

SOAH DOCKET NO. 582-22-02856
TCEQ DOCKET NO. 2022-0326-MWD

APPLICATION OF § BEFORE THE STATE OFFICE
RESTORE THE GRASSLANDS, LLC §
AND HARRINGTON/TURNER § OF
ENTERPRISES, LP FOR TPDES §
PERMIT NO. WQ0016003001 § ADMINISTRATIVE HEARINGS

EXECUTIVE DIRECTOR'S REPLY TO EXCEPTIONS TO THE ADMINISTRATIVE LAW
JUDGE'S PROPOSAL FOR DECISION

I - Overview

The Executive Director notes as an initial matter that some of the protestants questioned the credibility, honesty, and qualifications of the Executive Director's witnesses. As is typical for a hearing on a TPDES application, the Executive Director offered three witnesses: a permit coordinator, a modeler, and an aquatic scientist. All three of the witnesses are experienced and performed their respective reviews thoroughly, without bias, according to TCEQ's statutory and regulatory requirements. Additionally, some of the Executive Director's witnesses relied on reviews performed by other TCEQ employees; this reliance does not negate the testifying expert's credibility.¹ The Executive Director takes exception to any characterization of any of her witnesses, or any other TCEQ employees that assisted in the administrative or technical review of the application, as being less than unbiased professionals.

The Executive Director also takes exception to the allegations that the Executive Director performed a cursory review of this application or any other application for a TPDES permit, or any other type of permit. The Executive Director provided testimony from three experienced staff members: a permit coordinator with over 10 years of experience, a standards reviewer with nine years of experience, and a modeler with approximately seven years of experience. Each witness testified that they reviewed the RTG application in the same manner as they review all applications for similar types of facilities and found that the RTG application complied with the applicable regulatory requirements.²

¹ As is the common practice, the Executive Director did not offer a member of the Administrative Review Team as a witness in this hearing.

² See as examples: ED-JM-1 3:20-22; ED-JM-1 11:29-12:24; ED-JL-1 4:8-24; ED-JL-1 6:13-25; ED-JL-1 7:9-30; ED-GD-1 14:12-26; ED-GD-1 15:11-20.

II. Specific Replies to Exceptions

A. *City of Murphy*

The City of Murphy (Murphy) excepts to the Administrative Law Judge's deference to the Executive Director's testimony regarding how the Executive Director develops draft permits. Murphy expressed particular concern that the Executive Director relied on the Procedures to Implement the Texas Surface Water Quality Standards (IPs) instead of relying on the testimony of Murphy's experts. All the Executive Director's witnesses testified that they considered the testimony of the other parties' witnesses; however, they did not find any of the testimony persuasive enough to recommend stricter effluent limits or the addition of additional requirements to the RTG permit.³ Contrary to Murphy's argument that the Executive Director did not consider any information from Murphy's experts, Gunnar Dubke and Jenna Lueg both testified that they used the site visit notes from Texas Parks and Wildlife Department in their review of the RTG application.⁴

B. *City of Murphy and Moebius*

Both Murphy and Protestants Moebius, Cloud, Hernandez, and Hemming (collectively "Moebius") continue to argue that the Executive Director should have considered species that "might" exist in the receiving water as well as species that are not included in the United States Fish and Wildlife Service's (USFWS) biological opinion on the State of Texas authorization of the Texas Pollutant Discharge Elimination System (TPDES; September 14, 1998; October 21, 1998 update) for the presence of critical habitat of federally endangered or threatened aquatic or aquatic-dependent species in the vicinity of the discharge. The Executive Director notes that none of the protestants were able to definitively identify a species that would be harmed by the proposed discharge, nor a species identified in the USFWS biological opinion. As Jenna Lueg testified, she has performed over 1,500 aquatic life use assessments in her tenure with TCEQ and followed the same procedure for the RTG application as she performed for every other review.⁵ Ms. Lueg has far more experience than any of the other expert or lay witnesses regarding how to conduct a review of the potential impact of the

³ As examples: ED-JM-1 20:19 to 22:25; ED-JM-1 23:12 to 24:21; ED-JM-1 27:25 to 28:2; ED-LJ-1 5:29 - 6:12; ED-JL-1 11:13 to 12:30; ED-JL-1 13:23 to 14:31; ED-GD-1 6:11-24.

⁴ ED-JL-1 9:30-32; ED-GD-16:11-20

⁵ ED-JL-1 5:10-6:12.

proposed discharge on aquatic life, and thus her testimony should be given the most weight. Additionally, Ms. Lueg testified on behalf of the Executive Director that she reviewed the testimony of Mr. Morrison but disagreed with his testimony regarding water dependent endangered or threatened species in the segment, county, or waterbodies of the discharge route.

C. *Moebius*

Moebius relies on *Maverick County* for their assertion that the Executive Director must follow the TCEQ's rules; however, *Maverick County* supports the Executive Director's position. Moebius directs the ALJ to 31 TAC § 65.175 for their position that the Executive Director must consider the Alligator Snapping Turtle as a threatened species in Texas; however, 31 TAC § 65.175 is part of the rules governing the Texas Parks and Wildlife Department. The Executive Director reviewed the RTG application using the TCEQ's rules in 30 TAC Chapters 30, 217, 305, 307, 309, 311, 312, and 319.⁶ As Jenna Lueg testified, she used the IPs and a spreadsheet to determine if there are any endangered species identified by the USFWS biological opinion.⁷ If Ms. Lueg had relied on the rules in 31 TAC § 65.175 as suggested by Moebius she would have not been following TCEQ's rules.

The Protestants also stated that the Executive Director did not address the disinfection requirement and whether it protects nearby residents from “exposure to pathogens (including enteric viruses and E coli (sic)).”⁸ After a thorough review of the record, the Executive Director is unable to find the term “pathogen” used in any context, thus the Executive Director asserts any argument regarding pathogens is outside of the record. Regarding disinfection generally Mr. Martinez testified it is his expert opinion that the draft permit includes adequate provisions to protect the health of the requestors and their families.⁹ Additionally, the draft permit requires the effluent contain a total chlorine residual of at least 1.0 mg/L.¹⁰ Moreover, as Ms. Lueg testified “the TSWQS found at 30 TAC Chapter 307 state that “surface waters will not

⁶ ED-JL-1 6:13-19; ED-JM-1 2:31 to 3:6; ED-GD-1 15:11-17.

⁷ ED-JL-1 13:13-22.

⁸ Exceptions to the Proposal for Decision of Protestants Moebius, Cloud, Hernandez & Hemming, pg. 4.

⁹ ED-JM-1 9:17-21, 11:4-23.

¹⁰ Administrative Record, Tab C, Bates pages 0002 and 0003.

be toxic to man from ingestion of water, consumption of aquatic organisms, or contact with the skin or to terrestrial or aquatic life.”¹¹

Moebius also argued that the record does not support the ALJ’s determination that the draft permit will prevent nuisance odors. To the contrary, Mr. Martinez testified that, as allowed by 30 TAC § 309.13(e), the draft permit addresses nuisance odor issues by requiring the treatment units be located at least 150 feet from the nearest property line and by prohibiting construction of homes in the buffer zone that are on property owned by the permittee.¹²

D. Buddy Pilgrim

Mr. Pilgrim identified 24 specific issues with the application and the Executive Director’s review of the application which he asserts demonstrates that the permit should either be denied or remanded to the Executive Director for additional review. Many of the issues identified by Mr. Pilgrim relate to the Executive Director’s administrative review of the application; however, as Mr. Martinez testified, the Applications Review and Processing Team determined RTG submitted all the required information.¹³ Mr. Pilgrim also stated that there are multiple false maps; however, there is no testimony or other evidence from the hearing on the merits that the maps submitted with the application were false or inaccurate.¹⁴

III. Conclusion

The Executive Director maintains her position that the draft permit meets all applicable statutory and regulatory requirements and respectfully recommends the Commission issue the permit with new Other Requirement No. 8 requiring the permittee to install carbon scrubbers and partially enclose the plant.

¹¹ ED-JL-1 15:12-14.

¹² ED-JM-1 12:12-24

¹³ ED-JM-1 4:27-33.

¹⁴ During the hearing on the merits there was some discussion regarding whether the maps in the application should have been updated to describe the Director’s Lots.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the following by U.S. Regular Mail, Certified Mail (return receipt requested), electronic mail, hand delivery and/or facsimile at the addresses listed below on this 6th day of June 2023.



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