

**SOAH DOCKET NO. 582-22-0585  
TCEQ DOCKET NO. 2021-1001-MWD**

<b>APPLICATION OF</b>	§	<b>BEFORE THE STATE OFFICE</b>
<b>CITY OF GRANBURY</b>	§	
<b>FOR TPDES PERMIT NO.</b>	§	<b>OF</b>
<b>WQ0015821001</b>	§	
	§	<b>ADMINISTRATIVE HEARINGS</b>

**PROTESTANTS GRANBURY FRESH, VICTORIA CALDER, STACY AND JAMES  
RIST, AND BENNETT’S CAMPING CENTER & RV RANCH’S  
MOTION FOR REHEARING**

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

Protestants Granbury Fresh, Victoria Calder, Stacy and James Rist, and Bennett’s Camping Center & RV Ranch, collectively referred to herein as “Protestants,” submit this Motion for Rehearing of the Commission’s October 24, 2022 Order granting the application by the City of Granbury (“Granbury” or “Applicant”) for new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0015821001. Protestants move that the Commission set Granbury’s Application for rehearing, and upon rehearing, deny Granbury’s Application. The Commission’s decision to issue Granbury’s requested permit is the result of several errors. These errors include violations of the plain language of TCEQ’s own rules, violation of Protestants’ Statutory Due Process Rights under the Texas APA, violation of Protestants’ United States’ Constitutional Due Process Rights, and violation of Protestants’ Due Course of Law Rights under the Texas Constitution, as discussed in detail below:

**I. Introduction**

The permit issued to the Applicant falls short of compliance with TCEQ rules, including the Surface Water Quality Standards (SWQS) and location standards to protect Texans from nuisance conditions.

Granbury's proposed facility violates the clear and unambiguous language of the TCEQ rules by the placement of an un-aerated equalization basin within less than 500 feet of the nearest property line. Further, the facility places a BNR *Anaerobic* Basin within less than 500 feet of the nearest property line based on an unreasonable finding that "anaerobic" somehow has a meaning in Chapter 309 of the TCEQ rules that is entirely different than the meaning of "anaerobic" in Chapter 285 of the TCEQ rules.

Granbury did not meet its burden of proof in demonstrating compliance with the anti-degradation policy set forth in the TCEQ rules. In particular, Granbury has not demonstrated compliance with the applicable Tier 1 standard minimum dissolved oxygen standard of 5.0 mg/L. All modeling performed demonstrates dissolved oxygen levels lower than 5.0 mg/L. Documentation relied upon by the ALJs to justify acceptance of a variance explicitly states that such a variance was not found justified under circumstances such as those presented by this application. Furthermore, the ALJs place unjustified reliance upon modeling that was not performed under critical discharge conditions, contrary to all TCEQ precedent on the consideration of wastewater discharge permits. Modeling evidence improperly excluded by the ALJs only further demonstrates the deep flaws in the conclusions set forth in the PFD and in the Commission's Final Order.

In addition, Granbury has not demonstrated compliance with the Tier 2 anti-degradation standards. In addition to modeling errors, the Executive Director (ED) and Granbury failed to evaluate the impacts of the increases in phosphorus loading and fecal coliform levels in the receiving waters as a result of this discharge. Granbury has not sufficiently demonstrated that degradation is necessary for important social and economic development.

Lastly, the ALJs' denial of Protestants' written and oral motions for leave to provide rebuttal testimony led to critical evidence by Protestants' expert witness James Machin being left out of the record of this proceeding.

## II. Buffer Zone Requirements

### A. Summary

By Conclusion of Law 9, the Commission's Order states that the Draft Permit complies with applicable requirements to abate and control nuisance odors, as set forth in 30 Texas Administrative Code § 309.13(e)(1). This conclusion of law is: i) in violation of applicable constitutional and statutory provisions; ii) in excess of TCEQ's statutory authority; iii) made through unlawful procedure; iv) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; v) arbitrary and capricious; and vi) characterized by abuse of discretion and the clearly unwarranted exercise of discretion.

Applicant has not demonstrated compliance with the rules related to the control and abatement of nuisance odors. The TCEQ rules contain a *conclusive* presumption that *any* unaerated equalization basin is a "lagoon with zones of anaerobic activity." TCEQ rules at 30 Tex. Admin. Code § 309.13(e) state that:

One of the following alternatives must be met as a compliance requirement to abate and control a nuisance of odor prior to construction of a new wastewater treatment plant unit...

**(1) Lagoons with zones of anaerobic activity (e.g., facultative lagoons, un-aerated equalization basins, etc.) may not be located closer than 500 feet to the nearest property line.** All other wastewater treatment plant units may not be located closer than 150 feet to the nearest property line.

TCEQ's issuance of the permit is in direct violation of the plain and unambiguous language of this rule.

**B. The Permit improperly authorizes an un-aerated equalization basin, which is a lagoon with zones of anaerobic activity, within 500 feet of the nearest property line.**

30 Tex. Admin. Code § 309.13 explicitly designates “un-aerated equalization basins” as examples of “lagoons with zones of anaerobic activity.”<sup>1</sup> The undisputed evidence demonstrates that the proposed facility will include an unaerated equalization basin less than 500-feet from the nearest property line.<sup>2</sup> Issuance of a permit for the location of an unaerated equalization basin at this distance from the nearest property line is directly in violation of 30 Tex. Admin. Code § 309.13(e).

**C. The Permit improperly authorizes the BNR *Anaerobic* Zone within 500 feet of the nearest property line in violation of TCEQ Rules.**

The BNR zone with anaerobic activity likewise constitutes a unit that must have a 500-foot buffer. The Application itself represents that this will contain anaerobic activity. The Rules contain no exception for anaerobic zones that are maintained above any certain oxidation reduction potential (ORP), which is the excuse given for the exception to the Rule applied here.<sup>3</sup> TCEQ has applied a definition of “anaerobic” that differs from that set forth in the TCEQ rules. Under TCEQ rules, “anaerobic” refers to areas where there is an absence of *free* oxygen.<sup>4</sup> Such is the case for the BNR anaerobic zone. While it would seem self-apparent, under the standard established by the TCEQ rules, the BNR anaerobic zone is anaerobic.

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<sup>1</sup> BLACK'S LAW DICTIONARY, defining “*e.g.*” as “for example” (11<sup>th</sup> ed. 2019).

<sup>2</sup> Admin. Record-0298, Admin. Record-0309, Admin. Record-0312.

<sup>3</sup> See Tr. V. 2, 258:3-5 (regarding permit requirements).

<sup>4</sup> See, e.g., 30 Tex. Admin. Code § 285.2(3) (defining “anaerobic digestion” to mean, “[t]he bacterial decomposition and stabilization of sewage in the absence of *free* oxygen.”)

The BNR anaerobic zone further constitutes a “lagoon.” As discussed above, the governing rule parenthetically defines “lagoon” to include an equalization *basin*. The BNR zone is likewise a “basin.”<sup>5</sup> Such a unit falls squarely within the plain meaning of the term “lagoon” as including, “a shallow artificial pool or pond (as for the processing of sewage or storage of a liquid).”<sup>6</sup>

Considering that the BNR anaerobic zone is a lagoon with zones of anaerobic activity, it is required to be located at least 500 feet from the nearest property line pursuant to 30 Tex. Admin. Code § 309.13(e). By allowing the location of this unit within less than 500 feet of the nearest property line, the draft permit violates 30 Tex. Admin. Code § 309.13(e).

#### **D. Odor Requirement Conclusion**

Considering that the facility’s wastewater treatment plant units, containing lagoons with anaerobic activity, will be located within 500 feet of the nearest property line, Findings of Fact 33, 34, 35, 36, 37, 38, 39, and 40, and Conclusions of Law 9 and 13, are: i) in violation of applicable constitutional and statutory provisions; ii) in excess of TCEQ’s statutory authority; iii) made through unlawful procedure; iv) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; v) arbitrary and capricious; and vi) characterized by abuse of discretion and the clearly unwarranted exercise of discretion.

### **III. TCEQ Erred in Finding the Permit Compliant with the Tier I Anti-degradation Review Requirements**

#### **A. The Commission erred in concluding that the modeling complies with TCEQ regulations.**

By Conclusion of Law 15, the Commission’s Order states that the modeling complies with applicable regulations to ensure the Draft Permit is protective of water quality, and by Conclusion

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<sup>5</sup> Admin. Record-0310, identifying BNR anaerobic zone as “BNR Anerobic Basin.”

<sup>6</sup> <https://www.merriam-webster.com/dictionary/lagoon> (last accessed June 30, 2022).

of Law 16, the Commission's Order states that the ED's Tier 1 and Tier 2 anti-degradation review was accurate. These conclusions of law are: i) in violation of applicable constitutional and statutory provisions; ii) in excess of TCEQ's statutory authority; iii) made through unlawful procedure; iv) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; v) arbitrary and capricious; and vi) characterized by abuse of discretion and the clearly unwarranted exercise of discretion.

The Texas Surface Water Quality Standards provide a dissolved oxygen (DO) criteria of 5.0 mg/L for Rucker Creek and Lake Granbury. The DO values predicted in QUAL-TX modeling performed by both the ED and the Applicant, with predicted values as low as 4.81 mg/L, all fall below the DO criteria of 5.0 mg/L for receiving waters Rucker Creek and/or Lake Granbury. This evidence alone justifies denial of Granbury's permit.

Executive Director staff member James Michalk conducted the only modeling performed by the ED. This modeling indicated DO in the Lake Granbury segment of the receiving waters would be 4.81 mg/L as a result of this discharge in the final phase.<sup>7</sup> The ALJs, and now the Commission, have taken position that 4.80 mg/L is *close enough* to 5.0 mg/L, asserting that a 2008 modeling study performed by the TCEQ Water Quality Assessment Team justifies the allowance for such a variance.<sup>8</sup> By Finding of Fact 82, the Commission's Order states there is a "margin of safety" in QUAL-TX modeling analyses that has been studied by the ED staff, referring to the study relied upon by the ED and the ALJs.

Notably, this same study explicitly states that it was unable to find that a 0.20 mg/L variance is justified for facilities with chemical biological oxygen demand (CBOD<sub>5</sub>) limits of 20 mg/L or 30 mg/L which frequently discharge nutrients in concentrations in excess of the permit

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<sup>7</sup> Ex. ED-18, p. 3.

<sup>8</sup> PFD, p. 45.

limits.<sup>9</sup> The permit for the City of Granbury falls into this exception from the study, since the permit contains a CBOD<sub>5</sub> concentration limit of 30 mg/L.<sup>10</sup>

Tim Osting, an expert witness for Granbury, also conducted QUAL-TX modeling. Mr. Osting, however, admitted during the hearing on the merits that he had made a fundamental error in the performance of this modeling. When the depths of the receiving waters significantly change, it is necessary to also change the value used for the “reaeration rate.”<sup>11</sup> The reaeration rate depends upon the depth of the water body at issue, with deeper water bodies having lower reaeration rates.<sup>12</sup> TCEQ’s Implementation Procedures state that reaeration rates are among the “most important model inputs.”<sup>13</sup> Yet, Mr. Osting’s modeling made significant changes to the ED’s assumed depths of the receiving waters without making changes to the assumed reaeration rates.<sup>14</sup> Mr. Osting admitted that he did not know what the results of the modeling would be if adjusted reaeration rates were used.<sup>15</sup> **Mr. Osting further admitted that if the model were run using adjusted depths and reaeration rates the predicted dissolved oxygen could potentially be less than 3.0 mg/L.**<sup>16</sup>

Finding of Fact 78 states correctly that, pursuant to the TSWQS, the DO criterion for Lake Granbury is 5.0 mg/L. The TCEQ rules do not provide for a .20 mg/L variance or a range of values. No validly-adopted policy justifies such an exemption from the TCEQ rules. Considering that compliance with the Tier 1 standard for dissolved oxygen has not been met, Finding of Fact 87, 100, and 102, as well as Conclusions of Law 10, 13, 14, 15, 16, and 17 are: i) in violation of

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<sup>9</sup> Ex. ED-24, p. 6.

<sup>10</sup> Admin Record-0114.

<sup>11</sup> Tr. V. 2, 353:19-21, 360:16-19.

<sup>12</sup> *Id.*

<sup>13</sup> Ex. ED-3, p. 84.

<sup>14</sup> Tr. V. 2, p. 362.

<sup>15</sup> Tr. V. 2, p. 368.

<sup>16</sup> Tr. V. 2, p. 369.

applicable constitutional and statutory provisions; ii) in excess of TCEQ’s statutory authority; iii) made through unlawful procedure; iv) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; v) arbitrary and capricious; and vi) characterized by abuse of discretion and the clearly unwarranted exercise of discretion.

#### IV. Tier II Review

##### A. Summary

Rucker Creek and the Lake Granbury segment of the receiving waters are classified as having high aquatic life use under the TCEQ rules, and therefore TCEQ’s decision on Granbury’s permit application is subject to a Tier 2 anti-degradation review.<sup>17</sup> The Tier 1 review (preservation of attainable uses) has been discussed immediately above. The Tier 2 anti-degradation policy requires that high quality waters not be degraded absent a showing that degradation is necessary for important social or economic development.<sup>18</sup> A lowering of water quality may constitute degradation even if existing uses are not impaired, with “degradation” defined by rule as a lowering of water quality by more than a *de minimis* amount.<sup>19</sup> The baseline water quality for a Tier 2 review – from which *de minimis* would properly be determined - is the highest water quality sustained in the receiving water since November 28, 1975.<sup>20</sup> TCEQ’s IPs provide for a parameter-specific consideration of degradation, with parameters of potential concern for a Tier 2 review explicitly

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<sup>17</sup> 30 Tex. Admin. Code § 307.5(b)(2). *Save Our Springs Alliance, Inc. v. Texas Commission on Environmental Quality*, Cause No. D-1-GN-19-003030 (345<sup>th</sup> Dist. Ct., Travis County, Tex. Oct. 29, 2020) at page 5.

<sup>18</sup> 30 Tex. Admin. Code § 307.5(b)(2).

<sup>19</sup> *Id.*

<sup>20</sup> 30 Tex. Admin. Code § 307.5(c)(2)(B) (November 28, 1975 is apparently the date on which Texas first adopted water quality standards under the 1972 amendments of the federal Clean Water Act, thus reflecting the goal of avoiding degradation of water quality subsequent to adoption of the standards).



including dissolved oxygen, bacterial indicators of recreational suitability, nutrients, as well as “any other *constituents* that could lower water quality.”<sup>21</sup>

With regard to multiple parameters, Granbury has not demonstrated that the proposed discharge will not lower water quality by less than a *de minimis* extent. Nor has Granbury demonstrated that the proposed discharge is necessary for important social or economic development. Thus, the proposed discharge has not been demonstrated compliant with the Tier 2 anti-degradation review requirements of 30 Tex. Admin. Code § 307.5(b)(2). Accordingly, Findings of Fact 94, 100, and 102, as well as Conclusions of Law 10, 13, 14, 15, 16, and 17 are: i) in violation of applicable constitutional and statutory provisions; ii) in excess of TCEQ’s statutory authority; iii) made through unlawful procedure; iv) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; v) arbitrary and capricious; and vi) characterized by abuse of discretion and the clearly unwarranted exercise of discretion.

**B. Granbury has not demonstrated that Dissolved Oxygen will be lowered by a less than *de minimis* extent.**

Granbury has not demonstrated that dissolved oxygen will not be lowered by more than a *de minimis* extent. All critical conditions modeling performed by either the Executive Director or Granbury reflects the lower of dissolved oxygen concentrations by more than 1.0 mg/L at one or more points downstream of the discharge. In fact, all critical conditions modeling contained in the record performed reflects a final dissolved oxygen concentration of less than the high aquatic life criterion of 5.0 mg/L. No demonstration has been made that such a change is a less than *de minimis* lowering of water quality. To the contrary, Mr. Woody Frossard on behalf of Protestants testified

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<sup>21</sup> Ex. ED-3, pp. 61 – 62 (emphasis added).

that, “The City has not demonstrated that Dissolved Oxygen will not be lowered to a greater than *de minimis* amount.”<sup>22</sup>

**C. Granbury has not demonstrated that bacterial indicators of recreational suitability (*E. coli*) will be lowered by a less than *de minimis* extent.**

Granbury has not demonstrated that the lowering of bacterial water quality will be less than *de minimis*. The quality of the receiving waters with respect to bacteria has clearly been degraded over the years, as reflected by the development of the Lake Granbury Watershed Protection Plan to address bacteria levels within Lake Granbury. The Watershed Protection Plan noted that, “In 1993, a cooperative study between the Texas Water Commission, the Brazos River Authority (BRA) and the Hood County Health Unit first identified an **increase** in fecal coliform levels in the lake.”<sup>23</sup> Despite this official acknowledgment that bacterial levels have declined since 1975, no determination was made of the highest water quality for *E. coli* since November 28, 1975, nor did the Executive Director or Granbury attempt to make that determination in considering Granbury’s application.<sup>24</sup> Without such a determination, the extent of the lowering of water quality from baseline cannot be determined, and it cannot be said that the discharge will result in a less than *de minimis* lowering of bacterial indicators of recreational suitability in comparison to baseline water quality. In fact, Jeff Paull, who the Executive Director presented as having performed the Tier 2 anti-degradation review,<sup>25</sup> testified that he did not know whether the permit would prevent a more than *de minimis* lowering of water quality with respect to *E. coli*:

Q: So what was that Tier 2 review that you did with regard to *E. coli*?

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<sup>22</sup> Ex. GF-500, p. 16.

<sup>23</sup> Ex. GF-306, p. 17.

<sup>24</sup> Tr. V. 1, 132:4-13.

<sup>25</sup> Ex. ED-11, 14:27 – 15:7.

A: So it's asking if water quality with respect to *E. coli* in this case will be lowered by more than a de minimis amount.

(Simultaneous discussion)

Q And it's asking -- well, go ahead. Let me -- I apologize.

A: Yeah. Applying a, you know, the *E. coli* limits to the -- **your permit should help protect water quality from dropping below our criteria.**

Q: **Will it prevent water quality by being lowered by more than a de minimis amount?**

A: **I don't know.**

Q: **With regard to *E. coli*, what constitutes a greater than de minimis change?**

A: **I don't know.**<sup>26</sup>

Granbury presented Mr. David Flores to testify as to whether issuance of the permit would comply with TCEQ's Tier 2 anti-degradation requirements.<sup>27</sup> However, Mr. Flores solely evaluated whether the proposed discharge complied with Tier 2 requirements related to dissolved oxygen and nutrients.<sup>28</sup> With regard to *E. coli*, Mr. Flores' analysis went no further than that of the Executive Director's staff – who could not even say whether the proposed discharge would result in a more than de minimis lowering of water quality with regard to bacteria.

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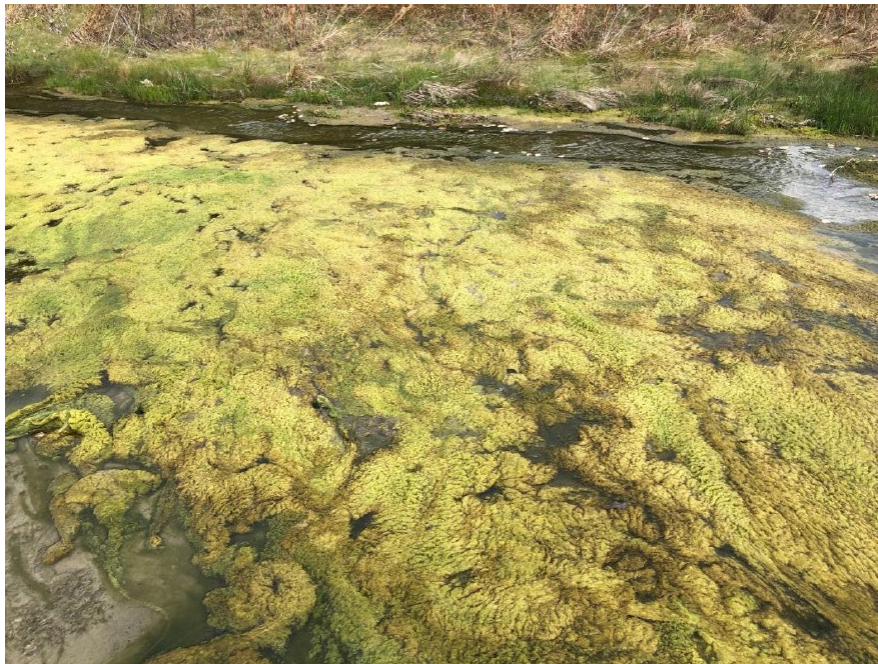
<sup>26</sup> Tr. V. 1, 130:15 – 131:3.

<sup>27</sup> Ex. COG-700, 25 :18 – 28 :8.

<sup>28</sup> Ex. COG-700, 26 :22 – 27 :2.

**D. Granbury has not demonstrated that Nutrient Water Quality will be lowered by a less than *de minimis* extent.**

Granbury has likewise not demonstrated that the lowering of nutrient water quality resulting from the discharge will be less than *de minimis*. The Watershed Protection Plan noted that, “Results of the data evaluation also indicate that there is an increasing trend in nutrients in the main body of Lake Granbury.”<sup>29</sup> This clearly indicates that higher water quality for nutrients was previously sustained in Lake Granbury. Yet, no determination of historic water quality for nutrients within Lake Granbury has been made.<sup>30</sup> The testimony of Woody Frossard graphically demonstrated the potential consequences for a water body resulting from the addition of nutrients:



**Figure 4: Algae Mats within phosphorus-sensitive stream<sup>31</sup>**

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<sup>29</sup> Ex. GF-306, p. 17.

<sup>30</sup> Tr. V. 1, 118 :1-3.

<sup>31</sup> Ex. GF-510.

Granbury's proposed discharge will be permitted to discharge more than 1.5 tons of phosphorus per year into a tributary of Rucker Creek,<sup>32</sup> and the effluent will not be appreciably diluted between the discharge and Rucker Creek.<sup>33</sup> The draft permit has no limit on the quantity of nitrogen with may be discharged.<sup>34</sup> In light of the quantity of nutrients that the draft permit would allow to be discharged, Mr. Frossard testified that Granbury has not demonstrated that the discharge will result in a less than *de minimis* lowering of water quality with respect to nutrients.<sup>35</sup>

**E. Granbury has not demonstrated that issuance of the Permit is necessary for important social or economic development.**

TCEQ's IPs provide that information relevant to a determination of whether a discharge is necessary for important social or economic development includes an evaluation of alternatives, including alternatives that could eliminate or reduce the anticipated degradation, and an assessment of cost and feasibility for reasonable alternatives.<sup>36</sup> EPA's Permit Writers' Manual provides that, in evaluating whether a discharge is necessary for important social or economic development:

The state would perform an alternatives analysis to evaluate whether the proposed discharge is actually *necessary* (i.e., whether there are less degrading feasible alternatives) and that might include consideration of a wide range of alternatives (e.g., non-discharging options, relocation of discharge, alternative processes, and innovative treatments).<sup>37</sup>

Granbury has not presented an alternatives analysis that demonstrates that the proposed discharge is necessary for important social or economic development. Granbury presented the testimony of Ray Perryman to testify as to the alleged negative consequences if no additional

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<sup>32</sup> Ex. ED-7, p. 2 & 2a (8.3 lb./d is equivalent to 3,029.5 lb./year, which is equivalent to 1.515 tons/year).

<sup>33</sup> Ex. GF-500, 19:12-18.

<sup>34</sup> Ex. ED-7, p. 2

<sup>35</sup> Ex. GF-306, p. 17-18.

<sup>36</sup> Ex. ED-3, pp. 66-67.

<sup>37</sup> Ex. Bennett 3, p. 16 of 17 (emphasis in original).

wastewater capacity was added. However, Granbury did not present an evaluation of alternatives that would avoid the proposed discharge.

Furthermore, Granbury has not demonstrated that the discharge *as proposed to be permitted* is necessary for important social or economic development. The evidence demonstrates that TCEQ has issued permits with more stringent nutrient phosphorus limits,<sup>38</sup> as well as nitrogen limits.<sup>39</sup> With regard to bacteria, Steve Esmond for Protestants testified that more stringent bacterial limitations are easily achievable.<sup>40</sup> In fact, Mr. Osting himself on behalf of Granbury offered testimony that significantly lower concentrations of *E. coli* and phosphorus are attainable.<sup>41</sup> Neither Mr. Perryman, nor any other witness presented by Granbury, addressed the cost of the additional levels of treatment (if any) that would be needed to meet the more stringent permit limitations identified. The economic or social necessity of discharging *E. coli* at a concentration of 126 CFU/100ml into a water body already impaired for harmful bacteria in which young children swim shortly upstream of a public water supply has simply not been shown. Nor has the economic or social necessity of discharging more than 1.5 tons of phosphorus per year into a tributary of Rucker Creek been shown. The evidence demonstrates that lower effluent concentrations for both *E. coli* and nutrients are technically achievable, but Granbury has made no showing that economic or social necessity justifies not including limits to ensure attainment of those lower effluent concentrations.

## **V. Denial of Protestants' Due Process and Due Course of Law Rights**

Protestants submitted their prefiled case on February 4, 2022. Applicant's prefiled case was due on February 18, 2022. Applicant's prefiled evidence, provided to the parties on February

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<sup>38</sup> Ex. GF-507, p. 5.

<sup>39</sup> Ex. GF-507, p. 6.

<sup>40</sup> Ex. GF-300, 13:22-14:1.

<sup>41</sup> Ex. COG-610.

20, 2022, contained substantial new modeling performed by Mr. Osting that was not provided through discovery responses made reasonably prior to the submission of Granbury's prefiled testimony. Up until the filing of Applicant's prefiled evidence, the only modeling provided to justify satisfaction of the 5.0 mg/L DO standard was the modeling performed by the ED in its Dissolved Oxygen Permit Review Checklist completed January 24, 2020, which indicated a concentration of DO of 4.81 mg/L in Lake Granbury. As such, the only modeling that Protestants had or knew of to address in their prefiled case was that of the ED. It is undisputed that the modeling at issue did not even exist on the date that Protestants' prefiled testimony was due.<sup>42</sup> It was only after submission of Protestants' testimony that this modeling was submitted.

In light of this new modeling, Protestants moved that either the additional modeling be struck from the record, or that Protestants be allowed the opportunity to present evidence responding to Mr. Osting's additional modeling.<sup>43</sup> The ALJs denied Protestants' motion at the prehearing conference.<sup>44</sup> During the hearing on the merits, Protestants renewed their request to present testimony by James Machin on the modeling performed by Mr. Osting.<sup>45</sup> The ALJs again denied this request.<sup>46</sup> This denial of Protestants' initial motion, and the denial of the renewed motion, was: i) in violation of applicable constitutional and statutory provisions; ii) in excess of TCEQ's statutory authority; iii) made through unlawful procedure; iv) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; v) arbitrary and capricious; and vi) characterized by abuse of discretion and the clearly unwarranted exercise of discretion.

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<sup>42</sup> Tr. V. 2, p. 375.

<sup>43</sup> Protestants' Objections to Applicant's Prefiled Testimony and Exhibits, Motion to Strike, and Alternatively, Motion for Continuance and Leave to File Rebuttal Testimony, February 24, 2022.

<sup>44</sup> Prehearing Conference Tr. 21:11-25.

<sup>45</sup> Tr. V. 3, 475:19 – 477:24.

<sup>46</sup> Tr. V. 3, 490:2-3.

Protestants presented their rebuttal testimony on this issue in the form of an Offer of Proof so that the Commission and, if necessary, a reviewing court can see that Mr. Osting's new data actually demonstrates that the ED's modeling is overly optimistic.

Protestants were entitled to present responsive evidence pursuant to Federal Constitutional Due Process Rights, Texas Constitution Due Course of Law Rights, the Texas Administrative Procedure Act, and the TCEQ rules. Constitutional due process in administrative proceedings is judged by the presence of the rudiments of fair play. Here, Granbury was allowed to present unforeseeable evidence which Protestants had not seen at the time of the deadline for their testimony, and Protestants were given no opportunity to present responsive evidence.

The Texas APA provides that "each party is entitled to an opportunity . . . . to respond to and to present evidence and argument on each issue involved in the case."<sup>47</sup> Allowing the City of Granbury to present modeling that did not even exist at the time of Protestants' prefiled case, without an opportunity for rebuttal, denied Protestants this opportunity. The TCEQ rules provide that, "[a]ny party may present a rebuttal case when another party presents evidence that could not have been reasonably anticipated."<sup>48</sup> Here, Protestants could not have anticipated the new modeling that Granbury's experts performed, and the significant mistakes that modeling would contain.

In testimony the ALJs refused to admit, Mr. Machin performed additional QUAL-TX modeling with utilized the adjusted parameters presented by Mr. Osting, while also appropriately adjusting the reaeration rates for the modeling. Mr. Machin's adjustment of the reaeration rates complied with normal TCEQ practice and policy regarding use of the model, unlike Mr. Osting's modeling identified by the ALJs in the PFD, which failed to comply with normal TCEQ practice

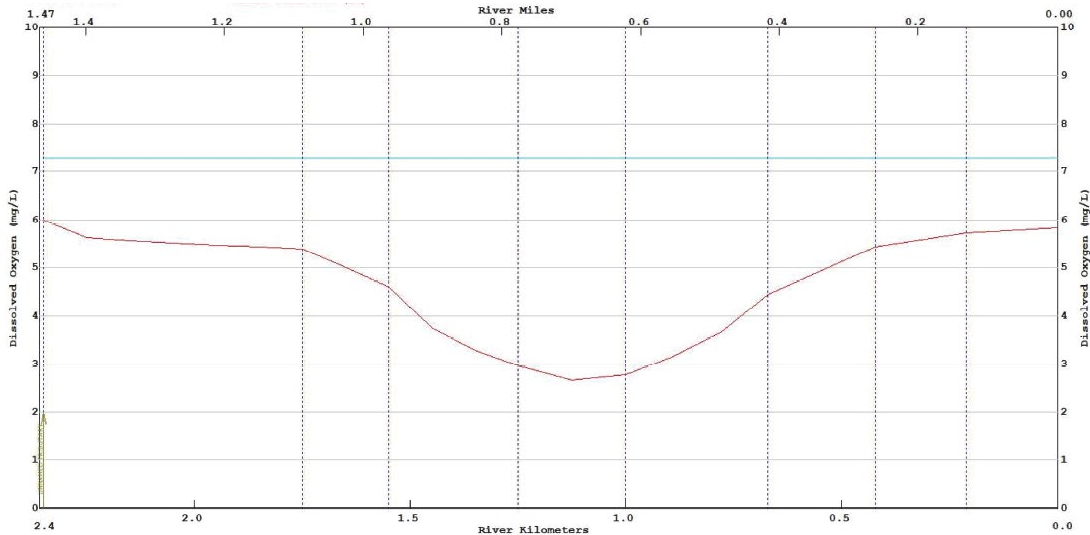
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<sup>47</sup> Tex. Gov't Code § 2001.051.

<sup>48</sup> 30 Tex. Admin. Code § 80.117(b).



and policy. Mr. Machin’s compliant modeling demonstrated that the dissolved oxygen levels in the receiving waters would drop to concentrations of *less than 3.0 mg/L* as a result of the discharge:<sup>49</sup>



**Predicted Downstream Dissolved Oxygen Concentrations, with corrected depths and reaeration rates<sup>50</sup>**

Mr. Machin’s modeling, in combination with the 2008 TCEQ study findings, demonstrates that, far from being conservative, the modeling performed by the Executive Director is overly optimistic. The actual impact of the discharge, as fully permitted, is more likely to result in a dissolved oxygen level closer to the ultimately modeled level of 2.8 mg/L, than the 4.81 mg/L modeled by the Executive Director.

The Commission continued to refuse to consider this evidence at the time of its own consideration of the matter. That refusal to consider Protestants’ evidence was: i) in violation of applicable constitutional and statutory provisions; ii) in excess of TCEQ’s statutory authority; iii) made through unlawful procedure; iv) not reasonably supported by substantial evidence

<sup>49</sup> Offer of Proof Tr. 497:17:22.

<sup>50</sup> Ex. GF-8 (Offer of Proof).

considering the reliable and probative evidence in the record as a whole; v) arbitrary and capricious; and vi) characterized by abuse of discretion and the clearly unwarranted exercise of discretion.

**VI. Proper Notice of a Tier 2 consideration of social and economic need was not provided.**

TCEQ failed to provide the notice required by its own rules in this matter in relationship to the agency's application of the Tier 2 anti-degradation policy. TCEQ rules require that "[w]hen degradation of waters exceeding fishable/swimmable quality is anticipated, a statement that the antidegradation policy is pertinent to the permit action must be included in the public notice for the permit application or amendment."<sup>51</sup> This notice allows the public to prepare to address in comments and during the hearing whether a proposed discharge is necessary for important social or economic development.

The Commission engaged in a consideration of the factors relevant under a Tier 2 evaluation when degradation is anticipated, without providing the public with the required notice of that consideration. At Findings of Fact 103 – 114, the Final Order contains numerous findings related to Granbury's allegation of need for the proposed wastewater treatment plant in relationship to the asserted economic development of the City of Granbury as relevant under the Tier 2 anti-degradation policy. For example, Finding of Fact 110 asserts that, without additional wastewater capacity, Granbury is projected to lose \$45.3 million in annual real gross product and 597 jobs by 2040. In large part, these findings are premised upon the conclusory testimony of Ray Perryman, presented as an expert by City of Granbury in the City's attempt to demonstrate that the lowering of water quality by a more than *de minimis* amount was necessary for important social or economic

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<sup>51</sup> 30 Tex. Admin. Code § 307.5(c)(2)(D).

development.<sup>52</sup>

The necessity of the authorization for important social or economic development was not an issue on which the Commission sought SOAH determination. Protestants were not placed on notice that the issue would be addressed, and the ALJs were not directed to make a finding on this point. The Commission did require that the ALJs determine whether the draft permit should be altered based on a consideration of need under Texas Water Code § 26.0282<sup>11</sup> and the ALJs concluded the draft permit did not need to be altered.<sup>12</sup> This finding is not part of the anti-degradation de minimis review and the evidence is not the same, as can be seen in TCEQ's IPs and in the EPA's guidance on the issue.

During the hearing on the merits, Protestants responded to the presentation of testimony by Mr. Perryman by a motion that the matter be re-noticed such that the public could have the opportunity to provide evidence as to the *lack* of a need for the discharge for important social or economic development.<sup>53</sup> The ALJs denied this motion, stating that they would address the sufficiency of notice in their Proposal for Decision.<sup>54</sup> Yet, the Proposal for Decision did not address Protestants' arguments offered during the hearing regarding insufficient notice under the anti-degradation notice provisions. The ALJs' denial of Protestants' hearing motion that the matter continued pending new notice was: i) in violation of applicable constitutional and statutory provisions; ii) in excess of TCEQ's statutory authority; iii) made through unlawful procedure; iv) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; v) arbitrary and capricious; and vi) characterized by abuse of discretion and the clearly unwarranted exercise of discretion.

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<sup>52</sup> See Ex. COG-800, p. 3.

<sup>53</sup> Tr. V. 3, p. 474 – 475.

<sup>54</sup> Tr. V. 3, p. 490.

## VII. Conclusion

For these reasons, TCEQ's issuance of new TPDES Permit No. WQ0015821001 to the City of Granbury was: i) in violation of applicable constitutional and statutory provisions; ii) in excess of TCEQ's statutory authority; iii) made through unlawful procedure; iv) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; v) arbitrary and capricious; and vi) characterized by abuse of discretion and the clearly unwarranted exercise of discretion. Protestants respectfully pray that the TCEQ set this matter for rehearing, and, upon rehearing, that TCEQ deny Granbury's Application.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I do hereby certify that on November 18, 2022, a true and correct copy of the above and foregoing document was electronically served on the parties listed below.

/s/ Eric Allmon  
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