

SOAH DOCKET NO. 582-22-028526
TCEQ DOCKET NO. 2022-0326-MWD

**IN THE MATTER OF THE APPLICATION
OF RESTORE THE GRASSLANDS LLC AND
HARRINGTON/TURNER ENTERPRISES, LP
(TPDES PERMIT NO. WQ0016003001)**

§ **BEFORE THE STATE OFFICE**
§
§ **OF**
§ **ADMINISTRATIVE HEARINGS**

JOINT REPLY TO THE EXCEPTIONS OF THE EXECUTIVE DIRECTOR,
RESTORE THE GRASSLANDS LLC & HARRINGTON/TURNER ENTERPRISES, LP
BY PROTESTANTS CAROLYN J MOEBIUS, DON WADE CLOUD, JR.,
RAY HEMMIG AND LAURA HERNANDEZ

JUNE 6, 2023

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PROTESTANTS’ REPLY TO EXCEPTIONS

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW CARROLYN J MOEBIUS, DON WADE CLOUD, JR., RAY HEMMIG AND LAURA HERNANDEZ (“Protestants”), and presents to the Texas Commission on Environmental Quality (“TCEQ” or “Commission”) this Reply to Exceptions to the Administrative Law Judge’s (“ALJ”) Proposal for Decision (“PFD”) filed on April 27, 2023, for the Application by Restore the Grasslands, LLC and Harrington/Turner Enterprises, LP (“Applicants”) for a TPDES Permit in Collin County in the above referenced docket.

I. REPLY TO EXCEPTIONS

A. ISSUE E - REGIONALIZATION

PROTESTANTS’ REPLY TO THE EXECUTIVE DIRECTOR

Regarding Issue E (regionalization) the ALJ ruled on page 45 of the Proposal for Decision and Order (PFD) that “Despite the ED’s argument, the ALJ finds that the rule requires service to be provided by NTMWD and that granting the application would not be consistent with 30 Texas Administrative Code Chapter 351, subchapter C.” (the “ALJ’s Regionalization Determination”). The ED inexplicably continues to make argument against regionalization. However, the ALJ specifically references the ED’s argument in making the ALJ’s Regionalization Determination. The ED’s exception provides no additional argument. Instead, the ED oddly continues to argue against the plan language of the law and does not provide any argument against the ALJ’s finding “that the rule requires service to be provided by NTMWD “and that granting the application would not be consistent with 30 Texas Administrative Code Chapter 351, subchapter C.”

Protestants reply to the ED's proposed new conclusions of law numbers 18, 19 and 22 by stating that number 18 is superfluous in that the law speaks for itself, number 19 is incorrect on its face, and conclusion 22 is in direct contravention of the ALJ's Regionalization Determination.

The ALJ determined that 30 Texas Administrative Code section 351.35 creates a mandatory requirement and imposes a duty on NTMWD to provide service to Applicants, either on terms they agree to or on terms the Commission orders. The ED's continued opposition against regionalization and against the plain language of the law is not a basis for the ALJ to accept the ED's exceptions, which exceptions are contrary to law as discussed.

The ED's exceptions are unsupported in law or in fact and should be rejected by the ALJ. The ED's suggestion that the law is permissive is not consistent with existing law. The Protestants suggest that Regionalization is the policy of the State and is mandated by the law as Protestants filed previously in their Exceptions to the PFD.

The Protestants suggest TWC §26.003 states the policy of Texas and provides:

TWC § 26.003. POLICY OF THIS SUBCHAPTER. It is the policy of this state and the purpose of this subchapter to maintain the quality of water in the state consistent with the public health and enjoyment, the propagation and protection of terrestrial and aquatic life, and the operation of existing industries, taking into consideration the economic development of the state; to encourage and promote the development and use of regional and areawide waste collection, treatment, and disposal systems to serve the waste disposal needs of the citizens of the state; and to require the use of all reasonable methods to implement this policy.

Protestants suggest pursuant to TWC § 26.081 the Legislature identifies its policy of regionalization as follows:

TWC § 26.081. REGIONAL OR AREA-WIDE SYSTEMS; GENERAL POLICY. (a) The legislature finds and declares that it is necessary to the health, safety, and welfare of the people of this state to implement the state policy to encourage and promote the development and use of regional and area-wide waste collection, treatment, and disposal systems to serve the waste disposal needs of the citizens of the state and to prevent pollution and maintain and enhance the quality of the water in the state.

Protestants suggest that the ED has not provided any reason for the ALJ to reverse the PFD and Order regarding the policy of mandatory (not merely permissive) regionalization or otherwise.

30 TAC Chapter 351, Subchapter C, RULE §351.33 provides" the North Texas Municipal Water District is designated as the governmental entity to design, construct, and be the operating agency for a regional sewerage system in the regional area and to provide the services therefore."

30 TAC Chapter 351, Subchapter C, RULE §351.35 provides “After development of the area-wide system, the district shall provide regional wastewater collection and treatment service to all legal entities requiring such services within the defined area, upon such terms as may be agreed upon by the parties or as may be ordered by the commission if agreement cannot be reached.”

PROTESTANTS’ REPLY TO THE APPLICANT

Regarding Issue E (regionalization) the ALJ ruled on page 45 of the PFD that “Despite the ED’s argument, the ALJ finds that the rule requires service to be provided by NTMWD and that granting the application would not be consistent with 30 Texas Administrative Code Chapter 351, subchapter C.” (the “ALJ’s Regionalization Determination”). Applicants did not accept the ALJ’s Regionalization Determination.

Instead, Applicants argue that the ALJ’s proposed Order “is inconsistent with the PFD’s analysis” by proposing an outright denial of the Draft Permit. Protestants reply to this “exception” by stating that the ALJ’s proposed Order is wholly consistent with the analysis of the ALJ regarding the ALJ’s Regionalization Determination.

Notwithstanding the plain language of the ALJ’s Regionalization Determination Applicants mischaracterize the ALJ’s Regionalization Determination by claiming it “merely offers an opportunity for Applicants to negotiate terms of service with NTMWD, and/or the TCEQ to order such service.” (See page 6 of Applicants’ exceptions). To the contrary the ALJ’s analysis requires the denial of the Draft Permit because “granting the application would not be consistent with 30 Texas Administrative Code Chapter 351, subchapter C.” Applicants did not meet their burden on Issue E.

Applicants’ proposed language for the Order could easily result in the issuance by the *mere passage of time* (not on merit or the law) of a Draft Permit which was correctly determined by the ALJ to not be in compliance with regionalization. Therefore, Applicant’s exception to the proposed Order should be rejected by the ALJ.

B. Issue A – Wildlife Impact Issues

Protestants’ Reply to the City of Murphy

The City of Murphy accepted the ALJ’s PFD regarding wildlife (issue A), amongst other issues. In the PFD the ALJ’s finding of fact number 42 that “as of the date of the hearing on the merits, the alligator snapping turtle was not on the threatened or endangered list” and the ALJ’s conclusion of law number 11 states that “the Draft Permit is protective of livestock, wildlife, and wildlife habitats.”

Protestants agree with the exception of the City of Murphy regarding wildlife. Further, Texas has a statute listing the alligator snapping turtle as threatened, as Protestants discuss in their filing Exceptions to the PFD. Protestants respectfully request the ALJ reverse conclusion of law number 11 and clarify finding of fact number 42 by providing that “as of the date of the hearing on the merits, the alligator snapping turtle was not on the threatened or endangered list” to provide finding of fact number 42 that “as of the date of the hearing on the merits, the alligator snapping turtle was not on the threatened or endangered list at the federal level but is listed as threatened in Texas pursuant to 31 TAC §65.175. The purpose, in part, of the TCEQ rules is to enforce state and other laws. (See 30 TAC Rule 1.1). 31 TAC 65.175, lists the Alligator Snapping Turtle as a threatened species. TCEQ cannot rely upon a rule in contravention of this law.”

The ED’s position appears to be the TCEQ has authority to promulgate rules on protecting wildlife which are inconsistent with Texas state law. It is reasonable to assume the Court in *Maverick County* meant the TCEQ must follow its rules *which are consistent with Texas law*. Protestants assert the TCEQ cannot disregard the fact that Texas lists the Alligator Snapping Turtle as threatened even under the claim that TCEQ is merely following its rules. TCEQ did not adhere to other of its rules regarding requiring application information, as asserted in our Exceptions.

Dr. Morrison’s direct testimony includes the Alligator Snapping Turtle as a key species as well as River Otter, Monarch Butterfly and the federally endangered Whooping Crane (See Exhibit C9. Direct Testimony of Dr Morrison, page 7, lines 5-10). In this direct testimony, Section VI, Potential Adverse Ecological Impact on Key Species, (Exhibit C9, page 10, lines 17-23) he answered the question “Do you believe there are potential adverse ecological impacts on key species of concern from the proposed wastewater discharge?” Dr Morrison responded “Yes. My concerns specifically relate to changes caused by the proposed wastewater 19 discharge to the pH, dissolved oxygen and temperature within Maxwell Creek. My concerns also relate to unregulated pollutants that will be discharged to Maxwell Creek from the proposed wastewater plant and from the densely developed 100-acre tract to be served by the wastewater plant.” The follow up question was “What are your concerns about impacts on pH levels within Maxwell Creek?” Dr Morrison responded “The draft permit allows for pH in the wastewater effluent discharge to be between 6.0 25 standard units and 9.0 standard units as monitored by a grab sample once per month. However, pH lower than 6.0 or higher than 8.0 has been shown to increase mortality in various stages of amphibian development... Survival of eggs and larvae is low (<5-10%) in most 5 species and some *Ambystoma* salamanders have been shown to be sensitive to increasing 6 mortality with a pH between 5 and 6 (e.g., Pierce and Wooten 1992).” (Exhibit C9, pages 10-11, lines 24-28; lines 1-7).

The question “What are your concerns with respect to a combination of environmental factors such as water temperature, pH and various minerals?” was answered by Dr Morrison. His reply stated “It is well known that the reproductive success of aquatic species is dependent on water temperature, pH, and the composition of various minerals. Not only can improper water condition cause fatalities, but the growth (ontogeny) of fish and amphibians can be negatively

impacted by these environmental factors (e.g., Pierce 1985, Grant and Licht 2 1993, Fominykh 2008).” (See C9, page 12-13, lines 27-30; 1-3). Alligator snapping turtles are almost exclusively aquatic and tend to stay submerged and motionless for so long that algae begins to grow on their shells. Dr Morrison also states in his direct testimony that the Alligator Snapping Turtle and Whooping Crane (federally endangered) “have been identified in the Maxwell Creek watershed based on sightings and photographic records of local residents”. (C9, page 8, lines 10-22). Refer to City of Murphy’s Exhibit MLM-1 for Dr. Morrison’s biography.

C. Issue F - Whether the Draft Permit complies with the Texas Surface Water Quality Standards and is protective of surface and groundwater quality, including requesters’ use and enjoyment of their property

Protestants reiterate that the Texas policy is mandatory Regionalization and Regionalization cannot be replaced by scrubbers or partial enclosures.

II. PROTESTANTS’ REPLY TO APPLICANT’S OBJECTIONS AND EXCEPTIONS TO THE PROPOSED ORDER AND CONCLUSION

A. The Protestants disagree with the Applicant’s recommended language in place of paragraph 1 of the current proposed Order with existing paragraphs 2-6 renumbered statement. The Applicant’s recommended language is inconsistent with the PFD’s analysis.

III. PROTESTANTS’ REPLY TO FINDING OF FACT

A. ED’ S FINDING OF FACT #66 (Correction/Clarification)

The Protestants disagree with ED’s proposed correction. The Protestants respectfully suggest this finding of fact be revised to read: “Jenna Lueg performed the antidegradation review on for the Application.”

B. CITY OF PARKER’S FINDING OF FACT (Correction/Clarification)

The Protestants agree and support the City of Parker’s request noted at page 2 of its Exception to PFD, Section III, Changes of PFD, Finding of Facts.

IV. PROTESTANTS’ REPLY TO NEW CONCLUSION OF LAW

A. ED’s NEW CONCLUSION OF LAW #18 AND #19

The Protestants disagree with the ED’s recommendation for new conclusion of law numbers 18 and 19 and the remaining Conclusions of Law be sequentially remembered. As noted by

the Protestants in reply A., the Legislators have made it evident that the policy of the State of Texas and the purpose of subchapter TWC 26 is to maintain the quality of water in the state consistent with the public health and enjoyment, the propagation and protection of terrestrial and aquatic life, and the operation of existing industries, taking into consideration the economic development of the state; to *encourage and promote the development and use of regional and areawide waste collection, treatment, and disposal systems to serve the waste disposal needs of the citizens of the state; and to require the use of all reasonable methods to implement this policy.*

The ED's conclusion that the policy of the State is "permissive" based upon the words "encourage and promote". The definition of "encourage" is to "give support, confidence, or hope to". The definition of "promote" is "further the progress of (something, especially a cause, venture, or aim); support or actively encourage". The ED's conclusion regarding the policy does not correctly reflect the State's policy.

The Protestants state the words "maintain the quality of water", "consistent with public health and enjoyment", "propagation and protection of terrestrial and aquatic life", and "require" as used in TWC § 26.003 is not permissive.

B. ED'S CONCLUSION OF LAW #22 (ORIGINAL NUMBER) (REVISION)

The Protestants disagree with ED's suggestion to delete and replace ALJ's Existing Conclusion of Law #22. ED's revision "The Draft Permit should be issued as proposed..." is a violation of the State's Regionalization policy. The ED's continued opposition against regionalization and against the plain language of the law is not a basis for the ALJ to accept the ED's revision to ALJ's Conclusion of Law #22.

C. CITY OF PARKER'S NEW CONCLUSIONS OF LAW

The Protestants agree and support the proposed Conclusions of Law of the City of Parker in its Exception to PFD.

V. PROTESTANTS' REPLY TO SUMMARY AND CONCLUSION

A. ED'S CONCLUSION

The Protestants oppose the ED's conclusion recommending the Administrative Law Judge issue a Revised Proposal for Decision recommending the Executive Director's Exceptions to PFD and for the Commission issue the draft permit. The ED's conclusion is in consistent with the PFD and Order.

VI. CONCLUSION

Wherefore, the Protestants respectfully request that the ALJ consider and approve their exceptions.

Protestants believe that, contrary to the PFD, the preponderance of the evidence in the record supports the Protestants' position on issues relating to wildlife (Issue A); requesters' and their families' health and safety (Issue B); water quality (Issues F, G and K); accuracy and completeness of the application (Issue H); and whether the applicants are legal entities (Issue I) as well as the other issues addressed herein and in Protestants' Exceptions.

In conclusion, Protestants respectfully request the ALJ continue to propose denial of the application and the Draft Permit in their entirety for the reasons cited herein and in Protestants' Exceptions. Protestants assert that denial in full of the Draft Permit and the application, as proposed by the ALJ, is appropriate. In the event the ALJ proposes more than full denial of the application and the Draft Permit then Protestants agree with the ALJ's recommendation as set forth in the PFD that the Commission deny the application and order the Applicants to attempt to reach an agreement with NTMWD (either alone or through a customer city) to provide service. Failing to reach an agreement would result in the Commission deciding on appropriate terms consistent with regionalization. In addition, for the reasons discussed herein including, without limitation, regionalization. Protestants take exception to and respectfully request the ALJ to remove from the PFD, the ALJ's alternative recommendation, which is not consistent with Regionalization. Carbon scrubbers cannot remedy a fatally flawed Draft Permit.

Protestants respectfully request the ALJ grant Protestants such relief in law and in equity to which they may be entitled.

Respectfully submitted,
/s/ Carolyn J Moebius

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CERTIFICATE OF SERVICE

THIS WILL CERTIFY that on June 6, 2023, a true and correct copy of the foregoing instrument has been served through the Electronic Filing Manager at eFileTexas.gov to all counsel of record, as is further detailed in the automated certified of service.

/s/ Carolyn J Moebius

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