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ADMINISTRATIVE HEARINGS
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**SOAH DOCKET 582-22-0585
TCEQ DOCKET 2021-1001-MWD**

**APPLICATION OF
CITY OF GRANBURY
TPDES PERMIT NO.
WQ15821001**

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**BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS**

OFFICE OF PUBLIC INTEREST COUNSEL'S CLOSING BRIEF

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES:

The Office of Public Interest Counsel (OPIC) at the Texas Commission on Environmental Quality (TCEQ) files this closing brief and would respectfully show as follows:

I. Introduction

OPIC finds the City of Granbury (City or Applicant) met its burden of proof for a majority of the referred issues. However, the City failed to meet its burden of proof on Issues G and I, and that failure is a basis to deny the application.

II. Procedural Background

On September 22, 2021, the TCEQ Commissioners granted hearing requests from Bennett's Camping Center and RV Ranch, Walter Shaw and Victoria Calder, Debra and Peter Cook, Doris and John Faber, Woody Frossard, Judith Gagliardo, Cynthia and Norman Gookins, George and Cynthia Griffin, Ronnie and Dianne Hasty, Kay and Bud Lowack, John and Susan Meche, David

and Kathy Montgomery, Keith and Colleen Nielsen, Jason Nolte, Stacy and Jim Rist, and Paul Williams. By Interim Order dated September 29, 2021, the Commission referred the following issues to the State Office of Administrative Hearings (SOAH) for a contested case hearing.

- A) Whether the draft permit complies with applicable requirements to abate and control nuisance odors, as set forth in 30 TAC § 309.13(e).
- B) Whether the draft permit is protective of water quality.
- C) Whether the draft permit is protective of groundwater and wells.
- D) Whether the draft permit is protective of the health of the requesters and their families, livestock, and wildlife, including endangered species.
- E) Whether the proposed discharge will adversely impact recreational activities.
- F) Whether the application is accurate and complete.
- G) Whether the modeling complies with applicable regulations to ensure the draft permit is protective of water quality.
- H) Whether the ED's antidegradation review was accurate.
- I) Whether the nutrient limits in the draft permit comply with applicable Texas Surface Water Quality Standards.
- J) Whether the Commission should deny or alter the terms and conditions of the draft permit based on the consideration of need under Texas Water Code § 26.0282.
- K) Whether the Applicant's compliance history or technical capabilities raise any issues regarding the Applicant's ability to comply with the material terms of the permit that warrant denying or altering the terms of the draft permit.
- L) Whether the proposed location for the Facility complies with the 100-year flood plain and wetland location standards found in 30 TAC § 309.13(a) and (b).

M) Whether Applicant substantially complied with applicable public notice requirements.

Administrative Law Judge (ALJ) Ross Henderson convened a preliminary hearing on December 13, 2021, and Victoria Calder, Granbury Fresh, Bennett's Camping Center and RV Ranch, and Stacy and Jim Rist (Protestants) were admitted as parties. On March 7-9, 2022, ALJs Sarah Starnes and Pratibha J. Shenoy conducted the hearing on the merits.

III. Standard of Review

By rule, the burden of proof is on the moving party by a preponderance of the evidence.¹ In a permit hearing, the applicant is the moving party. Therefore, the City bears the burden of proof on each of the referred issues.

Regarding the burden of proof in an SB 709 case, 30 TAC § 80.117(b) states that an applicant's presentation of evidence to meet its burden of proof may consist solely of the filing with SOAH, and admittance by the ALJ, of the administrative record. Section 80.17(c)(1) states that the filing of the administrative record establishes a prima facie demonstration that the ED's draft permit meets all state and federal legal and technical requirements, and if issued consistent with the ED's draft permit, would protect human health and safety, the environment, and physical property. Section 80.17(c)(2) further states that a party may rebut this presumption by presenting evidence demonstrating that the draft permit violates a specifically applicable state or federal legal or technical requirement. If a rebuttal case is presented, section

¹ 30 TAC § 80.17(a).

80.17(c)(3) states that the applicant and the ED may present additional evidence to support the ED's draft permit.

IV. Referred Issues

Applicant bears the burden of proof on each referred issue, and OPIC finds that Applicant failed to meet that burden for Issues G and I. For the remaining issues, OPIC finds that Applicant met its burden of proof, by a preponderance of the evidence, through a combination of the administrative record and Applicant's additional submitted evidence. OPIC also notes that by stipulation, the Parties are not contesting Issues C and L. Therefore, the following discussion is limited to Issues G and I.

G. Whether the modeling complies with applicable regulations to ensure the draft permit is protective of water quality

Protestants assert through the testimony of James L. Machin, P.E. that the proposed final phase discharge of 2 million gallons per day (MGD) will not meet the Texas Surface Water Quality Standard for dissolved oxygen (DO) of 5 milligrams per liter (mg/L) at critical conditions.² The designated uses and DO criterion as stated in the Texas Surface Water Quality Standards for Lake Granbury are primary contact recreation, public water supply, high aquatic life use, and 5 mg/L DO.³ Rucker Creek also has high aquatic life use and a corresponding 5 mg/L DO criterion.⁴

² GF-400 at 5:13.

³ ED-4 Standards Implementation Memo at 1.

⁴ *Id.*

As described by Mr. Machin and confirmed by ED witness James Michalk, barometric pressure drops with elevation, and the solubility of oxygen in water is proportional to its partial pressure above the water, meaning that at higher elevations, solubility is lower.⁵ The ED modeled DO using a default barometric pressure value of 1013.25 millibars (mb), which is the average sea level pressure on earth.⁶ The ED's modeling predicted a DO value of 4.81 mg/L—already below the required minimum of 5 mg/L. Mr. Machin ran TCEQ's model using the barometric pressure (988 mb) which corresponds to the site's actual elevation of 700 feet above mean sea level.⁷ Using the site-specific barometric pressure instead of a default value resulted in 4.03 mg/L DO, compared to the regulatory standard of 5 mg/L.⁸ The ED opined that Mr. Machin's change of the barometric pressure input was not appropriate because other site-specific inputs should also be changed.⁹ The ED attempted to reproduce Mr. Machin's result but instead got values of 4.63 mg/L and 4.65 mg/L.¹⁰ The ED and Mr. Machin may disagree on modeling methodology, but their results share one thing in common. None of them show a DO value which meets the required minimum of 5 mg/L. Every model run, whether the ED's (4.81), Mr. Machin's (4.03), or the ED's attempts to repeat Mr. Machin's result (4.63 and 4.65), produced DO values below the regulatory standard of 5 mg/L. In conclusion,

⁵ GF-400 at 5:22-6:3; ED-13 at 16:2-6.

⁶ GF-400 at 5:20.

⁷ GF-400 at 5:23-6:2.

⁸ GF-400 at 6:6.

⁹ ED-13 at 16:25-27.

¹⁰ ED-13 at 17:22-31.

OPIC finds the weight of evidence indicates that the modeling for dissolved oxygen does not ensure the draft permit is protective of water quality.

I. Whether the nutrient limits in the draft permit comply with applicable Texas Surface Water Quality Standards

Protestants assert through the testimony of Woody Frossard that the total phosphorus limit in the draft permit does not comply with applicable Texas Surface Water Quality Standards, and the draft permit should include a total nitrogen limit. OPIC agrees.

The ED proposes a total phosphorus effluent limit of 1 mg/L in the interim phase and 0.5 mg/L in the final phase.¹¹ OPIC appreciates and agrees with the addition of a total phosphorus limit, but the proposed limit is not low enough to prevent algae blooms caused by phosphorus in the discharge. As a finger of Lake Granbury that branches off the main stem, Rucker Creek Cove experiences less dilution than the main body of Lake Granbury. Given the recreational use of Rucker Creek Cove and the lack of mixing and dilution in the receiving water, it would have been more appropriate to consider the volume and surface area of Rucker Creek Cove instead of the entire Lake Granbury. Considering phosphorus this way also would have been consistent with the way DO was modeled. As stated by Mr. Frossard, diluting the total phosphorus load with the total volume of the reservoir instead of the cove obfuscates the impact of the phosphorus on the receiving water.¹²

¹¹ ED-1 at 8:11-19.

¹² GF-500 at 20:5-7.

To prevent noxious algae blooms and protect water quality and public health, it is important to limit the discharge of nitrogen too, not just phosphorus. However, the ED states that TCEQ's general approach for setting nutrient limits for wastewater discharges is to focus on phosphorus instead of nitrogen, and the ED did not recommend a total nitrogen limit.¹³ Mr. Frossard testified that the presence of a phosphorus limit and the absence of a total nitrogen limit can cause the limiting nutrient to become nitrogen instead of phosphorus.¹⁴ In other words, the unlimited discharge of nitrogen may cause it to become the nutrient which allows excessive algae growth. OPIC notes at least one other TCEQ discharge permit limits total nitrogen, and that example is the Belterra Permit (Hays County WCID No. 1, TPDES Permit No. WQ0014293001).

In conclusion, OPIC finds that the draft permit's total phosphorus limit should be lowered in both phases, and a total nitrogen limit should be added to the draft permit. Our position is based on discharge volume, discharge route characteristics like critical low flow and short length, the limited dilution that occurs prior to and in Rucker Creek Cove, and the primary contact recreation and public water supply uses of Lake Granbury. Without those changes, the nutrient limits in the draft permit do not comply with the applicable Texas Surface Water Quality Standards.

¹³ ED-11 at 11:22-26.

¹⁴ GF-500 at 21:16-20.

V. Transcript Costs

Under 30 TAC § 80.23(d)(2), OPIC, as a statutory party, cannot be assessed reporting or transcription costs. Therefore, OPIC takes no position on this issue and defers to those parties who have incurred or may be responsible for transcript costs.

VI. Conclusion

On Issue G, OPIC finds the modeling for dissolved oxygen does not comply with applicable regulations and does not ensure the draft permit is protective of water quality. On Issue I, we find the nutrient limits in the draft permit do not comply with the applicable Texas Surface Water Quality Standards. The City's failure to meet its burden of proof on Issues G and I is a basis to deny the application.

Respectfully submitted,

Vic McWherter
Public Interest Counsel



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CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2022, the foregoing document was filed with SOAH and the TCEQ Chief Clerk, and all parties listed below were served via email.



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