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

**APPLICATION OF § BEFORE THE STATE OFFICE
CITY OF GRANBURY, §
FOR TPDES PERMIT NO. § OF
WQ0015821001 §
§ ADMINISTRATIVE HEARINGS
§**

PROTESTANTS’ REPLY TO APPLICANT’S EXCEPTIONS BRIEF

TO THE HONORABLE COMMISSIONERS:

Protestants Granbury Fresh, Victoria Calder, Stacy and James Rist, and Bennett’s Camping Center & RV Ranch, collectively referred to herein as “Protestants,” submit this reply to the exceptions brief submitted by Applicant City of Granbury (“Granbury”, “the City”, or “Applicant”) and would respectfully show the Commissioners as follows:

INTRODUCTION

The City of Granbury has put the Commission in a horrible position. If it adopts the ALJs’ Proposal for Decision (“PFD”), it will establish several precedents not protective of water quality regarding standards for water quality modeling, evaluation of nutrients, and the antidegradation review, including the novel argument Granbury raises in its exceptions brief and that is discussed below. If upheld on appeal, these precedents will be so lacking in water quality protection that TCEQ’s EPA delegation may be jeopardized. Even if Protestants are incorrect about the evaluation of their chances of success before the Commission and, if necessary, the courts, Protestants strongly believe that Granbury’s plant will quickly cause nutrient and dissolved oxygen problems that will require changes to the plant which would likely include moving the discharge point to Lake Granbury itself. Because of the proximity to the City’s wastewater treatment plant in the Lake, this may be a very expensive and politically risky proposition.

How did this case get to this position? From the timeline below, one can see that Granbury and its engineering consultants failed to evaluate the environmental impacts from the discharge when evaluating plant sites and simply did not care about the impact to neighbors by locating the plant on a piece of land that could not accommodate the required buffer. The City’s environmental experts were not even hired until after the draft permit was issued. The timeline below shows that key modeling and environmental analysis was done close to or even after Protestants’ deadline to

pre-file their direct case. Similarly, Dr. Ray Perryman, the expert witness supporting Granbury’s findings in its exceptions was not hired until approximately the end of January or early February. Doubling down on its approach to this case, Granbury objected to rebuttal evidence being presented by Protestants:

Permit Proceedings Partial Timeline

September 19, 2019	Application received by TCEQ.
May 4, 2020	Notice issued.
August 24, 2021	Fact Sheet, draft permit, and Executive Director's Preliminary Decision issued. ¹
Late August/ Early September 2021	Granbury environmental experts hired. ²
September 9-16, 2021	Environmental sampling ongoing. ³
September 29, 2021	TCEQ refers matter to SOAH.
December 13, 2021	SOAH Preliminary Hearing.
January 5, 2022	Protestants and OPIC must identify witnesses.
January 25, 2022	Applicant and ED must identify witnesses.
End of January 2022	QUAL-TX Run. ⁴
End of January/ Early February 2022	Dr. Perryman hired. ⁵
Beginning of February 2022	QUAL2K Run ⁶ and sampling finished. ⁷
February 4, 2022	Deadline for Protestants to submit prefiled testimony.
February 18. 2022	Deadline for Granbury to submit additional prefiled evidence.

Indeed, it’s fortunate that Dr. Perryman had already done work in the area, so that he was able to put together one of his famed econometric reports in such a short amount of time.

¹ Admin Record-0185.

² Tr. V. 2, p. 402.

³ COG Exhibit 700, pp. 10-11.

⁴ Tr. V. 2, p. 375.

⁵ Tr. V. 3, p. 441.

⁶ Tr. V. 2, p. 375.

⁷ COG Exhibit 700, p. 11.

ARGUMENT

Granbury excepts to the ALJs' PFD and asks the Commission to add a finding that the "Commission is satisfied that the discharges are shown to be necessary for important economic and social development." Granbury's exceptions brief attempts to set up an argument for appeal that even if Protestants are correct about the problems with dissolved oxygen, nutrients, or Tier 2 review and the impacts of those issues, the permit should still be granted no matter what the environmental consequence because the lowering of water quality is necessary for important economic or social development.⁸ This is the required finding if the antidegradation review shows that there is more than a de minimis impact to water quality as a result of the discharge. It is unclear from the TCEQ rules and statutes what process exactly is for determining whether the lowering of water quality is necessary for important economic or social development after notice has already been issued, parties determined, and the hearing has begun. The rules and Implementation Procedures clearly lay out what happens if the degradation issue comes up before the permit is noticed and sent to hearing:

Evaluation of Alternatives and Economic Justification

When initial and additional screening under Tier 2 preliminarily indicates that the proposed discharge is expected to degrade water quality, then the applicant is notified so that the following information can be provided to TCEQ by the applicant:

- *Any additional information about the nature of the discharge and the receiving waters that could affect the evaluation of whether degradation is expected.*
- *An analysis of alternatives to the proposed discharge that could eliminate or reduce the anticipated degradation, and an assessment of cost and feasibility for reasonable alternatives.*
- An evaluation of whether the proposed discharge will provide important economic and social development in the area where the affected waters are located, considering factors such as:
 - Employment
 - Increased production that improves local economy
 - Improved community tax base
 - Housing
 - Correction of an environmental or public health problem.

⁸ Strangely, Granbury is trying to argue that the Commission should make this finding without acknowledging there is a more than a de minimis impact.

Agency Review of Degradation

When degradation is anticipated, the TCEQ reviews the preliminary determination of potential degradation, the evaluation of alternatives, and economic and social justification. The TCEQ then determines whether a lowering of water quality is expected from the proposed discharge. If it is, the TCEQ then determines whether the lowering of water quality is necessary for important economic or social development and whether reasonable alternatives to the lowering of water quality are unavailable. The TCEQ may also refer questions concerning antidegradation review to the State Office of Administrative Hearings for further review and consideration for an administrative hearing. Any proposed TPDES permit that allows degradation is subject to EPA review and approval.

Public Notice

When the proposed permit affects receiving waters whose quality is exceptional, high, or intermediate, the public notice also indicates whether a lowering of water quality is anticipated. Information in the public notice about uses and antidegradation is indicated as preliminary and is subject to additional review and revision before approval of the permit by the TCEQ. A summary of anticipated impacts and the criteria for preliminary determinations of whether degradation will occur is publicly available in the permit file.

The public notice provides opportunity to comment and to submit additional information on the determination of existing uses and criteria, anticipated impacts of the discharge, baseline conditions, the necessity of the discharge for important economic or social development if degradation of water quality is expected under Tier 2, and any other applicable aspects of the antidegradation policy.

(emphasis added)⁹

These procedures were not followed and none of the notices in this proceeding discuss a Tier 2 finding of degradation of more than a de minimis extent.¹⁰ TCEQ rules require that “[w]hen degradation of waters exceeding fishable/swimmable quality is anticipated, a statement that the antidegradation policy is pertinent to the permit action must be included in the public notice for the permit application or amendment.” 30 TAC § 30(c)2(D).

⁹ Ex. ED-3 (TCEQ’s Implementation Procedures).

¹⁰ See Admin Record-0034.

This was not an issue on which the Commission sought SOAH determination. Protestants were not allowed to introduce evidence and the ALJs were not directed to make a finding on this point. The Commission did require that the ALJs determine whether the draft permit should be altered based on a consideration of need under Texas Water Code §26.0282¹¹ and the ALJs concluded the draft permit did not need to be altered.¹² This finding is not part of the antidegradation de minimis review and the evidence is not the same, as can be seen above in TCEQ's IPs and below in the EPA's guidance on the same issue:

6.6.2 Tier 2 Implementation

For new or increased discharges that could potentially lower water quality in high-quality waters, Tier 2 protection provides the state with a framework for making decisions regarding the degree to which it will protect and maintain the high water quality. A new or expanded discharge permit application typically triggers a Tier 2 antidegradation review. Depending on the outcome of the review, the permit could be written to maintain the existing high water quality or could be written to allow some degradation.

Each state's antidegradation policy or implementation procedures should describe the Tier 2 antidegradation review process. Though the process varies among states, EPA's antidegradation regulation at § 131.12 outlines the common elements of the process. To permit a new or increased discharge that would lower water quality, the state is required to make a finding on the basis of the following:

- The state must find that allowing lower water quality is necessary for important social or economic development in the area in which the waters are located.
 - The state would perform an alternatives analysis to evaluate whether the proposed discharge is actually *necessary* (i.e., whether there are less degrading feasible alternatives) and that might include consideration of a wide range of alternatives (e.g. non-discharging options, relocation of discharge, alternative processes, and innovative treatments).
 - The state should provide a justification of important social or economic development (or both) that would occur as a result of permitting the proposed discharge
- The state's finding must be made after full satisfaction of its own intergovernmental coordination and public participation provisions.
- The state must assure that the highest statutory and regulatory requirements for all new and existing point sources will be achieved.

¹¹ PFD, pp. 86-87.

¹² *Id.*

- The state must assure that all cost-effective and reasonable BMP's for nonpoint source control will be achieved.
- The state must assure that water quality will still protect existing uses.

If, after fulfilling the above conditions of the Tier 2 antidegradation review process, the state makes a determination to allow a new or increased discharge that would lower water quality, the permit writer may include such limitations in the NPDES permit for that discharge provided the limitations meet all other applicable technology and water quality standards.¹³

Whatever the process for the necessary evidence to be heard and findings made, the way by which Granbury proposes to simply bring it up in the hearing midway through the process without discovery or rebuttal is not correct. To do so would be yet another, and an even greater, egregious constitutional and administrative due process violation than has already occurred in this proceeding. At a minimum, Protestants believe this case should be remanded and broadly noticed as if it would be for a new permit application and a hearing before SOAH held after discovery on these new issues. While the Commission can make what it wants out of Dr. Perryman's testimony, neither he nor other Granbury witnesses testified on the issues required to make this very significant antidegradation finding even if it was properly before the Commission. The evidence required is more than the fact that the selected site was the least expensive option.

CONCLUSION

For the reasons stated above as well as the reasons stated in Protestants' Exceptions, this permit should be denied, or a new hearing should be held on the issues identified by Protestants.

¹³ Ex. Bennett 3 (EPA NPDES Permit Writers Manual).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing document has been forwarded by email to the following counsel of record, on July 21, 2022.

/s/ Eric Allmon
Eric Allmon

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