

State Office of Administrative Hearings

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Chief Administrative Law Judge

April 27, 2023

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VIA EFILE TEXAS

RE: Docket Number 582-22-1885; Texas Commission on Environmental Quality No. 2021-1442-MWD; APPLICATION OF STEPHEN SELINGER FOR TPDES PERMIT NO. WQ0015932001

Dear Parties:

Please find attached a Proposal for Decision in this case. Any party may, within 20 days after the date of issuance of the PFD, file exceptions or briefs. Any replies to exceptions, briefs, or proposed findings of fact shall be filed within 30 days after the date of issuance on the PFD. 30 Tex. Admin. Code § 80.257.

This matter has been designated TCEQ Docket No. 2021-1442-MWD; SOAH Docket No. 582-22-1885. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs, and replies along with certification of service to the above parties and the ALJ shall be filed with the Chief

Clerk of the TCEQ electronically at <http://www14.tceq.texas.gov/epic/eFiling/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

CC: Service List

**BEFORE THE
STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**APPLICATION OF STEPHEN SELINGER
FOR NEW TEXAS POLLUTANT
DISCHARGE ELIMINATION SYSTEM
PERMIT NO. WQ0015932001**

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PERMIT NO. WQ0015932001**

PROPOSAL FOR DECISION

Stephen Selinger (Selinger or Applicant) filed an application (Application) with the Texas Commission on Environmental Quality (TCEQ or Commission) for a Texas Pollutant Discharge Elimination System (TPDES) permit No. WQ0015932001 to release treated domestic wastewater from a proposed plant site located in Ellis County, Texas.

The City of Ennis, City of Waxahachie, and Ellis County (collectively, Protestants) opposed the Application. The Commission determined that Protestants were affected persons, granted the hearing request, and referred the matter to the

State Office of Administrative Hearings (SOAH) for a hearing on three issues. During the proceedings at SOAH, a fourth issue concerning land ownership arose.

The Commission's Executive Director (ED) and the Office of Public Interest Counsel (OPIC) both recommended denying the Application.¹ Having considered the evidence relating to these four issues in the context of governing law, the Administrative Law Judge (ALJ) recommends that the Application be denied.

I. NOTICE, JURISDICTION, AND PROCEDURAL HISTORY

No party contested the Commission's jurisdiction to act on the Application or SOAH's jurisdiction to convene a hearing and prepare a Proposal for Decision (PFD). In addition, no one contested the adequacy of notice regarding the Application or the hearing. The ALJ will address these issues only in the findings of fact and conclusions of law in the Proposed Order attached to this PFD.

Selinger filed the Application on October 1, 2020. The ED determined the Application was administratively complete on December 3, 2020, and technically complete on April 12, 2021, and prepared the draft permit (Draft Permit). On January 19, 2022, the Commission referred the Application to SOAH for a contested case hearing.

On May 2, 2022, a preliminary hearing was convened in this case via videoconference by SOAH ALJ Amy Davis. The administrative record and

¹ Although the ED issued the Draft Permit for the Application, at the hearing, the ED requested that the Application be denied. ED Brief (Br.) at 8.

jurisdictional documents were admitted into evidence.² Jurisdiction was noted by the ALJ, and the ALJ admitted Selinger, the ED, OPIC, the City of Ennis, the City of Waxahachie, and Ellis County, as parties. A second preliminary hearing was convened via videoconference by ALJ Davis on January 19, 2023, at which the ALJ established prehearing procedures.

On January 25, 2023, ALJ Davis convened the evidentiary hearing at SOAH via videoconference. Selinger appeared and represented himself; attorneys Emily Rogers, Stefanie Albright, and Kimberly Kelley appeared for Protestants; attorney Aubrey Pawelka appeared for the ED; and attorney Eli Martinez appeared for OPIC.³ The record closed with the filing of post-hearing briefs on March 3, 2023.

II. PROPOSED FACILITY AND DRAFT PERMIT CONDITIONS

The following description of the Facility and the Draft Permit is based on descriptions in the administrative record. New TPDES Permit No. WQ0015932001 would authorize discharge from the Facility of treated domestic wastewater at a daily average flow not to exceed 405,000 gallons per day (gpd). The Facility, which has not been constructed, will be located approximately 3,907 feet northwest of the intersection of Getzenander Road and the railroad tracks, and approximately 2,045 feet southeast of the end of Jenkins Road, in Ellis County, Texas 75165. The

² Selinger Ex. 1-AR, including Tabs A through E. The administrative record consists of the Application (including all Technical Reports and attachments submitted by Selinger); the Draft Permit, including TCEQ's Technical Summary and Preliminary Decision, Technical Memoranda; and all associated jurisdictional documents (notices, affidavits, and the Commission's Interim Order).

³ Attorney Garret Arthur represented OPIC at the preliminary hearing on May 2, 2022.

treated effluent would be discharged to an unnamed tributary, then to Waxahachie Creek, and then to Bardwell Reservoir in Segment No. 0815 of the Trinity River Basin. The proposed Facility will serve the Waxahachie 530 subdivision, located between the Cities of Waxahachie and Ennis, Texas. The unclassified receiving water uses are minimal aquatic life use (ALU) for the unnamed tributary and intermediate ALU for Waxahachie Creek. The designated uses for Segment No. 0815 are primary contact recreation, public water supply, and high ALU.

The Facility would be an activated sludge process plant operated in the extended aeration mode. Treatment units include an equalization basin, a flow splitter, three aeration basins, three clarifiers, three combined aerobic sludge digesters, and storage tanks, and three chlorine contact chambers. The Draft Permit authorizes the disposal of sludge at a TCEQ-authorized land application site, co-disposal landfill, wastewater treatment facility, or facility that further processes sludge.

The effluent limits in the final phase of the Draft Permit, based on a 30-day average, are 10 milligrams per liter (mg/l) five-day carbonaceous biochemical oxygen demand (CBOD₅), 15 mg/l total suspended solids (TSS), 3 mg/l ammonia-nitrogen (NH₃-N), 126 colony forming units or most probable number (MPN) of *E. coli* per 100 ml and 4.0 mg/l minimum dissolved oxygen (DO). The effluent will contain a chlorine residual of at least 1.0 mg/l and will not exceed a chlorine residual of 4.0 mg/l after a detention time of at least 20 minutes based on peak flow.

TCEQ staff (Staff) determined that the end-of-pipe compliance with pH limits between 6.0 and 9.0 standard units reasonably assures instream compliance with the Texas Surface Water Quality Standards (TSWQS) for pH when the discharge authorized is from a minor facility and the unclassified waterbodies have minimal or limited ALU. Staff further found that the discharge from the Facility is not expected to have an effect on any federal endangered or threatened aquatic or aquatic-dependent species or proposed species or their critical habitat.

Segment No. 0815 is currently listed on the 2020 Clean Water Act section 303(d) list, specifically for sulfate in water throughout the entire segment. Effluent limits or monitoring and reporting for levels of sulfate are not included in the Draft Permit.

III. APPLICABLE LAW

A. BURDEN OF PROOF AND PRIMA FACIE CASE

Selinger, as the moving party, bears the burden of proof by a preponderance of the evidence.⁴ The Application was filed after September 1, 2015, and the Commission referred it to SOAH under Texas Water Code section 5.556, which governs referral of environmental permitting cases to SOAH based on a request for

⁴ 30 Tex. Admin. Code § 80.17(a); 1 Tex. Admin. Code § 155.427.

a contested case hearing.⁵ Therefore, this case is subject to Texas Government Code section 2003.047(i-1)-(i-3), as enacted in 2015, which provides:

(i-1) In a contested case regarding a permit application referred under Section 5.556 . . . [of the] Water Code, the filing with [SOAH] of the application, the draft permit prepared by the executive director of the commission, the preliminary decision issued by the executive director, and other sufficient supporting documentation in the administrative record of the permit application establishes a prima facie demonstration that:

- 1) the draft permit meets all state and federal legal and technical requirements; and
- 2) a permit, if issued consistent with the draft permit, would protect human health and safety, the environment, and physical property.

(i-2) A party may rebut a demonstration under Subsection (i-1) by presenting evidence that:

- 1) relates to...an issue included in a list submitted under Subsection (e) in connection with a matter referred under Section 5.556, Water Code; and
- 2) demonstrates that one or more provisions in the draft permit violate a specifically applicable state or federal requirement.

⁵ Tex. Water Code §§ 5.551(a), .556.

(i-3) If in accordance with Subsection (i-2) a party rebuts a presumption established under Subsection (i-1), the applicant and the executive director may present additional evidence to support the draft permit.⁶

Although this law creates a presumption, sets up a method for rebutting that presumption, and shifts the burden of production on that rebuttal, it does not change the underlying burden of proof. The burden of proof remains with Selinger to establish by a preponderance of the evidence that the Application would not violate applicable requirements and that a permit, if issued consistent with the Draft Permit, would protect human health and safety, the environmental, and physical property.⁷

In this case, the Application, the Draft Permit, and the other materials listed in Texas Government Code section 2003.047(i-1), which are collectively referred to as the prima facie demonstration, were offered and admitted into the record at the preliminary hearing.⁸

B. WASTEWATER DISCHARGE PERMIT REQUIREMENTS

Chapter 26 of the Texas Water Code requires a person who seeks to discharge wastewater into water in the State to file an application with TCEQ.⁹ 30 Texas Administrative Code, chapter 305, subchapter C contains TCEQ's application filing

⁶ Accord 30 Tex. Admin. Code § 80.17(c).

⁷ 30 Tex. Admin. Code § 80.17(a), (c).

⁸ Selinger Ex. 1-AR, including Tabs A through E.

⁹ Tex. Water Code §§ 26.027, .121.

requirements. Once an application is filed, Staff reviews the application in accordance with 30 Texas Administrative Code chapter 281.¹⁰ Based on a technical review, Staff prepares a draft permit that is to be consistent with Environmental Protection Agency (EPA) and TCEQ rules and a technical summary that discusses the application facts and significant factual, legal, methodological, and policy questions considered while preparing the draft permit.¹¹

A domestic wastewater treatment facility in Texas is subject to wastewater discharge permit requirements.¹² 30 Texas Administrative Code, chapter 305, subchapter F contains standard permit requirements, which TCEQ has adapted specifically for use in wastewater discharge permits. All wastewater discharge permits are also subject to regulations found in 30 Texas Administrative Code, chapter 319, which require the permittee to monitor its effluent and report the results as required in the permit.

Finally, TCEQ has adopted water quality standards applicable to wastewater discharges in accordance with section 303 of the Clean Water Act and section 26.023 of the Texas Water Code. These standards, known as the TSWQS, are found in 30 Texas Administrative Code, Chapter 307. Provisions for implementing the TSWQS are described in Procedures to Implement the TSWQS (IPs).¹³

¹⁰ 30 Tex. Admin. Code § 281.2(2).

¹¹ 30 Tex. Admin. Code § 281.21(b)-(c).

¹² Tex. Water Code ch. 26; see, e.g., 30 Tex. Admin. Code chs. 217 (applying to domestic wastewater systems), 305, 307 (applying to all wastewater-discharge permits), 319.

¹³ ED Exhibit JP-3 contains the IPs (RG-194) (Jun. 2010).

Additional law specifically applicable to the four issues in this case will be discussed below.

IV. SUMMARY OF THE EVIDENCE

The administrative record established a prima facie demonstration that: (1) the Draft Permit meets all state and federal legal and technical requirements; and (2) a permit, if issued consistent with the Draft Permit, would protect human health and safety, the environment, and physical property.¹⁴

On December 5, 2022, the ED filed a motion requesting to add the issue of land ownership to the contested case hearing. On December 14, 2022, the ALJ granted the motion and allowed all parties to prefile exhibits relating to land ownership by January 10, 2023. Applicant failed to prefile any exhibits or testimony relating to land ownership by the deadline.

At the hearing on the merits, Protestants offered evidence for the purposes of rebutting Selinger's prima facie demonstration.¹⁵ Protestants had 11 exhibits admitted, which included the prefiled testimony of Edward Green, Jeremy Buechter, and Tim Osting.¹⁶

¹⁴ Tex. Gov't Code § 2003.047(i-1).

¹⁵ Tex. Gov't Code § 2003.047(i-1)-(i-3).

¹⁶ Protestants Exs. 1-11.

The ED and Selinger presented additional evidence in response to evidence offered by Protestants. At the hearing, Selinger had one exhibit admitted,¹⁷ which included the prefiled testimony of Charles Gillespie.¹⁸ The ED had 12 exhibits admitted, which included the prefiled testimony of Josi Robertson, Jeff Paull, and Abdur Rahim.¹⁹ OPIC offered no testimony or exhibits.

V. ISSUES

The Commission referred this matter to SOAH for hearing on the following three issues:

- A. Whether the Draft 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 water, in accordance with applicable TSWQS; and

¹⁷ Selinger appears to have included additional testimony in his Exhibit 1 that was not part of the prefiled version. Accordingly, lines 9 through 16 (which reference events that postdate Exhibit 1's prefiling deadline) on page 9 of Selinger's Exhibit 1 are struck from the record.

¹⁸ Selinger Ex. 1.

¹⁹ ED Exs. JR-1-JR-7; JP-1-JP-3; AR-1-AR-2.

C. Whether the Draft Permit requires adequate licensing requirements for the operator of the Facility in accordance with applicable TSWQS.

The fourth issue added to the hearing was:

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

A. WHETHER THE DRAFT 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

1. Legal Background

The Texas Legislature adopted section 26.003 of the Texas Water Code to encourage and promote regionalization. Section 26.003 provides:

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.²⁰

TCEQ implements regionalization through section 26.0282 of the Texas Water Code, which provides:

In considering the issuance, amendment, or renewal of a permit to discharge waste, the commission may deny or alter the terms and conditions of the proposed permit, amendment, or renewal based on consideration of need, including the expected volume and quality of the influent and the availability of existing or proposed areawide or regional waste collection, treatment, and disposal systems not designated as such by commission order pursuant to provisions of this subchapter.²¹

TCEQ requires information concerning regionalization of wastewater treatment plants in its Domestic Technical Report 1.1 of the Application.²² The application indicates that TCEQ may approve applications for discharges of wastewater in four situations:

- There is no wastewater treatment facility or collection system within three miles of the proposed facility.
- The applicant requested service from wastewater treatment facilities within the three miles, and the request was denied.
- The applicant can successfully demonstrate that an exception to regionalization should be granted based on costs, affordable rates, and/or other relevant factors.

²⁰ Tex. Water Code § 26.003.

²¹ Tex. Water Code § 26.0282.

²² Selinger Ex. 1-AR, Tab D, at 98.

- The applicant has obtained a Certificate of Convenience and Necessity (CCN) for the service area of the proposed new facility or the proposed expansion of the existing facility.²³

2. Selinger's Application

TCEQ requires applicants to determine (1) whether any portion of the proposed service area is located in an incorporated city; (2) whether any portion of the proposed service area is located inside another utility's CCN area; and (3) whether there are any domestic permitted wastewater facilities or collection systems located within a three-mile radius of the proposed facility.²⁴ If there is another facility or system within three miles, applicants must provide information on whether the facility has sufficient capacity and is willing to expand to accept the additional wastewater and provide copies of relevant correspondence.²⁵

The City of Ennis has wastewater collection facilities approximately two miles from the Facility, and it has capacity to receive the Facility's discharge.²⁶ Selinger did not request service from the City of Ennis prior to submitting the Application to TCEQ; instead, the City of Ennis provided a "will serve" letter on March 29, 2021, after the Application was filed with TCEQ.²⁷

²³ *Id.*

²⁴ ED Ex. AR-1 at 4.

²⁵ ED Ex. AR-1 at 4-5.

²⁶ Protestants Ex. 1 at 5.

²⁷ Protestants Ex. 1 at 4-5.

On August 20, 2020, Selinger mailed a certified letter to the City of Waxahachie, that has a wastewater treatment plant within three miles from the Facility, asking whether it could provide services to the Facility.²⁸ Selinger did not receive a response from the City of Waxahachie.²⁹

All the parties except for Protestants argue that Selinger's Application complies with regionalization.

3. Selinger's Position

Selinger states that his application for a permit should be approved under governing law because TCEQ's regionalization policy does not mandate the use of regional collection systems. He argues that his application should be granted because: (1) the City of Ennis' collection lines, which are approximately 2.6 miles away, are not adequate to serve the project; and (2) the costs of connecting to the City of Ennis demonstrate that such a connection is unreasonable and unjustified.

Selinger's witness Mr. Gillespie, president, owner, and primary engineer of Consulting Environmental Engineers, Inc., testified that a connection to the City of Ennis would require construction of 26,200 lineal feet of new 16-inch forcemain and 8,000 lineal feet of new 14-inch forcemain, totaling 6.477 miles of new pipe that must be installed.³⁰ Mr. Gillespie further testified that the cost of the proposed Facility is

²⁸ Selinger Ex. 1-AR, Tab D, at 34.

²⁹ Selinger Ex. 1 at 7.

³⁰ Selinger Ex. 1 at 7.

\$2.4 million dollars versus the \$7 million dollar estimated cost to connect to the City of Ennis—a difference of approximately \$4.6 million dollars.³¹

4. Protestants’ Position

Protestants argue that the Application and the Draft Permit do not comply with the state’s regionalization policy.

Protestants assert that Selinger failed to request service from the City of Ennis, which has wastewater collection facilities within three miles of the proposed Facility.³² Additionally, the City of Ennis provided Selinger with a “will serve” letter on March 29, 2021, after Selinger’s Application was filed with TCEQ.³³

Moreover, Protestants argue that Selinger failed to demonstrate that an exception to regionalization should be granted based on costs.³⁴ Protestant witness Mr. Buechter, a professional engineer and project manager, testified that the cost estimate the City of Ennis provided to Selinger would not have been the actual cost that the City of Ennis would have charged Selinger because that estimate included costs that would ultimately have been shared between the municipality and Selinger.³⁵ Mr. Buechter further testified that, in his experience, “the long-term

³¹ Selinger Ex. 1 at 8.

³² Selinger Ex. 1-AR, Tab D at 33-34, 99; Protestants Ex. 1 at 5.

³³ Protestants Ex. 1 at 4.

³⁴ Protestants Br. at 4.

³⁵ Transcript of the hearing on the merits (Tr.) at 23-24 (“So I can’t speak to how this one would be directly handled, but the general process is that there are multiple—multiple sources of funding to bring these developments in. There

costs of regionalized systems are less than the costs of constructing, operating, and maintaining multiple smaller systems.”³⁶

5. ED’s Position

The ED contends that the Draft Permit complies with the state’s regionalization policy and demonstration of need in section 26.0282 of the Water Code.

The ED argues that Selinger requested service from nearby wastewater facilities and that Selinger’s requests for service were denied. ED Witness Mr. Rahim testified that Selinger provided a copy of the certified letter he sent to the City of Waxahachie requesting service and that Selinger did not receive in a response from the City of Waxahachie in over a year.³⁷ Mr. Rahim further testified that Staff verified that there is no other wastewater facility located within a three-mile radius of the proposed Facility.³⁸ According to Mr. Rahim, his review of the Application was limited to only consider the City of Ennis wastewater treatment facility, which is not located within a three-mile radius of the proposed Facility, rather than its collection system because Selinger did not indicate that its collection system was within a three-mile radius of the proposed Facility in his Application. Based on his review of the Application, Mr. Rahim testified that Selinger was not required to

are –there are bids, there are tax increment refinance zones, there are City-paid portions of this, there are development-paid portions of it. And the distribution of that is a negotiated process that I’m not typically part of.”).

³⁶ Protestants Ex. 5 at 6-7.

³⁷ ED Ex. AR-1 at 9-10.

³⁸ ED Ex. AR-1 at 8.

contract with the City of Ennis for wastewater service nor was Selinger required to provide a cost analysis.³⁹

6. OPIC's Position

OPIC agrees with the ED that, even if there are domestic wastewater treatment facilities or collection systems located within a three-mile radius of the proposed Facility, the state's policy on regionalization does not require TCEQ to automatically deny an application or to compel an applicant to connect to that facility.⁴⁰ OPIC explains that TCEQ has approved applications in situations where the applicant has demonstrated that an exception should be granted based on costs, affordable rates, and financial, managerial, and technical capabilities of the existing system.⁴¹

OPIC agrees with Selinger that the estimated costs of connecting to the City of Ennis's wastewater facilities is disproportionately higher than constructing the proposed Facility. OPIC explains that the estimated cost of connecting to Ennis's wastewater facilities was \$6,799,464, and that this figure did not include any phasing and, therefore, a substantial portion of the improvements would have to be installed before any connections could be served.⁴² In contrast, OPIC explains that Selinger's estimated costs to build out his own facilities would be \$601,000 for a 100,000 gpd

³⁹ ED Ex. AR-1 at 8 and 10; Tr. at 91-92.

⁴⁰ OPIC Br. at 5.

⁴¹ ED Ex. AR-1 at 4.

⁴² Selinger Ex. 1 at 6.

system, or \$2.4 million dollars for a 405,000 gpd system, resulting in a cost difference of \$4.4 million dollars.⁴³

7. ALJ's Analysis

The ALJ agrees with Selinger, the ED, and OPIC that Selinger met the requirements regarding regionalization and that the Staff's review of the Application was sufficient.

The legislature has authorized TCEQ to consider need and regional treatment options when issuing new permits for wastewater discharge.⁴⁴ The TCEQ's regionalization policy is meant to encourage and promote the use of regional wastewater systems.⁴⁵ Regionalization promotes the use of existing wastewater treatment facilities by requiring applicants to explore the feasibility of connecting to those facilities. Regionalization is a mechanism by which TCEQ can limit the proliferation of wastewater treatment facilities to minimize pollution of the waters of Texas. Texas Water Code section 26.082 further allows TCEQ to designate regional systems and can require connection to the regional system.

Protestants argue that Selinger should have connected to the City of Ennis's wastewater system, which has available capacity. Although the City of Ennis may have available capacity to accommodate additional wastewater customers, the

⁴³ Selinger Ex. 1 at 6.

⁴⁴ Tex. Water Code § 26.0282.

⁴⁵ Tex. Water Code § 26.003.

TCEQ's regionalization policy does not require connecting to any nearby wastewater facility, especially if it is not economically feasible to do so. In this case, the preponderance of the evidence presented demonstrates that it is not economically feasible to connect to the City of Ennis's wastewater system.

B. WHETHER THE DRAFT PERMIT IS PROTECTIVE OF WATER QUALITY AND THE EXISTING USES OF THE RECEIVING WATER, IN ACCORDANCE WITH APPLICABLE TSWQS

Under the TSWQS, the policy of the state is to maintain the quality of water consistent with public health and enjoyment, propagation and protection of terrestrial and aquatic life, operation of existing industries, and taking into consideration economic development of the state; to encourage and promote development and use of regional and area-wide wastewater collection, treatment, and disposal systems to serve the wastewater disposal needs of the citizens of the state; and to require the use of all reasonable methods to implement this policy.⁴⁶

The TCEQ has standard procedures for implementing the TSWQS, referred to as the Implementation Procedures (IPs), which are approved by the EPA.⁴⁷ The TSWQS and IPs are used to set permit limits for wastewater discharges and other activities that may have an effect on water quality.

⁴⁶ Tex. Water Code § 26.003; 30 Tex. Admin. Code § 307.1.

⁴⁷ 30 Tex. Admin. Code § 307.2(e); *See also* ED Ex. JP-3.

The TSWQS also require that proposed wastewater discharges undergo an antidegradation review, which is designed to ensure that standards for protecting existing uses and water quality are met.⁴⁸ The antidegradation review process for TPDES permits is described in the IPs.⁴⁹

All permit applications are requested to provide information about the receiving water as part of the permit application. Determining general stream flow characteristics (perennial, intermittent, or intermittent with perennial pools) is of major importance in assigning uses to unclassified streams. TCEQ considers hydrological conditions, appropriate assessment location, and applicability when determining the ALU for waterbodies that receive or may receive a permitted wastewater discharge. For facilities that have not yet discharged, TCEQ gives more weight to physical, hydrological, chemical, and biological conditions downstream of the proposed discharge point.⁵⁰

Water quality standards are incorporated into permits via the effluent limitations. New permit applications are reviewed to ensure that permitted effluent limits will maintain instream criteria for DO and other parameters such as bacteria, phosphorus, nitrogen, turbidity, dissolved solids, temperature, and toxic pollutants. TCEQ reviews all available information from sources that may include the application, stream surveys, route monitoring information, waste load evaluations, and total maximum daily loads. Additional information may be acquired from

⁴⁸ 30 Tex. Admin. Code § 307.5.

⁴⁹ 30 Tex. Admin. Code § 307.5(c)(1)(A); ED Ex. JP-3 at 55-70.

⁵⁰ ED Ex. JP-3 at 18.

TCEQ's regional staff, applicant, adjacent landowners, river authorities, or governmental entities.⁵¹

1. ED's Position

Mr. Paull, an aquatic scientist on the Standards Implementation Team in the Water Quality Assessment Section of the Water Quality Division of TCEQ, reviewed the Application, prepared a memorandum and the ALU assessment,⁵² and performed an antidegradation review in accordance with TCEQ's rules, standards, and procedures.⁵³

During his review of permit applications, Mr. Paull evaluates the water quality criteria associated with the uses of the receiving waters of a proposed discharge; confirms or finds the discharge route; assigns the aquatic and human health water quality criteria associated with the uses of the unclassified receiving streams; finds appropriate uses for the classified receiving water; identifies endangered species in the watershed; and performs antidegradation reviews.⁵⁴

In this case, Mr. Paull determined the discharge route of the treated effluent—it will be discharged to an unnamed tributary, then to Waxahachie Creek, and then

⁵¹ ED Ex. JP-3 at 20.

⁵² Mr. Paull assesses the ALU based on the IPs and the flow of unclassified waterbodies. ED Ex. JP-1 at 4.

⁵³ See ED Ex. JP-1 at 5-7.

⁵⁴ ED Ex. JP-1 at 4.

to Bardwell Reservoir in Segment No. 0815 of the Trinity River Basin.⁵⁵ To the unnamed tributary, Mr. Paull assigned minimal ALU and intermediate aquatic life for Waxahachie Creek. The designated uses for Segment No. 0815 are primary contact recreation, public water supply, and high aquatic use.⁵⁶ Mr. Paull explained that he did not perform a nutrient screening and made no nutrient requirements because degradation due to nutrient loading was not of concern. He testified that the characteristics of the immediate receiving water (the unnamed tributary) include a somewhat turbid, heavily shaded stream with a gravel bottom and low sensitivity to growth of aquatic vegetation.⁵⁷ Mr. Paull's review determined that: all existing water quality uses will not be impaired by the proposed discharge; numerical and narrative criteria to protect existing uses will be maintained; and there will be no significant degradation of water quality in Waxahachie Creek, which has an intermediate ALU.⁵⁸

Mr. Paull determined that the Draft Permit will not impact any federal endangered or threatened aquatic or aquatic-dependent species or proposed species or their critical habitat.⁵⁹ He reviewed the United States Fish and Wildlife Service's (USFWS) biological opinion on the State of Texas authorization of TPDES permits. To make this determination for TPDES permits, he considered the aquatic or

⁵⁵ Selinger Ex. 1-AR, Tab C at 17.

⁵⁶ Selinger Ex. 1-AR, Tab C at 17.

⁵⁷ ED Ex. JP-1 at 9.

⁵⁸ Selinger Ex. 1-AR, Tab C at 17.

⁵⁹ *Id.*

aquatic-dependent species occurring in watersheds of critical concern or high priority as listed in Appendix A of the USFWS biological opinion.⁶⁰

Ms. Robertson, a water quality modeler on the Water Quality Assessment Team in the Water Quality Assessment Section of the Water Quality Division of TCEQ, performed DO modeling, using the QUAL-TX model, and determined that an effluent set at 10 mg/L CBOD₅ and 4.0 mg/L DO for the 0.135 million gallons per day (MGD) Interim I phase and 10 mg/L CBOD₅, 2 mg/L NH₃-N, and 4.0 mg/L DO for the 0.27 MGD Interim II phase and 0.405 MGD Final Phase would be necessary to maintain the DO levels of the receiving waterbodies.⁶¹

2. Protestants' Position

Protestants argue that the Draft Permit is not protective of the water quality standards for the Waxahachie Creek watershed and Lake Bardwell. Specifically, Protestants assert the following water quality deficiencies with the Draft Permit:

a) The modeling in the Draft Permit did not accurately predict DO levels in the receiving water.

Protestants' witness Mr. Osting, Principal Engineer at Aqua Strategies, Inc., testified that the Draft Permit's modeling did "not exactly" meet the TCEQ's standards for DO.⁶² He explained that the modeling did not properly account for

⁶⁰ *Id.*

⁶¹ ED Ex. JR-1 at 4.

⁶² Protestants Ex. 7 at 10.

consumption, or decrease, of oxygen in waters resulting from algae respiration during dark hours, and instead, only accounted for production, or increase, of oxygen in waters because of algae photosynthesis.⁶³ Mr. Osting testified that, if the modeling had either omitted the presence of algae entirely or added the full algae oxygen cycle (to include *both* photosynthesis and respiration), then the modeling would not have predicted a 4.81 mg/L DO concentration. He testified that the modeling would then not meet the 4.80 mg/L prediction to achieve the “within 0.2 of 5.0 mg/L” water quality standard.⁶⁴ According to Mr. Osting, if algae were removed from the modeling, the DO concentration prediction would be 4.79 mg/L or lower, a result that would not meet the water quality standards.⁶⁵

Mr. Osting further testified that, if the proposed Facility impairs the water quality, the existing uses would be impaired, and that this would violate TCEQ’s antidegradation policy.⁶⁶ He stated that his analysis showed that a small change to the modeling inputs related to Lake Bardwell can cause the DO prediction to be lower, which would cause the Draft Permit to not meet its ALU criteria and, therefore, not meet the Tier 1 antidegradation requirement.⁶⁷

⁶³ Protestants Ex. 7 at 11.

⁶⁴ Protestants Ex. 7 at 10-11.

⁶⁵ *Id.*; 30 Tex. Admin. Code 307.7(b)(3).

⁶⁶ Protestants Ex. 7 at 16.

⁶⁷ Protestants Ex. 7 at 17.

(i) ED's, OPIC's, and Selinger's Response

The ED, OPIC, and Selinger all maintain their position that the Draft Permit meets TCEQ's standards for DO. ED witness Ms. Robertson testified that the DO modeling review for the Draft Permit followed TCEQ's standard modeling procedures that are outlined in the agency's standard operating procedures (SOPs) and guidance documents.⁶⁸

Ms. Robertson disagreed with Mr. Osting's conclusion that the results of the QUAL-TX modeling do not meet TCEQ's standard for DO. She explained that the goal of the DO modeling analysis is to show that instream DO concentrations in the waterbodies making up the discharge route will be maintained at levels protective of aquatic life. In this case, all the predicted DO concentrations were within 0.20 mg/L of the established DO criterion for Lake Bardwell Reservoir (5.0 mg/L). She testified that because the modeling incorporates conservative assumptions (such as the inclusion of wastewater discharges at full-permitted flows and effluent limit concentrations paired with hot and dry, summertime low-flow conditions, which are typically the most restrictive of discharge conditions in relation to potential impacts on instream DO levels), a DO concentration within 0.20 mg/L below the numerical criterion value is considered to demonstrate compliance.⁶⁹

In response to Mr. Osting's concerns about algae, Ms. Robertson testified that it is TCEQ's modeling procedure that, if the waterbody under scrutiny is a classified

⁶⁸ ED Ex. JR-1 at 9-10.

⁶⁹ ED Ex. JR-1 at 10-11.

segment (such as Lake Bardwell) and if routine TCEQ monitoring data is available, then that data can be used to refine input values such as model temperature, chlorophyll-a, secchi depth, or no-load initialization DO target.⁷⁰ She testified that the QUAL-TX model TCEQ uses is a steady-state model that evaluates discharges under only the most pessimistic of discharge conditions; including hot, dry summertime, low-flow conditions as well as modeling the effluent at its full permitted flow and effluent concentration.⁷¹ She explained that the DO production from algae that is simulated in the QUAL-TX model represents the 24-hour average net production, and that this net production from algae is considered sufficient for use in predicting the 24-hour DO average.⁷²

b) The modeling did not take sulfate into account and the proposed Facility does not treat for or reduce the amount of sulfate in the effluent.

Mr. Osting testified that Lake Bardwell, which is in Segment No. 0815, has an existing water quality impairment due to sulfate concentration, but that the modeling does not consider sulfate.⁷³ The proposed municipal utility district that is also planned over the property where the proposed Facility will be located is proposing to use groundwater wells as a source of water influent. Mr. Osting explained that, because sulfate concentration and other salts are not reduced by the type of

⁷⁰ ED Ex. JR-1 at 12.

⁷¹ Tr. at 67.

⁷² ED Ex. JR-1 at 13.

⁷³ Protestants Ex. 7 at 13.

wastewater treatment process proposed by the Facility, and because drinking water allows up to 250 mg/L concentration of sulfate, any sulfate concentration in source water influent will be discharged at approximately the same concentration.

He explained that discharge of these waters would contribute to the existing sulfate impairment in Lake Bardwell because groundwater in this area already contains sulfates in higher concentrations than the allowable 250 mg/L concentration and higher than the surface water quality standard (50 mg/L).⁷⁴ Protestants argue that the TCEQ screening process for dissolved solids, including sulfate anion, regardless of discharge volume, precludes additional loading when effluent will cause further increases to ambient concentrations that are already at or above water quality standards for sulfate.⁷⁵

(i) ED's, OPIC's, and Selinger's Response

The ED, OPIC, and Selinger maintain their position that a permit limit for total dissolved solids, including sulfate, is not required in this Draft Permit. ED witness Mr. Paull testified that permit limits for total dissolved solids, including sulfate, are not included in permits unless it has been demonstrated via a screening procedure that the facility is discharging total dissolved solids in amounts that cause an exceedance of the water quality standards.⁷⁶ He testified that TCEQ's total dissolved solids screening procedures only apply to domestic discharges that have an

⁷⁴ Protestants Ex. 7 at 13.

⁷⁵ ED Ex. JP-3 at 59, 174-175.

⁷⁶ ED Ex. JP-1 at 8.

average permitted flow greater than or equal to 1.0 MGD.⁷⁷ Because the proposed Facility does not have an average permitted flow greater than or equal to 1.0 MGD, a total dissolved solids screening was not required.⁷⁸

c) The proposed limits are not sufficient to protect water quality standards for bacteria in the receiving waters.

Mr. Osting testified that the TCEQ 2022 Integrated Report for the Trinity River Basin indicates that Segment No. 0815 currently contains bacteria and nitrate concentrations at a level that nearly indicates impairment.⁷⁹ He stated that the observed *E. coli* bacteria geometric mean concentration of 123.66 MPN/100mL is nearly at the level to indicate bacteria impairment (over 126 MPN/100mL).⁸⁰ He explained that if the proposed discharge contributes additional bacteria into the waterbody, this will increase the bacteria concern and increase likelihood of a bacteria impairment.

Regarding nitrate concentrations, Mr. Osting observed that nitrate concentration in Waxahachie Creek exceeds the TCEQ screening level of 1.95 mg/L in 13 out of 15 samples according to the TCEQ 2022 Integrated Report. According to Mr. Osting, those 13 exceeding samples exhibit a mean of 4.47 mg/L, an observed

⁷⁷ ED Ex. JP-1 at 10.

⁷⁸ ED Ex. JP-1 at 10.

⁷⁹ Protestants Ex. 7 at 14-15.

⁸⁰ Protestants Ex. 7 at 15.

concentration much higher than the 1.95 mg/L screening threshold.⁸¹ Additionally, the observed nitrate level of 4.47 mg/L is higher than the 1.69 mg/L value that the QUAL-TX model predicts near the same location in the model.⁸² If the modeling approach is supposed to provide a look at worst case critical conditions, Protestants argue that the modeling outputs do not reflect that. Specifically, Protestants argue that the modeling does not predict worst case conditions for nitrate because the observed nitrate concentration in the receiving water is higher and worse than the model-predicted concentration.⁸³

Mr. Osting testified that if the proposed Facility impairs the water quality, the existing uses would be impaired, and that this would violate TCEQ's antidegradation policy.⁸⁴ Mr. Osting asserted that Staff had performed no analysis to show that discharging up to the permitted amount of 126 MPN/100mL of *E. coli* bacteria will not cause the waterbody of Waxahachie Creek to become impaired for recreational use.⁸⁵

(i) ED's, OPIC's, and Selinger's Response

The ED, OPIC, and Selinger argue that the additional nutrients of the effluent into Waxahachie Creek will not make the existing water quality concern worse for

⁸¹ Protestants Ex. 7 at 13.

⁸² Protestants Ex. 7 at 13.

⁸³ Protestants Ex. 7 at 15; Protestants Br. at 7.

⁸⁴ Protestants Ex. 7 at 16.

⁸⁵ Protestants Ex. 7 at 17.

the creek. ED witness Mr. Paull testified that end-of-pipe limits equal to segment criteria should preclude contribution to the water quality concern for bacteria.

Regarding nitrate, Mr. Paull testified that the IPs indicate that effluent limits for nitrate and total nitrogen can be considered in certain situations when existing or projected nitrogen levels would result in: (1) growth of nuisance aquatic vegetation; (2) a substantial increase in nitrate-nitrogen that could adversely affect public drinking water supplies (with a nitrate-nitrogen criterion of 10 mg/L); and (3) potential eutrophication of unusually sensitive tidal waters, such as around seagrass beds. He explained that none of the conditions enumerated above apply and, therefore, a nitrate limit was not recommended in the Draft Permit.⁸⁶

Mr. Paull also testified that ammonia requirements are evaluated and developed by the modeler and should be protective of ammonia toxicity, and that there were no phosphorus concerns noted in the TCEQ 2020 Texas Integrated Report.⁸⁷

d) The Draft Permit did not address the fact that the proposed Facility is in Lake Bardwell's Protection Zone.

Mr. Osting testified that Lake Bardwell is a sole-source surface drinking water supply pursuant to 30 Texas Administrative Code section 307.10(2), but that neither

⁸⁶ ED Ex. JP-1 at 9.

⁸⁷ ED Ex. JP-1 at 9.

the Application nor the Draft Permit adequately address the fact that the discharge will be into Lake Bardwell's Protection Zone.⁸⁸

(i) ED's Response⁸⁹

The ED explains that there is no statutory prohibition regarding discharges to a "sole source fresh drinking water supply protection zone," and that all TPDES permits are drafted to be protective of water quality, the environment, animal and aquatic life, and human health and safety.⁹⁰ Staff assessed the Draft Permit's impact to the receiving waters and determined that there would be no antidegradation beyond a *de minimis* amount.⁹¹

3. ALJ's Analysis

The ALJ finds that the preponderance of the credible evidence proves that the Draft Permit is protective of water quality and the existing uses of the receiving waters in accordance with applicable TSWQS, including protection of aquatic and terrestrial wildlife. Protestants failed to rebut the prima facie determination because its concerns about the Draft Permit's water quality modeling rely on analysis that goes beyond what is required by TCEQ rules and antidegradation requirements for

⁸⁸ Protestants Ex. 7 at 18.

⁸⁹ OPIC and Selinger did not directly address Protestants' argument in briefing, but they both maintain that the Draft Permit is protective of TCEQ's water quality standards.

⁹⁰ ED Br. at 3.

⁹¹ ED Br. at 4.

TPDES permits and do not establish that ED's water quality modeling for the Draft Permit was legally insufficient.

TCEQ's witnesses credibly testified that the Application was reviewed in accordance with TCEQ rules, standards, and procedures; and that the Draft Permit is protective of water quality and existing uses, as well as of aquatic and terrestrial wildlife. No party rebutted that the QUAL-TX model is the standard model pursuant to the TCEQ's IPs and Commission practice. Therefore, the ALJ concludes that the evidence established that the existing uses of the receiving waters would be protected under the Draft Permit conditions. Accordingly, the ALJ finds that the Draft Permit complies with TCEQ rules and procedures for TPDES permit applications and concludes that Selinger has met his burden regarding this issue.

C. WHETHER THE DRAFT PERMIT REQUIRES ADEQUATE LICENSING REQUIREMENTS FOR THE OPERATOR OF THE FACILITY IN ACCORDANCE WITH APPLICABLE TSWQS

1. Background

Under 30 Texas Administrative Code section 30.350(d), a wastewater treatment facility shall employ or contract with (a) one or more licensed facility operators holding the appropriate level of license or (b) wastewater system operations companies holding a valid registration that employ licensed wastewater treatment facility operators holding the appropriate level of license. A domestic wastewater treatment facility that uses an activated sludge treatment system operated in the extended aeration mode with a permitted daily average flow of 0.10

to 1.0 MGD is classified as Category C.⁹² The chief operator of a wastewater treatment facility must have a license equal to or higher than that of the category of the treatment facility.⁹³

Under “Operational Requirements” in the Draft Permit, Item No. 1 requires the Applicant to employ or enter into a contract with a one or more wastewater treatment facility operators or wastewater system operations companies that holds a valid license or registration in accordance with the relevant requirements.⁹⁴

2. ED’s and OPIC’s Position⁹⁵

The ED and OPIC take the position that the Draft Permit requires adequate licensing requirements for the operator of the proposed Facility. The Facility requires a Class C licensed operator, which requires two years of hands-on experience operating a wastewater treatment plant.⁹⁶ ED witness Mr. Rahim, testified that there is no TCEQ requirement that applicants for TPDES permits individually identify the facility’s future operators nor is there a requirement that an applicant must have experience operating a facility before applying for a TPDES permit.⁹⁷

⁹² 30 Tex. Admin. Code § 30.350(e).

⁹³ 30 Tex. Admin. Code § 30.350(i).

⁹⁴ Selinger Ex. 1-AR, TAB C at 35; 30 Tex. Admin. Code § 30.350(d).

⁹⁵ Selinger did not submit any arguments in closing briefing on this issue.

⁹⁶ ED Ex. AR-1 at 13.

⁹⁷ ED Br. at 7.

3. Protestants' Position

Protestants argue that Selinger has not demonstrated that he possesses the ability to meet TCEQ's licensing requirements for an operator of the proposed Facility. Protestants assert that Selinger does not hold a valid license to operate a wastewater discharge facility.⁹⁸ Protestants also argue that Selinger has not provided any information about whom the licensed operator will be if the Draft Permit is ultimately issued.⁹⁹

4. ALJ's Analysis

Protestants are attempting to impose additional licensing requirements into the Draft Permit than those prescribed by TCEQ rules. 30 Texas Administrative Code section 30.350 requires that the Facility's operator have a Class C license, and the Draft Permit incorporates that same requirement. Consequently, Protestants could not demonstrate that the Draft Permit violates any specifically applicable state or federal requirement. The ALJ finds that the Applicant has met his burden to prove, by a preponderance of the evidence, that the Draft Permit includes adequate licensing requirements for the operator of the Facility.

⁹⁸ Protestants Br. at 8.

⁹⁹ Selinger Ex. 1 at 6 ("The application does not provide the specified operator as the expectation is the facility will not be in operation for several years after submittal, which holds true to date.").

D. WHETHER THE APPLICANT OWNS THE LAND ON WHICH THE PROPOSED FACILITY IS TO BE LOCATED

1. Background

30 Texas Administrative Code sections 305.43, 305.44, and 305.45 are the relevant rules concerning applications and ownership. Section 305.43(a) provides:

It is the duty of the owner of a facility to submit an application for a permit or a post-closure order. However, if the facility is owned by one person and operated by another and the executive director determines that special circumstances exist where the operator or the operator and the owner should both apply for a permit or a post-closure order, and for all Texas Pollution Discharge Elimination System permits, it is the duty of the operator and the owner to submit an application for a permit.

Section 305.43 requires that an owner of a facility must apply for a TPDES permit.¹⁰⁰

The TPDES application form contains Section 9 Regulated Entity and Permitted Site Information, which requires that either the applicant must own the land where the proposed wastewater treatment facility will be located, or otherwise provide proof of a property interest in the land, such as a lease agreement or deed recorded easement.¹⁰¹

¹⁰⁰ “Facility” includes “all contiguous land and fixtures, structures, or appurtenances used for storing, processing, treating, or disposing of waste, or for injection activities. A facility may consist of several storage, processing, treatment, disposal, or injection operational units. “Owner” is defined to mean the person who owns a facility or part of a facility. 30 Tex. Admin. Code § 305.2(14), (26).

¹⁰¹ Selinger Ex. 1-AR, Tab D, at 63.

2. Selinger's Position

Selinger contends that he is the current owner of the property where the Facility would be located.¹⁰² He also argues that 30 Texas Administrative Code section 305.43(a) does not require that an applicant for a TPDES permit be the property owner.

Selinger further asserts that his due process rights were violated during the contested case proceeding. He contends that he is allowed to make revisions to the Application throughout the permitting process, including at the SOAH contested case hearing on the Draft Permit. Lastly, in his closing brief, Selinger raised, for the first time, the issue of equitable ownership. In his brief, he writes that a purchaser in contract to buy a property is referred to as an equitable owner with equitable title, and that the TCEQ application “asked an ambiguous question in not specifying whether it was asking for the equitable owner (which Selinger was) or the record owner (which Selinger was not at the time of the application but was at the time of the hearing).”¹⁰³

Moreover, Selinger raises several arguments in his closing briefing, and the pertinent arguments are addressed below:

¹⁰² For support, he cites to his own unsworn declaration, which he attached as an exhibit to his response to Protestants' motion for summary judgment but did not prefile, include on his exhibit list, or offer into evidence during the hearing on the merits. Accordingly, Selinger's unsworn declaration is not part of the evidentiary record in this case and will not be discussed further.

¹⁰³ Selinger Br. at 7.

a) Selinger’s argument that 30 Texas Administrative Code Section 305.43(c) allows a person other than an owner to submit an application for a permit is inapt to his case.

Section 305.43(c) specifies that a landowner may give consent to allow another person to place a treatment plant and discharge point on the landowner’s property, and that consent must be in writing. Because the record in this case does not include any written consent from the actual landowner, Poetry Road, LLC, authorizing Selinger to apply for a TPDES permit, Section 305.43(c) does not apply.

b) Selinger’s due process rights were not infringed during the hearing on the merits.

Selinger contends that applicants are allowed to revise their applications throughout the contested case proceeding and that he was wrongly prevented from presenting additional evidence concerning landownership during the hearing on the merits. However, Selinger was given the opportunity to prefile exhibits concerning the issue of land ownership by January 10, 2023, and he failed to do so.¹⁰⁴ A prehearing conference was held on January 19, 2023, to allow the parties to raise any

¹⁰⁴ Selinger claims the January 10, 2023 deadline was “fabricated” by Protestants’ counsel and then by the ALJ. However, the SOAH December 13, 2022 Order Granting Executive Director’s Motion to Include Land Ownership as an Issue to the Hearing specifically states: “The parties may prefile exhibits related to land ownership by January 10, 2023, and may present live testimony on the issue at the hearing on the merits.”

objections to newly prefiled exhibits relating to land ownership.¹⁰⁵ Since no additional exhibits, including any prefiled testimony, were filed, there were no objections raised. The exhibit list Selinger prepared and submitted on January 18, 2023, for the hearing on the merits included items that he had not prefiled by the applicable deadlines and, therefore, were objected to by Protestants. Because Selinger failed to establish good cause or lack of unfair surprise or prejudice in accordance with Texas Rule of Evidence 193.6 for his failure to prefile exhibits by the deadline, Protestants' objections were sustained.¹⁰⁶ Accordingly, his arguments concerning a violation of his due process rights are unsupported.

Selinger also argues that he was denied the opportunity to present a rebuttal case pursuant to 30 Texas Administrative Code section 80.17(c)(3). However, the issue of land ownership was raised prior to the hearing on the merits and added as an issue to the case on December 14, 2022.¹⁰⁷ Both Protestants' and the ED's witnesses prefiled direct testimony on the issue of land ownership and presented their witnesses for cross-examination on that issue. Selinger was also given the opportunity to prefile any exhibits relating to land ownership by January 10, 2023, but he did not. At the hearing, Protestants' witness Mr. Osting discussed the land ownership issue as did the ED's witness Mr. Rahim. Selinger had an opportunity to cross-examine both witnesses on that issue during the hearing on the merits. Because

¹⁰⁵ See FN 1 on December 13, 2022 Order Granting Executive Director's Motion to Include Land Ownership as an Issue to the Hearing (The ALJ will rule on objections to additional exhibits regarding landownership at the prehearing conference scheduled for January 19, 2023.)

¹⁰⁶ Tr. at 44-45.

¹⁰⁷ See SOAH Order Granting Executive Director's Motion to Include Land Ownership as an Issue to the Hearing (December 14, 2022).

Selinger had multiple opportunities to present evidence and cross-examine witnesses to develop his case supporting the issuance of the Draft Permit, he was not denied the opportunity to respond to Protestants' case.

3. ED's, OPIC's, and Protestants' Position

The ED, OPIC, and Protestants take the position that land ownership is threshold requirement and that the Draft Permit does not meet this requirement. They argue that, because Selinger did not own the land where the proposed Facility will be located on September 21, 2020, when the Application was submitted, the Draft Permit must be denied. On September 21, 2020, the land was owned by Waxahachie Creek Ranch, LLC.¹⁰⁸ On December 13, 2021, Waxahachie Creek Ranch LLC then purportedly conveyed the entirety of the 530.64 acres associated with the Application to another entity, Poetry Road, LLC.¹⁰⁹ ED witness Mr. Rahim testified that had the ED been made aware during the technical review that Poetry Road LLC was the land owner instead of Selinger, the ED would not have proceeded with issuing the Draft Permit until that issue had been resolved.¹¹⁰ At the hearing, Mr. Rahim testified that there is still no indication that Selinger owns the land where the proposed Facility will be located.¹¹¹ He explained that if Staff had been made aware of this discrepancy when the Application was originally reviewed, the

¹⁰⁸ Protestants Ex. 10.

¹⁰⁹ Protestants Ex. 10 and 11.

¹¹⁰ ED Ex. AR-1 at 7.

¹¹¹ ED Ex. AR-1 at 6; Tr. at 87 (“But in our record we do not have [any document regarding land ownership] from the Applicant yet.”).

Application would have been returned to Selinger.¹¹² Because of this discrepancy in ownership, Mr. Rahim testified that he recommends the Draft Permit be denied.

4. ALJ's Analysis

When Selinger submitted the Application on September 21, 2020, to TCEQ, he identified himself as the owner of the land where the Facility is or will be located.¹¹³ The Application included a field asking, "If the landowner is not the same person as the facility owner or co-applicant, attach a lease agreement or deed recorded easement." Selinger left that response blank and did not provide any attachments.¹¹⁴ The Application includes a certification that requires the Applicant verify the truth of the information provided: "...the information submitted, to the best of my knowledge and belief, true, accurate and complete."¹¹⁵

At the time Selinger submitted the Application, the land was not owned by him but was instead owned by Waxahachie Creek Ranch, LLC.¹¹⁶ On December 13, 2021, Waxahachie Creek Ranch, LLC, then conveyed the land to Poetry Road, LLC.¹¹⁷ Accordingly, Selinger provided false information on the Application and failed to comply with the Application requirements by not including

¹¹² ED Ex. AR-1 at 9.

¹¹³ Selinger Ex. 1-AR, Tab D at 63.

¹¹⁴ *Id.*

¹¹⁵ Selinger Ex. 1-AR, Tab D at 68.

¹¹⁶ Protestants Ex. 10.

¹¹⁷ Protestants Ex. 11.

Waxahachie Creek Ranch, LLC and Poetry Road LLC as a co-applicant or owner of the property in the Application.¹¹⁸

Regarding Selinger's late argument in his closing brief on equitable ownership; the ALJ finds that determining such aspects of property rights demands an intensive factual inquiry with respect to intent, circumstances, and the timing of events. Selinger failed to present the necessary evidence to address this claim. Therefore, because the preponderance of evidence establishes that Selinger does not own the land on which the proposed Facility is to be located, as required by TCEQ rules, and the Draft Permit should be denied.

VI. TRANSCRIPT COSTS

30 Texas Administrative Code section 80.23(d) provides for the allocation of transcript costs among the parties, excluding the ED and OPIC. In allocating those costs, the Commission is to consider the following applicable factors in allocating reporting and transcription costs among the other parties:

- The party who requested the transcript;
- The financial ability of the party to pay the costs;
- The extent to which the party participated in the hearing;
- The relative benefits to the various parties of having a transcript;

¹¹⁸ ED Ex. AR-1 at 7.

- the budgetary constraints of a state or federal administrative agency participating in the proceeding; and
- Any other factor which is relevant to a just and reasonable assessment of costs.

Selinger did not provide an invoice showing that he had been billed reporting and transcription costs. None of the parties raised the issue of the allocation of transcript costs during the proceeding or provided evidence of the transcript costs. Accordingly, the parties will bear their own transcription costs.

VII. RECOMMENDATION

The ALJ recommends that the Commission adopt the attached proposed order containing Findings of Fact and Conclusions of Law and deny the issuance of the Draft Permit to the Applicant. Some Findings of Fact concern undisputed matters not discussed above.

SIGNED APRIL 27, 2023

ALJ Signature:



AMY DAVIS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

**AN ORDER
DENYING THE APPLICATION BY
STEPHEN SELINGER FOR TPDES PERMIT NO. WQ0015932001
IN ELLIS COUNTY, TEXAS;
SOAH DOCKET NO. 582-22-1885;
TCEQ DOCKET NO. 2021-1442-MWD**

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the application of Stephen Selinger (Selinger or Applicant) for a new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0015932001 in Ellis County, Texas. A Proposal for Decision (PFD) was presented by Amy Davis, Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted an evidentiary hearing concerning the application on January 25, 2023, in Austin, Texas via Zoom videoconferencing.

After considering the PFD, the Commission makes the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

Application

1. Selinger filed his application (Application) for a new TPDES permit with TCEQ on September 21, 2020.
2. The Application requested authorization to discharge treated domestic wastewater at a daily average flow not to exceed 405,000 gallons per day (gpd) from a proposed plant site, to be located approximately 3,907 feet northwest of the intersection of Getzenander Road and the railroad tracks, and approximately 2,045 feet southwest of the end of Jenkins Road, in Ellis County, Texas 75165. The proposed Facility will serve the Waxahachie 530 subdivision, located between the Cities of Waxahachie and Ennis, Texas.
3. The treated effluent would be discharged via pipe to an unnamed tributary, then to Waxahachie Creek, and then to Bardwell Reservoir in Segment No. 0815 of the Trinity River Basin. The unclassified receiving water uses are minimal aquatic life use for the unnamed tributary and intermediate aquatic life for Waxahachie Creek. The designated uses for Segment No. 0815 are primary contact recreation, public water supply, and high aquatic life use.
4. The Executive Director (ED) declared the Application administratively complete on December 3, 2020, and technically complete on April 12, 2021.
5. The ED completed the technical review of the Application, prepared a draft permit (Draft Permit) and made it available for public review and comment.
6. On the Application, Selinger certified that he owned the site at which the proposed Facility will be located.

The Draft Permit

7. The Draft Permit would authorize a discharge of treated domestic wastewater at a daily average flow not to exceed 405,000 gallons per day (or 0.405 million gallons per day (MGD)).

8. The Facility will be an activated sludge process plant operated in the extended aeration mode. Treatment units will include an equalization basin, a flow splitter, three aeration basins, three clarifiers, three combined aerobic sludge digesters, and storage tanks, and three chlorine contact chambers.
9. The Draft Permit authorizes the disposal of sludge at a TCEQ-authorized land application site, co-disposal landfill, wastewater treatment facility, or facility that further processes sludge.
10. The Facility has not been constructed.
11. The unclassified receiving water uses are minimal aquatic life use for the unnamed tributary and intermediate aquatic life for Waxahachie Creek. The designated uses for Segment No. 0815 are primary contact recreation, public water supply, and high aquatic life use.
12. The effluent limits in the final phase of the Draft Permit, based on a 30-day average, are 10 mg/l five-day carbonaceous biochemical oxygen demand (CBOD5), 15 mg/l TSS, 3 mg/l ammonia-nitrogen (NH3-N), 126 colony forming units (CFU) or most probable number (MPN) of E. coli per 100 ml and 4.0 mg/l minimum dissolved oxygen (DO).
13. The effluent shall contain a chlorine residual of at least 1.0 mg/l and will not exceed a chlorine residual of 4.0 mg/l after a detention time of at least 20 minutes based on peak flow.

Notice and Jurisdiction

14. The Notice of Receipt of the Application and Intent to Obtain Water Quality Permit was published on December 9, 2020, in the *Waxahachie Daily Light* in English and, on December 8, 2020, in *La Prensa Comunidad* in Spanish.
15. The Combined Notice of Receipt and Intent to Obtain a Water Quality Permit and Notice of Application and Preliminary Decision was published on June 6, 2021, in the *Waxahachie Daily Light* in English and, on June 8, 2021, in *La Prensa Comunidad* in Spanish.

16. The comment period for the Application closed on July 8, 2021.
17. TCEQ's Office of the Chief Clerk received timely comments from various individuals, U.S. Representative Jake Ellzey, and Ellis County. Ellis County, City of Waxahachie, and the City of Ennis also timely filed a request for a Contested Case Hearing based upon issues raised during the public comment period.
18. The ED filed his Response to Public Comments on September 10, 2021.
19. On January 12, 2022, the Commission considered the hearing request at its open meeting and, on January 19, 2022, issued an Interim Order, directing that the following three issues be referred to SOAH, denying all issues not referred, and setting the maximum duration of the hearing at 180 days from the date of the preliminary hearing until the date the PFD is issued by SOAH:
 - A) Issue A: Whether the Draft 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) Issue 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; and
 - C) Issue 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.
20. On March 27, 2022, notice of the preliminary hearing was published in English in the *Waxahachie Daily Light*. The notice included the time, date, and place of the hearing, as well as the matters asserted, in accordance with the applicable statutes and rules.

Proceedings at SOAH

21. On May 2, 2022, a preliminary hearing was convened in this case via videoconference by SOAH ALJ Amy Davis. Stephen Selinger appeared for himself; attorney Emily Rogers appeared for the City of Ennis, City of Waxahachie, and Ellis County (collectively, Protestants); attorney Aubrey Pawelka appeared for the ED; attorney Garrett Arthur appeared for the TCEQ Office of Public Interest Counsel (OPIC).
22. Jurisdiction was noted by the ALJ and the Administrative Record, Selinger 1-AR, Tabs A through E, was admitted.
23. On December 5, 2022, and before the hearing on the merits, the ED filed a motion requesting to add the issue of land ownership to the contested case hearing.
24. On December 14, 2022, the ALJ granted the motion and allowed all parties to prefile exhibits relating to land ownership by January 10, 2023. Selinger failed to prefile any exhibits or testimony relating to land ownership by the deadline.
25. A second preliminary hearing was held via videoconference by SOAH ALJ Davis on January 19, 2023, to rule on objections to additional exhibits regarding land ownership. All parties appeared through their respective representatives. There were no pending motions or objections.
26. On January 25, 2023, ALJ Davis convened the hearing on the merits via videoconference and all parties appeared through their respective representatives. The record closed on March 3, 2023, after the parties filed post-hearing briefs.

Regionalization

27. In order to effectuate its policy of encouraging regionalization of wastewater services, TCEQ requires an applicant to provide certain information to allow TCEQ to conduct a regionalization analysis of the application.
28. No part of the Facility is within the City of Ennis's or City of Waxahachie's corporate limits.

29. The proposed Facility and its discharge are within the City of Ennis's extraterritorial jurisdiction.
30. As part of his Application, Selinger provided a copy of the certified letter he sent to the City of Waxahachie on August 20, 2020, requesting sewer service. Selinger did not receive a response from the City of Waxahachie.
31. Selinger's written communication with the City of Waxahachie sufficiently requested sewer service.
32. By refusing to respond for over a year, the City of Waxahachie denied Selinger's request for service.
33. Selinger did not request service from the City of Ennis prior to submitting his Application to the TCEQ because it does not have a wastewater treatment plant located within a three-mile radius of the proposed Facility.
34. The City of Ennis provided a "will serve" letter on March 29, 2021, after the Application was filed with the TCEQ because it has collection lines within the three-mile radius of the proposed Facility.
35. Because the City of Ennis wastewater treatment plant (rather than its collection system) is not located within a three-mile radius of the proposed Facility, Selinger was not required to contract with the City of Ennis for wastewater service.
36. To connect to the City of Ennis would require Selinger to construct 26,200 lineal feet of new 16-inch forcemain and 8,000 lineal feet of new 14-inch forcemain, totaling 6.477 miles of new pipe that must be installed.
37. Constructing a new plant will cost approximately \$4.4 million less than connecting to the City of Ennis's system.
38. Costs weigh in favor of granting Selinger's application.
39. There is no regional provider designated for the area where the Facility is proposed to be located.

40. The proposed Facility and its discharge are not within the sewer Certificate of Convenience and Necessity (CCN) of any retail public utility.

Protection of Water Quality and Existing Uses, in Accordance with the Applicable Texas Surface Water Quality Standards

41. The prima facie demonstration that 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 (TSWQS), including protection of aquatic and terrestrial wildlife, was not rebutted.
42. TSWQS apply to surface water in the state and are set by the Commission at levels designed to be protective of public health, aquatic resources, terrestrial life, and other environmental and economic resources. The applicable water quality standards are the TSWQS in 30 Texas Administrative Code Chapter 307.
43. The TSWQS consist of general standards, narrative standards, surface water segment-specific numeric standards, numeric standards for toxic substances, and antidegradation review.
44. The TSWQS establish specific uses for each classified water body in the state and also provide numeric criteria for each classified stream.
45. The provisions of the Draft Permit are protective of water quality and are in accordance with the TSWQS.
46. The Draft Permit is protective of water quality and existing uses of the receiving water.
47. The Draft Permit is protective of aquatic and terrestrial wildlife.

Antidegradation

48. The prima facie demonstration that the Draft Permit complies with TCEQ's antidegradation policy and procedures was not rebutted.

49. The ED performed a Tier 1 antidegradation review of the receiving waters in accordance with 30 Texas Administrative Code section 307.5.
50. The narrative and numeric criteria to protect existing uses will be maintained throughout the receiving waters; therefore, existing water quality uses will be maintained and protected.
51. The existing water quality uses of the receiving waters of the unnamed tributary, Waxahachie Creek, and Bardwell Reservoir in Segment No. 0815 of the Trinity River Basin will not be impaired by the Draft Permit as long as Selinger complies with the Draft Permit, which will satisfy the antidegradation Tier 1 requirements.
52. The Draft Permit complies with TCEQ's antidegradation policy and procedures.

Adequate Licensing Requirements

53. The prima facie demonstration that the Draft Permit complies with TCEQ's licensing requirements was not rebutted.
54. A Class C operator is appropriate for the proposed Facility.

Land Ownership of Site of Proposed Facility

55. The prima facie demonstration that the Application is substantially complete and accurate was rebutted.
56. The Application went through both an administrative and a technical review.
57. The Application included false statements about the owner of the land of the proposed Facility.
58. The Application did not contain the required information and was not substantially complete and accurate.
59. Selinger is not the owner of the land of the proposed Facility.

Transcription Costs

60. Reporting and transcription of the hearing on the merits was warranted because the hearing was scheduled for three days.
61. All parties fully participated in the hearing by presenting witnesses and cross-examining witnesses.
62. None of the parties contested the allocation of transcript costs or provided an invoice of the transcript costs.
63. There was no evidence that any party subject to allocation of costs is financially unable to pay a share of the costs.
64. The total cost for recording and transcribing the preliminary hearing and the hearing on the merits is unknown.
65. Because it does not appear that that the parties contest the allocation of transcript costs, the Proposal for Decision does not address the allocation of transcript costs and it is appropriate for the parties to bear their own transcript costs.

II. CONCLUSIONS OF LAW

1. TCEQ has jurisdiction over this matter. Tex. Water Code, chs. 5, 26.
2. SOAH has jurisdiction to conduct a hearing and to prepare a PFD in contested cases referred by the Commission under Texas Government Code section 2003.047.
3. Notice was provided in accordance with Texas Water Code sections 5.114 and 26.028; Texas Government Code sections 2001.051 and 2001.052; and 30 Texas Administrative Code sections 39.405 and 39.551.
4. The Application is subject to the requirements in Senate Bill 709, effective September 1, 2015. Tex. Gov't Code § 2003.047(i-1)-(i-3).

5. Selinger's filing of the Administrative Record established a prima facie case that: (1) the Draft Permit meets all state and federal legal and technical requirements; and (2) a permit, if issued consistent with the Draft Permit, would protect human health and safety, the environment, and physical property. Tex. Gov't Code § 2003.047(i-1); 30 Tex. Admin. Code § 80.17(c)(1).
6. Selinger retains the burden of proof on the issues regarding the sufficiency of the Application and compliance with the necessary statutory and regulatory requirements. 30 Tex. Admin. Code § 80.17(a).
7. The Draft Permit is protective of water quality and the existing uses of the receiving waters in accordance with applicable TSWQS, including protection of aquatic and terrestrial wildlife. 30 Tex. Admin. Code § 307.5.
8. The Draft Permit is protective of the health of residents near the proposed Facility and discharge route.
9. The Application demonstrates compliance with TCEQ's regionalization policy. Tex. Water Code §§ 26.003, 26.081(a)-(b), (d); 26.0282.
10. The Application demonstrates a need for the Draft Permit. Tex. Water Code § 26.0282.
11. The Draft Permit complies with TCEQ's antidegradation policy. 30 Texas Admin. Code §§ 307.5.
12. The Draft Permit contains sufficient provisions, including necessary operational requirements, to ensure protection of water quality.
13. The Draft Permit contains adequate licensing requirements to ensure compliant plant operations. 30 Tex. Admin. Code § 30.350(d).
14. The owner of the land where the proposed Facility will be located did not apply for the TPDES permit as required by 30 Texas Administrative Code section 305.43(a).
15. No transcript costs may be assessed against the ED or OPIC because TCEQ's rules prohibit the assessment of any cost to a statutory party who is precluded by law from appealing any ruling, decision, or other act of the Commission. 30 Tex. Admin. Code § 80.23(d)(2).

16. None of the parties raised the issue of allocation of transcript costs during the proceeding or provided evidence of the transcript costs. Accordingly, the parties will bear their own transcription costs.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. Selinger's Application for Texas Pollutant Discharge Elimination System Permit No. WQ0015932001 is denied.
2. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
5. The effective date of this Order is the date the Order is final, as provided by Texas Government Code section 2001.144 and 30 Texas Administrative Code section 80.273.
6. TCEQ's Chief Clerk shall forward a copy of this Order to all parties.
7. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Jon Niermann, Chairman, For the Commission