

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

<b>APPLICATION BY STEPHEN SELINGER</b>	<b>§</b>	<b>BEFORE THE STATE OFFICE</b>
<b>FOR NEW TEXAS POLLUTANT</b>	<b>§</b>	
<b>DISCHARGE ELIMINATION SYSTEM</b>	<b>§</b>	<b>OF</b>
<b>PERMIT NO. WQ0015932001</b>	<b>§</b>	
		<b>ADMINISTRATIVE HEARINGS</b>

**PROTESTANTS' EXCEPTIONS TO PROPOSAL FOR DECISION**

TO THE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

Comes now the City of Ennis, Texas (Ennis), the City of Waxahachie, Texas (Waxahachie), and Ellis County, Texas, (collectively, Protestants) and these Exceptions to the Proposal for Decision (PFD) and, in support thereof, would show the following:

**I. INTRODUCTION**

Protestants agree with the Administrative Law Judge's (ALJ) proposed recommendation that proposed Texas Pollution Discharge Elimination Program (TPDES) Permit No. WQ0015932001 (Draft Permit) be denied. The ALJ properly recommends that the permit should be denied because the Applicant, Stephen Selinger (Applicant or Selinger), was not the owner of the land where the proposed facility will be located when he applied for the proposed TPDES permit as required by law, despite certifying under oath that the information in the application was correct. However, Protestants except to certain Findings of Fact and proposed Conclusions of Law in the PFD, as detailed below. Specifically, the proposed permit that is the subject of this proceeding, if issued, that would allow the Applicant to discharge a daily average flow of 405,000 gallons per day of treated wastewater, does not contain limits that are protective of water quality in Lake Bardwell and the Waxahachie Creek watershed. Further, the Applicant did not comply

with the State's regionalization policy or the Texas Commission on Environmental Policy's (TCEQ) antidegradation policy.

## **II. EXCEPTIONS AND CORRECTIONS**

### **A. Exceptions to the PFD's analysis and recommendations regarding regionalization.**

The ALJ correctly details the State's policy to encourage and promote regionalization, as well as TCEQ's implementation of the regionalization policy, which in part provides for the following situations under which the TCEQ may approve an application for the discharge of wastewater: (1) there is no wastewater treatment facility or collection system within three miles of the proposed facility; (2) the applicant requested service from wastewater facilities within three miles, and the request was denied; and (3) the applicant can successfully demonstrate that an exception to regionalization should be granted based on costs, affordable rates, and/or other relevant factors. (PFD pgs. 11-12, citing TCEQ's Domestic Technical Report 1.1 of the Application). However, the ALJ failed to apply that policy to the facts at hand because the Applicant did not meet his burden to show that there were no such collection facilities within three miles, that he requested and was denied service from such facility, or that an exception should be granted based on costs or affordability.

Specifically, the ALJ correctly states that the City of Ennis has wastewater collection facilities approximately two miles from the proposed facility and has capacity to receive the facility's discharge. (PFD pg. 13). The ALJ also correctly states that the Applicant failed to request service from Ennis. The ALJ then acknowledges that the Applicant failed to indicate that Ennis' collection system was within a three-mile radius of the proposed facility, and that the ED's witness Mr. Rahim testified that the Applicant was not required to contract with Ennis for service, which is contrary to TCEQ's policy. (PFD pgs. 16-17). Lastly, the ALJ acknowledges that Protestants'

witness Mr. Buechter put forth testimony that the estimated cost relied upon by the Applicant's witness Mr. Gillespie to connect to Ennis was not the cost that the Applicant would bear alone; rather, the costs would likely be shared with the municipality. (PFD pgs. 14-15). Further, Mr. Buechter testified that the long-term cost of a regionalized system is less than the cost of constructing, operating, and maintaining multiple smaller systems at a time. (PFD pg. 16). The Applicant failed to reach out to Ennis engage in meaningful discussions about the costs of the system in order to accurately estimate the cost of service. (Protestants' Ex. 1 – 4:16 to 5:9 (Green) (Bates 7-8)).

Despite acknowledging the above evidence and testimony, the ALJ failed to consider the TCEQ's policies because (1) there is in fact a "wastewater treatment facility or *collection system*" within three miles of the proposed facility; (2) the applicant failed to requested service from wastewater facilities within three miles – here Ennis – and the request was *not* denied; and (3) the applicant *cannot* successfully demonstrate that an exception to regionalization should be granted based on costs, affordable rates, and/or other relevant factors, because he failed to engage in meaningful negotiations with Ennis in order to make that determination. To excuse the Applicant from even the minimalist of requirements related to regionalization guts the policy altogether and effectively makes the policy meaningless. Therefore, the Protestants except to and recommend rejection of Findings of Fact 31, 35, 37, and 38 which state that:

- "31. Selinger's written communication with the City of Waxahachie sufficiently requested sewer service.
- 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.
- 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."

The Protestants also except to and recommends rejection of Conclusions of Law 9 and 10 which state that:

"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."

**B. Exceptions to the PFD's analysis and recommendations regarding whether the Draft Permit is protective of water quality in Lake Bardwell and the Waxahachie Creek watershed.**

Protestants except to the PFD's statements that the Draft Permit is protective of water quality in Lake Bardwell and the Waxahachie Creek watershed. *See* Findings of Fact 45, 46, and 47. The Executive Director's recommendation of the Draft Permit is contrary to the public policy of the Clean Water Act and water quality standards, as the Draft Permit is not protective of water quality in the lake and watershed.

The ALJ acknowledged that Protestants' expert Tim Osting raised four main concerns in his testimony regarding water quality. First, that the modeling in the Draft Permit does not accurately predict dissolved oxygen (DO) levels in the receiving water. (PFD pg. 23). Mr. Osting explained that the TCEQ used a model that failed to take into account the consumption of oxygen from algae respiration, which would result in a DO concentration outside the acceptable limits of .2 of 5.0 mg/L if properly modeled. (PFD pg. 24). If the proposed discharge impairs the water quality, then the existing uses of the water bodies would be impaired, which would violate TCEQ's antidegradation policy. (*Id.*) In response, the Executive Director's witnesses simply testified that the steady state model used by the agency is sufficient. (PFD pgs. 25-26).

Second, Mr. Osting testified that the modeling used did not take sulfate into account, nor will the proposed facility treat for sulfate in the effluent. (PFD pg. 26). This is problematic because some of the proposed source water – groundwater wells – contains a sulfate concentration that is higher than the allowable concentration of 250 mg/L and higher than the surface water quality standard of 50 mg/L. (PFD pgs. 26-27). Considering that Lake Bardwell has an existing water quality impairment due to high sulfate concentration, the discharge of treated effluent would likely contribute to the existing sulfate impairment. (PFD pg. 27). Neither the ED, OPIC, nor Applicant put forth evidence that refuted Mr. Osting’s conclusion that the sulfate concentration from the proposed discharge will likely cause further sulfate impairment in the receiving waters; rather, the parties just stated that TCEQ does not consider or screen for total dissolved solids until it is too late after the facility is constructed and discharging. This is against public policy and not protective of water quality.

Third, Mr. Osting testified that the proposed limits are not sufficient to protect the water quality standards for bacteria and nitrate concentrations. (PFD pg. 28). The observed *E. coli* bacteria geometric mean concentration of 123.66 MPN/100mL is already close to the level to indicate impairment at 126 MPN/100mL, so any additional bacteria from the proposed discharge will likely cause impairment. (*Id.*). Further, the nitrate concentrations in Waxahachie Creek exceeded the TCEQ screening levels in 13 out of 15 samples in its own 2022 Integrated Report, for an average of 4.47 mg/L and therefore at a much higher than the threshold of 1.95 mg/L. (PFD pgs. 28-29). Further, the QUAL-TX model used by the ED predicted a much lower output than the observed level in the report, which indicates that the model is flawed. (PFD pg. 29). If the proposed discharge impairs the water quality due to bacteria and/or nitrates, it would violate the TCEQ’s antidegradation policy. (*Id.*). Again, no party refuted Mr. Osting’s testimony and evidence. Rather,

the ED's witness testified that the TCEQ does not consider limitations until it is too late when the receiving waters are already impaired. (*Id.*). Again, this is against public policy and not protective of water quality.

Lastly, Mr. Osting testified that the ED failed to address the fact that the proposed discharge is into the Protection Zone of Lake Bardwell, which is a sole-source drinking water supply lake. (PFD pg. 30). The ED's witness Mr. Paull responded that there is no statutory provision that prohibits discharges into such a zone, and generally replies that all permits are drafted to be protective of water quality. (PFD pg. 31). Therefore, in essence the ED responded that the ED in fact failed to consider that the discharge would be into a Protection Zone.

In response to all of this, the ALJ stated that the Protestants' concerns go beyond what is required by TCEQ rules and for TPDES permits. (PFD pg. 32). The ALJ's analysis is conclusory in light of Mr. Osting's testimony and evidence regarding the potential degradation of water quality in this particular watershed, considering the unique conditions of the receiving water bodies in question. Therefore, the Protestants except to and recommend rejection of Findings of Fact Numbers 41, 45, 46, 47, 48, 51, and 52 which state:

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

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."

The Protestants except to and recommend rejection of Conclusions of Law Numbers 7, 8, 11, and 12 which state:

- "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.
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."

**C. Exceptions to the PFD's analysis and recommendations regarding whether the Draft Permit requires adequate licensing requirements for the operator of the facility in accordance with applicable TSWQS.**

Protestants except to the PFD's statements that the Applicant has demonstrated that he possesses the ability to meet the TCEQ's licensing requirements for the proposed facility. At a minimum, the Applicant should be required to show some competency with respect to the operations of a wastewater treatment plant. It is not enough to simply conclude the Applicant will be required to hire a licensed operator when the Applicant has provided no evidence that he is a licensed operator or has the financial ability to hire a licensed operator. Particularly given the ALJ's acknowledgment that "Selinger provided false information" elsewhere within his Application, the TCEQ should be extra cautious about the representations of this particular applicant.

Therefore, the Protestants except to and recommend rejection of Findings of Fact Number 53, which states:

“53. The prima facie demonstration that the Draft Permit complies with TCEQ’s licensing requirements was not rebutted.”

The Protestants except to and recommend rejection of Conclusions of Law Number 13, which states:

“13. The Draft Permit contains adequate licensing requirements to ensure compliant plant operations. 30 Tex. Admin. Code § 30.350(d).”

**D. Exceptions to the recommended actions.**

The Protestants agree with the PFD’s recommendation to deny the Draft Permit based on the issue of landownership. However, the Protestants disagree with the above listed Findings of Fact and Conclusions of Law because issuance of the permit does not comply with regionalization, is not protective of water quality, and the Applicant has not demonstrated that he can comply with the licensing requirements. Based on the reasons cited above, the Protestants assert that issuance of the Draft Permit should not be granted based on all four referred issues that were subject of the contested case hearing.

**III. CONCLUSION AND PRAYER**

The Protestants respectfully request that the Commission grant their exceptions and recommend the PFD with the corrections as set out above. The Protestants respectfully request any other relief to which they are entitled.

Respectfully submitted,

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BY:   
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### **CERTIFICATE OF SERVICE**

I hereby certify that on May 17, 2023, a true and correct copy of the above and foregoing document was served on all parties on the mailing list via electronic or regular mail.

  
Emily W. Rogers