

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

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

**PROTESTANTS' RESPONSE TO APPLICANT'S
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 files this Response to Applicant's Exceptions to the Proposal for Decision (PFD) and, in support thereof, would show the following:

I. INTRODUCTION

Protestants disagree with the exceptions to the PFD proposed by Applicant, Stephen Selinger (Applicant or Selinger). In his exceptions, Selinger continues to reiterate his arguments about the record evidence of land ownership, and his erroneous contention that his due process rights have been violated. But the record is clear: Selinger was not the owner of the land where the proposed facility will be located when he applied for the proposed Texas Pollutant Discharge Elimination System (TPDES) permit as required by law, despite certifying under oath that the information in the application was correct. Therefore, the Commission should deny Selinger's exceptions to the PFD.

II. RESPONSE TO EXCEPTIONS

A. Response to Exceptions to the PFD's analysis and recommendations regarding landownership.

Contrary to Selinger's arguments, the ALJ correctly states the Findings of Fact and Conclusions of Law related to the land ownership of the site of the proposed facility. (PFD pgs. 8, 10, Findings of Fact nos. 55. – 59; Conclusion of Law no. 14). Selinger animatedly reiterates the same arguments that he put forth in his closing argument (and in various other filings after the evidentiary record was closed) to try to cure the fact that he did not own the property when he submitted his application, despite swearing under oath that he did. Mr. Selinger did in fact have multiple opportunities – not “**ZERO**,” as he indicates – to properly present evidence on the issue of landownership, as detailed more fully in Protestants' Response to Closing Arguments. He failed to prefile evidence and testimony by the applicable deadlines, and his arguments misconstrue the applicable rules, deadlines, and orders that all parties were required to adhere to.

Regardless of Mr. Selinger's apparent misunderstanding of the contested case hearing process, he cannot show that he was the owner of the land at the time that he submitted his Application. The evidence in the case demonstrates that in fact he was not, and only attempted to remedy the inaccuracies of the Application after the fact with self-serving shell transactions. Mr. Selinger should not be excused from complying with the legal and procedural requirements and deadlines applicable in this case. As the Applicant, it was his burden to comply with all applicable laws and regulations, and the evidence demonstrates that he has failed to do so. The above referenced sections of the PFD are proper, and Selinger's exceptions should be denied.

B. Response to Exceptions to the PFD's analysis and recommendations regarding Selinger's Due Process Rights.

Likewise, the ALJ correctly concludes that Selinger's due process rights were not violated during the contested case hearing or thereafter. Selinger takes issue with two sections of the PFD: (1) "Selinger was given the opportunity to prefile exhibits concerning the issue of land ownership by January 10, 2023, and he failed to do so."; and (2) "Selinger had an opportunity to cross-examine both witnesses on that issue during the hearing on the merits." Because 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." (PFD pgs. 36-38). Contrary to Selinger's arguments, he failed to prefile testimony or evidence by the deadlines in accordance with the applicable rules and orders in this case, and he continues to miss the point that he needed to present evidence that he owned the property at the time of submitting his application. Live testimony at a hearing cannot circumvent Applicant's obligation to prefile written evidence that would be relied upon at hearing. Selinger was given the opportunity to prefile written testimony and evidence on the ownership question, and then was given a second opportunity to do so by January 10. He did not do so either time – a problem of his own making – which is precisely why he was not allowed to provide live testimony on the subject of ownership at the hearing on the merits. Selinger's arguments to attempt to take a third or fourth bite of the apple are unpersuasive. The above referenced sections of the PFD are proper, and Selinger's exceptions should be denied.

C. Response to Transcript Costs.

Mr. Selinger provides no reasonable basis for his argument that the Protestants should bear the entirety, or alternatively 75%, of the transcript costs. As the ALJ properly noted, 30 Texas Administrative Code section 80.23(d) lists factors that the Commission can consider in allocating

reporting and transcript costs among parties. Here, Mr. Selinger submitted an application for a permit to discharge wastewater within the jurisdiction of a county and two cities, seeking the privilege of a state permit to benefit his proposed development. The County and Cities filed protests on behalf of the citizens within those jurisdictions. The ALJ found that the application should be denied, and moreover, and that the Applicant submitted false information to the Commission. The listed factors weigh in favor of Mr. Selinger bearing his own transcription costs, and as the ALJ noted, he failed to present evidence that justified otherwise. The taxpayers of the County and Cities should not bear the costs of Mr. Selinger's attempt to benefit his private development.

The Protestants do not except to the ALJ's allocation of the costs in the PFD.

III. CONCLUSION AND PRAYER

The Protestants respectfully request that the Commission deny Applicant's exceptions and recommend the PFD with the corrections as set out in Protestants' Exceptions to the PFD. The Protestants respectfully request any other relief to which they are entitled.

Respectfully submitted,

Emily W. Rogers
State Bar No. 24002863
erogers@bickerstaff.com

Joshua D. Katz
State Bar No. 24044985
Jkatz@bickerstaff.com

Stefanie P. Albright
State Bar No. 24064801
salbright@bickerstaff.com

Kimberly G. Kelley
State Bar No. 24086651
kkelley@bickerstaff.com

BICKERSTAFF HEATH DELGADO ACOSTA LLP
3711 S. MoPac Expressway
Building One, Suite 300
Austin, Texas 78746
Telephone: (512) 472-8021
Facsimile: (512) 320-5638

BY: Emily W. Rogers
Emily W. Rogers

Attorneys for Protestants

CERTIFICATE OF SERVICE

I hereby certify that on May 26, 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
Emily W. Rogers