

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

<b>APPLICATION BY</b>	<b>§</b>	<b>BEFORE THE STATE OFFICE</b>
<b>CITY OF KYLE</b>	<b>§</b>	
<b>FOR TPDES</b>	<b>§</b>	<b>OF</b>
<b>PERMIT NO. WQ0011041002</b>	<b>§</b>	<b>ADMINISTRATIVE HEARINGS</b>

**EXECUTIVE DIRECTOR’S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGES’  
PROPOSAL FOR DECISION**

**I. OVERVIEW**

The Executive Director of the Texas Commission on Environmental Quality (TCEQ or Commission) submits her Exceptions to the Proposal for Decision. The Executive Director supports the Administrative Law Judges’ conclusion that the City of Kyle (Kyle) met its burden of proof on all referred issues. However, the Executive Director recommends several corrections to the Proposal for Decision.

**Procedural Background**

TCEQ received the application for a major amendment to Kyle’s TPDES permit on March 11, 2022, and declared it administratively complete on April 28, 2022. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published on May 11, 2022, in the *Hays Free Press/News-Dispatch*. The Executive Director completed the technical review of the application on August 22, 2022. The Notice of Application and Preliminary Decision (NAPD) was published in the *Hays Free Press/News Dispatch* on September 21, 2022.

The Notice of the Public Meeting was published the *Hays Free Press/News Dispatch* on February 22, 2023. A public meeting was held on March 30, 2023. The public comment period ended at the conclusion of the public meeting. The Executive Director’s Response to Public Comment (RTC) was filed on July 12, 2023, and the time for filing Requests for a Hearing or a Request for Reconsideration (RFR) ended on August 17, 2023.

During an Open Meeting on December 13, 2023, the Commission considered the hearing requests, responses to the hearing requests, all timely public comments, and the Executive Director’s Response to Comments.

The Commission found the San Marcos River Foundation was an affected person and referred three issues to the SOAH for a Contested Case Hearing:

- A: Whether the draft permit is protective of water quality, wildlife, and the requester's members and their families' health, in accordance with applicable regulations, including the Texas Surface Water Quality Standards;
- B: Whether the draft permit complies with applicable antidegradation requirements and adequately protects existing uses; and
- C: Whether the draft permit should be altered or denied based on the Applicant's compliance history.

The preliminary hearing was held on April 15, 2024, via Zoom. The Hearing on the Merits was conducted in person on July 8 and 9, 2024. The ALJ issued her Proposal for Decision (PFD) to the Commission on October 11, 2024.

### **Burden of Proof**

Because the application for the City of Kyle was received after September 1, 2015, the application is subject to the procedural requirements adopted pursuant to HB 801, 76<sup>th</sup> Legislature (1999) and Senate Bill (SB) 709, 84<sup>th</sup> Legislature (2015), both implemented by the Commission in its rules in 30 TAC Chapters 39, 50, and 55.<sup>1</sup> The Texas Legislature enacted SB 709, effective September 1, 2015, amending the requirements for comments and contested case hearings. This application is subject to those changes in the law. One of the major changes to the contested case hearing process as a result of SB 709 is that the filing of the administrative record with SOAH establishes a prima facie case that the draft permit meets all applicable state and federal legal and technical requirements and, if issued, will protect human health and safety and the environment. According to Commission rules at 30 TAC Section 80.118(c), the administrative record includes the application submitted by the applicant, including any revisions to the original application; the Executive Director's final draft permit, including any special provisions or conditions; the Executive Director's preliminary decision, or the Executive Director's decision on the permit application, if applicable; the summary of the technical review of the permit application; the compliance summary of the applicant; copies of the public notices relating to the permit application, as well as affidavits regarding public notices; and

---

<sup>1</sup> SB 709 was codified in Tex. Gov't. Code § 2003.047.

any agency document determined by the executive director to be necessary to reflect the administrative and technical review of the application.

The statute further provides that a party may rebut the prima facie case by presenting evidence relating to one of the issues referred by the Commission and demonstrating that the draft permit violates an applicable state or federal requirement.<sup>2</sup> The statute also provides that the applicant and the Executive Director may present additional evidence to support the draft permit.<sup>3</sup> The Executive Director concurs with the ALJ that the prima facie case was not successfully rebutted.

## **II. EXCEPTIONS to the PROPOSAL for DECISION**

1. Page 5, second paragraph, there appears to be a typographical error. A domestic wastewater treatment facility in Texas is subject to wastewater discharge permit requirements. Standard requirements, which TCEQ has ~~adapted~~ adopted specifically . . .
2. Page 8, first line, there appears to be a word missing. For each phase, the minimum dissolved oxygen (DO) limit per grab sample would be . . .
3. Page 11, 2. DO Modeling. The Executive Director recommends the citation for the first sentence be added to the PFD. Specifically, [I]n the context of surface water quality, DO is the amount of free molecular oxygen dissolved in water, which typically enters a water body from the atmosphere and aquatic plant photosynthesis. [ED-JR-1 at 4:11-14]
4. Page 68, end of paragraph beginning on page 67, last sentence lacks clarity. However, Segment 1810 is presumed to require a daily mean DO concentration of 5.0 mg/L ~~DO mean~~ to support a high ALU.

## **III. CORRECTIONS TO PROPOSED ORDER**

1. Finding of Fact 15 includes a typographical error. The Executive Director respectfully recommends Finding of Fact 15 be revised to: Treatment units in the Final Phase will include six fine screens, 12 aeration basins, six lift stations, ~~six~~ twelve final clarifiers, four tertiary filters, ten post-aeration basins, six aerobic sludge digestors, ad four UV disinfection systems.

---

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

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

2. Finding of Fact 17, the table heading is missing relevant information. The Executive Director respectfully recommends the heading be revised to: Flow Rate (MGD) Not to Exceed.
3. Finding of Fact 18 is missing relevant information. The Executive Director respectfully recommends Finding of Fact 18 be revised to: The City is required to utilize a UV system for disinfection purposes in all phases. There shall be no discharge of floating solids or visible foam in other than trace amounts and no discharge of visible oil.
4. Finding of Fact 24 includes incorrect dates and should be divided into two Findings of Fact. The Executive Director respectfully recommends finding of Fact 24 be revised to: TCEQ's Chief Clerk certified that the Notice of Hearing was mailed to interested person on March 5 13, 2024.
5. The Executive Director respectfully recommends new Finding of Fact 25: Notice of Hearing was published on March 13, 2024, in the *Hays Free Press*. Subsequent Findings of Fact should be renumbered.
6. Existing Finding of Fact 26 should be clarified to identify by name the entities admitted as parties. The Executive Director respectfully recommends this finding be revised to: A preliminary hearing was held . . . SOAH admitted the following as parties: the City; the ED; the TCEQ Office of Public Interest Counsel (OPIC); and Protestant (San Marcos River Foundation).
7. Existing Finding of Fact 31 should be clarified that the record closed after submission of Replies to Closing Briefs. Executive Director respectfully recommends this Finding be revised to: The Record closed after submission of replies to closing briefs on August 7, 2024.
8. Existing Finding of Fact 34 should be clarified to clearly reflect that TSWQS are not the sole source of permit limits, additionally the punctuation of the Implementation Procedures should be corrected. Executive Director respectfully recommends this finding should be revised to: The TSWQs and TCEQ's ~~standard procedures for implementing the TSWQS~~ Procedures to Implement the TSWQS (IPs) are used to set both help establish permit limits for wastewater discharges.
9. Existing Finding of Fact 41 is overly broad and should be clarified to reflect that the primary use of the QUAL-TX Model is to ensure that aquatic life will

- be protected by the permit. The Executive Director respectfully recommends this finding be revised to: DO is the best overall indicator of water quality and was modeled by the ED's staff to evaluate whether the proposed Draft Permit is protective of ~~water quality, wildlife, and Protestant's members; and their families' health~~ aquatic life, in accordance with applicable regulations, including the TSWQS and IPs, for Segment 1801.
10. A New Finding of Fact should be added, and the remaining Findings of Fact should be renumbered. Executive Director respectfully recommends new Finding of Fact be included as: The Executive Director's Tier I and Tier 2 antidegradation reviews found that existing uses, including those of aquatic and terrestrial wildlife will be maintained.<sup>4</sup>
11. Existing Finding of Fact 49 should either be deleted or clarified to reflect that staff used the procedures outlined in the IPs and the nutrient screening spreadsheet. Executive Director respectfully recommends this finding be revised to: ~~The nutrient screen and IPs indicated that it was up to the ED's staff's~~ used best professional judgment and as to whether to included a TP limit for nutrient control.<sup>5</sup>
12. Existing Finding of Fact 55 should be clarified to reflect the Tier 2 antidegradation review. The Executive Director respectfully recommends the current language be struck in its entirety and replaced with: Tier 2 reviews apply to all pollution that could cause degradation of water quality where water quality exceeds levels necessary to support propagation of fish, shellfish, terrestrial life, and recreation in and on the water (fishable/swimmable quality).
13. New Finding of Fact 56 should be added, and subsequent Findings of Fact should be renumbered. The Executive Director recommends: New Finding of Fact 56. Guidance for determining water bodies that exceed fishable/swimmable quality are found in the IPs.
14. New Finding of Fact 57 should be added, and subsequent Findings of Fact should be renumbered. Executive Director respectfully recommends: New Finding of Fact 57. Tier 2 antidegradation reviews generally apply to water

---

<sup>4</sup> Exhibit A-BW-1 at 24;4-17.

<sup>5</sup> Exhibit ED-JP-1 at 0007:32 to 0008:7.

bodies that have existing, designated, or presumed uses of primary and secondary contact recreation and intermediate, high, or exceptional aquatic life waters.

15. Conclusion of Law 3 includes an incorrect citation regarding notice. The Executive Director respectfully recommends: Notice was provided in accordance with Texas Water Code sections ~~5.114~~ 5.115 and 26.028; Texas Government Code sections 2001.051-.052; and 30 Texas Administrative Code sections 39.405 and .551.

#### **IV. Conclusion**

The Executive Director maintains her position that the draft permit meets all applicable statutory and regulatory requirements and respectfully recommends the honorable Administrative Law Judges issue a Revised Proposal for Decision with the Executive Director's recommended changes to accurately reflect the record and the provisions in the Draft Permit.

Respectfully submitted,

Texas Commission on Environmental Quality

Kelly Keel,  
Executive Director

Charmaine Backens, Interim Director  
Office of Legal Services

Charmaine Backens, Deputy Director  
Environmental Law Division



---

Kathy Humphreys, Staff Attorney  
Environmental Law Division  
State Bar No. 24006911  
P.O. Box 13087, MC-173  
Austin, Texas 78711-3087  
Phone (512) 239-3417  
Fax (512) 239-0626  
Email: [Kathy.humphreys@tceq.texas.gov](mailto:Kathy.humphreys@tceq.texas.gov)



---

Fernando Salazar Martinez, Staff Attorney  
Environmental Law Division  
State Bar No. 24136087  
P.O. Box 13087, MC 173  
Austin, Texas 78711 3087  
Telephone No. 512-239-3356  
Email: [Fernando.martinez@tceq.texas.gov](mailto:Fernando.martinez@tceq.texas.gov)

REPRESENTING THE EXECUTIVE DIRECTOR  
OF THE TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

## V. CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the following by U.S. Regular Mail, Certified Mail (return receipt requested), electronic mail, hand delivery and/or facsimile at the addresses listed below on this 30<sup>th</sup> day of October 2024.



---

Kathy Humphreys, Staff Attorney  
Environmental Law Division

### **Counsel for the City of Kyle:**

Lauren J. Kalisek and Kathryn B. Bibby  
Lloyd Gosselink Rochelle & Townsend,  
P.C.  
816 Congress Ave., Suite 1900  
Austin, Texas 78701  
Email: [lkalisek@lglawfirm.com](mailto:lkalisek@lglawfirm.com)  
Email: [kbibby@lglawfirm.com](mailto:kbibby@lglawfirm.com)

### **Counsel for the San Marcos River Foundation:**

Victoria Rose and Bill Bunch  
Save Our Springs Alliance  
4701 Westgate Blvd., Bldg. D, Suite 401  
Austin, Texas 78745  
Email: [victoria@sosalliance.org](mailto:victoria@sosalliance.org)  
Email: [bill@sosalliance.org](mailto:bill@sosalliance.org)

### **Office of Public Interest Counsel:**

Jessica Anderson  
Texas Commission on Environmental  
Quality  
Office of Public Interest Counsel, MC-103  
P.O. Box 13087  
Austin, Texas 78711-3087  
Email: [jessica.anderson@tceq.texas.gov](mailto:jessica.anderson@tceq.texas.gov)

### **Office of the Chief Clerk:**

Docket Clerk  
Texas Commission on Environmental  
Quality  
Office of Chief Clerk, MC-105  
P.O. Box 13087  
Austin, Texas 78711-3087