

TCEQ DOCKET NO. 2025-1451-IWD

APPLICATION BY	§	BEFORE THE
CITY OF ABILENE	§	TEXAS COMMISSION
FOR TPDES PERMIT	§	ON ENVIRONMENTAL
NO. WQ0005213000	§	QUALITY

**PROTESTANTS’ REPLY TO RESPONSES TO PROTESTANTS’
REQUESTS FOR HEARING AND REQUESTS FOR RECONSIDERATION**

To the Members of the Texas Commission on Environmental Quality:

Possum Kingdom Lake Association (“PKLA”) and the Individual Members¹ (collectively, the “Protestants”) file this Reply to the Responses filed by the Applicant, the Executive Director and the Office of Public Interest Counsel (“OPIC”) regarding the hearing requests and requests for reconsideration filed by PKLA and the Individual Members in the above-captioned matter.

I. Summary of the Protestants’ Position

The Protestants established their status as “affected persons” under 30 Tex. Admin. Code §§ 55.203(a), (c), (d), 55.205(b); and timely filed a hearing request under 30 Tex. Admin. Code §§ 55.201(c), (d), 55.205(b), 55.211(c)(2)(B)–(D). The Protestants’ hearing request met the requirements of 30 Tex. Admin. Code § 55.211(c)(2)(A)(ii) by raising relevant and material disputed issues of fact that the Protestants raised during the comment period and have not

¹ The Individual Members include the following PKLA members, all of whom own property within one-half mile of the discharge point authorized under the existing permit (the “Discharge Point”), and as proposed in the renewal application filed by the City of Abilene (the “City” or “Abilene”) : (1) Jim & Leslie Abacherli; (2) Kyle J. & Susan P. Anderson; (3) Karen Bunch; (4) Jent & Stacy Burke; (5) Christian Oil & Gas, Inc.; (6) Blake Davis; (7) Dr. Kelly Grimes; (8) Justin & Jena Jackson; (9) Cammye & Michael S. McKee; (10) Alan & Robin Rhodes; (11) Grady & Jame Sanders; (12) Michael Scheriger; (13) Matthew & Tebora Scheriger; (14) Kris Stepp; (15) Lee & Dawn Warchesik; (16) Will Lunsford; (17) Arthur & Melissa Galvan; (18) Danny & Karon Pace; (19) Casey & Kelly Lipham; (20) Rick Brewster; (21) Tracy Talbot; (22) WW & Nita McFadin; (23) Greg Hamilton; (24) John Peters; (25) Randal Parker; (26) Debbie Rulestead; (27) Curtis & Cat Green; (28) Michael & Madison Lewis; (29) John & Carol Connally; and (30) Steve & Pegeen Link. The Individual Members also include Rob Pedigo, David & Jeanine Byrge, and Brent Nance, all of whom own property within 1 mile downstream of the Discharge Point; and Mert Fewell, Monte Land, Enid Montoya, Sue Cathey, Hank Lattimore, Stacy Urban, and Russell Madden, each of whom own property 1 mile or more downstream of the Discharge Point.

withdrawn. The Applicant, the Executive Director, and OPIC have not challenged the Protestants' status as affected persons or contended that the Protestants have failed to timely file a hearing request raising relevant and material disputed issues of fact.

Instead, the Applicant, the Executive Director, and OPIC have each recommended that the Commission determine that the Protestants have no right to a contested case hearing in this case, under 30 Tex. Admin. Code § 55.201(i)(5). However, the requirements of § 55.201(i)(5) have not been met and the Protestants have otherwise met the applicable requirements to obtain a contested case hearing in this matter because: (1) the Applicant has materially changed the pattern and place of discharge; and (2) the Executive Director's staff has not consulted and substantively responded to the Protestants' public comments. Therefore, the Protestants respectfully request that the Commission grant a contested case hearing and order this matter to be referred to the State Office of Administrative Hearings.

Alternatively, the Protestants filed a Request for Reconsideration raising issues with the modeling conducted in support of the draft permit and provided flow data that was not previously available to the Commission when the initial permit was issued, was not provided by the Applicant with the renewal application, and has not been considered and evaluated by the Executive Director's staff. The Request for Reconsideration also raises issues with respect to the evidence Protestants produced of an underwater inspection confirming that the as-built design of the diffuser does not match the design submitted as part of the application and modeled by TCEQ staff.

The request for reconsideration met the requirements of 30 Tex. Admin. Code § 55.201(e). The Protestants respectfully request that the Commission grant its Request for Reconsideration and direct the Executive Director to consider the Protestants' issues identified in the Request.

II. Protestants' Request for Contested Case Hearing Should Be Granted

The requirements of 30 Tex. Admin. Code § 55.201(i)(5) have not been met and the Protestants should be granted a contested case hearing.

A. Applicant Has Materially Changed the Pattern or Place of Discharge

When the Commission first issued the permit and when the renewal application was filed, the Applicant had not constructed the diffuser authorized under the permit. The Applicant has since constructed the diffuser and the Applicant has not submitted any certification that the diffuser as constructed conforms to the design prepared by Aqua Strategies, Inc. and modeled by the Applicant and the Executive Director's staff.

However, the Protestants have submitted evidence that the Applicant has materially changed the pattern and place of discharge.² A dive inspection conducted on behalf of PKLA has documented that the as-built diffuser does not conform to the design of the diffuser prepared by Aqua Strategies, Inc. and modeled by the Applicant and the Executive Director's staff. The deviations from the diffuser design are significant and cause the critical dilution modeling used to develop the TPDES permit conditions to be inaccurate. The deviations include the following:

- 1) Distance from shoreline to the first riser;
- 2) Distance between risers;
- 3) Length of diffuser (distance between first and last risers);
- 4) Horizontal orientation of the diffuser ports;
- 5) Orientation of the ports relative to the longitudinal direction of ambient flow;
- 6) Orientation of diffuser to the channel centerline; and
- 7) Depth of ports below the water surface.³

A follow-up inspection conducted on behalf of PKLA again confirmed that the diffuser as constructed differs substantially from its conceptual design on which the modeling was performed.

² See 30 Tex. Admin. Code § 55.201(i)(5)(A)(ii).

³ See Protestants' Request for Contested Case Hearing, at 4-5, where additional detail regarding these issues is provided.

The Applicant has not produced any evidence to refute PKLA's findings. The Executive Director's staff has not conducted an investigation in response to its receipt of evidence from PKLA's investigation.

Changing the pattern or place of the discharge requires an amendment of the permit⁴ and requires a contested case hearing given that the Protestants have otherwise met the requirements to be entitled to such a hearing. The Applicant, the Executive Director, and OPIC have contended that the Applicant has not applied to change the pattern or place of disposal from the existing permit, so there is no right to a contested case hearing and on that basis no hearing should be granted. However, the Executive Director is simply taking the word of the Applicant and its consultant, as submitted at the time of the submittal of the application, prior to construction of the diffuser.

The Executive Director and OPIC note that the Applicant is subject to administrative, civil and criminal penalties if it submitted false information to the TCEQ. However, because the construction of the diffuser occurred after the submission of the renewal application, no enforcement action can successfully be brought against the Applicant based on the information and certification included in the application. The Applicant has not submitted a certification of the conformity of the diffuser's construction with the permitted design requirements post-construction. The Commission may choose to require the Applicant and its consultant to certify that the diffuser as built conforms to the representation included in the renewal application. The Commission could do so by granting the Protestants' Request for Reconsideration.

The denial of an opportunity for a contested case hearing in this matter places the Protestants, TCEQ, and frankly the Applicant in an avoidably awkward position – only with the

⁴ 30 Tex. Admin. Code § 305.62(a), (c).

initial discharge from the diffuser will it be confirmed that the diffuser as built does not conform with the Applicant's representations and the permit issued by the Commission. But at that point, the harm has been done – to the Protestants and to Possum Kingdom Lake. And the Applicant is then subject to enforcement consequences that could have been avoided by simply confirming now, through a contested case hearing; an investigation by the Executive Director; or a certification and supporting documentation submitted by the Applicant's consultant proving that the diffuser is or is not constructed in compliance with the Applicant's representations and the permit's requirements.

B. Executive Director's Staff has Not Consulted and Responded to the Protestants' Public Comments

For there to be no right to a contested case hearing on a renewal application, under Texas Water Code, Chapter 26, TCEQ's rules require that "consultation and response to all timely received and significant public comment has been given."⁵ The Executive Director's staff's response to the Protestants' public comments has been insufficient to meet this requirement for waiver of a contested case hearing.

In the response to the Protestants' request for contested case hearing and motion for reconsideration, the Executive Director's staff stated:

Effluent limitations and monitoring requirements in the draft permit remain the same as the existing permit effluent limitations and monitoring requirements. The City of Abilene is not applying to increase the quantity of wastewater authorized to be disposed of. Therefore, the ED recommends finding that the application does not materially change the place or pattern of wastewater disposal from the existing permit and that the permit will maintain the quality of waste authorized to be discharged.⁶

⁵ 30 Tex. Admin. Code § 55.201(i)(5)(D).

⁶ Executive Director's Response, at 7.

The Response fails to address or even acknowledge the evidence provided by the Protestants demonstrating that, in fact, the Applicant has changed the place and pattern of wastewater disposal from the existing permit.

The Response further states, “The fact that the facility has not yet been constructed does not itself create a right to a hearing. The ED does not condition the right to renew on whether construction has occurred – rather on compliance history, rule conformity, and timely filings.”⁷ The Response fails to acknowledge that the diffuser has now been constructed and that the Protestants have produced evidence that the as-built diffuser does not conform to the design of the diffuser prepared by Aqua Strategies, Inc. and modeled by the Applicant and the Executive Director’s staff.

The Response to Comments filed in this matter also fails to substantively respond to the comments raised by the Protestants. As a result, the § 55.201(i)(5)(D) requirement for waiver of a contested case hearing has not been met.

Protestants raised the differences between the as-built diffuser and the diffuser design included in the permit and the renewal application.⁸ The Executive Director’s staff summarized and responded to the Protestants’ detailed comments as follows:

Comment 6:

The individuals in Appendix F⁹ provided comments expressing concern about perceived discrepancies between the design parameters of the diffuser versus the parameters of the installed diffuser.

Response 6:

It is the Applicant’s responsibility to construct and install a diffuser consistent

⁷ *Id.*

⁸ See Protestants’ Request for Contested Case Hearing, at 4-5

⁹ Counsel for PKLA, Paul Sarahan, is listed in Appendix F, but PKLA and Its Individual Members, whom he represents, were inadvertently excluded from the Appendix F list.

with the information provided in the application for the TCEQ's review of the diffuser, which included a diffuser report covering the design and installation of the diffuser that was stamped and sealed by the Applicant's licensed professional engineer.

As provided by state law, a permittee is subject to administrative, civil and criminal penalties, as applicable, for negligently or knowingly violating the Clean Water Act, Texas Water Code §§ 26, 27, and 28, and the Texas Health and Safety Code § 361, including but not limited to knowingly making any false statement, representation, or certification on any report, record, or other document submitted or required to be maintained under the draft permit, including monitoring reports or reports of compliance or noncompliance, or falsifying, tampering with or knowingly rendering inaccurate any monitoring device or method required by this permit or violating any other requirement imposed by state or federal regulations.¹⁰

The response to Comment 6 does not sufficiently respond to the comment or to the evidence provided by the Protestants with that comment. It is not apparent that the Executive Director's staff reviewed the Protestants' evidence. The Executive Director's staff did not consult with the Protestants regarding the evidence, despite Protestants' offer and request for such a meeting. The response does not address the specific discrepancies identified by the Protestants. The response is premised on the Executive Director's staff's review of a diffuser report that was submitted by the Applicant *prior to* the construction of the diffuser. The Applicant has not submitted any certification or other documentation since its construction of the diffuser to verify that the construction of the diffuser conforms to the design requirements included in the permit, the renewal application, and the proposed renewal permit. As noted above, because the construction of the diffuser occurred after the submission of the renewal application, no enforcement action can successfully be brought against the Applicant based on the information and certification that the Applicant included with the application.

¹⁰ Executive Director's Response to Comments, at 8-9.

In addition, the Protestants submitted comments including data showing that the stream flow and water level data provided by the Applicant and relied on by the Executive Director's staff was incomplete and inaccurate. Following installation of the application, most significantly the installation of United States Geological Survey ("USGS") Gauge 08088470 in Cedar Creek in 2020, the data recorded on the USGS website indicates that the stream flow over the diffuser is almost always zero (7Q2=0). This data has not been considered by the Executive Director's staff in its modeling. As a result, the modeling performed to demonstrate compliance with TCEQ's rules is inaccurate and flawed. The detailed comment was summarized by the Executive Director's staff as follows with the corresponding response:

Comment 8:

The individuals in Appendix H provided comments expressing concern about drought and low flow in the receiving segment.

Response 8:

The potential impact of the proposed discharge on instream dissolved oxygen levels is evaluated under hot and dry, low-flow summertime conditions, which are typically the most restrictive conditions in regard to dissolved oxygen levels. Critical low-flow, as defined in 30 TAC § 307.3(a)(16), is a "low-flow condition that consists of the seven-day, two-year flow (7Q2)," which is the lowest seven-day average stream flow with a recurrence interval of two years. The criteria of the Texas Surface Water Quality Standards (30 TAC Chapter 307) are applicable even during critical low-flow, therefore critical low-flow is considered when evaluating the appropriate effluent limits for the proposed discharge.

The effluent limitations in the draft permit will maintain and protect the existing instream uses and comply with the Texas Surface Water Quality Standards and 30 TAC §§ 307.1 - 307.10. The proposed draft permit includes effluent limitations and monitoring requirements to ensure that the proposed wastewater treatment plant meets water quality standards for the protection of surface water quality, even during periods of low flow, according to TCEQ rules and policies.¹¹

¹¹ *Id.*, at 10.

The response does not respond to the Protestants' comment. The Protestants have provided new information in their comments, never considered by the Executive Director's staff, which directly impacts the modeling performed in the context of the Executive Director's staff's evaluation of the pending renewal application. For context, one portion of the comment, as quoted in the Protestants' Request for Contested Case Hearing, reads as follows:

USGS data now available shows that the observed streamflow in Cedar Creek has been zero most of the time. The CORMIX modeling used by Abilene and the Executive Director's staff assumes a stream velocity of 0.01 m/s with no consideration of what volume of flow would be required to produce the assumed velocity across the area of the diffuser, as modeled. The USGS data shows there will not be constant inflow (ambient flow) to facilitate dilution of Abilene's effluent, as is assumed by Abilene. Under the terms of the existing permit, "When 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's staff, it shall promptly submit such facts or information." Abilene has failed to notify the Executive Director's staff of the data from the USGS gauge installed in Cedar Creek in 2020. The Executive Director's staff has premised its recommendation to grant the renewal on this flawed assumption.¹²

The response does not reflect a "consultation and response to all timely received and significant public comment has been given."¹³ There is no reference to the USGS data or the Protestants' submission of that data to the Executive Director. There is no indication that the data were reviewed and considered by the Executive Director's staff. There is no analysis of the data to show why the data did or did not affect the Executive Director's staff's recommendation with respect to the application. The response to the Protestants' comment is insufficient to meet this requirement for waiver of a contested case hearing.

¹² Protestants' Request for Contested Case Hearing, at 9.

¹³ 30 Tex. Admin. Code § 55.201(i)(5)(D).

The Protestants also submitted detailed comments related to the modeling performed with respect to this application. The detailed comment was summarized by the Executive Director's staff as follows with the corresponding response:

Comment 22:

The individuals in Appendix U provided comments expressing concern with the variables used for the CORMIX model conducted for this permit action.

Response 22:

Information regarding diffuser design and effluent density characteristics has been provided by the applicant. The current analysis relies, in part, on the applicant's diffuser report and a previous TCEQ diffuser report. Ambient data used for the analysis is from surface water quality monitoring stations near the discharge location.

The analysis is consistent with current standardized TCEQ procedures. However, the results of this evaluation can be reexamined upon receipt of information that conflicts with the information employed in this analysis.¹⁴

Again, the response does not respond to the Protestants' comment. For context, one portion of the comment, as quoted in the Protestants' Request for Contested Case Hearing, reads as follows:

The CORMIX modeling performed by Abilene and the Executive Director's staff for the current permit assumed that the Possum Kingdom pool level is always at the maximum pool elevation of 1000 feet msl, which is grossly inaccurate. Again, this is the maximum pool elevation - the full level for Possum Kingdom Lake. Brazos River Authority controls the lake levels and manages it to be full at 999 MSL, and it appears that the lake level has hit the 1000 feet msl level only once in the last decade. Other than that single instance, the lake has been lower than the level assumed in Abilene's modeling, often significantly so. For example, in 2014-2015 the pool elevation fell to as low as 984 ft msl and was below 985 ft MSL for almost one year. Abilene's modeling is based on this flawed assumption and the Executive Director's staff has premised its recommendation to grant the renewal on this flawed assumption.¹⁵

¹⁴ Executive Director's Response to Comments, at 20-21.

¹⁵ Protestants' Request for Contested Case Hearing, at 9-10.

Again, the response does not reflect a “consultation and response to all timely received and significant public comment has been given.” There is no reference to the information provided by the Protestants. There is no indication that the data were reviewed and considered by the Executive Director’s staff. There is no analysis of the data to show why the data did or did not affect the Executive Director’s staff’s recommendation with respect to the application.

The response concludes, “However, the results of this evaluation can be reexamined upon receipt of information that conflicts with the information employed in this analysis.” The Protestants provided “information that conflicts with the information employed in this analysis.” There is no indication in the response that the Executive Director’s staff have re-examined the results of its prior evaluation based on receipt of this added information that had not been previously considered. The response to the Protestants’ comment is insufficient to meet this requirement for waiver of a contested case hearing.

A final example of the inadequacy of the response is shown in Comment 23. The Protestants submitted detailed comments related to the diffuser design, specifically the assumed diffuser depth, and the resulting impact on dilution. The detailed comment was summarized by the Executive Director’s staff as follows with the corresponding response:

Comment 23:

The individuals in Appendix V provided comments expressing concern with the effectiveness of the diffuser in dispersing the effluent during low flow conditions, which is consistent with current standardized TCEQ procedures.

Response 23:

The water depth is an important parameter used in the analysis. Water body width and depth near the proposed discharge location were provided in the application. Our analysis relies on the information provided by the applicant.¹⁶

¹⁶ Executive Director’s Response to Comments, at 21.

The response does not respond to the Protestants' comment. It failed completely to do so. For context, one portion of the comment, as quoted in the Protestants' Request for Contested Case Hearing, reads as follows:

The diffuser design has the port exits at an elevation of 977.6 ft msl which means that at the 985 ft msl actual water elevation measured in 2014 the depth of the ports below the surface will only be 2.256 m (7.4 ft) rather than the 6.815 m (22.35 ft) depth used in the design. In any case, but for a single instance in the last decade, the assumed design depth is inaccurate. This inaccuracy affects the dilution factor/percent effluent at the zone of initial dilution, mixing zone and human health mixing zone. Thus, the dilution authorized by TCEQ in the current (and proposed renewal) permit is not the critical condition for evaluating water quality impacts as specified in TCEQ's Procedures to Implement the Texas Surface Water Quality Standards (RG-194). Again, Abilene's modeling is based on this flawed assumption and the Executive Director's staff has premised its recommendation to grant the renewal on this flawed assumption.¹⁷

The response to the Protestants' comment is non-responsive. The Protestants provided information that contradicted the information provided in the application. The response indicates that, rather than considering and evaluating this information, as required to do under 30 Tex. Admin. Code § 55.201(i)(5)(D), the Executive Director's staff simply and solely relied on the information provided in the application by the Applicant. There is no indication in the response that the Executive Director's staff have re-examined the results of its prior evaluation based on receipt of this added information that had not been previously considered. In fact, there is an admission that the Executive Director's staff failed to consider the substance of the Protestants' comment at all. The response to the Protestants' comment is insufficient to meet this requirement for waiver of a contested case hearing.

For there to be no right to a contested case hearing on a renewal application, under Texas Water Code, Chapter 26, TCEQ's rules require that "consultation and response to all timely

¹⁷ Protestants' Request for Contested Case Hearing, at 10.

received and significant public comment has been given.” It is not enough to simply receive the public’s comments. The Executive Director’s staff is required to actually consider the comments and re-examine its conclusions based on the information provided in the comments; where appropriate re-evaluate its conclusions; and explain in a substantive response why it did or did not make changes in response to the comment. It is insufficient (and arbitrary and capricious) to simply rely on the representations made by the Applicant when those representations are contradicted by the public’s substantive comments (and evidence). As demonstrated above with just a few examples, the Executive Director’s staff’s response to the Protestants’ public comments has been insufficient to meet this requirement for waiver of a contested case hearing. The Protestants respectfully request that the Commission find that the requirements of 30 Tex. Admin. Code § 55.201(i)(5) have not been met, grant a contested case hearing, and order this matter to be referred to the State Office of Administrative Hearings.

III. Request for Reconsideration Should be Granted

The Protestants also filed a Request for Reconsideration. The Protestants incorporate their arguments discussed above in support of their Request in this regard. The Protestants have highlighted above instances in which the comments, information, data, and evidence that they provided during the comment period were not considered by the Executive Director’s staff in the processing of the application and in the development of the Executive Director’s recommendation to approve the renewal of the Applicant’s permit.

The Executive Director’s staff is required to actually consider the comments and re-examine its conclusions based on the information provided in the comments and where appropriate re-evaluate its conclusions and make changes in response to the comment. The Executive Director’s staff failed to do so here and simply relied on the representations made by the Applicant.

Because the Applicant's representations were contradicted by the Protestants' substantive comments and evidence and because the Executive Director's staff failed to actually consider the comments and re-examine its conclusions based on the information provided in the comments, the Protestants respectfully request that Commission grant their Request for Reconsideration and remand this matter to the Executive Director for a full and complete review of each of the Protestants' timely filed comments, with an order that the Executive Director's staff re-examine its conclusions based on the information provided in the comment; where appropriate re-evaluate its conclusions; and explain in a substantive response why it did or did not make changes in response to the comment.

IV. Conclusion

As demonstrated above with just a few examples, the Executive Director's staff's response to the Protestants' public comments has been insufficient to meet 30 Tex. Admin. Code § 55.201(i)(5)'s requirements for waiver of a contested case hearing. The Protestants have otherwise met the applicable requirements to obtain a contested case hearing in this matter. The Protestants respectfully request that the Commission find that the requirements of 30 Tex. Admin. Code § 55.201(i)(5) have not been met, grant a contested case hearing, and order this matter to be referred to the State Office of Administrative Hearings.

Alternatively, the Protestants filed a Request for Reconsideration raising issues with the modeling conducted in support of the draft permit and provided flow data that was not previously available to the Commission when the initial permit was issued and was not provided by the Applicant with the renewal application. The Request for Reconsideration also raises issues with respect to the evidence Protestants have produced of an underwater inspection confirming that the

as-built design of the diffuser does not match the design submitted as part of the application and modeled by TCEQ staff.

As demonstrated above, these issues have not been considered by the Executive Director's staff. The request for reconsideration met the requirements of 30 Tex. Admin. Code § 55.201(e). The Protestants respectfully request that Commission grant their Request for Reconsideration and remand this matter to the Executive Director for a full and complete review of each of the Protestants' timely filed comment, with an order that the Executive Director's staff re-examine its conclusions based on the information provided in the comment; where appropriate re-evaluate its conclusions; and explain in a substantive response why it did or did not make changes in response to the comment.

Respectfully submitted,

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REPRESENTING POSSUM KINGDOM LAKE
ASSOCIATION AND THE INDIVIDUAL
MEMBERS

CERTIFICATE OF SERVICE

I certify that on November 10, 2025, the “Protestants’ Reply to Responses to Protestants’ Requests for Hearing and Requests for Hearing and Requests for Reconsideration” for TPDES Permit WQ0005213000 for City of Abilene was filed with the TCEQ’s Office of the Chief Clerk, and a copy was served on all parties as listed below via e-mail.



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