

**SOAH DOCKET NO. 582-24-11454  
TCEQ DOCKET NO. 2023-1268-MWD**

<b>APPLICATION BY CITY OF KYLE</b>	§	<b>BEFORE THE STATE OFFICE</b>
	§	
<b>FOR</b>	§	<b>OF</b>
	§	
<b>TPDES PERMIT NO.WQ001104102</b>	§	<b>ADMINISTRATIVE HEARINGS</b>
	§	

**CITY OF KYLE’S REPLY TO SAN MARCOS RIVER FOUNDATION’S AND THE  
EXECUTIVE DIRECTOR’S EXCEPTIONS  
TO PROPOSAL FOR DECISION**

**TO THE HONORABLE ADMINISTRATIVE LAW JUDGES:**

Comes now, the City of Kyle (“City”) and files this Reply to San Marcos River Foundation’s (“Protestants”) and the Executive Director’s Exceptions to the Proposal for Decision (“PFD”) as set forth below.

**I. REPLY TO PROTESTANTS’ EXCEPTIONS**

Protestants fail to raise any new arguments or evidence in the record that necessitate changes to the PFD or proposed Findings of Fact or Conclusions of Law. Specific responses to Protestants’ Exceptions are provided below.

**A. Response To Protestants’ Summary Of Exceptions**

**1. Issue A, Pages 2-4**

- a. Dissolved Oxygen Modeling: Protestants’ Exceptions reiterate the same arguments regarding the calibrated Waste Load Evaluation (“WLE”) QUAL-TX model used by TCEQ to prepare the Draft Permit. These arguments include criticism of the age of the model data, location of data collection relative to the discharge, and whether or not the City’s stream cross-section and velocity data support the model assumptions. All of these issues were fully addressed in the PFD.<sup>1</sup> Protestants again argue TCEQ should instead rely on the uncalibrated

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<sup>1</sup> PFD 35-39.

QUAL-TX model prepared by its witness, Dr. Ross; but that model was flawed and should not replace the EPA approved calibrated model used by TCEQ.<sup>2</sup> Protestants also repeat their previous characterization that the TCEQ calibrated WLE QUAL-TX model results indicate dissolved oxygen (“DO”) concentrations will fall below the applicable Water Quality Standard for Plum Creek, which is not correct. The DO concentrations Protestants cite to for this argument were predicted for upstream of the discharge and were clearly explained by TCEQ’s expert modeler, Josie Robertson and the City’s expert modeler, Tim Osting, as discussed in the PFD.<sup>3</sup>

- b. Odor: Despite Protestants’ assertion to the contrary, the record contains evidence refuting their witness’ testimony regarding odor.<sup>4</sup> Mr. Osting and Ms. Whitaker both testified to current aesthetic conditions of Plum Creek at the discharge location.
- c. Total Phosphorus: Protestants repeat their arguments regarding additional total phosphorus (“TP”) loadings in Plum Creek that were addressed in the PFD.<sup>5</sup>

## **2. Issue B, Pages 4-6**

- a. EPA Guidance: The ALJs correctly concluded that EPA’s 2005 EPA Significance Threshold Memo is inapplicable to this proceeding. EPA has approved the TSWQS and IPs that govern antidegradation review for TPDES permitting in Texas.<sup>6</sup>
- b. Testimony of Bianca Whitaker: Protestants repeat the same arguments attempting to discredit the City’s expert testimony that high aquatic life use in Plum Creek will be maintained and that antidegradation requirements have been met. Ms. Whitaker provided detailed testimony regarding her methods and analysis.<sup>7</sup> Her testimony was highly credible; and her characterization as a “liar” by Protestants in their Exceptions is

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<sup>2</sup> PFD 37-38.

<sup>3</sup> PFD 37.

<sup>4</sup> Exhibit A-TO-1 29:3-7; Exhibit A-BW-1 15:18-16:4.

<sup>5</sup> PFD 69-72.

<sup>6</sup> PFD 66-67.

<sup>7</sup> Exhibit A-BW-1, 9:7-11:3.

disappointing and a disservice to the over 20 years that Ms. Whitaker has worked in water resources, not only as a private consultant but also for the Texas Water Development Board.<sup>8</sup> After thoroughly considering the Protestants' arguments, the ALJs concluded that "Protestants in relying on the EPA permitting framework instead of TSWQS and IPs that were approved by EPA, failed to rebut the City's case on antidegradation."<sup>9</sup>

- c. Macroinvertebrate Sampling: The ALJs concluded that the macroinvertebrate sampling performed by Protestants' witness, Dr. Back, did not rebut the evidence in the record regarding impacts to water quality in Plum Creek for a variety of reasons, including Dr. Back's failure to follow SWQM Manual requirements.<sup>10</sup>

### **3. Issue C, Pages 6-7**

- a. Compliance History Period: Protestants' argument regarding the compliance history period is confusing and difficult to understand. The ALJs correctly concluded, based on the detailed testimony of Tim Samford, that the City inherited a challenging facility and has made great strides in recent years. Therefore, the Draft Permit should not be altered based on this factor.<sup>11</sup>

#### **B. Response to Protestants' Exceptions to Specific Findings of Fact and Conclusions of Law**

For the City's position with respect to Findings of Fact 34, and 49 please see Part II below. Protestants reurge the same arguments that have been previously addressed in its specific exceptions to Findings of Fact. 37, 41 , 44, 46, 49, 50, 52, 53, 57, 58, 59, 60, 63, 72 and Conclusions of Law 8, 9, and 10. These Findings and Conclusions do not warrant revision base on Protestants' Exceptions. For Findings of Fact 40, 54, and 55, Protestants quote regulatory language, but do not explain how the language of the Finding should be changed.

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<sup>8</sup> Exhibit A-BW-1, 1:8-3:2.

<sup>9</sup> PFD, 72-73.

<sup>10</sup> PFD, 69.

<sup>11</sup> PFD 81-82.

## II. RESPONSE TO EXECUTIVE DIRECTOR'S EXCEPTIONS

The City has no objection to the ALJs' adoption of the Executive Director's Exceptions as they generally either provide corrections or clarify the description of TCEQ's TPDES permitting program except for Findings of Fact 34 and 49.

- a) Finding of Fact 34: The City provides the following alternative language to Finding of Fact 34 in lieu of that proposed by the Executive Director. The City is concerned that the use of the words "help establish permit limits..." inadvertently minimizes the role that the TSWQS and IPs play in drafting permits. The regulations found in the TSWQS and the guidance found in the IPs do more than help—they are the foundation of permit limits. Therefore, the City proposes the following:

34. The TSWQS and the *Procedures to Implement the TSWQS* (IPs) are ~~used to set permit limits for wastewater discharges.~~ the governing regulations and regulatory guidance approved by EPA and used by TCEQ to develop TPDES permits.

- b) Finding of Fact 49: The City provides the following alternative language to Finding of Fact 49 to clarify that the use of best professional judgement by TCEQ staff is supported by the IPs and nutrient screen information relevant to this application:

49. ~~The nutrient screen and IPs indicated that it was up to the ED's staff used best professional judgment as to whether to include~~ a TP limit for nutrient control as supported by the IPs and nutrient screen.

## III. CONCLUSION

In conclusion, the City requests the ALJs deny the Protestants' Exceptions. The City has no objections to adoption of the Executive Directors' Exceptions but proposes language in the alternative to that proposed by the Executive Director for Findings of Fact 34 and 49.

Respectfully submitted,

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A handwritten signature in blue ink that reads "Lauren Kalisek". The signature is written in a cursive style and is positioned above a horizontal line.

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**ATTORNEYS FOR CITY OF KYLE**

**CERTIFICATE OF SERVICE**

I certify that on November 12, 2024, a true and correct copy of the City of Kyle’s Reply to San Marcos River Foundation’s and the Executive Director’s Exceptions to Proposal for Decision has been provided to all parties of record via electronic mail, in accordance with applicable rules.

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