

Nancy Koon (adpce.ad)

From: Ross Noland <ross@nolandfirm.com>
Sent: Tuesday, December 13, 2022 3:17 PM
To: Water Draft Permit Comment; Basil Hicks (adpce.ad)
Subject: Comment
Attachments: December 22 Public Comment.pdf

Hello-

Please accept the attached comment.

Thank you,

Ross

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December 13, 2022

Via Email Only (Water-Draft-Permit-Comment@adeq.state.ar.us)

Arkansas Department of Energy and Environment
5301 Northshore Dr.
North Little Rock, AR 72118

Re: *NPDES Draft Permit No. AR005321, Public Comment*

This letter is a public comment on behalf of the Pinnacle Mountain Community Coalition (“PMCC”), its officers, and members. Each topic below pertains to the draft permit AR005321. Please note, this comment is in addition to those letters submitted by me on behalf of PMCC on May 18, 2022, April 5, 2022, and November 8, 2021. It is my understanding, from exchanges with staff, that each of these documents remains part of the record. For these reasons, I am not repeating those comments, but do again incorporate them by reference.

Rick Ferguson Cannot be an Improvement District Commissioner and Benefit from the Improvement District’s Decisions

Rick Ferguson is a constant throughout the multiple permit applicants and entities associated with this project. There are problems with those attempted permit transfers, as discussed in my April comment, with the last permit transfer document in the record executed prior (November 23, 2021) to Judge Hyde signing the Order (January 12, 2022) creating Pulaski County Property Owners Multipurpose Improvement District No. 2021-2. This issue is not addressed. However, it is clear now that ADEQ considers the Improvement District as the present applicant.

Mr. Ferguson’s position as an individual who will achieve financial gain from decisions made by an Improvement District which he serves on as a Commission Chair is a clear breach of ethics and blatant, illegal, conflict of interest.

One cannot serve on a public commission and also benefit from the decisions of that commission. This is especially true, and clear, where, as here, an improvement district is formed for the sole purpose of serving a subdivision developed by the Commission Chair.

The Arkansas Ethics Commission’s Rule on Conflicts defines a governing body as follows:



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Governmental body – As used in these rules, the term “governmental body” means any office, department, commission, council, board, committee, legislative body, agency, or other establishment of the executive, judicial, or legislative branch of the state, municipality, county, school district, improvement district, or any political district or subdivision thereof.

Rule on Conflicts, § 400(e). Please note that an “improvement district” is a governmental body for the purposes of these rules. Mr. Ferguson is both a public official and public servant of the improvement district he chairs:

Public official – (1) As used in these rules, the term “public official” means a person holding an elective office of any governmental body, whether elected or appointed to the office

(2) “Public official” includes without limitation:

(A) A person holding an elective office of any governmental body, whether elected or appointed to the office, during the time period between the date he or she is elected or appointed and the date he or she takes office; and

(B) A member of a school district board of directors.

Public servant – As used in these rules, the term “public servant” means all public officials, public employees, and public appointees.

Rule on Conflicts, § 400(n) and (o). Mr. Ferguson is barred from accepting benefit from his business ventures due to his service as District Chair due to the likelihood of information he is privy to being barred from disclosure to or from the District and his private ventures:

No public servant shall accept employment or engage in any public or professional activity while serving as a public official which he or she might reasonably expect would require or induce him or her to disclose any information acquired by him or her by reason of his or her official position which is declared by law or rule to be confidential.

Rule on Conflicts, § 401(a)(1). Mr. Ferguson is also required to engage in fair treatment by not using his position as District Chair for personal gain:

No public servant shall use or attempt to use his or her official position to secure special privileges or exemption for himself or herself or his or her spouse, child, parents, or other persons standing in the first degree of relationship, or for those with whom he or she has a substantial financial relationship that is not available to others except as may be otherwise provided by law.

Rule on Conflicts, § 402(a).

These ethics rules comport with statutory law. Ark. Code Ann. § 21-8-301(2) includes improvement districts in its definition of governmental body. Ark. Code Ann. § 21-8-304 is the statutory basis for the information sharing and conflicts rules cited above. These provisions are enforceable by the prosecuting attorney, the Arkansas Ethics Commission, or a private plaintiff.

Ark. Code Ann. § 14-93-107, included in the enabling legislation of the Improvement Districts, also requires Commissioners to “discharge faithfully their duties as commissioners, and to not be interested, directly or indirectly, in any contract let by the board except upon the approval of all the owners of real property located in the district.” It is unclear from the record if such a vote has occurred.

Mr. Ferguson is clearly involved in the operations of both the Paradise Valley subdivision and the Improvement District. For a recent example, please Mr. Ford’s June 23, 2022, email to Bryan Leamons, which states Mr. Ferguson owns the treatment plant equipment which is the subject of the permit application.¹ Less than two months later, it is Mr. Ford’s position on page 3 of his August 19, 2022, letter that “Paradise Valley WWTP is already owned by Pulaski County Property Owners Multipurpose Improvement District No. 2021-2.”²

Mr. Ferguson is, evidently, transferring personal property amongst his business and the Improvement District he chairs in order to exact personal gain from a government entity. The line between Mr. Ferguson and the Improvement District is breached, within the first year of the district’s existence. Mr. Ferguson is using the taxing power of the State of Arkansas, delegated to improvement districts by law, for personal gain. These are illegal, unethical, and likely unconstitutional actions. ADEQ should not, and likely cannot, validate this illegal arrangement by issuing a permit to the Improvement District.

¹https://www.adeg.state.ar.us/downloads/WebDatabases/PermitsOnline/NPDES/PermitInformation/AR0053210_Response%20Email_20220623.pdf

²https://www.adeg.state.ar.us/downloads/WebDatabases/PermitsOnline/NPDES/PermitInformation/AR0053210_Response%20to%20Cost%20Estimate%20Letter_20220822.pdf

Pulaski County Property Owners Multipurpose Improvement District No. 2021-2 has not Authorized its Permit Application Due to Failure to Comply with FOIA

In addition to the fact the permit transfer to the Improvement District is likely a nullity because it occurred before the Improvement District existed, the Improvement District lacks the authorization to engage in any of the acts it presently purports to do, including applying for a discharge permit. A “public meeting” is a meeting of any political subdivision of the State of Arkansas. Ark. Code Ann. § 25-19-106(a). Arkansas FOIA law requires public notice of the time and place of a public meeting, published to media outlets. PMCC cannot locate any evidence the Improvement District authorized Mr. Ford, Mr. Ferguson, or any other agent to apply for a permit through a publicly noticed meeting. All actions by the Improvement District, to date, including this application, are illegal, as the Improvement District holds no public meetings, and thus cannot issue any authorization for Mr. Ford, Mr. Ferguson, or others to take action the Improvement District’s behalf.

Failure to Comply with Ark. Code Ann. § 8-4-203(b)(1)(D)

PMCC submitted multiple previous comments stating the applicant fails to comport with the financial planning requirements of Ark. Code Ann. § 8-4-203(b)(1)(D).³ ADEQ asked for such documents.⁴ The applicant responded, but those materials did not include a new application with a financial plan.⁵ Now, the applicant, on pages 8 and 9 of Mr. Ford’s August 19, 2022, letter purports to submit a financial plan, which, in total, is comprised of the following:

Paradise Valley Financial Plan

The Paradise Valley has a Special Improvement District (SID) that will collect fees for the operation and maintenance of the WWTP. Table 2 below indicates the financial plan for collection of revenue from the subdivision. Pulaski County Multipurpose Improvement District No. 2021-02

³https://www.adeg.state.ar.us/downloads/WebDatabases/PermitsOnline/NPDES/PermitInformation/AR0053210-Letter%20from%20Ross%20Noland%20and%20PMCC_20211108.pdf

⁴https://www.adeg.state.ar.us/downloads/WebDatabases/PermitsOnline/NPDES/PermitInformation/AR0053210-Letter%20to%20Rick%20Ferguson_20220106.pdf

⁵https://www.adeg.state.ar.us/downloads/WebDatabases/PermitsOnline/NPDES/PermitInformation/AR0053210-Response%20Letter%20to%20ADEQ%20and%20Additional%20Information_20220118.pdf



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(Permittee) will subsidize the difference between the expenses and revenue until enough lots can be sold to exceed the expenses.

Table 2
Paradise Valley WWTP
Permit #AR0053210

Projected Revenues 2022–2026

Revenue	2022	2023	2024	2025	2026
Paradise Valley SID	\$35,040	\$63,480	\$92,640	\$121,440	\$150,240

This is not a financial plan. It is unclear how the revenue numbers are arrived at, or what the confidence level of that revenue is. It is also woefully inadequate and financially irresponsible to plan a subsidy before beginning operations. The planned subsidy is also a blatant conflict of interest. Mr. Ferguson plans to utilize the improvement district he controls to subsidize his private development. The applicant repeatedly ignored financial planning requirements, and now admits the subdivision's future depends on financial support from a public entity. This is an illegal arrangement.

The last permit transfer is a nullity. No authorization exists for the improvement district to engage in any activity because it fails to comply with FOIA. Mr. Ferguson's involvement with both the development and the improvement district is a clear conflict of interest in violation of state law. PMCC requests ADEQ deny this permit due illegality of the application.

Sincerely,

/s/ Ross Noland

Ross Noland