

CAUSE NO D-1-GN-19-003030

IN THE 459TH JUDICIAL DISTRICT COURT
OF TRAVIS COUNTY, TEXAS

SAVE OUR SPRINGS ALLIANCE, INC.,
Plaintiff,

v.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY,
Defendant.

On Judicial Review from the
Texas Commission on Environmental Quality
TCEQ Docket No. 2017-1749-MWD

OPENING BRIEF OF PLAINTIFF SAVE OUR SPRINGS ALLIANCE

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STATEMENT OF THE CASE

Plaintiff Save Our Springs Alliance (SOS) seeks judicial review of the Texas Commission on Environmental Quality's (TCEQ) final order issuing a permit to the City of Dripping Springs authorizing discharge of domestic wastewater into waters of the state.¹ The final agency order was issued following the completion of a contested case hearing before the State Office of Administrative Hearings. Chapter 10 of the Local Rules for Travis County District Court applies to this case.

TCEQ issued its final order granting the permit on March 6, 2019. The order adopted the Administrative Law Judge's Proposal for Decision and made Findings of Fact and Conclusions of Law nearly identical to those proposed by the Administrative Law Judge. SOS timely filed a Motion for Rehearing, which was overruled by operation of law on April 30, 2019. Having exhausted all administrative remedies, SOS timely filed this appeal.

¹ A Glossary of Technical Terms, including acronyms and shorthand terms, follows the Certificate of Service page in this brief.

ISSUES PRESENTED FOR REVIEW

1. Whether TCEQ committed error of law and abused its discretion in issuing its final order granting the City's Permit, in violation of state and federal Clean Water Act rules prohibiting more than a *de minimis* degradation of "high quality waters."
2. Whether TCEQ's decision to grant the City's Permit is supported by substantial evidence, where the evidence showed that the discharge would increase nitrogen and phosphorus pollution by orders of magnitude over ambient water quality conditions.
3. Whether TCEQ committed error of law and abused its discretion in issuing its final order granting the City's Permit, in violation of state and federal Clean Water Act rules prohibiting impairment of designated uses and requiring protection of existing aquatic life, including native species.
4. Whether TCEQ misinterpreted and misapplied state and federal rules under the Clean Water Act in finding that the public notices for the Permit were sufficient, despite the undisputed fact that the notices only identified the body of receiving water, rather than the location of the discharge point, as required by the regulations.

STATEMENT OF FACTS

Plaintiff Save Our Springs Alliance seeks judicial review of the TCEQ's final order approving a permit authorizing the City of Dripping Springs to discharge up to 822,500 gallons per day of treated municipal wastewater into Onion Creek in Hays County. This permit, called a "Texas Pollutant Discharge Elimination System," or TPDES permit, is issued under the federal Clean Water Act and EPA and TCEQ rules implementing the Act. The Act seeks to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The primary goal of the Act was to eliminate the discharge of pollutants into the nation's waters by 1985. *Id.* Hence, the CWA permit name: pollutant discharge *elimination* system. TCEQ rules governing discharge permit approvals must be interpreted consistent with and at least as stringent as EPA rules. 40 C.F.R. § 123.25.

At the time the City's discharge permit was approved, the City held another type of TCEQ permit allowing treatment of up to 350,000 gallons per day of sewage. AR B, Doc. 200 at 31:17-19 (Faught Prefiled).¹ That permit—called a Texas Land Application Permit, or TLAP—prohibits the City from discharging any of its treated sewage into Onion Creek or any other stream. AR B, Doc. 269 at 29:4-6 (Ross Prefiled). As the permit name suggests, that permit requires the City's treated wastewater to be irrigated on land, or beneficially reused for landscape watering. AR B, Doc. 200 at 31:6-9; Doc. 269

¹ The Administrative Record compiled at TCEQ and SOAH is on file with the Court. It consists of one flash drive containing five folders, divided as follows: A. Documents; B. Exhibits; C. Transcripts, D. Audio records of meetings and hearings, and E. Public comment letters. Citations to the record will begin as "AR" followed by a letter representing the folder that contains the record, "Doc." and the document number as identified in the Index and file names. Sometimes, further information will be given, for example, a document's title or description or a reference to pages within a document.

at 29:20-21. In either case, the treated wastewater must not be discharged into State-owned public waters, and instead must be irrigated onto land, where it is assimilated by plants and soils and evaporated into the atmosphere. A settlement agreement entered into between the City and other parties on the discharge permit challenged here provides that there will be no discharge of pollutants up to 399,000 gallons per day of treatment, but once that threshold is reached, up to the entire 822,500 gpd may be discharged into Onion Creek. AR Doc. 82 at 7 (Settlement Agreement).

In the Edwards Aquifer, central Texas region, most of the TCEQ municipal wastewater treatment plant permits are TLAP permits that prohibit discharge to public streams or reservoirs. AR B, Doc. 269 at 29-32. In some areas, such as those surrounding the Highland Lakes, discharges are prohibited by TCEQ rule. 30 TAC § 311.2. In areas where discharges are not prohibited, TLAP non-discharge permits are most common in part because CWA water quality standards prohibit degradation of the high-quality, crystal clear waters of the Texas Hill Country. These “anti-degradation” standards are very hard or impossible to meet when significant volumes of municipal sewage are placed into clear, limestone, and often small (low volume flowing) streams. These standards, set out at TCEQ rule 30 TAC § 307.5 and EPA rule 40 C.F.R. § 131.12, as applied to the approved discharge to Onion Creek, are at the heart of this dispute.

More specifically, this case focusses on whether the TCEQ’s final order rests on proper legal interpretations of the anti-degradation rules, known as Tier 1 and Tier 2, as applied to the nutrient pollutant constituents, phosphorus and nitrogen, found in and authorized by the final permit, and as

applied to the chemical and biological changes in the stream caused by the phosphorus and nitrogen in the approved discharge.

Plaintiff SOS and the other parties focused on the phosphorus and nitrogen components of the discharge because “[c]ultural inputs of excess phosphorus (P) and nitrogen (N) are a leading cause of stream impairment around the world.” AR B, Doc. 269 at 220.²

These two nutrients act as food, or fertilizer, for aquatic plants, most notably algae. When introduced to a stream with naturally low levels of these fertilizing nutrients, the resulting nutrient “enrichment” causes chemical and biological reactions that alter the makeup of the stream’s ecosystem. *Id.* at 24:1-16, 221. Most notably, algae growth increases, the species of algae change, and aquatic invertebrates, fish and other species that favor higher-nutrient conditions displace the native species that have adapted over eons to the low-nutrient conditions (and other conditions like water clarity, minimal algae growth, and high dissolved oxygen associated with low-nutrient stream conditions.). *Id.* at 23:16-20, 226-27.

The federal Environmental Protection Agency and TCEQ have focused on the problem of nutrient pollution, especially of high quality streams that are naturally very low in nutrients (and thus very low in algae growth and high in clarity), for decades. In 2001, EPA published its *Ambient Water Quality Criteria Recommendations [for] Rivers and Streams in Nutrient Ecoregion IV*. Plf. App’x 11 (AR B, Doc. 269 at 170-211). The report summary explains that its recommended “ecoregional nutrient criteria address cultural eutrophication—the adverse effects of excess human-caused nutrient inputs.”

² Taylor JM *et al.* *Spatial, temporal, and experimental: Three study design cornerstones for establishing defensible numeric criteria in freshwater ecosystems*. J APPL ECOL. 2018;00:1-20. Attached as Exhibit S to SOS Exhibit No. 7 (Ross Prefiled Testimony).

Plf. App'x 11 at vii. Ecoregion IV is made up of the “Great Plains Grass and Shrublands” where “measured nitrogen and phosphorus levels in streams are generally much lower than in regions dominated by cropland agriculture or urban-suburban development. *Id.* at 9. The Edwards Aquifer watershed is identified as Sub-Ecoregion 30 within EcoRegion IV, with “a sparse network of perennial streams” that are “relatively clear and cool compared to those of surrounding areas.” *Id.* at 12. The EPA 2001 report recommended 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—which are intended to be “starting points” for the states to develop more refined nutrient standards.

Onion Creek is a prime example of an Edwards Aquifer ecoregion stream with naturally low levels of phosphorus and nitrogen. As a result, the waters are very clear with very little algae growth, as shown here:



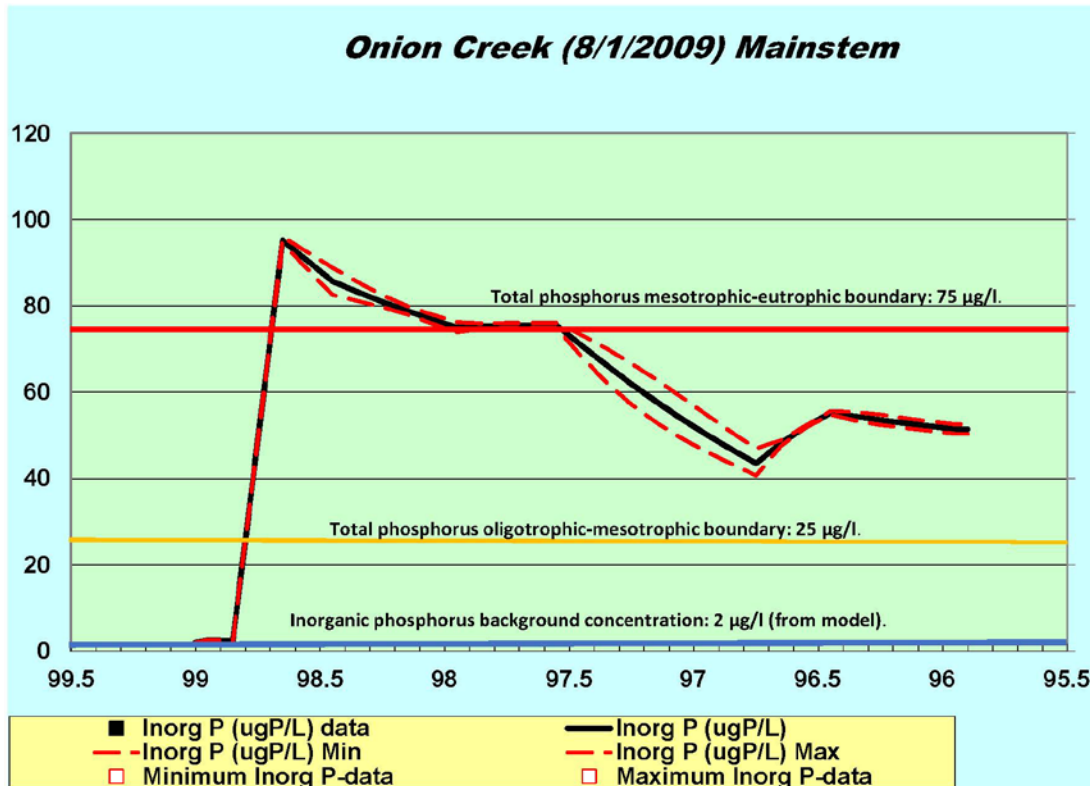


AR B, Doc. 269 at 62-63. (Ex. C to Ross Prefiled).

As explained by the City's expert, Dr. James Miertschin, the natural, background level of Total Phosphorus (TP) in Onion Creek is generally below the level of detection in water chemistry labs certified by the TCEQ. Plf. App'x 12 at 288 (AR C, Doc. 285). Since background, naturally-occurring levels of TP are below approved laboratory levels of detection in Onion Creek, those levels are estimated. *Id.* at 287-88. Dr. Miertschin testified that his best estimate of background levels of TP was 0.005 to 0.009 milligrams per liter (mg/L), or 5 to 9 micrograms/L ($\mu\text{g/L}$). *Id.* at 287. Neither the ED's nor SOS's experts disputed this estimate of background TP. And neither the ED's analysis nor the TCEQ's final order contained a finding of fact for baseline TP concentrations in Onion Creek.

By contrast, the Permit allows discharge of treated sewage with up to 0.15 mg/L TP, measured as a “daily average.” Plf. App’x 2, at 4 (AR A, Doc. 169). Thus, simple math tells us that the TP concentration allowed in the discharge is 16.7 to 30 times higher than Onion Creek background levels of TP. SOS introduced evidence that this would result in a predicted 0.14 mg/L (140 µg/L of TP. AR B, Doc. 269 at 246 (Ex. U to Ross Prefiled). Stated in percentage terms, the discharge is expected to increase TP levels by 1555% to 2800% above agreed-on best estimates of Onion Creek background TP concentrations.

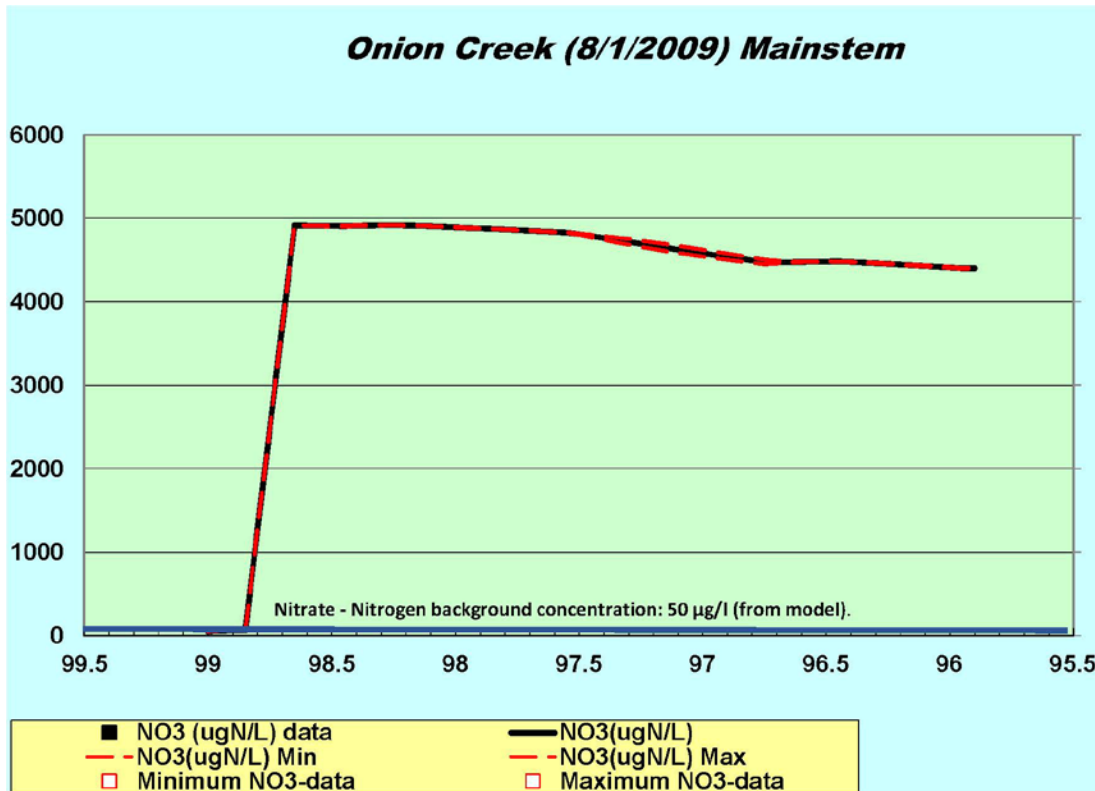
The City’s expert, Dr. Miertschin, predicted a slightly smaller increase in stream TP levels, as illustrated in the following chart, prepared by SOS expert Dr. Lauren Ross based on Dr. Miertschin’s data.



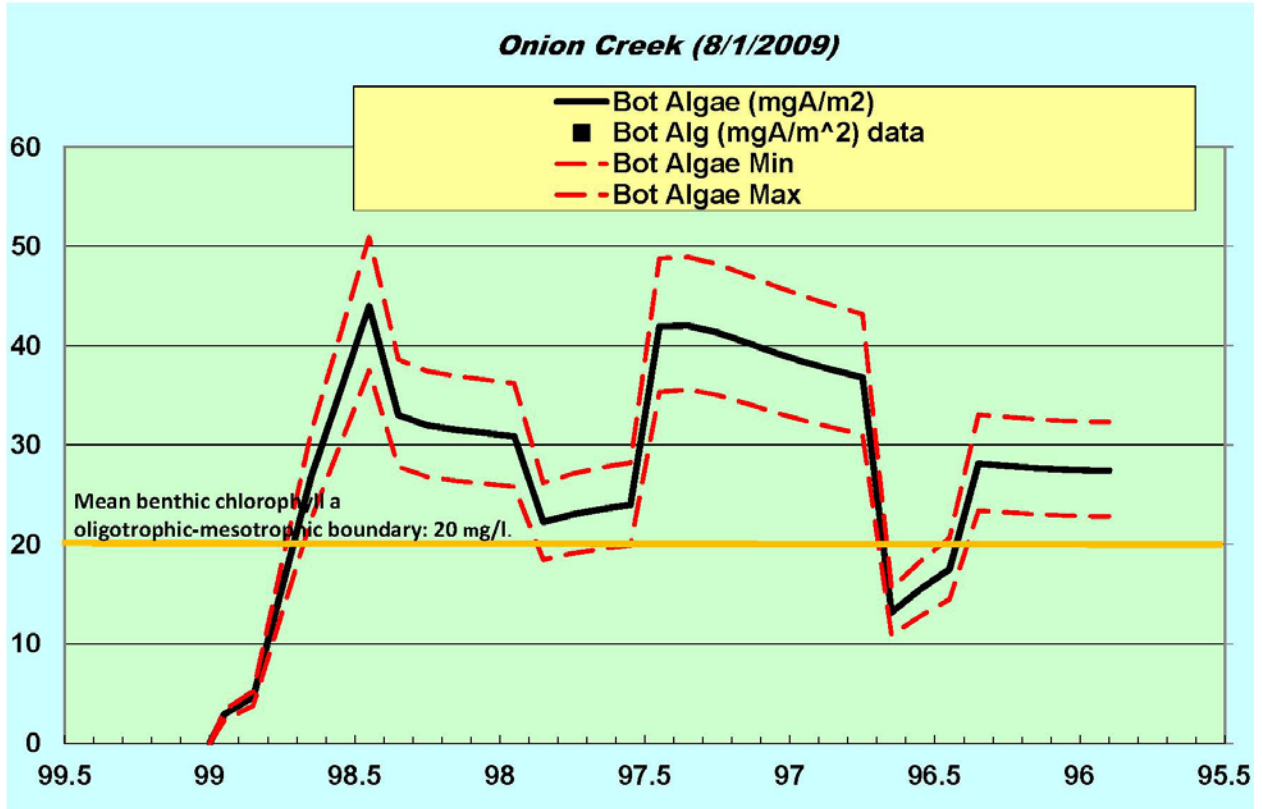
Plf. App’x 13 (AR B, Doc. 271). As shown, the City expert’s water quality modelling predicted background phosphorus of 2 µ/L to increase to almost

100 μ /L with the permitted discharge (on Y axis). Also as shown, Dr. Miertschin predicted this spike in phosphorus would then diminish—the downward sloping line—over about 3 kilometers of Onion Creek. (The horizontal X axis shows creek kilometers, as measured from the confluence of Onion Creek with the Colorado River.) However, phosphorus would still be about 50 μ /L at that point. In other words, TP would increase 50 times above background, or 5000%, and stay above 25 times, or 2500% higher over at least 3 kilometers.

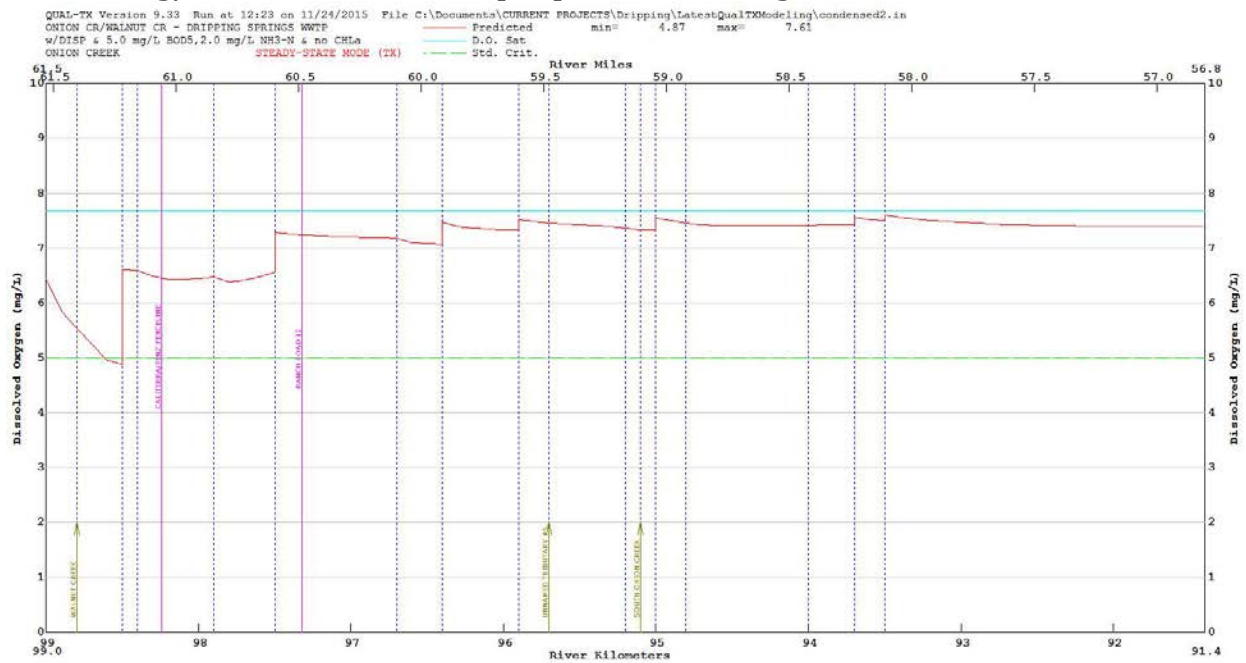
Similarly, Dr. Miertschin estimated natural, background Onion Creek concentrations of Total Nitrogen at 0.5 milligrams per liter, increasing to 5.5 mg/L at the full permitted discharge, for an 1100% increase. AR Doc. 285 at 288. (The approved permit allows 6.0 mg/L TN in the discharge. AR A Doc. 169 at 251; Plf. App'x 2, at 4.) The chart below shows Dr. Miertschin's prediction for nitrogen increases in the Onion Creek from the point of discharge to point roughly 3 kilometers downstream.



Plf. App'x 14 (AR B, Doc. 270). Dr. Miertschin's modelling efforts also took these inputs of TP and TN in background, natural conditions and then with the approved discharge, estimated increased algae growth. Caused by the nutrient inputs. That prediction, shown below, predicts that bottom dwelling (benthic) algae, measured as chlorophyll-*a* in the algae, would increase from below 5 milligrams per square meter (mg/m^2) to a range between 30 and 50 mg/m^2 .



Plf. App'x 13 (AR B, Doc. 271). Dr. Miertschin also predicted dissolved oxygen levels would dip from a maximum recorded level of 7.61 mg/L to a low of 4.87 mg/L, as a result of the proposed discharge.



AR B, Doc. 237 (Ex. APP_10-14 to Miertschin Prefiled).

While these background levels and predicted levels of TP, TN, DO, and algae growth were not directly disputed with conflicting evidence, all parties agreed that Dr. Miertschin's methods underestimated the increase in TP, TN, and algae and the decrease in DO at "critical low flow" conditions under which compliance with water quality standards must be measured.

Dr. Miertschin's analysis assumed a background flow of Onion Creek at 0.3 cubic feet per second (cfs) (or 135 gallons per minute). TCEQ rules required that compliance with water quality standards is measured under low flow conditions known as the "7Q2 flow." 30 TAC § 307.8. This is the lowest flow of the creek over seven days that reoccurs on average every two years. *Id.* § 307.3(16). That required 7Q2 value for Onion Creek is 0.12 cfs. AR A, Doc. 88 at 3 (Statement of Basis/Technical Summary and ED's Preliminary Decision). Thus, Dr. Miertschin's analysis at 0.3 cfs background creek flows was at flows 2.5 times higher than at the required 0.12 cfs flow rate—meaning the nutrients and their impacts on stream chemistry and algae growth were substantially diluted with much more clean background creek flows than the rules require. At the 0.12 cfs flow rate, the increases (and decrease for dissolved oxygen) would be worse than predicted.

For perspective, the approved 822,500 gallons per day discharge volume equals 1.27 cfs. Plf. App'x 16 (AR B, Doc. 269 at 246). Thus, the full permitted discharge is ten times that of the 7Q2 flow level; at least 90% of the creek flow would be treated sewage.

While the above summarized science was generally agreed upon, other science introduced by the parties was disputed. Several scientific studies in the record, funded by EPA and TCEQ and carried out by scientists at Baylor

University, Texas A&M University, and the U.S. Dept. of Agriculture that, in short, found that once Total Phosphorus in naturally low nutrient streams increased above the 20 to 30 µg/L range, native assemblages of algae and other species began to be lost and other, more nutrient-tolerant species took their place. Plf. App'x 17 (AR Doc. 269 at 220-229); Plf. App'x 18 (AR Doc. 241). These studies were funded and prepared with an eye toward TCEQ setting numeric standards for TP in Texas streams. However, no such numeric standards have been adopted by TCEQ at this time.

By contrast, the City pointed to a study by Jeff Mabe of the U.S. Geological Survey, in cooperation with TCEQ, that pointed to increases in stream nitrogen from wastewater, along with increased and stabilized stream flow from such discharges, being associated with increased stream productivity and increased species diversity, thus having “positive” impact that “benefit” aquatic life. Plf. App'x 3 at 16, 24 -27 (AR A, Doc. 162), *citing* Plf. App'x 12 (AR B, Doc. 269 at 113-167). Based primarily on this study, the City's arguments, and a finding that TCEQ experts had followed the antidegradation procedures, the final order concluded that the increases in nutrients and algae growth that would result from the proposed discharge would not impair aquatic life uses, would not cause nuisance algae growth, and would not violate either the Tier 1 or Tier 2 antidegradation standards. Plf. App'x 1 at p. 6 ¶37, p. 8 ¶59, p. 9 ¶74, p. 12 ¶113, p. 16 ¶¶8-14. The ALJ, and the agency's final order, reached similar conclusions that the proposed discharge would not violate antidegradation standards for DO or increased algae growth. Plf. App'x 1 at p. 9, ¶¶74-76, p.15 ¶¶12-13; Plf. App'x 3 at 18-19.

The evidence and findings of fact and conclusions of law relevant to the Tier 1 and Tier 2 antidegradation issues are set out in more detail within the arguments below.

Finally, Plaintiffs challenge whether the notice given by TCEQ for the location of the proposed discharge was adequate under agency rules. The evidence shows that public notices did not include a description of the location of the proposed discharge point, in violation of the plain meaning of the rules.

TCEQ erroneously found that the required notices “provide[] a general description of the proposed discharge point.” Plf. App’x 1 at 14 ¶¶130, 132. The Order’s findings and conclusions that the notice’s text was sufficiently descriptive are arbitrary and capricious, are not supported by substantial evidence, and are inconsistent with applicable law. However, the final order concludes that notice was adequate. Plf. App’x 1 at 14, 21.

SUMMARY OF THE ARGUMENT

SOS asks this court to reverse TCEQ's decision permitting the City to discharge 822,500 gallons of treated sewage per day into Onion Creek, a crystal-clear Hill Country stream with high water quality that warrants heightened protection under state and federal rules. The federal Clean Water Act, administered by TCEQ in Texas, and CWA-mandated TCEQ rules require protection of the stream for swimming, native aquatic life, and public water supply uses. These rules prohibit the approval of new pollutant discharge permits that would degrade the high-quality waters of Onion Creek. The approved permit allows increases of key pollutants by orders of magnitude, thereby violating these rules as a matter of law or as an abuse of agency discretion.

While misinterpreting the law, TCEQ's decision also lacks substantial evidence to support the conclusions that the permit will not, under summer low-flow conditions, reduce water quality more than a *de minimis* amount or impair existing aquatic life uses. It is undisputed that the approved discharge will increase nitrogen and phosphorus pollutants by more than 1,555 percent during low creek flow conditions and that algae growth will increase nine times above background levels. Dissolved oxygen in the creek will also be reduced substantially by the approved discharge.

TCEQ's rule prohibits lowering of water quality more than a "*de minimis*" amount, which is a term left undefined by TCEQ. Thus its common, ordinary meaning applies. The prohibition on lowering water quality no more than a "*de minimis*" amount must also be interpreted consistent with the federal Environmental Protection Agency's rule that there can be no lowering of water quality from a permitted discharge into "high-quality" public streams.

TCEQ's conclusion that such a massive increase in nutrient pollution and algae growth, and a large reduction in dissolved oxygen, will not lower water quality lacks a reasonable basis and cannot withstand scrutiny under federal and state laws, regulations, and EPA guidance. There is no plain language, common sense or other legal interpretation of the "*de minimis*" anti-degradation rule that can accommodate such a massive increase in nutrient pollution and algae growth.

"De minimis" and *orders of magnitude* pollutant increases are antithetical.

Furthermore, the substantial evidence—consisting of many years of published, peer-reviewed scientific research sponsored by TCEQ—establishes that the undisputed increases in nutrient pollution from the approved discharge would, if allowed to stand, harm native aquatic life in violation of the Clean Water Act standard prohibiting impairment of existing aquatic life communities. The Agency's failure to make findings of underlying facts, supported substantial evidence and reasonably connected to its ultimate findings and conclusions is arbitrary, capricious and an abuse of discretion.

In addition, TCEQ erred in finding that the public notices about the permit complied with state and federal regulations. Those regulations require that the notice identify the location of the proposed discharge point. The notices given fail to show the location of the discharge point, more than a mile upstream of the sewage treatment plant location that was shown. TCEQ's finding that the notices were sufficient rests on a misinterpretation of the law, misstatement of the facts, or both.

Plaintiff requests that TCEQ's Order granting the permit be reversed and declared in violation of law.

STANDARDS OF REVIEW

This appeal is governed by the Administrative Procedure Act (APA), Tex. Gov't Code §§ 2001.001-.903. Accordingly, this Court must 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).

The Third Court of Appeals and the Texas Supreme Court have commented on and interpreted these APA standards of review at length. The following points are particularly relevant to this appeal.

As to errors of law, administrative rules are interpreted like statutes, under traditional principles of statutory construction. *Tex. Comm'n on Env'tl. Quality v. Maverick Cnty.*, No. 03-17-00785-CV, 2019 Tex. App. LEXIS 9981 at *12 (Tex. App.—Austin Nov. 15, 2019, no pet. h.). 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.*

An agency acts arbitrarily if it makes a decision without regard for the facts, if it relies 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. [] In other words, we must remand for arbitrariness if we conclude that the agency has not ‘genuinely engaged in reasoned decisionmaking.’

Heritage on the San Gabriel Homeowners Ass’n v. Tex. Comm’n on Env’tl. Quality, 393 S.W.3d 417, 423 (Tex. App.—Austin, 2012) (cit. omitted). Moving from the errors of law and arbitrary or capricious review standards, the Third Court of Appeals recently held that:

A substantial evidence review of an agency’s final decision or action 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.

Maverick Cty., 2019 Tex. App. LEXIS 9981 at *7-8. The court went on to observe that the first inquiry may entail questions of law, while the second inquiry is highly deferential to the agency’s determination. *Id.* at *8. There is an initial presumption of substantial evidence, and the evidence may preponderate against the agency’s decision but need only be such that a “reasonable mind” might accept as adequate to support a finding of fact. *Id.*

The reviewing court must consider only the record upon which the decision is based, as delineated by statute. Tex. Gov't Code §§ 2001.175; 2001.060.

Even if supported by substantial evidence, however, an agency order may be arbitrary and capricious if a denial of due process has prejudiced the litigant's rights, or 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). An agency also acts arbitrarily if it reached a completely unreasonable result after considering relevant factors, or if “otherwise there does not appear a rational connection between the facts and the decision.” *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).

ARGUMENT AND AUTHORITIES

I. TCEQ'S FINAL ORDER VIOLATES THE TIER 2 ANTIDegradation *DE MINIMIS* STANDARD AS A MATTER OF LAW, IS ARBITRARY AND CAPRICIOUS, AND IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. The Legal Basis for the Anti-Degradation Rules

Congress enacted the federal Clean Water Act to “restore and *maintain* the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a)(emphasis added). Further, the Act established a goal of the total elimination of wastewater discharges by 1985. Towards these ends, the Act establishes a permitting system to regulate discharges into waters of the United States, the “National Pollutant Discharge Elimination System” (NPDES). Initially, the federal Environmental Protection Agency (EPA) issued these permits. However, the Act also allows a state to develop its own permitting program and seek approval to implement that program in place of EPA.

In 1998, EPA delegated to TCEQ the authority to administer and enforce the NPDES program through implementation of the Texas Pollutant Discharge Elimination System (“TPDES”). 63 Fed. Reg. 51,164 (Sept. 24, 1998); *see* Tex. Water Code § 26.027. The discharge Permit at issue here was issued under this authority.

i. Water Quality Standards

States administering a permitting program must ensure compliance with the Clean Water Act, 33 U.S.C. § 1342(b), and must adopt standards that are at least as stringent as those established in the Act and EPA’s CWA rules. 40 C.F.R. § 123.25. Among the required standards to be adopted are “water quality standards” for every body of water within a state. *See* 33 U.S.C. § 1313. These standards are the mechanism to ensure that any permits issued are

consistent with the Act's intent to protect and maintain water uses and quality. They include three components: (1) designated uses for each waterbody, such as recreation, aquatic life habitat, or public water supply; (2) specific criteria necessary to protect those designated uses; and (3) an anti-degradation policy designed to protect existing uses and preserve the present condition of the waters. 33 U.S.C. §§ 1313(a),(c)(2)(A), (d)(4)(B); 1342(o)(3); 40 C.F.R. § 131.12.

The Texas Surface Water Quality Standards are set forth in Chapter 307 of TCEQ's rules. 30 TAC §§ 307.1-307.10. These standards divide the state's major waterways into segments and assign uses to those segments. *Id.* § 307.10. Texas's water quality standards include numeric and "narrative" criteria designed to protect those assigned uses. *Id.* §§ 307.4, 307.7. Relevant here, TCEQ has established numeric standards for dissolved oxygen concentrations to support existing aquatic life uses. *Id.* § 307.4(h). For nutrients, TCEQ uses narrative criteria, for example, a general criterion that nutrients from permitted discharges shall not cause excessive growth of aquatic vegetation which impairs an existing or presumed use. *Id.* § 307.4(e).

ii. The Anti-Degradation Policy

Beyond simply protecting existing uses, the Clean Water Act is intended to *maintain* water quality, including the "chemical integrity" of water bodies. 33 U.S.C. § 1251(a). Any water quality standards established under the Act, whether state or federal, must "enhance the quality of water and serve the [Act's] purposes." 33 U.S.C. § 1313(c)(2)(A). With these goals in mind, EPA promulgated an Anti-Degradation Policy in 1975 and revised it in 1983 to provide special protection for "high quality waters." 40 Fed. Reg. 55,334, 55,336 (Nov. 28, 1975); 48 Fed. Reg. 51,400 (Nov. 8, 1983). This policy

protects against lowering of water quality in waters with quality exceeding (cleaner than) the standards necessary to protect aquatic life and contact recreation uses (known by the shorthand “fishable/swimmable” standard). 48 Fed. Reg. at 51,403. In 1987, Congress amended the Act confirming the anti-degradation policy and states’ responsibilities thereunder. 33 U.S.C. § 1313(d)(4)(B); *PUD No. 1 of Jefferson Cnty. v. Wash. Dep’t of Ecology*, 511 U.S. 700 (1994). Although referred to as a “policy,” it is an EPA rule to which the TCEQ rule must be at least as stringent.

The EPA rule provides, in pertinent part:

(a) The State shall develop and adopt a statewide anti-degradation policy, [which] shall, *at a minimum*, be consistent with the following:

(1) Existing instream water uses and the level of water quality necessary to protect the *existing uses* shall be maintained and protected

(2) *Where the quality of the waters exceeds levels necessary to support the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State’s continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully.*

40 C.F.R. § 131.12 (emphasis added).

The anti-degradation policy of TCEQ's TPDES program provides:

(b) Anti-degradation policy. In accordance with the Texas Water Code, § 26.003, the following provisions establish the anti-degradation policy of the TCEQ.¹

(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 TCEQ'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 TAC § 307.5 (emphasis added).

The first provision in the EPA and TCEQ rules is referred to as “Tier 1” review. It applies to all water bodies and prohibits impairment of designated water uses, most notably aquatic life uses and contact recreation (swimming).

The second provision in both rules is known as “Tier 2” review. This review applies only to waters that “exceed”—are cleaner than—water quality necessary to protect aquatic life and contact recreation uses. The TCEQ rule approximately mimics the federal rule above, with the notable difference that

¹ Texas Water Code § 26.003 provides in relevant part, that it is the policy of the State to maintain the quality of water in the state consistent with the public health and enjoyment, taking into consideration the economic development of the state.

it provides that water quality must not be lowered more than a “*de minimis*” extent.

B. TCEQ’s Application of the Tier 2 Anti-degradation Standard

In applying the Tier 2 rule, there are several points that are not in dispute. First, the City chose not to seek a finding of “important economic or social development” in order to obtain a variance to the prohibition on lowering water quality more than a *de minimis* amount. Instead, TCEQ concluded that “[a] Tier 2 review confirmed that no significant degradation of water quality is expected in Onion Creek, which has been identified as having high aquatic life uses, such that the existing uses will be maintained and protected.” Plf. App’x 1 at 10 ¶90.

Second, since the state rule must be at least as stringent as the federal rule, “no more than *de minimis*” lowering of water quality must therefore equate to no lowering of water quality; water quality must be maintained.

Third, it must be interpreted consistent with the Act that not just uses and biological function of our Nation’s waters are to be maintained, but also that the “chemical . . . integrity” of the waters must be maintained.

Fourth, the evidence establishes that there are not special or technical meanings of the term *de minimis* in the rule. In the absence of any regulatory definition or interpretation, the common, ordinary meaning of a statutory (or regulatory) term applies. *Tex. Workforce Comm’n v. Wichita Cnty.*, 548 S.W.3d 489, 492 (Tex. 2018). The standard dictionary definition of “*de minimis*” is “too trivial or minor to merit consideration, especially in law.” OXFORD AMERICAN DICTIONARY (3d ed. 2010).

Plaintiff respectfully submits that the inquiry should end here. No reasonable person—no legal analysis—can square the undisputed increases

of Total Phosphorus in Onion Creek at critical low flow conditions of at least 1555% with a finding that such an increase is only a trivial or trifling increase in a critical nutrient. The same is true for the undisputed increase in Total Nitrogen and for the predicted order of magnitude increase in benthic algae growth that will occur. These increases are actually much higher when analyzed at the required 7Q2 low flow because dilution with high quality background flows will be less than half.

Further, EPA has cautioned that new discharges or the expansion of existing facilities would presumably lower water quality and are not permissible unless the state conducts a full Tier 2 review. U.S. EPA, Water Quality Standards Handbook, 2d ed. at 9 (1994); Plf. App'x 10 at 9.

TCEQ's application of the *de minimis* standard in this case is wrong as a matter of law. Courts in other jurisdictions have held invalid the approach attempted by TCEQ here. Several states have included *de minimis* exclusion in their anti-degradation rules and implementing policies. *De minimis* provisions are created through an "administrative law principle which allows an agency to create unwritten exceptions to a statute or rule for insignificant or '*de minimis*' matters." *Ky. Waterways Alliance v. Johnson*, 540 F.3d 466, 483 (6th Cir. 2008). EPA and courts have recognized that *de minimis* exclusions are permissible under the Act so long as they are limited in scope. In 2015, EPA wrote in its preamble to rule revisions that "[s]tates can use *de minimis* exclusions, as long as they use them in a manner consistent with the [Act] and § 131.12." 80 Fed. Reg. 51,020, 51,034 (Aug. 21, 2015).

The D.C. Circuit Court of Appeals held that the implied *de minimis* provision authority is "narrow in reach and tightly bounded by the need to show that the situation is genuinely *de minimis* or one of administrative

necessity.” *Ala. Power v. Costle*, 636 F.2d 323, 361 (D.C. Cir. 1979)(analyzing analogous federal Clean Air Act). Implementing a *de minimis* exception “is not an ability to depart from the statute, but rather a tool to be used in implementing the legislative design.” *Id.* at 360. Where the potentially exempted activity furthers regulatory goals, authority to employ *de minimis* provisions “must be based on a fair reading of the specific statute, its aims and legislative history.” *Id.* at 361. Accordingly, this authority only applies “when the burdens of regulation yield a gain of trivial or no value.” *Id.* at 360-61.

A “determination of when matters are truly *de minimis* naturally will turn on the assessment of particular circumstances, and the agency will bear the burden of making the required showing.” *Ky. Waterways Alliance*, 540 F.3d at 483 (citations omitted). “Depending on the water body’s chemical, physical, and biological characteristics and the circumstances of the lowering of water quality, even very small changes in water quality could cause significant effects to the water body.” 80 Fed. Reg. 51,020, 51,034 (Aug. 21, 2015).

There is no rational basis for TCEQ’s finding that the massive increases in TP and TN in Onion Creek flows allowed by the permit will not lower water quality in Onion Creek more than a “*de minimis*” amount.

Importantly, the Final Order contains no reference to the *de minimis* standard: it dodges the legal standard entirely. The anti-degradation rule, for Tier 1 and Tier 2, are substantive rules, not procedural. The Order’s conclusion that following the Implementation Procedures ensures compliance with the anti-degradation policy is wrong as a matter of law. *See* Plf. App’x 1 at p. 9 ¶¶74-75, 78; p. 10 ¶88(c). TCEQ converts substantive requirements to procedural requirements by presuming that completing an anti-degradation review ensures that the substantive mandates are met. The IPs are subsidiary

to the anti-degradation rule; the procedures therein cannot supplant the rule's requirement that water quality not be degraded beyond a *de minimis* extent.

The IPs simply do not address what constitutes a complete analysis necessary to determine whether the *de minimis* standard is met or not. TCEQ has attempted to use the "*de minimis*" exception to circumvent the requirements of the Clean Water Act and its own regulations—in flagrant disregard of the term's plain meaning.

i. Total Phosphorus²

The Order states that based on TCEQ's Tier 2 review, "a phosphorus limit has been imposed to assure that the proposed discharge will protect and maintain the water quality of water bodies that exceed fishable/swimmable quality downstream of the discharge." Plf. App'x 1 at 10 ¶87. However, there is no finding of a reasoned analysis of whether the undisputed and massive increases in TP (or TN)—nor is there evidence to support such a finding—that the TP limit chosen will prevent lowering of water quality by no more than a *de minimis* amount. Because TCEQ used the wrong standard to set the TP effluent limit—to be consistent with another permit—the increase in TP levels from the discharge was never evaluated to determine whether Onion Creek's water quality would be lowered beyond a *de minimis* extent.

a. Baseline Conditions

The IPs explain that: "The effect of a proposed discharge is compared to baseline water quality conditions in order to assess the potential for degradation of water quality." AR B, Doc. 257 at 63. Thus, to determine

² Although TP and TN can both lead to excessive algae growth, the IPs focus on TP rather than TN for a variety of reasons. SOS likewise focuses on TP in relation to algae growth, while still recognizing that the TN increases authorized by the Permit will lower water quality by more than a *de minimis* amount.

whether a change in water quality is permissible, or *de minimis*, reference points for baseline water quality must serve as a starting point. Despite the unambiguous text in the IPs, TCEQ's order arbitrarily failed to determine what the baseline levels of key pollutants were and to evaluate the proposed discharge's effects on baseline water quality in Onion Creek. The Permit allows the effluent discharge to have 0.15 milligrams per liter (or 150 *micrograms/L*) on a daily average.³ Plf. App'x 2 at p. 2b (AR A, Doc. 169). This equals 1.0 pound per day in total loadings. *Id.* The City's own expert witness, Dr. James Miertschin, modelled the effects of the discharge on Onion Creek and estimated that Total Phosphorus concentrations would spike to 45 times higher than their current baseline conditions—from about 2 micrograms per liter to over 90 micrograms per liter. Plf. App'x 13. This discharge will result in a dramatic increase in both the *concentration* and the *absolute amount* of Total Phosphorus in Onion Creek. This increase in Total Phosphorus levels alone represents degradation beyond a *de minimis* amount.

The baseline conditions to be used for determinations of degradation are defined in TCEQ's rules as "the highest water quality sustained since November 28, 1975 (in accordance with EPA standards Regulations 40 C.F.R. § 131). 30 TAC § 307.5(c)(2)(B).⁴ The IPs provide that "[b]aseline conditions are estimated from existing conditions, as indicated by the latest edition of the Texas Water Quality Inventory or other available information, unless there is information indicating that degradation in ambient water quality has occurred in the receiving waters since November 28, 1975." AR B, Doc. 257 at 63.

³ One milligram is equal to 1000 micrograms. Because the concentrations of TP in Onion Creek, and the threshold level of concern, are so low, many studies and SOS's experts use the unit micrograms, also represented as µg/L.

⁴ This date is based on the effective date of the 1975 federal anti-degradation regulations.

A proper Tier 2 analysis would have involved comparing the baseline levels to the levels that would result from the proposed discharge. The evidence shows that TCEQ staff never analyzed how the background levels of TP in Onion Creek would increase from the proposed discharge. Rather than evaluating effects of the discharge on ambient conditions, the agency's record evidence shows that TP limit was set to prevent excessive algae growth. Plf. App'x 20 (AR B, Doc. 260). TCEQ's "analysis" consists of this statement: "Due to the high clarity of the water column, lack of shade along the banks, and minimal dilution, a total phosphorus limit of 0.15 mg/L and a total nitrogen limit of 6.0 mg/L are proposed to protect Onion Creek from accumulation of excess algae." *Id.* Notably, the factors identified in this statement are part of the "Nutrient Screening" evaluation to determine whether some kind of nutrient effluent limit is needed to maintain water quality. It does not tell you what the nutrient limit should be. Plf. App'x 15 at 52.

Moreover, the 0.15 mg/L was based on factors not contemplated in the rule. Lili Murphy conducted the Tier 2 review for TCEQ. She testified that the TP limit 0.15 mg/L in the Permit was set because that was "consistent" with "other permits in the area." AR B, Doc. 255 at 18:25-27 (Murphy Prefiled). At the hearing, she specified that she plucked the TP limit from the Belterra Permit.⁵ AR C, Doc. 286 at 596:7-597:4. This approach finds no basis in law or the IPs. "Consistency with other permit limits" is nowhere considered a factor in the anti-degradation analysis. The IPs repeatedly refer to making site-specific analyses to evaluate impacts based on the unique characteristics of

⁵ Even if this were a valid consideration, the Permit is *not* consistent with the Belterra permit in that it authorizes discharge of pollutants to Onion Creek at all times, even under low flow conditions. The Belterra Permit only authorizes discharge when threshold levels of precipitation and flow in the receiving stream are met.

the receiving waters, yet TCEQ made no attempt to conduct such an analysis here. TCEQ acted arbitrarily and capricious in relying on non-statutory criteria to make its decision.

Although TCEQ failed to analyze the impact of increased TP in Onion Creek, the City did perform this analysis. Chlorophyll-a is used to measure levels of benthic (bottom-dwelling) algae. The City's expert, Dr. Miertschin modelled the effects of the discharge on chlorophyll-a. His modelling showed that baseline levels less than 5 milligrams per square meter (mg/m^2) would jump to $44 \text{ mg}/\text{m}^2$. Plf. App'x 13 at 2. The numbers in the modelling results are not in dispute—the interpretation of these results, however, is contested. Dr. Miertschin offers two summary statements as to why this increase in algae does not violate anti-degradation rules. First, he states, this increase is below the level at which people would no longer want to swim in the water, based on random polling. This factor, however, only relates to Tier 1 review—whether the algae would impair use of the water for contact recreation. His other explanation defending the Permit is that the modelled increased chlorophyll-a levels in Onion Creek still fall within the range observed in a study on Hill Country streams by the United States Geological Services (USGS) AR B, Doc. 223 at 32:22-33:9 (Miertschin Prefiled). But again, Dr. Miertschin fails to address the *de minimis* standard—that is, whether the increase in chlorophyll-a from Onion Creek's ambient baseline conditions constitute degradation by more than a *de minimis* extent.

ii. Dissolved Oxygen

As with nutrients, TCEQ's Tier 2 analysis for dissolved oxygen focuses only on whether the discharge would impair existing high aquatic life use. The Order states that the "ED included DO limits in the Draft Permit that will

protect the existing uses of Onion Creek.” Plf. App’x 1 at 10 ¶85. The Order then states that a Tier 2 review confirmed that no “significant degradation of water quality is expected in Onion Creek... such that the existing uses will be maintained and protected.” *Id.* ¶90. This is a Tier 1 impairment analysis, not a Tier 2 analysis.

TCEQ did not attempt to measure or identify the proposed impacts on baseline DO levels in Onion Creek, instead focusing its inquiry on whether the designated DO criterion for aquatic life use (5.0 mg/L) would be met. The regulation’s structure and text make clear that the *de minimis* inquiry is separate from compliance with the DO numeric standard and the use-impairment inquiry of Tier 1. The Tier 2 standard states that existing uses need not be impaired for there to be degradation. “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.**” 30 TAC § 307.5(b)(2) (emphasis added). *De minimis* is therefore necessarily a lowering of water quality less than the amount that would impair existing uses. TCEQ’s approach reads the separate Tier 2 review and “*de minimis*” standard out of the rule. The Ohio Supreme Court held invalid an identical interpretation of Tier 2 by its state agency, noting that “[t]heir attempt to equate degradation of existing water quality with an interference with an existing use not only creates a redundancy but also renders [the regulatory text] inconsistent. *Columbus & Franklin Cnty. v. Shank*, 600 N.E. 2d 1042, 1055 (Ohio 1992). By collapsing the Tier 2 analysis into the Tier 1 analysis, TCEQ erred as a matter of law.

The City’s expert, Dr. James Miertschin, endorsed TCEQ’s erroneous application of the standard in testifying that anti-degradation requirements were satisfied by “[t]he fact that dissolved oxygen will be maintained at

concentrations that support a healthy aquatic life community.” AR B, Doc. 223 at 47:11-15 (Miertschin Prefiled). Dr. Miertschin testified that whether Onion Creek’s background DO levels are higher than the designated use criterion was irrelevant for an anti-degradation analysis, because all that mattered was whether the DO would meet the criterion to protect the designated use. *Id.* at 48:13-21. Thus, Dr. Miertschin also collapsed Tier 2 review into the Tier 1 impairment of uses standard.

The record shows that DO would dip from ambient levels above 8.0 mg/L to 4.87 mg/L at its lowest point, TCEQ never compared the baseline DO levels with the estimates from the impacts of the discharge, focusing only on whether the 5.0 mg/L criterion would be met under the proposed discharge. TCEQ failed to conduct a proper Tier 2 analysis under the law.

iii. Reliance on Non-Statutory Criteria

Similarly, TCEQ relies on the relative “stringency” of the permit limits to conclude that water quality standards and anti-degradation requirements are met. Plf. App’x 1 at p. 7 ¶49, p. 9 ¶75. It is an abuse of discretion and arbitrary and capricious for TCEQ to rely on this factor to find that this Permit complied with law.

The Order incorrectly makes multiple finding that the proposed discharge would have the highest or one of the highest limits of TP and TN in the State of Texas. These are false findings. The record contains no facts to support TCEQ’s conclusion that this was among the “most stringent” permits issued in the state of Texas. The only other discharge permit in the record introduced for purposes of review of effluent limits is more stringent than the challenged permit. AR B, Doc. 277 (Hays County Water Control and Improvement District No. 1, Permit No. WQ0014293001); AR B, Doc. 269, at

32:20-34:7 (Ross Prefiled). That permit restricts the conditions under which discharge is permitted to only very narrow, high-flow conditions, when the wastewater is diluted and the permittee cannot irrigate the land due to saturation from wet weather conditions. The Permit at issue contains no such restrictions. Thus, the Permit allows wastewater to be discharged into the creek even at dry times, increasing both the concentration and total load of pollutants in Onion Creek.

Texas Land Application Permits, that prohibit all discharge, are the most stringent wastewater disposal permits. The City's attempt to switch from years of "no discharge" treatment of its sewage to one of massive discharge that will overwhelm Onion Creek constitutes a giant leap backward. Claiming this permit is one of the best in the State of Texas is a hoax, the water-quality equivalent of denying climate change.

C. Summary of Tier 2 Anti-degradation Violations

In summary, TCEQ committed the following errors:

1. TCEQ committed legal error and misapplied the anti-degradation policy to TP and TN, because the agency ignored the plain meaning of *de minimis* and concluded Tier 2 was met without making underlying factual findings to support its decision. Plf. App'x 1 at 10 ¶¶87-88, 90.
2. TCEQ ignored substantial evidence in finding that the massive increases of TP and TN would protect and maintain water quality in compliance with Tier 2 anti-degradation review. *Id.*
3. TCEQ committed legal error in applying the anti-degradation policy to dissolved oxygen because the agency focused only on whether DO levels to support existing uses would be maintained, collapsing Tier 2 review

into Tier 1 and failing to examine whether DO levels would be reduced beyond a *de minimis* extent. *Id.* ¶¶ 85,90.

4. TCEQ acted arbitrarily by basing its determination that the Permit would not violate Texas Surface Water Quality Standards based on non-statutory criteria—the stringency of the permit relative to other TPDES permits. *Id.* at p. 6 ¶¶41, 47; p. 7 ¶¶48-49; p. 9 ¶75; p. 11 ¶92.

II. TCEQ’S FINAL ORDER VIOLATES THE TIER 1 ANTI-DEGRADATION STANDARD AS A MATTER OF LAW, IS ARBITRARY AND CAPRICIOUS, AND IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

TCEQ’s final order, and the underlying reasoning set out in the ALJ’s PFD, reflects a near total misunderstanding of the Act’s mandate to protect our nation’s waters. TCEQ’s application and interpretation would convert the Clean Water Act’s mandate to eliminate discharges of treated sewage into one calling for even more wastewater discharges into our nation’s waters. These discharges “stabilize flow,” provide for “nutrient enrichment” and “increase [biological] productivity.” Plf. App’x 1 at 16, 24. Rather than protect existing high quality aquatic life uses, it would ignore those uses as “irrelevant” in favor of promoting even greater growth of algae and species that thrive on higher nutrient levels in streams. It would view increasing algae growth as a good thing—greater productivity—rather than what the science and law recognize as “eutrophication” that must be prevented under both Tier 1 and Tier 2 standards.

Before explaining these points, we note again TCEQ’s disturbing finding that the substantive standard of preventing degradation of our nation’s waters under both Tier 1 and Tier 2 is just a matter of following a procedural guidance document. *See* Plf. App’x 1 at 9 ¶78. Again, this is wrong as a matter

of law. Following the IP anti-degradation procedures set out in TCEQ's IPs does not "ensure" compliance with the substantive anti-degradation rule.

As with the Tier 1 violations described above, TCEQ's decision would translate the substantive standard of protecting existing aquatic life uses into a purely procedural one. Check the boxes, as TCEQ's staff did here, and water quality is magically protected. Set a TP limit in the discharge and conclude—no matter what the limit is or what its actual effect is on TP *in the receiving stream*—that high quality waters are protected and degradation is avoided. The plain language of the rule and the Act cannot be trumped by an agency checklist or a discharge limit that does not prevent degradation.

The final order and the PFD make clear that TCEQ and the City interpreted the protection of existing uses in the Tier 1 analysis for nutrients as only requiring that algae growth not be stimulated to such an extent that aesthetic and contact recreation uses would be harmed by "nuisance algae." Plf. App'x 1 at p. 7 ¶58, p. 8 ¶¶64-66; Plf. App'x 12 at 324 (Miertschin testimony); AR C, Doc. 286 at 590-91 (Murphy testimony). It is also clear that it only looked at the quantity of algae, and not its species make up and its relation to macroinvertebrates and fish that feed differently on different species of algae.

However, nutrient increases, especially the massive increases here, stimulate algae growth that harms aquatic life *and* that displaces algae species and the animal species that feed on algae. These issues must be examined in the anti-degradation analysis, not dismissed as irrelevant.

EPA guidance on anti-degradation explains what protecting existing "fishable," or high aquatic life uses actually means. Speaking directly to the Tier 1 standard, EPA states:

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.*

Plf. App'x 10 at 6 (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. The EPA, King and Taylor studies, and the testimony of Drs. Nowlin and Gabor all make clear that the proposed discharge will impair existing species of flora and fauna. Thus, both the Tier 1 anti-degradation standard and the "fishable" standard will be violated under the Permit.

The PFD provides the findings of fact, conclusions of law and underlying reasoning for those finding and conclusions adopted by TCEQ. 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. Plf. App'x 3 at 16-17, 26-29. The ALJ writes:

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

Plf. App'x 3 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. He 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.

It is true that adding nutrient fertilizer and flow to Onion Creek would increase biological productivity. More nutrients benefit a range of aquatic species and the amount of biological productivity, especially algae growth. But the species that would benefit are NOT the species that live there now. They are *not* the ones that Clean Water Act standards promulgated by the EPA and TCEQ require be protected when they call for maintaining the existing aquatic life use.

The PFD completely sidesteps the overwhelming scientific evidence in the record that increasing TP and TN in Onion Creek to the degree allowed under the Permit would shift the stream ecology to favor different species of algae, aquatic invertebrates, and fish. The PFD cites, and misconstrues only one of these studies, from 2009, while ignoring the subsequent studies from similar streams over Texas limestone from Taylor *et al.* (2018) and Taylor & King (2014). Plf. App’x 17 and 22. These studies were funded by TCEQ and the EPA, carried out by experts from Baylor University, Texas A&M University, the U.S. Department of Agriculture, and other institutions, and peer-reviewed. None of them are disputed in the record by any other studies of any kind.

All of the introduced studies—and many others cited within those studies—point to the same conclusion: that the level of increases in TP and TN in Onion Creek that would result from the proposed discharge will result in a drastic change in aquatic species composition and productivity. Existing aquatic communities would not be protected; they would be displaced by more pollution-tolerant species.

The ALJ is wrong in asserting that trophic status is irrelevant to the anti-degradation analysis. 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 productivity abundance or simply 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.*, Plf. App’x 15 at 27, 47. A proper interpretation of the mandate to protect aquatic life requires protecting those species that have evolved and live in the low-nutrient (“oligotrophic”) conditions found in Onion and other Hill Country creeks.

Although the EPA 2001 recommendation of a 25 µg/L TP limit in the Edwards Aquifer region was based in part on a statistical analysis, all of the abundant research since that time concludes that TP must be kept below the 20 to 25 µg/L range to avoid having native species be displaced by species adapted to higher nutrient conditions. *See* Plf. App’x 17, 18, 22. Thus the ALJ and TCEQ erred by finding that trophic status is irrelevant (and only a statistical artifact).

In summary, the King & Winemiller 2009 study, *Development of Biological Indicators of Nutrient Enrichment for Application in Texas Streams*, concludes that there is “overwhelming evidence” of “consistent biological changes in streams with greater than 20 µg/L TP. This document was introduced into evidence by the City. Plf. App’x 18 at 67 (AR B, Doc. 241). In their 2014 study, Taylor, King and others from Baylor and Texas A&M, also funded by TCEQ and EPA and again with an eye toward providing a scientific basis for setting nutrient water quality standards for Texas streams, published a study in the journal *Freshwater Biology*. Plf. App’x 22 (AR B, Doc. 269 at 230-45). The study, *Nonlinear response of stream ecosystem structure to low-level phosphorus enrichment*, found that two species of native fish declined significantly when TP increased above 28 to 34 µg/L, while invasive and nutrient tolerant fish species increased. *Id.* at 1. The authors specifically recommend a TP limit of 20 µg/L to protect native algae and the sensitive native fish species.

Then, in 2018 Taylor, King and others, again supported with EPA research grants, published results from a two-year study in the Brazos River watershed that found “maximum [algal species] assemblage level changes occurring at relatively low TP concentrations for both years (2006 = 20 µg/L; 2007 = 25 µg/L).” The study reports:

These responses correspond well with a previous study in central Texas streams, where we demonstrated that changes in algal assemblage structure were associated with synchronous declines of several sensitive taxa at TP concentrations around 21 µg/L (Taylor *et al.*, 2014). Our observed threshold responses also correspond well with other regional studies from North America and Europe that reported significant changes in stream algal assemblage structure at TP concentrations ranging between 10

and 32 µg/L (Chambers *et al.*, 2012; Schneider & Lindstrøm, 2011; Smucker *et al.*, 2013).

Plf. App'x 17 at 7. No research papers contradicting the conclusions of these studies appear in the record. Further, as explained in the 2018 Taylor *et al.* paper:

Extensive loss of naturally oligotrophic streams and lakes could have widespread ecosystem consequences including increased incidence of harmful algal blooms, altered habitat for aquatic organisms and unforeseen impacts (Stoddard *et al.*, 2016).

There is nothing in the record to suggest that Onion Creek is somehow unique from the streams studied with similar geology a short distance away. To the contrary, none of the expert witnesses suggested that these studies were not relevant to Onion Creek conditions. The scientific research shows similar results from streams around the world.

While TCEQ may try to drag its feet forever in adopting science-based numeric standards for phosphorus and nitrogen, it does not exempt the agency from full compliance with both the Tier 1 and Tier 2 anti-degradation standards. Those standards must be interpreted consistent with the Act, with the plain meaning of the rules themselves, and with the science admitted into the hearing record. Compelling evidence that was not rebutted shows that TP must be kept below a 20 to 25 micrograms/L range to avoid harm to aquatic life species native to low nutrient streams in central Texas, and to comply with the Tier 1 anti-degradation rule. The evidence is not disputed that the proposed discharge would increase TP from well below the 20 to 25 µg/L range to levels in the 85 to 100 µg/L range.

III. TCEQ ERRED AS A MATTER OF LAW IN FINDING THAT PUBLIC NOTICE REQUIREMENTS WERE MET.

TCEQ erred as a matter of law in determining that the City substantially complied with all applicable notice requirements. Plf. App'x 1 at p. 14¶¶130, 132, 134. The public notices did not include a description of the location of the proposed discharge point, in violation of the plain meaning of the rules. This is particularly significant in this case, where the discharge outfall is upstream and relatively far from the treatment plant. The omission of this key information did not allow the public to understand whether their interests may be affected and deprived the public a meaningful opportunity to protect their interests.

A. Clean Water Act Requirements for Public Notice

In addition to establishing substantive requirements for discharge permits, the Act also declares an objective of fostering public participation. Public participation in the administrative processes conducted under the Act “shall be provided for, encouraged, and assisted” by EPA or the state. 33 U.S.C. § 1251(e). Thus, “Congress clearly intended to guarantee the public a meaningful role in the implementation of the Clean Water Act.” *Waterkeeper Alliance v. EPA*, 399 F.3d 486, 503 (2d Cir. 2005). In order to provide the public an opportunity for meaningful participation, agency actions, such as the issuance of this Permit, must undergo a public notice and comment period. *See Natural Res. Def. Council, Inc. v. EPA*, 859 F.2d 156, 175 (D.C. Cir. 1988). Per the Act’s mandate, EPA has promulgated regulations specifying minimum guidelines for public participation in such processes. *Id.*; 40 C.F.R. Part 124.

Essential to public participation is adequate notice to inform the public about pending actions. TCEQ, as EPA’s delegee of the NPDES program, “must

provide notice sufficient to fairly apprise interested persons of the subjects and issues before the agency.” *Natural Res. Def. Council v. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002); see 33 U.S.C. § 1342(a), (b)(3) (requiring states to adopt public participation regulations for state assumption of permit program). In determining whether notice is sufficient, “the relevant inquiry is whether or not potential commentators would have known that an issue in which they were interested was ‘on the table.’” *Am. Med. Ass’n v. United States*, 887 F.2d 760, 768 (7th Cir. 1989).

The required elements of public notice are spelled out by regulation, and their applicability is not in dispute here. The Texas Water Code and TCEQ regulations require that the notice for a new TPDES permit include “a brief description of the nature and location of the proposed activity.” Tex. Water Code § 5.552(c)(1); 30 TAC § 39.411(b)(3).⁶ Specific to wastewater discharge permits, the notice must include “a general description of the **location of each existing or proposed discharge point** and the name of the receiving water.” 30 TAC § 39.551(c)(4)(B); 40 C.F.R. § 124.10(d)(1)(vii)(same language) (emphasis added).⁷ Thus state law, TCEQ regulations, and federal regulations all require TCEQ and the City to submit the discharge point’s location to the notice and comment process. *Id.*

In reviewing the adequacy of the agency’s notice and comment procedure, a court’s role is to ensure that “statutorily prescribed procedures have been followed.” *Campanale & Sons, Inc. v. Evans*, 311 F.3d 109, 116 (1st Cir. 2002)(internal citations omitted). Courts should conduct an exacting review “without deferring to an agency’s own opinion of the ... opportunities it

⁶ The requirements in 30 TAC chapter 39 are made applicable to this permitting action by virtue of 30 TAC §§ 39.1(2), 39.401, 39.403(a).

⁷ Made applicable to state programs via 40 C.F.R. § 123.25(a)(28).

provided.” *Kern Cnty. Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006).

B. The Inadequacy of the Notices

Here, three mandatory public notices were published, none of which described the location of the discharge point. The text of these notices is not in dispute. *See* AR A, Doc. 6, at 10-12 (Notice of Receipt of Application and Intent to Obtain Water Quality Permit); AR A, Doc. 30, at 4-6 (Combined Notice of Public Meeting and Notice of Application and Preliminary Decision for New TPDES Permit for Municipal Wastewater), and AR A, Doc. 64, at 3-4 (Notice of Hearing).⁸

TCEQ misapplies the law in finding that identifying the receiving waters suffices to describe the location of the discharge point. The NORAI states that “[t]he discharge route is from the plant site via pipe to Walnut Springs; thence to Onion Creek.” AR A, Doc. 6, at 10-12. The NAPD and Notice of Hearing are even less descriptive, stating that “[t]he treated effluent will be discharged to Walnut Springs; thence to Onion Creek in Segment No. 1427 of the Colorado River Basin.” AR A, Doc. 30, at 4-6 AR A; Doc. 64, at 3-4. The only other information in the notices relative to location is the address for the wastewater treatment plant, 1.5 miles southeast from the discharge point, across a highway and several stream miles upstream. *See id.* Members of the public that own and use the creek between the outfall and the wastewater plant were not properly notified.

During the hearing, SOS introduced evidence of federal agency staff

⁸ TCEQ staff prepares the text of the notice and provides instructions for the applicant to publish the notices in local newspapers. 30 TAC § 39.405(a). The City is directed to notify TCEQ immediately if there are errors or omissions, and is responsible for ensuring the accuracy of all information published. AR A Doc. 6 at 3.

expressing confusion about the discharge point's location, along with maps illustrating the distance between the discharge point and the treatment plant. TCEQ and the City presented any evidence to support adequate notice; TCEQ concluded that the language in the notices was sufficient.

Only on close review of the application can the exact location of the discharge point be discerned, via longitude and latitude coordinates. The City's own witness bore witness to the confusion about the discharge point's location, testifying that "as the crow flies, it's probably three-quarters of a mile to a half mile" from the plant. AR C, Doc. 284 at 21:20-24.

TCEQ's evidence consisted of a single conclusory statement that all applicable notice requirements were complied with. AR B, Doc. 247 at 31:3-5 (Centeno Prefiled). Similarly, the ED's Response to Comments on notice summarily state that the discharge *route* was sufficiently described, but say nothing about the discharge *point*. AR A, Doc. 49 at 89. "From the plant site via pipe to Walnut Springs; thence to Onion Creek" does not give an ordinary person any idea of where the discharge will actually start. *See id.*

In a factually similar case, the Georgia Supreme Court ruled a public notice legally deficient because it failed to accurately identify the location of the discharge point. *Hughey v. Gwinnett Cnty.*, 609 S.E.2d 324, 329 (Ga. 2004) (citing 40 C.F.R. § 124.10(d)). The court found it significant that the actual discharge point (a mile from the described location) was never subjected to public comment. *Id.* As in the present case, the notice identified the receiving waterbody, but the court rejected the state agency's conclusion that this sufficed. Under such a theory, the court reasoned, agencies could name huge bodies of water that in no way informed the public where the discharge point

may be. *Id.* “Plainly, more specificity is required if the public is to have any meaningful opportunity to participate in these decisions.” *Id.*

Similarly, stating that the wastewater will be discharged into “Onion Creek in Segment 1427 of the Colorado River Basin” cannot be deemed sufficient considering that this segment stretches for several miles across three counties.⁹ *See* AR A, Doc. 30 at 4. This stream segment stretches across three counties, so identifying the segment is not enough information for the public to know whether their interests are affected.

Nor does the reference to “Walnut Springs” suffice to meet the notice requirements, because it does not reasonably convey where the discharge point will be. It is never explained or noted that “Walnut Springs” is not actually a “springs” location but rather is a tributary to Onion Creek. Walnut Springs is considered by TCEQ to be an intermittent, unclassified stream, meaning it is dry a significant portion of the year. AR A, Doc. 88 at 2-3.

Moreover, TCEQ was aware that the notice did not provide enough information. Evidence introduced at trial revealed the confusion about the discharge point by stakeholders attempting to review the permit—in this case a federal agency. AR B, Doc. 278. Specifically, this exhibit contains email correspondence between TCEQ staff and staff at the U.S. Fish and Wildlife Service (“Service”), along with attached maps demonstrating the inadequacy of the notice and the importance of providing more information. The Service points out that the notice does not identify a discharge location and requests more information. The Service specifically points out that the hyperlink on the notice only provides the site of the wastewater plant, attaching the screenshot

⁹ This segment stretches from the confluence with the Colorado River in Travis County to the most upstream crossing of FM 165 in Blanco County. 30 TAC § 307.10, App’x C (Segment Descriptions).

to the email, and that it needed to know the location of the discharge point for purposes of endangered species review. AR B, Doc. 278 at 1. TCEQ created maps and provided the latitude and longitude coordinates of the proposed discharge point in response to the Service's request, showing that TCEQ was aware of the deficiencies in the public notice. *Id.* at 6-7. But there is no evidence in the record that TCEQ shared those maps with anyone besides the Service, despite the legal requirement to provide sufficient information to the public. Thus, TCEQ staff was on notice that the proposed discharge point was not discernible from publically available documents, had on-hand information that could have informed the public about "the location of the discharge point," *see* 30 TAC § 39.411, and chose not to take any corrective action, such as amending and having Applicant re-publish the public notices.

SOS also introduced as evidence a map of the City of Dripping Springs titled "WQ0014488003 Facility & Outfall: Map Requested by TCEQ Office of Legal Services for Commissioners' Agenda." AR B, Doc. 279. TCEQ staff prepared the map in February 2018. This map shows that the discharge point is not within a one-mile radius of the wastewater plant, which is the boundary for providing enhanced notice requirements. It also shows that the only contested case hearing requester along this portion of the route was David Penn, despite the fact that Onion Creek downstream of the discharge point passes properties of several different landowners. *Id.* Although not proof, this suggests that potential participants in the comment and hearing process were not aware that the wastewater would flow through their backyards.

The neighborhood immediately downstream of the discharge point, Caliterra, has residents who just recently or are about to move in, and is projected to soar in housing units over the next five years. *See* AR A, Doc. 1 at

87 (Table 1: Wastewater Flow and Growth Projections, City of Dripping Springs). Locals may reasonably conclude that the discharge is next to the wastewater plant, over a mile downstream from him. Without adequate notice in any of the published notices, these new residents were not and still have not been given adequate notice that treated municipal sewage will be discharged into and flow through their community, where they and their children, pets, and guests will be drawn to Onion Creek and the “Caliterra pond” for swimming, wading, fishing, and birdwatching.

This lack of transparency is also particularly worrisome given the large number of domestic wells in area, including just downstream of the discharge point. Plf. App’x 23, Map of Wells Within One Mile of Discharge Point (AR B, Doc. 269 at 107).

Inadequate notice of this nature cannot be deemed harmless error. The extent of harm can never be assessed with certainty, because there may have been residents who would have commented if they had known the location of the discharge point. The loss of that opportunity is the harm. TCEQ’s erroneous legal interpretation of the public notice standard frustrates public participation in violation of the plain meaning of the regulatory text and the Clean Water Act’s purpose and structure.

CONCLUSION

There is no question but that we can't have a water quality improvement program if we have standards and rules which permit water to be degraded further.

Secretary of the Interior Stewart Udall, 1968¹⁰

¹⁰ Quoted in Kalisek, Lauren, *The Principle of Antidegradation and Its Place in Texas Water Quality Permitting*, Tex. Env’tl. Law J., Fall 2010, at p. 3.

It cannot be disputed that this Permit runs in the opposite direction mandated by the Clean Water Act. Rather than move to eliminate discharges by 1985, it eliminates the “no discharge” status of Onion Creek and adds a giant, new sewage discharge to Onion Creek thirty-five years after the 1985 goal to eliminate all discharges. *See* 33 U.S.C. § 1251(a). It would do so where there is *zero* need for such a discharge and the *obvious no-discharge alternatives are already built, in-place, and operating*.

If TCEQ’s permit approval is allowed to stand, the waters of the Hill Country, and the State as a whole, will be thrown open for more discharges of municipal waste. The Act’s purpose to eliminate discharges and maintain the chemical, physical, and biological integrity of our public waters will be will be sent down the river.

For the reasons described above, the TCEQ’s Order issuing the Permit is: in violation of constitutional and statutory provisions; in excess of the agency’s statutory authority; made through unlawful procedure; affected by other error law; not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; arbitrary and capricious; and characterized by abuse of discretion and clearly unwarranted exercise of discretion. The permit approval must be reversed.

PRAYER

WHEREFORE, PREMISES CONSIDERED, SOS respectfully requests the following relief:

1. That the TCEQ’s Order issuing the Permit be reversed;
2. That TCEQ and the City of Dripping Springs be enjoined from taking actions in reliance on the approved permit until such time as a new order is entered; and

3. That SOS be awarded such further relief to which SOS may be entitled.

Dated: January 15, 2020

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on this 16th day of January, 2020, in accordance with the Texas Rules of Civil Procedure, to the persons listed below, via electronic service.



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CERTIFICATE OF COMPLIANCE

I hereby certify that Opening Brief of Plaintiff Save Our Springs Alliance contains 11,007 words in the relevant parts of the document, in compliance with Texas Rule of Appellate Procedure 9.4(i), as calculated by the computer program used to prepare this document.



Kelly D. Davis

GLOSSARY OF TECHNICAL TERMS AND ACRONYMS

ALJ	Administrative Law Judge
Application	Application for Texas Pollutant Discharge Elimination System Permit No. WQ0014488003
AR	Administrative Record
Assimilative capacity	Measurement of the amount by which a water body's quality exceeds levels necessary to support fish, wildlife, and recreation.
City	City of Dripping Springs
Commission	Texas Commission on Environmental Quality
CWA or the Act	Clean Water Act, 33 U.S.C. §§ 1251-1387
DO	Dissolved Oxygen
ED	Executive Director of the Texas Commission on Environmental Quality
EPA	Environmental Protection Agency
Eutrophic	A water body characterized by high nutrient levels, with high algae growth and periods of low dissolved oxygen.
Eutrophication	The process by which a body of water becomes enriched in dissolved nutrients that stimulate the growth of aquatic plant life usually, resulting in the depletion of dissolved oxygen.
Implementation Procedures (IPs)	Procedures to Implement the Texas Surface Water Quality Standards, Water Quality Division, TCEQ, RG-194
Mesotrophic	A water body characterized by a middle range of nutrient concentrations and an assemblage of aquatic life species that thrive on those concentrations.

Notices	Notice of Application and Preliminary Decision for TPDES Permit for Municipal Wastewater and the Notice of Receipt of Application and Intent to Obtain Water Quality Permit published relating TCEQ Permit No. WQ0014488003
Oligotrophic	A water body with very low naturally occurring nutrient levels, with a resulting low level of algae growth and high water clarity
Permit	Texas Pollutant Discharge Elimination System Permit No. WQ0014488003
7Q2	The critical low-flow conditions for stream water quality compliance, consisting of the seven-day, two-year low flow, and below which some water quality standards do not apply. 30 TAC § 307.3 (16)
SOAH	State Office of Administrative Hearings
SOS	Plaintiff Save Our Springs Alliance
Tier 1 Review	Review conducted to determine if a proposed discharge would impair existing uses of a water body, under 30 TAC § 307.5(b)(1). Also referred to as Use-Impairment Review.
Tier 2 Review	Review conducted to determine if a proposed discharge would degrade water quality of high-quality waters beyond a de minimis extent, under 30 TAC § 307.5(b)(2). Also referred to as De-Minimis Review.
TAC	Texas Administrative Code
TCEQ	Texas Commission on Environmental Quality
TN	Total Nitrogen
TP	Total Phosphorus
TPDES	Texas Pollutant Discharge Elimination System
WWTP	Wastewater Treatment Plant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on January 16, 2020, to the persons listed below, via email, and was served on the persons listed below on January 21, 2020, via electronic service.



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