

Jon Niermann, *Chairman*
Bobby Janecka, *Commissioner*
Catarina R. Gonzales, *Commissioner*
Kelly Keel, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

November 8, 2024

Honorable ALJs Katerina DeAngel and Susan Rodriguez
State Office of Administrative Hearings
P.O. Box 13025
Austin, Texas 78711-3025

RE: City of Kyle
SOAH Docket No. 582-24-11454
TCEQ Docket No. 2023-1268-MWD

Honorable Administrative Law Judges DeAngel and Rodriguez:

Enclosed please find a copy of the Executive Director's Exceptions to the Proposal for Decision for the Contested Case Hearing listed above.

If you have any questions, please do not hesitate to call me at (512) 239-3417 or email at Kathy.humphreys@tceq.texas.gov.

Best Regards,

A handwritten signature in cursive script that reads "Kathy J. Humphreys".

Kathy Humphreys
TCEQ Staff Attorney

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

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

**EXECUTIVE DIRECTOR’S REPLY TO 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 Reply to Exceptions to the Proposal for Decision. The Executive Director maintains her position that San Marcos River Foundation (SMRF) failed to identify any provision in the Draft Permit that specifically violates any applicable state or federal requirement; thus, the Executive Director respectfully recommends the honorable Administrative Law Judges issue a Revised Proposal for Decision with the Executive Director’s recommended changes noted in her Exceptions to the Proposal for Decision to accurately reflect the record and the provisions in the Draft Permit.

II. DISCUSSION

The Executive Director supports the Administrative Law Judges’ conclusion that the City of Kyle (Kyle) met its burden of proof on all referred issues. As an initial matter, SMRF makes multiple unsubstantiated assertions that the Draft Permit does not comply with the Clean Water Act and EPA rules. This issue was not referred to SOAH; however, the Executive Director notes for clarity that the draft permit was provided to EPA for comment on July 11, 2022.¹ Additionally, on October 6, 2022, EPA responded to TCEQ, in part, “Based on our review of the above referenced draft permit,

¹ Administrative Record, Tab C at 0059-0061. According to the Memorandum of Agreement (MOA) a draft permit is a document indicating the executive director's tentative recommendation to issue or deny, amend, revoke, or renew a permit. Such draft permits are subject to public notice. For purposes of this MOA, a proposed permit means a TPDES permit prepared after the close of public notice, a public meeting, or a contested case hearing, which will be forwarded for action by the Commission or the Executive Director. (MOA Between TCEQ and EPA (June 2020)), page 8 of 36, available at: <https://www.tceq.texas.gov/downloads/permitting/wastewater/municipal/2020-tpdes-moa.pdf>.

the TCEQ, in its role as the NPDES permitting authority for the State of Texas, may proceed with the issuance of the draft permit.”² Moreover, had EPA objected to the draft permit the Executive Director would have worked with EPA to address its concerns before moving forward.

The Executive Director submits her specific Responses to SMRF’s Exceptions to the issues referred to SOAH as follows:

Issue 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.

SMRF continues to argue that the Executive Director’ use of the calibrated model was “unwarranted.” SMRF is simply wrong. As Ms. Robertson testified on behalf of the Executive Director, according to the Memorandum of Agreement between the EPA and TCEQ, “Treatment limits developed from calibrated models and those contained in approved Waste Load Evaluations and Total Daily Maximum Load (TMDL) reports or implementation plans will supersede those derived from this [uncalibrated] methodology.”³ Thus, if the Executive Director adopted the approach suggested by SMRF, the Executive Director would not be following the applicable requirements in TCEQ’s rules, the Implementation Procedures (IPs), or the provisions of the MOA between EPA and TCEQ.

SMRF also argues that the IPs are not a substitute for compliance with the rules. The Executive Director agrees. As noted in the Introduction to the IPs, the IPs explain the procedures TCEQ uses when applying the Texas Surface Water Quality Standards (TSWQS) to TPDES permits.⁴ The TSWQS are codified in 30 TAC Chapter 307. On behalf of the Executive Director, Mr. Jeff Paull and Ms. Josi Robertson testified that they consulted the IPs in their technical reviews to ensure the Draft Permit was prepared in accordance with the TSWQS.⁵

Regarding model selection and inputs, the IPs explain that model selections depends on factors such as the type of water body to be analyzed, the type and quantity of available site-specific information, the location of the discharge point, and

² The EPA response was not included in the Administrative Record because Compliance with EPA regulatory requirements was not a referred issue. The EPA response was provided to all the parties in the Executive Director’s Initial Disclosures and Designation of Expert Witnesses, filed on May 1, 2024.

³ Implementation Procedures page 101, ED-JP-03.

⁴ ED-JP-3, IPs, 0028 (page 12 of IPs).

⁵ Tr. Vol. 2, 86:6-18, 100:22 – 101:4, 114:4 – 115:4; ED-JR-1, 0312:18 – 0317:22

the availability of previously developed models.⁶ The IPs further explain that “If available, waste load evaluations (WLEs), total maximum daily loads (TMDLs), or models calibrated to site-specific information are used to generate permit limits.”⁷ On behalf of the Executive Director, Ms. Josi Robertson testified that she used the calibrated QUAL-TX model to evaluate the dissolved oxygen impacts of a proposed discharge under the most pessimistic discharge conditions.⁸ Ms. Robertson also testified that the calibrated model is the only model that TCEQ uses for the main body of Plum Creek, and the calibrated model has been approved by EPA.⁹ Lastly, while there is not a specific provision of 30 TAC Chapter 307 that requires the use of a calibrated QUAL-TX model, the Executive Director notes that 30 TAC § 307.5(c)(1)(A) provides that the process for the antidegradation review is described “in the standards implementation procedures.”¹⁰

Issue B. Whether the draft permit complies with applicable antidegradation requirements and adequately protects existing uses.

The Executive Director maintains her position that the draft permit complies with the applicable antidegradation requirements and adequately protects existing uses. Contrary to SMRF’s assertion, the Executive Director performed both a Tier I and Tier II antidegradation review and determined that the existing uses will be maintained and protected.¹¹ Mr. Paull testified on behalf of the Executive Director, that he performed his nutrient screening according to the IPs, and he based his recommendation for Total Phosphorus limits on the IPs and his nutrient screening spreadsheet.¹²

SMRF offers various opinions regarding the flaws in the Executive Director’s antidegradation review; however, SMRF fails to identify a specific rule provision that the Executive Director did not follow. In fact, Mr. Paull testified that the discharge from the City of Kyle’s wastewater treatment facility will not violate either the Tier 1 or Tier 2 antidegradation standard.¹³

⁶ ED-JP-3, IPs, 0099 (page 83 of IPs).

⁷ *Id.*

⁸ Tr. Vol. 2, 126:1-11.

⁹ Tr. Vol. 2, pg. 124, line 25 to pg. 125 line 9.

¹⁰ See 30 TAC 307.5(c)(1)(A), “For TPDES permits for wastewater, the process for the antidegradation review and public coordination is described in the standards implementation procedures.”

¹¹ Admin. Record, Tab C, pg. 0087.

¹² ED-JP-1, 0010:2-6; Tr. Vol. 2, 114:4 -115:4.

¹³ ED-JP-1, Bates 0012; lines 18- 21

Additionally, SMRF seems to misunderstand the roles of the Executive Director's witnesses. Mr. Paull and Ms. Robertson were colleagues and had different roles.¹⁴ Mr. Paull is an Aquatic Scientist and performs water quality standards and biomonitoring reviews.¹⁵ Ms. Robertson was a dissolved oxygen modeler and performed dissolved oxygen modeling and recommended limits for Carbonaceous Biochemical Oxygen Demand – 5 day (BOD₅), ammonia-nitrogen, and dissolved oxygen.¹⁶ As Mr. Paull testified, he relies on information from the modeler to ensure the dissolved oxygen will meet the standard.¹⁷

Finally, it appears that SMRF is attempting to conflate the Tier 1 and Tier 2 antidegradation reviews. The Tier 1 antidegradation review ensures that the “existing uses and water quality sufficient to protect existing uses will be maintained.”¹⁸ The Tier 2 antidegradation review ensures “that where water quality exceeds the normal range of fishable/swimmable criteria, such water quality will be maintained unless lowering it is necessary for important economic or social development.”¹⁹ These are two different standards, which are clearly differentiated in Mr. Paull's memo.²⁰

Issue C. Whether the draft permit should be altered or denied based on the Applicant's compliance history.

The Executive Director maintains her position that the draft permit should not be altered or denied based on Kyle's compliance history. SMRF, however, continues to argue that the Executive Director used the incorrect compliance history dates in her evaluation of the Kyle application. SMRF is simply wrong. The Executive Director acknowledges that the incorrect Compliance History was inadvertently included in the Administrative Record submitted on March 14, 2024, but the correct Compliance history was added to the Administrative Record on June 20, 2024 (Tab F). However, as Ms. Bhuiya testified, she used the correct Compliance History in her review of the City

¹⁴ Ms. Robertson is no longer employed at the TCEQ.

¹⁵ ED-JP-1, Bates 002; lines 11 -12.

¹⁶ Admin. Record, Tab C, pg. 0090.

¹⁷ Tr. Vol. 2, pg. 89; lines 8 -23.

¹⁸ ED-JP-3 (IPs) pg. 56; Bates Page 0072.

¹⁹ *Id.* pg. 61; Bates Page 0077.

²⁰ Admin. Record, Tab C, Bates Pages 0087-0088. A Tier 1 antidegradation review has preliminarily determined that existing water quality uses will not be impaired by this permit action. Numerical and narrative criteria to protect existing uses will be maintained. A Tier 2 review has preliminarily determined that no significant degradation of water quality is expected in Plum Creek, which has been identified as having high aquatic life use. Existing uses will be maintained and protected (emphasis added).

of Kyle application.²¹ 30 TAC § 60.2(a) provides “On September 1, 2023, and annually thereafter, the executive director shall evaluate the compliance history of each site, and classify each site and person.” Thus, for an application submitted in March, the correct compliance history period would be five years from the previous September. Because Kyle submitted its application in March 2022, the appropriate compliance history period is from September 1, 2016 to August 31, 2021.

As Sonia Bhuiya testified on behalf of the Executive Director, 30 TAC § 60.1(b) provides that the compliance history period includes the five years prior to the date the permit application is received by the Executive Director, which in this case would be the period from September 1, 2016 to August 31, 2021.²² Ms. Bhuiya testified that she used the compliance period from September 1, 2016 to August 31, 2021 in her review of the City of Kyle application.²³ 30 TAC § 60.1(b) provides that the “compliance history period includes the five years prior to the date the application is received by the executive director . . .” Thus, the Executive Director used the correct Compliance History in her review of the City of Kyle application.

III. SMRF’S EXCEPTIONS TO SPECIFIC FINDINGS OF FACT AND CONCLUSIONS OF LAW

SMRF excepted to several Findings of Fact and Conclusions of Law; however, SMRF did not offer any alternative language for the Findings of Fact and Conclusions of Law it disagrees with. The Executive Director respectfully recommends the ALJs reject SMRF’s vague arguments regarding the Findings of Fact and Conclusions of Law and adopt the changes to the Findings of Fact and Conclusions of Law recommended by the Executive Director in her Exceptions to the PFD.

IV. CONCLUSION

SMRF did not successfully rebut any portion of the Executive Director’s review of the application; thus, the Executive Director maintains her position that the draft permit complies with all applicable statutory and regulatory requirements and should

²¹ The Compliance History, which was inadvertently included in the Administrative Record, provides that the date the compliance history was prepared was March 14, 2024, the same date the Administrative Record was filed with the Office of Chief Clerk, therefore, Ms. Bhuiya could not have used it in her review.

²² ED-SB-1, pg. 3, lines 21-24.

²³ ED-SB-1, pg. 2, lines 25-27; ED-SB-03.

be issued without changes. The Executive Director respectfully recommends the honorable Administrative Law Judges issue a Revised Proposal for Decision with the Executive Director's recommended changes noted in her Exceptions to the Proposal for Decision to accurately reflect the record and the provisions in the Draft Permit.

Respectfully submitted,

Texas Commission on Environmental Quality

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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 8th day of November 2024.



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