TCEQ DOCKET NO. 2024-1985-MWD

APPLICATION BY THE VILLAGE AT GRAPE CREEK, LLC FOR TPDES PERMIT NO. WQ0016363001	**§ § § § §**	**BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

PEDERNALES RIVER ALLIANCE AND GREATER EDWARDS AQUIFER ALLIANCE'S REPLY TO RESPONSES TO HEARING REQUESTS AND REQUESTS FOR RECONSIDERATION

TO THE HONORABLE COMMISSIONERS:

Pedernales River Alliance ("PRA") and Greater Edwards Aquifer Alliance ("GEAA") (collectively, "Requestors") hereby submit this Reply to the Responses to Hearing Requests and Requests for Reconsideration by The Village at Grape Creek, LLC ("Applicant"), the Executive Director ("ED"), and the Office of Public Interest Counsel ("OPIC") regarding the Application by The Village at Grape Creek, LLC for TPDES Permit No. WQ0016363001 (the "Application"). As recommended by the ED and OPIC, the Commission should find that Requestors are "affected persons" and should grant their hearing requests. The Commission should refer the issues raised in the requests by PRA and GEAA to the State Office of Administrative Hearings ("SOAH") for a contested case hearing on the Application.

I. The ED and OPIC correctly found that PRA and GEAA are affected persons.

Requestors agree with the recommendations of the ED and OPIC in recommending the Commission find PRA and GEAA are affected persons, including members Kris Weidenfeller and Donny Clark. The ED and OPIC also correctly recommend the Commission grant the hearing requests of several individuals as well as the Hill Country Underground Water Conservation District (HCUWCD) and the Stonewall Water Control and Improvement District (Stonewall

WCID) as local governmental entities with justiciable interests related to protecting groundwater quality.

II. The Commission should refer the issues identified in the ED's Response.

Requestors generally agree with the scope of the relevant and material issues included in the ED's recommendation of the issues that should be referred to SOAH. Requestors respectfully offer two clarifications where OPIC's recommendation of issues differ.

First, Requestors appreciate the thorough nature of OPIC's Response but respectfully disagree that the concern over the discharge of pharmaceuticals and microplastics is not relevant or material to the Commission's decision. Some toxic elements and chemicals are used in the production of pharmaceuticals and plastics. The Texas Surface Water Quality Standards include Rule 307.6 which governs toxic materials. Included in Rule 307.6 is the requirement that water quality must be maintained to preclude adverse toxic effects on human health resulting from contact recreation, consumption of aquatic organisms, consumption of drinking water, or any combination of the three. Since it was the HCUWCD that raised the concern over pharmaceuticals and microplastics, the issue is germane to their purpose, and they are an affected person, it is without doubt an issue within the Commission's jurisdiction and one that should be referred to SOAH. That being said, this issue falls squarely within the ED's Issue 1.

Second, Requestors respectfully disagree that flooding is not relevant. Pursuant to Rule 309.13, a wastewater treatment plant unit may not be located in the 100-year floodplain, unless the Applicant can demonstrate the unit is protected from inundation and damage that may occur during that flood event. Requestors maintain that the RTC does not address comments and concerns that the floodplain is likely larger than what is mapped in the Application, which is directly relevant to the Commission's consideration of unsuitable site characteristics in Rule 309.13 but is also

relevant to the requirement that the Commission find that the proposed site minimizes possible contamination of water in the state in Rule 309.12. Because this issue remains in dispute and is within the TCEQ's jurisdiction, it should be referred to a contested case hearing. That being said, this issue falls squarely within the ED's Issue 4.

Requestors agree with the ED's list of issues and request the Commission grant those issues as articulated in the ED's Response, and copied here, as being a workable set of issues to refer to SOAH.

1. Whether the draft permit is adequately protective of water quality and the receiving waters, including surface water, groundwater, evaluation of antidegradation, aquatic life, and wildlife in accordance with applicable regulations including the Texas Surface Water Quality Standards.
2. Whether the draft permit is protective of human health and safety and residents in the immediate vicinity of the facility and the immediate discharge route.
3. Whether the draft permit adequately addresses nuisance conditions, including odor.
4. Whether the draft permit complies with applicable siting requirements in 30 TAC chapter 309.
5. Whether the application is complete and accurate.
6. Whether the Commission should deny or alter the terms and conditions of the Draft Permit based on consideration of need under TWC § 26.0282.

III. The Commission should reject the arguments offered by the Applicant.

The Applicant's arguments boil down to a misapplication of constitutional standing doctrine, including associational standing requirements found in TCEQ's rules.

A. GEAA and PRA have demonstrated associational standing.

Applicant seems to imply that PRA and GEAA should have been required to identify more than two standing members.[1] To be clear, 30 Tex. Admin. Code § 55.205(a) states, in relevant part: "A group or association may request a contested case hearing only if . . . . (1) one or more members of the group or association would otherwise have standing to request a hearing in their own right."

[1] Applicant's Response at 5 ("Nor does PRA and GEAA's letter mention any members but the two whose concerns are listed above, much less where other members live and how those other members are affected.").

PRA identified Kris Weidenfeller and Donny Clark as members who would otherwise have standing, while GEAA identified Kris Weidenfeller as a member who would have standing. Thus, PRA and GEAA have met and exceeded the requirement to demonstrate associational standing found in TCEQ's rules.

B. GEAA and PRA have demonstrated standing under the Texas Water Code.

TCEQ has been delegated authority to administer the federal NPDES permitting program though its State TPDES permitting program, and as such, is subject to certain procedural and technical requirements, including in applying standing doctrine to who may challenge the approval or denial of TPDES permits. *See, e.g.,* 40 C.F.R. § 123.30 ("A State will not meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of permits (for example, if only the permittee can obtain judicial review, if persons must demonstrate injury to a pecuniary interest in order to obtain judicial review, or if persons must have a property interest in close proximity to a discharge or surface waters in order to obtain judicial review.")). Furthermore, the definition of "affected person" in Chapter 5 of the Texas Water Code is intended to reflect judicial constitutional standing principles. *City of Waco v. Tex. Comm'n on Envtl. Quality*, 346 S.W.3d 781, 803-04 (Tex. App.—Austin 2011), *rev'd on other grounds*, 413 S.W.3d 409 (Tex. 2013) (acknowledging that "personal justiciable interest" not common to members of the "general public"—the cornerstone of section 5.115's "affected person" definition—denotes the constitutionally minimal requirements for litigants to have standing to challenge governmental actions in court).

Here, Applicant relies on several cases to effectively argue that an affected person should be required to litigate the merits of the case in order to establish standing. That is not supported by the constitutional standing doctrine, nor is it supported by the cases Applicant cites.

For example, in *Sierra Club v. Tex. Comm'n on Envtl. Quality*, 455 S.W.3d 214 (Tex. App.—Austin 2014, pet. denied), the court found that while Sierra Club members expressed concern about potential impacts from the permit being granted, the requestors lived more than three miles and did not work or spend any substantial time in or around the proposed facility. *Id.* at 224. In contrast, members of PRA and GEAA have shown that they own property and spend significant time outdoors or engaged in activities that could be impacted if the proposed permit is granted. Mr. Weidenfeller's property is directly adjacent to the Applicant's and, among others, he has concerns about odors and impacts to his groundwater well. Mr. Clark spends significant time outdoors on his property, his home itself being approximately 1,500 feet north of the facility. He is also concerned about his groundwater well and his ability to enjoy being outside, particularly given the prevailing winds. In addition, the permit at issue in *Sierra Club* was proposed under the Texas Radiation Control Act, not the federal Clean Water Act, and so was not subject to the specific delegation requirements, such as those in 40 C.F.R. § 123.30.

Neither does *United Copper Indus., Inc. v. Grissom*, 17 S.W.3d 797 (Tex. App.—Austin 2000, pet. dism'd) support Applicant's arguments. In *United Copper*, Grissom requested a hearing based on specific concerns about possible negative impacts a copper plant could have on his and his family's health considering they lived within two miles down-wind of the proposed facility. *Id.* at 803. The Court reasoned that finding a personal justiciable interest "does not require parties to show that they will ultimately prevail on the merits; it simply requires them to show that they will potentially suffer harm or have a justiciable interest that will be affected." *Id.* The Court specifically rejected the applicant's contention, explaining: "United Copper confuses the preliminary question of whether an individual has standing as an affected person to *request* a

contested-case hearing with the ultimate question of whether that person will *prevail* in a contested-case hearing on the merits." Applicant Village at Grape Creek has made the same error.

Finally, Applicant argues that *Bosque River Coal. v. Tex. Comm'n on Envtl. Quality*, 347 S.W.3d 366 (Tex. App.—Austin 2011), order vacated (Feb. 1, 2013), rev'd, 413 S.W.3d 403 (Tex. 2013), supports a finding that the injuries claimed by PRA and GEAA are "conjectural and hypothetical." Applicant takes the language from *Bosque* out context. *Bosque* actually affirms that constitutional standing simply requires that a plaintiff (or in this case, hearing requestors) show "injury in fact." *Id*. at 375. ("The Supreme Court has observed that the 'irreducible constitutional minimum' of individual standing contains three elements: (1) the plaintiff must have suffered an "injury in fact," an invasion of a legally protected interest that is concrete, particularized, and actual or imminent rather than conjectural or hypothetical, (2) the injury is fairly traceable to the challenged action of the defendant and not the independent action of a third party not before the court, and (3) it must be likely that the injury will be redressed by a favorable decision.")

To be clear, plaintiffs in environmental cases are not required to demonstrate that they are literally certain that the harms they identify will come about. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 153 (2010) (holding plaintiff established a "substantial risk" of the injury occurring); *Nat. Res. Def. Council v. Envtl. Prot. Agency*, 464 F.3d 1, 6 (D.C. Cir. 2006) (holding a 1 in 200,000 chance of developing skin cancer was sufficient for standing). A plaintiff (or a hearing requestor) need not "pinpoint[ ] the origins of particular molecules," but must "merely show that a *defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged* in the specific geographical area of concern." *PennEnvironment v. RRI Energy Ne. Mgmt. Co.*, 744 F. Supp. 2d 466, 480 (W.D. Pa. 2010). Thus, where plaintiffs (or hearing requestors) have

demonstrated that there is a substantial risk that the discharge could cause the alleged injuries, the traceability requirement has been met.

With this context, it is clear PRA and GEAA—and HCUWCD, Stonewall WCID, and several individuals—have met their burden to articulate an actual or imminent injury, which has a substantial risk of occurring, and that is fairly traceable to issuance of the Draft Permit: in the simplest of terms, the Draft Permit, if issued, authorizes the discharge of pollutants into receiving waters and groundwater—this amounts to an increase in pollutants into waters these requestors use. Like in *Grissom*, Applicant's argument is only that Requestors' members and others may not be affected to a sufficient degree to entitle them to prevail on the merits of the case, but that is not relevant to showing constitutional standing. Because Requestors and others have demonstrated that they or their members would suffer concrete and particularized injury that is fairly traceable to the issuance of the Draft Permit, they have demonstrated that they are entitled to standing to pursue the contested case hearing.

C. Applicant's statements about Chapter 210 reuse and LCRA are irrelevant.

In several places, Applicant's Response references its pending Chapter 210 reuse application, its intent to produce Type I reclaimed water, and correspondence from LCRA. To be clear, none of this information is relevant to the decision before the Commission—whether hearing requests should be granted—and should therefore be disregarded.

IV. Conclusion

For the reasons stated above, PRA and GEAA respectfully request that the Commission grant their hearing requests, and the requests of HCUWCD, Stonewall WCID, and other individuals, and refer the issues raised in their requests to the State Office of Administrative Hearings for a contested case hearing on the Application.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on February 14, 2025, a true and correct copy of the foregoing document was electronically filed with the TCEQ Office of the Chief Clerk, and that copies were served upon the following parties via electronic mail.

/s/ Lauren Ice
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