

SOAH DOCKET NO. 582-25-10508
TCEQ DOCKET NO. 2024-1582-MWD

APPLICATION BY CLEAR	§	BEFORE THE STATE OFFICE
UTILITIES, LLC FOR NEW	§	
TEXAS POLLUTANT DISCHARGE	§	OF
ELIMINATION SYSTEM PERMIT	§	
NO. WQ0016273001	§	ADMINISTRATIVE HEARINGS

**GLENDA WILLIAMS AND
CITIZENS FOR RESPONSIBLE
COUNTY DEVELOPMENT'S
EXCEPTIONS TO THE PROPOSAL
FOR DECISION**

September 15, 2025

**SOAH DOCKET NO. 582-25-10508
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**GLEND A WILLIAMS AND CITIZENS FOR RESPONSIBLE COUNTY
DEVELOPMENT’S EXCEPTIONS TO THE PROPOSAL FOR DECISION**

TO THE HONORABLE COMMISSIONERS:

Protestants Glenda Williams and Citizens for Responsible County Development (collectively “CRCD”) submit these Exceptions to the Administrative Law Judge’s August 26, 2025 Proposal for Decision, and urge the denial of Clear Utilities, LLC’s (“Applicant”) Application for TPDES Permit No. WQ0016273001 (hereinafter, the “Application”). For support, CRCD respectfully offer the following:

I. Introduction & Summary

The ALJ’s PFD improperly shifts the burden of proof from the Applicant to CRCD, Ellis County, and David Miller (the “Protesting Parties”). CRCD and the other Protesting Parties presented evidence raising genuine issues of fact regarding each referred issue. Therefore, the Protesting Parties’ burden of production has been met. Accordingly, the initial *prima facie* presumption created by the filing of the administrative record is now moot. As the ALJ has acknowledged, the burden of proof has always been, and continues

to be, the Applicant's burden. As detailed in CRCD's Closing Arguments, the preponderant evidence does not show that Applicant satisfied its burden on Referred Issues A-D.¹

First, unresolved fundamental issues about the adequacy and accuracy of discharge route information — including whether each connecting segment of the route between the discharge point and Brushy Creek is state water — dictate that the Application should be denied. Inaccurate, inconsistent, and omitted discharge route information does not allow for an adequate technical review and evaluation of water quality impacts. In this case, rather than following applicable protocol by requiring Applicant to amend the Application to include complete and accurate discharge route information, the Executive Director (“ED”) did the Applicant's work for them and incorporated two unnamed tributaries into the discharge route. These purported elements of the discharge route were not discussed or depicted in the Application materials. While it is unknown if the ED's revised route supposedly flows over Ms. Williams's property, the Application depicts a discharge route running through the middle of Ms. Williams's hayfield. Ms. Williams has lived here for 40 years and gave credible testimony, as a fact witness with 40 years of experience observing condition on her property, that this area of her land has no defined channels with bed and

¹ A) Whether the draft permit is protective of water quality, including the protection of existing uses in the receiving waters, aquatic life, animal life, and the requesters' 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;

C) Whether the draft permit adequately addresses nuisance odor in accordance with 30 Texas Administrative Code § 309.13; and

D) Whether Applicant substantially complied with applicable notice requirements.

banks. Contrary to the PFD's analysis, Ms. Williams did not provide "layperson opinion" — she testified as to observable conditions on her property that are supported by photographic evidence. The ALJ dismissed Ms. Williams's extensive first-hand knowledge of her property's characteristics. CRCD excepts to all findings and conclusions related to the discharge route that followed from this flawed analysis.

Second, Applicant failed to show that the default hydraulic coefficient assumptions in the QUAL-TX model produced reliable dissolved oxygen results for the receiving waters identified by the ED. The modeling presented in support of the Draft Permit is not conservative and does not account for site-specific conditions such as channel substrate and the influence of vegetation on sediment oxygen demand. Third, Applicant did not meet its burden to demonstrate that the Draft Permit would maintain water quality sufficient to protect existing uses, and failed to show how the Draft Permit would protect interests detailed by the Protesting Parties regarding aquatic life, animal life, and human health.

For the Commission's convenience and reference, CRCD's Closing Arguments are attached hereto as Attachment A. CRCD will not highlight nuisance odor and notice issues in the discussion to follow, but excepts to the PFD's findings on these issues, and refers the Commission to Attachment A at pages 35- 40 for its reasoning.

II. Burden of Proof

In a SB 709 permit hearing, 30 Tex. Admin. Code § 80.17(a) places the burden of

proof on the moving party by a preponderance of the evidence, where the applicant is the moving party.² While the filing of the administrative record is a *prima facie* demonstration that the burden has been met, a party may rebut this presumption by presenting evidence on the referred issues that demonstrates the draft permit violates at least one applicable state or federal requirement. 30 Tex. Admin. Code § 80.17(c)(2).

The nature of protestants' burden has been specifically addressed by the State Office of Administrative Hearings in the *Application of the City of Dripping Springs for New TPDES Permit No. WQ0014488003*.³ In the *Dripping Springs* matter, the ALJ concluded that protesting parties do not bear a burden of persuasion and that SB 709 does not shift the burden of proof to protesting parties.⁴ Rather, the ALJ found that protestants have a burden to present evidence *that raises a genuine issue of fact* as to whether the permit meets an applicable requirement.⁵ Accordingly, the ALJ in the *Dripping Springs* matter concluded, "SB 709 sets out a burden of production on protesting parties, not a burden of persuasion."⁶

In the present case, the PFD correctly recognizes that the burden of proof remains with the Applicant to show, by a preponderance of the evidence, that the Draft Permit meets

² Acts 2015, 84th Leg., R.S., ch. 116 (S.B. 709), eff. Sept. 1, 2015.

³ Tex. State Office of Admin. Hearings, *Proposal for Decision Regarding the Application by the City of Dripping Springs for New TPDES Permit No. WQ0014488003*, SOAH Docket No. 582-18-3000 (Nov. 16, 2018) (*rev'd on other grounds*).

⁴ *Dripping Springs* PFD at 3-4.

⁵ *Dripping Springs* PFD at 4 (emphasis added).

⁶ *Dripping Springs* PFD at 4.

all applicable requirements; however, at various times, the PFD improperly shifts the burden of proof to the Protesting Parties. Most notably for CRCDC, and as discussed further below, the PFD improperly interprets and applies burdens related to evidence of the discharge route.

III. The preponderant evidence fails to support findings and conclusions that the Draft Permit is adequately protective of water quality.

A. Water quality cannot be evaluated because of discharge route discrepancies in the administrative record, as well as the unrebutted testimony of Glenda Williams regarding her personal observations of the physical characteristics of her property.

CRCDC excepts to all findings and conclusions based on the following analysis stated in the PFD at page 35:

While the Application described a different route and method than is stated in the Draft Permit, it does not follow that there remains any uncertainty regarding the discharge route. Dr. Wallace described how, prior to the technical review, she consulted USGS maps, GIS layers, and aerial images to identify the water bodies on the discharge route and refine the route described in the Application. Consistent with her determination, the Draft Permit states that effluent from the Facility will flow from the pond to an unnamed tributary, then to a second unnamed tributary, then to Brushy Creek and Red Oak Creek, and finally to the Upper Trinity River. Ms. Williams offered her layperson opinion that the second tributary may not exist, but the fact that she does not recognize any tributary where water runs through her hayfield is not sufficient to overcome the ED's evidence of a second-order unnamed tributary there.

First, the problems with the incomplete and inaccurate description of the discharge route in the Application cannot be disregarded. The Application was never amended and its descriptions and depictions of the discharge route remain irreconcilably inconsistent with each other, as well as with descriptions in the Draft Permit. Also, nothing in any of the Application materials makes mention of an "unnamed tributary 1" or an "unnamed

second order tributary.” The discharge route authorized under a wastewater discharge permit must correspond to the associated application. As addressed by the State Office of Administrative Hearings in *HK Real Estate Development, LLC*, “the proposed discharge route in a TPDES application is a fundamental underpinning of the ED’s technical review.”⁷ The present case is distinguishable from *HK Real Estate* in that the Applicant has made no amendment at any point in time (neither before nor after technical review) to correct discharge route information.

Instead, the discharge route information was changed by the ED during technical review. To be clear, this significant change was not made “*prior* to the technical review”—the ED revised the discharge route information *during* technical review. As Dr. Wallace’s testimony confirms, her work on the Standards Implementation Team is part of the technical review process.⁸

Dr. Wallace did not merely “refine” the discharge route description in the Application — she substantially changed it. She added every component that could connect the discharge point to Brushy Creek. Dr. Wallace’s testimony makes clear that a specific and thorough description of the discharge route leading from Applicant’s stock pond to Brushy Creek could not be ascertained from the Application materials.⁹ While the PFD

⁷ Tex. State Office of Admin. Hearings, *Supplemental Proposal for Decision Regarding the Application by HK Real Estate Development, LLC for New TPDES Permit No. WQ0016150001*, SOAH Docket No. 582-23-21878 (Feb. 3, 2025), at 83.

⁸ Ex. ED-11 at 2:23-27.

⁹ Tr. at 98:12 – 100:15.

accurately summarizes Dr. Wallace’s testimony that she used USGS maps, GIS layers, and aerial images to identify a couple of tributaries that eventually empty into Brushy Creek, nothing in the record shows how the specific location or characteristics of these tributaries relate to descriptions or maps of the discharge route contained in the Application. While the Draft Permit’s discharge route description is “consistent” with Dr. Wallace’s independent work, it is *not* “consistent” with the Application.

The Application only describes how wastewater would be discharged to Applicant’s stock pond — “which discharges to Brushy Creek”— and includes no details whatsoever of any connection between Point A (the stock pond) and Point B (Brushy Creek). Dr. Wallace filled in *all* the gaps. She did this without regard to whether her changes were consistent with all Application materials, including drawings, photographs, and adjacent landowner information.

Also, there was no verification of actual conditions on the adjacent Williams property that lies between the Applicant’s stock pond and Brushy Creek. To be clear, no ED witness visited the Williams property to observe the alleged path of any purported tributary.

If permitting staff determines that an application’s discharge route information is incomplete or inaccurate, the proper course of action is to issue a notice of deficiency (NOD) requiring the applicant to submit an amended application *before* the ED continues technical review and drafts a permit.¹⁰ This is the only approach that is consistent with the

¹⁰ See 30 Tex. Admin. Code § 281.19(b) (The applicant shall be promptly notified of any additional technical material as may be necessary for a complete review; and if the necessary additional information

TCEQ Commissioners’ recent pronouncements that: (1) “[i]t is TCEQ’s policy not to issue TPDES permits if a proposed discharge route has been identified incorrectly;”¹¹ and (2) “[t]he ED’s policy is not to perform a technical review, including water quality analysis, if a proposed discharge route in a TPDES permit application has been identified incorrectly.”¹² These findings articulated in the recent Commission Order for *HK Real Estate* are independent and free-standing policies. The Commission’s Order did set forth other findings and policies to address the unique facts of the *HK Real Estate* case. However, no finding in the proceeding supports a proposition that TCEQ policy encourages or even allows the ED to do Applicant’s work for them, and change the deficient discharge route information, rather than addressing the problem through a notice of deficiency (NOD) and requiring a corresponding application amendment.

The distinction that the discharge route in the present case was changed *by the ED during* technical review, rather than being changed through application amendment by an *applicant after* technical review, is irrelevant with respect to the core principle of the *HK*

is not received by the executive director prior to expiration of the technical review period and the information is considered essential by the executive director to make recommendations to the commission on a particular matter, the executive director may return the application to the applicant).

See also 30 Tex. Admin. Code § 305.125(19) (Where the permittee becomes aware that it failed to submit any relevant facts in a permit application, or submitted incorrect information in an application, or in any report to the executive director, it shall promptly submit such facts or information).

¹¹ Tex. Comm’n on Env’tl. Quality, *Order Denying the Application by HK Real Estate Development, LLC for TPDES Permit No. WQ0016150001*, TCEQ Docket No. 2023-0385-MWD (May 7, 2025), Finding of Fact No. 80.

¹² Tex. Comm’n on Env’tl. Quality, *Order Denying the Application by HK Real Estate Development, LLC for TPDES Permit No. WQ0016150001*, TCEQ Docket No. 2023-0385-MWD (May 7, 2025), Finding of Fact No. 90.

Real Estate decision. Both situations are improper because the discharge route deficiencies should have been addressed through the NOD and permit amendment processes, before technical review occurred or continued. Here, the Applicant has never submitted an amendment explaining how effluent would reach Brushy Creek after being discharged to Applicant's stock pond.

In some respects, this is an even more egregious problem than the one examined in *HK Real Estate*. Applicant in this case has submitted no underlying supporting application materials to show where the two tributaries identified in the Draft Permit are located. The PFD incorrectly assumes that an unnamed "second order tributary" enters Brushy Creek by crossing the Williams property, but the preponderant evidence does not support that assumption. The PFD's assumption can only be based on the flawed Application's maps, descriptions, and depictions that are internally inconsistent.

The PFD refers to "ED evidence" of a second-order unnamed tributary running through Ms. Williams's hayfield. However, there is no such evidence. Nothing in the record establishes where the second-order tributary identified by Dr. Wallace is located in relation to adjacent properties, or how the second-order tributary relates to any depictions of the discharge route in the flawed Application. Dr. Wallace provided no testimony that the tributary runs through the Williams property, and she did not observe where the discharge would enter Brushy Creek.¹³ The Applicant never submitted an amendment

¹³ Tr. at 88:2-5, 89:17-25, 103:23 – 104:16.

explaining how effluent would reach Brushy Creek after being discharged to Applicant's stock pond.

Most significantly, the PFD errs in characterizing the testimony of Ms. Williams as "layperson opinion" and dismissing it without any consideration whatsoever. Ms. Williams testified as a fact witness regarding the physical characteristics of her property based on her 40 years of experience living there. She testified that there is no defined channel with bed and banks that directs any flows of water through her hayfield. These are facts. Ms. Williams expressly acknowledged she was not labeling these conditions, just describing her observations: "*I do not know what is meant by the tributary descriptions; all I know is that after that effluent crosses my property line, there's no defined existing channel of any kind at that location. The effluent would just spill out over my hayfield before making its way into Brushy Creek.*"¹⁴

Based on her 40 years of personal knowledge concerning her property's layout, characteristics, and history of rainfall and flooding, Ms. Williams further explained the harm to her property expected from the proposed volume of discharge being spilled across her land. Over time, the constant flow and erosion eventually would cut gulleys through this acreage and change the topography, thereby threatening her access to eight to ten acres of her hayfield.¹⁵ Her low water crossing is the only access to her hayfield. Her low water crossing is located just west of where the repeated spillage of wastewater across the

¹⁴ Ex. CRCD-100 at 4:18-21 (emphasis added).

¹⁵ Ex. CRCD-100 at 14:12-25.

property would enter Brushy Creek.¹⁶ Increased inundation events and erosion over time could permanently prevent use of the low water crossing for access.¹⁷

The PFD falsely implies that Ms. Williams gave testimony that, under existing conditions, “water runs through her hayfield.” In fact, she did not. The hypothetical tributary falsely assumed to exist on Ms. Williams’s hayfield would cross her property from north to south before emptying into Brushy Creek. However, as explained in Closing Arguments,¹⁸ CRCD presented *unrebutted* evidence showing that while the hayfield is inundated periodically *from the south* by Brushy Creek during rainfall events (resulting in standing water until conditions allow for evaporation), there is no channel with defined bed and banks “running through the hayfield” *from the north* to enter Brushy Creek.¹⁹

To be clear, no witness other than Ms. Williams has personal knowledge of conditions on this property. Dr. Wallace has not visited the Williams property. Dr. Wallace did not observe the second-order tributary she identified through on-line resources. She provided no testimony that the tributary runs through the Williams property, and she did not observe where the discharge would enter Brushy Creek.²⁰ For these and all other

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *See* Attachment A at 20-23.

¹⁹ Ex. CRCD-100 at 15:10-12 (“There is no channel with bed and banks to contain and direct the flow of wastewater where the discharge would flow onto our property. Instead, the wastewater would spill out over our hayfield”).

²⁰ Tr. at 88:2-5, 89:17-25, 103:23 – 104:16.

reasons discussed in Closing Arguments,²¹ CRCDC did rebut *the prima facie* presumption on all water quality and notice issues related to inaccurate and insufficient discharge route information, and Applicant failed to meet its burden of proof by a preponderance of the evidence.

B. The ED's dissolved oxygen modeling is not adequately conservative and representative of conditions in relevant areas of the receiving waters.

To assure that receiving waters are adequately protected, modeling that supports permit conditions should conservatively and accurately reflect the characteristics of the receiving waters. Dr. Zamora provided persuasive testimony demonstrating that the ED's modeling is not adequately conservative and reliable to predict dissolved oxygen concentrations in the receiving waters that have been identified by Dr. Wallace. Dr. Zamora's testimony and associated exhibits raise genuine issues of fact that are more than sufficient to rebut the *prima facie* presumption that the Draft Permit is protective. Furthermore, in light of the entirety of the direct case presented by Ellis County, the preponderant evidence fails to establish that the Applicant has met its burden on this issue.

Dr. Zamora explained that CSTR is more appropriate than the ED's uncalibrated QUAL-TX model for purposes of predicting dissolved oxygen concentrations in a wider water body with less flow, such as the Applicant's stock pond. The QUAL-TX model is more suitable for streams because it emphasizes momentum and flow and assumes a linear flow for the water body.²² When modeling a water body that contains *both* streams and

²¹ See Attachment A at 6-24.

²² Tr. at 28:20-25.

ponded areas or pools, Dr. Zamora acknowledged that both of these models can “do those dissolved oxygen calculations;”²³ however, in addition to CSTR better accounting for physical attributes and low flow of Applicant’s stock pond, Dr. Zamora also considered CSTR more appropriate for this particular discharge route because of the specific order of the pond and the streams within the route.²⁴ The fact that the stock pond initially receives and mixes the wastewater before it enters other streams with more flow gave even more reason for Dr. Zamora to use CSTR for this initial component of the route with both streams and a pond.²⁵ In so doing, Dr. Zamora’s results are more appropriately based on site-specific discharge route conditions. For these and all other reasons discussed in Closing Arguments,²⁶ CRCDD excepts to the PFD’s conclusions that Protesting Parties did not present evidence sufficient to rebut the *prima facie* demonstration that the Draft Permit is protective of water quality.

IV. The Applicant failed to show by a preponderance of the evidence that aquatic life and animal life will be adequately protected.

No witness other than Glenda Williams testified regarding personal observations of existing aquatic life in Brushy Creek. The testimony of Ms. Williams demonstrates that existing aquatic life in Brushy Creek is varied and plentiful. Ms. Williams has observed

²³ Tr. at 28:14-15.

²⁴ Tr. at 29:3-11.

²⁵ *Id.*

²⁶ *See* Attachment A at 24-35.

bass, perch, frogs, and turtles in the clear waters of Brushy Creek.²⁷ The ED's "limited" ALU assignment is inconsistent with the testimony of Ms. Williams.²⁸ Water bodies with "limited" aquatic life uses are characterized by uniform habitat characteristics, with most regionally expected species absent, a low diversity of species, and a low species richness.²⁹ The credible testimony of Glenda Williams refutes any presumption that a "limited" ALU designation should apply to Brushy Creek. The preponderance of the evidence fails to support a conclusion that the ED's presumed aquatic life use is accurate.

Also, 30 Tex. Admin. Code § 307.4(h) provides that dissolved oxygen concentrations must be sufficient to support not only presumed uses, but also existing aquatic life uses and attainable aquatic life uses. The ED's review considered only presumed aquatic uses.³⁰ There's been no attempt by the ED to establish that the Draft Permit would be protective of existing or attainable aquatic life uses.³¹ For these reasons, CRCD excepts to findings and conclusions that the Draft Permit is adequately protective of aquatic life and animal life.

²⁷ Ex. CRCD-100 at 9:21-22.

²⁸ Ex. ED-13; Ex. ED-14.

²⁹ Ex. ED-15 at 15 (Bates 0063), Table A Aquatic Life Subcategories.

³⁰ Tr. at 118:13-25.

³¹ Tr. at 111:11-16, 115:2-7.

V. The Applicant failed to show by a preponderance of the evidence that the requesters' health will be adequately protected.

CRCD further excepts to the PFD's finding that Glenda Williams expressed only generalized concerns about her health that are insufficient to overcome the *prima facie* demonstration that the Draft Permit is sufficiently protective. The PFD mentions only the concerns of Ms. Williams regarding the impact of aerosolized chemicals on her congenital lung condition. The PFD fails to acknowledge the full impact the proposed facility could have on Ms. Williams's health. While Ms. Williams is concerned about aerosolized chemicals, her testimony was "[m]y health would be endangered by breathing such chemicals, *as well as by any mycobacteria present in the effluent.*"³²

With respect to the health of requesters and requesters' families, CRCD provided evidence showing that Brushy Creek frequently inundates the property of Glenda and John Williams.³³ Such conditions create increased risk of human contact with discharged wastewater contaminants. The potential threat is uniquely concerning for Glenda Williams because of a congenital lung condition. As a result of this condition, she has a high susceptibility to infections.³⁴ Over recent years, her coughing and shortness of breath have grown progressively worse, and she has also experienced repeated bouts of pneumonia and bronchitis during her lifetime.³⁵ In 2024, Ms. Williams was diagnosed with a mycobacterial

³² Ex. CRCD-100 at 16:3-4 (emphasis added).

³³ Ex. CRCD-100 at 10:13 – 13:2; Ex. CRCD-104; Ex. CRCD-105; Ex. CRCD-106.

³⁴ Ex. CRCD-100 at 15:17 – 16:4.

³⁵ *Id.*

infection that has required anti-biotic treatment for over a year.³⁶ The PFD has not addressed particularized concerns about biocontaminants such as mycobacteria — a specific, rather than a generalized, concern for Ms. Williams because of her pre-existing condition and lengthy mycobacterial infection. Applicant and the ED presented no additional evidence in response to CRCD’s direct case raising genuine issues of fact related to requesters’ health. For these reasons, CRCD excepts to findings and conclusions that the Draft Permit is adequately protective of requesters’ health and requesters’ families’ health.

VI. Transcript Costs

CRCD excepts to the PFD’s allocation of transcript costs. The most CRCD stands to gain from the current proceedings is maintenance of the status quo. On the other hand, the Applicant stands to gain considerable economic benefit from the proceedings and from the existence of the transcript. The transcript facilitates the creation of a record which the Applicant can use in its attempt to meet its burden of proof. For these reasons, no portion of the transcript costs should be allocated to CRCD. Likewise, Mr. Miller has nothing to gain other than maintenance of the status quo and should not incur additional costs. Furthermore, Ellis County is a local government reliant upon taxpayers for expenses incurred and should be spared the burden of transcript costs. Accordingly, transcript costs should be borne entirely by the Applicant.

³⁶ *Id.*

VII. Conclusion

For the reasons highlighted herein, and discussed in further detail in Attachment A, CRCD excepts to the PFD's findings and conclusions on each referred issue. CRCD respectfully requests that the Commission deny the Application.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing document has been served via electronic service to the parties of record listed below, on September 15, 2025.

/s/ Vic McWherter
Vic McWherter

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ATTACHMENT A

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DEVELOPMENT’S WRITTEN CLOSING ARGUMENTS**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE STARNES:

Protestants Glenda Williams and Citizens for Responsible County Development (collectively “CRCD”) submit these Written Closing Arguments and urge the denial of Clear Utilities, LLC’s (“Applicant”) Application for TPDES Permit No. WQ0016273001 (hereinafter, the “Application”). For support, CRCD respectfully offer the following:

I. Introduction & Summary

The Applicant and the Executive Director (“ED”) have not shown that the proposed wastewater treatment plant’s operations under conditions of the draft permit would be adequately protective of water quality, existing uses of Brushy Creek, human health, terrestrial life or aquatic life. A preliminary and fundamental jurisdictional question here is whether the discharge would even be in “waters in the state” in all proposed areas of the discharge route between Applicant’s stock pond and Brushy Creek. Because of uncertainties regarding the discharge route and which, if any, waters in the state between the discharge point and Brushy Creek are to be evaluated, the Applicant cannot meet its burden to demonstrate compliance with anti-degradation requirements or other Texas Surface Water Quality Standards (“TSWQS”) requirements. In addition, the immediate

area of Brushy Creek that would receive the discharge is prone to inundation during times of even moderate rainfall, resulting in unacceptably heightened risks of exposure to contaminants. Furthermore, the record raises substantial concerns as to whether the ED's aquatic life use assignment for Brushy Creek is appropriate and whether modeling in support of the draft permit is reliable and adequately conservative.

The Applicant and the ED have also failed to show compliance with applicable requirements for nuisance odor prevention, as well as applicable notice requirements. The record is unclear on the details for planned compliance with nuisance abatement and control requirements. Wrong and unhelpful discharge route descriptions in notices and application materials have misinformed and confused members of the public. All of these reasons warrant denial of the Application.

II. Burden of Proof

In this contested case hearing for an SB 709 permit, the Applicant is the moving party seeking the permit and, therefore, the Applicant has the burden of proof.¹ Under SB 709, the filing of the administrative record creates a *prima facie* presumption that the draft permit does not violate applicable state or federal requirements.² While the filing of the administrative record is a *prima facie* demonstration that Applicant's burden has been met as to certain elements, a party may rebut this presumption by presenting evidence on the referred issues showing the draft permit violates at least one applicable state or federal requirement.³ 30 Tex. Admin. Code § 80.17(c)(2). The burden of proof on the ultimate

¹ Acts 2015, 84th Leg., R.S., ch. 116 (S.B. 709), eff. Sept. 1, 2015; 30 Tex. Admin. Code § 80.17(a).

² Tex. Gov't Code § 2003.047(i-1)(i).

³ Tex. Gov't Code § 2003.047(i)(2); 30 Tex. Admin. Code § 80.17(c)(2).

merits of the issue remains with the Applicant. In this respect, an opposing party's burden under Texas Government Code Section 2003.047(i-2) is similar to one of production rather than proof in the sense of ultimate persuasion.⁴

The *prima facie* presumption is that the draft permit meets applicable state and federal legal and technical requirements.⁵ However, the language of the statutory presumption applies only to the draft permit, and not the underlying elements of the application or the TCEQ's technical review.⁶ The courts presume that the Legislature deliberately and purposefully omits words and phrases it does not enact.⁷ Given that the presumption under Texas Government Code Section 2003.047(i-1)(i) makes reference only to the draft permit, it is improper to apply the *prima facie* presumption created by that section to all elements of the administrative record. For example, the presumption has no relevance to the question of whether the discharge route is accurately described or located in the application, any public notice, or technical review documentation.

Also, the nature of a demonstration required of the parties in an SB 709 contested case hearing is a function of the substantive law applicable to the application being challenged. This particular permit is subject to 30 Tex. Admin. Code § 305.531(4), which requires:

[Permit] limitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the

⁴ *Application by 130 Environmental Park, LLC for a Limited-Scope Amendment to MSW Permit No. 2383*, SOAH Docket No. 582-24-13241 (Proposal for Decision at 4-5, March 19, 2024) (“an opposing party's burden under section 2003.047(i-2) is similar to one of production rather than proof in the sense of ultimate persuasion”).

⁵ Tex. Gov't Code § 2003.047(i-1).

⁶ *Id.*

⁷ *Centerpoint Builders GP, LLC v. Trussway, Ltd.*, 496 S.W.3d 33, 36 (Tex. 2016).

Director determines are or may be discharged at a level which will cause, have the *reasonable potential* to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality.⁸

Given that permit conditions must ensure that discharged contaminants do not have a “reasonable potential” to cause an excursion of the TSWQS, it is not necessary for protesting parties to demonstrate that a discharge *will* cause a violation of an applicable standard. To meet their burden, protesting parties need only demonstrate that a discharge within the conditions of the permit would have a reasonable potential to cause or contribute to a violation of the TSWQS.

III. Referred Issues

Pursuant to its November 12, 2204 Interim Order,⁹ the Texas Commission on Environmental Quality has referred the Application to hearing on the following issues:

Issue A: Whether the Draft Permit is protective of water quality, including the protection of existing uses in the receiving waters, aquatic life, animal life, and the requesters’ and their families’ health, in accordance with applicable regulations including the Texas Surface Water Quality Standards;

Issue B: Whether the Draft Permit complies with applicable antidegradation requirements;

Issue C: Whether the Draft Permit adequately addresses nuisance odor in accordance with 30 Texas Administrative Code § 309.13; and

⁸ 30 Tex. Admin. Code § 305.531(4), incorporating by reference 40 C.F.R. § 122.44, including 40 C.F.R. § 122.44(d)(1)(i) (emphasis added).

⁹ Administrative Record, Tab A, at App. Ex A0005.

Issue D: Whether Applicant substantially complied with applicable notice requirements.

The arguments below are relevant and material to the referred issues and provide ample grounds for denial of the Application.

IV. Arguments

A. The Applicant cannot meet its burden to show the draft permit will protect the receiving waters and comply with anti-degradation requirements because there is substantial uncertainty as to the waters to be evaluated.

The Applicant cannot meet its burden to show the draft permit will protect the receiving waters and comply with anti-degradation requirements. Inconsistent, confusing and changed discharge route representations create substantial uncertainty as to the waters to be evaluated. In fact, no watercourse even exists in the segment of the discharge route that some Application materials show between the Applicant’s southern property line and Brushy Creek.¹⁰ For each unclassified stream segment in the receiving waters, aquatic life uses and associated dissolved oxygen criteria are determined based on a watercourse’s specific characteristics. Therefore, as the TCEQ Commissioners have acknowledged in very recent proceedings,¹¹ accurately and specifically identifying each segment of the proposed discharge route is essential to assigning appropriate uses and evaluation criteria

¹⁰ See Discussion in Section IV.A.4, below.

¹¹ *Application by HK Real Estate Development, LLC for TPDES Permit No. WQ0016150001*; SOAH Docket No. 582-23-21878 (TCEQ Interim Order, May 17, 2024) at page 2 (instructing that the hearing upon remand for three issues, including whether the draft permit was adequately protective of water quality, address whether all sections of the proposed discharge route were surface waters in the state, “*as the nature of the watercourse and where it terminates inform whether the discharge’s effect on surface water quality was adequately evaluated.*”) (emphasis added); see also *Application by HK Real Estate Development, LLC for TPDES Permit No. WQ0016150001*; SOAH Docket No. 582-23-21878 (TCEQ Final Order, May 7, 2025) Findings of Fact Nos. 5, 57 97, 98; Conclusions of Law Nos. 13 and 14.

for purposes of the TSWQS. The record here does not support a finding that a discharge route has been accurately identified, located and properly evaluated. Therefore, the Applicant cannot meet its burden to show that water quality will be protected under the TSWQS and that anti-degradation requirements will be met.¹²

1. The Application materials contain inconsistent, contradictory, and confusing narrative descriptions of the discharge route.

The Application itself states “the plant will discharge treated effluent through an 18” pipe to the existing stock pond, *which discharges to* Brushy Creek, Red Oak Creek, then to the Trinity River, through Lake Livingston, and finally to Trinity Bay.”¹³ This same language is stated in response to separate instructions to provide (1) an “accurate description” of the discharge route,¹⁴ and (2) a description that “must follow the flow of effluent from the point of discharge to the nearest major watercourse.”¹⁵ There is *no mention* of an unnamed tributary 1 or unnamed 2nd order tributary. The Application was filed on December 12, 2022. Since that time, there’s been no amendment of the Application to change the discharge route description. To be clear, the Application’s descriptions of the discharge route have never referenced two unnamed tributaries and do not match the descriptions changed by the Executive Director during technical review. In the Application’s Domestic Technical Report 1.1, Section 4, Description of Receiving Water, the immediate receiving waters are stated to be the Applicant’s stock tank — with no

¹² *Id.*

¹³ Administrative Record, Tab D, at App. Ex A0226 (emphasis added).

¹⁴ *Id.*

¹⁵ Administrative Record, Tab D, at App. Ex A0236.

mention of the discharge entering any tributary 1 or 2nd order tributary before the receiving water joins Brushy Creek.¹⁶

The method used to characterize the upstream and downstream areas of the discharge route is represented to be “personal observation.” However, there is nothing in the record indicating that Applicant representatives have observed any alleged watercourse crossing property owned by Glenda and John Williams (the “Williams Property”) at its northern boundary and continuing en route to Brushy Creek. Indeed, the Application only states opinions about the conditions of the stock pond on Applicant’s own property, as observed on July 7, 2022.¹⁷ With respect to the ED, the record is clear that no staff representatives have visited the Williams Property.¹⁸ The only “personal observations” in evidence concerning the characteristics of any area of the Williams Property are set forth in the testimony of Ms. Glenda Williams.

Notably, the Application’s Domestic Technical Report Worksheet 2.0 Section 4, D. Downstream Characteristics, specifically asked: “*Do the receiving water characteristics change within three miles downstream of the discharge (e.g., natural or manmade dams, ponds, or reservoirs)?*” (emphasis added). The Applicant answered “No.”¹⁹ However, this answer cannot be correct.

Regardless of speculation over the exact route by which the discharged effluent could move from the stock pond into Brushy Creek, “the receiving water characteristics”

¹⁶ Administrative Record, Tab D, at App. Ex A0270-0271.

¹⁷ Administrative Record, Tab D, at App. Ex A0272.

¹⁸ See Discussion in Section IV.A.4.a, below.

¹⁹ Administrative Record, Tab D, at App. Ex A0271.

clearly change within three miles downstream of the initial discharge point in the pond. *Otherwise, why would the ED change the Applicant’s description of the route between the discharge point and Brushy Creek by breaking it down into three separate components (pond, unnamed tributary 1, and unnamed tributary 2), each with its own assigned use and associated criterion?*

Whether the effluent would move through a “tributary” across the Williams Property, or otherwise spill across the Williams Property as diffuse surface water, the characteristics of the “receiving waters” definitely change before the route reaches Brushy Creek. Therefore, Applicant’s erroneous answer that there are no changes in the characteristics of the receiving water for a distance of three miles simply contributes to the confusion and uncertainty regarding the discharge route.

To confuse the issue further, the TCEQ’s Receiving Water Assessment Determination Form describes the discharge route as “*via pipe to Brushy Creek, thence to Red Oak Creek, thence to Upper Trinity River (Seg 0805),” not even mentioning the stock pond, much less any tributaries purportedly connecting the stock pond to Brushy Creek.*²⁰

2. Some visual depictions of the discharge route in the Application do not show how effluent will reach Brushy Creek.

The location of Applicant’s stock pond relative to the adjacent Williams Property and Brushy Creek is visually represented in various sections of the Application. The Application’s site drawing shows the Williams Property, with its boundaries outlined in

²⁰ Ex. ED-17 (Receiving Water Assessment Form).

black, just to the south of the proposed facility and stock pond.²¹ Brushy Creek is accurately shown as flowing northwest to southeast through the Williams Property; but the site drawing shows *no* watercourse other than Brushy Creek, and provides *no* representation of the path for discharged effluent to (1) flow from the discharge point in the pond, (2) move from the north to the south, (3) cross the Williams Property, and (4) somehow enter Brushy Creek.

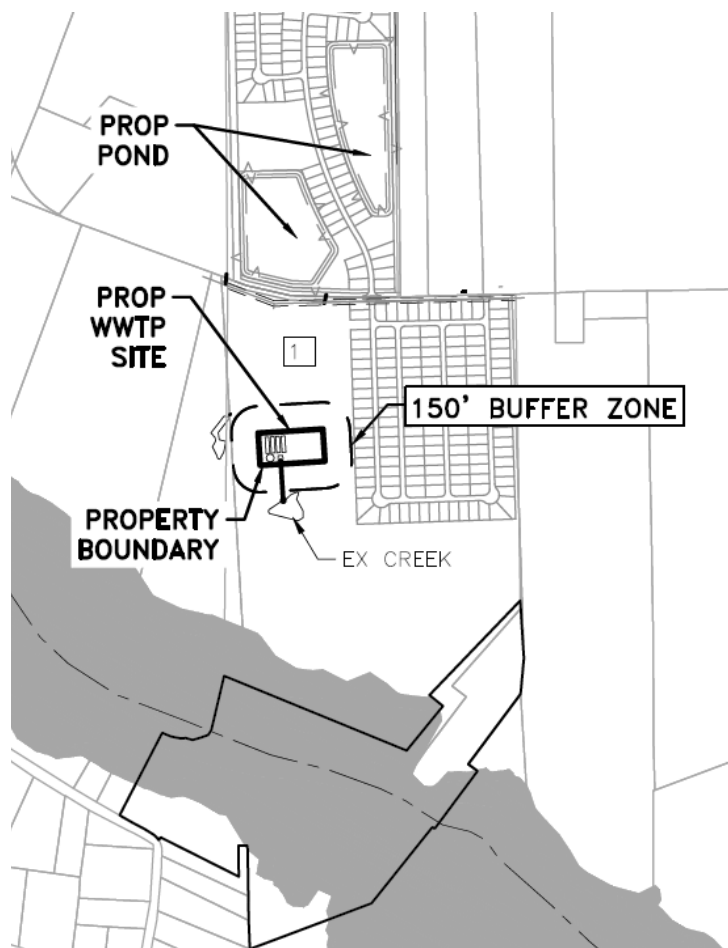


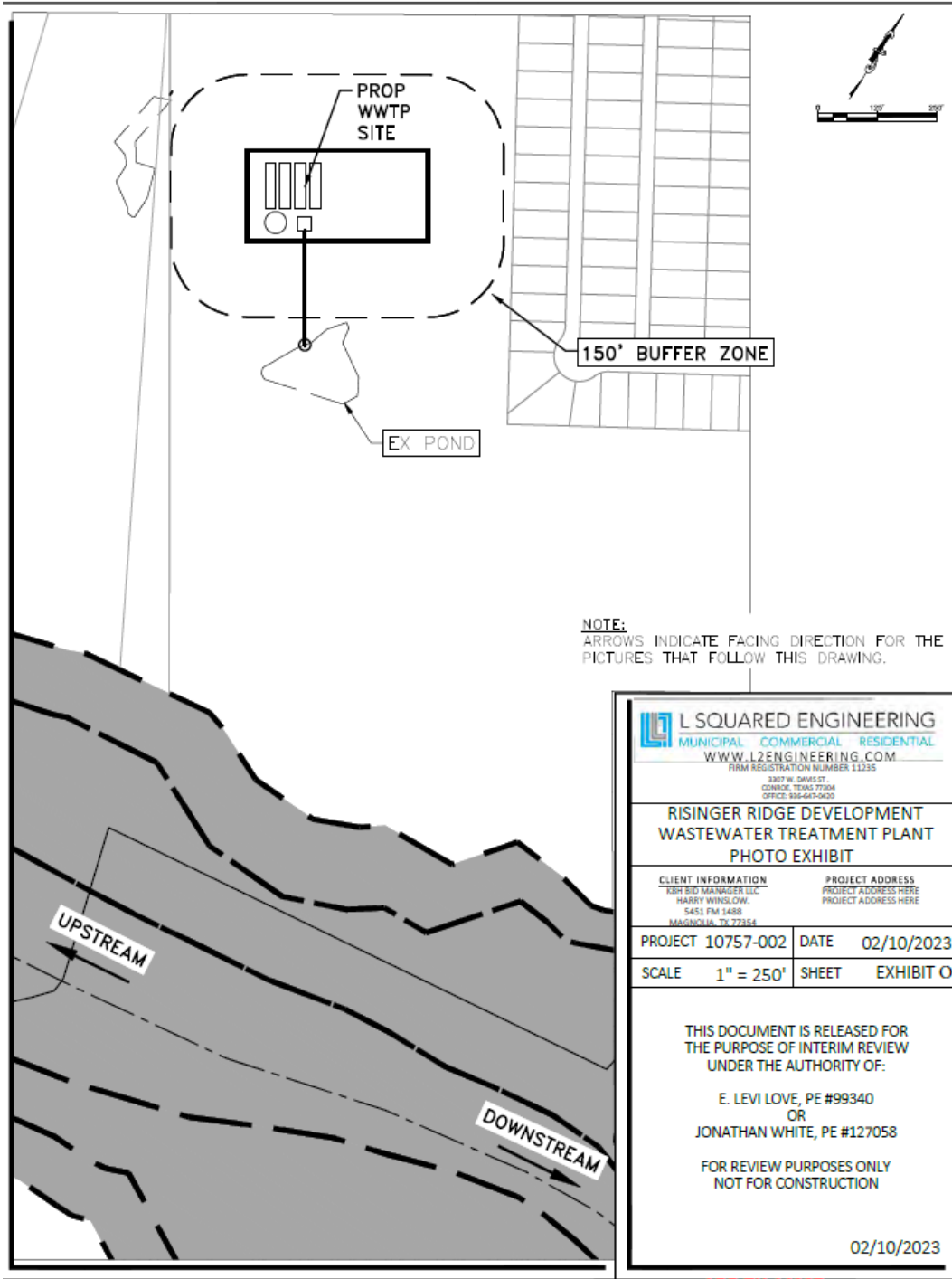
Figure 1: The Application’s site drawing shows no connection between the pond and Brushy Creek.²²

²¹ Administrative Record, Tab D, at App. Ex A0286.

²² *Id.*

Below is another site drawing from the Application that shows locations where photographs were taken.²³ It indicates photographs were taken facing upstream and downstream in Brushy Creek. This figure also shows the location of Applicant's stock pond relative to the Williams Property and Brushy Creek. The Williams Property line is shown as a straight, solid, thin line, just above Brushy Creek where the "Upstream" and "Downstream" markers are indicated. As with the drawing above, nothing is shown or depicted as to the discharge route from the pond to Brushy Creek.

²³ Administrative Record, Tab D, at App. Ex. A0327.



APP EX A0327 00110

Figure 2: This map indicating where discharge route photos were taken shows no connection between the pond and Brushy Creek.²⁴

²⁴ Administrative Record, Tab D, at App. Ex 0327.

a. The landowners map in the Application shows effluent crossing the Williams Property from its northern boundary to reach Brushy Creek, but no watercourse actually transects the Williams Property in such a manner.

The Williams Property is comprised of two parcels, one with assigned Ellis County Appraisal District Property ID 156321 (Parcel #156321), and the other with assigned Property ID 264172 (Parcel #264172).²⁵ The Application's adjacent landowners list and map²⁶ correctly show Parcel #156321 as property #2 and Parcel #264172 as property #3. This map marks property boundaries as thin gray lines dividing the parcels of land near the proposed facility.

This component of the Application *does* depict the *purported* path through which effluent would flow south from the stock pond and cross the northern property line of property #2 (Parcel #156321). After crossing the property line, the depicted discharge route cuts straight down across the Williams Property until it reaches Brushy Creek, where it makes a sharp turn as Brushy Creek flows to the southeast.²⁷ However, as discussed more fully below, there is no watercourse that flows down from the north over property #2 (Parcel #156321) to enter Brushy Creek.

²⁵ Ex. CRCD-100 (Williams Prefiled Testimony) at 6:21-23.

²⁶ Ex. CRCD-101; Administrative Record, Tab D, at App. Ex. A0317-A0318.

²⁷ *Id.*

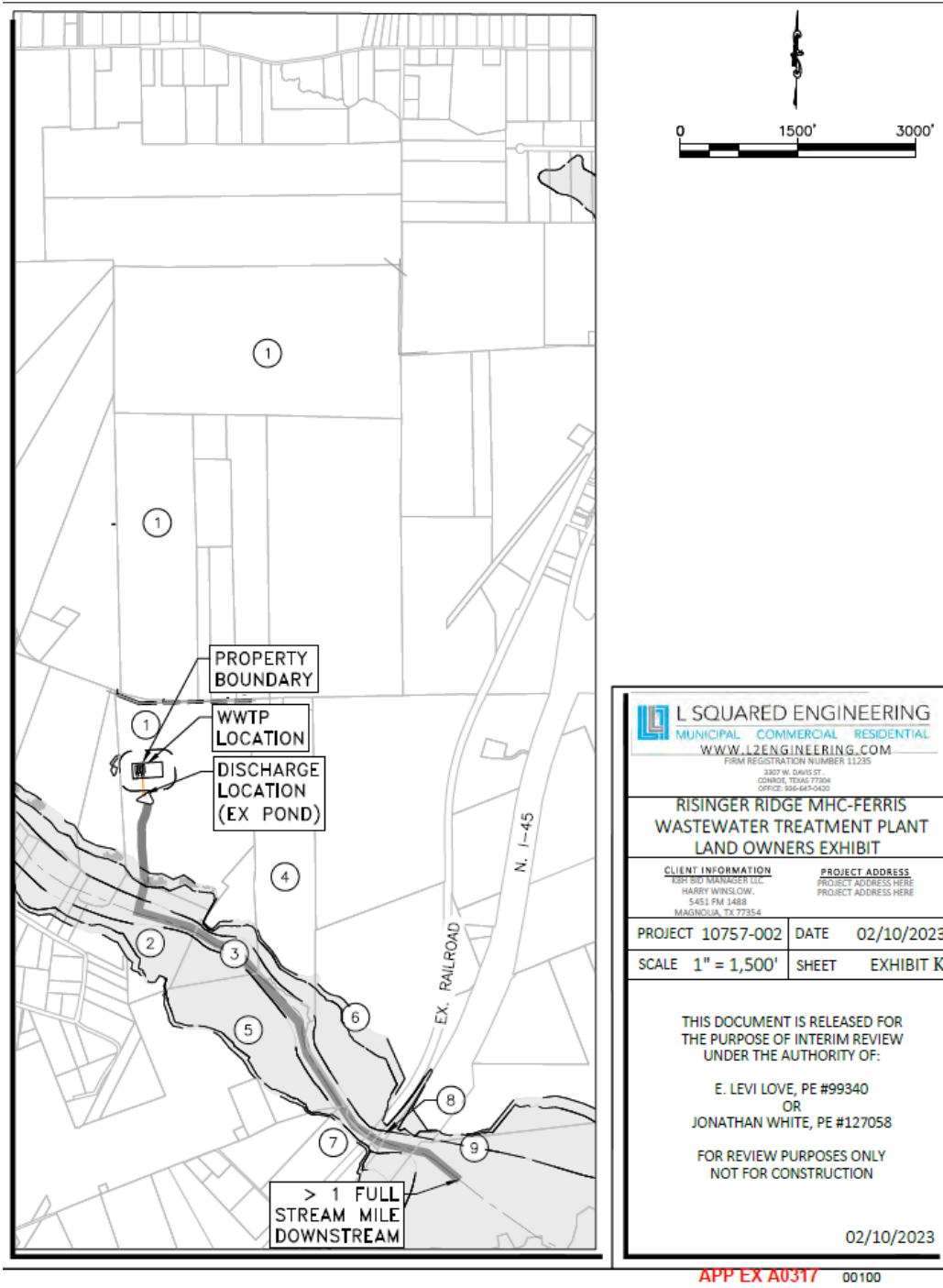


Figure 3: A section of the discharge route is shown crossing the Williams Property between the northern property line and Brushy Creek.²⁸

²⁸ *Id.*

b. The tributary shown on the Application's USGS map does not correspond directly to the discharge route as marked on that map.

The USGS map included in the Application²⁹ creates uncertainty as to where the last tributary (unnamed tributary 2, or the second order tributary) in the proposed discharge route is purportedly located, prior to the discharge to Brushy Creek. Specifically, the location of this tributary entering Brushy Creek is not consistent with the discharge route location shown in the other application materials discussed above. The landowners map shows a route that cuts straight down from the northern boundary of Parcel #156321, and directly through the middle of this parcel, before entering Brushy Creek. The tributary shown on the USGS map does not follow such a path.

Moreover, even on the USGS map that has been marked with the discharge route, a gap is shown between this tributary and Brushy Creek. If the view of the relevant area of the USGS map is magnified, the marked discharge route can be seen cutting across a land area where no tributary is indicated, and then entering Brushy Creek.

²⁹ Administrative Record, Tab D, at App. Ex A0283.

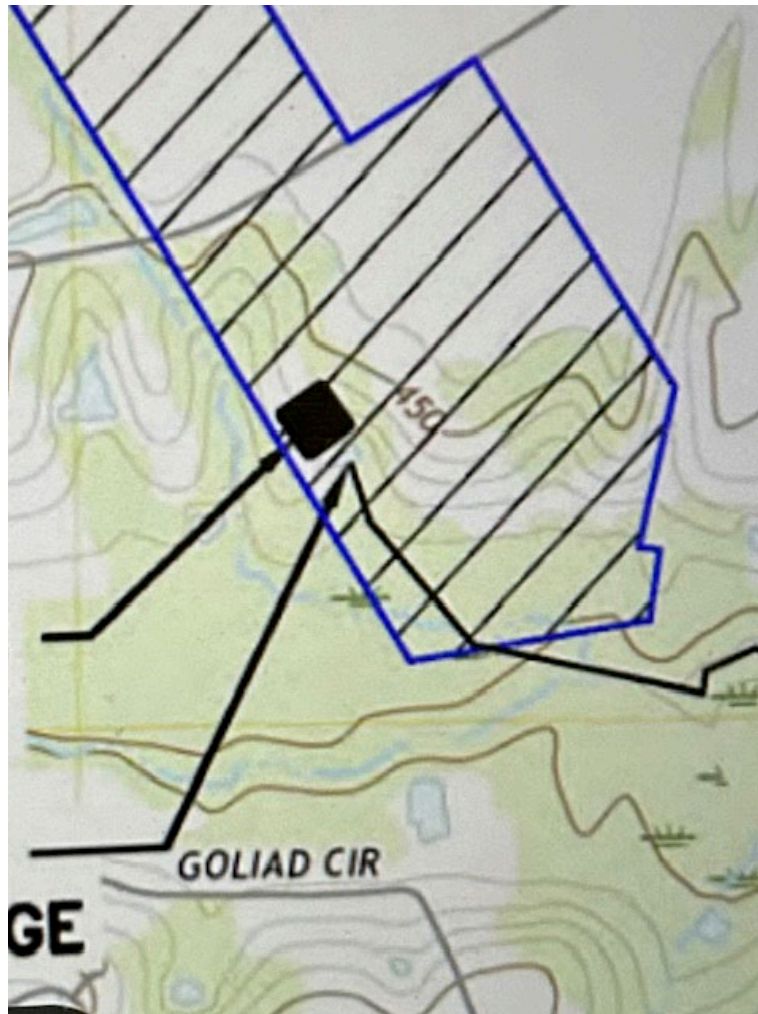


Figure 4: A magnified view of the relevant area of the Application’s USGS map shows a marked discharge route crossing land where no tributary is indicated.³⁰

The dotted blue path shown on the USGS map to the north of Parcel #156321 could be spotted wetlands in the wooded ecosystem that Ms. Williams described in her testimony. Ms. Williams testified that photos in the Application appeared to be of the wooded area of land near the property line she and her husband share with the Applicant.³¹ She further testified as to the abundance of wildlife in this wooded ecosystem,³² and that the adjacent

³⁰ *Id.*

³¹ Ex. CRCD-100 (Williams Prefiled Testimony) at 4:10-12.

³² *Id.* at 10:1-4.

landowners map showed effluent would initially enter the Williams Property by crossing over this wooded ecosystem.³³ Such a “tributary” would run along, and above, the tree line above the Williams Property northern boundary, more parallel with the property line and with Brushy Creek. However, *none* of the Application’s narrative descriptions or visual depictions of the discharge route indicate that it runs *above, and basically parallel to*, the Williams Property northern boundary. Instead, as shown above, components of the Application that describe or visually depict the route between the pond and Brushy Creek represent that the effluent *cuts across* the Williams Property northern boundary, flows over Parcel #156321, and merges into Brushy Creek at a hard right angle.

3. Undisputed Evidence shows no watercourse flows down from the Williams Property line to Brushy Creek.

Much of the Williams Property is rated suitable for agriculture, and Mr. and Ms. Williams grow hay on both the north and the south sides of Brushy Creek.³⁴ The testimony of Glenda Williams included a map of Parcel #156321, marked to show areas where photographs were taken.³⁵ This parcel includes an area on the north side of Brushy Creek where Mr. and Ms. Williams grow hay (the “Hayfield”). The Hayfield is located on the area of the map crossed by red dotted lines between markers “View #3” and “View #4.”³⁶

The property line of Parcel #156321 is shown in gold on the map.³⁷ Specifically, the northern property line shown in gold in the woodland edge separates the Applicant’s

³³ *Id.* at 13:14-15.

³⁴ *Id.* at 7:24-25.

³⁵ Ex. CRCD-106 at p. 1 of 5.

³⁶ Ex. CRCD-100 (Williams Prefiled Testimony) at 11:26-12:4; Ex. CRCD 106 at p. 1 of 5; Ex. CRCD-106 at p. 4 of 5.

³⁷ *See* Ex. CRCD-106 at p. 1 of 5.

property from the Hayfield. The Applicant's land is north of the property line. The Hayfield is south of the property line. Brushy Creek flows along the south side of the Hayfield.³⁸



Figure 5: Map of Parcel #156321 marked by Glenda Williams to show locations of her property shown in corresponding photographs.³⁹

³⁸ See Ex. CRCD-106 at pp. 1, 4; Ex. CRCD-100 (Williams Prefiled Testimony) at 11:26 – 12:6.

³⁹ Ex. CRCD-106 at p. 1 of 5.

The testimony of Glenda Williams is clear and undisputed — effluent following the route depicted by the Application cannot enter Brushy Creek without crossing the Williams Property. This fact is not only undisputed, it's confirmed by the location of the property boundary depicted on the site drawings and maps and shown above. Specifically, the Application's adjacent landowners map,⁴⁰ which indicates property boundaries as thin gray lines dividing the parcels, shows the proposed discharge route *crossing* the northern property line of Parcel #156321 and *flowing over* the Hayfield before making a sharp turn at Brushy Creek as it flows to the southeast.⁴¹

4. The segment of the purported “discharge route” that crosses the Williams Property is not a watercourse.

In evaluating the location and physical characteristics of the proposed discharge route, CRCD's focus is the portion of the route between the northern boundary of Parcel #156321 and Brushy Creek. As discussed above, the Application materials depict this purported section of the route as cutting across the Williams Property's northern boundary in a straight line and transecting Parcel #156321 before making a hard right turn at Brushy Creek.⁴²

a. The ED and Applicant witnesses have not visited Parcel #156321 and have not personally observed its features and characteristics.

No expert witness or other representative of the Applicant or the Executive Director has visited the Williams Property. No Applicant or ED witness has based their testimony

⁴⁰ Ex. CRCD-101; Administrative Record, Tab D, at App. Ex A0317-A0318.

⁴¹ *Id.*

⁴² See Ex-CRCD 101; Administrative Record, Tab D, at App. Ex 0327, 0286.

on personal observations of any part of the purported discharge route between the northern boundary of Parcel #156321 and Brushy Creek. The Applicant's witness, Dr. To, has not visited the proposed facility to see any on-site or off-site part of the proposed discharge route.⁴³ Prior to a public meeting, the ED's witnesses visited the proposed facility site, but did not visit any area of the Williams Property, including Parcel #156321.⁴⁴ Mr. Rahim testified that he participated in the February 15, 2024 facility site visit; however, it was the Standards Implementation Team that evaluated the discharge route, and he did not see any part of it.⁴⁵ Dr. Lu testified that she participated in the facility site visit; her testimony indicates she observed only the stock pond and the first unnamed tributary at the area where the discharge would exit the pond on the Applicant's property.⁴⁶

Dr. Wallace testified regarding her observations of the discharge route made during the ED staff's facility site visit. Similar to Dr. Lu, Dr. Wallace testified that she observed the pond and walked along tributary 1 leaving the pond.⁴⁷ Because of the public meeting later that day, staff visiting Applicant's facility site on February 15, 2024 were not dressed for field work to investigate the route extending all the way to Brushy Creek — they were only present to see where the facility was to be sited and to see “the *immediate* discharge route.” Dr. Wallace did not observe the second tributary, did not enter Parcel #156321

⁴³ Tr. at 49:1-4 (To Cross).

⁴⁴ Tr. at 103:23-104:1 (Wallace Cross).

⁴⁵ Tr. at 59:2-23 (Rahim Cross).

⁴⁶ Tr. at 79:18 – 80:15 (Lu Cross).

⁴⁷ Tr. at 102:6-13 (Wallace Cross). Dr. Wallace further observed that tributary 1 on the Applicant's property, though small, had defined bed and banks; however, this has no relevance concerning the characteristics of the off-site sections of route crossing the Williams Property, and extending all the way to Brushy Creek.

owned by Mr. and Ms. Williams, and did not observe where the discharge would enter Brushy Creek.⁴⁸

b. Glenda Williams has personal knowledge of Parcel #156321.

Unlike expert witnesses for the Applicant and ED, fact witness Glenda Williams has personal knowledge of Parcel #156321 based on direct observations of her property. The undisputed testimony of Ms. Williams states unequivocally that *at the point where the Application materials show the effluent would cross her property line*, “there’s no defined existing channel of any kind at that location” and that “[t]he effluent would just spill out over my hayfield before making its way into Brushy Creek.”⁴⁹

As previously discussed, the area in question (previously defined as the “Hayfield”) is shown on Exhibit CRCD-106 on page 1 of 5 along the dotted red line marked between “View 3” and “View 4.” A photograph of the Hayfield, and narrative orientation to the location of the property line and Brushy Creek, are also contained in this exhibit.⁵⁰

⁴⁸ Tr. at 88:2-5, 89:17-25, 103:23 – 104:16.

⁴⁹ Ex. CRCD-100 at 4:20-21.

⁵⁰ Ex. CRCD-106 at p. 4 of 5.



Figure 6: The Hayfield in Parcel #156321.⁵¹

The frequent inundation of the Hayfield occurs during moderate to heavy rain events.⁵² Brushy Creek cannot contain the resulting runoff.⁵³ The rising water in Brushy Creek spills over its banks, which are located to the right of the tree line shown on the right side of the photo.⁵⁴ Floodwaters from the creek can take weeks to recede and be slow to evaporate because of the high clay content of the soil.⁵⁵ The photos of the Hayfield show that, after this area was flooded by Brushy Creek on January 30, 2025, unevaporated puddles remained on the Hayfield on February 23, 2025.⁵⁶ The initial floodwaters and residual puddles of standing water shown in the photo result from Brushy Creek spilling

⁵¹ Ex. CRCD-106 at p. 4 of 5.

⁵² Ex. CRCD-100 at 12:15-19.

⁵³ *Id.* at 12:22.

⁵⁴ *Id.* at 12:15-22; Ex. CRCD-106 at p. 4 of 5.

⁵⁵ Ex. CRCD-100 at 12:19-22.

⁵⁶ Ex. CRCD-100 at 11:26 – 12:6, 12:10-14; Ex. CRCD-106 at p. 4 of 5.

its banks along the *south* side of the Hayfield.⁵⁷ The photo shows no tributary or other watercourse with defined bed and banks entering the Hayfield from the *north* where the property line, the Applicant’s site, and the proposed discharge point are located. The photographic evidence is consistent with the undisputed testimony of Ms. Williams that there’s *no defined existing channel of any kind at that location*.⁵⁸

c. The Applicant and the ED have not shown that a watercourse exists in all parts of the discharge route between Applicant’s stock pond and Brushy Creek.

Texas law categorizes surface water into one of two types: diffuse surface water and water in a watercourse.⁵⁹ Discharging wastewater into Texas watercourses may be authorized by permit.⁶⁰ This is because waters in “watercourses” are defined as “waters in the state” under Texas Water Code Chapter 26.001(5), and are thereby considered property of the State.⁶¹ But before the State may authorize a proposed discharge, it must be determined whether a “watercourse” exists.⁶² If an applicant is discharging outside of a “watercourse,” the discharge is not into “waters in the state” and a permit is not authorized by Texas law.⁶³

A “watercourse” has (1) a defined bed and banks, (2) a current of water, and (3) a permanent source of supply.⁶⁴ Also, swales, draws and similar land features are not

⁵⁷ Ex. CRCD-100 at 11:26-13:2; Ex. CRCD-106 at p. 4 of 5.

⁵⁸ Ex. CRCD-100 at 4:20.

⁵⁹ *Domel v. City of Georgetown*, 6 S.W.3d 349, 353 (Tex. App.—Austin 1999, pet. denied).

⁶⁰ *Id.* at 360.

⁶¹ *Id.* at 353.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Hoefs v. Short*, 114 Tex. 501, 273 S.W. 785 (1925).

generally considered watercourses.⁶⁵ Under the criteria of long-established Texas law, the record does not support any underlying assumption that a “watercourse” crosses the Williams Property northern boundary and flows to meet Brushy Creek in the area depicted in the Application.⁶⁶ In fact, the undisputed testimony of Glenda Williams demonstrates that no watercourse crosses her property in the manner represented by the Applicant. Rather than flowing through waters in the state, the proposed discharge over the Williams Property would cut across and erode private land, creating gulleys or ravines, and threaten the Williams Family’s ability to access areas of their land on the north side of Brushy Creek.

Accordingly, (1) the discharge of effluent over the Hayfield on Parcel #156321 of the Williams Property cannot be authorized under Texas law, (2) there is no watercourse to evaluate along the part of the Application’s identified discharge route crossing the Williams Property, and (3) the Applicant cannot meet its burden to prove that water quality along the discharge route will be protected. As the TCEQ Commissioners have recognized, questions of whether all sections of a discharge route are surface waters in the state are relevant to water quality issues, “as the nature of the watercourse and where it terminates

⁶⁵ *Id.*; see also *Turner v. Big Lake Oil Co.*, 62 S.W.2d 491, 493 (Tex. App.—El Paso 1933), *aff’d*, 128 Tex. 155, 96 S.W.2d 221 (1936) (holding that an area of land at issue was a “draw,” falling within the rule announced in *Hoefs* that ravines, swales, and similar features are not generally considered watercourses).

⁶⁶ In recent SOAH proceedings, the presiding Administrative Law Judges acknowledged and applied the standards of both the *Domel* and *Hoefs* decisions in their proposal for decision concluding that: the application in question inaccurately described a proposed discharge route; the entirety of proposed discharge route was not a watercourse, and, therefore, the entirety of the proposed discharge route was not surface water in the state. *Application by HK Real Estate Development, LLC for TPDES Permit No. WQ0016150001*; SOAH Docket No. 582-23-21878 (Supplemental Proposal for Decision) (February 3, 2025) at pp. 49-51.

inform whether the discharge's effect on surface water quality was adequately evaluated.”⁶⁷

B. The preponderance of the evidence does not establish that water quality, requesters' and requesters' families' health, and existing uses of the receiving waters will be protected.

The TSWQS at 30 Tex. Admin. Code § 307.4 also establish several general criteria for surface waters, both narrative criteria and numeric criteria. These criteria apply to all surface water in the State and specifically apply to substances related to waste discharges or human activity. 30 Tex. Admin. Code § 307.4(a). Among these general criteria, surface waters must not be toxic to humans or terrestrial or aquatic life. 30 Tex. Admin. Code § 307.4(d).

These general criteria also require dissolved oxygen concentrations sufficient to support existing, designated, and presumed aquatic life uses, which are determined further in 30 Tex. Admin. Code § 307.7. 30 Tex. Admin. Code § 307.4(h). In addition to the prohibition on toxicity set forth in the general criteria, the TSWQS further specifically provide that water in the State subject to aquatic life use must not be chronically toxic to aquatic life. 30 Tex. Admin. Code § 307.6(b)(2). This rule also requires that water in the State must be maintained to preclude adverse toxic effects on aquatic life or terrestrial life. 30 Tex. Admin. Code § 307.6(b)(4).

⁶⁷ *Supra* note 10.

1. The proposed discharge would create a heightened risk of exposure to wastewater contaminants and adverse effects to human health and terrestrial life because of the unsuitable discharge route conditions.

Glenda Williams provided undisputed evidence that her family's property, through which the discharge of up to 250,000 gallons per day of effluent would flow, is *already* subject to frequent and sustained inundation.⁶⁸ She has witnessed numerous significant inundation events all over various areas of the Williams Property over the 40 years her family has lived on this land.⁶⁹ As of the May 28, 2025 date of the hearing, the Hayfield on the Williams Property had already been fully inundated three times in 2025,⁷⁰ and last year it was fully inundated five times. Also, when the Williams Property is flooded by Brushy Creek, Interstate Highway 45 experiences flooding impacts and closures because the creek banks are lower there.⁷¹ During flooding in 1997, the waters of Brushy Creek encroached on the family's ponds used for fishing and recreation, and even threatened the family's home.⁷²

While flooding itself is not for the Commission to regulate, existing conditions along Brushy Creek which could exacerbate the risks to human health from receiving water uses must be examined. Such unsuitable exacerbating conditions are inextricably intertwined with the issue referred to hearing of whether the draft permit is protective of water quality. Referred Issue A expressly requires consideration of protecting the requesters' and their families' health, as well as area wildlife, in accordance with applicable

⁶⁸ Ex. CRCD-100 at 10:14-20, 11:13-19; Ex. CRCD-104; Ex. CRCD-105; and Ex. CRCD-106.

⁶⁹ *Id.*

⁷⁰ Tr. at 20:12-14 (Williams Cross).

⁷¹ *Id.* at 21:4-11.

⁷² Ex. CRCD-104.

regulations.⁷³ The discharge of an additional 250,000 gallons per day of water (wastewater effluent) through and onto Ms. Williams' property would result in Ms. Williams and her family members being exposed to a heightened risk of exposure to water contaminants because the area is already exposed to frequent incidents of rising water. Wildlife in the area would also be exposed to higher risks of exposure to wastewater contaminants because of discharge route conditions.

Rising waters from Brushy Creek would transport discharged wastewater onto various areas of the Williams Property used for residential, agricultural, and recreational purposes, and potentially deposit wastewater into their recreational ponds used for swimming and fishing.⁷⁴ Not only does the proposed discharge threaten recreational uses of Brushy Creek and the use and enjoyment of the Williams Property, it threatens the health of members of the Williams Family who may engage in those uses.

a. The heightened risk of exposure to wastewater contaminants caused by the unsuitable wastewater discharge route is particularly consequential for Glenda Williams.

The addition of up to 250,000 gallons per day of wastewater effluent into this flood-prone area poses a health risk for all nearby residents, but is particularly consequential for Glenda Williams. Not only are Mr. and Ms. Williams the affected persons closest to the proposed facility and discharge path,⁷⁵ but Ms. Williams is also a highly sensitive receptor

⁷³ See *supra* note 9 and Section III Referred Issues (“Issue A: Whether the Draft Permit is protective of water quality, including the protection of existing uses in the receiving waters, aquatic life, animal life, and the requesters’ and their families’ health, in accordance with applicable regulations including the Texas Surface Water Quality Standards”).

⁷⁴ See Ex. CRCD-100 at 13:18 – 14:2.

⁷⁵ Ex. CRCD-101.

with a congenital lung condition.⁷⁶ She has a history of lung infections, and has been required to undergo antibiotic treatment for a mycobacterial infection over the course of the last year.⁷⁷ Because of Ms. Williams’ congenital condition, she is highly susceptible to infection, as well as lung damage from potential exposure to pathogens and aerosolized wastewater treatment chemicals.⁷⁸ While chlorine disinfection may be intended to address nuisance odors (as discussed in Section IV.C), the chlorine used could be particularly harmful to Ms. Williams’ health.

CRCD and Glenda Williams have met their burden of production with respect to concerns about human health impacts. The preponderance of the evidence fails to support the *prima facie* assumption that the proposed draft permit is adequately protective of human health.

2. The assignment of a limited aquatic life use designation for Brushy Creek is unsupported by a preponderance of the evidence.

TCEQ staff has determined that Brushy Creek has limited aquatic life use (or “ALU”), based on its characterization as intermittent with perennial pools.⁷⁹ Under the Texas Surface Water Quality Standards (“TSWQS”), unclassified intermittent streams with perennial pools are *presumed* to have limited ALU and corresponding dissolved oxygen criteria; *however*, higher uses are protected where they are attainable.⁸⁰ Unclassified waters are to be assigned “the *specific* uses that are *attainable or characteristic* of those waters.”⁸¹

⁷⁶ Ex. CRCD-100 at 15:16-21.

⁷⁷ Ex. CRCD-100 at 15:18 – 16:1.

⁷⁸ Ex. CRCD-100 at 16:1-3.

⁷⁹ Ex. ED-13; Ex. ED-14.

⁸⁰ 30 Tex. Admin. Code § 307.4(h).

⁸¹ 30 Tex. Admin. Code § 307.4(l) (emphasis added).

Furthermore, “[u]pon administrative or regulatory action by the commission that affects a particular unclassified water body, the characteristics of the affected water body must be reviewed by the commission to determine which aquatic life uses are appropriate.”⁸² Accordingly, as these proceedings develop the record for the TCEQ’s regulatory action on this Application affecting Brushy Creek, the characteristics of the creek should be revisited and reviewed based on all information now in the record. Only then may the Commissioners make a fully informed determination as to which ALU designation is appropriate.

During technical review of the Application, the ED determined that Brushy Creek has limited ALU based on the assessment that the stream is intermittent with perennial pools.⁸³ Water bodies with “limited” aquatic life uses are characterized by uniform habitat characteristics, with most regionally expected species absent, a low diversity of species, and a low species richness.⁸⁴ As shown by the testimony of Glenda Williams, these are *not* the characteristics of Brushy Creek.

For over 40 years, Ms. Williams has resided along Brushy Creek,⁸⁵ engaged in outdoor recreational activities with her family around and near the creek,⁸⁶ and used her property on both sides of the creek for agricultural purposes.⁸⁷ Ms. Williams testified that clear water runs through Brushy Creek.⁸⁸ She has observed numerous species in the creek—

⁸² *Id.*

⁸³ Ex. ED-13; Ex. ED-14.

⁸⁴ Ex. ED-15 at 15 (Bates 0063), Table 1 Aquatic Life Subcategories.

⁸⁵ Ex. CRCD-100 at 7:1-3.

⁸⁶ *Id.* at 7:1-19; Ex. CRCD-102; Ex. CRCD-103.

⁸⁷ Ex. CRCD-100 at 7:23-25.

⁸⁸ *Id.* at 9:16-20.

including perch, bass, frogs and turtles.⁸⁹ Considering this richness of species, Brushy Creek should not be categorized as subject to limited aquatic life use. The TCEQ staff acknowledge that their aquatic life use determinations are preliminary, meaning they may be modified if new information is received. In this case, the additional information developed as a result of the hearing warrants treatment of Brushy Creek as subject to no less than intermediate aquatic life use.

3. The ED's modeling is insufficiently conservative to demonstrate the draft permit would comply with anti-degradation requirements or even satisfy the ED's assigned limited ALU.

As discussed under Section IV.B.2, above, an incorrect and insufficient aquatic life use designation of Brushy Creek has been used for purposes of evaluating compliance with the TSWQS. At a minimum, Brushy Creek has an intermediate aquatic life use. However, even assuming a "limited" ALU assignment for Brushy Creek, the Applicant and the ED still have not shown compliance with anti-degradation requirements or otherwise shown the applicable dissolved oxygen standard would be met.

The TCEQ regulations provide that dissolved oxygen must be maintained at a minimum level of 3.0 mg/L in order to protect limited aquatic life uses.⁹⁰ The water quality analysis performed by the ED's staff assumes that the modeling programs used produce significantly conservative results. But Dr. Zamora demonstrated that the results of the ED's modeling in this case were not conservative.

⁸⁹ Ex. CRCD-100 at 9:21-23.

⁹⁰ 30 Tex. Admin. Code § 307.7(b)(3)(A)(i); Ex. ED-15 at 15 (Bates 0063), Table 1.

Dr. Zamora showed that the ED's modeling was not conservative because: (1) the CSTR model was more appropriate to predict dissolved oxygen for the stock pond initially receiving the discharge, rather than the uncalibrated QUAL-TX model used by the ED; (2) the default hydraulic parameters in the ED's QUAL-TX model do not necessarily capture the hydraulic behaviors of the receiving waters; and (3) the ED's modeling did not conservatively consider the influence of vegetation and channel substrate on sediment oxygen demand and channel roughness.⁹¹

With respect to modeling dissolved oxygen concentrations in the pond, CSTR is more appropriate than the ED's uncalibrated QUAL-TX model. CSTR emphasizes the effect of mixing in a wider water body with less flow, such as most ponds,⁹² whereas the QUAL-TX model emphasizes "momentum and flow" and "assumes a liner pathway," such as a stream.⁹³ Circulation factors can vary in different areas of a discharge route and should be reflected appropriately in modeling.⁹⁴

With respect to the ED's use of default hydraulic parameters for modeling dissolved oxygen concentrations in areas identified as unnamed tributary 1 and unnamed tributary 2, this approach is not conservative because it fails to incorporate accessible site-specific data about water body geometry. The ED's choice to base permit limits on the uncalibrated QUAL-TX model using inappropriate default values "has significant effects to the model results."⁹⁵ For the geometry of sections described as tributary 1 and tributary 2, the ED

⁹¹ Ex. Protestant-1 (Zamora Prefiled Testimony) at 10:17 – 11:9.

⁹² Ex. Protestant-1 at 11:12-16.

⁹³ Tr. at 28:23 – 29:17 (Zamora Cross).

⁹⁴ Tr. at 29:15-21 (Zamora Cross).

⁹⁵ Ex. Protestant-1 at 10:20-23.

used default parameters for stream width, stream depth, and also failed to account for the slope differences in the tributaries which would result in different velocities of flow. Dr. Zamora explained that using the same default values for each tributary does not make sense because available information shows the streams are dissimilar with respect to slope and their physical characteristics, and also because the default values are inconsistent with the information known about site-specific conditions.⁹⁶ The ED’s use of improper hydraulic parameters by TCEQ “yielded higher predicted dissolved oxygen concentration and higher rates of dissolved oxygen recovery along the Unnamed Tributary 1 and 2nd order tributary.”⁹⁷

With respect to assigning channel roughness and selecting a coefficient to account for sediment oxygen demand, the ED did not give due consideration to the channel substrate and influence of vegetation along the purported discharge route.⁹⁸

⁹⁶ Ex. Protestant-1 (Zamora Prefiled Testimony) at 11:23 – 12:2 (“In my professional opinion, these results do not make physical sense considering the topographic difference.”); *Id.* at 11:5-9 (explaining that the ED’s Water Quality Assessment Team’s standard procedures recommend that “to the extent that site-specific information is readily available, it should be incorporated into the analysis to improve the predictive ability of the model”); *see also* Ex. ED-9 (*Methods for Analyzing Dissolved Oxygen in Freshwater Streams*) at 1 (discussing model input parameters and also stating the methods described in the document are to be used “when little or no site-specific information is available”).

⁹⁷ *Id.* at 12:5-7; Ex. Protestant-4.

⁹⁸ *Id.* at 10:23 – 11:4.



Figures 7 & 8: Application photographs of the discharge route showing a rough, uneven area that's wooded and covered in vegetation.⁹⁹

⁹⁹ Administrative Record, Tab D, at App. Ex A0328-A0329.

As Dr. Zamora observed, given the vegetation density and the apparent muddy substrate expected along portions of the discharge route, “we would expect a higher sediment oxygen demand relative to the default 0.35 g/m²d.”¹⁰⁰ Still, Dr. Zamora made only a small adjustment for sediment oxygen demand by using a coefficient of 0.65 g/m²d. Although this coefficient is slightly higher than the ED’s, both values are on the low side of the range that can go up to 2.0 g/m²d.¹⁰¹

Dr. Zamora ran models adjusting for the factors described above. He used a CSTR model for the pond after he re-initialized the sediment oxygen demand at the full permitted flow.¹⁰² He then used the CSTR model results for dissolved oxygen, CBOD, and ammonia¹⁰³ as waste load inputs as the discharge moves through the next areas of the purported route.¹⁰⁴ For the areas of the route purporting to connect the pond to Brushy Creek (unnamed tributary 1 and unnamed tributary 2), he changed the velocity and geometry coefficients for these tributaries and Brushy Creek consistent with geometries derived from more current satellite imagery and higher resolution topographic data.¹⁰⁵

Dr. Zamora’s CSTR model¹⁰⁶ shows the resulting outflow from the pond to have a dissolved oxygen concentration lower than the TCEQ-required standard of 3.0 mg/L.¹⁰⁷ Using appropriately modified hydraulic parameters for the route as depicted between the

¹⁰⁰ *Id.* at 13:13-14.

¹⁰¹ *Id.* at 13:14-18.

¹⁰² *Id.* at 12:17-19.

¹⁰³ *See* Ex. Protestant-6 (containing Dr. Zamora’s CSRT model results for the pond).

¹⁰⁴ *Id.* at 12:19-21.

¹⁰⁵ *Id.* at 12:14-17.

¹⁰⁶ *Supra* note 11.

¹⁰⁷ Ex. Protestant-1 (Zamora Prefiled Testimony) at 13:1-3.

pond and Brushy Creek, Dr. Zamora found that dissolved oxygen remained below the TCEQ-required standard for unnamed tributary 1, and for the upper half of unnamed tributary 2.¹⁰⁸ Then, using a modified coefficient for sediment oxygen demand that more appropriately accounts for the site-specific influence of vegetation and channel substrate, the minimum dissolved oxygen value in areas of tributaries would decline further.¹⁰⁹ For the reasons explained in his testimony, in comparison to the ED's analysis, Dr. Zamora's modeling yields more appropriate and conservative predictions of dissolved oxygen levels that better reflect site-specific conditions. Dr. Zamora's analysis yielded a predicted dissolved oxygen concentration of 2.72 mg/L in unnamed tributary 1, which falls below the standard of 3.0 mg/L, and also falls below the "margin of safety" threshold of 2.8 mg/L arguably allowed under interpretations of the policy set forth in Exhibit ED-10.

Also, the ED's reliance on the "margin of safety" policy further undermines the concept of conservative modeling. The ED's modeling results for the pond predicts dissolved oxygen concentrations that fall below the 3.0 mg/L standard set by the ED's Standards Implementation Team. Nevertheless, the ED determined that "these minimum [dissolved oxygen] values fall within 0.20 mg/L of the 3.0 mg/L [dissolved oxygen] criterion assigned to the pond by the Standards Implementation Team *and so* is considered to demonstrate compliance with the 3.0 mg/L standard."¹¹⁰ (emphasis added). "*Therefore, they are protective to aquatic life use of the receiving waters.*"¹¹¹ (emphasis added).

¹⁰⁸ *Id.* at 13:4-9.

¹⁰⁹ *Id.* at 13:16-17.

¹¹⁰ Ex. ED -3 (Lu Prefiled Testimony) at 15:25-28.

¹¹¹ *Id.*

Dr. Lu’s testimony provides no substantive basis for application of this “margin of safety” policy under the circumstances of this case. There is no evidence indicating that the default hydraulic parameter assumptions in the QUAL-TX model were sufficiently conservative and reliable to produce realistic results regarding Brushy Creek. Blanket application of the “margin of safety” policy does not promote conservative modeling, especially under circumstances where no site-specific data has been used to predict impacts, *and* the proposed facility is discharging into a flood-prone area with elevated exposure risks.

C. The preponderance of the evidence does not establish that the draft permit adequately addresses nuisance odor.

CRCD members Gregory Crow and Glenda Williams each testified concerning outdoor activities they currently enjoy, and how odors from the proposed facility’s operations would affect their health and their use and enjoyment of property. Mr. Crow and his wife reside approximately 180 to 200 yards east of Applicant’s property.¹¹² Mr. Crow and his family will be subject to potentially strong and consistent nuisance odor conditions because of prevailing winds and their proximity to the proposed facility.¹¹³ Mr. and Ms. Crow spend time together enjoying their outdoor patio “almost every night,” and also regularly entertain friends and family there.¹¹⁴ Mr. Crow also has concerns about impacts to his family’s health caused by nuisance odor conditions.¹¹⁵ Strong odors exacerbate the symptoms Ms. Williams experiences related to her lung condition

¹¹² Ex. CRCD-200 at 3:9.

¹¹³ *Id.* at 5:17-25.

¹¹⁴ *Id.* at 3:21-25.

¹¹⁵ *Id.* at 6:1-2.

previously discussed. Such conditions impair her breathing and make it difficult to recover from infections.¹¹⁶

Under 30 Tex. Admin. Code § 309.13(e), the Applicant has various options for demonstrating that its operations will abate and control nuisance odors. Throughout the administrative record, different answers are stated as to how odor abatement will be achieved. The Application states the facility will achieve compliance with the rule by restrictive easement.¹¹⁷ The ED's Technical Summary states the Applicant will comply with the rule by ownership of the required buffer zone area.¹¹⁸ The ED's Response to Comments indicates the Applicant will comply with the rule through its choice of a chlorine disinfection method: "For the proposed facility, the Applicant has chosen chlorine disinfection" which "can kill disease-causing bacteria and nuisance organisms and *can* eliminate *certain* noxious odors during disinfection."¹¹⁹ The ED's Response to Comments further states "[t]he effluent from the proposed facility, disinfected with chlorine, must contain a chlorine residual of at least 1.0 mg/L. The permit limit for maximum total chlorine residual is 4.0 mg/L after a detention time of at least 20 minutes (based on peak flow), which must be monitored five times per week by grab sample."¹²⁰ The chlorine disinfection requirements stated in the Application were "Chlorine: 2 mg/l after 20 minutes detention time at peak flow."¹²¹

¹¹⁶ Ex. CRCD-100 at 16:21 – 17:2.

¹¹⁷ Administrative Record, Tab D, at App. Ex A0234.

¹¹⁸ Administrative Record, Tab C, at App. Ex A0137.

¹¹⁹ Administrative Record, Tab C, at App. Ex A0205 (emphasis added).

¹²⁰ Administrative Record, Tab C, at App. Ex A0205.

¹²¹ Administrative Record, Tab D, at App. Ex A0266.

From the Response to Comments, it appears the ED has relied on Applicant's plan for chlorine disinfection as a nuisance control and abatement plan by which the Applicant will comply with the 30 Tex. Admin. Code § 309.13(e). A request for approval of such a plan can be submitted to the ED prior to facility construction, either during the permitting process, or after the permitting process is completed. However, given that (1) nuisance odor is an issue that has been referred for hearing, (2) chlorine disinfection is relied on by the ED as a primary method of odor control, and (3) plans for chlorine disinfection are stated only briefly and slightly differently in elements of the administrative record, a full nuisance odor control plan that meets the requirements of 30 Tex. Admin. Code § 309.13(e)(2) should have been required prior to this hearing so that all participants could evaluate whether the proposed solution would "prevent nuisance conditions at the edge of the buffer zone and beyond."¹²²

D. The notices of the Application are defective because of the failure to identify and provide sufficient information about the discharge route.

Substantially defective notice is evident from a review of the confusing and different descriptions of the discharge route contained in: (1) the Application itself; (2) the Notice of Receipt of Application and Intent to Obtain a Permit; and (3) all subsequent TCEQ notices and materials. The Application itself states "the plant will discharge treated effluent through an 18" pipe to the existing stock pond, which discharges to Brushy Creek, Red Oak Creek, then to the Trinity River, through Lake Livingston, and finally to Trinity

¹²² 30 Tex. Admin. Code § 309.13(e)(2).

Bay.”¹²³ To this day, there has been no amendment of the Application changing that description to mention the various tributaries discussed in subsequent memos and notices. While the Application represents that effluent will be discharged via pipe to the stock pond; the Application is very unclear — there are no details whatsoever — about the mechanism or method by which effluent will be transported from the stock pond to Brushy Creek.

The Notice of Receipt of Application and Intent to Obtain Water Quality Permit (the “NORI”) described the discharge route differently: “The discharge route will be from the plant site *via pipe to* Brushy Creek; thence to Red Oak Creek; thence to Upper Trinity River.”¹²⁴ The origin of this description — contained both in the NORI and the Receiving Water Assessment Form¹²⁵ — is a mystery. This description has no basis in the Application, fails to mention the stock pond, and actually seems to conflate Applicant’s stock pond with Brushy Creek. Rather than conforming to the Application’s statement that effluent will be piped to the stock pond, the NORI represents that the effluent will be *pipled directly to Brushy Creek*. If that were true, the discharge point would be at Brushy Creek rather than the stock pond.

It might be logical to *assume* discharged effluent would be piped directly into Brushy Creek, given that Application site drawings and maps provide no clue as to the mechanism or method by which effluent would move from the facility to the creek;¹²⁶

¹²³ Administrative Record, Tab D, at App. Ex A0226.

¹²⁴ Administrative Record, Tab B, at App. Ex A0089 (emphasis added).

¹²⁵ Ex ED-17 (Receiving Water Assessment Form).

¹²⁶ Administrative Record, Tab D, at App. Ex 0286, A0327; Ex. CRCD-101 (the landowners map, with a line drawn over land from the stock pond to Brushy Creek, covering land that includes the Hayfield where no mechanism exists for moving effluent toward Brushy Creek).

however, this plan was not stated in the Application. In fact, there is no plan to pipe effluent directly into the creek, and the description in the NORI is flatly wrong and misleading.

At some point during technical review of the Application, the discharge route description changed, but only through the work of the Executive Director's staff and not through an amendment of the Application. Following completion of the technical review, the Notice of Application and Preliminary Decision ("NAPD") contained revised language referencing a discharge path through a pond and two tributaries before reaching Brushy Creek.

Both the NORI and the NAPD informed the public how to view application materials. Members of the public following this matter and receiving and reviewing notices saw two different descriptions of where (and even, whether) effluent would be discharged prior to Brushy Creek, and the route (if any) the discharge would follow before reaching Brushy Creek. It would be reasonable for the public to be curious about this change. It would also be reasonable to expect that available application information would explain the changed description in the NAPD.

However, the Application has never included details about any specific connection between the pond and the creek. The Application represents only that the pond "discharges to" the creek.¹²⁷ That's all the Application indicated when first notice was given through the NORI, and that's all the Application indicated when second notice was given through the NAPD. There's no mention of tributaries or other watercourses purportedly connecting

¹²⁷ Administrative Record, Tab D, at App. Ex A0226.

the discharge point to Brushy Creek. The NORI failed to inform the public of any potential impact to watercourses purportedly transporting effluent from the discharge point to the creek. While the subsequent NAPD *does mention* the stock pond and two tributaries to Brushy Creek, this second notice directs the public to the same application materials that provide no new information regarding the discharge route. For these reasons, the Applicant has not substantially complied with applicable notice requirements.

V. Transcript Costs

The allocation of transcript costs is governed by 30 Tex. Admin. Code § 80.23(d), which requires consideration of:

- (A) the party who requested the transcript;
- (B) the financial ability of the party to pay the costs;
- (C) the extent to which the party participated in the hearing;
- (D) the relative benefits to the various parties of having a transcript;
- (E) the budgetary constraints of a state or federal administrative agency participating in the proceeding;
- (F) in rate proceedings, the extent to which the expense of the rate proceeding is included in the utility's allowable expenses; and
- (G) any other factor which is relevant to a just and reasonable assessment of costs.

In this case, CRCDD consists of private individuals who are relying on their own individual and family resources to fund participation in this matter and have already incurred costs to engage legal counsel to participate in this matter. CRCDD participated in the hearing to a reasonable degree to protect its members' due process rights. Witnesses

presented by CRCDC were limited to two fact witnesses and occupied very little of the transcript. Cross-examination by CRCDC was limited to issues relevant to the Application at issue and was not unduly cumulative.

The most CRCDC stands to gain from the current proceedings is maintenance of the status quo. On the other hand, the Applicant stands to gain considerable economic benefit from the proceedings and from the existence of the transcript. The transcript facilitates the creation of a record which the Applicant can use in its attempt to meet its burden of proof. For these reasons, no portion of the transcript costs should be allocated to CRCDC. Likewise, Mr. Miller has nothing to gain other than maintenance of the status quo and should not incur additional costs.

Furthermore, Ellis County is a local government reliant upon taxpayers for expenses incurred and should be spared the burden of transcript costs. Accordingly, transcript costs should be borne entirely by the Applicant.

VI. Conclusion

For the reasons set forth above, CRCDC respectfully request that the ALJ issue a Proposal for Decision recommending denial of the Application and assessment of all transcript costs against Applicant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing document has been served via electronic service to the parties of record listed below, on June 25, 2025.

/s/ Vic McWherter
Vic McWherter

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