



COURT OF APPEALS  
EIGHTH DISTRICT OF TEXAS  
EL PASO, TEXAS

TEXAS COMMISSION ON	§	
ENVIRONMENTAL QUALITY and the		No. 08-20-00239-CV
City of DRIPPING SPRINGS,	§	
		Appeal from the
Appellants,	§	345th Judicial District Court
		of Travis County, Texas
v.	§	(TC# D-1-GN-19-003030)
SAVE OUR SPRINGS ALLIANCE, INC.,	§	
Appellee.	§	

**OPINION**

The Texas Commission on Environmental Quality (TCEQ) approved an application by the City of Dripping Spring (the City) for a permit to discharge treated wastewater into a hill country creek. Save Our Springs Alliance, Inc. (SOS) successfully challenged that decision in a Travis County district court. The TCEQ and the City challenge that ruling in this appeal.<sup>1</sup> At issue on appeal is whether the TCEQ permit violates any state or federal water quality standards by approving a discharge permit that will (1) lower the water quality of the creek, or (2) will impact the existing uses in the creek. Also at issue is whether the City provided adequate public notice of the location of the proposed discharge.

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<sup>1</sup> This case was transferred from our sister court in Austin, and we decide it in accordance with the precedent of that court to the extent required by TEX.R.APP.P. 41.3.

We conclude that the TCEQ followed the controlling statutes and its own rules in resolving the fact intensive questions raised by the permit application. As we explain below, for some pollutants, TCEQ rules employ a qualitative standard to measure the potential decreases in water quality. SOS advances a spirited case for the use of quantitative standards. Yet following the Texas Supreme Court’s recent directive that a “court’s duty is to stick to the text chosen by the rule-makers, without adding to it or subtracting from it,”<sup>2</sup> we consider only whether substantial evidence supports the TCEQ’s conclusions under the statutes and rules—as they are written. Under that rubric, we reverse the district court’s ruling, and uphold the TCEQ’s issuance of the permit.

## I. BACKGROUND

### A. The City’s Initial Permit Application

The City of Dripping Springs currently has a discharge permit for its wastewater treatment plant, but that permit only allows it to use treated water to irrigate designated irrigation fields. In October 2015, due to increasing demands from a burgeoning population, the City applied with the TCEQ to obtain a new permit, known as a Texas Pollution Discharge Elimination System (TPDES) permit.<sup>3</sup> The proposed permit would allow the City to do three things: (1) increase the volume of

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<sup>2</sup> *Texas Comm’n on Env’tl Quality v. Maverick Cnty.*, 642 S.W.3d 537, 546 (Tex. 2022).

<sup>3</sup> The briefing and record are a virtual alphabet soup of acronyms, which can befuddle anyone who does not regularly use them. We have tried to minimize use of those acronyms as much as possible. Here is a key to the less common ones we have used in this opinion:

TPDES	Texas Pollutant Discharge Elimination System
NPDES	National Pollutant Discharge Elimination System
SOAH	State Office of Administrative Hearings
ED	Executive Director of the TCEQ
PFD	Proposal for Decision
TSWQS	Texas Surface Water Quality Standards
MGD	Million Gallons per Day
IP	Implementation Procedure
DO	Dissolved Oxygen
TP	Total Phosphorus
TN	Total Nitrogen

its treatment capacity; (2) discharge a certain amount of treated water into two nearby waterways; and (3) use treated water to irrigate any land in the City needing water, including new neighborhood developments. The initial application proposed a ramping up of the daily average flow of discharge to eventually reach a level not to exceed 0.995 million gallons per day (MGD). And it also identified the discharge path through a piping system leaving the treatment plant, with the initial discharge being made into Walnut Springs and then into Onion Creek. The latter creek is designated as Segment 1427 of the Colorado River Basin.<sup>4</sup>

### **B. The TCEQ's Role in the Permitting Process**

The TCEQ is the state agency in Texas tasked with reviewing all TPDES permits in accordance with state and federal rules and regulations. *See* TEX.WATER CODE ANN. § 26.027(a)-(b) (authority for permitting process); 30 TEX.ADMIN.CODE §§ 307.1, 307.4, 307.5(b) (creating the TPDES program). The TCEQ's authority derives first from the federal Clean Water Act, which Congress enacted in 1977 with the stated goal to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>5</sup> 33 U.S.C.A. § 1251(a). As part of the Clean Water Act, Congress created the National Pollutant Discharge Elimination System (NPDES), which regulates the issuance of permits for the discharge of pollutants into the nation’s waterways. The NPDES requires public notice before a permit may be issued, and that the permit comply with the water quality standards in the Act. 33 U.S.C.A. § 1342(a)(1). The Act gives the United States

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<sup>4</sup> For purposes of water quality management, the TCEQ segments the state’s major surface waters. *See Texas Comm’n on Env’t Quality v. City of Waco*, 413 S.W.3d 409, 412 n.2 (Tex. 2013).

<sup>5</sup> The Water Code sets forth a similar goal, providing that it is the stated policy of Texas “to maintain the quality of water in the state consistent with the public health and enjoyment, the propagation and protection of terrestrial and aquatic life, and the operation of existing industries, taking into consideration the economic development of the state[.]” TEX.WATER CODE ANN. § 26.003. The Code adds that Texas seeks “to encourage and promote the development and use of regional and areawide waste collection, treatment, and disposal systems to serve the waste disposal needs of the citizens of the state; and to require the use of all reasonable methods to implement this policy.” *Id.*

Environmental Protection Agency (EPA), and any state to which EPA has delegated its authority, the ability to issue a permit allowing a discharge that complies with the requirements set forth in the Act. *Id.* §§ 1342(a)(1)(b), 1251(a)(2). The EPA has delegated NPDES authority to the State of Texas through a Memorandum of Agreement which provides that the TCEQ has “primary responsibility for implementing the NPDES program for Texas.” The Memorandum further provides that the TCEQ operate its TPDES program in accordance with the Clean Water Act as amended, applicable federal regulations, applicable TCEQ legal authority, Title 30 of the Texas Administrative Code (containing water quality standards), and “taking into consideration published EPA policy.”

Federal regulations require all participating states to develop surface water quality standards at least as stringent as those established by the Act and the EPA’s rules. 40 C.F.R. § 123.25. In accordance with that mandate, Texas adopted the Texas Surface Water Quality Standards (TSWQS) found in Title 30 of the Texas Administrative Code. In general, these standards, which must be approved by the EPA and reviewed every three years, must consider several factors, including the need for public water supplies, protection of fish and wildlife, as well as recreational uses. 40 C.F.R. § 131.12; 33 U.S.C. § 1313(c)(1)(2)(A).

### **C. The TCEQ’s Administrative Review**

The permitting process requires all TPDES permits be submitted to the TCEQ for review. TEX.WATER CODE ANN. § 26.027(b); 30 TEX.ADMIN.CODE § 305.1, et seq. (creating the TPDES program and setting forth the TCEQ’s role in reviewing TPDES permits); 30 TEX.ADMIN.CODE § 305.42 (requiring any person who is required to obtain a permit to submit an application to the TCEQ’s Executive Director). Once the TCEQ’s executive director determines an application is “administratively complete,” the applicant must provide public notice of its intent to obtain the

permit. TEX.WATER CODE ANN. § 5.552(b)(1). The TCEQ then conducts a “technical review of and issue[s] a preliminary decision on the application.” *Id.* § 5.553(a). The applicant then must publish notice of that preliminary decision, which is then subject to public comment. *Id.* § 5.553(b)–(c). Following a public meeting, with invited public comment and the TCEQ’s Executive Director’s (ED) response, the ED’s decision must be transmitted to the interested parties with instructions on how to pursue a contested case hearing. *See id.* §§ 5.554 (requiring public meetings during the comment period), and 5.556(a) (allowing for contested case hearings).

#### **D. The TCEQ’s Technical Review of the Permit**

Here, TCEQ staff conducted a “technical review” of the Application to ensure that the permit, if approved, would comply with the applicable water quality standards under both federal and state laws and regulations governing water quality standards.

##### *1. The antidegradation policy*

The technical review of a TPDES permit application is mainly governed by the TSWQS which includes a general mandate that any discharges that cause pollution “must not lower water quality to the extent that the Texas Surface Water Quality Standards are not attained.” 30 TEX.ADMIN.CODE § 307.5(b)(4). Important here is the “antidegradation policy” in section 307.5 of the TAC, which applies to all wastewater discharges that may impact the waters in the state. *See id.* § 307.5(a). The policy contains standards for three tiers of waterways, only two of which are relevant to the City’s application.<sup>6</sup> The Tier 1 standard applies to all waters in the state and provides that: “Existing uses and water quality sufficient to protect those existing uses must be

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<sup>6</sup> The third tier applies to “outstanding national resource waters” defined as those within or next to national parks and wildlife refuges, state parks, wild and scenic rivers, or other areas of exceptional recreational or ecological significance. The parties agree that neither Onion Creek nor Walnut Creek has this designation, and that a Tier 3 review was not required.

maintained.” *Id.* § 307.5(b)(1). The Tier 2 standard applies only if the receiving waterbody is designated as a “high quality” waterbody—“waters that exceed fishable/swimmable quality”—which in turn are defined as “waters that have quality sufficient to support propagation of indigenous fish, shellfish, terrestrial life, and recreation in and on the water.” *Id.* § 307.5(b)(2). The Tier 2 standard provides that: “No activities subject to regulatory action that would cause degradation of waters that exceed fishable/swimmable quality are allowed unless it can be shown to the commission’s satisfaction that the lowering of water quality is necessary for important economic or social development.” *Id.* § 307.5(b)(2). In turn, “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.” *Id.* The Code further provides that under the Tier 2 standard, “Water quality sufficient to protect existing uses must be maintained.” *Id.*

Onion Creek is designated as a “high quality” waterway. 30 TEX.ADMIN.CODE § 307.10, Appendix A. The parties agree that the discharge into Onion Creek was subject to a Tier 2 water quality review. Nor does the City contend that the permit falls within the exception in the Code that allows for a lowering of water quality to achieve an important economic or social development goal. The parties also agree that Walnut Springs, as an unclassified intermittent water body with minimal aquatic life, was not subject to a Tier 2 review.<sup>7</sup>

The Code provides that TCEQ staff must review all TPDES permit applications to ensure that the permit will meet the applicable TSWQS using the standard Implementation Procedures (the IPs) that have been approved by both the TCEQ and the EPA. *See id.* § 307.5(c)(1)(A) (“For TPDES permits for wastewater, the process for the antidegradation review and public coordination is described in the standards implementation procedure.”). When the City’s permit was reviewed,

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<sup>7</sup> SOS only discusses the impact the discharge may have on Onion Creek, so this will be the focus of our analysis as well.

the TCEQ was operating under the 2010 IPs, the relevant portions of which had been approved by both the TCEQ and the EPA.

## 2. *Narrative v. numeric standards*

There are two primary steps in conducting an antidegradation review. Step one involves a nutrient screening to determine whether certain nutrients found in the discharge will degrade the water. At issue is the amount of total phosphorous (TP) and total nitrogen (TN) found in the discharge. There is no dispute in this record that increases in TP and TN can result in degradation, resulting from increased algae growth in the receiving water, which in turn can impact existing uses and lower water quality. In addition, increased nitrogen levels can result in health risks if the water is used for drinking. Yet neither the TAC nor the IPs prescribe any specific numeric or quantitative standards for limiting the amount of TN or TP in a discharge. Instead, the determination of whether the nutrient levels in a discharge will result in degradation is conducted in what is called a “qualitative” or “narrative” fashion, with the ultimate question being whether the TN or TP amounts in the discharge would lower the water quality in the receiving water or impact its existing uses.

The other step in the antidegradation review involves reviewing the permit to ensure that the discharge will not reduce Dissolved Oxygen (DO) in the receiving waters below what is necessary to sustain existing uses. For this part of the review, the Code and the IPs do provide for numeric or qualitative standards established for waterways depending on their classification. *Id.* § 307.10. And for a waterway with a “high” aquatic life designation, such as Onion Creek, the creek must maintain a minimum 5.0 DO mg/L (milligrams per liter) level over a 24-hour period. *Id.* § 307.10, Appendix A.<sup>8</sup>

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<sup>8</sup> The Administrative Code also contains a separate set of regulations for wastewater discharges into waterways in the Edwards Aquifer and the Colorado River Basin, which includes Onion Creek. Those regulations provide that no

### *3. TCEQ staff proposes effluent limits in the permit*

TCEQ aquatic scientist Lili Murphy conducted the technical review of the City's application. She determined that Walnut Springs is an intermittent water body with minimal aquatic life, and Onion Creek is classified in the TAC as a high quality water body, requiring both a Tier 1 and Tier 2 review. Murphy then conducted a nutrient screening from which she determined that it was necessary to set effluent limits on the permit to ensure that the applicable water quality standards were met. She determined that the TP level in the discharge should be set at .15 mg/L, and recommended a toxicity screen for nitrates to ensure that the standards for drinking water were met. Although she first recommended a TN level of 10.0 mg/L, she later revised her recommendation to set a TN level of 6.0 mg/L.

Murphy assigned Walnut Creek, as an unclassified intermittent waterway, a minimum DO level of 2.0 mg/L, and assigned Onion Creek a minimum DO level of 5.0 mg/L, given its status as a high-quality water. TCEQ water modeler, James Michalk, ultimately determined the effluent limits necessary to maintain the DO level of the creek. Based on modeling techniques that we describe below, he and an expert from the City concluded that with the effluent limits in the permit, the DO level of 5.0 mg/L would be maintained in Onion Creek.

### *4. The ED's technical summary and draft permit*

The TCEQ determined that the City's application was administratively complete in December 2015. The ED then issued a preliminary decision granting the application, along with a draft permit incorporating the proposed effluent levels, as well as a requirement that the City was

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discharge that would create additional pollutants may be made into a recharge zone in the aquifer. TEX.ADMIN.CODE § 213.6. But it expressly provides that for waterways that are more than five miles upstream from a recharge zone, which includes Segment 1427 of Onion Creek, a discharge is permitted if it meets certain levels of "effluent treatment," which includes 5 milligrams per liter of "biochemical oxygen" based on a 30-day average, and if it meets certain disinfection standards. *Id.* §§ 213.6 (c)(1), 311.43(a)(1), 311.44.



to disinfect the wastewater through a dechlorination process before discharging it.<sup>9</sup> The City accepted the effluent limits set forth in the draft permit, and revised its application accordingly. But because Onion Creek is home to the Barton Creek salamander (an endangered species), the draft permit was subject to review by both the EPA and the United States Fish and Wildlife Service (USFWS). The draft permit was therefore forwarded to those two agencies for review.

#### **E. Resolution of the EPA's Interim Objection to the Draft Permit**

In December 2016, the EPA, raised an “interim objection” to the draft permit. The EPA estimated the permit would contribute to 450 pounds of phosphorous annually into Onion Creek and an even larger amount of Nitrogen. The EPA was also unable to discern how the TCEQ determined that the water quality standards would be met if the permit was issued with those additions of TN and TP. The ED responded to the EPA, explaining that TCEQ staff followed the EPA-approved IPs, conducted nutrient and other screenings, and performed DO water modeling, all of which caused it to impose stringent effluent limits that it believed would prevent degradation of the water in accordance with the TSWQS. It also provided the EPA with its nutrient screening calculations, its “statement of basis/technical summary and executive director’s preliminary decision,” and a copy of the draft permit with the effluent limits. In response, the EPA withdrew its objection, explaining that it believed the TCEQ had adequately addressed its concerns. In particular, the EPA expressed its opinion that the TCEQ had conducted sufficient DO modeling and nutrient evaluations, and had imposed sufficient limits of TN and TP, which it described as being “very low,” and had added a dechlorination requirement to the draft permit, all of which it believed would protect water quality and existing uses.

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<sup>9</sup> The TCEQ’s review and its technical summary addressed other chemicals in the discharge that are not at issue in the present appeal.

## **F. Notice of the TCEQ’s Preliminary Decision and the Public Comment Period**

During this same time frame, the City published a second notice, which included both its revised application and the ED’s preliminary decision to approve application. It sent the notice to various environmental groups, local agencies, and downstream landowners, to allow them to comment on the application. The second notice also informed the public and interested parties that they could attend a public hearing held by the ED, and could make comments on the draft permit. In the public comment period, the TCEQ received at least 1,087 filed comments. The ED responded to those public comments and outlined how in the TCEQ’s opinion the application met the requirements under Tier 1 and Tier 2 review. Soon after, the ED filed a decision letter approving the application on November 8, 2017.

## **G. The Request for a Contested Case Hearing and the Notice of Hearing**

After the issuance of the decision, at least 100 individuals or entities, including SOS, requested an administrative hearing to contest the decision with the State Office of Administrative Hearings (SOAH). As authorized by its rules, the TCEQ granted the request for a hearing, identifying the specific contested issues to be resolved. 30 TEX.ADMIN.CODE § 55.211(b) (granting the TCEQ the authority to refer a matter to SOAH for a contested case hearing, specifying the “the number and scope of the issues . . . [and] maximum expected duration of the hearing[.]”).

A notice of hearing was published in local newspapers, and sent to a list of interested parties, notifying them of the upcoming SOAH hearing.

## **H. The Revised Permit and the Settlement Agreements**

Before the SOAH hearing, the Lower Colorado River Authority, various other environmental organizations, and concerned citizens who had requested the SOAH hearing—with the exception of SOS—entered into settlement agreements with the City. The settlement

agreements called for a reduced maximum daily flow of discharge in the final phase of the treatment plant's expansion (from 0.995 to .0.8225 MGD) and the use of ultraviolet disinfection, (rather than disinfection using chlorine) to reduce the impact to aquatic life. *Id.* In July 2018, the TCEQ prepared a revised draft permit that the City accepted, incorporating those two changes. The TCEQ revised its technical summary accordingly to reflect the lowered maximum flow and the use of UV disinfectant.<sup>10</sup>

By August 2018, all the other protesting parties, except SOS, withdrew as parties to the SOAH hearing based on the settlement agreements.

### **I. The ALJ's Decision and the TCEQ's Order Granting the Permit**

A SOAH administrative law judge (ALJ) conducted an evidentiary hearing attended by the City, the ED, and SOS. Before the hearing, the parties submitted 85 exhibits, which consisted primarily of testimony and deposition testimony from expert witnesses on both sides, and published scientific studies on which the experts relied in reaching their conclusions. For our purposes, the main focus of the experts' testimony was on whether the permit complied with the Tier 1 and Tier 2 standards for water quality set forth in the TAC.

In support of its position that the standards were met, the TCEQ and the City presented the testimony of Murphy and Dr. James Miertschin, as well as testimony from other experts, including Paul Price and Dr. Kirby Tyndall, all of whom expressed their opinion that the effluent limits set forth in the revised draft permit would meet those standards. On the other hand, SOS presented the testimony of three experts witnesses, Dr. Lauren Ross, Dr. Caitlin Gabor and Dr. Weston Nowlin,

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<sup>10</sup> Other terms of the settlement agreements were not within the TCEQ's jurisdiction, and therefore could not be included in the revised draft permit. Of significance, the City agreed to reduce the need to discharge treated water into Onion Creek by adding infrastructure so it could use more treated water to irrigate land and to increase its storage capacity to allow it to better regulate its discharges. The City's administrator testified that the City's goal was to eliminate all or nearly all discharges into the waterway, and she added that she believed the agreements were fully enforceable due to certain penalty provisions contained in them.

who expressed contrary opinions, focusing primarily on the increased “nutrient load” the discharge would create in Onion Creek. They asserted that the proposed effluent limits of TN and TP were approximately 30 times higher than the current levels, which they believed would promote algae growth that in turn would harm the Creek’s water quality and its existing aquatic life. The SOS experts also postulated the increased nutrients could lower the DO levels in Onion Creek, which would also have the same negative impacts.

Following the hearing, the ALJ issued a Proposal for Decision (PFD) that recommended upholding the TCEQ’s final decision to approve the revised permit. After summarizing the evidence, the ALJ determined that “[i]n a nutshell, this case boils down to conflicting conclusions between SOS’s experts and the City’s and the ED’s experts,” and that after “considering the totality of the record, the ALJ finds the testimony of the ED’s and the City’s experts to be more compelling and reliable.” Relevant to this appeal, the ALJ observed that mere increases in TN or TP do not, standing alone, establish a Tier 1 or Tier 2 violation. The ALJ also found that the draft permit incorporates some of the most stringent effluent limits of any TPDES permit issued in the State of Texas, and that the TN and TP limits set forth in the revised permit will ensure that the discharge would not interfere with the uses assigned to Onion Creek and would protect water quality and the Creek’s existing uses. The ALJ also found that the required minimum DO level in the discharge would ensure that the instream DO levels in the waterways would be maintained above the applicable criteria, which was sufficient to both protect aquatic life and to ensure that there was no lowering of the water quality. In reaching the ultimate conclusion that the Tier 1 and Tier 2 standards would be satisfied, the ALJ found, among other things, that the TCEQ had applied the appropriate review procedures found in the IPs and the TSWQS in developing the draft permit, and had used the appropriate water quality modeling in determining the DO levels in the permit.

And the ALJ found that the City substantially complied with all public notice requirements set forth in the TAC, finding that they sufficiently set forth a general description of the location of the discharge point and the names of the receiving waters.

The ALJ then issued a proposed order, which included 143 findings of fact, and 21 conclusions of law, that it recommended the TCEQ adopt. With relatively minor differences in the findings of fact, which are not at issue in this appeal, the TCEQ adopted the ALJ's proposed order, and issued a final order granting the City's application for the TPDES permit in its revised form.

#### **J. The District Court Proceedings**

SOS sued the TCEQ in a Travis County district court challenging the final order granting the City's application; the City intervened in the case. In its petition, SOS raised two claims relevant to this appeal. First, SOS contended that the permit violates both the Tier 1 and Tier 2 standards as a matter of law. In support of this argument, SOS contended that the undisputed evidence in the administrative record established that the permit would lead to substantial increases in the TN and TP levels in Onion Creek, which would result in more than a *de minimis* lowering of the water quality and would harm existing aquatic life uses. Second, SOS argued that the public notices did not comply with state and federal regulations, as they did not adequately describe the location of the discharge point of the receiving water.

After reviewing the administrative record and hearing argument of counsel, the district court issued a letter ruling to the parties, in which it concluded that the TCEQ's approval of the application was not supported by the law or substantial evidence, and that in particular, the TCEQ had erred in making these three conclusions in its final order granting the permit:

- (1) that the proposed discharge complies with the Agency's "Tier 2" anti-degradation rule requiring that the City's discharge must not cause more than a *de minimis* lowering of water quality in Onion Creek . . . ;

- (2) that the proposed discharge [complies with the Tier 1 standard and] would not impair existing high quality aquatic life uses of Onion Creek; and
- (3) that the information in the public notices of the proposed wastewater discharge permit sufficiently identified the location of the proposed discharge point.

As for the Tier 2 standard, the district court concluded that the “undisputed” evidence in the administrative record demonstrated that the permit would violate that standard as a “matter of law.” In support of this conclusion, the district court found that: (1) at the maximum discharge allowed, the discharge would increase the ordinary low flow of Onion Creek by approximately ten times its normal amount; (2) the permit would result in TP increases of ten times the current level; (3) the permit would increase TN background levels by 100 times the current level; (4) the City’s own expert (Dr. Miertschin) estimated that with the discharge, the bottom-dwelling algae growth in Onion Creek could increase tenfold; (5) the proposed discharge would cause DO levels to drop from their current levels, which range from 6.89 to 8.42 mg/L, to at or near the minimum 5.0 mg/L level, with an estimated low of 4.87 mg/L at the initial discharge point. The district court believed that the TCEQ made no findings of fact to support its conclusion that the Tier 2 standard—which allows for only a de minimis lowering of water quality—was met. Rather, the TCEQ justified its conclusion simply asserting that it followed the proper review procedures set forth in the IPs in setting effluent limits in the permit. The district court believed that allowing the TCEQ to issue permits without proper factual findings on how or why it believed the Tier 2 standards had been met would create a “loophole in the [Clean Water] Act’s mandate to protect and maintain the quality of our Nation’s waters.”

The district court also generally agreed with SOS that the Tier 1 standard was not met, referring to SOS’s argument that the TCEQ again did not make proper factual findings to support its conclusion that the discharge of the high levels of TN and TP would not harm existing aquatic

life. The district court stated that it would have remanded the matter to the agency to make proper factual findings on the Tier 1 standard, but for the fact that it found that the permit violated the Tier 2 standard as a matter of law, which mandated reversal of the TCEQ's order granting the permit without the need for a remand. In accordance with its findings, the district court entered a judgment reversing the TCEQ's order and enjoined the City and the TCEQ "from taking actions in reliance on the unlawful agency order." Both the TCEQ and the City appeal from this judgment.

## **II. ISSUES ON APPEAL**

Both the TCEQ and the City agree on the same three primary issues to be considered in this appeal. First, they contend that the administrative record contains substantial evidence to support a finding that the revised permit complied with the Tier 2 antidegradation rule. Second, they contend that there was also substantial evidence in the record to support a finding that the permit complied with the Tier 1 antidegradation rule. And third, they contend that the record supports the TCEQ's finding that the public notices of the proposed permit sufficiently identified the location of the proposed discharge point. In addition, the City identifies a fourth issue of whether the district court lacked the authority to include injunctive relief in its final judgment.<sup>11</sup>

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<sup>11</sup> SOS addresses each of these issues in its responsive brief, and later moved for permission to file a supplemental brief in response to the reply briefs filed by the TCEQ and the City. We deferred ruling on SOS's motion, but we now grant the motion and will consider SOS's supplemental brief in our analysis. SOS filed another motion to consider portions of the administrative record from a different application involving a different discharge permit and different parties. We deny that motion. We also benefited from several amicus curiae filings in this case. The Ingleside Bay Coastal Water Association and the Hillside Residents Association express concerns that this case will impact a pending application for a permit filed by the City of Corpus Christi that seeks to discharge wastewater into the Corpus Christi Bay. A second amicus brief by a concerned hill country resident, Stephanie Morris, and various non-profit environmental groups in the Texas hill country believe that this case will have a significant impact on several other wastewater permits that are pending in the hill country. The Aransas Pass Project, a non-profit organization dedicated to the protection of the water quality in Texas bays, also filed a letter in support of SOS's position. Finally, the West Travis County Public Utility Agency filed a brief in support of the permit based on the need to expand sewage treatment in the area.

### III. STANDARD OF REVIEW

#### A. Statutory Guides

The Administrative Procedure Act governs our review of agency decisions; generally a court “may not substitute its judgment for the judgment of the state agency on the weight of the evidence on questions committed to agency discretion[.]” TEX.GOV’T CODE ANN. § 2001.174. Nonetheless a court may reverse or remand an agency order if the “substantial rights” of a party are prejudiced by administrative findings or decisions that are:

- (A) in violation of a constitutional or statutory provision;
- (B) in excess of the agency’s statutory authority;
- (C) made through unlawful procedure;
- (D) affected by other error of law;
- (E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or
- (F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

TEX.GOV’T CODE ANN. § 2001.174(2).

Contested case hearings in TCEQ permit applications are also governed by 2015 amendments to the TAC and Government Code. For permit applications under sections 5.556 or 5.557 of the Texas Water Code, the ALJ’s review must be guided by the following:

- (1) the filing of the administrative record as described in § 80.118(c) of this title (relating to Administrative Record) establishes a prima facie demonstration that the executive director’s draft permit meets all state and federal legal and technical requirements, and, if issued consistent with the executive director’s draft permit, would protect human health and safety, the environment, and physical property;
- (2) a party may rebut the presumption in paragraph (1) of this subsection by presenting evidence regarding the referred issues demonstrating that the draft permit violates a specifically applicable state or federal legal or technical requirement; and



- (3) if a rebuttal case is presented by a party under paragraph (2) of this subsection, the applicant and executive director may present additional evidence to support the executive director's draft permit.

30 TEX.ADMIN.CODE § 80.17(c); TEX.GOV'T CODE ANN. § 2003.047(i-1)-(i-3) (containing nearly identical provisions).

Section 2003.047 does not elaborate on the type of evidence the protesting party (in this case SOS) must present to rebut the TCEQ's prima facie case. The concept of a prima facie case, however, is not a new one, and we agree with the ALJ that if the protesting party does not present *any* controverting evidence to rebut the TCEQ's prima facie demonstration, the ALJ's inquiry would stop there. In that case, the ALJ would have to uphold the TCEQ's decision to grant the permit. *See generally In re Lipsky*, 460 S.W.3d 579, 590 (Tex. 2015) (a prima facie case refers to evidence "sufficient as a matter of law to establish a given fact if it is not rebutted or contradicted."); *Serafine v. Blunt*, 466 S.W.3d 352, 358 (Tex.App.--Austin 2015, no pet.) (recognizing that a prima facie case is one that will entitle a party to recover if no evidence to the contrary is offered by the opposite party). But if the protesting party provides some controverting evidence which raises a question of fact on the issue of whether the permit violates a state or federal rule or regulation, then the ALJ must consider the entire record to determine whether such a violation occurred, or conversely, whether the TCEQ has submitted sufficient evidence to support its decision to grant the permit.

#### **B. Judicial Review Under the Substantial Evidence Rule**

A "substantial evidence" review is essentially "a rational-basis test to determine, as a matter of law, whether an agency's order finds reasonable support in the record." *TJFA, L.P. v. Texas Comm'n on Env't'l Quality*, 632 S.W.3d 660, 676 (Tex.App.--Austin 2021, pet. filed), *citing Jenkins v. Crosby Indep. Sch. Dist.*, 537 S.W.3d 142, 149 (Tex.App.--Austin 2017, no pet.). In other words, the "test is not whether the agency made the correct conclusion in our view, but

whether some reasonable basis exists in the record for the agency's action." *Slay v. Texas Comm'n on Env't'l Quality*, 351 S.W.3d 532, 549 (Tex.App.--Austin 2011, pet. denied), citing *Railroad Comm'n of Texas v. Pend Oreille Oil & Gas Co., Inc.*, 817 S.W.2d 36, 41 (Tex. 1991). The agency is tasked with determining "the meaning, weight, and credibility to assign conflicting evidence, and we may not set aside an agency decision because testimony was conflicting or disputed or because it did not compel the agency's decision." *Sanchez v. Texas State Bd. of Med. Examiners*, 229 S.W.3d 498, 511 (Tex.App.--Austin 2007, no pet.), citing *Firemen's & Policemen's Civil Serv. Comm'n v. Brinkmeyer*, 662 S.W.2d 953, 956 (Tex. 1984).

Under this deferential standard, a court must presume that the agency's order is supported by substantial evidence, and the burden is on the opposing party to show otherwise. *TJFA, L.P.*, 632 S.W.3d at 676, citing *Jenkins*, 537 S.W.3d at 149. "Although substantial evidence is more than a mere scintilla, the evidence in the record actually may preponderate against the decision of the agency and nonetheless amount to substantial evidence." *Id.*, citing *Personal Care Prods., Inc.*, 578 S.W.3d 262, 266 Tex.App.--Austin 2019, no pet.); *Texas Health Facilities Comm'n v. Charter Med.-Dall., Inc.*, 665 S.W.2d 446, 452 (Tex. 1984); see also *Texas Health Facilities Comm'n*, 665 S.W.2d at 453 (recognizing that if there is evidence to support either affirmative or negative findings on a specific matter within an agency's discretion, the decision of the agency must be upheld).

Yet even if an agency's decision is supported by substantial evidence, the decision may still be considered unreasonable, or otherwise arbitrary and capricious, if the agency improperly based its decision on legally irrelevant factors or disregarded statutorily-mandated criteria. See *City of El Paso v. Pub. Util. Comm'n of Texas*, 883 S.W.2d 179, 184 (Tex. 1994) ("An agency's decision is arbitrary or results from an abuse of discretion if the agency: (1) failed to consider a

factor the legislature directs it to consider; (2) considers an irrelevant factor; or (3) weighs only relevant factors that the legislature directs it to consider but still reaches a completely unreasonable result.”); *see also Texas Dep’t of Ins. v. State Farm Lloyds*, 260 S.W.3d 233, 245 (Tex.App.--Austin 2008, no pet.) (recognizing that an agency’s decision may be arbitrary and capricious if based on legally irrelevant factors).

### **C. Appellate Review is De Novo**

Finally, the question of whether a TCEQ decision was supported by substantial evidence is considered a question of law, which we review de novo. *See County of Reeves v. Texas Comm’n on Env’tl Quality*, 266 S.W.3d 516, 528 (Tex.App.--Austin 2008, no pet.), *citing Montgomery Indep. Sch. Dist. v. Davis*, 34 S.W.3d 559, 562 (Tex. 2000). This standard requires us to conduct our own independent review of the administrative record to determine whether the TCEQ’s decision to grant the permit was reasonable and whether it was based on substantial evidence, without deference to the district court’s judgment. *Id.* (recognizing that the district court’s judgment affirming an agency decision “is not entitled to deference on appeal”).

Having set forth the applicable standards on which we base our review, we turn to the merits of the parties’ arguments.

## **IV. THE ANTIDegradation REVIEW: TIER ONE**

We begin with the TCEQ and the City’s second issue, whether the district court erred in overruling the TCEQ’s finding that the proposed discharge met the Tier 1 standard. The Tier 1 standard focuses on preserving the existing “uses” of water. 30 TEX.ADMIN.CODE § 307.5(b)(1) (“Existing uses and water quality sufficient to protect those existing uses must be maintained.”). We agree with the TCEQ and the City that substantial evidence supports the TCEQ’s conclusion

that the Tier 1 standard was met, and that the district court therefore erred in reversing the agency's finding on this issue.

#### **A. Evidence Supporting the TCEQ's Finding of Compliance with the Tier 1 Standard**

##### *1. Murphy's Tier 1 review: the nutrient screening*

TCEQ staff member and aquatic scientist, Lili Murphy, conducted TCEQ's antidegradation review under both the Tier 1 and Tier 2 standards.<sup>12</sup> In her testimony, Murphy explained the procedures that the TCEQ follows in reviewing a TDPEs permit application, and how she followed those procedures in her review of the City's application. Murphy primarily used the relevant portion of the EPA-approved 2010 IPs, which reference and implement the applicable TSWQS standards. The IPs describe the procedures the TCEQ must use "to determine water quality uses and associated criteria, evaluate water quality impacts, and perform antidegradation reviews."

Murphy first determined that the path of the proposed discharge—from Walnut Springs then to Segment 1427 of Onion Creek. This segment of Onion Creek is a high-quality waterway, which has the "designated uses of primary contact recreation, public water supply, aquifer protection and high aquatic life use with a corresponding dissolved oxygen criterion of 5.0 mg/L."

Murphy's "standards worksheet" memorialized her antidegradation review. That document reflects that she needed to perform a nutrient screening on the impact the proposed discharge would have on Onion Creek, due to its existing low level of phosphorous (which ranged from 0.01 mg/L at an upstream monitoring station to 0.02 mg/L at downstream station). In general, the purpose of this screening is to ensure that nutrients in a proposed discharge will not cause excessive growth of aquatic vegetation that impairs an existing use. *See* 30 TEX.ADMIN.CODE § 307.4(e) ("Nutrients

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<sup>12</sup> Murphy testified that she has a B.S. in biology from the University of Texas in San Antonio, and an M.S. in Environmental Science from the University of North Texas. She added that she has reviewed approximately 2,188 wastewater permit applications during the 19 years that she has worked at the TCEQ.

from permitted discharges . . . must not cause excessive growth of aquatic vegetation that impairs an existing, designated, presumed, or attainable use.”).

Murphy explained that both the TSWQS and the IPs provide that a nutrient screening is conducted in a “narrative” or qualitative manner to determine the impact that nutrients in a proposed discharge will have on the receiving waters. There are no specific numeric or quantitative standards in either the Code or the IPs that limit the level of nutrients that may be contained in a discharge. In addition, Murphy noted that in conducting a nutrient screening she considers various “site-specific screening factors,” set forth in the IPs, which include the size of the proposed discharge, instream dilution, stream substrate, stream depth, water clarity, presence of aquatic vegetation, shading, streamflow characteristics, presence of channel impoundments and pools, and consistency with other permits.

As required by the IPs, she ranked each of the site-specific factors from 1 to 5, to express her level of concern with each factor, as reflected in her “nutrient screening” worksheet, which resulted in an average ranking of 4.36. And because the IPs required her to consider effluent limits for any result over four, Murphy determined that effluent limits were needed in the permit based on this ranking. In determining those limits, she followed the IPs guidance, and considered the site-specific screening factors that she found of concern in her worksheet, and the corresponding levels that she assigned to them. She also consulted the Texas Integrated Report of Surface Water Quality, which lists areas of concern in specific waterways, and which provides the “most recent assessment of the condition of the receiving waters.” She also considered a “USGS Report on the Nutrient and Biological Conditions of Selected Small Streams in the Edwards Plateau, Central Texas (2005-2006),” which was conducted in cooperation with the TCEQ.

After completing her assessment, she entered the following in her standards worksheet: “Due to the high clarity of the water column, lack of shade along the banks, and minimal dilution, a total phosphorus limit of 0.15 mg/L and a total nitrogen limit of 6.0 mg/L are proposed to protect Onion Creek from accumulation of excessive algae.” In her testimony, Murphy concluded that those effluent limits would protect against algae bloom, and that, combined with the DO requirements in the discharge as discussed below, the proposed discharge would protect existing uses in both Walnut Springs or Onion Creek, and that the Tier 1 standard would be met for both waterways.

## *2. The QUAL-TX modeling to screen for dissolved oxygen levels*

Murphy also explained that the TCEQ needed to perform oxygen modeling, known as QUAL-TX modeling, to ensure that the discharge would not lower the DO in Onion Creek below its designated criteria of 5.0 mg/L. 30 TEX.ADMIN.CODE § 307.10, Appendix A. The modeling results performed by both the TCEQ’s employee, James Michalk and the City’s expert, Dr. Miertschin, determined that with the proposed effluent levels, and with a DO level of 6.0 in the effluent itself, the DO level in Onion Creek would remain at or above the 5.0mg/L criteria—with a minor drop to 4.85 at the initial discharge point into Onion Creek. These results are within acceptable statistical limits—and in fact would remain in the approximate range of 6.5 mg/L for approximately 4.5 miles downstream of the discharge, even under the “worst case” scenario of a continuous 30-day discharge at the maximum discharge rate allowed under the permit. Mierstschin also explained that in a supplemental QUAL-TX modeling study, which assumed a lower amount of chlorophyll, the lowest predicted DO level was 5.04 mg/L, again within the required level.

### *3. The QUAL2K modeling to screen for potential algae blooms*

Although not required by any of the applicable state or federal regulations, the City's expert, Dr. Miertschin, also performed a second modeling study, known as a QUAL2K, to predict the amount of algae growth that would occur in Onion Creek, given the proposed effluent limits and DO requirements in the permit, under critical low flow stream conditions, again assuming a continuous maximum discharge for 30 days. Dr. Miertschin explained that QUAL2K modeling is generally accepted in the industry to simulate the effects on algae growth from an increase of nutrients such as phosphorous and nitrogen. He explained that based on his modeling, algae growth would be expected to occur from the proposed discharge, even with the proposed effluent limits in place, as would be expected with any virtually any discharge of treated wastewater. But he concluded that the growth would not be "detrimental" or significant and would instead be "within the range of growth expected even for Hill Country streams not impacted by wastewater discharges." He also opined that the effluent levels in the permit would protect against the occurrence of any "significant algae bloom" from the discharge. The proposed limits would protect both the water quality in the creek and its existing uses as required by the TSWQS, as well as the aesthetic parameters found in the Code, as the algae growth would not be visible to the naked eye. In conclusion, Dr. Miertschin testified that: "Based on the results of the QUAL2K model analysis . . . [and] because of the stringent effluent limitations, algal growth from the treated effluent will be minimized such that the treated effluent will not violate the antidegradation requirements" set forth in the TAC.

### *4. The City's other expert witnesses*

The City also presented the testimony of Paul Price, an aquatic ecologist with a Ph.D. in Zoology, who testified that after reviewing the various screening and modeling results described

above, as well after considering various scientific studies, he believed that the City's permit would protect existing uses and would meet the antidegradation standards in the TAC. In particular, he believed that the effluent limits in the final draft permit, together with the DO level required in the effluent, and the agreed-upon use of a UV-disinfectant process, would ensure that the DO level in Onion Creek would not drop below the 5.0 mg/L level necessary to support the existing uses in the creek. He noted that although some algae growth could be expected from the discharge, he believed the TN and TP limits in the permit could preclude the excessive accumulation of algae, and to prevent any impairment of existing uses. He further found it significant that hill country streams, such as Onion Creek, have a natural ability to remove phosphorous from the water through a complex biological and geological assimilation process, which accounts for their typically low phosphorous content, and that any antidegradation review should consider that factor when determining whether a proposed discharge will lead to an excessive accumulation of algae.

In addition, the City presented the testimony of Michael Forstner, who holds a B.S. in zoology and a Ph.D. in genetics, who specializes in the field of herpetology (the study of reptiles and amphibians) with a particular focus on studying the endangered Barton Creek Salamander. Forstner testified that he also believed that the permit would protect aquatic life in Onion Creek, and of the Barton Creek Salamander in particular, as he believed the permit requirements would ensure that the DO level in the Onion Creek would remain above the minimum level required for their maintenance. He also found it significant that the initial discharge of the treated water would be into Walnut Springs, and he believed that this would lessen the impact on Onion Creek, as the plants and algae in Walnut Springs could utilize the nutrients in the discharge in part before the discharge reached Onion Creek.



And finally, the City presented the testimony of Robert Callageri, a professional engineer who specializes in designing and constructing wastewater treatment plants. Callageri testified that he believed the effluent limits for TN and TP in the final permit were “among the most stringent limits” set forth in any TPDES permit in the state, and along with the DO levels required in the discharge, the permit would protect the health of both humans and wildlife in the area.

### **B. SOS’s Arguments That the Tier 1 Standard Was Not Met**

In the administrative proceedings, SOS presented the testimony of three expert witnesses in support of its position that the permit violated the antidegradation rules. However, on appeal, SOS makes little reference to its own expert witnesses, and instead argues that the TCEQ’s finding that the permit met the Tier 1 standard was arbitrary and capricious, contending that because it “consider[ed] the wrong factors, ignore[ed] required factors, and fail[ed] to make reasoned underlying findings of fact.”<sup>13</sup>

#### *1. The TCEQ recognized the need to protect existing aquatic life*

SOS first contends that the TCEQ’s order finding that the Tier 1 standard was met was unreasonable because it was based on a fundamental misunderstanding of the standard itself. SOS points out that the Tier 1 standard is intended to protect *existing* aquatic life in the receiving waterway, or in other words, to protect against changes in the aquatic species currently living in the waterway that might occur from a proposed discharge. And SOS contends that the ALJ showed a fundamental misunderstanding of this purpose when he made statements that while some species might suffer, increased nutrients might increase biological diversity (that is, allow for a new or different use) As support for this claim, SOS points out that the ALJ referenced a passage from the

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<sup>13</sup> The ALJ concluded that none of SOS’s experts provided credible evidence to support a finding that the permit would result in a Tier 1 violation. Based on the arguments presented, and our standard of review, we do not elaborate on nor address the credibility issue.

“Mabe Report,” a scientific study that SOS submitted as an exhibit for other purposes. The authors of that report observed that some studies demonstrate that increased nutrients found in wastewater discharges can at times “benefit aquatic life” in the receiving waters by leading to “species richness.” SOS concludes from this statement that the ALJ believed it was appropriate to approve permits that can lead to changes in aquatic life, rather than to protect existing aquatic life, as required by the Tier 1 standard.

While the ALJ made the observation about the potential benefits of wastewater discharges, he did so in the context of explaining that not every change in a water’s nutrient level will lead to negative impacts on wildlife—a valid observation under a Tier 1 review. The ALJ did not indicate any confusion over the Tier 1 standard, and instead repeatedly stated in his PFD, as well as in his proposed Findings of Fact, that to meet the Tier 1 standard, the City’s proposed discharge must *not* impact existing aquatic life and other designated uses in Onion Creek. In addition, there is nothing in the PFD or in the proposed Findings of Fact to indicate that the ALJ relied on any other standard in determining that the permit should be issued. The TCEQ also expressed the correct Tier 1 standard in its Findings of Fact, concluding that the City’s permit will protect “existing” uses in Onion Creek. There is nothing in the order showing that the TCEQ mistakenly believed that a change in those uses would be permissible under the Tier 1 standard. Accordingly, we reject SOS’s argument that the TCEQ’s order granting the permit was based on an incorrect interpretation of the Tier 1 standard.

*2. The TCEQ did not ignore the potential for algae growth in its analysis*

SOS next contends that the TCEQ ignored the several scientific studies it presented during the administrative proceedings showing that increases in nutrients can lead to the growth of algae and other invasive species. These in turn, would lead to the displacement of the native aquatic life

forms found in the waterway. SOS contends that the TCEQ was only concerned with algae growth's impact on recreational uses or aesthetics, and not on its impact on aquatic life. We disagree. While the order did consider those factors as it had to do under the TSWQS, the order also expressly stated that the modeling showed the proposed discharge would result in only minimal algal growth. That level of algal growth would meet the antidegradation standards in the TAC—which includes the Tier 1 standard for protecting *all* existing uses.

We also disagree with SOS's argument that the City's expert witness, Dr. Miertschin, and the TCEQ's aquatic scientist, Lili Murphy, did not consider the effect that algae growth could have on aquatic life forms. While Dr. Miertschin discussed aesthetic parameters and nuisance issues in his testimony, he also testified that the increased nutrients in the proposed discharge would not cause a "detrimental" increase in algae growth, which he noted "affects *all* of the water quality issues in this case (emphasis added)." And he expressly testified that because there will be no detrimental increase in algae growth, the "draft permit will be protective of water quality and the uses of the receiving waters under the applicable Texas Surface Water Quality Standards," without limitation to just recreational uses or aesthetic concerns.

Similarly, Murphy testified that she believed the effluent limits in the permit would preclude the excessive accumulation of algae in Onion Creek and would therefore protect the recreational uses in the water and satisfy aesthetic parameters. That said, she also testified that in conducting her nutrient screening and in determining the necessary effluent limits needed in the permit, she considered the proposed discharge's "eutrophication potential," that is, its potential to lead to increase algae formations in the receiving waters that can lead to changes in aquatic lifeforms.<sup>14</sup>

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<sup>14</sup> The term, "eutrophic," refers to a process when nutrients such as phosphorous and nitrogen are introduced into a waterway, which can cause "some restructuring of the ecosystem," such as the "enhanced growth of algae, exhaustion

Thus, we reject SOS's contention that the TCEQ did not consider the effect that the growth of algae would have on the existing aquatic life in Onion Creek when conducted its Tier 1 review.

*3. The TCEQ was not required to consider SOS's "trophic status" argument*

In a related argument, SOS contends that ALJ was "wrong" in concluding that the receiving water's "trophic status" was not relevant to an antidegradation analysis, and that the TCEQ acted unreasonably failing to take Onion Creek's trophic status into consideration in its Tier 1 review. We disagree.

As SOS's expert witness, Dr. Lauren Ross explained, some studies divide waterways into different classifications, known as trophic states. The division depends primarily on their nutrient content, with three primary classifications: oligotrophic (low content); mesotrophic (intermediate content); and eutrophic (high content). Of importance in a trophic status analysis are the so-called "nutrient boundaries" between the various trophic states, and the concern that when the nutrient levels in a waterway begin to rise, the boundaries are crossed and the waterway will transform into a higher, more nutrient-rich, trophic state. And in turn, that a transformation can lead to changes in the aquatic population, as the existing species accustomed to a lower-nutrient environment will likely die off and be displaced by different species of both flora and fauna that thrive in a more nutrient-rich environment.

SOS finds it significant that the EPA recognizes trophic states, and that it has published guidelines setting forth "recommended" nutrient boundaries for determining the trophic state classification of streams, which includes a TP level of .025 mg/L and a TN level of .70 mg/L as the boundary between oligotrophic and mesotrophic streams, and a TP level of .075 mg/L and a

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of fish species, overall deterioration of the quality of water, and . . . other serious effects which prevent and reduce the usage of water." See What is Eutrophication?, VEDANTU, <https://www.vedantu.com/chemistry/eutrophication> (last visited, November 10, 2022).

TN level of 1.50 mg/L as the boundary between mesotrophic and eutrophic streams. SOS asserts that the TCEQ had to consider the EPA's guidelines, including its numeric designation of nutrient boundaries, in conducting its Tier 1 antidegradation review.

But as the ALJ recognized in its PFD, the EPA guidelines are just that, guidelines, and the EPA has never required states to adopt a trophic state analysis in conducting their antidegradation reviews. To the contrary, the EPA has approved the Texas rules and regulations governing antidegradation review, including the TSWQS and the IPs, neither of which requires the TCEQ to consider a waterway's trophic status. As Murphy clarified, because the TSWQS and the IPs do not address trophic status, and do not provide any criteria for conducting a trophic state analysis, it would have been improper for her to conduct such an analysis in performing her Tier 1 review. Instead, Murphy properly conducted her Tier 1 review in the narrative fashion required by the existing rules and regulations to determine whether the proposed discharge would impact aquatic life uses.

#### *4. SOS is impermissibly advocating for the adoption of a numeric analysis*

SOS uses its discussion of the EPA's guidelines on trophic states to segue into a discussion of the other scientific evidence it presented to support its argument that TP levels in Onion Creek must be maintained in the range of .02 to .025 mg/L to prevent harm to existing aquatic life in the creek. In this regard, SOS points to several scientific studies discussed by Dr. Ross that it would be necessary to maintain TP levels in Onion Creek in the range of .020 to .025 mg/L to avoid increases in algae that could displace native species in the Creek.<sup>15</sup>

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<sup>15</sup> Both of SOS's other experts, Dr. Weston Nowlin and Dr. Caitlin Gabor also discussed the need to keep TP levels in Onion Creek below certain numeric levels to protect existing aquatic life. In particular, Dr. Gabor testified that TP levels between .20 to .25 mg/L were needed to avoid increases in algae bloom, which can lead to a decrease in DO, which in turn, poses grave threats to aquatic organisms. And Dr. Nowlin testified that he believed TP levels as low as .15 mg/L in hill country streams can cause negative changes in biological assemblages.

SOS contends that the TCEQ has presented no evidence to rebut the .20 mg/L threshold for detrimental changes to aquatic life in Hill Country streams. SOS therefore contends that it established—without dispute—that the proposed discharge into Onion Creek would violate the Tier 1 standard if it causes TP levels to rise above that level. And, in turn, SOS contends that it also presented undisputed evidence proving that the City’s proposed discharge would spike the TP level in Onion Creek above the recommended .020 to .025 mg/L range. Accordingly, SOS concludes that although the TCEQ may not have adopted any numeric criteria to be used in its nutrient screening process, it cannot avoid the inexorable conclusion that it must not allow the TP level in Onion Creek to increase to this level.

We reject SOS’s argument for several reasons. First, although SOS denies that it is doing so, it is essentially advocating that the TCEQ should abandon its narrative approach to nutrient screening and should adopt a numeric standard in conducting antidegradation reviews. To that point, SOS’s brief complains that the TCEQ has considered adopting numeric standards for nutrient screening in the past, but it has been “drag[ing] its feet” in adopting appropriate standards. However, as the TCEQ points out, it is impermissible for a party to challenge an agency’s failure to adopt a particular rule in a lawsuit brought under the Administrative Procedures Act. *See Sansom v. Texas R.R. Comm’n*, No. 03-19-00469-CV, 2021 WL 2006312, at \*2 (Tex.App--Austin May 20, 2021, no pet.) (mem. op.) (recognizing that it is impermissible for a party to challenge the lack of a rule in a lawsuit brought under the APA), *citing Kidd v. Texas Pub. Util. Comm’n*, 481 S.W.3d 388, 390 (Tex.App.--Austin 2015, no pet.) (the APA’s remedies “do not extend to authorizing suits to challenge an agency’s refusal to promulgate rules.”); *Texas Comm’n on Env’t Quality v. Bonser-Lain*, 438 S.W.3d 887, 895 (Tex.App.--Austin 2014, no pet.) (“[N]o Texas court has ever held that

an agency’s refusal to promulgate rules is reviewable by courts[.]”). The Texas Supreme Court made that point in an analogous context, by writing:

When a statute or rule defines its terms, courts should not construct a restated definition using alternative verbiage that adds or subtracts substantive requirements or limiting factors. The court of appeals erred by substituting a judicially crafted definition of “operator” for the definition provided by TCEQ’s rules. Even if the definition supplied by the rule’s drafters leaves room for interpretation in some cases, the touchstone must remain the text of the definition—not a judicial paraphrase of it.

*Texas Comm’n on Env’tl Quality v. Maverick Cnty.*, 642 S.W.3d 537, 541 (Tex. 2022). The IPs call for a narrative and not a quantitative standard. We are not at liberty to change that standard. Rather, we must apply those rules as written in determining whether they were properly applied. *See Chrysler Motors Corp. v. Texas Motor Vehicle Comm’n*, 846 S.W.2d 139, 142–43 (Tex.App.-Austin 1993, no writ) (to be upheld, an agency rule need only be “based on a legitimate position of the agency and need not be wise, desirable, or even necessary”).

Moreover, if SOS is complaining that the TCEQ did not properly apply its existing rules in conducting its antidegradation review, SOS has not explained where the TCEQ erred in its application of those rules. Murphy explained in detail that she conducted her antidegradation review following the procedures set forth in the IPs. She applied the required site-specific factors for nutrient screening found in the IPs in determining the necessary effluent limits to be placed in the permit that she concluded would protect the existing uses in Onion Creek. And while SOS clearly would have liked for Murphy to apply other factors not in the IPs in conducting her review—such as the numeric criteria set forth in the EPA guidelines—her failure to do so does not establish that she incorrectly applied the rules.<sup>16</sup>

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<sup>16</sup> SOS contends that Murphy merely applied a check the box approach in conducting her antidegradation review when she applied the site-specific factors in her analysis. Yet at the same time, SOS acknowledges that the IPs expressly required her to use those factors in her antidegradation review.

Accordingly, we agree with the TCEQ and the City that the TCEQ conducted an appropriate antidegradation review and reasonably concluded, based on substantial evidence, that the City's permit complied with the Tier 1 standard in the TAC.

Appellant's Issue Two is sustained.

## **V. THE ANTIDEGRADATION REVIEW: TIER TWO**

In their first issue, the TCEQ and the City contend that the district court erred in overruling the agency's finding that the permit would meet the Tier 2 standards in the TSQWS. We agree.

### **A. Evidence Supporting the TCEQ's Finding of Compliance with the Tier 2 Standard**

The Tier 1 and Tier 2 standards substantially overlap as both require a determination that a proposed discharge will not impact existing uses in the receiving water. The Tier 2 standard, however, requires another determination that the discharge will not lower water quality more than a de minimis amount. *See* 30 TEX.ADMIN.CODE § 307.5(b)(1), (2). And in large part, the determination under both standards involves an examination of the same two factors—the impact that nutrient loading will have on the receiving waterway, and whether there will be a decrease in the DO level. Both those factors can impact existing uses and diminish water quality. As a result, the TCEQ relied on substantially the same evidence in conducting its Tier 2 review, as it did in conducting its Tier 1 review. That evidence included Murphy's nutrient screening and the results of the QUAL-TX and QUAL2K modeling that was done by Michalk and Dr. Miertschin.

Rather than rely on the testimony of its own expert witnesses, SOS challenges the legal basis of the TCEQ's order for its Tier 2 analysis—much as it did on the Tier 1 analysis—arguing (1) that the TCEQ applied an incorrect standard in its analysis; (2) that it applied legally-irrelevant or non-statutory criteria in its analysis; and (3) that its review process was generally flawed because it ignored evidence that adding “massive” amounts of TN and TP would have a substantial impact



on water quality. And for many of the same reasons that we rejected SOS's challenges to the TCEQ's Tier 1 review, we also reject its challenges to the TCEQ's Tier 2 review.

**B. Whether the TCEQ Failed to Recognize the Correct Tier 2 De Minimis Standard**

SOS argues that the TCEQ failed to apply the correct standard in conducting its Tier 2 review, finding it significant that the term de minimis appears nowhere in the order. As SOS points out, the TSWQS expressly requires a determination that a permit may not be issued if it would cause degradation to a high-quality water, with the term "degradation" defined in part as a "lowering of water quality by more than a de minimis extent." 30 TEX.ADMIN.CODE § 307.5(b)(2). SOS contends that by failing to make a finding that Onion Creek's water quality would not be lowered by more than a de minimis amount, the TCEQ has in effect "dodge[d] the legal standard entirely." SOS concludes that a court cannot "defer" to an agency's finding if it is not based on the correct legal standard.

While the TCEQ's order granting the permit did not use the term de minimis, we do not find this to be fatal. The order itself, as well as the rest of the administrative record, reflects that the TCEQ applied the correct standard in conducting its Tier 2 review. In particular, the order expressly references the fact that the antidegradation standards for both Tier 1 and Tier 2 reviews are set out in section 307.5(b) of the TAC, which provides that a proposed discharge must not lower water quality by more than a de minimis amount. 30 TEX.ADMIN.CODE § 307.5(b)(2). And in turn, the order expressly states that the TCEQ conducted its antidegradation review in accordance with those standards, recognizing that the "purpose of a Tier 2 antidegradation review is to protect and maintain the water quality of water bodies that exceed fishable/swimmable quality."

In addition, in its PFD, the ALJ quoted the antidegradation standards in the TSQWS in their entirety, and repeatedly referred to the Tier 2's de minimis standard throughout his analysis. And the ALJ expressly determined that the "evidentiary record has demonstrated satisfaction of *all* applicable requirements and supports issuance of the permit sought (emphasis added)."

Moreover, the TCEQ's primary witness, aquatic scientist Lili Murphy, expressly referred to the de minimis standard required in the Tier 2 review process five times, and she testified that she applied that standard in determining that the effluent limits she placed in the permit would satisfy that standard. As well, Dr. Miertschin testified that he was familiar with the water quality standards in the TSWQS, and that he knew that the Tier 2 standard prohibited any more than a de minimis lowering of water quality. And he expressly concluded that the permit met the Tier 2 standards based on the effluent limits and the DO requirements in the permit. We therefore conclude that the absence of the term de minimis in the TCEQ's order does not, standing alone, mean that the TCEQ failed to apply the correct standard in conducting its Tier 2 review.

### **C. Whether the TCEQ is Seeking an "Exemption" from the Tier 2 Standards**

In a related argument, SOS contends that the TCEQ is seeking to create an "exemption" from the Tier 2 standard by its failure to fully set out or consider the Tier 2 standard in its order. In support of that argument, SOS primarily relies on two out-of-state cases in which courts were considering challenges to the validity of exemptions to antidegradation rules that allowed permits to be granted without the need for any Tier 2 antidegradation review. In both cases, the courts expressed concern with granting automatic exemptions and required the agencies to reconsider the rules. *See, e.g., Greater Yellowstone Coal. v. U.S. E.P.A.*, No. 4:12-CV-60-BLW, 2013 WL 1760286, at \*4 (D. Idaho Apr. 24, 2013) (finding that Idaho's antidegradation rule, which provided for an automatic exemption from a Tier 2 antidegradation review was subject to further agency

review to determine whether it complied with federal water quality standards); *see also Kentucky Waterways All. v. Johnson*, 540 F.3d 466, 493 (6th Cir. 2008) (finding that the EPA’s approval of a state rule allowing for an automatic exemption from a Tier 2 review for coal-making discharges was subject to reconsideration by agency). These cases are inapt, as we do not face a situation in which the City is seeking an exemption from conducting a Tier 2 review. Rather, the TCEQ undeniably conducted such a review. Instead, we are only tasked with determining whether the TCEQ applied the correct standards in conducting its review, and whether its conclusion that the Tier 2 standard was met is supported by substantial evidence.

**D. Whether the TCEQ “Collapsed” the Tier 1 and Tier 2 Standards in its Order**

In another related argument, SOS contends that the TCEQ improperly “collapsed [the] Tier 2 review into the Tier 1 impairment of uses standard.” In effect, SOS contends that when analyzing the Tier 2 standard, the TCEQ’s order focused solely on the issue of whether the permit would protect uses (the focus of the Tier 1 standard) and not on whether the permit would lower water quality in Onion Creek, due to the increase of nutrients (TN and TP). We disagree.

First, maintaining existing uses is part of both the Tier 1 and the Tier 2 standards, and as the ALJ pointed out in his PFD, there is a substantial overlap in these standards, making it difficult to analyze the two standards separately. 30 TEX.ADMIN.CODE § 307.5(b)(1), (2) (setting forth the standards for both Tier 1 and Tier 2 reviews to include examining the impact a proposed discharge will have on “existing uses”). Thus, while the TCEQ’s order reflects that it believed the permit met the Tier 2 standard because it would protect the existing uses in Onion Creek, it also stated that the permit would protect and maintain “water quality” as well under the applicable TSWQS. The order also states that its “Tier 2 review confirmed that no significant degradation of water

quality is expected in Onion Creek . . . .” We therefore do not believe that the TCEQ collapsed the two standards in its order.

Nor do we believe that the expert witnesses who provided testimony in support of the permit collapsed these two standards. Murphy expressly stated that she addressed both aspects of the Tier 2 standard in conducting her antidegradation review, and that she concluded that the permit—with the effluent limits she proposed—would be both protective of existing uses and would also protect and maintain the water quality in Onion Creek. In addition, Dr. Miertschin expressed his opinion, again based on the effluent limits and the DO requirements in the permit, that the permit would protect both “water quality” and “existing uses.” His modeling results demonstrated that no significant degradation of water quality was expected in Onion Creek from the discharge. As well, Paul Price, one of the City’s other expert witnesses stated that the permit would protect both “water quality and the uses of the receiving waters under the applicable Texas Surface Water Quality Standards.” As a result, we find no basis for SOS’s argument that the TCEQ improperly collapsed the Tier 1 and Tier 2 standards in its antidegradation review.

#### **E. The TCEQ Properly Noted Stringent Effluent Limits in the Permit**

SOS also contends that the TCEQ’s finding that the Tier 2 standard was met was “arbitrary and capricious” because the TCEQ allegedly based its finding on a “non-statutory criteria”—the “stringency of the permit relative to other TPDES permits.” The TCEQ’s order states that the City’s permit “includes the most stringent TP limit of any municipal wastewater permit in the state,” and also “includes a TN limit that is one of the most stringent nitrogen-related effluent limits for any permit in the state.” The TCEQ, however, did not indicate that it made the decision to grant the permit based simply on its favorable comparison to other state permits. Instead, the TCEQ referenced the comparatively stringent nature of the effluent limits in the permit in the

context of explaining why it believed the permit met the various antidegradation requirements set forth in the TAC.

Moreover, as the TCEQ points out, the IPs expressly state that the TCEQ may consider a proposed permit's "consistency with similar permits" in performing its antidegradation review. And when the EPA withdrew its objection to the permit, it did so, based at least in part, on the "stringent nature of the permit in comparison to other municipal permits" issued in the state, noting that the effluent levels in the draft permit were "considerably more stringent than most municipal permits, especially Total Phosphorus." Thus, the EPA found this to be a relevant factor in the TCEQ's antidegradation review.

For these reasons, we do not believe that the TCEQ improperly relied on any non-statutory or otherwise irrelevant criteria in issuing the permit.

#### **F. Whether the TCEQ Ignored Evidence Pertaining to Increases in TN and TP Levels**

As it did in challenging the TCEQ's Tier 1 analysis, SOS next contends that the TCEQ improperly ignored evidence establishing that the permit would cause a Tier 2 violation based on the "massive" amounts of effluent in the proposed discharge. SOS repeats its argument that the administrative record contains unrebutted scientific evidence that any rise above the .20 mg/L level of TP in Onion Creek would lower water quality, and the proposed discharge would exceed that threshold. It then concludes that "no reasonable person—[and] no legal analysis—can square the undisputed increases" with a finding that Onion Creek's water quality would not be diminished more than a de minimis amount due to this increase.

We disagree with this argument for several reasons.<sup>17</sup> First, as the City points out, the Austin court rejected a substantially similar argument in which an environmental group challenged

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<sup>17</sup> Whether SOS is correct in claiming that the nutrient levels would raise so significantly turns in part on accepting its expert's analysis of those anticipated rises in TP and TN. The ALJ rejected that analysis for reasons detailed in the

the TCEQ's decision to grant a wastewater permit, focused solely on the size of the proposed discharge. The group argued that "as a matter of law the discharge of such a large quantity of wastewater and stormwater cannot have a de minimis effect on the water quality of the receiving body," regardless of any other factors. *See Robertson County: £Our Land, Our Lives (RCOLOL) v. Texas Comm'n on Env'tl Quality*, No. 03-12-00801-CV, 2014 WL 3562756, at \*9 (Tex.App.--Austin July 17, 2014, no pet.) (mem. op.). The court rejected the claim, holding that under the controlling standard of review, the issue before the court was whether the TCEQ's decision to grant the permit was supported by substantial evidence, considering all the various factors involved in making an antidegradation review. *Id.* at \*9-10.

And as discussed above, while SOS would prefer that the TCEQ add numerical criteria to the review process, that is not the current standard by which the TCEQ's review is to be conducted. Thus, SOS cannot establish as a matter of law that a permit violates the antidegradation rules, whether under the Tier 1 or the Tier 2 standards, simply by pointing to evidence that a proposed discharge would lead to numeric increases in the TP and TN levels in the receiving water. To the contrary, the existing TSWQS standards and the EPA-approved IPs provide that an antidegradation review be conducted in a narrative or qualitative manner, considering several factors in determining the effect a proposed discharge will have on the receiving waters. Moreover, one of our sister courts has expressly approved of the TCEQ's use of this narrative standard in conducting Tier 2 reviews, and has further recognized that it is improper for an ALJ to apply a stricter numeric or quantitative standard in determining Tier 2 compliance. *See Wood v. Texas Comm'n Env'tl Quality*, No. 13-13-00189-CV, 2015 WL 1089492, at \*5 (Tex.App.--Corpus Christi Mar. 5, 2015, no pet.) (mem. op.) (upholding TCEQ decision to overturn an ALJ's decision that a permit did not

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PFD. Under our standard of review, we could not accept those projections as undisputed, or binding on a reviewing court. *See TJFA, L.P. v. Texas Comm'n on Env'tl Quality*, 632 S.W.3d 660, 676 (Tex.App.--Austin 2021, pet. filed).

meet Tier 2 standards, where the ALJ applied an “incorrect” quantitative or numeric standard in reaching her conclusion). Accordingly, we reject SOS’s claim that the TCEQ’s decision to grant the permit was erroneous as a matter of law based solely on numeric increases in the TN and TP levels in Onion Creek.

For similar reasons, we reject SOS’s argument that the TCEQ needed to conduct a “baseline” analysis of the impact the permit would have on Onion Creek, by creating a “before and after” comparison of numerical nutrient levels in Onion Creek. The IPs require the TCEQ to establish the “baseline water quality conditions” in the receiving water, which is defined as water quality conditions on November 28, 1975 in accordance with federal standards, and then compare the “effect of a proposed discharge . . . to baseline water quality . . . to assess the potential for degradation of water quality.” But the IPs make it clear that the potential for degradation is not determined by making a “before and after” numerical comparison of the levels of nutrients in a waterway. Instead, the IPs state that this comparison is to be made in a narrative fashion, using the various site-specific criteria that Murphy used in her antidegradation review, as reflected in her nutrient screening worksheet. Moreover, the IPs provide that baseline conditions are in the latest edition of the Texas Water Quality Inventory, and Murphy expressly testified that she consulted this document in conducting her Tier 2 review. In addition, Dr. Miertschin testified that he also considered the baseline conditions in Onion Creek in conducting his antidegradation review. We thus conclude that the TCEQ conducted a proper baseline analysis in its Tier 2 review.

#### **G. Whether the TCEQ Ignored Projected Drops in DO Level in Onion Creek**

Finally, SOS contends that Dr. Miertschin’s QUAL-TX modeling demonstrated that the proposed discharge would cause the DO level in Onion Creek to drop by approximately 2.0 mg/L from its existing level of 7 to 8 mg/L, down to the 5.0 mg/L minimum level or less. And SOS

contends that the TCEQ ignored this important fact in concluding that the proposed discharge would not affect water quality. SOS further contends that the TCEQ ignored its own rules in failing to address the effects that this projected drop would have on water quality, contending that the IPs provide that any drop in DO levels of more than 0.5 mg/L is an indicator of degradation.

There are several problems with this argument. First, SOS has misinterpreted the IPs provision, as it only applies to drops of DO levels in “exceptional quality” bodies of water, which does not include Onion Creek. Second, under the provision, a drop in DO level of 0.5 mg/L or more is only an indicator of degradation if the drop is projected to continue for a “substantial distance.” As the TCEQ points out, Dr. Miertschin’s modeling did not suggest that there would be any significant drop of DO below existing levels for a “substantial distance” from the discharge zone. Instead, he projected that there would be a slight drop of DO at the initial point where the discharge enters Onion Creek, but that the DO level would increase back to a 6.5 level or higher almost right after, and that it would remain at that level for several miles downstream.

For these reasons, we agree with the TCEQ and the City that the TCEQ conducted an appropriate Tier 2 review, and reasonably concluded, based on substantial evidence, that the City’s permit complied with the Tier 2 standards in the TAC.

Appellants’ Issue One is sustained.

## **VI. THE SUFFICIENCY OF THE PUBLIC NOTICE**

In Issue Three, the TCEQ and the City contend that the district court erred when it concluded that the public notices the City provided for its permit application were legally deficient based on their failure to sufficiently identify the location of the discharge point for the treated water. The TCEQ and the City point out that the TAC only requires a “general description” of the location of the discharge point, and they assert that the TCEQ correctly determined that the public



notices met this standard. They also contend that even if the notices did not meet the technical requirements of the Code, SOS has not shown that any harm came from this alleged deficiency, as it failed to come forward with any evidence that any interested parties were denied the right to meaningfully participate in the permitting process as a result.<sup>18</sup> We agree on both points.

#### **A. Applicable Law and Standard of Review**

The notice requirements for TPDES and other wastewater discharge permits are found in 30 TEX.ADMIN.CODE § 39.551.<sup>19</sup> As for the first required notice, the Code is silent on whether a description of the location of the discharge point is required. *Id.*, § 39.551(b). But the Code provides that the next two notices in the TPDES permitting process, the NAPD (Notice of Application and Preliminary Decision) and the NOH (Notice of Hearing), must contain a “general description of the location of each existing or proposed discharge point and the name of the receiving water.” *Id.*, § 39.551(c)(4)(B); (d)(1)(D)(ii).

The TCEQ and the City contend that the question of whether the notices met the Code’s requirements should be analyzed under the TCEQ Hearing Statute and the substantial evidence rule, and that SOS’s failure to have its experts address the sufficiency of the notices created an un rebutted presumption that the notices met the Code’s requirements. We agree with SOS, however, that it was not required to present “evidence” on this issue, as the content of the public notices were not in dispute, and the question of whether the notices were sufficient under the Code

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<sup>18</sup> The City also contends that SOS lacked “standing” to raise this issue in the district court, as SOS cannot demonstrate that it was harmed by any deficiency in the public notice. SOS counters that it was not required to show harm to raise this issue, as the Administrative Procedure Act provides that any person who is aggrieved by a final decision in a contested case is entitled to judicial review. TEX.GOV’T CODE ANN. § 2001.171.

<sup>19</sup> These requirements were mandated by section 5.552 of the Texas Water Code, which provides that the Commission must create rules establishing the form and content of public notices relating to any water permits issued under Chapter 26 of the Code that would affect the quality of water in the State. TEX.WATER CODE ANN. § 5.552(c)(1) (“The commission by rule shall establish the form and content of the notice. The notice must include . . . the location and nature of the proposed activity.”).

is a question of law that can be answered without resort to any outside evidence. *See, e.g., Rettberg v. Texas Dep't of Health*, 873 S.W.2d 408, 413 (Tex.App.--Austin 1994, no writ) (concluding that the question of whether a notice complied with the Texas Open Meetings Act could be resolved as a matter of law, where the facts were undisputed as to the content of the notice). We will therefore review the question of whether the notices were sufficient to meet the Code's requirement on a de novo basis. *See Jenkins*, 537 S.W.3d at 150 (recognizing that the "extent to which the underlying facts found by the agency logically support its ultimate decision or action, may entail questions of law that we review de novo"); *Heritage on San Gabriel Homeowners Ass'n v. Texas Comm'n on Env't'l Quality*, 393 S.W.3d 417, 424 (Tex.App.--Austin 2012, pet. denied) (appellate court reviews an agency's "legal conclusions for errors of law and its factual findings for support by substantial evidence").

## **B. Analysis**

The City's first public notice included the address of the treatment plant and stated that the treated effluent would be discharged from the plant site via pipe to Walnut Springs and then to Onion Creek in Segment No. 1427 of the Colorado River Basin. The next two notices, the NAPD and the NOH similarly described the discharge point by stating "[t]he treated effluent will be discharged to Walnut Springs; thence to Onion Creek in Segment No. 1427 of the Colorado River Basin." In finding these notices to be deficient, the district court found it significant that they only provided the address of the wastewater treatment plant, but provided "no address, set of coordinates, or reference to nearby street crossings . . . for the discharge point despite the focus in the regulations on identifying the location . . . where the pollutants will be released into public waters." The district court also observed that the notices provided no indication that the treatment plant was "nowhere near" the discharge point, and that the treatment plant was approximately 1.5

miles from the discharge point. And finally, the district court argued that an employee from the United States Fish and Wildlife Service had advised the TCEQ that he “could not tell from the public notices where the discharge point would be,” and that the TCEQ then gave him additional information, including the coordinates of the discharge point, which was not shared with the public.

We find none of these reasons compelling. First, the Code only requires a “general description” of the location of the discharge point, and there is nothing in the Code, or in any other rules or regulations, requiring an applicant to include the address, GPS coordinates, or cross streets of the discharge point in a public notice. SOS concedes the discharge point—like many waterways—does not have an address, and at the time there were no nearby cross streets to reference, as it was in a generally undeveloped area. Moreover, the GPS coordinates for the location of the discharge point were provided in the City’s application. While it may have been somewhat burdensome for an individual to find the coordinates in the rather extensive application, they were still available for anyone wishing to find them.

The key purpose of providing the public with notice of a permit application is to ensure that “potentially affected” persons are aware of the application, rather than to give them specific technical information about the permit itself. *See Chocolate Bayou Water Co. & Sand Supply v. Texas Nat. Res. Conservation Comm’n*, 124 S.W.3d 844, 850 (Tex.App.--Austin 2003, pet. denied) (recognizing that the public notice requirement “in the TCEQ application context” is to afford “individuals who may be affected by the grant or denial of the permit a meaningful opportunity to voice their concerns and participate in the permitting process by requesting a contested-case hearing on the permit application.”), *citing United Copper Indus., Inc. v. Grissom*, 17 S.W.3d 797, 805 (Tex.App.--Austin 2000, pet. dismissed as moot) (recognizing that the purpose of providing

public notice of a permit application is to ensure that interested parties have a “fair and meaningful opportunity” to participate in the process). Thus, in *Chocolate Bayou*, the Austin court upheld a water permit that contained different language than was in the public notice on monthly flow restrictions, where the “defective” notice nevertheless sufficiently apprised the potentially affected individuals in the area that their rights would be affected by the permit and provided them with a meaningful opportunity to participate in the permitting process. *Chocolate Bayou*, 124 S.W.3d at 850. As the Austin court noted, the notice requirements are only intended to “reasonably” convey to potentially affected individual’s relevant information about the permit application, but are “not intended to fully apprise potentially affected parties of the specifics of [a] proposed permit,” as such information can be found in the permit application itself and supplemental materials, all of which are available to the public. *Id.* at 850-851.

We also disagree with the district court’s finding that the public notices were flawed because they did not specify the distance that the water would travel via pipe from the treatment plant to the discharge point. While it may be a “common TCEQ practice” to include that information in public notices—as SOS contends—we do not believe that information was required here. The address of the treatment plant was in the notices, and the notices also specified the initial discharge would be into Walnut Springs. Walnut Springs is an intermittent water body and its location is identified on United States Government Services maps. Any interested party could easily discern the approximate distance and direction the treated water would take from the treatment plant to the initial discharge point to allow them to determine whether they would be potentially impacted by the discharge.

SOS, however, contends that the public notices were flawed because they only named the waterways into which the treated water would be discharged, but did not specify the exact location

where the treated water would enter either of those two bodies of water. In support of its argument, SOS relies on the Georgia Supreme Court's opinion in *Hughey v. Gwinnett Cnty.*, 609 S.E.2d 324, 329 (2004), where an applicant sought a permit to discharge treated wastewater into a 40-mile-wide lake. The applicant's public notices identified a discharge point over a mile away from where the discharge point was ultimately set in the permit. The court concluded that the misinformation in the notices raised a question of fact about whether any potentially affected persons might have been denied a "meaningful opportunity" to participate in the permitting process. *Id.* In reaching this conclusion, the court noted that it would not be enough for the applicant to simply state that it would be discharging treated water into the lake, without specifying the discharge point, as the public would have no way of knowing if they would be affected by a discharge that could take place at any point in the lake's 40-mile radius. *Id.* SOS contends that the notices here raise the same problem, as Onion Creek in Segment 1427 of the Colorado River Basin stretches 78 stream-miles across three counties, and the notices did not make it clear exactly where the discharge into Onion Creek would take place.

We disagree, as we find *Hughey* to be distinguishable in two important ways. First, unlike the situation in *Hughey*, all the City's public notices consistently described the location of the discharge point as the point at which Walnut Creek and Onion Creek converge, and there was no variance from that location in the final permit. Second, the record reflects that Walnut Springs itself is less than a half-mile long and that the final discharge point into Onion Creek is even smaller and more distinct. In particular, the record contains evidence establishing that there was only one point at which Walnut Springs intersects with Onion Creek, making this a defined point that any interested party could readily identify and locate to determine whether their rights would be potentially impacted by the permit.

SOS has not directed us to any evidence in the record showing that any of the hundreds of individuals and organizations that participated in the public comment portion of the permitting process expressed any confusion over the discharge route the treated water would take or the location of the final discharge point. Similarly, SOS did not come forward with any evidence establishing the existence of any disgruntled party who may have been potentially affected by the permit and was denied a meaningful opportunity to participate in the permitting process because of the lack of specificity in the public notices. Further, as the City points out, it took multiple steps to ensure that all potentially affected persons would know about the permit, including providing “enhanced notices” to affected landowners next to the wastewater plant, as well as to those who owned property for one mile downstream of the discharge point, thereby ensuring that they had the opportunity to participate in the process. The City further points out that along with the formal public notices that were both published and mailed out, there were dozens of communications in all types of media and in multiple languages that informed the public of the City’s permit application.

Contrary to SOS’s argument, we attach limited significance to the fact that only one landowner within two miles downstream of the discharge point requested a contested case hearing. While that one owner may have been the only downstream landowner to request a hearing, this does not mean that the other landowners in the area did not receive notice of the permit, or that they did not otherwise participate in the permitting process. And as the City points out, the administrative record established that the land immediately south of the discharge point itself was nearly undeveloped at the time, and that there was only one other landowner in that immediate area (a development company), who received written notice of the application, but apparently chose not to request a hearing. In short there is simply no evidence in the administrative record to

demonstrate that the alleged lack of specificity in the public notices deprived any interested or potentially affected individuals from having a meaningful opportunity to participate in the permitting process.

We thus conclude that the trial court erred when it used the lack of specificity in the public notices to reverse the TCEQ's order granting the permit.

Appellants Issue Three is sustained. We find no need to address the City's fourth issue over the scope of the injunction.

## **VII. CONCLUSION**

The TCEQ and the City's first issues are sustained. We decline to reach the City's fourth issue. We reverse the judgment of the district court, dissolve the injunction, and affirm the order of the Executive Director approving the permit.

JEFF ALLEY, Justice

December 13, 2022

Before Rodriguez, C.J., Palafox, and Alley, JJ.  
Palafox, J., dissenting