation review.

~~72. The Draft Permit has been prepared in accordance with the June 2010 Procedures to Implement the Texas Surface Water Quality Standards (RG-194) (IPs) to be consistent with the TSWQS.~~

The Protestants except to and recommend the following amendments to Conclusions of Law 5, 8, and 9, which state that:

5. The Administrative Record did not established a prima facie demonstration that: (1) the Draft Permit meets all state and federal legal and technical requirements; and (2) a permit, if issued consistent with the Draft Permit, would protect human health and safety, the environment, and physical property. Tex. Gov't Code § 2003.047(i-1); 30 Tex. Admin. Code § 80.17(c)(1).

8. ~~No party~~ The Protestants rebutted the prima facie demonstration. Tex. Gov't Code § 2003.047(i-2); 30 Tex. Admin. Code § 80.117(c).

9. The Draft Permit is not adequately protective of water quality, including the protection of surface water, groundwater, and animals in accordance with applicable regulations including the TSWQS in 30 Texas Administrative Code chapter 307.

**B. Exceptions to the PFD’s analysis and recommendations regarding whether the notice of the Application was improper due to the issuance of a combined notice.**

The Protestants have provided sufficient evidence that the Draft Permit was not properly noticed. The ALJ failed to properly analyze the issue, relying on the fact that the Protestants did not present evidence on the matter, that the ED’s apparent past practices issuing combined notices make it permissive, as well as the assertion that no party was harmed by the notice. Again, the Protestants did not have to produce evidence on this issue to raise and argue that the notice was deficient, because the notice of the application in question is deficient on its face. Further, while it may be true that issuing a combined notice is an ED practice, that does not mean it is a correct practice. *See Texas Citrus Exch. v. Sharp*, 955 S.W.2d 164, 170 (Tex. App.—Austin 1997, no pet.) (holding that courts will not defer to an administrative construction that deviates from the clear and express provisions of a statutory scheme). Further, there is no way of knowing whether a party who wished to protest was harmed by this “combined notice.” There is no evidence in the record of this. By combining the notices, the TCEQ effectively eliminated an affected person’s ability to comment on the application *before* the draft permit is prepared. Therefore, the Protestants except to and recommend the following amendment to Finding of Fact 16 which states that:

16. A Combined NORI and Notice of Application and Preliminary Decision (NAPD) was published in English on October 5, 2022, in the Waxahachie Sun, and in Spanish on October 6, 2022, in the Tex Mex News. This notice was not issued in accordance with the applicable statutes and rules.

The Protestants except to and recommend rejection of Findings of Fact 78 and 81 which state that:

~~78. The applicable rules do not prohibit the ED from issuing a combined NORI/NAPD as was done in this case.~~

~~81. The evidence does not demonstrate that any party was harmed by the notice provided.~~

The Protestants except to and recommend the following amendment to Conclusion of Law 3 which states that:

3. Notice was not properly provided in accordance with Texas Water Code §§ 5.114 and 26.028, Texas Government Code §§ 2001.051-.052, and 30 Texas Administrative Code §§ 39.405 and .551.

The Protestants except to and recommend rejection of Conclusion of Law 12 which states that:

~~12. Applicant substantially complied with applicable public notice requirements. 30 Tex. Admin. Code § 39.551(c).~~

**C. Exceptions to the PFD’s analysis and recommendations regarding whether the Draft Permit is adequately protective of human health, safety, the environment, and physical property relating to the discharge of emerging contaminants.**

The Protestants disagree with the ALJ’s analysis that the Draft Permit is sufficiently protective of human health and safety, the environment, and physical property relating to the discharge of emerging contaminants in the effluent. Contaminants of emerging concern are common in household waste and not treated in the typical wastewater treatment process. Protestants Ex. 1, 18:11-22 (Osting). Therefore, granting this permit creates the potential for low concentrations of the emerging contaminants that will be discharged into the streams to enter Lake Waxahachie, which is a drinking water supply lake. *Id.* at 18:11 – 19:2. The TCEQ failed to sufficiently rebut that these emerging contaminants and forever-chemicals will not have an unreasonable effect on the water quality from this development.

While the TCEQ does not have any standards that address the treatment of these chemicals, the TCEQ, at a minimum, should require on-going sampling of the discharged wastewater for these chemicals so that it has information regarding these chemicals and can address their impacts in the future if needed. Therefore, the Protestants except to and recommend the following amendment to Finding of Fact 87, which states that:



87. The Draft Permit would not protect human health and safety, the environment, and physical property relating to the discharge of emerging contaminants in the effluent.

The Protestants except to and recommend the following amendment to Conclusion of Law 10, which states that:

10. The Draft Permit is not protective of human health and safety, the environment, and physical property, relating to the discharge of emerging contaminants in the effluent.

**D. Exceptions to the recommended actions.**

The Protestants disagree with the PFD's recommendation to approve the Draft Permit based on the above corrected Findings of Fact and Conclusions of Law, because issuance of the permit is not protective of water quality, was not properly noticed, and is not protective of human health, safety, the environment, and physical property relating to the discharge of emerging contaminants. Based on the reasons cited above, the Protestants assert that issuance of the Draft Permit should not be granted based on all three of these referred issues that were subject of the contested case hearing.

**III. CONCLUSION**

The Protestants respectfully request that the Commission grant their exceptions and recommend the PFD with the corrections as set out above. The Protestants respectfully request any other relief to which they are entitled.

Respectfully submitted,

Emily W. Rogers  
State Bar No. 24002863  
[erogers@bickerstaff.com](mailto:erogers@bickerstaff.com)

Kimberly G. Kelley  
State Bar No. 24086651  
[kkelley@bickerstaff.com](mailto:kkelley@bickerstaff.com)

BICKERSTAFF HEATH DELGADO ACOSTA LLP  
3711 S. MoPac Expressway  
Building One, Suite 300  
Austin, Texas 78746  
Telephone: (512) 472-8021  
Facsimile: (512) 320-5638

BY: Emily W. Rogers  
Emily W. Rogers  
*Attorneys for Ellis County, City of Midlothian, and  
City of Waxahachie*

**CERTIFICATE OF SERVICE**

I hereby certify that on April 15, 2024, a copy of the foregoing document was served on all parties listed via electronic mail.

For the Applicant:

Helen S. Gilbert

Randall B. Wilburn

Barton Benson Jones, PLLC

7000 N. MoPac Expwy, Suite 200

Austin, TX 78731

[hgilbert@bartonbensonjones.com](mailto:hgilbert@bartonbensonjones.com)

[rwilburn@bartonbensonjones.com](mailto:rwilburn@bartonbensonjones.com)

Ms. Jennifer Jamison

Public Interest Counsel

Office of the Public Interest Counsel, TCEQ-MC 103

P.O. Box 13087

Austin, TX 78711-3087

[Jennifer.Jamison@tceq.texas.gov](mailto:Jennifer.Jamison@tceq.texas.gov)

Ms. Aubrey Pawelka, Staff Attorney

Office of Legal Services

TCEQ-MC 173

P.O. Box 13087

Austin, TX 78711-3087

[Aubrey.Pawelka@tceq.texas.gov](mailto:Aubrey.Pawelka@tceq.texas.gov)

  
\_\_\_\_\_  
Emily W. Rogers