

SOAH DOCKET No. 582-06-2038
TCEQ DOCKET No. 2006-0402-IWD

TEXAS COMMISSIONERS ON ENVIRONMENTAL QUALITY
MAY 11 2006 11:31 AM
CHIEF CLERKS OFFICE

APPLICATION OF SANDY CREEK §
ENERGY ASSOCIATES, L.P. FOR §
TPDES PERMIT NO. WQ0004755000 §

BEFORE THE
STATE OFFICE OF
ADMINISTRATIVE HEARINGS

**PROTESTANTS' EXCEPTIONS TO THE PROPOSAL
FOR DECISION AND ORDER**

**TO THE HONORABLE TEXAS COMMISSIONERS ON ENVIRONMENTAL
QUALITY:**

COME NOW TPOWER, RICKY BATES, PAULINE FRANK, GALE NOLAND and GARY SCHIMSCHOT, hereafter referred to as Protestants and file this their Exceptions to the Administrative Law Judge's Proposal for Decision and Order and would respectfully show the Texas Commissioners on Environmental Quality ("Commissioners") the following:

I. Introduction

The Administrative Law Judge ("ALJ") made several errors, both procedural and substantive, which deprived the Protestants of a fair hearing and are contrary to law. Governor Perry's so-called "fast tracking order", Order R P 49, as implemented by SOAH, deprived the Protestants of an opportunity to fairly contest the permit proposed by Sandy Creek Energy Associates, L.P., ("Sandy Creek or Applicant"). The ALJ further acted contrary to the SOAH Order implementing Order RP 49 by allowing Sandy Creek to submit TCEQ staff review evidence concerning the application after the deadline for the Applicant to present its' direct case.

The participation of the TCEQ Executive Director ("ED") in the hearing and assisting the Applicant in attempting to sustain the Applicant's burden of proof was in violation of state law. Neither Sandy Creek nor the ED presented any legal or probative evidence whether the thermal component of the discharge would meet the anti-degradation requirements of the law. Finally, the proposed permit and order will not result in a final order, leaving contested issues for resolution to a later time after the contested case hearing has been concluded.

Consequently the Application must be denied on the existing evidence or sent back to SOAH for a new hearing.

II. Fast Tracking Order

Governor Perry's RP49 Order was misapplied to this waste discharge permit application that proposes to use only Powder River coal and does not propose to use directly any natural resources of Texas. Moreover, the application of the Order in this case deprived the Protestants

of a fair opportunity to contest the permit and protect their interests in a clean and healthy Brazos River. Sandy Creek had well over 2 years to complete its application and coordinate with the TCEQ staff on the requirements of the laws regulating waste discharge permits. Basically, Protestants were given 21 workdays (June 27th to July 26) to analyze Sandy Creek's direct case to prove up its application, retain experts needed to contest the Application, prepare its' prefiled testimony and do all the other things required to go to hearing on July 27th. The Commissioners need to review the ALJ's Procedural Schedule to see how absurd such a schedule is. Sandy Creek gets over 2 years to get its case together and Protestants gets well under 2 months to do the same.

Protestants attempted to hire experts to assist them and could find none that could even begin to assist them in the ridiculous time restraints imposed by the ALJ and Governor Perry's Order.

Consequently, the Protestants were deprived of due process of law as guaranteed by the U.S. and Texas Constitutions.

III. ALJ Procedural Error

Over timely objections of the Protestants, the ALJ allowed Sandy Creek to supplement its direct case with testimony from the ED staff contrary to the Chief ALJ's Order implementing RP 49 and Texas Water Code Section 5.228. The filing of the ED's testimony by deposition on written question further reduced the time that Protestants had to prepare its case by 20 workdays. Sandy Creek relied extensively upon TCEQ staff testimony to sustain its burden of proof.

Consequently, the Protestants were further deprived of their constitutional due process rights by the procedural error of the ALJ.

IV. ED Participation Unlawful

Over the timely objections of the Protestants, the ED participated actively in the contested case hearing by offering testimony from TCEQ staff as to whether Sandy Creek's Application complied with the laws of Texas. Without the testimony of TCEQ staff, Sandy Creek could not have met its burden of proof. Such actions of the ED and his staff are directly contrary to Texas Water Code Section 5.228.

Consequently, Sandy Creek has not lawfully met its burden of proof by demonstrating that the Application and permit will comply with the law.

V. Thermal Degradation

Sandy Creek produced no evidence that the thermal component of the discharge would not cause unlawful degradation of the receiving stream. Moreover, the TCEQ staff's testimony attempting

to prove otherwise was unlawful and even if lawful, of no assistance. It was of no probative value.

As the ALJ acknowledges, Sandy Creek's water quality expert misunderstood the law concerning Tier II anti-degradation review. (Page 8, PFD, 2nd full paragraph) So, Sandy Creek did not provide any evidence that its proposed thermal discharge would meet the anti-degradation requirements of the law. Moreover, Lori Hamilton, the TCEQ staff assigned to review the discharge for anti-degradation, upon cross-examination by the Public Interest Counsel, couldn't recall whether she had reviewed the impact of the thermal portion of the discharge for degradation. (Vol. 2, page 83, lines 12 thru 18) Protestants would urge the Commissioners to review all of Ms. Hamilton's cross-examination to determine for themselves the clarity or lack thereof as to her testimony on the impact of the discharge on the receiving stream. Her testimony was evasive and not persuasive at all, contrary to the ALJ's assertions. (Page 9, PFD, 1st full paragraph)

However, without question, the ALJ relies solely upon the ED evidence concerning the degradation of this proposed discharge. Consequently, the Application cannot be lawfully permitted because there is no evidence of whether the thermal portion of the discharge will meet the anti-degradation requirements of the law.

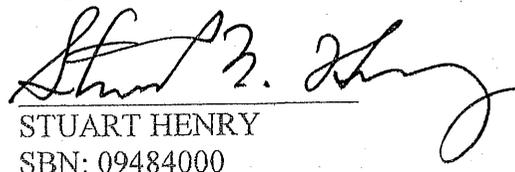
Non-Final Order

The ALJ adopts and recommends the Commissioners follow the TCEQ practice of granting waste discharge permits without imposing numerical limits on pollutants clearly known and reasonably expected to be discharged from such permitted facilities, instead deferring any numerical limits until after the hearing, the facility is built and running and when the discharge is shown to exceed a predetermined limit. (Proposed finding of fact 65) Any such orders and associated permits are non-final.

Such practice is contrary to state law and deprives Protestants a fair opportunity to contest whether the discharge will adversely impact the receiving stream.

WHWERFORE, PREMISES CONSIDERED, Protestants Pray the Commissioners deny the Application and proposed Permit for the reasons stated above.

Respectfully submitted,


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