TCEQ DOCKET # 2014-1339-MWD

PETITION BY THE CITY OF MISSION TO REVOKE TEXAS POLLUTION DISCHARGE ELIMINATION SYSTEM PERMIT NO WQ0014415003	**§ § § § §**	**BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

AGUA SPECIAL UTILITY DISTRICT'S REPLY TO OFFICE OF PUBLIC INTEREST COUNSEL'S AND EXECUTIVE DIRECTOR'S RESPONSES TO PETITION TO REVOKE TPDES PERMIT

On October 28, 2014, the Office of Public Interest Counsel ("OPIC") of the Texas Commission on Environmental Quality ("TCEQ") and the Executive Director ("ED") of the TCEQ filed their respective Responses to the City of Mission's (the "City" or "Petitioner") Petition to Revoke TPDES Permit No. WQ0014415003 (the "Petition"), which was issued to the Agua Special Utility District ("Agua SUD" or the "District") by the ED on May 17, 2013. The ED recommended that the Petition be denied, or in the alternative, that the Commission refer the Petition to the State Office of Administrative Hearings ("SOAH") for a contested case hearing on five defined issues before the Commission may determine if the District's Permit should be revoked pursuant to 30 Texas Administrative Code § 305.66. OPIC recommended that two issues be referred to SOAH for a contested case hearing to determine whether the Permit should be revoked.

The District files this Reply to the Responses of the ED and OPIC, and incorporates by reference the arguments set forth in its Response to the City's Petition to Revoke TPDES Permit that the District filed on October 28, 2013.

I. Referral to SOAH is not necessary because the City has not demonstrated a significant violation and that the District has not made a substantial attempt to correct the alleged violation.

The City sued the District in Hidalgo County, Texas in an effort to prevent construction of the District's proposed Palmview wastewater treatment system. While that suit was pending, the City filed its Petition to revoke the District's properly issued wastewater discharge permit as a second attempt to achieve its litigation strategy, this time at the TCEQ. The ED correctly notes in its Response that referral of this Petition to SOAH is not necessary unless the Commission intends to grant the Petition, in which case the opportunity for a public hearing must be given.[1] The District concurs with the ED's primary recommendation that the Commission should deny the Petition without need for a contested case hearing based on the evidence that is now before it that there has been no significant violation of TCEQ rules that prejudiced the rights of the City, and also because the District is taking the necessary substantive steps to correct an insignificant clerical error in the Permit itself.

TCEQ's Rules state that before suspending or revoking a permit, the TCEQ must first find that the violation is significant, *and* that the permit holder has not made a substantial attempt to correct the significant violation.[2] The use of "and" in this rule demonstrates that *both* requirements must be met in order for a permit to be revoked. The District concurs with the ED's primary recommendation to deny the Petition without need for a contested case hearing because the evidence already before the Commission shows that neither factor has been met.

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[1] *See* ED Response at p. 3 ("Unless the Commission intends to deny the petition, if the permittee does not consent to the revocation, the Commission shall conduct a public hearing on the petition."), citing 30 Texas Administrative Code § 305.68(a). *See also* § 305.66(a) ("A permit . . . may be suspended or revoked for good cause . . . after opportunity for a public hearing is given.").

[2] 30 Texas Administrative Code § 305.66(g)(1) (emphasis added). Subsection (g)(2) states an alternative finding the Commission must make before revocation that has not been pled by the City and is not applicable here.

a. The alleged violation is not "significant" because Petitioner had actual notice of the District's discharge permit application, which identified the exact location of the proposed plant.

The ED's Response notes, just as the District did in its Response, that, as an affected landowner, the City of Mission received mailed notice of both the Notice of Receipt of Application and Intent to Obtain Water Quality Permit ("NORI") and the Notice of Application and Preliminary Decision for TPDES Permit for Municipal Wastewater New ("NAPD").[3] This fact is not disputed by the City, which instead argues that these notices received by the City should have been addressed to its mayor and health authorities.[4] However, as the ED notes, whether Mission was notified as an adjacent landowner or as the city where the facility and discharge point will be located is irrelevant, as in both instances the same notice containing the same information would be sent to the same official address for the City of Mission.[5] But more to the point, a mayor or health official only receives notice in their representative capacities; the City itself is the legal entity that is entitled to receive notice, and whether their names appear on an envelope has no bearing on the fact that the City received actual legal notice. In this instance, the notice properly identified the location of the proposed plant by address as well as by latitude and longitude, giving the City actual notice of its location with regard to the City's limits and the property it owns.[6]

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[3] ED Response at p. 3-4. The City also received published notice of the District's Application. See District Response to Petition to Revoke TPDES Permit at 2, and Exhibits B and C to the District's Response to Petition.

[4] City of Mission Petition to Revoke TPDES Permit at p. 4.

[5] ED Response at p. 4.

[6] **Exhibit F** to the District's Response to Petition to Revoke TPDES Permit, TCEQ Domestic Wastewater Permit Application – Domestic Administrative Report and Domestic Technical Report 1.0

The ED's Response questioned whether or not the District's proposed plant and discharge point were clearly within Mission's city limits at the time the application was filed.[7] However, this question does not need to be determined in order to deny the City's Petition without need for a hearing, because there is no fact question that the City has not met either of the requirements of § 305.66(g)(1) – that a significant violation occurred, and that the District has not made a substantial attempt to correct that significant violation. By admission, the City received three forms of actual notice of the District's application, including mailed notice; the application clearly identified the location of the plant and discharge point, and, as discussed below, the District is already taking the necessary steps to amend the Permit to state that both are within City of Mission. These facts support the ED's recommendation that the Commission deny the Petition without need of a hearing.

OPIC's Response recommends referral to SOAH to consider the question of whether Mission received notice.[8] However, OPIC did not address the requirement of § 305.66(g)(1) that the Petitioner must complain of a significant violation, and did not consider the published and mailed notices that the City, by its own admission, received regarding the District's application. As discussed above, the actual received by the City identified the location of the project by address as well as latitude and longitude, and the City simply failed to participate in the TCEQ's administrative consideration of the application.[9] Despite having actual mailed notice sent to the proper listed address for notices to the City, the City claims that the Permit should be revoked because the notice received by the City was not addressed to the "mayor and health authorities"

[7] Ed Response at p. 4-5.

[8] See OPIC Response at p. 4.

[9] **Exhibit F** to the District's Response to Petition to Revoke TPDES Permit, TCEQ Domestic Wastewater Permit Application – Domestic Administrative Report and Domestic Technical Report 1.0

as well. Like in *McMaster*[10] and *Denbury Onshore*,[11] the City had actual notice of the District's application at a time that allowed it the opportunity – which it declined to exercise – to participate in the administrative proceeding on the application. No significant violation has been identified. The Petition should therefore be denied.

b. The District is taking substantial steps to correct any clerical error in the Permit.

Neither the ED nor OPIC's Responses – nor, for that matter, the City's Petition – consider the second requirement that the petitioner must demonstrate before the Commission can revoke a validly issued discharge permit: The violation must be substantial, but also the permit holder has not made a substantial attempt to correct that substantial violation.[12] The City cannot meet this requirement because, to the extent a clerical correction is required in the Permit, it can either be made by the ED or as part of the already-underway process of renewing this Permit.

As explained in the District's Response to the Petition, the ED may issue permit corrections, which include – as would be the case here – the correction of a clerical or typographical error, the update of any provision in a permit without changing the authorizations or requirements of that provision, or "to describe more accurately the location of the authorized point or place of discharge . . . or disposal of any waste, or the route which any waste follows along the watercourses in the state after being discharged."[13] The physical location of the District's proposed plant and discharge point, as described by address and by latitude and longitude, will remain unchanged if the "violation" the City complains of is made to the Permit,

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[10] *McMaster v. Public Utility Commission of Texas*, 2012 WL 3793257 (Tex. App.—Austin 2012, no pet.) (*mem. op*.),

[11] *Texas Commission on Environmental Quality v. Denbury Onshore*, 2014 WL 3055912 (Tex. App.—Austin 2014, no pet. h.) (*mem. op*.).

[12] 30 Texas Administrative Code § 305.66(g)(1).

[13] *Id*. at § 50.45(b).

nor will the quality, quantity, or manner of treating effluent change at the proposed plant. The description in Appendix A of the Permit listing the city in which the plant is located or nearest city would simply be changed from Palmview, Texas to Mission, Texas, in order to "describe more accurately" that location.

But moreover, the District is already undertaking the substantive steps necessary to make this change in its Permit. The District is currently working on its renewal application for this Permit, which will be filed on or before December 2nd of this year.[14] As part of the permit renewal process, the District will correct inadvertent references to the city in which the proposed wastewater treatment plant and discharge point are located as "Palmview."[15]

Because the City has failed to demonstrate that any significant violation has occurred or that the District has not made substantial efforts to correct that substantial violation, there is simply no need for a contested case hearing. The evidence already before the Commission shows that the District has not met its burden to obtain the relief requested in its Petition, and the Petition should therefore be denied at this preliminary stage.

II. Conclusion

With the City going to court in an effort to prevent construction of the District's Palmview wastewater treatment system, the City now attempts to reopen a properly issued permit to achieve those same litigation goals. However, the ED correctly found that the Petitioner has not met its burden to revoke the District's Permit. The District agrees with the ED's primary finding that the Commission may make this determination based on the evidence before it, and without need for the cost and delay of a contested case hearing. The alleged violation that the City complains of is not significant, and is easily correctable. The City of

[14] **Exhibit A** to the District's Response to Petition to Revoke TPDES Permit, Affidavit of Francisco Flores.

[15] *Id*.

Mission received three forms of actual notice, including several mailed notices, of the District's application for a wastewater discharge permit. That application described the physical location of the proposed plant as well as its discharge point by address and by latitude and longitude. Each of the notices received by the City came at times that allowed the City to participate in the administrative proceeding on the District's permit application, but the City elected not to do so. To the extent that the Commission believes corrective action is necessary with regard to this Permit, the proper course is to make a minor modification during the permit renewal process to correct any reference to "Palmview," not to revoke the Permit altogether. For these reasons, the City's Petition to Revoke TPDES Permit should be denied at the earliest possible opportunity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been served via electronic filing service provider, email, facsimile, and/or Certified Mail Return Receipt Requested to all parties of record on this the 10th day of November, 2014.

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