Jon Niermann, *Chairman*
Emily Lindley, *Commissioner*
Bobby Janecka, *Commissioner*
Erin Chancellor, *Interim Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

May 17, 2023

Laurie Gharis, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC – 105)
P.O. Box 13087
Austin, Texas 78711-3087

RE: Stephen Selinger; TPDES Permit No. WQ0015932001
SOAH Docket No. 582-22-1885; TCEQ Docket No. 2021-1442-MWD

Dear Ms. Gharis:

Enclosed please find a copy of the Executive Director's Exceptions to the Proposal for Decision for the Contested Case Hearing listed above.

If you have any questions, please do not hesitate to call me at (512) 239-0622 or email at aubrey.pawelka@tceq.texas.gov.

Sincerely,

Aubrey Pawelka

Aubrey Pawelka
Staff Attorney
Texas Commission on Environmental Quality
Environmental Law Division
512-239-0622
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Enclosures

SOAH DOCKET NO. 582-22-1885
TCEQ DOCKET NO. 2021-1442-MWD

APPLICATION OF	**§**	**BEFORE THE STATE OFFICE**
	§	
STEPHEN SELINGER FOR TPDES	**§**	**OF**
	§	
PERMIT NO. WQ0015932001	**§**	**ADMINISTRATIVE HEARINGS**

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

I. OVERVIEW

The Executive Director of the Texas Commission on Environmental Quality (TCEQ or Commission) submits her Exception to the Proposal for Decision. The Executive Director supports the Administrative Law Judge's (ALJs) conclusion that Stephen Selinger has met his burden of proof on referred issues A, B, and C. Additionally, the ED supports the ALJ's position that due to issue D, the application should be denied because Applicant did not own the land on which the facility was to be located at the time of the application. The Executive Director is providing a suggested change to a Finding of Fact.

Procedural Background

The TCEQ received the application from Stephen Selinger on October 1, 2020, and declared it administratively complete on December 3, 2020. The Executive Director completed the technical review and prepared the proposed permit. The Applicant published the Notice of Receipt of application and Intent to Obtain a Water Quality Permit (NORI) in the *Waxahachie Daily Light* newspaper on December 9, 2020, and in Spanish in the *La Prensa Comunidad* newspaper on December 8, 2020. The Applicant published the Notice of Application and Preliminary Decision (NAPD) in the *Waxahachie Daily Light* newspaper on June 6, 2021, and in Spanish in the *La Prensa Comunidad* newspaper on June 8, 2021. The public comment period closed on July 8, 2021.

As required by the Texas Water Code (TWC) and the Texas Administrative Code (TAC), the Executive Director reviewed the comments submitted during the comment period and prepared a Response to Comments, which was provided on September 10,

2021, to everyone who commented and the persons on the mailing list maintained by the Office of Chief Clerk.[1] The Hearing Request/Request for Reconsideration period ended on October 14, 2021. During an Open Meeting on January 12, 2022, the Commission considered the hearing requests, responses to the hearing requests, all timely public comments, and the Executive Director's Response to Comments.

The Commission found the City of Ennis and Ellis County as affected persons, and referred three issues to the SOAH for a Contested Case Hearing:

A) Whether the permit should be denied or altered in consideration of the need for the facility in accordance with Texas Water Code section 26.0282 and the general policy to promote regional or area-wide systems under Texas Water Code section 26.081;

B) Whether the draft permit is protective of water quality and the existing uses of the receiving waters, in accordance with applicable Texas Surface Water Quality Standards;

C) Whether the draft permit provides adequate licensing requirements for the operator of the facility in accordance with 30 Texas Administrative Code, Chapter 30, Subchapter J, Wastewater Operators and Operations Companies. Whether Applicants substantially complied with applicable notice requirements.

The fourth issue added to the hearing was:

D) Whether the Applicant owns the land on which the proposed Facility is to be located.

The preliminary hearing was held on May 2, 2022, via Zoom. The Hearing on the Merits was conducted via Zoom on January 25, 2023. The ALJ issued her Proposal for Decision (PFD) to the Commission on April 27, 2023.

Burden of Proof

Because the Stephen Selinger application was received after September 1, 2015, the application is subject to the procedural requirements adopted pursuant to HB 801, 76th Legislature (1999) and Senate Bill (SB) 709, 84th Legislature (2015), both implemented by the Commission in its rules in 30 TAC Chapters 39, 50, and 55.[2] The

[1] Tex. Water Code § 5.555 and 30 Tex. Admin. Code § 55.156.
[2] SB 709 was codified in Tex. Gov't. Code § 2003.047.

Texas Legislature enacted SB 709, effective September 1, 2015, amending the requirements for comments and contested case hearings. This application is subject to those changes in the law. One of the major changes to the contested case hearing process as a result of SB 709 is that the filing of the administrative record with SOAH establishes a prima facie case that the draft permit meets all applicable state and federal legal and technical requirements and, if issued, will protect human health and safety and the environment. According to Commission rules at 30 TAC Section 80.118(c), the administrative record includes the application submitted by the applicant, including any revisions to the original application; the Executive Director's final draft permit, including any special provisions or conditions; the Executive Director's preliminary decision, or the Executive Director's decision on the permit application, if applicable; the summary of the technical review of the permit application; the compliance summary of the applicant; copies of the public notices relating to the permit application, as well as affidavits regarding public notices; and any agency document determined by the executive director to be necessary to reflect the administrative and technical review of the application.

II. EXCEPTIONS to the PROPOSAL for DECISION

A. Executive Director's Recommended Change to Findings of Fact

The Executive Director recommends the following change to the ALJ's Findings of Fact:

1. Finding of Fact #1 (Correction/Clarification)

Finding of Fact #1 indicates that Mr. Selinger filed his application with TCEQ on September 21, 2020. The Executive Director notes that this finding of fact appears to be inaccurate as TCEQ records and the record[3] for this case indicate that the application was filed on October 1, 2020.

III. Conclusion

The Executive Director maintains her position that the draft permit meets all applicable statutory and regulatory requirements. The ED supports the ALJ's position that due to issue D, the application should be denied because Applicant did not own

[3] ED-AR-1 5:30-31, Bates Stamp 0391

the land on which the facility was to be located at the time the application was filed. The ED respectfully recommends the Administrative Law Judge issue a Revised Proposal for Decision reflecting the correct application filing date.

Respectfully submitted,

Texas Commission on Environmental Quality

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Interim Executive Director

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REPRESENTING THE EXECUTIVE DIRECTOR
OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

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 17th day of May 2023.

Aubrey Pawelka

Aubrey Pawelka, Staff Attorney
Environmental Law Division

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