

**SOAH DOCKET NO. 582-25-01778
TCEQ DOCKET NO. 2024-0670-MWD**

APPLICATION BY MUNICIPAL	§	BEFORE THE
OPERATIONS, LLC FOR NEW TEXAS	§	
POLLUTION DISCHARGE	§	TEXAS COMMISSION ON
ELIMINATION SYSTEM PERMIT NO.	§	
WQ0016171001	§	ENVIRONMENTAL QUALITY

**MUNICIPAL OPERATIONS, LLC’S REPLY TO EXCEPTIONS TO THE PROPOSAL
FOR DECISION**

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW, Municipal Operations, LLC (Municipal Operations or Applicant), and files its Reply to Exceptions to the Proposal for Decision (PFD) and would respectfully show the following:

I. SUMMARY OF REPLY TO EXCEPTIONS TO PFD

Protestants’ Exceptions focus predictably on their surface and groundwater quality arguments that the Administrative Law Judges (ALJs) rightly rejected in the PFD.¹ However, the Protestants’ Exceptions are more remarkable for what they skip – Protestants conspicuously ignore the fact that Applicant intends to reuse 100% of its effluent at treatment levels that exceed the Texas Surface Water Quality Standards (TSWQS) and the Edwards Aquifer Rules.² This fact alone voids nearly all Protestants’ arguments. Protestants are also silent that Applicant exceeds operational requirements by voluntarily agreeing to utilize a Class A operator when a lesser certification would suffice. Meanwhile, these are the same Protestants, at over two and half miles away, whose own septic tanks are located near their drinking water wells.³

At the same time, Protestants wrongly assert that the ALJs misapplied the burden of proof and urge the Texas Commission on Environmental Quality (TCEQ or Commission) to depart from

¹ Applicant does not address Issues D and G referred by the August 20, 2024 Interim Order (App. Ex. 1, Tab A) because Protestants do not address them in their Exceptions. *See* Proposal for Decision at 3 (regarding partial summary disposition on Issues C, E and F).

² Title 30 Tex. Admin. Code (TAC) chs. 307, 213.

³ App. Ex. 18 at 12:10-14; Tr. Vol. 1 at 80:9-21; GEAA-106 at 117 (“ . . .in cases of increased development or failure of OSSF systems, increased impacts to the quality of recharge to the Edwards Aquifer are to be expected”).

its traditional Senate Bill 709 analysis to 1) apply standards on an *ad hoc* basis that have not been promulgated by rule at the federal or state level (regarding per- and polyfluoroalkyl substances (hereinafter PFAS)), 2) misapply geographic and geological siting requirements in the Edwards Aquifer Rules and 3) deviate from the agency's tried and true water quality modeling protocol. Protestants can only prevail if the Commission turns numerous rules and policy on their heads, does not apply the "rules on the books," and treats this Applicant and the Guajolote Ranch Site unlike any other in the State. In order to reject the PFD, the Commission would have to:

- Throw out the standard QUAL-TX model, including its use of default coefficients;
- Rescind/rewrite the Edwards Aquifer Rules;
- Reject the reasoning in prior on-point administrative decisions;
- Apply the Total Phosphorus (TP) limit from the City of Liberty Hill case as an *ad hoc* rule;
- Ignore the 1998 biological opinion by the U.S. Fish and Wildlife Service regarding aquatic/aquatic-dependent species;
- Consider a deposition that is outside the evidentiary record;
- Misapply the burden of proof;
- Single out and subject Municipal Operations to unpromulgated PFAS requirements in its TPDES permit; and,
- Invade the province of the ALJs on an evidentiary ruling.

For over three years, the Application has been subject to non-stop rigorous public scrutiny at the city, county and state level. Now, the ALJs have presented a well-reasoned and comprehensive assessment of the evidence, concluding that the Draft Permit meets all state and federal legal and technical requirements and a final permit would protect human health and safety, the environment, and physical property.⁴ As a result, Applicant urges the Commission to overrule Protestants' Exceptions in their entirety, grant the Application, and issue the final permit in this case without changes.

⁴ Tex. Gov't Code § 2003.047(i-1).

II. PROTESTANTS' ARGUMENT IS OUTSIDE THE RECORD

Protestants argue that the ALJs improperly excluded certain deposition testimony (tendered as an offer of proof during hearing as Exhibit GF-8). Even though the deposition is outside the evidentiary record, Protestants attached the deposition to their Exceptions, argued directly from the excluded deposition transcript and further extrapolated points from the deposition that even the deponent did not make. In the PFD, the ALJs explained their reasoning at length and were correct to exclude the testimony of an undisclosed and out-of-court witness (Paul Bertetti), who was misrepresented as testifying in “his personal capacity” despite his clear employment, membership and affiliation with both a non-party Edwards Aquifer Authority and a party, Greater Edwards Aquifer Alliance (GEAA).⁵ Applicant’s Motion to Exclude this improper and prejudicial testimony could hardly be called unfair or surprising. What is patently unfair is Protestants’ efforts to go outside the record, before, during and now after the hearing.

The legal bar to overturn the PFD is very high.⁶ Any amendment to the proposed order, including its findings of fact and conclusions of law, must be based *solely on the record*.⁷ The Protestants’ offer of proof (Exhibit GF-8) is not part of the record but outside of it. An offer of proof allows a party to make a record for appellate review of matters that do not appear in the record, such as the evidence that was excluded.⁸ An offer of proof provides the mechanism for a reviewing court to determine whether the evidence was properly excluded. But an offer of proof does not allow a factfinder to consider matters excluded from the evidentiary record. As the deposition is not part of the evidentiary record, it cannot be considered in making any findings of fact.⁹ Moreover, the Commission may not amend the PFD, including any finding of fact, unless the “amendment thereto and order shall be based solely on the record made before the administrative law judge.”¹⁰

⁵ Tr. Vol. 1 at 9:4-10, Vol. 2 at 121:3-123:1.

⁶ Tex. Gov’t Code § 2003.047(m).

⁷ *Id.* (emphasis added).

⁸ *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572 (Tex. 2006); Tex. R. Evid. 103(a)(2).

⁹ Tex. Gov’t Code § 2001.141(c) (“Findings of fact may be based only on the evidence and on matters that are officially noticed.”).

¹⁰ Tex. Gov’t Code § 2003.047(m).

The ALJs analyzed 115 exhibits sponsored by 16 witnesses over 3 full days of hearing. There is no legal basis for the Commission to disregard or change the ALJs' thorough fact-finding on any subject, let alone their evidentiary ruling to exclude the improper Bertetti deposition.¹¹

III. BURDEN OF PROOF

Protestants state that the PFD “improperly shifts the burden of proof”¹² but misunderstand the normal burden-shifting scheme foundational to Senate Bill 709 cases that applies to TPDES permits.¹³ The burden of proof is broken down into three phases, which includes the filing of the administrative record (first phase),¹⁴ protestant's rebuttal to the applicant's prima facie case (second phase),¹⁵ and the ED and/or applicant's presentation of additional evidence in support of the draft permit in response to rebuttal evidence.¹⁶

In order to rebut Applicant's prima facie case, Protestants must have presented evidence that “*demonstrates* that one or more provisions in the draft permit violate a specifically applicable state or federal requirement.”¹⁷ However, rather than demonstrate that the Draft Permit violates any law, Protestants urged a lower burden of proof – one based merely on the “reasonable potential” to cause a violation. Protestants cite no statute, rule or precedent that indicates that the Texas Legislature or TCEQ intended to water down the burden of proof from a level of demonstration to potentiality.¹⁸ It is not enough for Protestants to merely allege a violation, they must *demonstrate* one.¹⁹ The PFD was correct to find Protestants' burden of proof arguments to

¹¹ See Section IV of this Reply below regarding the Executive Director's (ED) minor exception.

¹² Protestants' Exceptions at 2.

¹³ SB 709 is codified at Texas Government Code § 2003.047(i-1) through (i-3) and implemented by Title 30 Texas Administrative Code (TAC) § 80.17(c).

¹⁴ App. Ex. 1 (Administrative Record) was admitted into evidence during the Preliminary Hearing on November 21, 2024.

¹⁵ Tex. Gov't Code § 2003.047(i-2).

¹⁶ Tex. Gov't Code § 2003.047(i-3).

¹⁷ Tex. Gov't Code § 2003.047(i-2) (emphasis added). Section 80.17(c)(2) implements section 2003.047(i-2) in nearly identical language.

¹⁸ Protestants' reference the “reasonable potential” language in federal rule 40 CFR § 122.44(d)(1)(i) which is incorporated by reference in 30 TAC § 305.531(4).

¹⁹ *Tex. Comm'n on Envtl. Quality v. Save Our Springs Alliance, Inc.*, 668 S.W.3d 710, 726 (Tex. App. – El Paso 2022, pet. granted) (emphasis added).

be unpersuasive²⁰ and, after reviewing the totality of the record evidence, to find that no party rebutted Applicant's prima facie demonstration.²¹

IV. REPLY TO ED'S EXCEPTIONS

Applicant agrees with the ED's minor change to proposed Finding of Fact No. 2. The change to the description of the existing uses of the receiving waters will result in a clearer Final Order.

V. REPLY TO PROTESTANTS' EXCEPTIONS

A. Issue A: Whether the Draft Permit is Adequately Protective of Water Quality, Including Surface Water, Groundwater, and Drinking Water Wells

1. DO Modeling

The PFD was correct to find that the ED's modeling complied with applicable regulations to ensure the Draft Permit is protective of water quality.²² Protestants' essential complaint is with the methodology itself, not how it was applied to Helotes Creek and the discharge route. That is, Protestants fundamental problem is that the QUAL-TX model is uncalibrated and uses hydraulic coefficients based on default assumptions that are appropriate designed approximations.²³ In fact, it should not be lost on the Commission that the Protestants' witness has *never supported any QUAL-TX modeling performed by the ED (or any applicant)* in the numerous contested cases in which she has testified, except in one case she could not specifically recall.²⁴

However, it is neither a flaw in the model nor a deficient practice for the ED to use the uncalibrated model in dry intermittent creeks. As Applicant expert Dr. Miertschin points out, the uncalibrated model based on critical conditions or the "worst case scenario"²⁵ is the best you can do for a highly variable, non-uniform dry creek like Helotes Creek. It would simply be impossible

²⁰ Proposal for Decision at 12.

²¹ Proposed Order, Conclusion of Law 8.

²² Proposed Order, Finding of Fact 43.

²³ App. Ex. 30 at 18:20-27.

²⁴ Tr. Vol. 1 at 150:4-151:3. Whether calibrated or uncalibrated, there is no discharge on dry Helotes Creek with which to compare either mode, let alone any water quality data from 1975.

²⁵ Tr. Vol. 2 at 242:1-6.

to collect multiple measurements as cross-sections or transects because there is normally no water in the stream to measure.²⁶

And yet, as with the burden of proof example, Protestants persist in working outside TCEQ's normal process for water quality modeling of Texas streams by substituting on a piecemeal basis particular data points based on visual observations on one part of a one-mile creek on one half-day's visit to the Site.²⁷ Again, this does not reach the required rebuttal threshold of a demonstrable violation. As the ED's modeling expert Dr. Lu opined, "one observation is not enough to make any conclusion,"²⁸ and default coefficients must be used where there is no site-specific data available.²⁹ The vast amounts of supporting site-specific data³⁰ or field data³¹ required to calibrate the model as Protestants' urge is missing.

Dr. Lu was correct to criticize Protestants' "random observations," thus:

[T]he randomly observed width values or velocities, or other stream characteristics on some random day at some random streamflow, or just from aerial images, are not sufficient to further refine our hydraulic coefficients. Adequate field measured stream transect data (i.e., width, depth, velocity, and flow) would need to be collected to develop supportable, repeatable non-default coefficients. We don't often receive sufficient transect data (i.e., width, depth, velocity, and flow) for intermittent streams for two main reasons. First, if there is no water present, or if it isn't flowing even if it is present, then adequate data for the development of site-specific hydraulic coefficients cannot be collected or provided. Second, applicants are not required to collect transect data if the first water body in their discharge route is intermittent or intermittent with perennial pools. However, if sufficient quality data is provided, then it could be used to develop site-specific hydraulic coefficients to further refine the model.³²

The PFD was also correct to conclude that the ED's reliance on her Margin of Safety guidance (to predict DO concentrations sufficient to maintain Aquatic Life Uses (ALUs) on the discharge route) was reasonable.³³ For over 17 years, the standard practice at the TCEQ when

²⁶ Tr. Vol. 2 at 225:10-17.

²⁷ If effluent is ever discharged, it will travel over a mile before exiting the Guajolote Ranch in the dry intermittent Helotes Creek.

²⁸ Tr. Vol. 3 at 108:23, 113:24-114:1, 117:9-10, 119:5-7 and 18-21, 135:18-19.

²⁹ Tr. Vol. 3 at 85:24-86:5, 111:25-112:2, 113:18-20.

³⁰ Tr. Vol. 3 at 86:13-19 ("We'd need, like, the data at different locations, and each location we need, like a lot of data at different points to get, like different water depths and the width. ...to get supportable and repeatable coefficients.").

³¹ Tr. Vol. 3 at 169:23-24.

³² ED-XL-1 at 13:23-14:8.

³³ Proposal for Decision at 31.

interpreting DO modeling results is to consider the DO criterion met as long as the model predicts that the minimum DO is no more than 0.2 mg/L below the criterion.³⁴ This interpretation aligns with the Commission’s recent decision in *Application by the City of Kyle for a Major Amendment to TPDES Permit No. WQ0011041002 in Hays County, Texas*, SOAH Docket No. 582-24-11454, TCEQ Docket No. 2023-1268-MWD (Feb. 5, 2025).³⁵ As in the *City of Kyle* case, the predicted DO (2.9 mg/L) in this case fell within the 0.2 mg/L variance of the DO criterion of 3.0 mg/L for the limited ALU in the on-site impoundment on Helotes Creek.³⁶ At all other times, the predicted DO exceeded the TSWQS, above 3.0 mg/L and even above 5.0 mg/L as discussed more fully below.³⁷

2. Nutrient Screening

The Commission has no one-size-fits-all standard for TP, let alone a *de facto* “Liberty Hill,” “Hill Country” or “Pristine Water” nutrient standard.³⁸ In fact, the proposed Site on Helotes Creek is approximately 100 miles away from the City of Liberty Hill’s existing, non-compliant WWTP located on the San Gabriel River, in an entirely different county and watershed. Applicant’s experts Dr. Miertschin and Mr. Price were also expert witnesses in Liberty Hill’s recent permit amendment case and testified (here) that the sites were vastly different. The San Gabriel River below Liberty Hill’s discharge is a very wide, shallow reach with complete exposure to sunlight and stagnant water whereas Helotes Creek is normally a dry streambed, with some shading from tree canopy, higher banks and no aquatic species diversity.³⁹

Regardless, Protestants and the Office of Public Interest Counsel demand the *ad hoc* Liberty Hill 0.02 mg/L TP limit instead of the proposed 0.15 mg/L TP. This is inappropriate and contradicts the site-specific nature of the ED’s nutrient screen which expressly states that, “[s]ome

³⁴ ED-XL-8 at 1 (Margin of Safety in TCEQ Default QUAL-TX Modeling Analysis); Tr. Vol. 3 at 89:1-17; Tr. Vol. 2 at 237:3-5.

³⁵ See *An Order Granting the Application by the City of Kyle for a Major Amendment to TPDES Permit No. WQ0011041002 in Hays County, Texas*, SOAH Docket No. 582-24-11454, TCEQ Docket No. 2023-1268-MWD, Finding of Fact No. 45 (Feb. 5, 2025) (finding 4.8 mg/L was suitable for meeting the DO water quality standards criterion of 5.0 mg/L in Plum Creek).

³⁶ App. Ex. 30 at 22-24.

³⁷ App. Ex. 38 (Modeling Output Plot); App. Ex. 30 at 20:4-7.

³⁸ Tr. Vol. 3 at 22:3-5.

³⁹ App. Ex. 30 at 22: 15-18; Tr. Vol. 2 at 158:12-15 (describing the San Gabriel River below the Liberty Hill WWTP as “practically a farm for algae. . .you couldn’t ask for a better algae-growing habitat than this area right here.”).

similar permits have TP limits, but *applicability is site-specific and not across the board.*”⁴⁰ It also ignores Dr. Miertschin uncontroverted testimony that, “there are NO treatment plants in the State of Texas that are currently in operation and consistently meeting such a limit” (i.e., 0.02 mg/L).⁴¹ Ultimately the PFD found Protestants’ Liberty Hill argument to be unavailing.⁴²

The Draft Permit’s proposed 0.15 mg/L TP standard is not only one of the most stringent TP limits in the state but it was derived in this case after much coordination by the Applicant and ED, based on multiple site visits and the aforementioned ED’s nutrient screen.⁴³ The ED’s nutrient screen, in particular, shows that staff considered factors (stream bottom, shading, etc.) unique to the Helotes Creek on the Guajolote Ranch.⁴⁴ Both Dr. Miertschin and Mr. Price⁴⁵ further testified that a higher TP limit (in Municipal Operation’s permit) would still be adequately protective.⁴⁶ It is also uncontroverted that the proposed 0.15 mg/L TP is not only site-specific but far more stringent than the 1.0 mg/L TP limit required by the Edwards Aquifer Rules, 30 TAC § 213.6(c)(1)(D), for sites 0-5 stream miles from the Edwards Aquifer Recharge Zone.⁴⁷

On the issue of phosphorus, Protestants are again at cross purposes. Where they insist on the insertion of “site-specific,” albeit one-off modeling parameters for the QUAL-TX model, they reject the very site-specific factors identified in the ED’s nutrient screen for Guajolote Ranch in order to force a lower standard based on Liberty Hill or out-of-state WWTPs like in Breckenridge, Colorado.⁴⁸ This flies in the face of the fact that there is a great variability in nutrient loading responses among streams.⁴⁹ Yet even more hypocritically, counsel for Protestants recently criticized the ED’s nutrient screening procedures (and resulting TP limit) in another case, *Application by LVTP Holdings, LLC for New TPDES Permit No. WQ0015964001*, SOAH Docket No. 582-25-04889, TCEQ Docket No. 2023-1558-MWD (*LVTP*) where the nutrient screening

⁴⁰ ED-ML-5 (Nutrient Screening for Streams and Rivers) (emphasis added).

⁴¹ App. Ex. 30 at 22:21-28.

⁴² Proposal for Decision at 46.

⁴³ App. Ex. 4; ED-ML-6 at 37-43; Tr. Vol. 3 at 198:16-199:10.

⁴⁴ ED-ML-5.

⁴⁵ Mr. Price has studied algae for 50 years. See Tr. Vol. 2 at 162:19-20.

⁴⁶ App. Ex. 20 at 13:13-15; App. Ex. 30 at 21:21-27, 22:1-9.

⁴⁷ The Site is actually *more* than 5 miles upstream of the Recharge Zone, yet Protestants appear to advocate the wholesale prohibition on *any* discharge containing phosphorus on the Contributing Zone without the due process afforded by notice and comment rulemaking. See Tr. Vol. 1 at 76:19-22; Protestants’ Exceptions at 8-9.

⁴⁸ GEAA-121 (citing 2007 study which includes data from as long ago as 2002).

⁴⁹ App. Ex. 20 at 18:1-2.

ratings were for that applicant and Municipal Operations were similar. In *LVTP*, Protestants argued that, “for the Commission to act in a manner consistent with the approach adopted by the Executive Director in the Municipal Operations matter” a “phosphorus limit of 0.15 mg/L would be required. . . .”⁵⁰ Counsel also claimed “for a permitted flow of 0.5 to 3.0 mgd, the typical phosphorus limit under the IPs is 1.0 mg/L to 0.5 mg/L.”⁵¹ When convenient, Protestants’ counsel espouses the very process and limit they criticize in the present case. This is self-serving and unpersuasive.

Accordingly, the PFD was correct that a TP limit of 0.15 mg/L is justified based on the site characteristics and is sufficiently protective to “preclude excessive growth of aquatic vegetation”⁵² – this is especially true at a site that proposes 100% beneficial reuse.

3. Antidegradation

The PFD analysis of antidegradation is also correct.⁵³ Specifically it found that the ED properly conducted a Tier 1 review for all water bodies at issue in this case and a Tier 2 review for Segment 1906 (Lower Leon Creek),⁵⁴ which is almost 20 miles from the proposed outfall.⁵⁵ With respect to Segment 1906, it is the only classified segment on the discharge route that has a high ALU due to its primary contact recreation designation. There, the PFD also concludes that the water quality will not be lowered by more than a *de minimis* amount,⁵⁶ which it also found to be consistent with the Texas Supreme Court’s recent decision in *Save Our Springs All., Inc. v. Tex. Comm’n on Env’tl. Quality*, 2025 WL 1085176 (Tex. Apr. 11, 2025) (*Save Our Springs*).

The ED correctly determined that existing uses in all the reaches of the receiving water where the discharge may flow will be maintained,⁵⁷ and this determination was confirmed by the

⁵⁰ *Application by LVTP Holdings, LLC for New TPDES Permit No. WQ0015964001*, SOAH Docket No. 582-25-04889, TCEQ Docket No. 2023-1558-MWD, Texans for MUD Reform’s Response to Written Closing Arguments at 5 (May 28, 2025).

⁵¹ *Id.* at 3.

⁵² Proposal for Decision at 45.

⁵³ The Interim Order did not refer antidegradation as a separate issue, but it is analyzed under Issue A - whether the Draft Permit is protective of surface and groundwater quality.

⁵⁴ Proposed Order, Findings of Fact 49, 51.

⁵⁵ App. Ex. 32 (Map of Area Streams); App. Ex. 20 at 21:17-23.

⁵⁶ Proposed Order, Finding of Fact 54.

⁵⁷ ED-ML-3.

ED's and Applicant's computer modeling.⁵⁸ Moreover, the ALJs astutely pointed out that the Protestants did not dispute the ED's ALU designations during the hearing⁵⁹ but only contested this afterward through lay photographs and legal argument, not expert testimony.⁶⁰ Applicant submits that Mr. McEntire's photographs and anecdotes of swimming and fishing in Helotes Creek do not qualify as credible evidence that Helotes Creek exceeds the fishable/swimmable quality level commiserate with a 5.0 mg/L DO. But even if Helotes Creek were "at least intermediate" or even high as Protestants disparately seem to argue,⁶¹ the record evidence shows that by the time the discharge reaches the downstream perennial pools on Helotes Creek, the DO *exceeds* the water quality standard of over 5.0 mg/L which corresponds with a high or exceptional ALU. Dr. Miertschin's Output Plot demonstrates that the DO is maintained at 3.0 mg/L for the reaches designated as limited and exceeds 5.0 mg/L in reach 5, the first perennial pool downstream on the Helotes Creek and the exact location Protestants urge a higher ALU would apply, though after the fact.⁶² Protestants have not disputed this.

Oddly and also for the first time, although the *Save Our Springs* case primarily deals with the issue of antidegradation, Protestants use it as a spring board to argue that Applicant should have considered PFAS.⁶³ However, the Commission has already taken a definitive position on PFAS, which expressly rejects Protestants' arguments. In an earlier contested TPDES case, *Application by Highland Lakes Midlothian I, LLC for TPDES Permit No. WQ0015999001*, SOAH Docket No. 582-23-23818, TCEQ Docket No. 2023-0844-MWD, the Commission "...determined that [the PFAS] issue is not relevant and material to TPDES permits."⁶⁴ Moreover, "...the

⁵⁸ App. Ex. 20 at 25:11-17; App. Ex. 30 at 17:6-7; App. Ex. 38.

⁵⁹ Minimal ALU for the unclassified reach of the Helotes Creek upstream of the unnamed tributary (with a corresponding 2.0 mg/L DO); limited ALU for the small on-site impoundment (with a corresponding 3.0 mg/L DO); limited ALU for Helotes Creek downstream of the pond at Culebra Creek (with a corresponding 3.0 mg/L DO); and high ALU for the Lower Leon Creek, Segment 1906 of the San Antonio River Basin (with corresponding 5.0 mg/L DO).

⁶⁰ Proposal for Decision at 56.

⁶¹ Compare Protestants' Exceptions at 10-11 with their Written Closing Arguments at 2 and 15: at page 2 of their Written Closing Arguments, Protestants claim they have already "demonstrated that waters of Helotes Creek are 'fishable/swimmable'" but later at page 15 claim this was "developed as a result of the hearing" without citation to the record. In Exceptions, Protestants simply declare this to be "the evidence."

⁶² App. Ex. 38; App. Ex. 20 at 26:27-29.

⁶³ Protestants' Exceptions at 12-13.

⁶⁴ *An Order Granting the Application by Highland Lakes Midlothian I, LLC for TPDES Permit No. WQ0015999001*, SOAH Docket No. 582-23-23818, TCEQ Docket No. 2023-0844-MWD, Explanation of Changes No. 3 (Aug. 5, 2024) (emphasis added) (*Highland Lakes*).

Commission does not regulate CECs⁶⁵ in the TPDES program as a matter of law and does not evaluate CECs in permit applications.”⁶⁶ Furthermore, the Commission concluded that “[n]o federal or state law regulates CECs in TPDES permits, and therefore [the issue] is not a relevant and material issue for the Commission to determine.”⁶⁷ Therefore, despite Protestants’ best efforts to work around the *Highland Lakes* precedent and creatively graft it onto their antidegradation analysis, it is still a fact that TCEQ has no rules for PFAS/CECs in TPDES permitting.⁶⁸ Significantly, the PFD did “not consider the lack of limits for CECs, PFAS, or similar constituents in the Draft Permit – including any “case-specific” limits advocated by Protestants – as a basis for denying the permit.”⁶⁹

4. Toxicity

Protestants analysis of “toxicity concerns” as a subset of Issue A is again tied up with its push for PFAS regulation, which the PFD and previous Commission action have rejected. Despite their efforts to look at almost all aspects of this case – surface water, groundwater and endangered species – through the lens of PFAS, it is improper to do so. Without state, let alone federal rulemaking (relative to wastewater discharges), in accordance with the Administrative Procedure Act,⁷⁰ it is a deprivation of Municipal Operations’ due process rights to impose such a standard on a single permittee through *ad hoc* rulemaking in the contested case process. When and if TCEQ actually establishes new PFAS/CEC requirements for TPDES permits, Applicant will be required to comply with those limits along with every other TPDES permittee in the State.⁷¹

In the meantime, TCEQ’s approved method to address toxicity is by assessing acute and chronic toxicity under its biomonitoring requirements. Whole Effluent Toxicity testing or (WET testing) is required once the WWTP flow reaches 1.0 MDG as set out in 35 pages in the Draft Permit entitled “Biomonitoring Requirements.”⁷² Here the ALJs have properly applied the prior

⁶⁵ “CECs” are contaminants of emerging concern, and the term includes PFAS/PFOS.

⁶⁶ *An Order Granting the Application by Highland Lakes Midlothian I, LLC for TPDES Permit No. WQ0015999001*, SOAH Docket No. 582-23-23818, TCEQ Docket No. 2023-0844-MWD, Explanation of Changes No. 3 (Aug. 5, 2024) (emphasis added).

⁶⁷ *Id.* at revised Conclusion of Law No. 10 (Aug. 5, 2024).

⁶⁸ App. Ex. 20 at 29:8-9; App. Ex. 18 at 14:12-13.

⁶⁹ Proposal for Decision at 96.

⁷⁰ Tex. Gov’t Code § 2001, Subchapter B.

⁷¹ Tex. Water Code § 26.029(b), 30 TAC § 305.123; App. Ex. 1, Tab D, Permit Conditions, APP000124.

⁷² App. Ex. 1, Tab D at APP000152; Tr. Vol. 3 at 18:11-19:1; App. Ex. 30 at 26:11-26.

administrative decision in *Highland Lakes* to their consideration of PFAS, and no party has demonstrated that this construction was incorrect or should be changed.⁷³

5. Surface Water, Groundwater, and Drinking Water Wells

The Draft Permit protects groundwater and drinking water wells in multiple ways when just one is required. First, it is uncontroverted that the proposed WWTP (including any treatment units), within the approximately 1,167-acre Site, is more than 250 feet from any individual well (Toepperwein)⁷⁴ and 500 feet from any public wells (Grey Forest),⁷⁵ as required by TCEQ's separation distance requirements at 30 TAC § 309.13(c). Indeed Grey Forest Utilities' (GFU) (Grey Forest's municipal utility) wells are approximately 2.2 miles from the proposed outfall and completed in the Middle Trinity Aquifer.⁷⁶ In fact, the Commission originally *denied* Grey Forest's request for hearing on the basis that it was "not quite close enough."⁷⁷

Not only is Grey Forest's public water supply significantly far away from the proposed WWTP – which is not expected to even discharge – but there is simply no pathway for contamination of either public or private wells because no hydraulic connection exists between the Upper and Middle Trinity.⁷⁸ All but two area wells, including Grey Forest's two wells, are completed in the Middle Trinity.⁷⁹ As Applicant's geological expert Mr. Khorzad explained, the base of the Upper Trinity and the top of the Middle Trinity have massive low permeable units that severely restrict groundwater flow vertically, a confining layer or aquitard.⁸⁰ Protestants' witness Green's own publication agreed that "the tight low-permeability interbeds in the Upper and Middle Trinity hydrostratigraphic units can severely restrict vertical flow so that groundwater moves laterally along impermeable bedding (often discharging from seeps and springs) rather than

⁷³ Tex. Gov't Code § 2001.058(e)(1), (2).

⁷⁴ Tr. Vol. 1 at 106:20-25.

⁷⁵ GEAA-501; App. Ex. 12 at 6:10-11; App. Exs. 16 and 17.

⁷⁶ GEAA-500 at 3:25-4:1; App. Ex. 12 at 6:10-11; App. Ex. 18 at 6:29-7:3.

⁷⁷ See TCEQ open meeting broadcast at 1:10:20—1:10:33 (Aug. 14, 2044) https://www.youtube.com/watch?v=TgszYCmSmE&list=PLwzfZK5z8LrFffDJ2zsOTEmA_Z54fD725&index=10.

⁷⁸ App. Ex. 12 at 6:11-15, 7:19-22; App. Ex. 14 at 5 ("Beneath the GFWS, there is one usable aquifer which is the Trinity Aquifer. . . made up of three aquifers, the Upper Trinity, the Middle Trinity, and the Lower Trinity").

⁷⁹ App. Ex. 14 at Appendix A (Well Reports for GFU Well Nos. 1 and 2); App. Ex. 16 (Map of Area Wells); App. Ex. 17 (Table of Area Wells); See also, App. Ex. 12 at 12:13-13:2 (of two outliers, one is a "closed loop geothermal" (non-potable) well and the other is deep enough at 370 feet to be completed in the Middle Trinity).

⁸⁰ App. Ex. 12 at 9:18-21.

percolating into the underlying Trinity hydrostratigraphic units. . . .”⁸¹ On top of which, GRU’s General Manager, Mr. Remmert, agreed with Mr. Khorzad’s 2024 Wet Rock Report and had no basis to challenge its credibility.⁸² Mr. Remmert also acknowledged that the city hired Mr. Khorzad’s firm not once but twice to address its groundwater needs (i.e., capacity).⁸³ Based on the preponderant evidence in this record, the Commission should reject Protestants’ arguments regarding the lack of groundwater protection.

Likewise, the Draft Permit is also protective of groundwater quality and drinking water for the additional reason that compliance with the TSWQS and ensuring the protection of surface water quality, also ensures the protection of groundwater quality.⁸⁴ This long-standing policy was recently confirmed in *Application by Undine Texas Environmental, LLC for New TPDES Permit No. WQ0016046001*, SOAH Docket No. 582-23-20937, TCEQ Docket No. 2023-0163-MWD (June 26, 2024).⁸⁵ Thus, a permit that is drafted to be protective of surface receiving waters will be protective of groundwater in the vicinity.

As to special site conditions, Protestants’ witness Green conceded that the mere presence of a fault on the Guajolote Ranch was neither proof of a connection between the Upper and Middle Trinity nor proof of a conduit for groundwater contamination.⁸⁶ Nor could he produce a site-specific dye-tracer study relevant to the Guajolote Ranch to prove the fate and transport of contaminants – again assuming a discharge or the absence of the confining aquitard between the Upper and Middle Trinity. The PFD is correct that Applicant has met its burden to show that surface water, groundwater, and drinking water will be protected under the Draft Permit’s terms.⁸⁷

⁸¹ App. Ex. 15 at 88-89.

⁸² App. Ex. 14 at 11; Tr. Vol. 1 at 54:12-16.

⁸³ Tr. Vol. 1 at 52:24-53:12.

⁸⁴ ED-AR-1 at 8:25-9:2; ED-ML-1 at 12:20-23.

⁸⁵ *An Order Granting the Application by Undine Texas Environmental, LLC for New TPDES Permit No. WQ0016046001*, SOAH Docket No. 582-23-20937, TCEQ Docket No. 2023-0163-MWD at Finding of Fact No. 35 (June 26, 2024).

⁸⁶ Tr. Vol. 1 at 105:23-106:5.

⁸⁷ Proposal for Decision at 74.

B. Issue B: Whether the Draft Permit is Protective of Wildlife, Including Endangered Species, in accordance with Texas Surface Water Quality Standards in 30 TAC Chapter 307

The Draft Permit is protective of wildlife, including endangered species, in accordance with the TSWQS.⁸⁸ Applicant's compliance with the TSWQS and maintenance of ALU demonstrate protection of aquatic life, which extends to wildlife, terrestrial life and endangered species.⁸⁹ Here again, the determination of compliance with the TSWQS does not, and should not, include an analysis of PFAS.

It is telling however, that Protestants continue to urge non-existent standards (PFAS) but completely ignore the requirements that apply to this case. For example, Protestants are silent on the applicability of the U.S. Fish and Wildlife Service's (USFWS) 1998 Biological Opinion to TPDES permitting cases. This USFWS Opinion clearly states that only aquatic and aquatic-dependent species occurring in watersheds of critical concern or high priority are considered in TPDES permitting.⁹⁰ Karst invertebrates (or "cave bugs"), the Golden Cheek Warbler and the (now delisted) Black-Capped Vireo⁹¹ are not aquatic or aquatic-dependent species.⁹² Moreover, no watershed of critical or high priority anywhere near the Site is listed in the Opinion's Appendix A, and no nearby aquatic or aquatic-dependent species are listed in Appendix B. The only critical habitat identified for karst invertebrates is well off the Guajolote Ranch, approximately 2.7 miles away.⁹³ No endangered species and no wildlife will be negatively affected by the proposed permit.⁹⁴ The PFD was correct to find that Applicant met its burden relative to Issue B.

⁸⁸ Proposed Order, Conclusion of Law 12.

⁸⁹ Executive Director's Response to Comments at 53-54 (Jan. 25, 2024); 30 TAC § 307.6(b)(4).

⁹⁰ ED-ML-3; ED-ML-6 at 21-24; ED-ML-7; Tr. Vol. 3 at 12:11-13.

⁹¹ App. Ex. 8 at 11:11-13 and 14:19-24.

⁹² Tr. Vol. 2 at 142:15-17; Tr. Vol. 3 at 16:4-13.

⁹³ App. Ex. 8 at 9:27-28; App. Ex. 11 (CHU map); *See also* Tr. Vol. 1 at 231:21-232:12, 276:13.

⁹⁴ Tr. Vol. 1 at 286:3-4; Tr. Vol. 2 at 148:10-13.

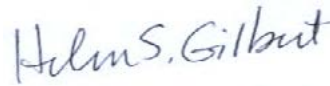
VI. TRANSCRIPT COSTS

Protestants did not except to the reasonable allocation of transcript costs in the PFD. Applicant agrees with the PFD that Protestants should pay one-half of the total \$11,719 costs as this is fair, reasonable, and consistent with 30 TAC § 80.23(d).

VII. CONCLUSION

For the foregoing reasons, Applicant Municipal Operations, LLC respectfully requests that the Commission overrule Protestants' Exceptions in their entirety, amend Finding of Fact No. 2 as recommended by the ED, grant the Application in this case, issue the Draft Permit without changes as recommended in the PFD, and grant all other relief to which it is entitled.

Respectfully submitted,



By: _____

Helen S. Gilbert
State Bar No. 00786263
John R. Manning
State Bar No. 24121578
BARTON BENSON JONES, PLLC
7000 N. MoPac Expwy, Suite 200
Austin, Texas 78731
Telephone: (512) 565-4995
hgilbert@bartonbenjones.com
jmanning@bartonbenjones.com

**ATTORNEYS FOR MUNICIPAL
OPERATIONS, LLC**

CERTIFICATE OF SERVICE

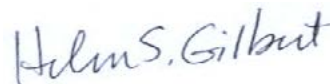
I hereby certify that I have served or will serve a true and correct copy of the foregoing document via hand delivery, facsimile, electronic mail, overnight mail, U.S. mail, or Certified Mail Return Receipt Requested on all parties on this 18th day of June 2025:

Eric Allmon
Lauren Alexander
Allmon & Ice, P.C.
1206 San Antonio Street
Austin, Texas 78701
Tel.: (512) 469-6000
eallmon@txenvirolaw.com
laalexander@txenvirolaw.com

Fernando Martinez, Staff Attorney
Bradford Eckhart, Staff Attorney
Michael Parr, Staff Attorney
Office of Legal Services
TCEQ-MC 173
P.O. Box 13087
Austin, Texas 78711-3087
Tel.: (512) 239-0600
Fernando.Martinez@tceq.texas.gov
Bradford.Eckhart@tceq.texas.gov
Michael.Parr@tceq.texas.gov

Jennifer Jamison, Attorney
Josiah Mercer, Attorney
Office of the Public Interest Counsel
TCEQ-MC 103
P.O. Box 13087
Austin, Texas 78711-3087
Tel.: (512) 239-6363
Jennifer.Jamison@tceq.texas.gov
Josiah.Mercer@tceq.texas.gov

Ms. Laurie Gharis, Chief Clerk
Office of Chief Clerk
TCEQ-MC105
P.O. Box 13087
Austin, Texas 78711-3087
Tel.: (512) 239-3300
Chiefclk@tceq.texas.gov



By: Helen S. Gilbert