

State Office of Administrative Hearings

Kristofer S. Monson
Chief Administrative Law Judge

February 15, 2024

Mary Smith, General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711

VIA EFILE TEXAS

RE: Application by City of Wichita Falls for Water Use Permit No. 13404; SOAH Docket No. 582-22-2634; TCEQ Docket No. 2022-0125-WR

Dear Parties:

On December 21, 2023, the undersigned administrative law judge (ALJ) issued the Proposal for Decision (PFD) in this case. On January 19, 2024, the City of Wichita Falls (Applicant), Protestants, and the Executive Director (ED) of the Texas Commission on Environmental Quality timely filed exceptions. Applicant, the ED, and Protestants filed replies to exceptions. The Office of Public Interest Counsel did not file any exceptions or replies to exceptions. The exceptions largely raise issues that were fully considered and addressed in the PFD.

Most of the exceptions are adequately addressed by the adversarial replies. The ALJ provides the following for further clarity.

Parties. The Applicant excepts to the parties listed on page 5 of the PFD. The Applicant notes that the PFD erroneously listed the following: Joshua Don Ferguson, Carol Staley Morrow (executor of the Staley Family Trust and Melva Jo

Staley Estate), and the National Wildlife Federation.¹ These parties were removed as parties pursuant to Order No. 2. The ALJ agrees that the PFD should be revised to reflect their removal as parties.

Exhibits. The Applicant requests that page 7 the PFD include a statement acknowledging that WF Exhibits 6-14 were also admitted during the hearing on the merits for purposes of completeness and consistency with the recognition that O'Malley Exhibits 1-7 were so admitted. The ALJ agrees. The PFD should reflect that WF Exhibits 6-14 were admitted during the hearing.

Burden of Proof. The Applicant argues that the PFD incorrectly placed the burden of proof on the ED. In meeting its burden of proof, the Applicant drew extensively on the ED's review. *See, e.g.*, WF Exhibits 2F, 2G, 2H, 2I. It therefore became necessary to evaluate the probative value of the ED's testimony, which was largely conclusory.²

Beneficial Use. Both the Applicant and the Protestants commingle beneficial use and need: the one arguing that because a beneficial use is intended, there must be need; the other that because there is no need, no beneficial use is intended. The ALJ clarifies that the PFD analyzed those criteria separately, and therefore reached different conclusions. The PFD addressed only whether the appropriation was *intended* for a beneficial use. To the extent the showing of need informs beneficial use, the ALJ agrees that the appropriation does not meet the definition of beneficial use.

Public Welfare. The parties on both sides struggle with this criterion, as did the ALJ. The Protestants ask the Commission to weigh in to provide further clarity. The ALJ agrees that all parties would benefit from further clarity of how this criterion should be reviewed. Elsewhere, the Water Code requires a showing that the permitted activity will "further the public welfare,"³ whereas section 11.134(b)(3)(C) requires a showing that the permitted activity "is not detrimental to

¹ SOAH Order No. 2 (July 28, 2022).

² *City of San Antonio v. Pollock*, 284 S.W.3d 809, 816 (Tex. 2009); *Nat. Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150, 156 (Tex. 2012).

³ *See, e.g.*, TWC § 58.021(a)(4).

the public welfare,” raising the question of whether an applicant should be required to prove a negative.

Need. The Applicant excepts to the PFD’s scrutiny of the Applicant’s reserve supply,⁴ population projections,⁵ and reservoir size,⁶ in assessing need on grounds that these are not rooted in statute or regulation. The ALJ clarifies that these three factors were not analyzed because they are rooted in statute or regulation, but because they were the inputs in the Applicant’s asserted need. The evidence showed that population growth was the primary driver of need. Had the Applicant presented evidence regarding industrial, mining, and agricultural demand, those would have been considered as well.

Consistency. The ED excepts to the statement on page 59 of the PFD that Ms. Allis consistency review went no further than looking at the 2016 Regional Water Plan. The ED correctly points to testimony that Ms. Allis also looked at 2016 Region B Water Plan, the 2017 State Water Plan, the 2021 Region B Water, Plan, and the 2022 State Water Plan. ED Ex. JA-1 at 12. This does not, however, change the depth of review performed.

Alternative Recommendation. The Protestants ask for clarification regarding the alternative recommendation on page 104 of the PFD in light of the Applicant’s statement that the PFD “offers an in-the-alternative recommendation that TCEQ authorize a 9,110 acre-feet reservoir,” which the Applicant states “is less than the City’s shortage projected in the 2021 Regional Water Plan (10,864 acre-feet).” The ALJ clarifies that the alternative recommendation of 9,110 acre-feet in 2070 is for a diversion right, not the reservoir. As the PFD explains, the proposed reservoir would result in a firm yield of 27,000 acre-feet per year, far in excess of the 10,864 acre-feet need projected in the 2021 Regional Water Plan. The ALJ further clarifies that 9,110 acre-feet is based on accepting the Applicant’s reserve supply and population projections to be reliable and disregarding all evidence to the contrary.⁷

⁴ PFD at 80-84.

⁵ PFD at 84-85.

⁶ PFD at 86-89.

⁷ PFD at 80-85.

Based on the parties' uncontested exceptions, the ALJ recommends the following revisions:

Findings of Fact:

17. Following the preliminary hearing, the following parties were named in Order No. 1 as clarified by Order No. 2: the City of Wichita Falls; the ED; the Office of Public Interest Counsel; Emry Birdwell; Deborah Clark; Shane and Casey Cody; Laura Del Murray; Joshua ~~Don Ferguson~~; Mark Hill; Stan Horwood; Larry Horwood; Lonnie Horwood; Umhail Valley, LLC; Kildavnet Castle, LLC; Rockfleet Castle, LLC; William O'Malley; ~~Carol Staley Morrow, executor of the Staley Family Trust and Melva Jo Staley Estate~~; Joe Staley; Phil Staley; Gil Staley; Jason Obermier; Jimmy Dale Obermier; Johnnie Shaw; William (Chris) Welborn and Welborn Ranch Ltd.; the City of Henrietta; Clay County; ~~the National Wildlife Federation~~; the Texas and Southwestern Cattle Raisers Association; the Texas Conservation Alliance; the Texas Wildlife Association; the Texoma Stewardship Coalition; Brent Durham; Dan Stansbury for Lively Ranch Limited; Rebecca Hickman; Robert and Courtney Wilson.

17A. Order No. 4 memorialized the parties' alignment as follows: William O'Malley represented aligned parties Umhail Valley, LLC, Kildavnet Castle, LLC, and Rockfleet Castle, LLC; Deborah Clark represented aligned parties Emry Birdwell, Shane and Casey Cody, Diaz Murray (on behalf of Laura Del Murray), Mark Hill, Jason Obermier, Jimmy Dale Obermier, Johnny Shaw, Joe Staley, Phil Staley, Gil Staley, William (Chris) Wellborn (on behalf of Wellborn Ranch, Ltd.), Brent Durham, Dan Stansbury (on behalf of Lively Ranch Limited), Mark Hickman (on behalf of Rebecca Hickman), Robert and Courtney Wilson, and Texoma Stewardship Coalition.

Conclusions of Law:

12. The application does not state or clearly set forth the amount of water to be used for each purpose, as required by 30 Texas Administrative Code section 295.5 and Texas Water Code § 11.124(a)(4).

26. The Applicant did not meet its burden of proof to establish that the Draft Permit contains conditions, or that it considered all factors required under Sections 11.147(e) and 11.152 of the Texas Water Code, that are necessary and sufficient to maintain fish and wildlife habitats. Tex. Water Code §§ 11.147(e), 11.152; 30 Tex. Admin. Code § 297.53.

With the above clarifications and revisions, the ALJ recommends that the PFD be adopted as filed.



Christiaan Siano,
Administrative Law Judge

CC: Service List