

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

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

**PROTESTANTS’ OBJECTIONS TO APPLICANT’S PREFILED TESTIMONY AND  
EXHIBITS, MOTION TO STRIKE, AND ALTERNATIVELY, MOTION FOR  
CONTINUANCE AND LEAVE TO FILE REBUTTAL TESTIMONY**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES:

NOW COME Protestants Granbury Fresh, Victoria Calder, Bennett’s Camping Center and RV Ranch, and Stacy and James Rist (collectively, “Protestants”) and, pursuant to the agreement of parties, file these objections to testimony and exhibits prefiled by Applicant City of Granbury (“Applicant” or “Granbury”) in the above-referenced matter. Protestants move to strike certain prefiled testimony and exhibits of the Applicant or, in the alternative, move for a continuance of these proceedings and leave to provide rebuttal testimony and evidence.

**I. Introduction**

The prefiled evidence submitted by Applicant contained substantial new modeling performed by Mr. Tim Osting that was not contained in the Administrative Record supplied as the City of Granbury’s *prima facie* case, nor provided through discovery responses made reasonably prior to the submission of Granbury’s prefiled testimony.<sup>1</sup> Admission of this testimony, and testimony by Mr. David Flores that relies upon the Osting modeling, without allowance for additional time and the opportunity for presentation of rebuttal testimony by Protestants would violate Protestants’ due process rights. Accordingly, Protestants move that certain portions of Mr.

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<sup>1</sup> Certain materials relevant to the modeling at issue were provided February 16, 2022. This did not provide time to conduct discovery prior to the February 18 deadline for discovery upon Granbury and did not cure the unavailability of the material prior to Protestants’ deadline for prefiled testimony.

Osting's and Mr. Flores' testimony be struck from the record. In the alternative only, if the materials are admitted, Protestants ask that the ALJs grant a continuance and grant Protestants the opportunity to present rebuttal evidence to Mr. Osting's and Mr. Flores' testimony regarding dissolved oxygen and nutrient impacts of the proposed discharge.

## **II. Applicable Standards**

### **A. Texas Rules of Civil Procedure provide that information not timely disclosed may not be admitted as evidence.**

Texas Rule of Civil Procedure 193.6 governs the effect of deficient discovery responses upon whether evidence may be admitted at trial. Rule 193.6(a) provides that a party that fails to timely disclose material may not introduce into evidence the material or information that was not disclosed unless the court finds that there was good cause for the failure to timely make, amend, or supplement discovery or the failure to supplement discovery will not unfairly surprise or unfairly prejudice the other parties.<sup>2</sup> The burden of establishing that material falls into such an exception is upon the party seeking to introduce the evidence or call the witness.<sup>3</sup>

### **B. Administrative Due Process entitles each party to a full and fair hearing, including the opportunity to respond and present evidence on each issue presented.**

Furthermore, in administrative proceedings, due process requires that the parties be accorded a full and fair hearing on disputed fact issues.<sup>4</sup> To this end, the Texas Administrative Procedures Act provides that "each party is entitled to an opportunity . . . to respond and to present evidence and argument on each issue involved in the case."<sup>5</sup> To accommodate this requirement,

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<sup>2</sup> Tex. R. Civ. P. 193.6(a).

<sup>3</sup> Tex. R. Civ. P. 193.6(a).

<sup>4</sup> *City of Corpus Christi v. Public Utility Commission of Texas*, 51 S.W.3d 231, 262 (Tex. 2001) (Justices Owen, Phillips, Baker, Abbott, Hankinson, and Jefferson in concurrence).

<sup>5</sup> Tex. Gov't Code § 2001.051.

Texas Senate Bill 709 incorporated the allowance that the deadline for completion of a contested case hearing on a TCEQ permit application may be extended by SOAH where a failure to do so would deprive a party of due process.<sup>6</sup> Furthermore, TCEQ rules provide that “[a]ny party may present a rebuttal case when another party presents evidence that could not have been reasonably anticipated.”<sup>7</sup>

**III. The admission of evidence presenting new water quality modeling performed after Protestants’ deadline for prefiled testimony would result in unfair surprise and undue prejudice, and thus such evidence should be struck.**

The sufficiency of the permit conditions in protecting existing uses of the receiving waters has long been an identified issue with regard to the City of Granbury’s application. In fact, in comments submitted September 8, 2020, Victoria Calder expressed concern that the proposed discharge would result in harmful dissolved oxygen levels in the receiving waters.<sup>8</sup> It is undisputed that under the applicable regulations, the dissolved oxygen in Rucker Creek must be maintained at a level of 5.0 mg/l in order to protect the high aquatic life use in that waterbody.<sup>9</sup> Up until the filing of the City of Granbury’s prefiled testimony on February 18<sup>th</sup> - which was only provided to Protestants on February 20<sup>th</sup> - the sole modeling provided to justify satisfaction of this standard was modeling performed by the Executive Director in the Executive Director’s Dissolved Oxygen Modeling Permit Review Checklist completed January 24, 2020.<sup>10</sup> The results of that modeling indicated a concentration of dissolved oxygen of 4.81 mg/L in Lake Granbury as a result of the authorized discharge without addressing nutrient concentrations in the receiving waters.<sup>11</sup> In the

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<sup>6</sup> Tex. Gov’t Code § 2003.047(e-3)(2).

<sup>7</sup> 80 T.A.C. 80.117(b).

<sup>8</sup> Attachment A to this Brief, at pp. 2-3, 5.

<sup>9</sup> Administrative Record-204 (Executive Director Water Quality Standards).

<sup>10</sup> Exhibit ED-18.

<sup>11</sup> Exh. ED-18, p. 3 of 4.

Executive Director's consideration of Granbury's application, the City of Granbury had at no point provided any water quality modeling of its own.

Protestants' deadline to submit prefiled testimony was February 4, 2022, and on that date, Protestants presented evidence addressing the Executive Director's water quality modeling, since that was the only water quality modeling that had been presented in support of the draft permit.<sup>12</sup>

The City of Granbury's prefiled testimony filed February 18<sup>th</sup> – provided to Protestants February 20<sup>th</sup> – fundamentally altered the claimed support for the permit, particularly with regard to dissolved oxygen and nutrient impacts. The City of Granbury presented Mr. Tim Osting as an expert witness. In part, Mr. Osting presented new modeling of dissolved oxygen impacts using the same “QUAL-TX” model as the Executive Director had used, but with different assumptions.<sup>13</sup> Mr. Osting further testified that he had developed a new water quality model that addressed phosphorus and *E. coli*.<sup>14</sup> Mr. Osting discussed other model runs using a different modeling program than used by the Executive Director, with different assumptions and consideration of variables not incorporated in the Executive Director's modeling at all.<sup>15</sup> Mr. Osting further presented new modeling that claimed to predict the extent of algal growth resulting from the discharge.<sup>16</sup> In all, Mr. Osting's testimony presents more than ten new modeling scenarios.<sup>17</sup>

The admission of such extensive new modeling in support of the permit after the deadline for Protestants to present evidence would result in unfair surprise that would unfairly prejudice Protestants' substantial rights. The City of Granbury has been aware of Protestants' critiques for

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<sup>12</sup> *e.g.*, Exh. GF-400, at pp. 5 – 7.

<sup>13</sup> Exh. COG-600, pp. 17 – 20.

<sup>14</sup> Exh. COG-600, p. 22.

<sup>15</sup> Exh. COG-600, pp. 23 – 25.

<sup>16</sup> *e.g.*, Exh. COG-600, p. 34.

<sup>17</sup> Exh. COG-600, pp. 19-20, 26.

18 months, and Granbury has had ample opportunity to address the deficiency of its application through the submission of additional water quality modeling. Within the established hearing process, the additional evidence supplied by an applicant is to be responsive to the evidence produced by protestants, rather than presenting TCEQ and SOAH with a substantially new application. Accordingly, Protestants move to strike the following testimony and exhibits associated with modeling performed by Mr. Osting not disclosed until after Protestants' deadline to submit their prefiled testimony:

- Prefiled testimony of Tim Osting (Exhibit COG-600), page 19, line 21 – page 41 (end); and,
- Exhibits COG-606, 607, 608, 609, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, and 621.

Substantial portions of the testimony by Mr. Flores on behalf of the City of Granbury are premised upon this new modeling by Mr. Osting. Protestants move to strike those portions of Mr. Flores' testimony as well:

- Prefiled testimony of David Flores (Exhibit COG-700), page 8, line 3 – page 10, line 5; 16:19 – 18:12; 19:8-10; 26:1 – 27:2; 31:15 – 33:23; 34:12 – 35:13; 36:8 – 38:4; 38:22 – 42:6; and 42:22 – 43:5.

**IV. In the alternative only, if testimony and evidence related to new water quality modeling are admitted, then Protestants seek a continuance and leave to present rebuttal testimony.**

Should the ALJs rule that the testimony and exhibits identified above are to be admitted, then Protestants should be afforded a meaningful opportunity to evaluate those materials, and present evidence responding to this newly produced evidence. As noted, TCEQ rules provide that

“[a]ny party may present a rebuttal case when another party presents evidence that could not have been reasonably anticipated.”<sup>18</sup> Certainly, the additional modeling presented by Mr. Osting could not have been reasonably anticipated at the time of the deadline for Protestants’ prefiled testimony.

Evaluating the information presented by Mr. Osting and developing responsive evidence requires more than the single week remaining until the commencement of the hearing on the merits.<sup>19</sup> Protestants accordingly ask that the currently scheduled live hearing on the merits be continued to commence no earlier than March 28, 2022.

## **V. Prayer**

For the reasons stated above, Protestants respectfully pray that the ALJs:

- 1) Strike the testimony of Tim Osting (Exhibit COG-600), page 19, line 21 – page 41 (end);
- 2) Strike Exhibits COG-606, 607, 608, 609, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620 and 621;
- 3) Strike the testimony of David Flores (Exhibit COG-700), page 8, line 3 – page 10, line 5; 16:19 – 18:12; 19:8-10; 26:1 – 27:2; 31:15 – 33:23; 34:12 – 35:13; 36:8 – 38:4; 38:22 – 42:6; and 42:22 – 43:5; or, in the alternative only,
- 4) Continue the hearing on the merits to commence no earlier than March 28, 2022, and
- 5) Grant Protestants the opportunity to present rebuttal testimony relating to the modeling performed by Mr. Tim Osting and presented by the City of Granbury and the conclusions drawn by Mr. David Flores from that modeling.

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<sup>18</sup> 80 T.A.C. 80.117(b).

<sup>19</sup> Attachment B to this Brief, Affidavit of James L. Machin

Respectfully submitted,

/s/ Eric Allmon

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*and Stacy and James Rist*

**CERTIFICATE OF CONFERENCE**

Counsel for Protestants have conferred with counsel for the Applicant, Executive Director, and Office of Public Interest Counsel regarding this motion. The Applicant opposes the motion. The Executive Director and the Office of Public Interest Counsel were contacted regarding the proposed schedule and motion and had not yet stated their positions at the time of filing.

/s/ Eric Allmon  
Eric Allmon

**CERTIFICATE OF SERVICE**

I do hereby certify that a true and correct copy of the above and foregoing document has been served on the following counsel of record on this day, February 24, 2022.

/s/ Eric Allmon  
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