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Re: Cause No. D-1-GN-19-003030; *SOS v. TCEQ*; in the 459th Judicial District Court of Travis County, Texas

Dear All:

On June 25, 2020, this Court heard argument in this case. Plaintiff Save Our Springs Alliance ("SOS"), Defendant Texas Commission on Environmental Quality ("TCEQ," or "the Agency") and Intervenor City of Dripping Springs ("City"), appeared through counsel and announced ready for trial.

The Court, after hearing argument of counsel, considered and denied the motion of Defendants to strike the brief filed by Amici Curiae Stephanie Ryder Morris et al.

This case is an appeal of a final agency order and is governed by the Administrative Procedure Act (APA), Tex. Gov't Code §§ 2001.001-.903. TCEQ's final order, entered following a contested case hearing before the State Office of Administrative Hearings, granted the City a permit

authorizing the discharge of up to 822,500 gallons per day of treated municipal wastewater into Onion Creek in Hays County. Plaintiff timely appealed the order. This is a review based on the administrative record, which was entered into evidence at the hearing, in accordance with Tex. Gov't Code § 2001.175(d).

The Court, after reviewing the pleadings, administrative record, briefing, and argument of counsel, finds that the TCEQ's order approving the City of Dripping Springs's wastewater discharge permit is not supported by the law or substantial evidence and should be reversed. Specifically, the Court finds the following conclusions of TCEQ unsupported by substantial evidence: (1) that the proposed discharge complies with the Agency's "Tier 2" anti-degradation rule requiring that the City's discharge must not cause more than a *de minimis* lowering of water quality in Onion Creek unless there is a showing that such lowering of water quality is necessary for important economic or social development; (2) that the proposed discharge would not impair existing high quality aquatic life uses of Onion Creek; and (3) that the information in the public notices of the proposed wastewater discharge permit sufficiently identified the location of the proposed discharge point.

OVERVIEW OF THE CASE

TCEQ approved the City's wastewater discharge permit pursuant to provisions of the Texas Water Code and TCEQ's implementing rules. TCEQ's authority to issue the permit, while set out in Texas statutes, was also delegated to the Agency by the U.S. Environmental Protection Agency (EPA) pursuant to the federal Clean Water Act and EPA's implementing rules. TCEQ's actions, and its rules applicable in this case, must be interpreted in the context of the Clean Water Act, and must be consistent with, and at least as protective of water quality, as EPA's applicable rules. 33 U.S.C. § 1342(b); 40 C.F.R. § 123.25.

The Clean Water Act's stated objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Towards this objective, the Act establishes a national goal that discharges of pollutants into the Nation's waters be eliminated by 1985. *Id.* § 1251(a)(1). Where discharges are not fully eliminated, the Act sets a goal of achieving water quality "which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." *Id.* § 1251(a)(2). These two goals of the Act—to protect aquatic life and recreation "in and on the water," known as keeping our water "fishable" and "swimmable"—are met primarily through two types of regulations: water quality standards and discharge standards. Permitted discharges must ensure that water quality standards that maintain "fishable/ swimmable" are met. *Id.* §§ 1311, 1312(a). To that end, discharge permits must set sufficiently protective limits on total volume of the discharge and on concentrations and amounts of specific pollutants. *Id.* §§ 1311, 1312(a), 1342.

In order to qualify for delegation of Clean Water Act administration, Texas adopted the required legislation and rules. The Texas Water Code declares the State's policy "to maintain the quality of water in the state consistent with the public health and enjoyment, the propagation or protection of terrestrial and aquatic life, and the operation of existing industries, taking into consideration the economic development of the state… and to require the use of all reasonable methods to implement this policy." Tex. Water Code § 26.003. TCEQ "may refuse to issue a permit when the commission finds that issuance of the permit would violate the provisions of any state or federal law or rule or regulation promulgated thereunder, or when the commission finds that issuance

of the permit would interfere with the purpose of this chapter." Tex. Water Code § 26.027. It is against the backdrop of these statutory purposes that the permit at issue must be considered.

Plaintiff primarily challenges whether the permit approved by TCEQ violates a subset of Texas's water quality standards that apply to Onion Creek. TCEQ has designated the portion of Onion Creek that would receive the City's discharge as "high aquatic life use," along with other uses of primary contact recreation, water supply, and aquifer recharge. TCEQ Order, AR A Doc. 169, at 5 ¶30.

Because Onion Creek is designated as "high aquatic life use" it is subject to a two-tiered EPA-required "anti-degradation policy." Although titled as a "policy," it is a mandatory rule that must be interpreted consistent with both EPA's anti-degradation rule and the Clean Water Act. 40 C.F.R. § 131.12; 30 Tex. Admin. Code § 307.5.

Plaintiff's first claim is that TCEQ's final order approving the City's permit violates the more stringent of TCEQ's two-part anti-degradation rule, known as Tier 2 anti-degradation review, as a matter of law or as an abuse of discretion. Plaintiff's second claim is that TCEQ misapplied the less stringent "Tier 1" anti-degradation rule, which applies to all waters of the state, by considering improper factors, failing to consider required factors, and failing to make required underlying findings of fact that connect to the agency's ultimate conclusions, thereby demonstrating reasoned decisionmaking that is transparent and subject to judicial review.

Plaintiff's third claim is that the public notice given for the proposed permit failed to identify the location of the proposed discharge with sufficient accuracy to provide for public input and participation in the agency's decisionmaking process.

STANDARDS OF REVIEW

The Texas Administrative Procedure Act sets out the standards of review applicable in this case. This Court "shall reverse or remand the case for further proceedings if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(A) in violation of a constitutional or statutory provision;
(B) in excess of the agency's statutory authority;
(C) made through unlawful procedure;
(D) affected by other error of law;
(E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or
(F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

Tex. Gov't Code § 2001.174(A)-(F). These grounds for reversal are collectively referenced, in shorthand, as the "substantial evidence rule."

Review of an agency's final decision or action under the substantial evidence rule involves the following two component inquiries:

(1) whether the agency made findings of underlying facts that logically support the ultimate facts and legal conclusions establishing the legal authority for the agency's decision or action and, in turn,
(2) whether the findings of underlying fact are reasonably supported by the evidence.

TCEQ v. Maverick Cnty., 2019 Tex. App. LEXIS 9981 at *7-8. The first inquiry may entail questions of law, while the second inquiry is highly deferential to the agency's determination. *Id.* at *8. An agency acts arbitrarily if it has not "genuinely engaged in reasoned decisionmaking" by making a decision without regard for the facts, relying on fact findings that are not supported by any evidence, or if there does not appear to be a rational connection between the facts and the decision. *Heritage on the San Gabriel Homeowners Ass'n v. TCEQ*, 393 S.W.3d 417, 423 (Tex. App.—Austin, 2012); *City of Waco v. TCEQ*, 346 S.W.3d 781, 819 (Tex. App.—Austin 2011), *rev'd on other grounds*, 413 S.W.3d 409 (Tex. 2012)(citations omitted).

Even if supported by substantial evidence, however, an agency order may be arbitrary and capricious if the agency has improperly based its decision on non-statutory criteria or failed to consider relevant factors. *Tex. Dep't of Ins. v. State Farm Lloyds*, 260 S.W.3d 233, 245 (Tex. App.—Austin 2008); *City of El Paso v. Pub. Util. Comm'n*, 883 S.W.2d 179, 184 (Tex. 1994).

Administrative rules are interpreted like statutes, under traditional principles of statutory construction. *Tex. Comm'n on Envtl. Quality v. Maverick Cnty.*, No. 03-17-00785-CV, 2019 Tex. App. LEXIS 9981 at *12 (Tex. App.—Austin Nov. 15, 2019, pet. filed). The "primary objective in both statutory and rule construction is to ascertain and give effect to the drafters' intent." *Id.* That intent is determined from the plain meaning of the words chosen when it is possible to do so. *Id.* "If there is vagueness, ambiguity, or room for policy determination in the regulation 'we normally defer to the agency's interpretation unless it is plainly erroneous or inconsistent' with the rule's language." *Id.* (quoting *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W. 3d 432, 438 (Tex. 2011)). However, "no deference is due where an agency's interpretation fails to follow the clear, unambiguous language of its own regulations." *Id.*

DISCUSSION

a. Plaintiff's Anti-Degradation Claims

TCEQ's Anti-degradation rule provides:
(1) Tier 1. Existing uses and water quality sufficient to protect those existing uses must be maintained. Categories of existing uses are the same as for designated uses, as defined in § 307.7 of this title (relating to Site-Specific Uses and Criteria).
(2) Tier 2. No activities subject to regulatory action that would cause degradation of waters that exceed fishable/swimmable quality are allowed unless it can be shown to the commission's satisfaction that the lowering of water quality is necessary for important economic or social development. Degradation is defined as a lowering of water quality by more than a *de minimis* extent, but not to the extent that an existing use is impaired. Water quality sufficient to protect existing uses must be maintained. Fishable/swimmable waters are defined as waters that have quality sufficient to support propagation of indigenous fish, shellfish, terrestrial life, and recreation in and on the water.

30 Tex. Admin. Code § 307.5 (emphasis added).

Thus, degradation is defined as "a lowering of water quality by more than a *de minimis* extent." *Id.*

Onion Creek has water quality exceeding the fishable and swimmable standard; therefore both a Tier 1 and Tier 2 anti-degradation review were required. In arguing that the permit violates the Tier 2 prohibition against lowering water quality by more than *a de minimis* amount, Plaintiff relies on the framework and evidence, which is undisputed in the record, as summarized here.

Compliance with water quality standards is measured at a critical low flow level, which for the stretch of Onion Creek that would receive the discharge is 0.12 cubic feet per second (cfs). The permit authorizes the City to discharge up to 822,500 gallons per day of treated wastewater, which equals 1.27 cfs. Thus, at the regulatory flow level and the permitted discharge, Onion Creek would consist of one parts background Onion Creek flow and ten parts treated sewage. The water quality conditions as of November 28, 1975 define baseline conditions that must be protected.

Total phosphorus is the primary limiting nutrient, meaning the primary control on algae growth, but nitrogen is also a recognized pollutant that threatens aquatic life and other uses and is therefore regulated by water quality and discharge standards. Onion Creek is a phosphorus limited stream, with very low naturally occurring concentrations of total phosphorus which are below the level of detection in TCEQ-certified labs.

Experts of Plaintiff, TCEQ, and the City agreed that the best estimate of baseline total phosphorus levels in Onion Creek is in the range of 2 to 9 micrograms per liter (μg/L). A report by the United States Geological Survey measured total phosphorus at 3 μg/L in Onion Creek. By contrast, TCEQ's final order approves wastewater discharge containing up to 150 μg/L total phosphorus. At the regulatory low flow level and the permitted discharge rate, total phosphorus in Onion Creek would increase to above 100 μg/L.

In 2001, EPA published a report, *Ambient Water Quality Criteria Recommendations [for] Rivers and Streams in Nutrient Ecoregion IV*. AR B Doc. 293 (Suppltl. AR). The Edwards Aquifer region, including Onion Creek where the discharge would occur, is within Ecoregion IV. The report summary explains that its recommended "ecoregional nutrient criteria address cultural eutrophication—the adverse effects of excess human-caused nutrient inputs." The report recommends nutrient limits at which stream changes occur in sensitive streams—25 micrograms per liter for Total Phosphorus and 700 micrograms per liter for Total Nitrogen. This 2001 EPA report placed Onion Creek in a group of streams with very low, naturally occurring phosphorus and nitrogen streams, known as "oligotrophic" streams. This description, and the nutrient limit recommendations in the report, were based on a statistical analysis of hundreds of streams across the country.

Since 2001, TCEQ has funded studies that would help Texas set specific phosphorus and nitrogen water quality standards, but TCEQ has so far not adopted numeric nutrient water quality standards. Several of these studies were introduced into the record. One such study from 2009, introduced by the City, concludes that there is "overwhelming evidence" of "consistent biological changes in streams with greater than 20 μg/L" total phosphorous. King & Winemiller, Development of Biological Indicators of Nutrient Enrichment for Application in Texas Streams, AR B Doc. 241, at

67. TCEQ procedures and TCEQ's final order make clear the agency must consider phosphorus and nitrogen when determining compliance with the anti-degradation water quality standards.

As to nitrogen, the permit allows discharged effluent to have up to 6.0 milligrams per liter (mg/L) of total nitrogen. The City's expert estimated that nitrate-nitrogen would increase from background levels in Onion Creek of 0.05 mg/L to almost 5 mg/L with the proposed discharge. This was not disputed by other evidence.

The City's expert estimated that phosphorus and nitrogen in the discharge would increase bottom-dwelling algae growth in Onion Creek tenfold, from less than 5 mg per square meter (m2) of chlorophyll-a to 30 to 50 mg/m2.

In addition to nutrients and algae growth, maintaining dissolved oxygen levels that protect aquatic life is also important. Baseline levels of Dissolved Oxygen (DO) in Onion Creek range from 6.89 mg/L to 8.42 mg/L, as measured by the City's expert. TCEQ's modelling found that the proposed discharge would cause DO levels in Onion Creek to drop down to at or near the 5.0 mg/L DO criterion assigned for its high-aquatic life use. The City's expert conducted modelling estimating a low of 4.87 mg/L DO resulting from the permitted discharge.

In applying the Tier 2 rule to this undisputed evidence, Plaintiff first notes, and the parties agree, that the City made no effort to show important social and economic development needs that would allow a discharge resulting in more than a *de minimis* lowering of water quality. Thus, the City, as applicant, bore the burden of showing that the permitted discharge would not lower water quality in Onion Creek more than a *de minimis* amount.

Plaintiff argues that the undisputed increases in nutrient pollution, lowered dissolved oxygen, increase in algae growth, and conversion of Onion Creek, at low-flow conditions to one part clean creek-water to ten parts treated sewage violates the no more than a *de minimis* lowering of water quality Tier 2 standard as a matter of law.

Plaintiff further argues that Defendants failed to interpret the Tier 2 standard correctly by: (a) requiring a showing of harm to existing uses, thereby collapsing the Tier 2 *de minimis* standard into the Tier 1 standard requiring that uses, not quality, must be maintained; (b) ignoring, and writing out of the rule, the provision that if there is to be more than *de minimis* lowering of water quality, a showing of important social and economic necessity must be made; and (c) considering, in both the Tier 2 and Tier 1 analyses, improper factors (primarily that "nutrient enrichment," increased biological productivity, species diversity, and stream flow "stabilization" from the discharge indicated a positive effect on the stream rather than pollution of the stream).

Defendants respond that TCEQ correctly applied the rule in this case, and that the Agency's findings that the anti-degradation standards were met and are supported by substantial evidence and reasoned decisionmaking. Defendants also argue the Court should defer to TCEQ's expertise and judgment on matters of conflicting expert opinion and evidence, among other points.

The Court agrees with Plaintiff that the evidence shows as a matter of law that the permitted discharge will lower water quality in Onion Creek more than a *de minimis* amount.

The EPA anti-degradation rule provides that TCEQ must adopt a rule that "at a minimum" is consistent with EPA's rule, which states in pertinent part that where "the quality of waters exceed levels necessary to support the protection and propagation" of aquatic life, "that quality shall be maintained and protected unless the State finds . . . that allowing lower water quality is necessary to accommodate important economic or social development." 40 C.F.R. § 131.12 (emphasis added).

TCEQ's rules, like EPA's, must also be interpreted consistent with the purposes of the Clean Water Act and the plain language of the rule. *See Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462 (2020). The Clean Water Act's purpose, among others, is to "maintain" the "chemical" integrity of our Nation's waters, including Onion Creek. *See* 33 U.S.C. § 1251.

"*De minimis*" is defined in Black's Law Dictionary as "1. trifling, minimal; 2. (Of a fact or thing) so insignificant that a court may overlook it in deciding an issue or case." There is no technical or other definition that would supplant or modify this plain language definition of *de minimis*.

Given the plain language of the TCEQ rule, the EPA rule, and the Clean Water Act, and the undisputed evidence, the Court declines to give deference to TCEQ's implied interpretation of the Tier 2 anti-degradation rule. That interpretation is implied because the Agency's final order avoids interpreting the *de minimis* lowering of water quality language in favor of more general findings that the rule has been met. As in the recent U.S. Supreme Court Clean Water Act case of *County of Maui v. Hawaii Wildlife Fund*, accepting TCEQ's position would conflict with the plain language of the rule and open a major loophole in the Act's mandate to protect and maintain the quality of our Nation's waters. *See* 140 S. Ct. 1462, 1474 (2020) ("But here, as we have explained, to follow EPA's reading would open a loophole allowing easy evasion of the statutory provision's basic purposes. Such an interpretation is neither persuasive nor reasonable.")

The limited case law on anti-degradation supports this conclusion. *See Ky. Waterways Alliance v. Johnson*, 540 F.3d 466, 483 (6th Cir. 2008); *Columbus & Franklin Cnty. Metro. Park Dist. v. Shank*, 600 N.E.2d 1042 (Ohio 1992); *Robertson Cnty.: Our Land, Our Lives v. TCEQ*, No. 03-12-00801-CV, 2014 WL 3562756 (Tex. App.—Austin July 17, 2014, no pet.); *Greater Yellowstone Coal. v. EPA*, 2013 U.S. Dist. LEXIS 59661 (D. Idaho 2012). The Sixth Circuit explains in *Kentucky Waterways Alliance*:

> This Tier II standard may also be described as protecting the water body's "assimilative capacity" which is the amount by which the water body exceeds the quality level necessary to support its designated uses. Under the regulation, a pollution increase that would decrease a water body's assimilative capacity would need to be justified by the necessity of the pollution for achieving important economic and social development.

540 F.3d 466, n 4. Defendants' positions ignore the necessity of protecting this buffering, or assimilative, capacity of Onion Creek while having no answer for how such enormous increases in the key nutrient pollutants would not lower water quality by more than a *de minimis* amount. The Agency's approach, as suggested by the final order's findings of fact, would require a showing of impairment to the designated uses of Onion Creek. The Tier 2 standard, unlike Tier 1, does not require a showing of impairment of uses; it requires that water quality not be lowered by more than a *de minimis* amount absent a showing of important social and economic development need. The City

chose not to attempt such showing and the undisputed evidence establishes that TCEQ's final order approving the permit violates the Tier 2 anti-degradation standard.

Under Tier 1 of the anti-degradation policy, existing uses, and water quality sufficient to protect those existing uses, must be maintained. 30 Tex. Admin. Code § 307.5. This includes maintaining water-quality levels sufficient to support existing, designated, presumed, and attainable aquatic life uses. 30 Tex. Admin. Code § 307.4(h).

Plaintiff argues, with support from Amici, that TCEQ's interpretation of the Tier 1 standard protecting existing uses is based on consideration of improper factors while ignoring the required factors that define "aquatic life use" and maintenance of that aquatic life. Plaintiff disputes TCEQ arguments that the anti-degradation rule (both Tier 1 and Tier 2) are met if the agency follows its anti-degradation review procedures and that anti-degradation compliance takes a "whole water" approach rather than a constituent-by-constituent approach. Plaintiff further argues that the absence of underlying findings of baseline chemical and biological conditions, resulting conditions triggered by the proposed discharge, and how these resulting conditions will assure that the high aquatic life use of Onion Creek will be maintained constitutes arbitrary and capricious decisionmaking.

The Court generally agrees with these arguments and would remand this case for reconsideration by the agency on the Tier 1 standard absent the above conclusion that the TCEQ-approved permit violates the Tier 2 antidegradation standard and is reversed for that reason.

Review of the TCEQ's final order and the Administrative Law Judge's Proposal for Decision on which it relies reveals several problems. In the Tier 1 protection of uses analysis, TCEQ only considered whether nutrient stimulation of algae growth would impair recreational uses. It did not consider whether the amount and kind of algae growth would harm aquatic life uses.

TCEQ's and EPA's anti-degradation rule sets out substantive standards: following TCEQ's checklist of procedures for anti-degradation review does not assure compliance with these substantive standards.

TCEQ's rules, its "Implementation Procedures" manual, or IP's, for implementing its water quality standards, and its final order make clear that nutrient pollutants and other specific pollutants are considered in the anti-degradation analysis individually and not on a "whole water" basis.
EPA guidance on anti-degradation explains:

> No activity is allowable under the antidegradation policy which would partially or completely eliminate any existing use whether or not that use is designated in a State's water quality standards. The aquatic protection use is a broad category requiring further explanation. *Non-aberrational resident species must be protected, even if not prevalent in number or importance. Water quality should be such that it results in no mortality and no significant growth or reproductive impairment of resident species. Any lowering of water quality below this full level of protection is not allowed.*

EPA, Water Quality Standards Handbook (2012) at § 4.4.2. (emphasis added).

In other words, avoiding impairment of aquatic life uses requires protecting the species assemblages that are present, as long as they are not an aberration. Plaintiff, and to some extent the

City and TCEQ, introduced evidence indicating that aquatic species adapted to the low-nutrient conditions of Onion Creek would be harmed by the proposed discharge. This evidence was disputed by TCEQ and the City's experts. However, this evidence was not considered as relevant to the Tier 1 inquiry.

The Proposal for Decision (PFD) provides the findings of fact, conclusions of law and underlying reasoning for those findings and conclusions incorporated into TCEQ's final order. The PFD's analysis leans heavily on a study by Jeff Mabe and others, quoting the study's finding that increasing nitrogen concentrations is associated with higher aquatic life diversity scores. PFD, AR A Doc. 162, at 16-17, 26-29. The Administrative Law Judge (ALJ) wrote:

> The [Mabe] report goes on to discuss the positive impact of waste- water on aquatic life in providing 'nutrient enrichment' and 'consistently stable streamflow,' which led to greater 'species richness.'

PFD at 16. This statement is made in the context of evaluating potential impacts to endangered species. *Id.* In analyzing the anti-degradation standard, the ALJ returns to this report, saying "as discussed previously, some studies have shown that wastewater can have a beneficial effect on low-flow, low-nutrient streams by bringing more regularity to the flow and by increasing nutrients that can benefit aquatic life." *Id.* at 24.

The ALJ concludes that "SOS's evidence regarding the impact of the proposed discharge on Onion Creek's assimilative capacity for TN and TP is not relevant to the anti-degradation analysis." *Id.* at 26. The ALJ then states that "SOS's assertions regarding the trophic state of Onion Creek to be irrelevant to the analyses required in this case" because the "rules and IPs do not address a streams trophic classification in the antidegradation policy." *Id.* at 27.

As Plaintiff and Amici argue, this approach converts municipal wastewater discharges into benefits that should be encouraged rather than, as the Clean Water Act provides, pollutants to be eliminated from our Nation's waters. While adding nutrient fertilizer in the form of municipal wastewater to Onion Creek would increase biological productivity (more algae growth) and would stabilize low flows, these results are either irrelevant or harmful to determining whether existing aquatic life uses will be maintained. Increased species richness (diversity) is also irrelevant. The rules call for protecting the assemblage of species that are found in the stream.

TCEQ rules define "high quality aquatic life uses", at 30 TAC § 307.7(b)(3)(A), Table 3, in relevant part, as having "species assemblages" that are "usual associations of regionally expected species," that "sensitive species" are present, and that the "trophic structure" is "balanced to slightly unbalanced." The species make up—not biological productivity, abundance, or species diversity—is what is important for protecting existing aquatic life. Consistent with the rule defining the high quality aquatic life use, the IPs make clear that "eutrophication," is to be avoided. *See, e.g.,* Implementation Procedures, AR B Doc. 257 at 27, 47.

By relying on the City's arguments that the wastewater discharge will "enrich" Onion Creek, making it more biologically productive, while deeming as irrelevant the effects of the discharge on native aquatic species adapted to the very low nutrient conditions of Onion Creek and other Hill Country streams, the Agency really has turned the Clean Water Act upside down. This approach allowed the ALJ and the Agency to ignore as irrelevant the multiple scientific studies introduced into

the record concluding that increasing phosphorus in Texas streams above 20 to 25 μg/L would lead to a displacement of native aquatic species by more nutrient-tolerant and lower dissolved oxygen tolerant species. As noted above, it is undisputed that the proposed discharge would increase background Onion Creek flows from 2 to 8 μg/L total phosphorus to over 100 μg/L under low flow conditions where compliance with the anti-degradation standard must be measured.

The Agency's final order reflects that it relied upon irrelevant factors while ignoring powerful evidence that the approved discharge would harm native aquatic life species in Onion Creek. The order also fails to make underlying findings of fact that support the ultimate conclusions of compliance with the Tier 1 and Tier 2 standards, thereby demonstrating the agency engaged in genuine, reasoned decisionmaking.

The Court recognizes that wastewater return flows can and often do benefit Texas stream flows in important ways. The Court also recognizes that TCEQ has not set numeric nutrient water quality standards. However, these facts do not relieve the agency from compliance with the Clean Water Act and the federally required antidegradation standards.

b. Plaintiff's Notice Claim

Plaintiff's third claim is that the notices of the proposed wastewater discharge application and permit provided to the public failed to adequate identify the location of the proposed point of discharge. Text of public notices for discharge permits must include, among other things, "a general description of the location of each existing or proposed discharge point and the name of the receiving water." 30 Tex. Admin. Code § 39.551(c)(4)(B). Identical mandatory language is found in the applicable federal regulation, 40 C.F.R. § 124.10(d)(1)(vii).

The public notices are in the administrative record, and their text is not disputed. The Notice of Receipt of Application and Intent to Obtain Water Quality Permit stated: "The discharge route is from the plant site via pipe to Walnut Springs; thence to Onion Creek."
The Notice of Application and Preliminary Decision and the Notice of Hearing provided stated: "The treated effluent will be discharged to Walnut Springs; thence to Onion Creek in Segment No. 1427 of the Colorado River Basin."

While all of the notices provide the address of the existing wastewater treatment plant, which will be expanded under the approved permit and state that it is located in Hays County, there is no address, set of coordinates, or reference to nearby street crossings given for the discharge point despite the focus in the regulations on identifying the location of the where the pollutants will be released into public waters.

There is also no hint that this location is nowhere near the treatment plant.

TCEQ and the City contend that these notices meet the requirements because they identify Walnut Springs as the point of discharge, a small tributary that runs for less than half a mile before its confluence with Onion Creek.

The regulations do not state specifically how a proposed discharge point should be described, e.g., by coordinates, address, etc. But use of the conjunctive "and" in the regulation indicate that identifying the receiving waters is not enough—the notice must include both a description of the

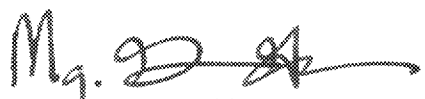
proposed discharge point's location *and* the name of the receiving water. The public notices made no attempt to describe the location of the discharge point.

The proposed point of discharge is a long distance away from the identified location of the wastewater treatment facility. The wastewater will be piped to a point 1.5 miles away (as the crow flies), across a highway (RR 12) and beyond a couple of neighborhoods, to its point of discharge upstream of and nowhere near the treatment plant. Plaintiff presented evidence that staff with the federal U.S. Fish and Wildlife Service could not tell from the public notices where the discharge point would be. TCEQ responded with more specific information to the federal agency. AR B Doc. 278 (SOS Ex. 16). The public never had the benefit of that more specific information.

For these reasons TCEQ's conclusion that notice was legally adequate is not reasonably supported by substantial evidence considering the record as a whole, and is arbitrary and capricious and characterized by an abuse of discretion. *See* Tex. Gov't Code § 2001.174.

Therefore for all the above reasons and any other supporting reasons even if not listed here, in a separate order I do reverse the TCEQ order and enjoin Dripping Springs from taking actions in reliance on the unlawful agency order.

Very Truly Yours,



Maya Guerra Gamble
Judge, 459th District Court

Ms. Velva L. Price, Travis County District Clerk