

**SOAH DOCKET NO. 582-24-22552
TCEQ DOCKET NO. 2023-1591-MWD**

**APPLICATION OF CORIX
UTILITIES (TEXAS) INC.
FOR TPDES PERMIT NO.
WQ0013977001**

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**BEFORE THE STATE

OFFICE OF

ADMINISTRATIVE HEARINGS**

APPLICANT’S REPLY TO EXCEPTIONS

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

COMES NOW, Corix Utilities (Texas) Inc. (“Corix” or “Applicant”) and files this Reply to the Exceptions filed by the Executive Director (“ED”) and Environmental Stewardship (“ES”).

REPLY TO THE EXCEPTIONS OF THE EXECUTIVE DIRECTOR

Applicant agrees with and supports the Executive Director’s Exceptions.

REPLY TO THE EXCEPTIONS OF ENVIRONMENTAL STEWARDSHIP

I. Introduction

The fundamental problem with ES’s case is that rather than demonstrating that the applicable Commission rules or processes were violated, ES’s experts essentially used alternative methodologies to try to demonstrate potential problems that may result from the expected discharge under the proposed permit.

ES’s Exceptions point to any evidence that suggests any statutes or rules were not followed. As required by Tex. Gov’t Code § 2003.047(i-1 to i-3), ES does not identify evidence regarding the referred issues demonstrating that the draft permit violates a specifically applicable state or federal legal or technical requirement. In sum, ES’s Exceptions should be rejected.

II. Water Quality

A. Tier 1 Antidegradation Review

Tier 1 requires that “[e]xisting uses and water quality sufficient to protect those existing uses must be maintained.” 30 TAC § 307(b)(1). As ES noted, the discharge here flows for more than one mile through an unnamed tributary before it reaches Segment 1428_01 of the Colorado River.¹ As also noted by ES, “TCEQ Rule [Figure] 307.10(1) designates that Segment 1428 has exceptional aquatic life uses, primary contact recreation, and public water supply.”² What ES failed to show was that the discharge that was the subject of this permit application would affect the water quality in segment 1428 in any manner whatsoever after flowing for more than a mile down an unnamed tributary. ES argues that there is “evidence” demonstrating that the ambient water quality of the receiving waters has been degraded since November 28, 1975 and that, therefore, “the addition of [any] nutrients to the receiving waters will potentially cause algal blooms which impede recreation, depress night-time oxygen concentrations, and stress or kill organisms that are oxygen dependent.”³ In other words, ES argues that no discharge that ultimately reaches the Colorado River can ever be permitted.

ES also attacks the water quality designation established by rule for the Colorado River based on anecdotal statements and photographs that prove nothing, and concludes that because ES believes the Colorado River has been degraded without the proposed discharge, nothing more may ever be discharged. ES failed to show that the Colorado River is, in fact degraded and that the rule is incorrect. It also failed to demonstrate that after flowing more than a mile downstream, that this discharge would affect existing uses of the Colorado River.

1. Evidentiary burdens were correctly applied.

ES asserts that it presented sufficient evidence to rebut any presumption that Segment 1428's exceptional aquatic life uses would be protected and maintained. Its exceptions, however, fail to point to any evidence about how this discharge will affect existing uses. Instead, it asserts that other users (prior users) of the Colorado have degraded the river.⁴ This position is evident from its assertion that the "data demonstrate that the receiving waters are already experiencing degradation."⁵ This is not the question. The question is whether this discharge will maintain existing uses. There was no evidence presented by ES on this topic or question. Nor does ES identify any such evidence in its Exceptions.

It is undisputed that Segment No. 1428 is not currently listed on the State's inventory of impaired and threatened waters.⁶ In fact, as shown at APP-01-6, ES itself petitioned to submit comments on the draft 2024 Texas 303(d) List – asserting that Data indicate that the Colorado River Below Lady Bird Lake (formerly Town Lake) (SegID 1428) and the Colorado River above La Grange (SegID 1434) do not support General Use criteria for nitrate or total phosphorus. TCEQ considered those comments and rejected them.⁷ In other words, TCEQ has already considered the arguments made by ES that segment 1428 should be considered impaired and has rejected those arguments. Not satisfied, ES now attempts to use this proceeding to change the regulatory determination of whether segment 1428 should be considered impaired. That is a job for the Surface Water Quality Monitoring (SWQM) Program within the Water Quality Planning Division

¹ ES Exceptions at 2.

² ES Exceptions at 2.

³ Quoted from ES's Closing Argument at 20.

⁴ Nowhere in its Exceptions does ES argue that the uses of the unnamed tributary will be affected. "Intermittent streams, such as the unnamed tributary, are given a minimal aquatic life use." PFD at 22 (citing Ex. ED-JL-1 at 5).

⁵ ES Exceptions at 3.

⁶ Ex. APP-01 at 16:18-19 ("Segment No. 1428 is not currently listed on the State's inventory of impaired and threatened waters (the 2022 Clean Water Act Section 303(d) list).").

⁷ Ex. APP-01-6; Ex. APP-01 at 30:1-31.

of the TCEQ, not the division which evaluates and issues TPDES permits, and certainly not for the ALJs in this proceeding.⁸

ES asserts that based on its assertion that the TCEQ designation is wrong, any discharge, no matter how small or insignificant, as a matter of law “is **likely** to worsen existing receiving water quality.”⁹ This is not how antidegradation review works. The Supreme Court of Texas recently decided *Save Our Springs All., Inc. v. Tex. Comm’n on Env’t Quality*, 2025 Tex. LEXIS 306 (Tex. 2025). In that case, like ES did here, SOS also made an argument that it provided “[e]xamples where degradation is **likely** to occur” as the result of any discharge. *Id.* at *23 (emphasis added). The Supreme Court rejected that notion. It also rejected the notion that degradation can be determined as a matter of law by the introduction of any discharge. The Court noted that “both the rules and the implementation procedures not only allow, but contemplate, a qualitative assessment on a whole-water basis.” *Id.* at *25. In other words, it is not enough to suggest that any discharge will result in degradation or that degradation can be determined as a matter of law by the introduction of any amount of pollutant. See *Id.* at *13 and *34. ES fails to identify any instance where TCEQ failed in its qualitative assessment for the discharge that is the subject of this proceeding.

⁸ Ex. ED-JM-1 at 19:24-30. ES is essentially challenging the TSWQS designation rule through this proceeding. It is impermissible for a party to challenge an agency’s failure to adopt a particular rule in a lawsuit brought under the Administrative Procedures Act. See *Sansom v. Texas R.R. Comm’n*, No. 03-19-00469-CV, 2021 WL 2006312, at *2 (Tex. App.—Austin May 20, 2021, no pet.) (mem. op.) (recognizing that it is impermissible for a party to challenge the lack of a rule in a lawsuit brought under the APA), citing *Kidd v. Texas Pub. Util. Comm’n*, 481 S.W.3d 388, 390 (Tex. App.—Austin 2015, no pet.) (the APA’s remedies “do not extend to authorizing suits to challenge an agency’s refusal to promulgate rules.”); *Texas Comm’n on Env’t Quality v. Bonser-Lain*, 438 S.W.3d 887, 895 (Tex.App.—Austin 2014, no pet.) (“[N]o Texas court has ever held that an agency’s refusal to promulgate rules is reviewable by courts[.]”)

⁹ ES Exceptions at 3 (emphasis added).

The evidentiary process was correctly applied. The burden of production statute here is broken down into three phases. The first phase is the filing of the administrative record¹⁰ that establishes an applicant's prima facie demonstration that the draft permit meets all applicable requirements.¹¹ In the second phase, a party (protestant) may rebut the applicant's prima facie case by presenting evidence on the referred issues demonstrating that the draft permit violates a specifically applicable federal or state requirement.¹² Finally, in the third phase, the Executive Director, the applicant, or both, may present additional evidence to support the draft permit if the protestant presents rebuttal evidence.¹³

ES presented no evidence that applied to whether this particular discharge would violate the Tier 1 standard.

2. The evidence did not show that the Tier 1 standard would be violated from the issuance of this permit.

Presumably pointing to Finding of Fact No. 36, ES asserts that it was not required to “establish that the water quality uses will be impaired.”¹⁴ The PFD does not say that the burden was on ES. Finding of Fact No. 36 states that “Photographs of algae in the unnamed tributary and the Colorado River do not establish that the water quality uses will be impaired.” The burden of production statute requires that ES “present[] evidence . . . demonstrating that the draft permit violates a specifically applicable federal or state requirement.” Finding of Fact 36 merely states that the photographs do not satisfy that requirement. To defeat the issuance of the permit, ES was required to present such evidence. It did not.

¹⁰ The Administrative Record (Ex. AR) was admitted into evidence during the Preliminary Hearing on September 30, 2024.

¹¹ Tex. Gov't Code § 2003.047(i-1).

¹² Tex. Gov't Code § 2003.047(i-2).

¹³ Tex. Gov't Code § 2003.047(i-3).

¹⁴ ES Exceptions at 4.

In fact, the “evidence” provided by ES was irrelevant to the question before this tribunal. ES presented no evidence that Tier 1 was not satisfied in this case. Instead, it attempted to provide evidence that “[i]n the last 20 years, however, Segment 1428 of the Colorado River has experienced water quality degradation.”¹⁵ That is not a question for this case. In fact, it is a question that has been considered and rejected by TCEQ in another, appropriate, forum.¹⁶ The question is whether the proposed discharge will maintain existing uses. ES presented no evidence on that question.

3. Dissolved Oxygen modeling was appropriate.

ES asserts that TCEQ should not use its Implementation Procedures (“IPs”) for conducting its Tier 1 review. Instead, it asserts that Dr. Ross’ alternative analysis is more appropriate. TCEQ rules, however, “provides that TCEQ staff must review all TPDES permit applications to ensure that the permit will meet the applicable TSWQS using the standard Implementation Procedures (the IPs) that have been approved by both the TCEQ and the EPA.”¹⁷

ES fails to identify a single instance in its Exceptions where the IPs were not followed for the Tier 1 dissolved oxygen review. This proceeding is not the appropriate forum for attacking the IPs, but for determining whether the IPs were followed. Nothing in ES’s Exceptions suggests such a failure.

ES complains that the QUALTX model was not utilized to model for algae and nutrients.¹⁸ The ED’s witness Mr. Michalk, however, points out that “the Colorado River model is a calibrated

¹⁵ ES Exceptions at 5.

¹⁶ Ex. APP-01-6; Ex. APP-01 at 30:1-31.

¹⁷ *Tex. Comm’n on Env’tl. Quality v. Save Our Springs Alliance*, 668 S.W.3d 710, 719 (Tex. App.—El Paso 2022), *aff’d Save Our Springs All., Inc. v. Tex. Comm’n on Env’tl. Quality*, 2025 Tex. LEXIS 306 (Tex. 2025) (citing 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 procedure.”)).

¹⁸ ES Exceptions at 11.

QUAL-TX model [and] does include an algal component, and algal effects on dissolved oxygen are considered in the modeling.”¹⁹

ES also argues that the ED used the incorrect geometry of the unnamed tributary to conduct its modeling.²⁰ But as Mr. Michalk explained, TCEQ appropriately implemented its standard operating procedures, which “indicate that [they] should use default hydraulic coefficient values for effective free-flowing reaches, and there was not site specific stream transect data [from which] to develop site specific hydraulics.”²¹

B. Tier 2 Antidegradation Review

Like the Tier 1 analysis, “[a]lthough Environmental Stewardship argues that it has shown a degradation of water since November 28, 1975, it has not presented evidence that the proposed discharge will contribute more than a de minimis amount to that degradation.”²² In other words, nothing presented by ES ties its evidence to the discharge authorized by this permit.

Furthermore, ES states that the ED has not utilized the proper baseline in evaluating whether the discharge will result in the degradation of water quality.²³ ES asserts that “[n]o party presented evidence indicating that existing conditions are reliable for determining a proper baseline for the receiving waters in this matter.”²⁴ IP makes clear, however, that “baseline conditions are estimated from existing conditions, as indicated by the latest edition of the Texas Water Quality Inventory or other available information.”²⁵ Moreover, the Texas Water Quality Inventory is synonymous with the Texas Integrated Report of Surface Water Quality, which establishes that “existing conditions” are the Exceptional Aquatic Life Use designations applicable

¹⁹ Ex. ED-JM-1 at 38:5-8 and 39:15-24.

²⁰ ES Exceptions at 9-10.

²¹ TR. (Vol. 1) at 228:21-25.

²² PFD at 27.

²³ ES Exceptions at 12.

²⁴ ES Exceptions at 13.

²⁵ Ex. ED-JM-1 at 51:41-12.

to Segment Nos. 1428”²⁶ This Exceptional Aquatic Life Use designation is also the highest water quality sustained since November 28, 1975.”²⁷ Therefore, the appropriate baseline – that of Exceptional Aquatic Life Use designation was appropriately used. No evidence was presented by ES that the appropriate baselines were not used.

Even if ES had presented some reliable evidence (which it did not), ES’s argument is that the Executive Director should have considered the Colorado River to be more degraded than that which is identified on the Texas Water Quality Inventory.²⁸ But the rules are clear – 30 Tex. Admin. Code § 307.5(c)(2)(B) provides that “[t]he highest water quality sustained since November 28, 1975 (in accordance with EPA Standards Regulation 40 Code of Federal Regulations Part 131) defines baseline conditions for determinations of degradation.” (emphasis added). ES wants TCEQ to use what it considers to be the lowest water quality sustained for its baseline. Once again, ES is simply attempting to re-write the rules. The rules were appropriately applied in this case.

Nothing ES presented suggests that a higher level of water quality should have been used. ES provided nothing, therefore, to rebut the prima facie demonstration that was satisfied under the burden of production statute.

C. CECs and PFAS are not regulated by TCEQ.

In its exceptions, ES argues that “it is beyond dispute that CECs and PFAS in Corix’s discharge have a reasonable potential to result in toxicity to aquatic organisms, in violation of TCEQ’s rules.”²⁹ There are several problems with this position. First, there is no evidence that there are CECs or PFAS in Corix’s discharge. Second, there was absolutely no evidence provided

²⁶ Ex. ED-JM-1 at 51:41-12.

²⁷ Ex. ED-JM-1 at 51:41-12.

²⁸ ES Exceptions at 12.

²⁹ PFD at 17.

that there was any potential, must less an “reasonable potential” for the discharge to result in toxicity to aquatic organisms. ES seeks to have the Commission simply conclude that the mere existence of CECs and PFAS in the world means that they are in Corix’s discharge at levels that are toxic to aquatic organisms.

ES’s Offer of Proof should be disregarded as it was not admitted into evidence into the record. Applicant renews its objections to the document offered and attached to ES’s Exceptions as its Offer of Proof. It is simply not part of the administrative record. Moreover, the lawsuit provided in the Offer of Proof discusses exposure through water sources and by hand-to-mouth contact, not through wastewater discharges. Nothing in the Offer of Proof documents suggests that these CECs or PFAS will be in Corix’s wastewater discharge.

ES has not shown which PFAS compounds are toxic to humans and wildlife, has not shown that those compounds are present in the Colorado River in high levels, has not identified any sources of PFAS likely to enter the Corix waste stream, nor distinguished those potential compounds from the high molecular weight legacy compounds that have been out of production in the US since 2015.³⁰

Finally, and most importantly, the Commission has considered CECs and has stated the following:

The Commission questioned the relevance of one of the five issues considered by the ALJ related to the discharge of emerging contaminants in the effluent (aka contaminants of emerging concern or CECs). The Commission noted that the Commission does not regulate CECs in the TPDES program as a matter of law and does not evaluate CECs in permit applications. Therefore, the Commission determined that **this issue is not relevant and material to TPDES permits.**

³⁰ <https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/fact-sheet-20102015-pfoa-stewardship-program>. (last checked March 4, 2025).

An Order Granting the Application by Highland Lakes Midlothian I, LLC for New TPDES Permit No. WQ001599900, TCEQ DOCKET NO. 2023-0844-MWD, SOAH DOCKET NO. 582-23-23818 (August 5, 2024) at page 12 (emphasis added). Because the Commission has already determined that CECs are “not relevant [or] material to TPDES permits,” any issues related to CECs are irrelevant and cannot be regulated through TPDES permits. In fact, in the *Highland Lakes* case, the Commission adopted a new Conclusion of Law that addresses CECs:

No federal or state law regulates CECs in TPDES permits, and therefore Issue 5 is not a relevant and material issue for the Commission to determine.

Id. If anything, the Commission should add that same conclusion of law in this case.

Protestants also discuss Per- and polyfluoroalkyl substances (“PFAS”). “Contaminants of Emerging Concern (CEC) include per- and polyfluoroalkyl substances (PFAS).”³¹ Because PFAS’s are a subset of CECs, and because the Commission has already determined that CECs are “not relevant [or] material to TPDES permits,”³² any issues related to PFAS’s are irrelevant and are not regulated through TPDES permits.

Respectfully submitted,

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³¹ <https://www.wrcgroup.com/headlines/bite-sized-views/navigating-the-complexities-of-contaminants-of-emerging-concern-unveiling-wrc%E2%80%99s-2024-expert-forum-on-pfas-and-emerging-contaminants-in-drinking-water/> (last checked January 16, 2025).

³² *An Order Granting the Application by Highland Lakes Midlothian I, LLC for New TPDES Permit No. WQ001599900*, TCEQ DOCKET NO. 2023-0844-MWD, SOAH DOCKET NO. 582-23-23818 (August 5, 2024) at page 12 (emphasis added).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the following parties as shown below on this 4th day of June 2025 as follows:

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