

TCEQ DOCKET NO. 2021-1442-MWD

APPLICATION BY	§	BEFORE THE
STEPHEN RICHARD SELINGER	§	
FOR NEW TPDES PERMIT	§	TEXAS COMMISSION ON
NO. WQ0015932001	§	ENVIRONMENTAL QUALITY

**ELLIS COUNTY'S
REPLY TO RESPONSES TO REQUEST FOR CONTESTED CASE HEARING
ON APPLICATION FOR NEW TPDES PERMIT NO. WQ0015932001**

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY (“TCEQ”):

Ellis County, Texas (the “County”) files this Reply to Responses of the Executive Director (“ED”) and the Office of Public Interest Counsel (“OPIC”) to the County’s Request for Contested Case Hearing on the Application of Stephen Richard Selinger for New TPDES Permit No. WQ0015932001.

I.

INTRODUCTION

Stephen Richard Selinger (“Applicant”) applied to the Texas Commission on Environmental Quality (“TCEQ”) for new TPDES Permit No. WQ0015932001 (the “Application”) to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 405,000 gallons per day (“gpd”). By letter dated December 1, 2021, the TCEQ set a deadline of January 3, 2022 for the County to file a formal written reply to any response to hearing requests filed by the Applicant, the ED, or OPIC. This reply is therefore timely filed.

As both the ED and OPIC note in their respective Responses to Hearing Request,¹ the County has timely requested a contested case hearing regarding the issues raised in its public comments filed at TCEQ.² OPIC concludes that the County is an “affected person” entitled to a contested case hearing on the issues it has raised in its hearing request because the County has interests related to legal rights, duties, privileges, powers, or economic interests affected by the Application that are not common to the general public, while the ED concludes that the County is not an affected person.

The County respectfully submits that it is an “affected person” entitled to a contested case hearing on issues raised in its hearing request pursuant to 30 TEX. ADMIN. CODE § 55.203.

II.

REPLY TO THE ED’S RESPONSE TO THE COUNTY’S HEARING REQUEST

Local governments, such as the County, with authority under state law over issues contemplated by an application may be considered affected persons under 30 Tex. Admin. Code § 55.203(b). The County has authority over various functions – including public health and safety – that may be affected by the issuance of the proposed permit. Potential contamination of surface and/or groundwater within the region may impact the County’s ability to protect the public health and safety by lowering water quality. Also, the County has the authority to inspect public water

¹ On or about December 21, 2021, Applicant filed or submitted to counsel in this proceeding a document entitled “Applicant’s Response to City of Ennis’ Request for Contested Case Hearing for New TPDES’S (sic) Permit No. WQ0015932001.” By its letter dated December 1, 2021, the Commission required Applicant’s response to the any requests for a contested case hearing to be filed by December 13, 2021. Thus, Applicant’s response is not timely filed, and the Commission should not consider any issues raised therein.

² The Executive Director states that the County’s additional hearing request in response to the ED’s Response to Comments was filed on October 15, 2021, one day after the close of the hearing request period, and is therefore untimely and was not considered by the ED. The County notes that the issues that it raised in its October 15 response discussed and elaborated upon the issues already raised in its previous hearing request that the ED considers timely filed. The County therefore respectfully notes that the Commission may consider the County’s October 15, 2021 response, but that in any event the County has timely requested a hearing and raised issues should be referred to the State Office of Administrative Hearings, and that demonstrate that the County is an affected person.

and ensure compliance with water quality standards and discharge permit terms. This authority over issues contemplated by the Application confer the County affect party status.

In its Response to Ellis County’s Hearing Request, the ED concludes that “[n]either the Texas Water Code nor other applicable statutes give the County standing solely based on its status as a county, and that the County did not demonstrate how it was an affected person on an individual basis” or that it “has statutory authority over or interest in the issues relevant to this application.” ED Response at 8. The County respectfully disagrees, and requests a contested case hearing based on the issues it has raised in its previous, timely filed request for hearing as well as the present Reply.

The County is an “affected person” entitled to a contested case hearing on the issues raised in its hearing request under 30 Tex. Admin. Code § 55.203 because the County has interests related to legal rights, duties, privileges, powers, or economic interests affected by the Application that are not common to the general public. A relevant factor in determining whether the County qualifies as an affected person is the fact that the County has direct statutory authority over or interest in issues relevant to the Application. 30 TEX. ADMIN. CODE § 55.203(c)(6). Local governmental entities, such as the County, with authority under state law over issues contemplated by an application, may be considered affected persons under 30 Tex. Admin. Code § 55.203.

Specifically, as a “local government,” as that term is defined by Texas Water Code § 26.001, the County has specific statutory authority to inspect the public water in its geographic area to assess whether the quality of the water meets water quality standards, and to determine whether wastewater dischargers are discharging in compliance with the requirements of a TCEQ-issued permit. Texas Water Code § 26.171. The County also has authority to enter property to make inspections and investigations of conditions relating to water quality. Texas Water Code §

26.173. The County has the right to bring a civil suit against any person that violates or threatens to violate Chapter 26, or any permit issued thereunder. Texas Water Code § 7.351. As a potential enforcer of a TCEQ-issued permit, the County has an interest in ensuring that any permit issued by the TCEQ in this matter meets the state law requirements, is protective of water quality, and is enforceable. This interest is unique to the County and is not common to the general public.

The County also has authority to protect the public health and safety of the citizens within its jurisdiction. With that authority, the County has an interest in protecting creeks, rivers, and lakes within its jurisdiction, particularly those water bodies that supply drinking water to communities within the County. Applicant is proposing to discharge effluent into a tributary of Lake Bardwell, which is the sole drinking water supply for the City of Ennis, Texas, and is also a drinking water supply for the City of Waxahachie, both of which are within Ellis County. Lake Bardwell has been designated as a sole-source drinking water supply lake. *See* 30 TEX. ADMIN. CODE § 307.10, Appendix B. Lake Bardwell, which is in Segment 0815 of the Trinity River Basin, is included in the State's inventory of impaired or threatened waters for the amount of sulfate in the segment. *See* 2020 Clean Water Act Section 303(d). The County is concerned that the Application threatens the drinking water supply of the citizens of Ellis County, which the County has authority to protect pursuant to its police powers. For this reason, the County is an affected party, as it has an interest that is not common to the general public.

Finally, the County is an affected person because the Application contravenes the State of Texas' regionalization policy. *See* Texas Water Code §§ 26.003, 26.081, and 26.0282. The County believes that granting this Application would be contrary to the regionalization policy and lead to the unnecessary operation of smaller scale, less sophisticated package plants in lieu of more economical and efficient regional wastewater plants. As an inspection and investigative entity

with the power to enforce permits, it is in the County's interest to ensure that Texas' regionalization policy is implemented to its fullest extent in order to minimize potential sources of pollution and impacts on water quality. Failure to minimize potential sources of pollution uniquely impacts the County as an investigative entity and enforcer of permits. This interest is not common to the general public.

Because the Application affects numerous interests and the statutory authority of the County, the County should be considered an affected person and the TCEQ should grant the County's request for a contested case hearing on the Application.

III.

REPLY TO OPIC'S RESPONSE TO THE COUNTY'S HEARING REQUEST

The County agrees with OPIC's recommendation related to the County's status as an affected person based upon the County's interest in issues relevant to the Application.

IV.

REPLY TO ED'S AND THE APPLICANT'S LIST OF ISSUES TO REFER

The County agrees with OPIC's recommended list of issues, and with the ED's recommended list of issues 1 through 5. The County, however, proposes a modification to the ED's Issue 3, and recommends that ED's Issue 6 be referred to SOAH. The County disagrees with the Applicant's characterization of the issues regarding need and regionalization.

The Executive Director recommends several issues be referred to the State Office of Administrative Hearings (SOAH) for consideration but suggests that the issue regarding emerging contaminants not be referred because the TCEQ does not have regulations regarding emerging contaminants. The Applicant, in his late filed response, claims that the issues of need and

regionalization should not be referred because there are no material issue of disputed fact. The County disagrees with the ED and the Applicant.

With respect to the emerging contaminants, the TCEQ does have regulatory authority over them. Specifically, surface waters must not be toxic to humans from ingestion, consumption of aquatic organisms, or contact with the skin, or to terrestrial or aquatic life. 30 TAC § 307.4(d). Simply because the TCEQ has not yet adopted specific standards to address emerging contaminants does not render their impact on water quality irrelevant. It is the TCEQ's responsibility to ensure that these contaminants are not toxic to humans or aquatic or terrestrial wildlife, particularly if the proposed discharge is to a sole drinking water supply source. Thus, whether the TCEQ has adequately addressed emerging contaminants in the draft permit is a disputed issue of material fact that is within the TCEQ's jurisdiction to address. This issue should be referred to SOAH for consideration.

As for the Applicant's untimely claims that Ennis has mislead the TCEQ regarding the distance to Ennis' collection system and the relative costs of service, the Applicant's own arguments demonstrate there is a material dispute of fact regarding whether the Applicant should be required to seek a regional solution to his wastewater needs. Ennis contends that the Applicant should have been required to first request service from the City because the system is within three miles of Ennis's collection system, and that the Applicant's permit should be denied because there is a regional system to which the Applicant could connect. The County agrees with Ennis' assessment regarding the distance between the Applicant's development and Ennis' system and the need for regionalization. These issues should be referred to SOAH for consideration.

The County further suggests that the third referred issue identified by the ED be revised for clarity. As drafted, it states: “**Issue 3.** Whether the draft permit is protective of surface and groundwater quality in Lake Bardwell.”

The County respectfully suggests that this issue be changed as follows: “**Issue 3.** Whether the draft permit is protective of surface water in Lake Bardwell and its contributing waterways and groundwater in Ellis County.”

V.
CONCLUSION

The County urges the TCEQ to find that the County is an affected person and grant its request for a contested case hearing on this Application and refer the issues as set by the County herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify by my signature below that on December 30, 2021 a true and correct copy of the above and foregoing document was served on all parties on the attached Mailing List via electronic or regular mail.

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