

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

PLAINTIFF'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	ii
INTRODUCTION & SUMMARY.....	1
I. THE PERMIT VIOLATES THE TIER 2 PROHIBITION ON DEGRADATION IN MULTIPLE WAYS	4
A. The Increases in Pollution in Onion Creek Authorized by the Permit are Not in Dispute.....	5
Critical Low Flow in Onion Creek Compared to the Permit Discharge.....	5
Total Phosphorus.....	5
Total Nitrogen.....	6
Bottom Dwelling Algae.....	6
Dissolved Oxygen.....	6
The Scientific Record on Nutrients and Protecting Aquatic Life in Texas Streams	7
B. TCEQ’s Implied Interpretation of “Degradation” Would allow Some Degradation, Rather than the Required “No Degradation.”	8
C. Defendants’ Construction of the Tier 2 Standard Ignores the Clean Water Act and the EPA Rule Requiring that the Chemical Integrity of Public Waters Be Maintained and Protected....	9
D. The Anti-Degradation Analysis is Pollutant-By-Pollutant, Not “Water Quality As A Whole”	10

E. Defendants’ Construction of the Tier 2 Standard Reads Out Important Language is Inconsistent with Regulation’s Plain Text.	11
F. Neither TCEQ’s Continuing Planning Process (CPP) with EPA, the EPA’s Withdrawal of Its Objection Letter, nor Its IPs Support, Much Less “Ensure,” that TCEQ Complied with the Substantive Antidegradation Rules.....	14
G. The Case Law Supports SOS’s Claim That the City’s Permit Violates the Tier 2 Antidegradation Standard as a Matter of Law and that TCEQ Misconstrued the Rule.....	16
II. DEFENDANTS FAIL TO REBUT SOS’S SHOWING THAT TCEQ MISAPPLIED THE STANDARD.....	22
III. DEFENDANTS OFFERED NO PERSUASIVE ARGUMENTS THAT NOTICE REQUIREMENTS HAVE BEEN MET	23
PRAYER.....	28
CERTIFICATE OF SERVICE	29
CERTIFICATE OF COMPLIANCE	30

TO THE HONORABLE JUDGE GUERRA GAMBLE:

Defendant TCEQ and Intervenor City of Dripping Springs (together, Defendants) argue that this case rests on a “battle of witnesses”—of dueling expert opinions. They then insist this is a battle that Plaintiff Save Our Springs Alliance (SOS) loses because the Court must defer to the agency’s expertise and weighing of opinion testimony. They point to the Administrative Law Judge’s (ALJ) observations that SOS’s experts were unfamiliar with TCEQ’s anti-degradation standards, that they relied on “alternative methodologies,” and that some of their opinions were conclusive.

But this is not a case about dueling expert opinions. The evidence upon which this case mainly hinges is undisputed. Such evidence is summarized in SOS’s brief and largely ignored in Defendants’ responses.

The following critical facts are not disputed: Onion Creek, under its current condition without the proposed discharge, is a pristine, crystal-clear Hill Country stream. The permit at issue authorizes the City to discharge up to 822,500 gallons of treated sewage into Onion Creek every day—equal to 1.27 cubic feet per second in flow. The effect of the discharge must be evaluated under critical low-flow conditions established by TCEQ. The applicable critical low-flow here is 0.12 cubic feet per second. Simple math shows that addition of the maximum authorized discharge would render Onion Creek 90% treated sewage and 10% natural, baseline creek flows under critical low-flow conditions. This discharge would increase total phosphorus (TP) and total nitrogen (TN) by orders of magnitude—thousands of percent increases—from the naturally-occurring levels. Algae growth would increase by at least an order of magnitude, and dissolved oxygen (DO) would drop from high levels of

8.0 mg/L to right at or just below the minimum 5.0 mg/L established by TCEQ to protect existing uses.

With this undisputed evidence, the primary issues are questions of law. Did TCEQ properly construe its Tier 1 and Tier 2 anti-degradation rules, consistent with the CWA and EPA rules? Did the Agency properly apply these two anti-degradation rules, especially the Tier 2 rule, to the evidence?

Similarly, the evidence related to notice is likewise largely undisputed. Whether TCEQ provided adequate notice is a question of law.

Secondary to these issues, this case presents the issue of whether TCEQ's Final Order contains findings of facts supported by substantial evidence and adequate underlying facts, and whether it demonstrates a genuine exercise in reasoned decision-making sufficient to allow for effective judicial review.

Rather than a case of *ipse dixit*—unsupported expert opinion—this is a case of *ipso facto*: the *facts* speak for themselves. The undisputed massive increase in phosphorus and nitrogen—recognized and regulated pollutants that plague fresh waters across the planet—*ipso facto*, lower water quality in Onion Creek by more than a *de minimis* extent. There is no rational basis for concluding that these increases are “trifling,” that they are so minimal that they can be ignored, or that there is “no degradation” of water quality.

The Clean Water Act requires that the chemical integrity of Onion Creek be protected, along with its physical and biological integrity. 33 U.S.C. § 1251(a). The massive increases in TP and TN that would result from the permitted discharge fail this test, as well as the major lowering of dissolved oxygen, lower water quality by more than a *de minimis* extent as a matter of law.

In addition to erecting the strawman “battle of witnesses” argument, Defendants make other diversionary arguments that are either misleading or irrelevant. The City begins with an argument that its goal is to beneficially reuse its wastewater and avoid discharging as authorized by the permit. While laudable, the City’s goals are irrelevant to the legal question of whether the permit complies with the law. *See* 33 U.S.C. § 1342(a)(1) (permit can only be issued “upon condition that such discharge will meet” all applicable requirements of CWA); *see also id.* § 1342(k)(compliance with permit deemed compliance with CWA). Under the settlement agreements, the permit still allows the City to discharge 822,500 gallons of treated sewage per day into Onion Creek.

Defendants also assert that SOS’s true contention is with the TCEQ’s EPA-approved regulations. To the contrary, SOS does not seek to rewrite TCEQ’S rule, but to have it construed and applied as required.

Defendants repeat the ALJ’s unfounded and unexplained assertion that SOS’s experts used “alternative methodologies” when the record shows that SOS’s experts compared the natural baseline water quality to the water quality that would result from the permitted discharge, and applied accepted TCEQ and EPA science and scientific methods to the undisputed evidence.

Defendants mislead the Court in arguing that the testimony of SOS’s water expert, Dr. Lauren Ross, was not credible because she relied on the 2012 TCEQ Implementation Procedures (IPs) and not the EPA-approved 2010 IPs. Defendants know that the sections of the not-yet-approved 2012 IPs relevant to this case, published on TCEQ’s website, are verbatim identical to

the 2010 IPs.¹ Since the CWA requires EPA review of the TCEQ's delegated water quality permitting program every three years, 33 U.S.C. § 1313(c), that the 2012 IP update was still not approved at the time of hearing in 2018 speaks to TCEQ's credibility, not Dr. Ross's.

Even if the Tier 2 standard required a showing of biological impact, the multiple published and peer-reviewed scientific studies in the record, funded by TCEQ and EPA for the specific purpose of assessing nutrient impacts on aquatic life in Texas streams—one of them introduced by the City—establishes this impact. There are no scientific studies in the record to the contrary.

The single study relied on by the ALJ and TCEQ to suggest that adding treated sewage to small streams in Texas could increase biological diversity and thus be “good” for stream, is, to the contrary, an admission that the biological integrity of streams is compromised by nutrient increases from wastewater and other sources at levels well below those that would result from the approved discharge.

Defendants' interpretation of the notice regulations also attempts to skirt the rule's plain meaning and the purpose of the notice requirements. This Court should reject Defendants' attempt to fashion an interpretation of TCEQ regulations that conflict with the regulation's clear, unambiguous language and purposes of the regulatory scheme.

I. THE PERMIT VIOLATES THE TIER 2 PROHIBITION ON DEGRADATION IN MULTIPLE WAYS.

¹ The 2012 IPs are on TCEQ's website and appear as the second result on a web search for “TCEQ Implementation Procedures.” See <http://www.tceq.texas.gov/docs/2011draft-improcedures>.

SOS refers the Court to its Opening Brief, pages 18 to 32, on the Tier 2 issue, as largely unrebutted by Defendants' responses. Here, SOS highlights how Defendants' arguments clarify the legal errors in the Final Order; and responds to Defendants' case law arguments.

A. The Increases in Pollution in Onion Creek Authorized by the Permit Are Not in Dispute.

As summarized in SOS's brief, and shown in the charts reproduced therein from the record evidence, *see* SOS Br. at 7, 9, 10, the undisputed facts are:

Critical Low Flow in Onion Creek Compared to the Permitted Discharge

- The permit authorizes wastewater discharge of 1.27 cubic feet per second (cfs) of effluent every day, while the critical low-flow of Onion Creek for purposes of analyzing compliance with TCEQ rules and the CWA is 0.12 cfs.
- Thus, at full authorized discharge, Onion Creek would be more than 90% treated sewage under low flow conditions; there would be almost no dilution of the treated sewage in the creek.

Total Phosphorus

- The permit authorizes the discharge of treated wastewater with up to 0.15 milligram per liter (mg/L), or 150 micrograms per liter ($\mu\text{g/L}$), of total phosphorus (TP) into Onion Creek.
- The City's expert testimony estimated baseline, or natural background TP, in Onion Creek at 5 to 9 $\mu\text{g/L}$, but his water quality modelling assumed 2 $\mu\text{g/L}$ TP as the baseline.
- TCEQ's expert estimated background TP in Onion Creek at 2 $\mu\text{g/L}$.

- TCEQ's review noted that mean background TP in Edwards Aquifer streams is 0.003 mg/L, or 3 µg/L.²
- The City's expert estimated that the permitted discharge would increase TP in the receiving waters of Onion Creek to just below 100 µg/L. TCEQ's experts did not dispute this estimate.
- Stated in percentage terms, the authorized discharge would increase TP levels in Onion Creek at critical low flow conditions from 1,555% to 2,800%/ assuming 5 to 8 µg/L background TP. It would be even higher at the 3 µg/L background TP estimated by TCEQ.

Total Nitrogen

- The permit authorizes the discharge of treated wastewater with up to 6 mg/L, or 6,000 micrograms per liter (µg/L), of total nitrogen (TN) into Onion Creek, as a daily average.
- The City's expert estimated background TN in Onion Creek at 0.5 mg/L, or 500 µg/L.
- The City's expert estimated the approved discharge would increase TN in Onion Creek to 5.5 mg/L under critical low-flow conditions. TCEQ experts did not dispute this.

Bottom-Dwelling Algae

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

Dissolved Oxygen

² The amici curiae also highlighted this fact in their brief at 24-25.

- Baseline levels of Dissolved Oxygen in Onion Creek range from 6.89 mg/L to 8.42 mg/L, as measured by the City's expert.
- TCEQ's modelling found that with the proposed discharge would not cause DO levels in Onion Creek to drop below 5.0 mg/L DO criterion assigned for its high-aquatic life use (measured as a 24-hour average).
- The City's expert conducted modelling estimating a low of 4.87 mg/L DO.

The Scientific Record on Nutrients and Protecting Aquatic Life in Texas Streams

- EPA's 2001 report recommends for Edwards Plateau streams a 25 µg/L TP boundary between low nutrient "oligotrophic" streams and middle-range "mesotrophic" streams and a 75 µg/L TP boundary between mesotrophic and eutrophic streams. AR B Doc. 269, at 133, Table 4.
- The 2007 USGS Report, AR B, Doc. 269, at 113-167, is relied on by the ALJ to argue that the City's proposed discharge benefits the aquatic life of Onion Creek. While this conclusion turns the CWA upside down, as previously argued, the report concludes that "[c]hanges in benthic invertebrate functional feeding group percentages, especially the percentage of scrapers, were clearly related to both nutrient concentrations and algal conditions in the stream." *Id.* at 167.
- A 2009 study concludes that there is "overwhelming evidence" of "consistent biological changes" in streams with greater than 20 µg/L, including "nonlinear changes in algal species composition and fish community structure." AR B, Doc, 241 at 67-68.
- The 2014 TCEQ-funded "Nonlinear response of stream ecosystem structure to low-level phosphorus enrichment" report by Taylor, King,

et al. concludes that a TP stream water quality limit of 20 µg/L would be needed to protect both algae species assemblages and two species of native fish from more nutrient tolerant minnows and invasive carp. AR B, Doc. 269 at 230-43.

- A 2018 EPA-funded study on “establishing defensible numeric criteria in freshwater ecosystems,” reports on an in-depth two year field study that, in part, concluded that native diatom species assemblages declined at TP levels greater than 20 – 25 µg/L. AR B, Doc. 269, at 220-229.

B. TCEQ’s Implied Interpretation of “Degradation” Would Allow Some Degradation, Rather than the Required “No Degradation.”

TCEQ’s brief frames the Tier 2 issue as whether the permit allows Onion Creek to be degraded “to a greater degree than allowed by law.” TCEQ Br. at 1. This framing echoes the Final Order’s key Finding of Fact 90 of “no *significant* degradation.” Plf. App’x 1 at 10. However, the Tier 2 standard prohibits all activities subject to permitting “that would cause degradation” absent a showing of important social and economic needs. 30 Tex. Admin. Code § 307.5(b)(2). The rule prohibits degradation, of any kind, to any degree, and the *de minimis* definition must be read consistent with this prohibition.

Administrative rules are interpreted using the traditional principles of statutory construction. *Rodriguez v. Serv. Lloyds Ins. Co.*, 997 S.W.2d 248, 254 (Tex. 1999). The primary objective is to give effect to the drafter’s intent as determined from the plain meaning of the words used. *Id.*; see SOS Br. at 15. Additionally, in construing a statute, courts must give effect to all its words and, if possible, not treat any statutory language as mere surplusage. *State v. Shumake*, 199 S.W.3d 279, 287 (Tex. 2006).

Both federal and state regulations must be interpreted in a way that is consistent with the Clean Water Act purposes of protecting the “chemical, physical, and biological integrity” of our nation’s waters. 33 U.S.C. § 1251(a). As a condition of CWA permitting authority delegation, states must adopt an anti-degradation policy which “shall, at a minimum be consistent” with EPA’s own anti-degradation rule. SOS Br. at 20; 40 C.F.R. § 131.12(a). For those waters that are cleaner than necessary to support indigenous fish and wildlife and support recreation in and on the water, “that quality shall be maintained and protected” unless the State finds that “allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located.” *Id.*

The TCEQ Tier 2 rule, as written, conforms to the EPA’s mandate, prohibiting all activities subject to permitting “that would cause degradation” of high quality waters—thus prohibiting *any* degradation absent a showing of important economic or social need. 30 Tex. Admin. Code § 307.5(b)(2). It is agreed that no such showing was made or attempted here. “Degradation is defined as a lowering of water quality by more than a *de minimis* extent.” *Id.* The meaning of “more than a de minimis extent” must be interpreted in the context of a mandate of “no degradation,” not some “degree of degradation” or “significant degradation.”

C. Defendants’ Construction of the Tier 2 Standard Ignores the Clean Water Act and the EPA Rule Requiring that the Chemical Integrity Be Maintained and Protected.

Because TCEQ’S interpretation ignores the purpose, language, and structure of the CWA and its implementing regulations, it should be rejected. *See* SOS Br. at 18-21; 33 U.S.C. § 1251(a); Tex. Water Code § 26.003; *Cnty. of*

Maui v. Haw. Wildlife Fund, No. 18-260, 2020 U.S. LEXIS 2410 (Apr. 23, 2020)(rejecting statutory interpretation that would create a loophole allowing evasion in contravention of the CWA’s basic purpose).

D. The Anti-Degradation Analysis is Pollutant-by-Pollutant, Not Water Quality as a Whole.

Rather than attempt to argue that the orders of magnitude increases in key nutrient pollutants will not result from the approved discharge, TCEQ argues that the “degradation” definition applies to “water quality as a whole” and not to “each chemical’s measurables.” TCEQ Br. at 26-27. This appears to be a new argument not previously presented. TCEQ’s position here is that SOS’s argument is fatally flawed by looking at “individual pollutant components.” *Id.*

The Final Order and TCEQ’s Implementation Procedures (IPs) state unequivocally that the anti-degradation rule is applied constituent-by-constituent, and not by some amorphous, undefined “water quality as a whole” standard. *See* AR B, Doc. 257 at 66. The key Findings of Fact 87 and 88, which SOS challenges on the merits, address total phosphorus, total nitrogen, and dissolved oxygen individually. Plf. App’x 3 at 10. The chapter on “Anti-degradation” in the IPs specifically identifies “nutrients (nitrogen and phosphorus)” for analysis under both Tier 1 and Tier 2 anti-degradation review. AR B, Doc. at 56, 62. For Tier 2, the analysis begins by determining “baseline water quality conditions,” meaning pre-discharge existing conditions consistent with the cleanest the receiving waters have been since November 28, 1975. 30 Tex. Admin. Code § 307.5(c)(2)(B); AR B, Doc. 257 at 63. The IPs explain that “new discharges that use less than 10% of the existing assimilative capacity of the water body” are usually not considered a risk of

causing degradation. *Id.* at 64. The IPs then explain that the Tier 2 “screening procedure for nutrients” is explained in the previous “Nutrients” chapter. *Id.* (citing p. 26).

Flipping back to that chapter, the introduction section repeats that an anti-degradation review by TCEQ includes evaluating whether a limit is needed for nutrients—specifically “total phosphorus (TP) or, in appropriate situations, total nitrogen (TN).” AR B, Doc. 257 at 26. Thus, the Tier 1 and Tier 2 assessment applies to nutrients, TP and TN, not “water quality as a whole.”

E. Defendants’ Construction of the Tier 2 Standard Reads out Important Language and is Inconsistent with the Regulation’s Plain Text.

Defendants’ construction of the Tier 2 standard reads out of the rule both the *de minimis* standard and the mandate to show important economic and social needs before issuing a permit that would degrade high quality waters. The Final Order incorrectly requires a showing of harm to existing uses to find a Tier 2 violation, as illustrated by Finding of Fact 90, stating that TCEQ’s Tier 2 review “confirms” that “existing uses will be maintained.” *See* SOS Br. at 22, 29. TCEQ’s brief repeats this incorrect construction of the rule by arguing that increases in TP or TN, “standing alone without additional evidence of its specific impact” does not show a lowering of water quality. TCEQ Br. at 28. While the science is overwhelming that the undisputed TP increases would impair indigenous aquatic life uses, such showing of impact is not required. This construction reads out of the rule the words prohibiting degradation of high quality waters.

While it is correct that the Tier 2 standard repeats the Tier 1 mandate that water quality sufficient to protect existing uses must be maintained, this backstop does not erase the remaining text: that “no” degradation of high

quality waters is allowed absent a showing that “the lowering of water quality is necessary for important economic and social development.” 30 Tex. Admin. Code § 307.5(b)(2). Defendants’ reading of the rule would render superfluous the entire Tier 1 standard.

The City sets out a chart of four degradation/no degradation scenarios, asserting that SOS’s reading of the Tier 2 standard excludes its “Scenario 2,” framed as “no degradation.” City Br. at 43. SOS agrees—no reasonable interpretation of the rule could include that scenario. *See* 30 Tex. Admin. Code § 307.5(b)(2). The chart illustrates how mistakenly the City reads the rule. Degradation does not require a showing of use impairment. The rule defines degradation as “a lowering of water quality by more than a *de minimis* extent”—the second qualifying phrase “but not to the extent that existing uses are impaired” reinforces that a lowering of water quality that impairs use is a violation of the Tier 1 standard (which has no provision for a social/economic need variance). The Tier 2 standard offers a higher degree of protection: even if a high quality water could absorb some pollution and still remain fishable/swimmable, the polluting discharge would be prohibited absent the showing of social and economic need. The City’s misreading of the rule is reinforced by its “Scenario 3,” which classifies as “Degradation” a “*de minimis* lowering of water quality, such that existing uses are impaired.” City Br. at 4. Applying the proper definition of *de minimis*, as consistent with “no degradation,” there are simply no circumstances where a *de minimis* lowering of water quality would cause impairment. The table on the next page provides a graphic illustration of what the rule says and what Defendants would like it to say.

Table 1: Tier 2 Anti-degradation Rule v. Defendants' Interpretation

What the Rule Says	What Defendants Say
Existing high-quality water	Existing high-quality water
De minimis lowering only = no degradation	
<p style="text-align: center;">More than a de minimis lowering of water quality -- unlawful lowering without showing important social & economic needs and alternatives analysis.</p> <p style="text-align: center;">Must not impair uses.</p>	<p style="text-align: center;">“Not more than de minimis” can mean any degree of lowering water quality as long as it doesn’t impair uses;</p> <p style="text-align: center;">Process of showing important social and economic needs (with alternatives analysis) to allow degradation without harming existing uses eliminated from the rule.</p>
Water quality necessary to maintain uses	Water quality necessary to maintain uses

SOS's review of the case law, below, further addresses this point.

F. Neither TCEQ's Continuing Planning Process (CPP) with EPA, the EPA's Withdrawal of Its Objection Letter, nor Its IPs Support, Much Less "Ensure," that TCEQ Complied with the Substantive Anti-degradation Rules.

TCEQ's brief introduces a new argument that EPA oversight of TCEQ's administration of CWA permitting programs somehow assures that TCEQ properly concluded that the permit approved in this case meets all statutory and regulatory requirements. TCEQ Br. at 32-34. However, merely having the required programs in place in no way guarantees that the standards are met in a particular permitting case. The EPA approval of TCEQ's programs and policies include—and cannot substitute for—the contested case, evidentiary hearing process.

Similarly, TCEQ's argument that following the IPs for anti-degradation review "ensures" that the final permit complies with the anti-degradation rule would, if adopted by the Court, render the contested case process meaningless. *See* TCEQ Br. at 35.

TCEQ's argument also ignores the plain language of the IPs specific to nutrient screening:

If an effluent limit for TP is indicated, the screening factors and levels of concern are used to help determine the specific effluent limit for TP. Initial assessments can be improved and reconsidered in light of additional site-specific data and more extensive models and evaluations.

AR B, Doc. 257 at 45. In other words, the results of the nutrient screening process only "helps determine" what limit on TP in the discharge is needed to comply with the anti-degradation standard. It does not determine, or dictate, the correct answer. Further, TCEQ staff's "initial assessment" is subject to the

“additional” evidence, modeling, and evaluation in the contested case hearing process. That process, beyond dispute, shows orders of magnitude increases in TP and TN, and major reductions in DO, even with the “strict” effluent limits included in the permit.³

TCEQ performed the nutrient screening, but once the screening indicated a TP limit was needed, TCEQ never conducted the analysis required for Tier 2, including establishing baseline water quality. Instead, TCEQ borrowed a TP limit from a nearby permit and decided that was sufficient to deem Tier 2 requirements satisfied. *See* SOS Br. at 27.

Defendants also make great fanfare about the EPA withdrawing its December 2016 letter objecting to the issuance of the permit. That such a rare objection letter was issued in the first place is more telling. The EPA’s June 2017 letter withdrawing objections, issued after the Trump administration took office, fundamentally misreads the operative rules, and it was issued before the contested case hearing process. Without the benefit of the evidentiary hearing process, EPA’s letter pales in comparison to EPA’s comprehensive scientific report on protecting the high quality waters of Ecoregion IV, including the Edwards Aquifer subregion, by keeping stream flow concentrations of TP below the 25 µ/L threshold. AR B, Doc. 269, at 170-211.

³ In another misleading argument, Defendants point to SOS’s expert Dr. Ross indicating she was okay with a 6.0 mg/L minimum Dissolved Oxygen limit in the permit. *See* City Br. at 41; TCEQ Br. at 40-41. However, that limit applies *to the effluent*. The concern involves DO in the receiving water, not in the effluent. DO in the receiving water is affected by multiple constituents in the effluent, including oxygen-demanding substances (CBOD). *See* Plf. App’x 1 at 7 ¶48; AR B, Doc. 269 at 44-45.

G. Case Law Supports SOS’s Claim That the City’s Permit Violates the Tier 2 Anti-degradation Standard as a Matter of Law and that TCEQ Misconstrued the Rule.

The Austin Court of Appeals’ unpublished opinion in the 2014 case of *Robertson County: Our Land, Our Lives (RCOLOL) v. TCEQ*, relied on by the City, actually makes a strong case for SOS’s Tier 2 anti-degradation claims. See City Br. at 24-25 (citing No. 03-12-00801-CV, 2014 WL 3562756 (Tex. App.—Austin July 17, 2014, no pet.).

The *Robertson* case involved an amendment to a permit for discharge of “once through” power plant cooling water plus an intermittent discharge of stormwater runoff. *Id.* at *1. Here we have a new permit. The amended discharge was to a reservoir specifically built as a power plant cooling water reservoir, not to a pristine Hill Country stream.

The court properly set out the standards and procedure for the Tier 2 anti-degradation analysis:

Thus, stated generally, to determine whether the proposed regulated activity will result in degradation of water quality, TCEQ rules require a comparison of the baseline water-quality conditions with the conditions that will exist once the permitted activity begins. If this comparison shows no change in water quality, a water-quality improvement, or a de minimis—i.e., “trifling” or “negligible”—lowering of water quality, the anti-degradation policy is not implicated. If, however, the comparison shows a loss in water quality that is more than de minimis, the activity will not be allowed absent a showing that the loss is necessary for important economic or social development.

Id. at *8. The plaintiffs first argued that, under Tier 2, TCEQ had set an improper baseline level of water quality. *Id.* at *9. In the instant case, TCEQ never even bothered to determine baseline water quality for TP, TN, DO, or algae growth.

Similarly, there are no underlying findings of any kind in the PFD or the Final Order on “the conditions that will exist once the permitted activity begins” as to TP, TN, DO and algae growth, other than the conclusory, ultimate finding required by Tier 1 review (not Tier 2) that water quality will not be lowered to a point of impairing existing uses. Finally, there are no underlying findings in the ALJ’s PFD or the Final Order that compares baseline levels to post-discharge levels of TP, TN, DO and algae, or that makes the ultimate assessment of whether these changes in each constituent avoid a more than *de minimis* lowering of water quality.

The *Robertson* court found that the TCEQ properly established baseline water quality in light of the pre-existing discharge and operations of the power plant. 2014 WL 3562756 at *9. Here, there were no findings of baseline water quality conditions for the relevant pollutants.

The *Robertson* court then rejected the plaintiffs’ second Tier 2 argument that the amended discharge would lower water quality more than a *de minimis* extent as a matter of law—similar to the argument SOS makes here. *Id.* at *9-10. But in so doing, the court notes several factual findings not present here:

- The court observed that “only very small amounts of chlorine” and “no other contaminants” would be added to the once through cooling water. *Id.* at *10. By contrast, here we have large amounts of nutrients and an entire plethora of pollutants contained in municipal sewage being discharged, for the first time, into a pristine Hill Country stream.
- The court found that “the chlorine that is added is in an amount that is ‘so tiny that [it] would not be measurable.’ ” *Id.* While baseline levels of TP in Onion Creek are below levels of detection in TCEQ-certified labs,

there is agreement among the experts (but no findings) on a relatively narrow range of baseline levels of TP in Onion Creek. The levels of TP in Onion Creek resulting from the discharge are at least five times higher than TCEQ-certified lab detection levels, and both baseline and resulting levels of TN, DO, and algae are readily measurable (and measurably worse to a high degree).

- The court observed that “the average dilution factor ‘will typically be greater than 1,517 to 1 (.066%) and TCEQ degradation policy cites a 10% use of existing assimilative capacity in a specific contaminant as the *de minimis* Tier 2 threshold.’ ” *Id.*

By contrast, the dilution factor here, at the critical low-flow of 0.12 cubic feet per second (cfs) and permitted discharge of 1.27 cfs, is 1 to 10.58, or 1,058% greater than background flows. Unlike stormwater, municipal wastewater is generated—and under the permit can be discharged—every single day. Although TCEQ does not require the 10% assimilative capacity threshold to apply to nutrients, TCEQ fails to provide any rational basis for concluding that increases in TP and TN of more than 1,000% would constitute only a *de minimis* lowering of water quality.

The Third Court’s holdings in *Robertson* make clear that the Tier 2 anti-degradation standard has been violated here. The court’s holdings also make clear that the “no lowering of water quality by more than a *de minimis* extent” standard requires the agency to determine the baseline, pre-discharge water quality, to estimate the water quality with the proposed discharge, and to compare these conditions using an objective and quantitative analysis. The Final Order and TCEQ’s arguments conflict directly with these holdings.

Defendants also rely on the 2015 unpublished decision out of the

Corpus Christi Court of Appeals, *Wood v. TCEQ*, No. 13-13-00189-CV, 2015 WL 1089492 (Tex. App.—Corpus Christi Mar. 5, 2015, no pet.) (mem. op.), to argue that SOS misreads the Tier 2 anti-degradation rule. DS Br. at 25-26, 36; TCEQ Br. at 38-39. There, the court upheld TCEQ’s decision to reject an ALJ’s conclusion that Tier 2 compliance for a wastewater discharge permit had not been shown.

The *Wood* court’s analysis stands in stark contrast to, and in conflict with, the Austin court’s analysis of the Tier 2 standard in *Robertson*. The *Wood* court misreads or ignores the applicable law and IPs, and confuses the “narrative” swimmable/fishable aquatic use standards with the Tier 2 anti-degradation standard. The court incorrectly finds that the “no more than *de minimis*” standard is “qualitative” and “subjective,” and not “quantitative,” and thus, the court suggests, the agency is given free rein to decide if a discharge of pollutants is more than *de minimis* or not. The City compounds the problem by overstating the *Wood* holding as eschewing any quantitative evidence for anti-degradation review. City Br. at 25-26.

The *Wood* case likely reached the wrong result; however, the memorandum opinion does not provide enough facts to ascertain whether the permitted discharge complied with the Tier 2 anti-degradation rule. The opinion does not mention whether there were, as there are here, multiple peer-reviewed scientific studies directly applicable to the conditions of the receiving stream concluding that the permitted levels of TP would exceed threshold levels for harming indigenous aquatic life by 100 to 400 percent. Without these details, it is not possible to directly compare to the facts of this case.

In *Greater Yellowstone Coalition v. EPA*, 2013 U.S. Dist. LEXIS 59661 (D.

Idaho 2012) the plaintiff challenged EPA's approval of Idaho's CWA anti-degradation rules defining "degradation" and exemption from review *de minimis* levels of discharge. In granting EPA's motion to remand the case for further proceedings, the court was explicit in holding that Idaho's interpretation of its *de minimis* exemption had to be consistent with "no degradation" and protective of Tier 2 waters and their "assimilative capacity."

The court first described Tier 2:

[Tier 2] applies when "the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water." 40 C.F.R. § 131.12(a)(2). The capacity of a water body to absorb pollution from a new use and yet still maintain the water quality necessary to support fish, wildlife, and recreation is known as its "assimilative capacity." *Ky. Waterways Alliance v. Johnson*, 540 F.3d 466, 471 n.4 (6th Cir. 2008). Tier 2 water bodies have an assimilative capacity. Under the EPA's regulations, a pollution increase that would decrease a water body's assimilative capacity would need to be justified by the necessity of the pollution for achieving important economic and social development. *Id.*, see 40 C.F.R. § 131.12(a)(2).

Id. at *4-5. It then explained that the Idaho rule automatically exempted from Tier II anti-degradation review if the additional pollution from a new activity would consume 10% or less of the "assimilative capacity" of a water body. *Id.* at *3. Also, the Idaho rule defined "degradation" and "lower water quality" as "a change in a pollutant that is adverse to designated or existing uses." During its review, "EPA explained to Idaho that 'it is important that the definition of degradation does not imply that uses must be adversely affected before a proposed change in water quality triggers an anti-degradation review.'" *Id.* at *14. The court allowed the remand with the understanding that that "degradation means a change in a pollutant that reduces water quality" and not one that "is adverse to uses." *Id.* at 5. This holding directly conflict with

TCEQ's construction of its Tier 2 *de minimis* exception in this case.

Similarly, TCEQ and the City's criticize SOS's reliance on the Ohio case of *Columbus & Franklin Cnty. Metro. Park Dist. v. Shank*, 600 N.E.2d 1042 (Ohio 1992) by again mischaracterizing SOS's argument. In *Shank*, as here the agency incorrectly interprets and applies its lawful regulation. SOS does not dispute the anti-degradation regulation, but rather, *how* TCEQ applies it. *See* SOS Br. at 29. The court found that the Ohio environmental agency was interpreting and applying its Tier 2 anti-degradation rules unlawfully because the agency was equating Tier 2 degradation with the Tier 1 prohibition on impairment of use. TCEQ, like the Ohio agency in *Shank*, is attempting to read Tier 2 out of the rule.

The Defendants' reading and application of the Tier 2 standard would, in essence, eviscerate the CWA's objective to protect and maintain the physical, chemical, and biological integrity of our nation's waters and eliminate discharges. *See* 33 U.S.C. § 1251(a). The U.S. Supreme Court recently provided important guidance in holding that a discharge of municipal sewage into groundwater that flowed to protected surface waters was a discharge requiring a CWA. *Maui County v. Hawaii Wildlife Fund*, 2020 U.S. LEXIS 2410. EPA argued that the Act only required a permit for pollutant discharges directly to public surface waters. The Court explained that "to follow EPA's reading would open a loophole allowing easy evasion of the statutory provision's basic purposes. Such an interpretation is neither persuasive nor reasonable." *Id.* at *12. The same can be said of TCEQ's construction of the Tier 2 standard here; it would essentially eliminate the CWA mandate that high quality waters be protected and maintained. It would invite cities and developers to target these waters for waste disposal services even where, as

here, there are feasible alternatives to discharge. Just as the Supreme Court refused to defer to EPA's construction as hostile to the CWA's language and intent, this Court should refuse to defer to TCEQ's construction of its anti-degradation rule that cannot be squared with the CWA or implementing rules.

III. Defendants Fail to Rebut SOS's Showing That TCEQ Misapplied the Standard.

SOS stands on its Opening Brief, at pages 32 to 38, establishing that, as a matter of law, Defendants improperly considered the "enrichment" of Onion Creek flows to benefit aquatic life uses. As argued, protecting existing aquatic life uses requires protecting the species that are naturally found in the receiving stream. Converting a naturally low-nutrient stream into a nutrient-rich stream harms the native aquatic life communities while drastically altering conditions for other, non-native species to move in.

The City's assertion that the oligotrophic/mesotrophic boundary has no regulatory significance is incorrect given the science, including its own science. Most notably, the 2009 study by King and Winemiller for TCEQ and EPA concludes there is "overwhelming evidence" of "consistent biological changes" in streams with greater than 20 µg/L, including "nonlinear changes in algal species composition and fish community structure." AR B, Doc. 241 at 67-68. The scientific studies in the record consistently find that the 20-25 µg/L TP level defines a biologically significant boundary between oligotrophic and mesotrophic streams. *See* AR B, Doc. 269 at 170-211.

TCEQ staff did assess impacts to aquatic life in the Tier 1 analysis—but only for dissolved oxygen. TCEQ's Tier 1 analysis for nutrients only looked at the potential for nuisance algae, an impact to human recreational uses. TCEQ's Tier 1 analysis is deficient as a matter of law.

III. Defendants Offered No Persuasive Arguments that Notice Requirements Had Been Met.

The applicable standard in determining whether an agency has failed to comply with the procedural requirements for its action is “exacting, yet limited.” *Kern Cnty. Farm Bureau v. Allen*, 450 F.3d 1072, 1075-76 (9th Cir. 2006) (quoting *Natural Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1045, 1048-49 (D.C. Cir. 1979)). “Exacting” refers to the degree of judicial scrutiny to be applied. “On a petition for review from an agency decision, [courts] determine in the first instance the adequacy of the agency’s notice and comment procedure, without deferring to an agency’s own opinion of the adequacy of the notice and comment opportunities it provided.” *Natural Res. Def. Council v. EPA*, 2079 F.3d 1180, 1186 (9th Cir. 2002). “Limited” refers to the scope of the court’s review dictating a straightforward, surgical approach: based on the applicable law and the notice’s text, does the notice contain all the elements that are legally required?

Defendants would have this Court entertain an expansive look into materials they argue proves that notice was sufficient. But neither media attention, nor the degree of public fervor in opposition to the permit, nor promotional real estate materials are relevant to this court’s inquiry. Here, the question is whether the public notices on the permit provided a general description of the location of each proposed discharge point. They did not.

Defendants claim that by statutory decree the notices cannot be proffered as evidence of their insufficiency. This is nonsensical. The notices are the best (and necessary) evidence to show whether they meet the requirements set out by statute and regulation. SB 709 creates a statutory

presumption of regularity; it does not shroud every page of the administrative record in a cloak of unimpeachability.

In fact, courts have not only based their determinations on sufficiency of notice solely on the administrative record, but have noted that reviewing materials outside the record would be inappropriate. “Because our review is limited to ensuring that statutorily prescribed procedures have been followed, we are confident that the administrative record will usually be sufficient to ensure meaningful review.” *Natural Res. Def. Council v. SEC*, 606 F.2d 1031, 1045 (DC. Cir. 1979, reh’g denied); see *United Copper Indus. Inc. v. Grissom*, 17 S.W.3d 797, 805 (Tex. App.—Austin 2000, no pet.) (finding notice defective based only upon notices in the record and administrative rules).

Courts strictly construe the CWA’s notice requirements. *Cnty. Ass’n for Restoration of Env’t v. Henry Bosma Dairy*, 305 F.3d 943, 950 (9th Cir. 2002). “Nuance and subtlety are not virtues in agency notice practice.” *Natural Res. Def. Council v. EPA*, 2079 F.3d at 1188.

The notices failed to meet regulatory requirements because they did not provide a description of the location of the proposed discharge point, as required by §§ 39.411, 124.10. Pertinent geographic information was omitted from the public notice, depriving members of the public from being able to assess whether and to what extent their interests may be affected.

The cases cited by Defendants are inapposite. See TCEQ Br. at 64-65; City Br. at 58-59 (citing *Chocolate Bayou Water Co. v. Tex. Natural Res. Conservation Comm’n.*, 124 S.W.3d 844 (Tex. App.—Austin 2003, pet. denied)). There, it was not in dispute whether the notice met statutory requirements. *Id.* at 847. And the facts upon which the City tries to distinguish *Hughey v. Gwinnett* had no bearing to the court’s decision. The court focused on the fact

that, like here, the notices did not provide the actual location of the discharge point. *Hughey v. Gwinnett County*, 278 Ga. 740, 740 (Ga. 2004). The description of the discharge point was not in error—it changed. Still, the ALJ found notice sufficient because it identified the receiving water body. *Id.* at 742. It is for this reason that the *Hughey* court held that “plainly, more specificity is needed.” *Hughey*, 278 Ga. at 744.

The City’s postulation that no language would ever satisfy SOS conveniently forgets that SOS suggested several ways to describe the discharge point’s location in the proceedings below, such as by latitude and longitude coordinates, street name/block number, or approximate distance from roads or the existing treatment plant. Usual TCEQ practice in notices for wastewater treatment plants, if not yet been built, is to describe the site’s approximate distance and direction from a readily definable point. For example, three-fourths mile southwest of the intersection of Ranch Road 12 and US 290 is a readily identified point. Although the rules do not require the location be described in a particular way—it must be described. But the notices do not even attempt that.

Defendants argue for the first time that SOS lacks standing because it has not shown how failure to provide legally adequate notice resulted in a particular injury to SOS’s interests.

SOS is not required to make such a showing to challenge TCEQ’s issuance of the permit in violation of the notice requirements. The Texas APA provides that a person who is aggrieved by a final decision in a contested case is entitled to judicial review.⁴ Tex. Gov’t Code § 2001.171. “As long as the party

⁴ A party must also have exhausted its administrative remedies as a prerequisite to judicial review. Tex. Gov’t Code § 2001.171. It is not in dispute that SOS has met this requirement.

can establish an injury fairly traceable to the impact of the final contested case order...the judiciary has the power under the APA judicial review provisions to review and remand an agency order upon a finding of reversible error.” Tex. Admin. Prac. & Procedure § 11.2; *Tex. River Protection Ass’n*, 910 S.W.2d 141, 151 (Tex. App. – Austin, 1995) (legislature codified constitutional-standing requirements by including “aggrieved” in the APA). SOS is aggrieved by the TCEQ’s decision to issue the permit.

Contrary to Defendants’ characterization, SOS is not attempting to assert the rights of third parties in arguing that notice was defective. SOS mentioned the Caliterra residents and downstream landowners to emphasize the importance of providing legally adequate notice. For the same reason, SOS provided evidence showing that there are fifty-five private water wells supplied by the Trinity Aquifer within one mile of the proposed discharge point. SOS Br. at 45.

SOS is not required to disprove all claims of “harmless error.” Holding the notice insufficient does not rest on a party’s ability to show what they would have done differently if notice had been adequate. *California v. Azar*, 911 F.3d 558, 580-81 (9th Cir. 2018) (rejecting agency’s argument that parties challenging notice failed to identify specific comments that they would have submitted if notice were adequate).

Finally, SOS provides the following responses to other points made by Defendants:

- Defendants cannot point to fulfillment of one statutory provision to claim that this also fulfilled another statutory provision. *See* City Br. at 57. Otherwise, the requirement to describe the discharge point would be superfluous.

- Caliterra’s promotional materials cannot make up for deficient notice. The community design plan was not part of the administrative record or publicly distributed. Nothing in the record shows that the Walnut Springs Bridge is marked by a physical sign on the ground.
- TCEQ reads too much into SOS’s use of the phrase “where the discharge will actually start.” *See* TCEQ Br. at 67. From context it is clear SOS used “discharge point” in a manner consistent with the statutory definition.
- The short length of Walnut Springs does not save the notice, but supports an inference that it is obscure.
- The City claims that because the notice included the words “piped to,” the public was on notice. But pipes can be 2 feet or 200 miles. The first notice did include “via pipe, but the City asks much of these two words.
- SOS’s expert Dr. Ross only used the term “Walnut Springs” to track the language provided in the published notice. *See* City Br. at 56.
- Walnut Spring is not identified as a creek in the official USGS Map. AR B, Doc. 177.
- The FWS correspondence does not show that FWS successfully availed itself of the means to get further information provided in the notice. FWS is a federal agency with unique access to TCEQ staff.
- The City cannot rely on journalists to satisfy its statutory obligation to provide notice.
- The number of comments received does not prove notice requirements were met.

Due to the notice’s failure to provide a description of the location of the proposed discharge point, TCEQ’s decision making was “in violation of a statutory provision,” and “made through unlawful procedure.” *See* Tex. Gov’t

Code § 2001.174(2). This Court should reverse the agency's decision and remand with instructions to re-open the comment period after adequate public notice has been published.

PRAYER

For the reasons described above, SOS respectfully requests that the TCEQ's decision granting Permit No. WQ0014488003 be reversed, and declared invalid as a matter of law.

Dated: June 1, 2020

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that Plaintiff's Reply Brief was electronically filed with the Clerk of the Court using the electronic case filing system of the Court, and that a true and correct copy of Plaintiff's Reply Brief was served upon counsel for each party of record, listed below, by electronic service on this 1st day June 2020.



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CERTIFICATE OF COMPLIANCE

I hereby certify that Plaintiff's Reply Brief contains 7,484 words in the relevant parts of the document, in compliance with Texas Rule of Appellate Procedure 9.4(i)(2)(C), as calculated by the computer program used to prepare this document.

A handwritten signature in black ink, appearing to read "Kelly D. Davis", written in a cursive style.

Kelly D. Davis

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