

SOAH DOCKET NO. 582-15-0460
TCEQ DOCKET NO. 2014-1401-AIR

APPLICATION BY SOUTHERN	§	BEFORE THE STATE OFFICE
CRUSHED CONCRETE, LLC FOR AIR	§	
QUALITY STANDARD PERMIT	§	OF
REGISTRATION NO. 119443L001	§	
	§	ADMINISTRATIVE HEARINGS

**PROTESTANT WILLOW WATERHOLE GREENSPACE CONSERVANCY'S
EXCEPTIONS TO THE ALJ'S PROPOSAL FOR DECISION**

TO THE HONORABLE CASEY BELL, ADMINISTRATIVE LAW JUDGE:

COMES NOW Protestant Willow Waterhole Greenspace Conservancy, by and through its attorney of record, and respectfully submits its Exceptions to the ALJ's Proposal for Decision (PFD) in the above referenced case issued on September 11, 2015.

I. SUMMARY

Protestant has consistently argued, and continues to maintain, that SCC's application for an air quality standard permit ("Application") cannot be granted because the Application is replete with errors and inconsistent representations, because the facility will violate CBP Standard Permit requirements, and because the permit will be unenforceable.

The ALJ risks setting a bad precedent for applicants by granting a permit application that both fails to include all of the information required by the CBP Standard Permit and includes numerous inaccurate and inconsistent representations. The failure of an applicant to provide complete, accurate information in a permit application interferes with the TCEQ's ability to enforce permit conditions, interferes with the public's ability to understand a proposed project, and violates statutory requirements, regulatory requirements, and the face of the application

itself. In this case, SCC has not met its burden of proving that the Application and project meets all CBP Standard Permit requirements.

In these Exceptions, Protestant identifies arguments and assumptions in the PFD that are unlawful, unsupported by the record, and merit reconsideration.

II. ARGUMENT

A. **The ALJ incorrectly found that the roads at the project site meet the conditions of the CBP Standard Permit.**

SCC has not met its burden of proving that its vehicles will meet the distance limitation in Standard Permit Special Condition (8)(D)(ii). The ALJ's finding to the contrary is unsupported by both the plain meaning of this condition and the record.

The Standard Permit contains a distance limitation of fifty (50) feet to the property line for all vehicles used for the operation of the concrete batch plant.¹ In lieu of meeting this requirement found in Special Condition (8)(D), an owner or operator must construct dust suppressing fencing or another barrier "around roads, other traffic areas and work areas" to a height of at least twelve feet.² By both statute and rule, the determination of whether this distance limitation is met is made when the application is first filed with the TCEQ.³

The ALJ correctly recognized the uncontested fact that there is a road on the project site that is within 50 feet of the western property line.⁴ Mr. Miller also testified that drivers are free to use either of the two roads when entering or exiting the property, and the two roads "are not necessarily designated as an entrance and an exit."⁵ Nothing in the Application states that only one road will be used as an entrance and exit to the property. In fact, nothing in the Application

¹ Applicant's Exhibit No. 2B at 11.

² *Id.*

³ TEX. HEALTH & SAFETY CODE § 382.05195; 30 TEX. ADMIN. CODE § 116.615(11).

⁴ PFD at 29; *see also* Tr. 328:1–2 (Mr. Nelson).

⁵ Hearing Tr. 120:3–16.

addresses the use or nonuse of these roads whatsoever. Instead, SCC simply represented that it will meet the distance limitation and would not use dust suppressing fencing.⁶

The ALJ incorrectly found that because one of two roads on the project site met the exception in Special Condition (8)(D)(ii) for entrance and exit to the site, the Application should not be denied on this ground.⁷ This conclusion is not supported by a plain reading of the Standard Permit conditions or the record (including the Application and testimony from SCC itself).

First, it is not reasonable to interpret the setback requirement to be satisfied when only one road on a project site—and not all roads on a project site—meets the 50-foot setback. The plain language of this condition and its exception requires that owners or operators meet the buffer distance requirement “for *roads*”; if an applicant cannot meet this requirement, it must construct dust suppressing fencing or other barriers “around *roads*, other traffic areas and work areas.”⁸ The condition uses the plural “roads” to indicate that *all* roads must meet this requirement. There is no basis in the plain language of this condition to conclude that only one road must meet this requirement, especially where an applicant, like SCC, has not indicated that it will only use only one road for entrance, exit, and vehicular traffic.

Second, the evidence at the hearing, offered by SCC itself, established that drivers are free to use either of these two roads when entering or exiting the property.⁹ The analysis in the PFD erroneously assumes that only the eastern road will be used by SCC. It is unclear why this incorrect assumption is being substituted for the evidence at the hearing. Based on this statement by Mr. Miller, and the lack of any conflicting representation in the Application that the western

⁶ Applicant’s Exhibit No. 2D at 12-13.

⁷ PFD at 30.

⁸ Applicant’s Exhibit No. 2B at 10-11 (emphasis added).

⁹ Hearing Tr. 119:8–25.

road will not be used or will contain fencing, the Applicant has failed to meet its burden of proof on this issue.

Third, by both statute and rule, the determination of whether this distance limitation is met is made when the application was first filed with the TCEQ.¹⁰ On the date that the Application was first filed, the project site had (and continues to have) a road that violates the 50-foot setback requirement and fails to contain dust suppressing fencing. Therefore, the Application plainly violates a Standard Permit Special Condition.

For these reasons, the Application should be denied on this ground. Alternatively, Plaintiff requests that the Applicant be required to restrict vehicular traffic to the eastern road in the Application itself or to use dust suppressing fencing at a height of at least twelve feet.

Protestant specifically takes exception to:

- Finding of Fact #26 (because of the lack of evidence that the vehicles used in the operation of the plant will use only the centered driveway);
- Finding of Fact #65 (because vehicles will be free to use the western road that is not 50 feet from the property line); and
- Conclusions of Law #12 and #17 (because the plant will not satisfy Standard Permit Special Condition (8)(D)(ii)).

B. The PFD fails to give legal effect to Rule 116.615; and there is no legal basis for the ALJ's position that the most restrictive representations in the Application will be enforced.

The ALJ correctly recognizes that all representations in an application for a standard permit “become conditions upon which the facility or changes thereto, must be constructed and

¹⁰ See Protestant's Closing Arguments at Part II.C.1.c.

operated.”¹¹ In its Closing Arguments and Brief in Reply to Closing Arguments, Protestant argued that the inconsistent and contradictory representations made by SCC necessarily mean that all representations in the Application cannot be enforceable. Instead of giving legal effect to this rule, the ALJ, without providing any specific legal basis, adopts the position that the more restrictive restrictions in the Application will be enforced. This position is legally erroneous and creates ambiguity about what, in fact, the facility will contain.

30 Texas Administrative Code Section 116.615(2) clearly states that “[a]ll representations with regard to construction plans, operating procedures, and maximum emission rates in any registration for a standard permit become conditions upon which the facility or changes thereto, must be constructed and operated.”¹² The PFD does not give legal effect to this rule. Instead, the ALJ repeatedly adopts SCC’s position that the most restrictive representations made in the Application will be enforced.¹³ Neither SCC nor the ALJ have cited any statute, regulation, or other rule of law supporting this proposition. Maintaining, without any legal support, that the most restrictive representations made in an application will be enforced is inconsistent with the clear rule and general condition that “all representations” in an application—not the most restrictive; not those made for the first time during a contested case hearing—become conditions upon which the facility must be constructed and operated.

Briefly consider the issue of whether SCC has met its burden to prove that the stockpiles used for the plant will meet the distance limitation. As an initial matter, the PFD wrongly states that the TCEQ does not require plot plans to be drawn to scale when submitted with applications

¹¹ 30 TEX. ADMIN. CODE § 116.615(2).

¹² 30 TEX. ADMIN. CODE § 116.615(2) (emphasis added).

¹³ See PFD at 25 (“Again, as recognized by SCC, the most restrictive representation regarding operating procedures will be enforced”); (“ . . . and, as SCC recognizes, the most restrictive representation made in the Application will be enforced”).

for standard air permits.¹⁴ As Plaintiff has noted, Requirement (8)(G)(v) in the Standard Permit clearly states that an operator relocating a temporary concrete batch plant must submit “[a] scaled plot plan that identifies the location of all equipment and stockpiles, and also indicates that the required distances to the property lines can be met.”¹⁵ This is the very purpose for which plot plans are required in standard permit applications. Plot plans are also required within the Form PI-1S form, and Protestant maintains the position that the purpose of this form is consistent with that articulated elsewhere in the Standard Permit requirements (*i.e.*, to indicate that the required distances will be met).

SCC has consistently represented in its Application that the stockpiles will be two acres in size. Under Rule 116.615, this becomes a condition upon which the facility must be constructed and operated. In its revised plot plan, SCC has represented that the stockpiles will be located in a particular location and will be much smaller in size.¹⁶ Giving legal effect and meaning to Rule 116.615 means that SCC is authorized to have stockpiles up to two acres in size at the project site. Given this authorization, SCC has failed to meet its burden of proving in its plot plan that these stockpiles will not violate the distance limitation. The ALJ’s analysis of this issue renders the plot plan completely meaningless with respect to the depicted stockpiles.

Protestant respectfully requests that the PFD be amended to give proper legal effect to Rule 116.615. Protestant has argued that, given this rule and SCC’s inconsistent representations in its Application, SCC has failed to meet its burden of proving that it satisfies all conditions of the Standard Permit. The Application should be denied on this basis.

Alternatively, Protestant asks for two things. First, Protestant requests that the ALJ provide a basis in statute, rule, or case law for its proposition that the most restrictive

¹⁴ See PFD at 24.

¹⁵ Applicant’s Exhibit No. 2B at 12 (Requirement (8)(G)(v)).

¹⁶ See Applicant’s Exhibit No. 2D at 35.

representations in the Application will be enforceable against SCC, especially given Rule 116.615's language that "all representations" in an application become binding, enforceable conditions. Second, Protestant requests that the ALJ clearly state which representations in the Application are, in fact, the most restrictive (*i.e.*, which representations will become enforceable under this analysis). Clarity on this issue will benefit all parties.

Protestant specifically takes exception to:

- Finding of Fact #73.

C. Other Issues

1. The ALJ's analysis of CBP Standard Permit Special Condition (8)(D)(ii) is erroneous.

The ALJ's analysis of Standard Permit Special Condition (8)(D)(ii), which contains the setback requirement for stockpiles, is inconsistent with the language of the condition, gives undue deference to Mr. Nelon's testimony, and makes mistaken assumptions about the scope of the CBP Standard Permit.

First, Protestant has argued that the ED's interpretation of this special condition is inconsistent with its plain language.¹⁷ An agency's interpretation of a statute or rule is not entitled to deference if the construction contradicts the plain language of that statute or rule.¹⁸ Protestant will not reargue this point here, but notes that the plain language of the condition (based on the last antecedent rule) is supported by other conditions in the CBP Standard Permit. This Standard Permit contains an unambiguous requirement that an operator who wishes to relocate a temporary concrete batch plant must submit a plot plan identifying the location of "all equipment and stockpiles"—without reference to the plant—in order to demonstrate that the

¹⁷ See generally Protestant's Closing Arguments at II.C.1.a.

¹⁸ *Tarrant Appraisal Dist. v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993).

required distance limitation is met.¹⁹ The plain reading of these two requirements is that all equipment and stockpiles on the project site must meet this limitation.

In the PFD, the ALJ does not first interpret the plain language of Special Condition (8)(D)(ii).²⁰ Instead, the analysis of this issue starts with the statement that the ED's interpretation is not plainly erroneous or inconsistent with the language of the condition; but the basis for this finding is not clearly articulated in the PFD. Case law is clear that deference to an agency's interpretation applies only if that interpretation is not inconsistent with the language of the condition or plainly erroneous.²¹ Given this framework, the language of the condition must first be analyzed independent of the ED's interpretation in order to determine what the plain meaning of this condition is.

Second, the ALJ states that Protestant's interpretation "directly contradicts that of the ED, who drafted and adopted the provision."²² It is true that Mr. Nelson testified that it was his opinion that the only stockpiles that are subject to this requirement are the ones used for the operation of the concrete batch plant.²³ But Mr. Nelson's position on this issue is entitled to little, if any, deference. Mr. Nelson did not provide a basis for this interpretation at the hearing or during his deposition.²⁴ Mr. Nelson did not cite to any agency guidance confirming his opinion. Mr. Nelson clearly did not draft or adopt this provision, and did not state that the drafters or adopters of this provision interpret it in the same way that he does. Mr. Nelson did not discuss why he interpreted the condition in this way. This situation is unlike cases, such as *TGS-NOPEC*

¹⁹ Applicant's Exhibit No. 2B at 12 (Requirement (8)(G)(v)).

²⁰ See PFD at 28–29.

²¹ See *Moore*, 845 S.W.2d at 823; *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 438 (Tex. 2011).

²² PFD at 28.

²³ See Tr. 288:4–16.

²⁴ See *id.*; Applicant Exhibit 5 at 57:9–20 (Mr. Nelson stating that the condition applies only to stockpiles for the concrete batch plant, but providing no basis for this interpretation).

Geophysical Co. v. Combs, in which an agency has promulgated an official interpretation of a statutory provision through an implementing regulation and continued to issue guidance documents confirming this interpretation.²⁵ Mr. Nelon’s position should be afforded little deference because it lacks a basis in the record.

Finally, the PFD states that under the ED’s interpretation, “determination of whether an application for registration under the CBP Standard Permit logically focuses only on the operation of the concrete batch plant and would not consider unrelated equipment and stockpiles that might happen to be located somewhere on the site, as it would if Protestant’s interpretation applied.”²⁶ But, in fact, the CBP Standard Permit is repeatedly concerned with the cumulative effects of both non-CBP equipment and CBP equipment. Among other things, the CBP Standard Permit: (1) prohibits visible fugitive emissions “leaving the property” (regardless of source);²⁷ (2) prohibits locating the CBP within 550 feet from any crushing plant or hot mix asphalt plant;²⁸ (3) prohibits multiple concrete batch plants from exceeding a single site production limit;²⁹ and (4) requires identification of “all equipment and stockpiles” for relocation applications in order to determine whether all distance limitations will be met.³⁰ These requirements demonstrate that the issuance of a CBP Standard Permit is highly dependent on other emission sources on a project site, even if they are “unrelated” to the plant, contrary to the ALJ’s suggestion. There would be nothing inconsistent or illogical about a finding that the CBP Standard Permit focuses on both the operation of the plant and other equipment and stockpiles on the site.

²⁵ See 340 S.W.3d at 439–40.

²⁶ PFD at 28.

²⁷ Applicant’s Exhibit No. 2B at 8 (Requirement (5)(H)).

²⁸ Applicant’s Exhibit No. 2B at 9 (Requirement (5)(I)).

²⁹ Applicant’s Exhibit No. 2B at 9 (Requirement (5)(J)).

³⁰ Applicant’s Exhibit No. 2B at 12 (Requirement (8)(G)(v)).

For these reasons, Protestant respectfully requests that the ALJ reconsider its analysis of this issue in the PFD. Reconsideration is warranted because the plain language of the condition supports Protestant's position and because Mr. Nelon's interpretation is not an agency-issued or agency-supported interpretation, but an unsupported interpretation that should not be entitled to deference.

Protestant specifically takes exception to:

- Finding of Fact #64 (because it is silent on whether the other stockpiles will meet the distance limitation); and
- Conclusions of Law #12, #13, and #17.

2. The evidence at the hearing established that SCC did not meet the clear language of the administrative requirements of the CBP Standard Permit.

The CBP Standard Permit contains a clear requirement that the owner or operator of any concrete batch plant seeking authorization under the CBP Standard Permit "shall submit a completed, current" Table 11 form.³¹ Table 11 contains an unambiguous note that an applicant must attach the details regarding the principle of operation and an assembly drawing of the abatement device drawn to scale.³² The ALJ correctly identifies that there was no dispute that SCC did not attach these details or an assembly drawing.³³ Despite this omission, the ALJ does not give any legal effect to the fact that the Application violates Standard Permit Requirement (3)(A).

The ALJ provides two reasons in support of the dismissal of Protestant's argument. First, the ALJ notes that "Table 11 was completely filled out by SCC's consultant."³⁴ Protestant disagrees. The requirement clearly states that an applicant must submit a completed, current

³¹ Applicant's Exhibit No. 2B at 5 (Requirement (3)(A)).

³² Applicant's Exhibit No. 2D at 27.

³³ PFD at 21.

³⁴ *Id.*

Table 11 form, which includes the requirement to attach details regarding the principle of operation and an assembly drawing. The plain language of the form supports this interpretation.

Second, the ALJ states that both SCC and Mr. Nelon argued that these drawings are not necessary for the technical review of the CBP Standard Permit.³⁵ However, this interpretation is plainly erroneous and not in conformity with the plain language of the Standard Permit requirement. As the ALJ notes in a different context, an agency's interpretation of a statute, rule, or other requirement is afforded deference only if the interpretation is not plainly erroneous or inconsistent with the language of the requirement.³⁶ The language for this requirement could not be clearer. The requirement states that owners or operators "shall submit a completed, current" Table 11 form.³⁷ An interpretation that allows applicants to submit a facially incomplete Table 11 form is plainly erroneous and ignores the language of this requirement.

SCC must be required to resubmit a complete application in accordance with the administrative requirements of the CBP Standard Permit.

Protestant specifically takes exception to:

- Finding of Fact #38;
- Finding of Fact #43 (because there is no basis for concluding that the details and drawing are unnecessary to meet the applicable requirements given the specific requirement to submit a complete, current Table 11 form); and
- Conclusions of Law #12, #13, and #17.

III. CONCLUSION

For these reasons, Protestant respectfully requests that the ALJ reconsider its analysis on the issues identified above and amend the PFD accordingly. Protestant requests that the

³⁵ *Id.*

³⁶ *Id.* at 28; *see also Combs*, 340 S.W.3d at 438.

³⁷ Applicant's Exhibit No. 2B at 5 (Requirement (3)(A)).

Application because SCC has not met its burden of proving that the plant will meet all applicable requirements.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 1st day of October, 2015, a true and correct copy of the foregoing instrument was filed with the Chief Clerk of the TCEQ via the TCEQ E-Filing System and served on all persons listed on the attached mailing list via electronic delivery.

/s/ Charles W. Irvine

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