



**SIERRA
CLUB**

Lone Star Chapter

Contacts:

Ken Kramer, kramerkenw@gmail.com

512-626-4204 (cell – phone or text)

Alex Ortiz, alex.ortiz@sierraclub.org

512-923-4487 (cell – phone or text)

Cyrus Reed, cyrus.reed@sierraclub.org

512-740-4086 (cell – phone or text)

RE: Docket No. 2022-0175-PET; Rule Project No. 2022-014-PET-NR

Comments of the Lone Star Chapter of the Sierra Club in Support of the Petition for Rulemaking Filed by the Friends of Hondo Canyon dba Pristine Streams Team (PST), Hill Country Alliance, Save Barton Creek Association, Devils River Conservancy, Texas Hill Country River Region, Et Al – Comments Submitted to TCEQ on March 28, 2022 by Ken Kramer, Water Resources Chair

The Lone Star Chapter of the Sierra Club, on behalf of its more than 27,000 members who appreciate the natural beauty of our state and enjoy the outdoor recreational opportunities available in Texas, support the petition for rulemaking filed with TCEQ by numerous organizations and individuals to protect the water quality of the state’s most pristine streams. As an organization which has worked for clean rivers and streams in our state for over five decades, we believe that this broadly supported and citizen generated effort to preserve the best of Texas reflects the values of all Texans and provides TCEQ with the opportunity to show leadership in preserving water quality in the face of development challenges that could irrevocably harm several of our state’s iconic water features.

Our support for the “pristine streams petition” is based on five key factors:

The streams proposed for protection through the prohibition of wastewater discharges into them are currently some of the cleanest streams in Texas.

These pristine streams serve as an economic resource as well as a natural resource for many Texans and their communities.

Sound scientific evidence shows that wastewater discharges containing phosphorus into streams with this high level of water quality will degrade that quality, likely damaging their current economic and natural values.

TCEQ has the legal authority to take the actions requested by petitioners to protect these pristine streams as well as the ability to shape those protections in a responsible manner to address specific situations, and – contrary to the assertion by the TCEQ Executive Director – there is no demonstration of legislative intent that TCEQ should not exercise this authority.

The petition to protect these streams has drawn a wide range of support from landowners, local government officials such as county commissioners courts, conservation organizations, recreational groups, and others who recognize the threat to pristine streams if reasonable steps are not taken now to meet the challenges facing them.

We offer the following observations about these five factors.

(1) Current pristine status of the streams proposed for protection.

As noted in the petition for rulemaking, the streams proposed for protection from wastewater discharges “have a demonstrated record in TCEQ data files of Total Phosphorus content below 0.06 mg/l (a common limit of detection) in 90% or more of the water quality samples collected over a ten (10) year period prior to January 1, 2022.” Moreover, each of the 22 stream segments that would receive special protection under the proposed new Subchapter K in Chapter 311 of the Texas Administrative Code (TAC) are designated in the state’s Surface Water Quality Standards as “primary contact recreation 1” streams (the most protective level for bacteria pollution because they are used for swimming and other activities that may result in human ingestion of the water), “exceptional” or “high quality” aquatic habitat, and in many instances as either public water supplies and/or streams critical for protection of aquifers associated with those streams.

Indeed, most of these streams are widely known for the clarity of their water, which the petition notes allow observers to “clearly see the stream bottom in standing and running water at depths of many feet.” Numerous publications over the years have captured in photographs and descriptive words the incredible beauty and allure of these pristine streams and associated habitats (See, for example: [Wes Ferguson & Jacob Croft Botter, *The Blanco River, Texas A&M University Press, 2017*](#); and the essays and photographs exploring the magic of the Pecos, the Llano, and the Upper Sabinal Rivers in [John Graves & Wyman Meinzer, *Texas Rivers, Texas Parks and Wildlife Press, 2002*](#)). We all need to remember that the pristine streams proposed for protection by the petition are not abstractions, and their names are not just words on paper. They are wondrous, even magical, natural streams that have inspired and drawn literally millions of Texans over generations to experience them. Many of these streams are sacred to and historically were life-giving places for indigenous peoples going back thousands of years. In many respects, streams such as Barton Creek, the Blanco River, the Devils River, the Frio River, the Llano River, and the other pristine streams are iconic features of Texas as well as treasured playgrounds for Texans and visitors to our state.

(2) Pristine streams as an economic resource.

The petitioners point out in their filing with TCEQ that the pristine streams proposed for protection are “tourism magnets, sources of boundless recreational enjoyment and prominent engines for local, area and state economic prosperity.” The crystal clear waters of these streams attract residents and visitors for swimming, inner tubing, canoeing, or kayaking depending upon specific circumstances of the individual streams. Private camps or public parks

are associated with many of these streams. The high levels of water quality in these streams enhances property values for riverside and other landowners in the area. Tourists are attracted to the regions in which the streams are located by the recreational opportunities and the associated facilities and activities. Local businesses and local governments benefit from the tourist dollars and sales taxes provided by these visitors. The pristine streams are often the focal points for the economies associated with their areas.

(3) Degradation of water quality by wastewater discharges.

We agree with the petitioners that the scientific literature is clear about the impacts of discharging wastewater containing phosphorus into streams with little or no current levels of phosphorus. As stated in the petition:

“In freshwater streams where the presence of phosphorus is undetectable, even a modest increase in phosphorus can set off a chain of undesirable biologic events, including accelerated plant growth, algae blooms, low dissolved oxygen, and the death of certain fish, invertebrates, and other aquatic animals. Low-flow pristine streams are particularly adversely affected. Treatment of domestic wastewater, even when the treatment is to the highest level of purification, cannot eliminate all phosphorus from being present in the effluent discharge. Consequently, the introduction of any treated domestic wastewater effluent into...low-phosphorus pristine streams...will unquestionably degrade these pristine streams.

This observation is adequately supported by numerous technical studies and academic and governmental publications. See, for example, [“Phosphorus and Water” by the U. S. Geological Survey’s Water Science School \(June 2018\)](#).

Preventing degradation of water quality is one of the fundamental principles of the federal Clean Water Act and consequently of the pollutant discharge elimination system permitting program, which was delegated to the State of Texas by the U.S. Environmental Protection Agency in 1998. Therefore, TCEQ as the agency responsible for implementation of delegated clean water programs in Texas has an obligation to prevent degradation of water quality, and the issuance of permits for wastewater discharges into these pristine streams would degrade their water quality. Prohibiting wastewater discharges into these streams, as proposed in the petition, would send a clear signal to everyone, including would-be dischargers, that TCEQ will not authorize such degradation.

(4) Existing legal authority of TCEQ to prohibit discharges into pristine streams – no legislative direction to the agency prevents exercise of this authority.

The general authority to protect water quality and to take responsible actions to do so are found in Chapter 26.011 of the Texas Water Code, which states in part:

“Except as otherwise specifically provided, the commission shall administer the provisions of this chapter and shall establish the level of quality to be maintained in, and shall control the quality of, the water in this state as provided by this chapter. Waste discharges or impending waste discharges covered by the provisions of this chapter are subject to reasonable rules or orders adopted or issued by the commission in the public interest. The commission has the powers and duties specifically prescribed by this chapter and all other powers necessary or convenient to carry out its responsibilities.”

This is a broad grant of authority, likely based on a recognition of the diversity of bodies of water in Texas and the complexity of the science on which water quality protection decisions are based. The implication is that the state agency responsible for protecting water quality has the authority to rely on its technical expertise in establishing protections for the state’s streams and lake.

Indeed, that is what TCEQ and its predecessor agencies (the Texas Water Quality Board, the Texas Department of Water Resources, the Texas Water Commission, and the Texas Natural Resources Conservation Commission) have done over the past half-century or so of modern water quality regulation in Texas. Examples of that exercise of authority that are perhaps most relevant to the request made in the pristine streams petition are found in Chapter 311 of the Texas Administrative Code, which is entitled “[Watershed Protection Rules](#).”

Various subchapters in 311 TAC prohibit the discharge of pollutants in the Lake Austin and Lake Travis water quality areas ([311.2](#)), Inks Lake and Lake Buchanan water quality areas ([311.12](#)), and Lake Lyndon B. Johnson and Lake Marble Falls water quality areas ([311.52](#)). [The rules allow land disposal of effluent treated to certain standards, and already permitted wastewater facilities at the time of rule adoption were allowed to continue to operate and seek renewal of permits according to applicable standards). These discharge prohibitions are TCEQ rules which were adopted by predecessor agencies ***without specific legislative direction*** to do so. The discharge prohibitions are based on technical determinations by the state water pollution control agency that they are the best measures for protection of water quality in the lakes and associated drainage areas.

Current petitioners are seeking to add a new Subchapter K to 311.TAC (the “Watershed Protection Rules) that would prohibit discharges into the identified pristine streams, similar to the provisions governing protection of the named lakes and their water quality areas. What TCEQ is asked to do by the petitioners is consistent with the precedent established for Hill Country area lakes and associated areas, which are also of high quality, sources of natural and economic value, highly prized for recreation, and the location of local and state parks. To put it succinctly and colloquially, “there is nothing new going on here, folks.”

However, the TCEQ Executive Director is recommending that the Commission deny the pristine streams petition for rulemaking solely based on an assertion that “[t]o initiate or proceed with

rulemaking would be contrary to legislative intent....” This assertion is based on the observation that neither legislation introduced in the regular session of the 87th Texas Legislature to restrict issuance of permits for the discharge into streams or drainage areas with naturally occurring low levels of total phosphorus (HB 4146) or bills filed in past legislative sessions to restrict or study the potential for restricting wastewater discharges in the contributing areas of the recharge zone of the Edwards Aquifer “advanced into law.”

Based on approximately a half century of professional lobbying experience at the Texas Legislature, the representatives of the Lone Star Chapter of the Sierra Club know – as does the TCEQ Executive Director – that there are numerous reasons why introduced legislation may not be “advanced into law,” and that the failure of bills to become law does not constitute any clear signal about “legislative intent.” To start with, [literally thousands of bills are introduced in the Texas Legislature during any one regular session, and only a few hundred ever become law \(for example, in the regular session of the 87th Texas Legislature 4671 House Bills were introduced, and only 587 of those bills were passed by both houses and sent to the Governor\).](#)

The failure of bills to become law is based on many factors, none of which may be an indication of the merit of the legislation or whether or not a majority of House and Senate members actually favor the legislation. For example, bills may not advance because the presiding officer of the House or Senate refers them to a legislative committee whose chair or majority of members are known or thought to be unfavorable to the bill. A bill favorably reported out of a House committee may be blocked in the Calendars Committee by one or a handful of Committee members. A bill may be killed on the House or Senate floor by a technical point of order. The short 140-day regular session may be the simple explanation for why certain bills do not become law; there may not be enough time to advance a bill through the process.

Given this context, the failure of legislation to advance into law does not indicate “legislative intent.” If a specific bill passes both houses and is sent to the Governor (who, of course, might veto it), then one can make a credible assertion of “legislative intent” (assuming the text of the legislation is clear and the legislative dialogue on the legislation is informative). If the House votes down a bill on the House floor, and the Senate votes down a very similar bill on the Senate floor, then an assertion of “legislative intent” against the action proposed in those bills is certainly in order as well.

With the exception of HB 4146 in the 87th Texas Legislature, ***none*** of the bills noted by the TCEQ Executive Director ever had the opportunity to have a vote on the House or Senate floor because they were stymied in either the legislative committee to which they were referred by the chairman of that committee or they were blocked in House Calendars Committee from going to the House floor. *HB 4146 did go to the House floor, where the bill passed and was sent to the Senate late in the session.* The chairman of the Senate committee to which HB 4146 was referred did not set the bill for hearing before the session ended, and that tells us nothing other than the chairman did not think it a priority to move this bill in the last week that the bill could have been heard in committee.

Of note is the fact that the chairman of the House committee to which some of the Edwards Aquifer protection bills were referred and who never let them out of his committee later recommended in a communication to supporters of the pollution discharge restrictions that they seek a rule change at TCEQ to achieve their goal. In other words, one reason why legislation to prohibit discharges into certain bodies of water was not “advanced into law,” is that *some* legislators may not believe that **the Legislature** should require such prohibitions when TCEQ has the authority itself to make that determination based on science and its responsibilities to protect water quality.

Also of note is that to our recollection, no one in the Legislature has ever introduced legislation to preclude TCEQ or its predecessor agencies from prohibiting discharges into the pristine streams covered in the petition or into other bodies of water, for that matter. Even if we have missed the introduction of any such legislation, certainly no such bill ever “advanced into law.”

In other words, the assertion by the TCEQ Executive Director that granting the petition to protect pristine streams on the basis that such an action would be “contrary to legislative intent” does not, pardon the expression, “hold water.” The TCEQ Commissioners should exercise the broad legal authority, affirmatively granted to them by the Texas Legislature, to protect water quality by prohibiting wastewater discharges into pristine streams, just as their predecessors have done on other occasions to protect other bodies of water.

(5) Wide range of support for protection of pristine streams in the face of threats to the maintenance of water quality in those streams.

The request to TCEQ Commissioners to grant the petition for rulemaking has broad support. The petition itself was filed by a diverse set of organizations and individuals who are representative of the regions in which the pristine streams are located. The petitioners include numerous landowners adjacent to or in the vicinity of these streams as well as local citizen groups with a long history of working for stream protection in their respective area.

Numerous County Commissioners Courts and some municipalities in the regions of the pristine streams have passed resolutions in support of the petition for rulemaking. These local officials recognize the challenges their areas and their pristine streams face from explosive population growth and real estate development that could lead to a proliferation of wastewater discharges into the pristine streams, undermining their quality and their attractiveness and subsequently their economic value. These officials are not anti-growth, but they want development to be done in responsible manner that does not negate the quality of their communities and their streams. These officials understand that there are alternatives to wastewater discharges that may address the need to accommodate growth in their areas at a reasonable pace.

We believe that it is important to stress that the initiative to protect pristine streams through prohibitions on wastewater discharges into the streams or their associated drainage areas was launched by people in their regions of the state. It is an expression of local will and an outgrowth of community concerns. Although state-level organizations, such as our own,

support this grassroots effort, we are inspired by the local residents and leaders who have launched this mission to protect their own communities and water resources.

While there may be some individuals in the regions or some financial interests who may oppose the petition for rulemaking, the broad and diverse coalition for protection of the pristine streams sends a clear signal the TCEQ Commissioners have an opportunity to do what is not only scientifically correct but also strongly publicly supported.

Conclusion

The bottom line is that:

- **TCEQ's own water quality monitoring data verifies the pristine nature of the streams proposed for wastewater discharge bans.**
- **These pristine streams have been economic drivers for their communities as well as a source of life for generations, and they represent some of the most iconic water features in the state.**
- **TCEQ staff apparently has not disputed the fact that wastewater discharges containing phosphorus could lower water quality in these pristine streams, putting their value and their attractiveness in jeopardy in the face of the challenges of population growth and consequent development.**
- **TCEQ has the broad statutory authority to prohibit wastewater discharges into specific bodies of water in order to protect water quality.**
- **TCEQ or its predecessor agencies have taken such action by rule and have not been countermanded by the Legislature for doing so.**
- **The Legislature has taken no affirmative action to prevent TCEQ from prohibiting wastewater discharges and has left that decision to the agency to act as it deems appropriate based on science.**
- **TCEQ can take action to protect the water quality of the pristine streams by prohibiting wastewater discharges while at the same time allowing alternatives for handling wastes in order to accommodate reasonable levels of growth and development as appropriate.**
- **Broad and diverse public support exists for TCEQ to take the action requested in the petition for rulemaking.**

Given this context, the Lone Star Chapter of the Sierra Club urges the TCEQ to act under the authority to protect water quality given to the agency by the Texas Legislature and by federal law and grant the petition for rulemaking to protect pristine streams.

Thank you for the opportunity to submit these comments.