



COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

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

DISSENTING OPINION

Because I disagree with the majority's analysis and conclusion, I respectfully dissent. I would affirm the trial court's judgment, which reversed the TCEQ order approving the City's permit. The majority concludes the City's permit complied with both the Tier 1 and Tier 2 standards. It further concludes the public notice requirements were met. Regarding these conclusions, I disagree. In this fact-intensive case, I would conclude that the TCEQ's order approving the City of Dripping Spring's wastewater discharge permit was not supported by law or substantial evidence, and thus the order should be reversed. In my view, the TCEQ's ruling is unsupported by substantial evidence establishing that the permit would not impair existing aquatic life (Tier 1) or that it would not reduce water quality more than a de minimus amount (Tier 2).

Tier 1

I agree with Appellee Save Our Springs (SOS) that the Tier 1 standard was not met because the TCEQ considered the wrong factors while also ignoring required factors. Specifically, the evidence as a matter of law showed the approved discharge would harm aquatic life species in Onion Creek.

SOS contends that the TCEQ's finding that the permit met Tier 1 standards was arbitrary and capricious because it considered wrong factors, ignored required factors, and failed to make reasoned underlying findings of fact. The majority rejects these claims after concluding that nothing in the TCEQ order showed it misunderstood the applicable standard, or that it failed to consider the effect that algae growth would have on the existing aquatic life in Onion Creek, or showed that a narrative analysis was not properly conducted.

In my view, however, SOS asserted a wholly different claim. SOS argued the TCEQ had dismissed, as irrelevant, the fact that the massive nutrient increases would stimulate algae growth such as to harm aquatic life, displacing both algae and animal species that feed on algae. SOS asserts that the TCEQ only considered nutrients and algae growth as a threat to recreational uses, not as a threat to aquatic life uses. Based on my review, I agree with that claim.

In considering the evidence presented, the TCEQ ignored its great weight and substance, thereby granting a permit that will likely harm the aquatic life in Onion Creek. Unlike the majority, I disagree that SOS is advocating for a quantitative standard by asserting the TCEQ is allowing the TP level in Onion Creek to increase to the level stated by the evidence. Rather than argue for a quantitative standard, SOS simply points out that the undisputed evidence showed the proposed discharge would harm aquatic life species.

On this record, I would conclude the TCEQ's order failed to comply with the Tier 1 standard.

Tier 2

Additionally, I would conclude the Tier 2 ruling is unsupported by substantial evidence establishing the standard was met. Specifically, I agree with SOS's arguments that the TCEQ applied the wrong analysis in conducting the Tier 2 review, ignoring substantial evidence showing the water quality would be reduced by more than a de minimus amount. The majority rejected these arguments because the TCEQ's order mentioned the permit would protect and maintain "water quality" and that the "Tier 2 review confirmed that no significant degradation of water quality is expected in Onion Creek."

I agree that the TCEQ's permit order applies the wrong analysis in stating that a Tier 2 review confirmed no "significant degradation of water quality is expected in Onion Creek . . . such that the existing uses will be maintained and protected." SOS contends this standard applies an "impairment of uses" standard, but the Tier 2 standard requires a showing that water quality will not be lowered by more than a de minimus amount absent a showing of important social and economic development needs. Here, in my view, the undisputed evidence showed as a matter of law that the permitted discharge would result in a significantly large increase of nitrogen and phosphorus levels thereby lowering the water quality in Onion Creek by more than a de minimus amount.

I agree that the *Robertson* case, cited by the majority, rejected the argument that "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. *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 *Robertson* court held that the controlling standard of review asked whether the TCEQ’s decision to grant the permit was supported by substantial evidence. *Id.* However, as SOS points out, the *Robertson* case referenced other factors that contributed to the substantial evidence inquiry: that there was “only a small amount of chlorine,” “no other contaminants are added to the reservoir water,” the added chlorine was “so tiny that [it] would not be measurable,” the average dilution factor would be less than the degradation policy percentage under the Tier 2 de minimus threshold, and “the discharge flow rate is so high” that stormwater discharges would essentially be unmeasurable. *Id.* at 10. Here, SOS argues there was evidence of record that was otherwise missing from *Robertson*, like large amounts of nutrients, large amounts of pollutants, and a higher discharge rate, which all support a different conclusion. SOS urges this additional evidence demonstrates the Tier 2 anti-degradation standard was violated. I agree.

I would conclude that the TCEQ’s order did not meet the Tier 2 standard.

Public notice

Lastly, I further agree that the TCEQ erred in finding the public notice requirements were met. The proposed point of discharge was a long distance from the identified location of the wastewater treatment facility. Additionally, SOS presented evidence establishing that even the U.S. Fish and Wildlife Service could not tell where the discharge point would be located based on the public notices issued. As a result, the TCEQ then responded with more specific information. Yet this specific information was never given to the public. As a result, I would conclude the public notice fell short of compliance.

In sum, I would conclude the TCEQ’s order complied with neither Tier 1 nor Tier 2 standards. I further conclude that the public notice requirements were not met. Accordingly, I agree

with the ruling of the trial court, and I would affirm its reversal of the TCEQ's order. For all these reasons, I respectfully dissent.

GINA M. PALAFOX, Justice

December 13, 2022

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