

NO. 08-20-00239-CV

**IN THE EIGHTH DISTRICT COURT OF APPEALS
EL PASO, TEXAS**

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY AND
THE CITY OF DRIPPING SPRINGS,
Appellants,

v.

SAVE OUR SPRINGS ALLIANCE, INC.,
Appellee.

On Appeal from the 345th Judicial District Court
Travis County, Texas
The Honorable Maya Guerra Gamble Presiding
Cause No. D-1-GN-19-003030

**BRIEF OF AMICI CURIAE STEPHANIE MORRIS, PROTECT OUR
BLANCO, WIMBERLEY VALLEY WATERSHED ASSOCIATION,
GREATER EDWARDS AQUIFER ALLIANCE, TEXAS RIVERS
PROTECTION ASSOCIATION, SAN MARCOS RIVER FOUNDATION,
BANDERA CANYONLANDS ALLIANCE, AND FRIENDS OF HONDO
CANYON**

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I. SUMMARY

Texas Water Quality Standards must be applied as required by law to protect native streams. The district court properly held this in a thorough and rigorous decision. The law prohibits the Texas Commission on Environmental Quality (TCEQ) from granting wastewater discharge permits that will not only degrade native streams but also will harm the property rights of riverfront property owners on 191,000 miles of Texas landscape.¹ For an agency entrusted with protecting water quality to determine that discharges – which it recognizes will cause algal growth in pristine streams – will “benefit” those streams because of increased non-native “species richness,” is laughable, misstates the science, and defiles not just those water bodies but TCEQ’s legal obligations and the Clean Water Act. The district court’s decision should be upheld.

This case has broad significance. At least thirteen permit applications, seven permit renewals, and two major amendments to wastewater discharge permits for discharges into waters in the Texas Hill Country are currently pending at TCEQ. Whether TCEQ will ensure that these permits comply with the water quality standards depends on the results of this case. The proposed permit applications would authorize discharges of 8,140,000 gallons of treated effluent into San

¹ Tex. Parks & Wildlife Dep’t, *Texas River Guide*, <https://tpwd.texas.gov/landwater/water/habitats/rivers/> (last visited Apr. 26, 2021).

Geronimo/Medina River, Masters Lake/Frederick Creek, Salado Creek, Mankins Branch/San Gabriel/North Fork San Gabriel River, Long Hollow/Sabinal River, Third Creek/Guadalupe River, Maha Creek, Brushy Creek, Plum Creek, San Marcos River, Cedar Creek/Colorado River, Lewis Creek/Dripping Springs Creek, Water Hole Creek/York Creek, and South Fork Dry Creek East collectively each day.² The proposed permit renewals would authorize a discharge of 9,030,000 gallons of treated effluent into Llano River, Berry Creek/San Gabriel/North Fork San Gabriel River, Smith Branch/Salado Creek, Menger Creek/Upper Cibolo Creek, Pershing Lake/Nolan Creek/South Nolan Creek, and the Rio Grande River collectively each day.³ The proposed permit amendments would authorize a discharge of 1,612,000 gallons of treated effluent into Verde Creek/Guadalupe River and Upper Blanco River collectively each day.⁴

² TPDES new permit applications of Aqua Utilities, Inc. (WQ0005206000), Kendall West Utility LLC (WQ0015787001), Vineyard Municipal Management District 1 (WQ0015875001), Airw 2017-7, LP (WQ0015878001), Young Life (WQ0015892001), City Of Kerrville (WQ0010576002), Mustang Ridge, LLC (WQ0015905001), Studio Estates, LLC (WQ0015933001), Continental Homes (WQ0015940001), Continental Homes of Texas, LP (WQ0015948001), Ocean View Property Group, Ltd. (WQ0015949001), Gateway Oasis V, LLC (WQ0015958001), and the Crystal Clear Special Utility District (WQ0015966001). Details of individual applications are available on the TCEQ Commissioners' Integrated Database, www14.tceq.texas.gov/epic/eCID/. Enter the permit number in the "TCEQ ID Number" field.

³ TPDES proposed permit renewals of City of Junction (WQ0010199001), City of Georgetown (WQ0010489006), Village of Salado (WQ0014898001), City of Boerne (WQ0010066002), City of Del Rio, San Felipe Plant (WQ0010159001), City of Del Rio, Silver Lake Plant (WQ0010159003), and Universal Services Fort Hood, Inc. (WQ0013358001).

⁴ TPDES proposed permit amendments of City of Blanco (WQ0010549002) and the Camp Recovery Centers, LLC (WQ0013449001).

II. INTERESTS OF AMICI

A. Stephanie Morris

Stephanie Morris owns a home and has a small agricultural practice on 5.2 acres in Williamson County, Texas, on the South Fork San Gabriel River, a naturally clear, low-flowing stream, like Onion Creek. Her property includes half the streambed of the San Gabriel. Her property line is approximately 1/4 mile downstream of the municipal wastewater discharge of the City of Liberty Hill. Liberty Hill is currently permitted to discharge 1.2 million gallons a day (MGD) of wastewater with a daily average limit of 0.5 mg/l concentration of phosphorus, but Liberty Hill's permit will allow it to expand its discharge up to 4.0 MGD of effluent at a daily average 0.15 mg/l concentration of phosphorus, which is similar to the concentration permitted by the Dripping Springs permit.

The Morris family moved from Austin to Leander to give their children greater access to nature. They chose the property because of its view and access to the clear and shallow San Gabriel River. Ms. Morris's four children, ages 12 to 22, enjoy wading, fishing, tubing, and playing in the river and on its banks. The river in its natural state, free of degradation, is important to Ms. Morris and her enjoyment of her property. A degraded river diminishes Ms. Morris's uses of the river and the aesthetic value of the river. The degradation of the river also decreases Ms. Morris's property value.

Since Ms. Morris has lived in Williamson County, the discharges by the City of Liberty Hill into the San Gabriel have increased in volume, and the river in front of her house is now regularly blighted with algae, even when the City is in compliance with the nutrient levels (phosphorus and nitrogen⁵) in its permit. (Both nutrients cause algal growth, though phosphorus is the key contaminant in predicting excessive algae growth in Hill Country streams.⁶)

Ms. Morris has experienced firsthand how excessive algal growth limits the use of and harms the aesthetic value of Texas streams. She understands why the water quality standards must be given proper legal interpretation to protect Texas's 3,700 named streams and 15 major rivers.⁷ If the TCEQ is not required to undertake a legally valid Tier 1 and Tier 2 antidegradation review of the effects of a wastewater discharge on receiving streams, and the water quality standards are interpreted to allow in the name of "species richness" more algal growth in the receiving water, crystal clear Hill Country streams will be a thing of the past.⁸ TCEQ's approach

⁵ The City of Liberty Hill's wastewater permit has limits and/or reporting requirements for ammonia nitrogen, nitrate-nitrogen, and total nitrogen. Here and henceforth any mention of nitrogen is meant to encompass all relevant types of nitrogen.

⁶ Jeffrey Mabe, U.S. Geological Surv., *Nutrient and Biological Conditions of Selected Small Streams in the Edwards Plateau, Central Texas, 2005-06, and Implications for Development of Nutrient Criteria: Scientific Investigations Report 2007-5195*, 10-14 (2007) (AR E, Doc. 293) [hereinafter Mabe USGS Study].

⁷ Tex. Parks & Wildlife Dep't, Texas River Guide, *supra* note 1.

⁸ State Office Admin. Hearings, Application of the City of Dripping Springs for TPDES Permit No. WQ0014488003, Docket No. 582-18-3000 at 16 (Nov. 16, 2018) (Proposal for Decision) (AR A, Doc. 162) [hereinafter PFD]. Here, the ALJs quote from and attempt to interpret a report, the "Mabe Report." That report looked at relationships among nitrogen and phosphorous levels and

directly contradicts state and federal law, which require protection, not the state-sanctioned degradation, of Texas waters.

Ms. Morris has taken thousands of photos and dozens of videos capturing the degradation caused by discharges into the San Gabriel. The photos below capture water quality upstream and downstream of Liberty Hill's discharge point, when the plant is *in compliance* with its TCEQ permitted nutrient limits.⁹ In August 2019, the Liberty Hill wastewater treatment plant had been in compliance with all of its nutrient limits for almost a year, barring a violation of the daily average concentration for ammonia nitrogen in April 2019. In addition, the river was mostly scraped clean of previous algae in April 2019 due to intense rainfall and flooding. The photos from August 2019 demonstrate the level of algae growth in a Central Texas stream even when a discharger is in compliance with the nutrient levels in its permit.

the mass and diversity of benthic invertebrates and fishes in 15 Central Texas streams. Mabe explains, "Excessive amounts of nitrogen or phosphorus, or both, can promote the growth of aquatic vegetation and result in problems ranging from degraded water quality and altered aquatic habitats to a loss of recreational and aesthetic value." Mabe USGS Study, *supra* note 6, at 1-2.

⁹ Based on the data available on EPA's ECHO website, Liberty Hill was in compliance with all nutrient limits in its permit during the months in which the photos in the brief were taken. EPA, Enforcement and Compliance History Online, Detailed Facility Report, Liberty Hill Regional WWTP, <https://echo.epa.gov/detailed-facility-report?fid=110034063091> (last visited May 3, 2021).

Approximately 988 feet¹⁰ upstream of the Liberty Hill wastewater treatment plant (WWTP) outfall on the San Gabriel River – August 19, 2019



¹⁰ All measurements are estimates created using geographic information system software and are calculated based on the location of a specific photo taken by Ms. Morris in front of one portion of the Liberty Hill outfall. Coordinates of each photo were taken from the metadata attached to each photo by Ms. Morris's iPhone. Distance is measured in a straight line, not along the course of the river.

Approximately 68 feet across and upstream from the Liberty Hill WWTP outfall on the San Gabriel River, facing the outfall – August 19, 2019



**Approximately 255 feet downstream of the Liberty Hill WWTP outfall
on the San Gabriel River – August 19, 2019**



**Approximately 1275 feet downstream of the Liberty Hill WWTP outfall
on the San Gabriel River (taken from Ms. Morris's property)
August 19, 2019**



Liberty Hill and the South Fork San Gabriel river serve as a vivid demonstration as to the consequences of insufficient antidegradation review. Liberty Hill's application for the renewal of its wastewater permit is currently pending and Ms. Morris has submitted comments and requested a contested case hearing. She is directly affected by the proper interpretation and application of the water quality standards.

B. Protect Our Blanco

Protect Our Blanco (POB) is a non-profit corporation organized to protect public health, the environment, and quality of life for residents in Kendall, Blanco, and Hays counties, with a special emphasis on preserving the existing pristine nature of the Blanco River. POB is led by a volunteer board of directors and an active local membership, many of whom own property, operate small businesses, or live on the Blanco River downstream of the City of Blanco's wastewater treatment plant and outfall.

The Blanco River is an iconic Hill Country river, flowing from springs in Kendall County southeasterly for eighty-seven miles, through Blanco and Hays counties—and towns known for their access to the river, such as Blanco and Wimberley—before emptying into the San Marcos River inside the City of San Marcos. Like many Hill Country waterways, the Blanco River experiences significant variability in its flow, but its naturally occurring clear waters make it, and the natural areas it supports along its route, renowned attractions for locals and visitors alike.

POB formed in direct response to a 2016 application by the City of Blanco to expand its wastewater treatment plant from a 0.225 MGD plant to a 1.6 MGD plant. POB is contesting Blanco's application, currently pending at TCEQ, and the proper interpretation of water quality standards directly affects POB.

POB also noticed a change in 2019 in the Blanco River, when the City abandoned its voluntary practice of using effluent for irrigation and began discharging more treated wastewater into the Blanco River. That change in operations coincided with severe new algal blooms in the Blanco River, just downstream of the City's discharge. The contrast between upstream and downstream water quality is apparent in the photos below.

Approximately 1,500 feet downstream of the confluence where the Blanco WWTP outfall empties into the Blanco River – March 11, 2019



Aerial photo taken March 26, 2019, showing upstream and approximately 1,500 feet downstream of the confluence where the Blanco WWTP outfall empties into the Blanco River

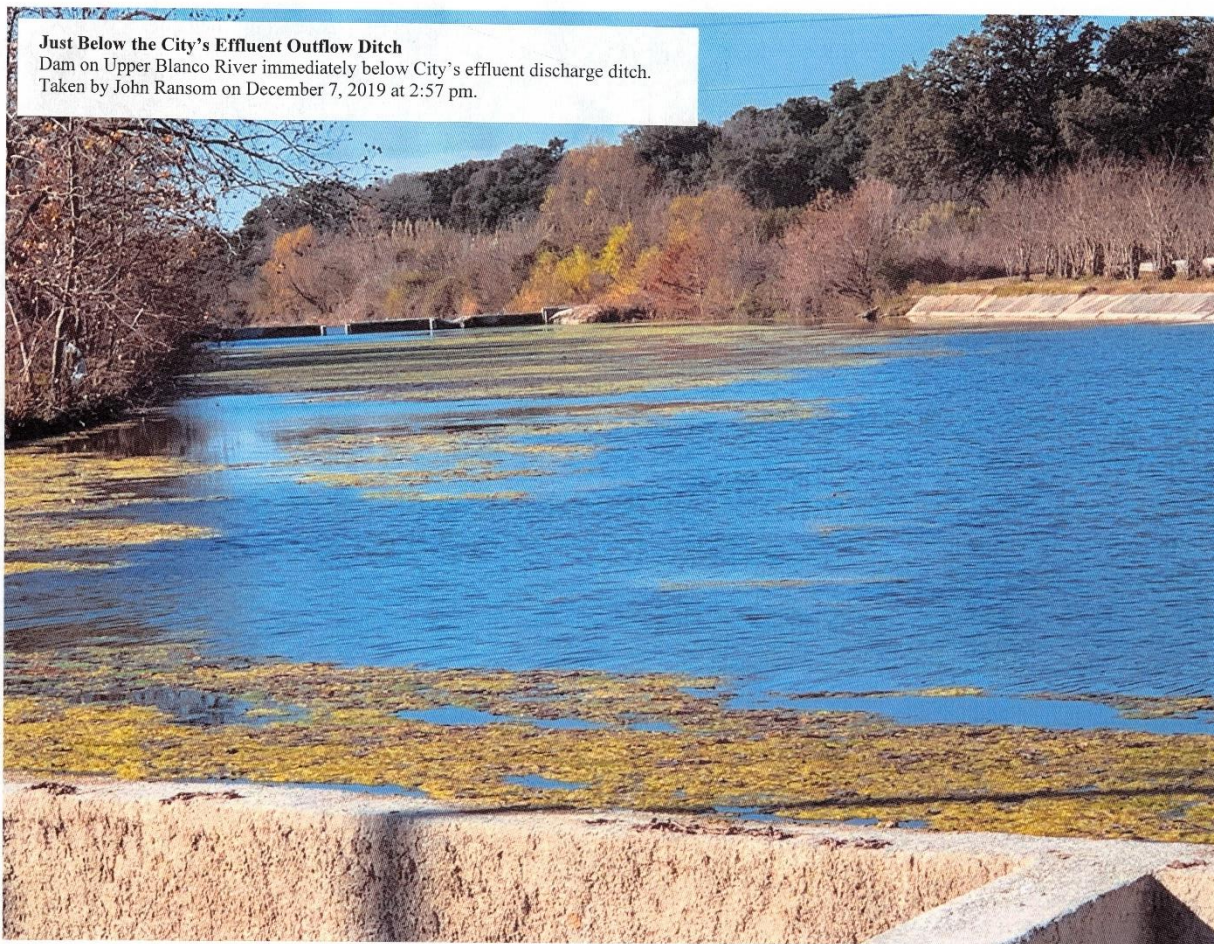


The algae persisted throughout 2019 and into early 2020, coinciding with Blanco's ongoing discharge of effluent.

**Approximately 250 feet upstream of the confluence where the Blanco WWTP
outfall empties into the Blanco River – Dec 7, 2019**



Approximately 1,500 feet downstream of the confluence where the Blanco WWTP outfall empties into the Blanco River (looking upstream) – Dec 7, 2019



TCEQ investigated the algal blooms on March 27-28, 2019, and determined that nuisance algae were observed downstream but not upstream of the Blanco WWTP.¹¹ The report concluded that it was likely increased phosphorus was added at the stretch of the river where the WWTP discharge is located. However, Blanco's 2015 permit does not contain an effluent limit on total phosphorus or total nitrogen.

¹¹ See TCEQ Compliance Investigation # 1553926, Customer: City of Blanco, CN600663728, available at: <http://www15.tceq.texas.gov/crpub/>.

TCEQ ultimately determined that the City of Blanco was meeting the effluent limits set by its 2015 permit.

Like many Hill Country streams, the Blanco River has naturally occurring low phosphorus concentrations, regularly testing below the detectible limit of 0.02 mg/L in the stretch near the Blanco WWTP.¹² In a prior draft permit prepared for Blanco, TCEQ determined that a discharge with a phosphorus concentration between 0.15 and 0.5 mg/l would not violate antidegradation requirements, despite the concentration being more than 25 times reported background levels and the discharge being allowed at times of low flow when effluent would make up the majority of the stream flow at the discharge location. The City currently seeks a permit that would continue to allow it to discharge effluent with no phosphorus limit at all.

POB is dedicated to preserving the Blanco River as a valuable and iconic local natural resource and to protecting its existing uses: recreational uses, as a

¹² According to Texas Clean Rivers Program, the water in the Blanco River at the State Park, immediately upstream from the discharge location tested at phosphorus concentrations as follows: 9/9/19: <0.020 mg/L; 10/3/19: <0.020 mg/L; 11/6/19: <0.020 mg/L; 4/30/20: <0.020 mg/L; 5/18/20: 0.029 mg/L; 6/26/20: <0.020 mg/L; 7/17/20: <0.020 mg/L; 8/13/20: <0.020 mg/L; 9/9/20: <0.020 mg/L; 10/7/20: <0.020 mg/L; 11/17/20: <0.020 mg/L. The Texas Clean Rivers Program, CRP Data Tool, <https://www80.tceq.texas.gov/SwqmisWeb/public/crpweb.faces> (last visited: May 11, 2021)(insert start date of 9/1/2019 and end date of 5/11/2021, type in Parameter Code: "00665"; select River Basin: "18-Guadalupe River"; select Segment: "1813 - Upper Blanco River"; click "Show Stations" and select "1813: 12669 - Blanco R at Blanco State Park"; select Extract Report To: "Results Data File" and click "Generate.")

contributing source to aquifers and drinking water wells, and as valuable wildlife habitat. The proper interpretation and application of water quality standards directly affect POB and its members.

C. Wimberley Valley Watershed Association

Wimberley Valley Watershed Association (WVWA) is a non-profit organization that works to protect the Trinity and Edwards Aquifers, their springs and contributing streams, and the natural and cultural heritage of the Hill Country region and its watersheds. WVWA also has members throughout the Texas Hill Country. WVWA is a member organization of Protect Our Blanco and is currently challenging an application by the City of Blanco to discharge 450,000 gallons of wastewater per day into the Blanco River. The TCEQ has claimed that the Blanco discharge would not violate antidegradation requirements.

WVWA also has members who live and recreate in the area of the City of Dripping Springs's wastewater treatment outfall, including on Onion Creek, and who would be adversely affected by the City of Drippings Springs's application. WVWA is opposed to the Dripping Springs permit because of the harm it would cause Onion Creek, the Trinity Aquifer, and ultimately, the Edwards Aquifer. The proper interpretation and application of the water quality standards directly affect WVWA and its members.

D. Greater Edwards Aquifer Alliance

The Greater Edwards Aquifer Alliance (GEAA) unites fifty-four organizations and thousands of citizens to promote effective, broad-based advocacy for aquifer protection throughout the twenty-one county Edwards Aquifer region, building statewide support for conservation and sustainable management of the Edwards and Trinity aquifers, springs, streams, and contributing watersheds, flora and fauna, and the quality of life, history, and culture of the Texas Hill Country.

Over the years GEAA has engaged with hundreds of individuals to contest Texas Pollutant Discharge Elimination System (TPDES) permits that would negatively impact receiving water bodies and hence, property values, use and enjoyment of property, and, in the case of losing streams, the safe use of untreated groundwater in wells used for potable consumption. GEAA is currently opposing the issuance of four TPDES permits that would allow discharges into Hill Country streams. The proper interpretation and application of TCEQ's water quality standards directly affect GEAA and its members. Algal impacts to Cibolo Creek resulting from wastewater discharges have been documented by GEAA in the comparison photos below.

**Algae on Cibolo Creek just below the Edgebrook Wastewater Treatment
Plant outfall - March 2, 2019**



Aerial photo from 2017 of the same section of Cibolo Creek, prior to effluent discharge



E. Texas Rivers Protection Association

Texas Rivers Protection Association (TRPA) is a non-profit organization with approximately 500 members across the state of Texas. TRPA's mission is to protect the flow, water quality, and natural beauty of the rivers of Texas. TRPA sponsors river clean-ups, engages in public outreach and education to its members and the public concerning preservation of water quality in Texas rivers and streams, and participates in wastewater permitting cases.

TRPA is currently involved in a contested case hearing regarding a permit for discharges to the San Marcos River from the Riverbend Ranch Wastewater

Treatment Plant. TRPA has also been involved in other challenges to wastewater discharge permits, including a permit for wastewater discharges into the San Marcos River from the Cherryville Wastewater Treatment Plant, and a permit involving wastewater discharges into Commissioners Creek near Tarpley in Bandera County. The decision in this case as to the scope of TCEQ's antidegradation review will affect TRPA's efforts to protect water quality in Texas rivers.

F. San Marcos River Foundation

The San Marcos River Foundation (SMRF) is a non-profit dedicated to protecting public access and preserving the flow, beauty, and purity of the San Marcos River since 1985. SMRF has successfully participated in wastewater permitting processes, including securing higher treatment standards for phosphorus in the wastewater discharged by the City of San Marcos into the San Marcos River.

SMRF is currently involved in the permitting processes for four discharges into intermittent streams that flow into the San Marcos River. SMRF is concerned that, rather than complying with its statutory obligation to protect water quality standards, TCEQ seems to believe it can allow discharges that do not protect existing uses or the quality of fishable/swimmable streams, leaving adjacent landowners to file lawsuits against dischargers after the discharges have adversely affected water quality. The decision in this case will affect SMRF's ability to protect water quality in the San Marcos River.

G. Bandera Canyonlands Alliance

Bandera Canyonlands Alliance (BCA) is a 501(c)(3) non-profit organization that was formed in 2007 to protect and preserve the natural and cultural resources, scenic beauty, and quality of life in Bandera Canyonlands.

BCA has submitted comments and a request for a contested case hearing in opposition to an application by Young Life for a discharge permit that would eventually flow to the Upper Sabinal River, located in the Upper Nueces River Basin.¹³ The pristine and naturally clear waterways in the Upper Nueces River Basin support multiple parks and natural areas that draw visitors to the area and support business and recreational uses by local residents. This relevant segment of the Sabinal River is also listed in the National Park Service's Nationwide Rivers Inventory of free-flowing river segments in the United States that possess one or more "outstandingly remarkable" natural or cultural values judged to be at least regionally significant.

The Young Life application is particularly concerning because at this time, no other direct discharge has been permitted in the Upper Nueces River Basin. The camp has been using the property since 2006 and serving 600 individuals with a septic system. Although the camp property is comprised of nearly 2,750 acres, rather than continuing to treat its wastewater through an improved septic system or

¹³ Application for TPDES Permit No. WQ0015892001 (currently pending at TCEQ).

applying for a Texas Land Application Permit (TLAP) that would have the camp land apply (irrigate) its wastewater effluent on some designated acreage, Young Life chose to apply for a direct discharge permit.

Young Life's application also comes on the heels of a hotly contested Camp OTX permit application, located only about 25 miles down the road in Bandera County (discussed below). This demonstrates that, despite the longstanding practice of utilizing septic and irrigation, these direct discharge wastewater applications are now becoming more frequent threats to pristine Hill Country streams. BCA is concerned with the precedent the Young Life application will set for others in the Upper Nueces River Basin, as well as other Texas watersheds currently untouched by wastewater effluent discharge.

Young Life's application contains no proposed limits on phosphorus or total nitrogen, meaning the likely nutrient levels in the wastewater effluent would be significantly higher than background levels in the Sabinal River and its tributaries. Thus, the proposed discharge of effluent will result in degradation to the receiving streams and impairment of existing uses. BCA and its members are directly impacted by the TCEQ's interpretation and application of water quality standards.

H. Friends of Hondo Canyon

Friends of Hondo Canyon (FOHC) is a 501(c)(3) non-profit organization that was formed to protect and preserve the creeks in Hondo Canyon as valuable

natural resources used for swimming, fishing, wildlife habitat, and as contributing sources to aquifers and drinking water wells. Hondo Canyon is located in the Upper Nueces River Basin in the Texas Hill Country west of San Antonio.

FOHC was formed in response to a wastewater application submitted by RR 417 LLC in 2018 for its new summer camp, Camp OTX. TCEQ initially prepared a draft permit that would have authorized Camp OTX to discharge 49,000 gallons of wastewater per day into Commissioner's Creek. Commissioner's Creek is a small, historically spring-fed tributary to Hondo Creek, a tributary to the Frio River. Like other Hill Country waterways, flow varies significantly, but its naturally clear waters support recreational uses, wildlife, aquifer recharge, and water supply. Despite FOHC efforts, which included hiring an independent expert to document recorded background levels in the Commissioner's Creek of less than 0.04 mg/l of total phosphorus, the TCEQ draft discharge permit would have allowed total phosphorus at 0.50 mg/l. The draft permit did not contain a total nitrogen limit. Still, TCEQ claimed that this discharge would not violate antidegradation requirements.

If issued as originally proposed, the Camp OTX permit would have amounted to the very first direct discharge permit in the Upper Nueces River Basin. However, thanks to the tireless efforts over the course of more than two years by FOHC—led by an active, but all-volunteer board of directors and membership—a compromise

was eventually reached to ensure that 100% of Camp OTX's wastewater effluent will be reused on its own property.

Like Young Life, Camp OTX owns several hundred acres of contiguous rural property. It is constructing its wastewater treatment plant near Commissioner's Creek at its downstream property boundary with a pipe to the creek. Although Camp OTX's current permit prohibits discharge, the regulatory pathway FOHC had to travel to prevent this wastewater discharge shows FOHC that TCEQ was willing to issue a wastewater discharge permit to Camp OTX and would be willing to do the same with other applicants in Hondo Canyon despite evidence that issuing such a permit would degrade the receiving stream. For all these reasons, the proper interpretation and application of water quality standards directly affects FOHC and its members.

III. ARGUMENT

A. The district court properly interpreted Texas Water Quality standards consistent with Texas law and Clean Water Act precedent.

The district court properly concluded that, "accepting TCEQ's position would conflict with the plain language of the [TCEQ anti-degradation] rule and open a major loophole in the [Clean Water] Act's mandate to protect and maintain the quality of our Nation's waters."¹⁴ The district court's decision is consistent with

¹⁴ *Save Our Springs All. v. Tex. Comm'n on Env'tl. Quality*, No. D-1-GN-19-003030 at 7 (459th Dist. Ct., Travis County, Tex. Oct. 29, 2020) (2 Supp. CR, Item 3) [hereinafter Letter Ruling].

Clean Water Act law. As Justice O'Connor wrote, the Clean Water Act requires that "a project be consistent with both components, namely, the designated use and the water quality criteria. Accordingly, under the literal terms of the statute, a project that does not comply with a designated use of the water does not comply with the applicable water quality standards."¹⁵

The district court's decision is consistent with prevailing Clean Water Act cases, which require strict adherence to regulatory standards and the best science when state agencies determine whether a discharge into a high-quality stream will cause degradation.¹⁶

¹⁵ *PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 715 (1994).

¹⁶ *See, e.g., Ky. Waterways All. v. Johnson*, 540 F.3d 466, 483 (6th Cir. 2008) (affirming Tier II requirement "that [water] quality *shall* be maintained ... unless ... allowing lower water quality is necessary to accommodate important economic or social development" (quoting 40 C.F.R. § 131.12(a)(2))); *Columbus & Franklin Cty. Metro. Park Dist. v. Shank*, 600 N.E.2d 1042, 1056 (Ohio 1992) (overruling an interpretation of a state environmental rule that "would eviscerate the rule because it allows a clear degradation of water quality to be considered nondegradation"); *Robertson Cty.: Our Land, Our Lives v. Tex. Comm'n Envtl. Quality*, No. 03-12-00801-CV, 2014 WL 3562756 at *8 (Tex. App.—Austin July 17, 2014, no pet.) (mem. op) (explaining that TCEQ requires a "comparison of the baseline water-quality conditions with the conditions that will exist once the permitted activity begins." And explaining: "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."); *Greater Yellowstone Coal. v. EPA*, 4:12-CV-60-BLW, 2013 WL 1760286, at *2 (D. Idaho Apr. 24, 2013) (discussing that the federal CWA non-degradation regulation "prohibits any pollution increase that would create negative assimilative capacity, regardless of the economic or social necessity for the pollution.")

B. There is widespread agreement that increased nutrient loading of surface water bodies is harmful to water quality.

It is well established that excessive nutrient pollution causes serious damage to bodies of water.¹⁷ The U.S. Environmental Protection Agency (EPA) explains:

Nutrient pollution is one of America's most widespread, costly and challenging environmental problems. ... Significant increases in algae harm water quality, food resources and habitats, and decrease the oxygen that fish and other aquatic life need to survive.¹⁸

The United States Geological Survey (USGS) has similarly stated:

¹⁷ Joel Beauvais, EPA, *Renewed Call to Action to Reduce Nutrient Pollution and Support for Incremental Actions to Protect Water Quality and Public Health* (Sept. 22, 2016), <https://www.epa.gov/sites/production/files/2016-09/documents/renewed-call-nutrient-memo-2016.pdf>, (“Nutrient pollution remains one of the greatest challenges to our Nation’s water quality and presents a growing threat to public health and local economies - contributing to toxic harmful algal blooms, contamination of drinking water sources, and costly impacts on recreation, tourism and fisheries.”); EPA, *Ambient Water Quality Criteria Recommendations* at 1 (2001), AR B, Doc. 269, at 181 (“Nutrients are essential to the health and diversity of surface waters. However, in excessive amounts nutrients cause eutrophication or hypereutrophication, which results in overgrowth of plant life and decline of the biological community. Excessive nutrients can also result in human health risks, such as the growth of harmful algal blooms....Chronic nutrient overenrichment of a waterbody can lead to the following consequences: algal blooms, low dissolved oxygen, fish kills, overabundance of macrophytes, likely increased sedimentation, and species shifts of both flora and fauna. Historically, National Water Quality Inventories have repeatedly shown that nutrients are a major cause of ambient water quality use impairments. EPA’s 1996 National Water Quality Inventory report identifies excessive nutrients as the leading cause of impairment in lakes and the second leading cause of impairment in rivers (behind siltation).”); and Mabe USGS Study, *supra* note 6, at 1-2 (“Nutrients, broadly defined, are chemical elements essential to the growth, reproduction, and metabolic processes of living organisms. Aquatic ecosystems require nutrients to support the biological communities they contain. However, overabundant nutrients can contribute to various water-quality problems. Excessive amounts of nitrogen or phosphorus, or both, can promote the growth of aquatic vegetation and result in problems ranging from degraded water quality and altered aquatic habitats to a loss of recreational and aesthetic value. Recent water-quality inventories compiled by the U.S. Environmental Protection Agency (USEPA) identify nutrient enrichment as one of the leading causes of water-resource impairment in the Nation (U.S. Environmental Protection Agency, 1996, 1998a, 2000).”).

¹⁸ EPA, *Nutrient Pollution: The Issue*, <https://www.epa.gov/nutrientpollution/issue> (last visited May 7, 2021).

Excessive nutrients, such as phosphorus and nitrogen (including ammonia), can cause eutrophication, or over-fertilization of receiving waters, which can be toxic to aquatic organisms, promote excessive plant growth, reduce available oxygen, harm spawning grounds, alter habitat and lead to a decline in certain species...¹⁹

These statements are echoed by the National Oceanic and Atmospheric Administration.²⁰ The Texas A&M handbook, used to train “watershed stewards,” likewise explains:

The over-enrichment of water with nutrients is called eutrophication. A massive growth of aquatic plant life can make water extremely murky and raise its temperature. When the plants die and start to decompose, bacteria begin to use up all of the oxygen in the water. The oxygen level can become so low (a condition known as hypoxia) that many types of fish, insects and other animals can no longer survive. Common sources of nitrates include commercial fertilizers, wastewater treatment plants, animal wastes, septic systems, and decaying plant residues (e.g., compost).²¹

Other states have recognized the harm caused by excessive phosphorus concentrations and have set limits on the amount of phosphorus in discharges to local streams that are lower than those required in this case. For instance, Montana sets

¹⁹ U.S. Geological Surv., *Wastewater Treatment Water Use*, <https://www.usgs.gov/special-topic/water-science-school/science/wastewater-treatment-water-use> (last visited May 7, 2021).

²⁰ Nat’l Ocean Serv., Nat’l Oceanic & Atmospheric Admin., *What is nutrient pollution*, <https://oceanservice.noaa.gov/facts/nutpollution.html> (last visited May 7, 2021) (“Nutrient pollution is the process where too many nutrients, mainly **nitrogen and phosphorus**, are added to bodies of water and can act like fertilizer, causing **excessive growth of algae**. ... Scientists are most interested in the nutrients that are related to people living in the coastal zone because human-related inputs are much greater than natural inputs.”).

²¹ Jennifer Peterson, et al., Tex. A&M Extension, *Texas Watershed Steward Handbook*, http://agrillife.org/tws/files/2017/08/TWS-Curriculum-Handbook_2017_COMPRESSED.pdf, at 29.

concentration rates during warm months for total phosphorus at 0.025 mg/l to 0.15 mg/l, depending on the ecoregion.²² Hawaii sets phosphorus concentrations at 0.05 mg/l during the wet season and 0.03 mg/l during the dry season.²³ New Mexico has a 0.1 mg/l standard for certain streams.²⁴

C. Protection of the interests of amici demands TCEQ's adherence to antidegradation standards.

The district court correctly described the water quality standards that apply to all TPDES permits. Those antidegradation standards are found in 30 Texas Administrative Code § 307.5(b), which provides for a two-tiered review of discharge permits.²⁵ The legal standards found in the administrative rules govern this – and all permit proceedings – not compliance with TCEQ's *Procedures to Implement the Texas Surface Water Quality Standards* ("Implementation Procedures") which are mere guidance.

The district court properly held that even if TCEQ followed its Implementation Procedures, this review "does not assure compliance with these substantive standards" (set out in TCEQ's antidegradation rule).²⁶ Additionally, the court noted that the Implementation Procedures were not followed. The agency's

²² Mont. Dep't of Env'tl. Quality, Department Circular DEQ-12A, *Montana Base Numeric Nutrient Standards*, Table 12A-1, 3-4 (July 2014).

²³ Haw. Code. R § 11-54-5.2.

²⁴ N.M. Code R. § 20.6.4.109.

²⁵ The regulations have three tiers of review, but the third tier is not relevant.

²⁶ Letter Ruling at 8.

“whole water” approach to antidegradation analysis, as the court noted, is not the approach supported by the Implementation Procedures.²⁷ The Implementation Procedures do not discuss a whole-water analysis but, rather, are explicit that an antidegradation analysis must look at “constituents that could lower water quality.”²⁸ The guidance’s “assimilative capacity” rule of thumb is applied on a constituent-by-constituent basis.²⁹

The district court then reviewed the decision below for compliance with the substantive rules. The court found that the Tier 1 analysis was not compliant, because TCEQ did not “consider whether the amount and kind of algae growth [resulting from Dripping Springs’ discharge] would harm aquatic life uses.”³⁰ Tier 1 requires that: “Existing uses and water quality sufficient to protect those existing uses must be maintained.”³¹ The court generally agreed that the agency’s Tier 1 antidegradation review was deficient and justified reversal.

The district court also properly found that the permit violates the Tier 2 antidegradation standards.³² The Tier 2 standards require:

No activities subject to regulatory action that would cause degradation of waters that exceed fishable/swimmable quality are allowed unless

²⁷ Letter Ruling at 8.

²⁸ Tex. Comm’n Env’tl. Quality, Water Quality Division, *Procedures to Implement the Texas Surface Water Quality Standards*, RG-194, 61-62 (June 2010) (AR B, Doc. 257) [hereinafter “Implementation Procedures”].

²⁹ *Id.* at 64.

³⁰ Letter Ruling at 8.

³¹ 30 Tex. Admin. Code § 307.5(b)(1).

³² Letter Ruling at 8.

...[a certain demonstration is made]. 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.³³

Reviewing the evidence in the record, the court found that the agency “relied on irrelevant factors” and “ignor[ed] powerful evidence that the approved discharge would harm native species.”³⁴ This is because the underlying TCEQ review and Administrative Law Judge’s (ALJ) ruling discounted the native condition of the stream, disregarded the harm to indigenous species, and misconstrued an academic article that factually explained that increasing algae in-stream can lead to more fish in the stream.³⁵ Protection of the native condition of the stream is what the water quality standards require, and the district court correctly interpreted these standards.³⁶

³³ 30 Tex. Admin. Code § 307.5(b)(2)

³⁴ Letter Ruling at 10.

³⁵ The ALJ misconstrued the Mabe article, which emphasized that “Excessive amounts of nutrients in aquatic ecosystems can promote the growth of aquatic vegetation and result in problems ranging from degraded water quality and altered aquatic habitats to a loss of recreational and aesthetic value.” Mabe USGS Study, *supra* note 6, at 34.

³⁶ In its initial brief in the district court, the TCEQ argues “the [Implementation Procedures] were drafted to ‘ensure’ that there will not be degradation, and it follows that applying the limits derived from following the IPs, as Ms. Murphy did, will prevent degradation.” Brief of Appellant TCEQ, at 34 (CR 347). Neither law nor logic supports this leap of faith. The Implementation Procedures are not regulatory, they are only guidance. Further, the Implementation Procedures are not at all precise; they leave many decisions to the judgment of the reviewer. For example, at 64, under the broader section entitled “Evaluating the Potential for Degradation of Water Quality,” the Implementation Procedures provide that “[n]ew discharges that use less than 10% of the

D. Requiring TCEQ to perform site-specific analyses of the degradation associated with specific wastewater discharges will prevent harm to the property rights of downstream property owners.

The TCEQ final order rejects the possibility that algal growth as a result of the Dripping Springs discharge will create nuisance conditions for stream-front landowners.³⁷ Nonetheless, the ALJ's proposal for decision makes it clear there was ample expert testimony that nuisance conditions will be created.³⁸ There are many landowners, like Ms. Morris and members of the amici organizations, who have a stake in the courts' forcing TCEQ to take seriously its duty to determine if nutrient loads associated with new and amended TPDES permits will degrade the receiving waters that run alongside their properties.

The TCEQ's final order includes the condescending and erroneous finding that the "Draft Permit does not limit the ability of an individual to seek legal

assimilative capacity of a water body at the edge of a mixing zone are usually not considered to constitute potential degradation as long as the aquatic ecosystem in the area is not unusually sensitive to the pollutant of concern." Implementation Procedures, *supra* note 28, at 64. "Assimilative capacity" is an undefined term, and there is no guidance as to what a not-usual situation is. Similarly vague, on page 65 in a section speaking to scenarios in which degradation attributable to phosphorus and nitrogen is not likely to occur, the Implementation Procedures list "[i]ncreased loading of total phosphorus, nitrate, or total nitrogen—if it can be reasonably demonstrated that detrimental increases to the growth of algae or aquatic vegetation will not occur." *Id.* at 65. Neither the parameters of a "reasonable demonstration" nor of "detrimental increases" are discussed. The screening procedures and considerations for potential degradation from phosphorus loading are described in a variety of subsections (see, for example, pages 26, 47, and 65), but consist primarily of 11 screening factors (e.g. "sensitivity to growth of aquatic vegetation"), each of which is rated against three levels of concern for a "weight of the evidence" assessment. *Id.* at 47 *et seq.*

³⁷ PFD, Findings of Fact at 37-41 and 66 (AR A, Doc. 162)

³⁸ PFD, 16-19 and 33-36 (AR A, Doc. 162).

remedies against the City regarding any potential trespass, nuisance, ... or other causes of action in response to activities that may ... interfere with the normal use and enjoyment of property.”³⁹

Nuisance law is byzantine; there “is perhaps no more impenetrable jungle in the entire law than that which surrounds the word ‘nuisance.’”⁴⁰ The Texas Supreme Court has observed that “nuisance law was such a morass that although half of the precedent had to be wrongly decided, we could not say which half that was.”⁴¹ In a tort action, affected downstream water users and property owners are forced to argue, after the discharges authorized by TCEQ have caused water quality degradation, that the governmental entities discharging the wastewater have created a nuisance and "taken" their property. A state-sanctioned nuisance sets the bar exceedingly high for downstream owners to assert their rights to use and enjoy their own property. Instead of preventing the damage before it is done, as is required by the Clean Water Act and TCEQ’s regulations, TCEQ would abandon downstream property owners to an uphill fight to maintain their property rights and their property values.

³⁹ PFD, Findings of Fact at 62 (AR A Doc. 162).

⁴⁰ William L. Prosser, *Law of Torts* § 88, at 592 (3d ed.1964).

⁴¹ *Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 587 n.1 (Tex. 2016) (citing *Schneider Nat’l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 274–75 (Tex. 2004), holding modified on other grounds, *Gilbert Wheeler, Inc. v. Enbridge Pipelines (E.Tex.), L.P.*, 449 S.W.3d 474 (Tex. 2014)).

Consigning downstream water users and property owners to navigate this morass of takings and nuisance law after the fact of harm is neither necessary nor a good use of judicial or individual resources. A true antidegradation analysis at the front end of the State's decision to authorize a wastewater discharge should avert the nuisance altogether by ensuring that, as required by the Clean Water Act and TCEQ's regulations, permits issued by TCEQ do not cause degradation of high-quality streams.

IV. CONCLUSION

EPA delegated to TCEQ the right to permit discharges into Texas streams based on TCEQ's representation that the Texas Surface Water Quality Standards would be enforced and that only discharges that degrade water quality less than a *de minimis* amount would be allowed into high quality Texas streams.⁴² That legal standard must be honored and enforced so that Texas streams and rivers maintain their water quality and future generations of Texans can continue to enjoy fishing, swimming, and recreating in Texas waters.

Amici ask the court to affirm the trial court judgment in all respects and, particularly, because the TCEQ failed to comply with its antidegradation regulations

⁴² The *de minimis* exception to the absolute ban on degradation is a concession made in Texas that is not authorized by the federal regulation that specifies the minimum content of delegated state programs. See 40 C.F.R. § 131.12(a)(2).

in granting Dripping Springs a permit to discharge 822,500 gallons of treated sewage per day into Onion Creek.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was filed with the Clerk of the Court using the electronic case filing system and was served upon each party's counsel on appeal, listed below, by electronic service on this 11th day of May, 2021, in compliance with Texas Rule of Appellate Procedure 6.3.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the above Amici Curiae Brief of Stephanie Ryder Morris, Protect Our Blanco, Wimberley Valley Watershed Association, Greater Edwards Aquifer Alliance, Texas Rivers Protection Association, San Marcos River Foundation, Bandera Canyonlands Alliance, and Friends of Hondo Canyon contains 6630 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.

/s/ Lorraine Hoane
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DISCLOSURE OF FEE PAID

I hereby certify that no fee has been paid or is to be paid for preparing this amici curiae brief. This disclosure is made in compliance with Texas Rule of Appellate Procedure 11.

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