

BEFORE THE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

9 JAN '23 10:55

IN RE: TCEQ NO. 2022-0324-MWD

APPLICATION BY CRYSTAL SPRINGS WATER COMPANY, INC.
FOR TPDES PERMIT NO. WQ0016005001

**PROTESTANTS' EXCEPTIONS TO THE
PROPOSAL FOR DECISION ON SUMMARY DISPOSITION**

I.

EXCEPTIONS TO THE PROCEDURAL HISTORY

1. The Location of the “Administratively” and “Technically” Complete Application WQ0016005001 Plant Construction. The “Proposal for Decision on Summary Disposition”, hereafter “Proposal”, omits a very important original challenge to the Application determined by the Executive Director to be “administratively” and “technically” complete. As this determination became indispensable to the Applicant’s efforts to achieve “summary disposition” it is important to note that from the outset Protestants Budd and Liedtke complained that the Application for Plant construction was inside the 100 Year Flood Plain. As the Application makes no mention of the Plant being built in the 100 Year Flood Plain Protestants complained it could not be complete either “administratively” or “technically”. The first mention of this fact was first raised by Protestants’ initial public comments and virtually ignored by the Executive Director’s response to Protestants’ initial public comments. That the Plant is proposed to be built in the 100 Year Flood Plain though acknowledged by Applicant’s representatives and engineers, no plans have been included in the Application itself for measures to address this reality. And yet, the efforts for Summary Disposition rely completely on the fact that the Executive Director found the Application

to be “Administratively” and “Technically” complete to be a prima facie case for the Draft Permit, itself, to be approved. It is a fiction that has pervaded the process from the start of the public notice and comment part of the process to date, i.e., that the Application is “administratively” and “technically” complete. The Draft Permit was issued with no physical inspection of the property. The Draft Permit was issued without a single measure included in Plant construction for dealing with the effects of the Plant being built in the 100 Year Flood Plain. Unfortunately, there is more.

2. Location of the Outfall-Initial Point of Discharge of Effluent. The initial discharge of effluent from the Plant is alleged to be to an “unnamed tributary of Caney Creek”. The Application attempts to describe what would be a body of water that flows to Caney Creek, and there is no water that will carry the effluent after discharge to Caney Creek. TCEQ, for obvious environmental reasons, expects that a stream of flowing water will take the effluent away thence to a larger body of flowing water, in this instance Caney Creek, and onto its eventual destination. The initial discharge is to dry land. The only time there is water anywhere near the point of discharge is when the area is flooded. An Application that is misleading cannot be “complete” either administratively or technically.

Additionally, the Application does not mention that the initial discharge of effluent is to adjacent land-owners in the form of Montgomery County storm drainage ditches and culverts. The Plant is located on the East side of Crockett Martin Road, and Caney Creek is located on the west side of Crockett Martin Road. The effluent had to get from one side of the road where the Plant is located to the other side of the road. To do this the discharge has to be in ditches and culverts to carry to the effluent to the other side of Crockett Martiin Road. Of course the discharge then is to an adjacent land owner, not mentioned in the Application. Rather, the Application does not mention the adjacent land-owner, P. Tech Tubular, nor that this adjacent land-owner is willing to

grant an easement or right-of-way for \$50,000 which is a price Applicant is unwilling to pay. There is no agreement between Applicant and either adjacent land-owners to discharge effluent in their drainage ditches, culverts nor for the effluent to be drained onto the adjacent land-owner's property without first paying \$50,000 for the privilege. And, as always, there is more.

The Application does not mention that the initial discharge of effluent, once it travels through County drainage ditches and culverts thence to dry land owned by an adjacent land - owner not Applicant, the drainage onto dry land is into the Montgomery County Flood Way. No agreement had been reached with Montgomery County to discharge into its Flood Way, and no agreement can be reached. It would violate federal law. An Application in such condition, "malum prohibitum per se, simply cannot be deemed administratively and technically complete especially when the answers given by the Applicant regarding effluent discharge and adjacent land owners on the Application itself are, at best, misrepresentative of the truth, and at worst, even worse.

3. Conclusion. It is simply misleading to believe the procedural history of this matter began June 18, 2021 when Applicant filed the Application, proceeded to July 26, 2021 and September 17, 2021 when the Executive Director determined the Application to be administratively and technically complete, respectively, and on to preparation of the Draft Permit, and on to the Commissioners unanimously ordering a contested case hearing on June 22, 2022. Protestants were bound to follow the procedure set out for obtaining notice and timely preparation and filing of their public comments, replies to responses to those comments, requests for a contested case hearing and replies to responses to that request, then to appear before the Commissioners as the Executive Director did in opposing the contested case hearing. The Commissioners voted unanimously to reject the Executive Director's opposition to the contested case hearing that never took place in this matter.

How that contested case hearing did NOT take place is what brings us before the Commission, again. This time, like last time, the facts have not changed. The same proposed defects in this Application have been neither answered nor settled amicably between the parties. *The two issues originally approved by this Commission for resolution in the contested case hearing have not been answered. No discovery has been conducted by Applicant. No affidavits or statements not under oath have been provided by witnesses Protestants named with summaries of the areas of inquiry for each witness. Protestants have not neglected the process.*

There have been hours of settlement meetings, meetings with the principles or their representatives and engineers at the site, in their offices and over the phone. The Executive Director did the heavy lifting for the Applicant in the administrative law process until Applicant retained counsel. Counsel took the first opportunity to move summary disposition, not after conducting discovery and presenting evidence to answer the issues raised by the Commission. Rather, we are before the Commission, again, to determine whether Protestants' inaction in the face of apparent needed action is sufficient to dispose of months of opposition to this Application and grant summary disposition with no answers, no evidence and no factual resolution to the issues ordered by the Commission be the subject matter of the inquiry in the contested case hearing.

Summary disposition is sought by Applicant on the grounds that what the Executive Director has already approved as administratively and technically complete constitutes a prima facie case for approval of the Application. The case has not moved one administrative inch past where it was when this Commission ordered a contested case hearing over the Executive Director's lone objection. All that is different is that Counsel for Applicant claims Protestants have not denied the "prima facie case", therefore, Applicant wins by default. It is not that simple. Protestants have

filed for rehearing. Applicant has not filed a response, to date. At a bare and forgiving minimum the motion for rehearing should be resolved first as it is returnable to the Commission as well.

We are talking about building a wastewater treatment plant. The Commissioners are bound by their duty to protect the environment while approving reasonable and measured economic development. The Commissioners are not moderating a debate and declaring a winner. Everyone “wins” with the Commissioners discharging their responsibilities regardless of the positions of the parties. Rather, what is important is what each Commissioner, over the Executive Director’s objection, determined needed to be answered in the hearing that was ORDERED. Summary disposition provides no answers to the issues the Commissioners have already deemed relevant enough for both sides to answer.

One of two things is occurring here: Either (1) Applicant does not understand the importance of the process and views this process as an academic competition subject to the Commissioners judging who wins; or (2) Applicant understands fully the process, its importance, and Applicant is seeking to just avoid the contested case hearing altogether because Applicant knows the answers to the issues presented by the Commissioners, already.

Either way, there seems little practical reason for declaring Applicant a winner without Applicant first answering the issues presented by the Commissioners. Accordingly, Protestants object to summary disposition, for the reasons stated in the motion for rehearing, and move the contested case hearing be re-scheduled for Judge DeAngelo to preside

II.

Exceptions to the Findings of Fact

1. Protestants object to the findings of fact that proper notice was received by Protestants' Representative Liedtke from Applicant's Counsel. The certificate of service does not show email service to Liedtke, but does show email service to all other parties on October 25, 2022. Liedtke was not served until November 15, 2022 via email from Applicant Counsel's legal secretary, a copy of such service is attached to the motion for rehearing.

2. Applicant Counsel's motion for summary disposition contains a certificate of service that is not in compliance with the requirement that service is required to contain the named recipient of service, the manner of service and the date on which service was perfected. Service, according to the certificate, was not perfected on Liedtke on October 25, 2022. Service was perfected by Counsel's secretary November 15, 2022, as is shown as an exhibit on Protestants' motion for rehearing, reference to which is made herein for all purposes as though attached hereto and incorporated herein for all purposes.

3. At the time of the hearing on the motion for summary disposition the motion had already been DENIED by Order of the Court hearing the motion on November 4, 2022, before Liedtke was served with the motion for summary disposition or permitted to respond to the motion for summary disposition; and

4. At the time of the hearing Liedtke had not had 15 days to respond to the motion for summary disposition. 1 T.A.C. 155.505; Liedtke was not served until November 15, 2022 which meant his response was due by November 30, 2022, and the hearing was held 2 days prior and the Order granting summary disposition was entered November 29, 2022, prior to Liedtke's response to the motion being due for filing; and

5. At the time of the hearing Liedtke was suffering flu symptoms, Co-Protestant Budd had COVID and was in no condition to appear, and Liedtke tried to appear but fell asleep waiting for the hearing to begin and awoke after the hearing was over; and there was no evidence that Liedtke intentionally did not appear at the hearing or showed conscious indifference to an order of this Court; and

6. In effect, death penalty sanctions were imposed on a Party Representative, Liedtke, for his non-appearance, and on a Party, Co-Protestant Budd, without notice and an opportunity to be heard; TCEQ Rules sec. 80.107 (a)(3)(4)(5)(6); and whereas this Court had discretion to enter such sanctions, and enter judgment for Applicant for Liedtke's non-appearance, the Court's discretion extends only to actions taken after notice and an opportunity to be heard; and

7. There are bona fide issues that exist to oppose the motion for summary disposition:

a. Applicant's Counsel made no reference to the issues certified by the Commission to be addressed in the contested case hearing; 1 TAC 155. 505 (c)(1)

b. Applicant did not reference what summary disposition "evidence" was relied upon for granting summary disposition, specifically as it related to the issues certified by the Commission for the contested case hearing, *Id.*, supra. Sec. 155. 505 (c) (2); and

c. Applicant's motion did not contain the mandatory language in the NOTICE TO PARTIES required by Sec. 155. 505 (c) (3); and

d. The record was closed prematurely before Liedtke's response was due and further proceedings are necessary; Sec. 155. 505 (f)(3)(C); and

e. Summary disposition was entered on the erroneous presumption that Liedtke had received notice of the filing of the motion on October 25, 2022, and he was not served until November 15, 2022, by Applicant Counsel's legal secretary, as is shown by the exhibits

attached to the motion for rehearing, reference to which is hereby made for all purposes and such exhibits being incorporated by reference for all purposes herein as though attached hereto and made a part of this filing.

III.

Exceptions to the Conclusions of Law

1. Protestants except to the conclusion that the Applicant complies with 30 TAC 309.13 (a).; and any finding or conclusion that the Application is technically or administratively complete with respect to the plant being built in the 100 Year Flood Plain or that the Application makes sufficient provision for that reality with respect to protecting the Plant from inundation by flood waters; and

2. Protestants except to any finding with respect to the legality of the outfall, the initial discharge of effluent to County drainage ditches, thence to the land of an adjacent land owner with no agreement with that land owner for discharge of effluent on his property.

3. These were the two issues submitted for the contested case hearing and Proponent objects to any finding or conclusion of law that the evidence supports the Application being protective of the rights of adjacent land owners or protective of the quality of water when effluent is to be discharged on dry land; and

4. An Application that misrepresents the outfall ... i.e., the initial discharge of effluent and where that will take place, and that will take place on dry land, is neither technically nor administratively complete to the extent of PROTECTING the quality of water.

Respectfully submitted,

Brent Liedtke, representative

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CERTIFICATE OF FILING BY MAIL

I certify that the original and seven conforming copies of this document were filed by mail by depositing same in the U.S. mail, postage prepaid, and addressed to Laurie Gharis, Chief Clerk, TCEQ, P.O. Box 1487, Austin, Texas 78711-3087 on ~~December 27, 2022.~~ **Jan. 3, 2023**

CERTIFICATE OF SERVICE

The following were served at their listed email addresses on the 27th day of December, 2022:

Pranjal Mehta
Aubrey Pawleka
Vic McWherter
TCEQsoah
Cody Faulk

Brent Liedtke, pro se
Representative Pro Se
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