

**SOAH DOCKET NO. 582-22-2095  
TCEQ DOCKET NO. 2021-1216-MWD**

**APPLICATION by  
STUDIO ESTATES, L.L.C. for  
NEW TPDES Permit No.  
WQ0015933001**

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**BEFORE THE  
STATE OFFICE OF  
ADMINISTRATIVE  
HEARINGS**

**EXECUTIVE DIRECTOR'S RESPONSE TO GUADALUPE-BLANCO RIVER AUTHORITY'S  
EXCEPTIONS TO THE PROPOSAL FOR DECISION**

**TO THE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL  
QUALITY:**

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ/Commission) submits the ED's Response to Protestant Guadalupe-Blanco River Authority's (GBRA) Exceptions to the Proposal for Decision (Exceptions/PFD) on the application by Studio Estates, LLC (Applicant) for new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0015933001 (proposed permit). The ED confirms her preliminary position that the Applicant has satisfied all applicable statutory and regulatory requirements in the application for the proposed permit, and because all statutory requirements from the Texas Water Code and the regulatory requirements of Title 30 of the Texas Administrative Code (30 TAC/TCEQ rules) on the one referred issue are satisfied from the evidentiary and administrative record (the record), the ED respectfully recommends the Commission find that the proposed permit should be issued, deny GBRA's exceptions, and adopt the PFD and Findings of Fact and Conclusions of law as currently drafted.

**I. INTRODUCTION**

Relevant to this document, a brief summary of the procedural history is that the Commission considered the hearing request filed by GBRA during an open meeting on January 12, 2022. The Commission found GBRA to be an affected person and granted its hearing request, referring one issue to the State Office of Administrative Hearings (SOAH) for a contested case hearing, otherwise known as a hearing on the merits (HOM), which was held on September 7, 2022. The one referred issue was whether the effluent limitations (limits) contained in the draft permit (otherwise known as the proposed permit) are adequately protective of water quality in the receiving streams.

As an introductory matter, the ED notes that the claims made by GBRA in its Exceptions are substantially similar to the claims GBRA made at the HOM, in its

Closing brief, and in its Reply to Closings brief, all of which lacked support from the record and were not persuasive at SOAH. Therefore, the ED offers her arguments from her Closing brief and her Reply to Closings brief but will provide a high-level summary of important attributes of the ED's position that rebut GBRA's claims in this Response.

## II. DISCUSSION OF GBRA'S EXCEPTIONS

GBRA claims in its Exceptions that the proposed permit is not protective of water quality in the Plum Creek Watershed, that a discharge with limits of 20 mg/L biochemical dissolved oxygen (BOD) and 20 mg/L total suspended solids (TSS) is not protective of water quality nor a discharge permit without an ammonia nitrogen (NH<sub>3</sub>-N) or total phosphorus limit.<sup>1</sup>

However, the evidence in the record reflects that water quality is protected when Dissolved Oxygen is maintained in accordance with the Texas Surface Water Quality Standards (TSWQS)<sup>2</sup>: 1) that the proposed permit will maintain numerical and narrative Dissolved Oxygen criteria to protect the existing water quality uses in both phases of the proposed permit without the expectation of any significant degradation of water quality in the receiving streams with exceptional, high, or intermediate aquatic life uses downstream of the proposed discharge point<sup>3</sup>; 2) that there are three comparable minor discharges to the proposed discharge that do not have nutrient limits due to their small size and that the ED does not expect that those three minor facilities without phosphorus limits combined with the proposed discharge will significantly contribute to the total nutrient loading of Plum Creek<sup>4</sup>; 3) finally, the record reflects water quality will be protected in the receiving streams without the proposed permit containing nutrient limits because a standard assumption of 12 mg/L NH<sub>3</sub>-N is used in DO modeling, which is six times the amount that GBRA seeks to be limited in the proposed permit.<sup>5</sup>

GBRA claims that TCEQ has provided no scientific basis to support the exclusion of nutrient limits in the proposed permit and that the TCEQ issuing the

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<sup>1</sup> GBRA's Closing Arguments at pg. 7.

<sup>2</sup> *Pre-filed testimony of Josi Robertson*, ED-3, pg. 0030, lines 10-15.

<sup>3</sup> *Pre-filed testimony of Jenna Lueg*, ED-2, pg. 0022, lines 6-8; Interoffice Memorandum from Josi Robertson to the Municipal Permits Team (3/18/21), ED-7, pg. 0321, second paragraph

<sup>4</sup> *Executive Director's Response to Public Comment*, ED-11, pg. 0370, Response #2.

<sup>5</sup> *Id.* at ED-11, pg. 0369, Response #1; *Methods for Analyzing Dissolved Oxygen in Freshwater Streams Using an Uncalibrated QUAL-TX Model (QUAL-TX SOP)*, ED-17, Attachment 1, pg. 0724.

proposed permit “sends a message to other partners in the WPP” about the validity of the WPP (See Exceptions at page 4-5) and makes it more difficult for future permits to have very restrictive limits.<sup>6</sup> Not only does the evidence in the record rebut these claims, related to the claim that the proposed permit will make it more difficult for future permits to have very restrictive limits, GBRA’s expert’s testimony rebuts this claim. Despite citing to GBRA’s expert’s testimony on page 14 of GBRA Exhibit 1, GBRA’s expert did not make such a statement; whereas the record reflects that the process for establishing permit limits in the proposed permit and future permits involves using a Dissolved Oxygen (DO) model, a mathematical model widely accepted as a valid scientific tool, and that the DO model is also the source of any recommended ammonia-nitrogen limit.

GBRA has not offered any evidence that the proposed permit or its discharge is contrary or in conflict with the TSWQS. GBRA has not provided any evidence that the proposed permit’s limits do not meet legal requirements or that the Dissolved Oxygen modeling performed by the ED was illegal or deficient as it relates to the water quality in the receiving streams or the Plum Creek watershed. The only information provided by GBRA is opinion testimony offered by its expert that the proposed permit will not be protective of water quality in the receiving streams because the proposed permit does not contain the recommended effluent limits from the 2008 Plum Creek Watershed Protection Plan (WPP).<sup>7</sup> GBRA has simply failed to produce evidence at the HOM or in its Exceptions that the limits contained in the proposed permit are not protective of water quality in the Plum Creek watershed, nor for that matter, the receiving streams.

GBRA offers no support from the record that because the TCEQ participated in the submittal of the WPP to the United States Environmental Protection Agency (EPA) the TCEQ is required to adopt, adhere, and enforce the WPP, as if it were an adopted standard or a regulatory requirement. The current TCEQ rules highlight that the WPP has not been codified in the TCEQ rules for TPDES permits or adopted by the TCEQ as an amendment to the TSWQS, found in Title 30 of the Texas Administrative code (30 TAC), Chapter 307. For the WPP to be an enforceable regulatory requirement, the TCEQ

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<sup>6</sup> GBRA’s Closing Arguments at pgs. 5 and 7.

<sup>7</sup> GBRA-1, pg. 15, lines 1-4.

would have needed to codify or adopt the WPP. This also supports the idea that the TCEQ approved of the WPP because of its voluntary nature, which was discussed during the HOM at SOAH.

Without any support from the record, GBRA also claims that because the TCEQ participated in the submittal of the WPP to the EPA that contained an “alternative pollution control plan,” TCEQ’s recommendation of the proposed permit without nutrient limits is an invalid or illegal permitting action. GBRA’s claim misconstrues the substance of GBRA Exhibit No.6, EPA’s November 18, 2011, letter to the TCEQ (EPA’s letter), which discussed the reasons for and removal of Segment No. 1810 from the 2010 Clean Water Act’s 303(d) list of impaired waters.<sup>8</sup>

The section of the EPA’s letter entitled *Waters to be removed from the 303(d) list and placed in category 4b of the Texas integrated report pursuant to 40 CFR 130.7(b)(1)(iii)* states that water bodies are not required to be included on the § 303(d) list if “Other Pollution Control Requirements (e.g., best management practices) required by local, State, or Federal authorities are stringent enough to implement applicable water quality standards within a reasonable period of time.”<sup>9</sup> The section, in Table 1, goes on to list the Other Pollution Control Requirements for Segment No. 1810 as “[t]he Plum Creek [WPP] describes both point and non-point source management measures to be implemented throughout the Plum Creek watershed for the reduction of *bacteria*,” (emphasis added).<sup>10</sup> In all portions of the EPA’s letter cited by GBRA in its closing brief for the contention or implication that the other or alternative pollution control requirements that EPA approved of relate to nutrient limits, an effluent set of 5-5-2-1, or that Segment No. 1810 was removed only because of the measures in the 2008 plan, and by extension that the “measures in the 2008 plan” refer to nutrient limits, there is only discussion of Segment No.1810’s recreational use impairment from elevated levels of *E. coli*.<sup>11</sup> Likewise, GBRA’s prefiled testimony and evidence does not contain any allegation or complaint that the proposed permit’s bacteria limit is incorrect or inappropriate.

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<sup>8</sup> GBRA Exhibit No. 6, pgs. 10-11 (Bates Nos. 000292-000294).

<sup>9</sup> *Id.* at pg. 10 (000292).

<sup>10</sup> *Id.* at pg. 11 (000293), Table 1.

<sup>11</sup> GBRA Exhibit No. 6, pgs. 10-26 (000292-000308).

GBRA's evidence simply does not rebut the prima facie case that the Applicant complied with the application requirements, the ED reviewed the application, prepared the proposed permit that complies with all applicable statutory and regulatory requirements, the proposed permit's limits were derived from a scientific process, a mathematical model, and are protective of water quality in the receiving streams. Nor does GBRA's evidence change the fact that all of the ED's witnesses supported the various points of the ED's position in both their prefiled testimony and exhibits (ED's testimony) and their cross-examination testimony.

GBRA has simply failed to produce evidence that the limits contained in the proposed permit are not protective of water quality in the Plum Creek watershed or the receiving streams.

GBRA excepts to and recommends rejection of findings of fact that state that the WPP is a voluntary guidance document that TCEQ has not adopted (See Exceptions at page 7). However, as GBRA states in its Exceptions, the WPP is a guidance document, and the reality is that the TCEQ has not adopted the WPP as the ED's witnesses testified to during the HOM.

GBRA excepts to and recommends rejection of Conclusions of Law that state the WPP's standards are not regulatory, and the TCEQ is not required to follow them in issuing permits. Again, GBRA admits the WPP is a guidance document, and its standards are not found in any TCEQ regulations. GBRA also offers no evidence that the TCEQ is bound to follow the standards in the WPP and instead states that TCEQ "should" follow them.

### III. CONCLUSION

GBRA seeks to include nutrient limits in proposed permit, not because GBRA complains of any ED error, miscalculation, or any inappropriate standard followed in drafting the proposed permit. Instead, it is telling that GBRA uses the word "should" when asking the Commission to ignore its own rules, practices, and even the TCEQ's process for drafting permits, and instead place GBRA's *preferred* limits in the proposed permit that follow the WPP.<sup>12</sup> GBRA has not offered any credible evidence to contradict the evidence supplied by the ED that supports a finding that the proposed

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<sup>12</sup> GBRA-1, pg. 15, lines 1-4.

permit adequately protects water quality in the receiving streams of the discharge route.

The ED respectfully recommends the Commission find that the proposed permit should be issued, deny GBRA's exceptions, and adopt the PFD and Findings of Fact and Conclusions of law as currently drafted.

Respectfully submitted,

Texas Commission on Environmental Quality

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REPRESENTING THE  
EXECUTIVE DIRECTOR OF  
THE TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

#### IV. CERTIFICATE OF SERVICE

I certify that on December 29, 2022, the "Executive Director's Response To Guadalupe-Blanco River Authority's Exceptions To The Proposal For Decision" for Permit No. WQ0015933001 was filed with the State Office of Administrative Hearings and the Texas Commission on Environmental Quality's Office of the Chief Clerk.



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