

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

APPLICATION BY CLEAR UTILITIES, LLC FOR TPDES PERMIT NO. WQ0016273001	§ § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
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PROTESTANT ELLIS COUNTY’S EXCEPTIONS TO PROPOSAL FOR DECISION

COMES NOW, Protestant Ellis County (“Protestant”) and files this, its Exceptions to the Proposal for Decision (“PFD”) and in support thereof, would show the following:

I. INTRODUCTION

Protestant excepts to the Administrative Law Judge’s (“ALJ”) recommended actions, proposed Findings of Fact, and proposed Conclusions of Law. The proposed Texas Pollutant Discharge Elimination System (“TPDES”) permit that is the subject of this proceeding would allow Applicant Clear Utilities, LLC (“Applicant”) to discharge a daily average flow of 250,000 gallons per day (“gpd”) of treated wastewater from a proposed activated sludge process plant into State waters. Protestant contends that the Applicant did not establish its prima facie case in this matter, as it has failed to demonstrate that the proposed limits contained in the Draft Permit are protective of water quality and sufficient to support aquatic life uses.

II. EXCEPTIONS TO PFD

A. Exceptions to the PFD’s Analysis and Recommendations Regarding Whether the Draft Permit is Protective of Water Quality.

Protestant excepts to the conclusion of the ALJ that the Draft Permit is protective of water quality, including the protection of existing uses in the receiving waters, aquatic life, animal life, and human health, in accordance with applicable regulations including the Texas Surface Water Quality Standards in 30 Texas Administrative Code chapter 307.

As stated in Protestant's Closing Argument, Xing Lu, who performed the ED's dissolved oxygen ("DO") modeling in this case, used an uncalibrated QUAL-TX model, wherein hydraulic characteristics such as stream dimensions, velocity, and flow are based on standardized default hydraulic coefficients. (ED's Exh. ED-3, p. 13:23-14:4; Protestant's Closing Argument, pp. 2-3). As Dr. Lu admitted, however, that "[i]f sufficient quality data is provided, then it could be used to develop site-specific hydraulic coefficients to further refine the modeling." (ED's Exh. ED-3, pp. 14:32-15:1; Protestant's Closing Argument, p. 3). Protestant's expert witness, Dr. Zamora, also testified that the TCEQ's Standard Operating Procedures ("SOPs") state that if site-specific data is available, that should be used to inform the modeling, and default coefficients are to be used only when there is no other data available. (CCH Transcript, pp. 32:22-33:3; Protestant's Closing Argument, p. 4). The ALJ, citing the language of the TCEQ's SOPs, additionally stated that "[t]o the extent that site-specific information is readily available, it should be incorporated into the analysis to improve the predictive ability of the model[.]" (PFD, p. 37).

Yet, the ALJ determined that it was appropriate for Dr. Lu to rely on default coefficients in this case, stating that "the IPs and SOPs do not impose an affirmative requirement for the ED's technical reviewers to search for and collect site specific data." (PFD, p. 37). Protestant's argument, however, was not merely that "site-specific data should have been collected and used." It was that site-specific data should have been collected and used, given the fact that all three of the ED's witnesses attended a site visit to the discharge site in February of 2024, two of the ED's witnesses viewed both the pond and unnamed tributary, and all had sufficient opportunity to identify and obtain this site-specific data. (See CCH Transcript, pp. 59:2-5; 79:18-25; 80:11-15; 89:8-16; Protestant's Closing Argument, p. 4).

In this case, site specific data *was* readily available, but the ED's witnesses chose not to collect it, making no effort to take any measurements or photographs of the discharge site or any of the receiving waters while present at the site visit. (See CCH Transcript, pp. 60:4-6; 80:8-10; 105:17-20). Rather, the ED chose to rely simply on default coefficients to complete the requisite DO modeling, which, as Dr. Zamora noted, did not accurately reflect stream widths, flow depths, and topography for the first and second unnamed tributaries. (See Protestant's Exh. 1, pp. 11:18-12:2; Protestant's Closing Argument, pp. 3-4).

Similarly, the ED relied upon default chemical kinetics parameters to assess sediment oxygen demand ("SOD"), rather than calibrated values based upon site specific data. As Dr. Zamora noted, the 0.35 g/m²d default value used by the ED represents a sandy condition, where there is not a lot of oxygen demand, as opposed to a more organic, silty, or clay material, where it is assumed the demand would be much higher. (CCH Transcript, pp. 33:19-34:5; Protestant's Closing Argument, pp. 5-6). Here, Dr. Zamora testified that based upon his review of both site photographs and textbook information, a higher value would be expected for the first unnamed tributary. (See Protestant's Exh. 1, pp. 10:23-11:2; 13:12-14; CCH Transcript, p. 40:4-23; Protestant's Closing Argument, p. 6). And, although the ALJ believed that the photographs of the site used by Dr. Zamora to make his assessment were "not sufficiently detailed to support calibration or deviation from the default" (PFD p. 38), the values used by the ED were not based on any site data at all, despite the ED's opportunity to have easily obtained the same.

Therefore, Protestant excepts to and recommends the amendment of Findings of Fact Nos. 43-46 and 48-49 as follows:

- "43. Under the IP's the use of default hydraulic coefficients and generalized hydraulic equations was not appropriate. There was ~~insufficient~~ site-specific data available to use non-default coefficients."

- ~~“44. ED staff and Applicant are not required to gather or generate site-specific data that might refute the defaults provided in the IPs and SOPs.”~~
- ~~“45. Pre-discharge photographs of foliage purportedly in one of the unnamed tributaries do not establish that the IPs’ default sediment oxygen demand (SOD) value is too low.”~~
- “46. TCEQ’s water modeling was not appropriately performed and does not demonstrates that the effluent limits in the Draft Permit will maintain the DO levels above the assigned criteria for the receiving waters.”
- “48. The Applicant has failed to demonstrate that tThe effluent limits in the Draft Permit are protective to aquatic life use of the receiving waters.”
- “49. The Applicant has failed to demonstrate that aA discharge in compliance with the Draft Permit will be protective of water quality, including 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 Texas State Water Quality Standards.”

Protestant also excepts to and recommends the amendment of Conclusions of Law No. 12 as follows:

- “12. The Applicant has failed to demonstrate that tThe Draft Permit is protective of water quality, including the protection of existing uses in the receiving waters, aquatic life, animal life, and the requester’s and their families’ health, in accordance with applicable regulations including the Texas Surface Water Quality Standards in 30 Texas Administrative Code chapter 307.”

B. Exceptions to the PFD’s Analysis and Recommendations Regarding Whether the Draft Permit Will Be Sufficient to Support Aquatic Life Uses.

Protestant excepts to the conclusion of the ALJ that the DO concentrations in the Draft Permit will be sufficient to support existing, designated, presumed, and attainable aquatic life uses, as required by 30 Texas Administrative Code section 307.4(h)(1).

As provided in Protestant’s Closing Argument, the Applicant’s witness, Dr. To, did not have any actual knowledge as to the aquatic life present Brushy Creek along the proposed discharge route. (*See* CCH Transcript, p. 55:10-15; Protestant’s Closing Argument, p. 5). The ED’s witness, Dr. Lu, made only the conclusory opinion that the Draft Permit will protect aquatic life.

(ED's Exh. ED-3, p. 18:26-27). The ED's second witness, Dr. Wallace, admitted that other than the TCEQ's classification/designation system for water bodies, she did not do anything else to determine what aquatic life existed along the portion of Brushy Creek impacted by the proposed discharge, and that the ED did nothing to analyze the vegetative or physical components of the aquatic environment. (CCH Transcript, pp. 111:11-16; 119:17-22; 120:16, 19, 22-25; Protestant's Closing Argument, pp. 6-7). She further testified that the Draft Permit does not directly address any limitation or effect on vegetative or physical components of the aquatic environment. (CCH Transcript, pp. 131:21-132:1; Protestant's Closing Argument, p. 7).

Although the ALJ apparently recognized the deficiencies on this issue raised by Protestants,¹ the ALJ still found that it "does not follow that the Application must be denied" and that Protestants did not provide sufficient evidence to show "what the ED missed." (PFD, pp. 39-40). Protestant submits that there has been ample evidence provided in this case to demonstrate that the ED failed to properly consider existing aquatic life in the receiving waters, and the Applicant has provided no evidence or testimony in response.

Therefore, Protestant excepts to and recommends the amendment of Findings of Fact Nos. 48 and 49 as follows:

- "48. The Applicant has failed to demonstrate that tThe effluent limits in the Draft Permit are protective to aquatic life use of the receiving waters."
- "49. The Applicant has failed to demonstrate that aA discharge in compliance with the Draft Permit will be protective of water quality, including 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 Texas State Water Quality Standards."

¹ Stating "[e]ven if the ALJ agreed that the ED is not addressing all pertinent TSWQS in its review of TPDES applications..." (PFD, p. 39).

Protestant also excepts to and recommends the amendment of Conclusions of Law Nos. 11 and 12 as follows:

- “11. The Applicant has failed to demonstrate that uUnder the Draft Permit, DO concentrations will be sufficient to support existing, designated, presumed and attainable aquatic life uses, as required by 30 Texas Administrative Code section 307.4(h)(1).”
- “12. The Applicant has failed to demonstrate that tThe Draft Permit is protective of water quality, including the protection of existing uses in the receiving waters, aquatic life, animal life, and the requester’s and their families’ health, in accordance with applicable regulations including the Texas Surface Water Quality Standards in 30 Texas Administrative Code chapter 307.”

III. CONCLUSION

For the foregoing reasons, Protestant respectfully requests that the TCEQ grant its exceptions and amend the PFD with the corrections set out above. Protestant respectfully requests any other relief to which it is entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify by my signature below that on this 15th day of September, 2025, a true and correct copy of the above and foregoing document was forwarded to the parties listed below via electronic mail.

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