

TCEQ DOCKET NO. 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

RECEIVED
2014 OCT 13 PM 4:22
CHIEF OF STAFF'S OFFICE

TEXAS
COMMISSION
ON
ENVIRONMENTAL
QUALITY

**CITY OF MISSION'S REPLY TO RESPONSES TO
PETITION TO REVOKE TPDES PERMIT**

TO THE HONORABLE COMMISSIONERS:

The City of Mission (the "City" or "Mission") filed a petition to revoke TPDES Permit No. WQ0014415003 with the Texas Commission on Environmental Quality on September 12, 2014 (the "Petition"). Pursuant to instructions from the General Counsel for the TCEQ dated October 14, 2014, the City provides this reply to responses by Agua Special Utility District ("Agua SUD"), the Executive Director of the TCEQ (the "ED"), and the Office of Public Interest Counsel of the TCEQ ("OPIC") to the Petition (collectively, the "Responses").

SUMMARY OF REPLY

Agua SUD does not have a vested right in TPDES Permit No. WQ0014415003 ("Permit 5003"). 30 Tex. Admin. Code § 305.66(a). In fact, the Commission can revoke it at any time after a public hearing based on Agua SUD's failure to fully disclose all relevant facts in its application for Permit 5003 (the "Application"), and for Agua SUD's misrepresentation at any time of facts relevant to the Application that Agua SUD communicated to the TCEQ. *Id.* § 305.66(a)(4). The importance of accurately disclosing the jurisdiction within which a wastewater treatment plant is proposed to be located *at the time the application is considered* seems so fundamental that it should not warrant repeating. But Agua SUD's failure to accurately represent this basic information in its Application is one of the specific defects § 305.66(a)(4) was created to address. Permit 5003 should be revoked on these grounds if for no other reason.

There is another reason for the Commission to take action against Agua SUD on this matter—one so important that the Texas Legislature has spoken explicitly on the subject. Section 5.552(b)(2) of the Texas Water Code requires Agua SUD to have caused the Chief Clerk to mail notice of its application to the Honorable Norberto “Beto” Salinas, Mayor of the City of Mission, and Mr. Noel Barrera, the City of Mission Health Director.¹ Agua SUD, the Executive Director, the Office of Public Interest Counsel, and the City all agree that this did not happen. As a consequence of Agua SUD’s mishandling of its application, controlling law considers Permit 5003 to be void *ab initio*. Therefore, there is little for the Commission to do in response to the Petition, and in response to the uniformly acknowledged fact concerning Agua SUD’s failure of notice, but to issue an order acknowledging that the permit was void from the beginning because of Agua SUD’s fundamental misrepresentation.

There is no requirement that this matter be referred to the State Office of Administrative Hearings (“SOAH”). Section 305.68 of the TCEQ rules does, however, require the Commission to hold a public hearing on the matter, despite Agua SUD’s plea to do otherwise. But because the only fact TCEQ must find in order to resolve this matter is undisputed by Agua SUD, the Executive Director, the Office of Public Interest Counsel, and the City of Mission—*i.e.*, the Chief Clerk did not mail notice of Agua SUD’s application for Permit 5003 to either Mayor Salinas nor Mr. Barrera—there is no need for the Commission to enlist SOAH to find additional facts.

TCEQ is required to convene a hearing on the Petition. Once it does so, the Commission should issue an order recognizing that TPDES Permit No. WQ0014415003 is void *ab initio*.

¹ Both individuals held these positions at the time of Agua SUD’s application.

TABLE OF CONTENTS

	Page
Summary of Reply	1
I. The Texas Legislature specifically required TCEQ to mail notice to the City of Mission's Mayor and its health authority.....	4
II. Because of Agua SUD, the Chief Clerk did not mail notice to the City of Mission's Mayor or its health authority.....	4
III. Facts alleged in the Executive Director's response to the Petition demonstrate why Agua SUD's misrepresentations ruined the efficacy of its notice.....	5
IV. The permit is void because the notice defect caused by Agua SUD's false statements is incurable.....	7
a. <u>The proper procedure for challenging a failure of notice after a permit has been granted is a petition under section 305.66 of the TCEQ's rules.</u>	7
b. <u>The TCEQ should issue an order recognizing that Permit 5003 is void <i>ab initio</i></u>	8
c. <u>TCEQ's criteria for revocation of a permit do not apply because there is no valid permit for the TCEQ to revoke.</u>	10
V. Agua SUD can make this right by simply filing a new application for a new permit.....	10
VI. Agua SUD's own failure to satisfy its statutory obligations should be resolved by the Commission by recognizing the defects in Permit 5003 without referring the matter to SOAH.....	11
Conclusion.....	12

I. The Texas Legislature specifically required TCEQ to mail notice to the City of Mission's Mayor and its health authority.

The Texas Water Code required the Chief Clerk of the TCEQ to mail notice of Agua SUD's intent to obtain the requested TPDES permit to "the mayor and health authorities of the municipality in which the facility is located or proposed to be located[.]" Tex. Water Code § 5.552(b)(2). This is a non-discretionary requirement, and one for which no waiver has been created.

The General Manager of Agua SUD acknowledged under oath that Agua SUD purchased the site for its proposed wastewater treatment plant in late 2012—almost three years after the area was annexed by the City of Mission.² The property that Agua SUD told TCEQ it wanted to construct its proposed wastewater treatment plant on was, therefore, inside the City's corporate boundaries at the time Agua SUD filed its application with TCEQ. The Texas Water Code says that the Chief Clerk was supposed to mail notice to Mayor Salinas and Mr. Barrera. Neither Agua SUD nor the Executive Director challenge the validity of § 5.552(b)(2). The Commission should not excuse its applicability to the Application.

II. Because of Agua SUD, the Chief Clerk did not mail notice to the City of Mission's Mayor or its health authority.

The General Manager of Agua SUD certified to the TCEQ that he was responsible for the veracity of the representations made in the Application, and that he had installed a system designed to assure that only qualified personnel gathered and evaluated the information the Application contained.³ He acknowledged his understanding that there were significant penalties for submitting false information to the TCEQ in the Application.⁴

² Deposition of Francisco Flores at 22:3-8, attached hereto as Exhibit 1.

³ The signature page of Agua SUD's application is attached hereto as Exhibit 2.

⁴ *Id.*

As a direct result of Agua SUD's misrepresentations, the Chief Clerk mailed notice of the Application to the Mayor of the City of Palmview and to the City of Palmview's health authorities.⁵ Agua SUD acknowledges in its response to the Petition that the Chief Clerk's mailing excluded the Mayor of the City of Mission and the health authorities of the City of Mission. *See* Agua SUD's Response at 4-5, Exhibit D. The ED and OPIC each recognize that the Chief Clerk never mailed notice of the Application to Mayor Salinas or to Mr. Barrera. ED's Response at 3-4; OPIC's Response at 2.

The only fact issue relevant to the Commission's decision on the Petition—*i.e.*, whether Permit 5003 was issued before Agua SUD satisfied each statutory prerequisite to its issuance—is not in dispute.

III. Facts alleged in the Executive Director's response to the Petition demonstrate why Agua SUD's misrepresentations ruined the efficacy of its notice.

The ED argues that “existing evidence does not demonstrate for a fact that Mission should have been the city listed in the application instead of Palmview.” ED's Response at 4. The ED cites printed pages from the Hidalgo CAD website as “evidence” that the Site may or may not have been within Mission's city limits at the time Agua SUD filed its application. *Id.* The ED goes on to state that, based on its internet research, “it is unclear whether the proposed facility site and outfall were located within Mission's corporate boundary as of September 24, 2012.” *Id.* at 5. Due to the ED's uncertainty regarding whether the Site was located in Mission on the date of the Application, the ED reasons that the Petition should be denied. *Id.* Put another way, the ED believes that good cause cannot exist to revoke Permit 5003 because substantial uncertainty has arisen from Agua SUD's false statements and misrepresentations.

⁵ As noted by the ED in its Response, the Chief Clerk's mailing list includes Palmview's officials and not Mission's.

That is, of course, the precise reason § 305.66 of the TCEQ rules penalizes false statements in applications. The ED could not independently verify the accuracy of the information Agua SUD supplied to the TCEQ in the Application. This underscores the importance of the sworn certification of veracity in applications like the one Agua SUD was supposed to have filled-out accurately. And this is why, under TCEQ rules, good cause exists to revoke a permit like Permit 5003 if an applicant included false statements in the application, 30 Tex. Admin. Code § 305.66.

Even Agua SUD now acknowledges that the location it purchased for its proposed wastewater treatment plant was inside the City's corporate boundaries when Agua SUD filed the Application with the TCEQ. With this fact in mind, the ED's response vividly illustrates the problems attributable to Agua SUD's misrepresentations. When misleading information is provided in an application, it inevitably misleads. The Executive Director has considerable resources and sophistication above-and-beyond what can be expected of the members of the "noticed" public. Yet, over a year after TCEQ issued Permit 5003, even the ED was unable to discern what city Agua SUD's proposed wastewater treatment facility would be located in. How can the TCEQ have expected any potentially affected member of the public—including any random employee of the City of Mission—to make heads-or-tails of the information in the Application notice under these circumstances, particularly with respect to filing public comment or a contested case hearing request on the application, when the Executive Director of the agency could not do it?

Neither the Executive Director nor potentially affected persons had a burden to independently verify the trustworthiness of the information that Agua SUD supplied in its Application. The result is that when an applicant's false representations create a fundamental failure of public notice, like Agua SUD's did, there is no meaningful opportunity for the ED or any potentially affected person to make informed decisions on the requests contained in the application.

Agua SUD created this problem. Now they want the City to bear fallout from it. The Petition asks the Commission to put this problem back where it belongs—in Agua SUD’s hands.

IV. The Permit is void because the notice defect caused by Agua SUD’s false statements is incurable.

- a. The proper procedure for challenging a failure of notice after a permit has been granted is a petition under section 305.66 of the TCEQ’s rules.

When the Texas Legislature directs an administrative agency to perform a function—*i.e.* provide mailed notice to specific members of authority in a multi-faceted municipal government structure—it does so for a reason, and the agency has a duty to perform that function. *See Texas Lottery Commission v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010) (stating that the Legislature is presumed to choose the wording of statutes with specific purpose). Agua SUD wants the Commission to circumvent the statutorily mandated notice requirements on Agua SUD’s behalf by turning a blind-eye to Agua SUD’s false and misleading statements in the Application. Agua SUD’s proposal to retroactively correct its “clerical error” through a minor amendment, one not subject to notice or hearing, is a false front. Texas law very plainly does not allow for that procedure.

Agua SUD cites to *Texas Comm’n on Environmental Quality v. Denbury Onshore, LLC*, No. 03-11-00891-CV, 2014 WL 3055912 at *9 (Tex. App.—Austin July 3, 2014, no pet. h.) (mem. op.) as purported support for its argument. Agua SUD Response at 6. As the Commission understands, the issues addressed by the Third Court of Appeals in Denbury revolved around the *Denbury Court’s* subject matter jurisdiction over certain issues. The Commission recalls that the applicant in that case—TexCom Gulf Disposal, L.L.C.—was alleged to have falsely stated in its application that TexCom was the owner of all mineral interests in land pertaining to the requests in the application. *Id.* at *1. Unlike in the present matter, TCEQ convened two contested case hearings on TexCom’s application. During the remand hearing, the ALJs admitted into evidence an affidavit from the

actual mineral interest owner's (Sabine Royalty Trust) executive rights holder that affirmatively admitted actual knowledge—as opposed to notice—of the application. *Id.* Sabine never intervened or even appeared in the contested case hearing, but it nevertheless appealed the TCEQ's decision regarding the TexCom application. *Id.* at *1-2. The *Denbury* Court did not hold that TexCom's notice defect was curable. The court held, instead, that it lacked subject matter jurisdiction to consider Sabine's appeal because Sabine failed to exhaust its administrative remedies. *Id.* at 5-6. What Agua SUD failed to disclose in its response to the Petition was that the *Denbury* Court actually pointed to title 30, § 305.66 of the Texas Administrative Code—*i.e.*, the process for seeking revocation of TexCom's UIC permits—as one of Sabine's available remedies for its allegations against TexCom. *Id.* at *6.

Denbury does not stand for the proposition that Agua SUD's failure to affect statutorily required notice to Mayor Salinas and Mr. Barrera is a remediable violation of an otherwise meaningless requirement. Yet Agua SUD would have the Commission believe just that. Agua SUD's Response, at 7. Agua SUD is wrong. It is ironic that Agua SUD raises the *Denbury* case in its defense. Through this Petition, the City has done exactly what the *Denbury* Court instructed.

b. The TCEQ must issue an order declaring that Permit 5003 is void *ab initio*.

In *Anadarko E & P Co., L.P. v. Railroad Comm'n of Texas*, an applicant for a well permit falsely stated a material fact in its application which resulted in the Railroad Commission ("RRC") sending notice to the wrong person. No. 03-04-00027-CV, 2009 WL 47112, at *1 (Tex. App.—Austin Jan. 7, 2009, no pet.) (mem op.). The RRC issued the permit in the absence of an objection to the application. *Id.* at *1. A party who was entitled notice of the application, but who did not receive notice because of the misrepresentations in the application (The Long Trusts), filed a complaint with the RRC seeking revocation of the permit over three years after its issuance. *Id.* The RRC held a

hearing on the revocation complaint. It was undisputed that the Long Trusts had actual knowledge of the proposed well location during the RRC's review of the application. *Id.* at *1-2.

The *Anadarko* Court held that “actual knowledge of the proposed location does not equate to actual knowledge of [the] application” and that it is “incumbent upon the applicant . . . to ensure that the correct parties have been identified so that the Commission may provide proper notice to those parties.” *Id.* at *8-9. The court went on to hold that actual knowledge of the proposed facility's location did not cure any defect in notice. *Id.* at *8. Importantly, the court also held that the RRC's revocation hearing could not cure the defects in notice created by the applicant's misleading application information. *Id.* The *Anadarko* Court concluded that, as a matter of law, the permit in that case was void *ab initio* because of the deficient notice caused by the applicant's misleading application. *Id.*

Anadarko provides the Commission with meaningful guidance in this matter. Because of Agua SUD's misrepresentations in the Application, the Chief Clerk did not mail notice of the Application to either Mayor Salinas nor Mr. Barrera as § 5.552(b)(2) of the Water Code required. Regardless of whether the Commission believes that Agua SUD somehow provided actual notice of the Application to Mayor Salinas some two years before the Application was even filed with the TCEQ, *Anadarko* makes clear that the deficiency leaves Permit 5003 void *ab initio*.

The purposes for specifically requiring notice to be mailed directly to the mayor and health authorities of a city, as opposed to the city generally, should be self-evident. The Legislature obviously intended those officials specifically receive the notice of an application if an applicant wanted to construct a wastewater treatment plant in their city. The Legislature did not single-out the city manager in § 5.552(b)(2) of the Water Code, nor the public works director, nor the receptionist, nor the employees in the city mail room.

- c. TCEQ's criteria for revocation of a permit do not apply because there is no valid permit for the TCEQ to revoke.

Because of Agua SUD's misrepresentations in the Application, the Application was not noticed in compliance with § 5.552(b)(2) of the Water Code, and Permit 5003 has been void *ab initio* as a consequence. See *Anadarko* at *6-7. Agua SUD has never been authorized to construct the proposed wastewater treatment plant or to discharge waste into waters of the State at the Site. See *Watson v. Hart*, 871 S.W.2d 914, 920 (Tex. App.—Austin 1994, orig. proceeding) (holding that a void order is without legal vitality or effect).

Subsection 305.66(g) is not applicable, as a consequence, as the issue of whether a significant violation has occurred is seemingly addressed by the lack of legal effect of Permit 5003.

V. Agua SUD can make this right by simply filing a new application for a new permit.

TCEQ's rules provide Agua SUD with a mechanism that, if it chose to use it, would spare all of the parties to this dispute an unnecessary hearing. Agua SUD can consent to the TCEQ issuing an order recognizing the invalidity of Permit 5003. 30 Tex. Admin. Code § 305.68. In lieu of Agua SUD's consent, the TCEQ has no legally available option other than to convene a hearing and issue such an order anyway. See *Anadarko* at *7; 30 Tex. Admin. Code § 305.66.

In an effort to convince the TCEQ that it may allow the legally void permit to stand, Agua SUD evoked in its Response a 2009 petition to revoke a TPDES permit issued by TCEQ to the Far Hills Utility District.⁶ That matter is distinguishable in at least one critical way. The ED, OPIC, the ALJ, and the TCEQ all agreed that Far Hills' notice defect could not be cured through any means other than revocation of the permit.⁷ However, as Far Hills had already begun discharging waste, the ED and OPIC agreed with Far Hills that a continuation of the discharge was necessary to

⁶ Agua SUD incorrectly stated that the petition to revoke Far Hills' permit was received in 2007. Far Hills' original application was received on April 11, 2007. The petition to revoke was received on March 3, 2009.

⁷ That conclusion was, of course, legally incorrect. The law under the *Anadarko* decision is that the notice defect rendered the permit a nullity.

prevent loss of life, serious injury, severe property damage, or severe economic loss with no feasible alternative for the treatment and disposal of the waste managed by Far Hill.⁸ Ultimately, Far Hills and the petitioners settled the matter, and the petitioners voluntarily withdrew their petition to revoke.⁹ The ALJ remanded the matter to the TCEQ without objection, and the TCEQ dismissed the petition with prejudice at the petitioners' request.¹⁰

Agua SUD has not even begun construction of its proposed wastewater treatment plant. But TCEQ's rules allow Agua SUD to consent to an order rather than force a hearing. In lieu of such consent, TCEQ rules require the Commission to hold a hearing on the Petition. *Denbury*, 2014 WL 3055912 at *5, 7 (recognizing that revocation process is proper where notice was deficient); 30 Tex. Admin. Code § 305.68. Applying *Anadarko*, the Commission should issue an order recognizing that, because of Agua SUD's misrepresentations in the Application, Permit 5003 was void *ab initio*. See *Anadarko* at *7; 30 Tex. Admin. Code § 305.68. Regardless, the only procedure available for Agua SUD to be properly permitted to construct its proposed wastewater treatment plant, and to discharge treated wastewater effluent, is to file a new application for a new permit.

VI. Agua SUD's own failure to satisfy its statutory obligations should be resolved by the Commission by recognizing the defects in Permit 5003 without referring the matter to SOAH.

The decision of whether to refer Mission's Petition to hearing is not discretionary. According to TCEQ's rules, unless (1) revocation of a permit is requested by the permittee or (2) the permittee has consented and waived its opportunity for hearing, "the commission *shall* conduct a

⁸ Executive Director's Closing Argument at 22-23, attached hereto as Exhibit 3; The Office of Public Interest Counsel's Closing Arguments on the Petition for Temporary Order and Remanded Petition to Revoke at 10-11 (noting that a continuing discharge under a void permit was "not an ideal scenario"), attached hereto as Exhibit 4; the Petitioner disagreed and argued that, while it would have been an expensive alternative, pumping and hauling its customers' waste as opposed to treating and discharging it was a feasible alternative for Far Hills. Protestants' Closing Arguments at 31, 35-36, attached hereto as Exhibit 5.

⁹ Petitioners' Request to Withdraw, with Prejudice, their Petition to Revoke and Party Status, attached hereto as Exhibit 6.

¹⁰ Supplemental Proposal for Decision at 4, attached hereto at Exhibit 7; An Order [regarding the Far Hills TPDES Permit] at 5, attached hereto as Exhibit 8.

public hearing on a petition to revoke or suspend a permit[.]” 30 Tex. Admin. Code § 305.68(a). The TCEQ’s rules unequivocally require that a hearing on Mission’s Petition be held. Denial of the Petition is not a legally available course of action the TCEQ may take.

The only controlling issue in this matter is whether the Chief Clerk mailed notice of the Application to Mission’s mayor and health authorities as required by the Texas Water Code. Yet the Respondents agree that no such notice was mailed. The Commission should therefore convene a public hearing simply to recognize the admissions of the parties on this key question, and grant the Petition accordingly. TCEQ should issue an order recognizing that the defect in notice Agua SUD created when it made false statements in its application is incurable, and that Permit 5003 was void *ab initio*.

CONCLUSION

The City of Mission respectfully requests (1) that the TCEQ convene a hearing as required by title 30, § 305.68 of the Texas Administrative Code, (2) that the hearing not be referred for evidentiary findings by SOAH, (3) that the TCEQ find that Agua SUD’s misrepresentations in its Application caused the Chief Clerk to fail to issue notice as required by § 5.552(b)(2) of the Texas Water Code, and (4) that the TCEQ issue an order recognizing that TPDES Permit No. WQ0014415003 was void *ab initio*. The City of Mission further prays for any other relief to which it may be justly entitled.

Respectfully submitted,

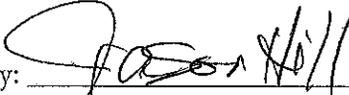
**LLOYD GOSSELINK ROCHELLE &
TOWNSEND, P.C.**

816 Congress Avenue, Suite 1900

Austin, Texas 78701

(512) 322-5800 (t)

(512) 874-3955 (f)

By: 

JASON T. HILL

State Bar No. 24046075

JAMES ALDREDGE

State Bar No. 24058514

JONES GALLIGAN KEY & LOZANO, LLP

2300 West Pike Boulevard

Weslaco, Texas 78596

(956) 968-5402 (t)

(956) 968-9402 (f)

ROBERT J. GALLIGAN

State Bar No. 07590500

RUDY SALINAS, JR.

State Bar No. 24027948

**ATTORNEYS FOR PETITIONER
CITY OF MISSION**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on the following attorneys as indicated on this 10th day of November, 2014:

Amy Warr
State Bar No. 00795708
awarr@adjtlaw.com
ALEXANDER DUBOSE JEFFERSON
& TOWNSEND, LLP
515 Congress Avenue, Suite 2350
Austin, Texas 78701
COUNSEL FOR AGUA SUD
Via E-mail

David Mendez
State Bar No. 13932575
dmendez@bickerstaff.com
Bradley B. Young
State Bar No. 24028245
byoung@bickerstaff.com
Joshua D. Katz
State Bar No. 24044985
jkatz@bickerstaff.com
BICKERSTAFF HEATH DELGADO
ACOSTA, LLP
3711 S. MoPac Expressway
Building One, Suite 300
Austin, Texas 78746
COUNSEL FOR AGUA SUD
Via E-mail

Joshua Godbey
State Bar No. 24049996
Joshua.Godbey@texasattorneygeneral.gov
Shannon Ryman
State Bar No. 24089705
shannon.ryman@texasattorneygeneral.gov
Assistant Attorney General
Financial Litigation, Tax and Charitable Trusts
Division
P.O. Box 12548
Austin, Texas 78711-2548
**COUNSEL FOR THE ATTORNEY
GENERAL OF TEXAS**
Via E-mail



JASON T. HILL