

TCEQ Docket No. 2022-0531-MWD

PETITION BY 1817 LACEY, Ltd. to	§	BEFORE THE TEXAS
REVOKE TPDES PERMIT NO.	§	COMMISSION
WQ0015722001 HELD BY	§	ON
SIGMAPRO PROPERTIES, LLC	§	ENVIRONMENTAL QUALITY

EXECUTIVE DIRECTOR'S RESPONSE TO PETITION TO REVOKE

The Executive Director (ED) of the Texas Commission on Environmental Quality (**Commission** or TCEQ) files this Response to the Petition filed under Title 30 of the Texas Administrative Code (**30 TAC**), section (**§**) 305.66. on April 21, 2022, by 1817 Lacey, Ltd. (**Petitioner**) to revoke SigmaPro Properties, LLC's (**SigmaPro**) Texas Pollutant Discharge Elimination System (**TPDES**) permit, No. WQ0015722001 (**the Permit**), which authorizes the SigmaPro Wastewater Treatment Facility (**SigmaPro facility**). This matter is not currently set for Commission hearing.

I. FACILITY DESCRIPTION

The SigmaPro facility is located at 13241 Harmon Road, in Tarrant County, Texas 76177, and is an activated sludge process package plant operated in the extended aeration mode. Treatment units include an aeration basin, a final clarifier, a sludge holding tank, and a chlorine contact chamber. The SigmaPro facility serves domestic sources for SigmaPro Properties, a commercial site. The Permit (No. WQ0015722001) authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 9,500 gallons per day (GPD) with the treated wastewater discharged to an unnamed tributary; then to Buffalo Creek; then to Henrietta Creek; then to Elizabeth Creek; then to Denton Creek; then to Grapevine Lake in Segment No. 0826 of the Trinity River Basin.

The unclassified receiving water uses are limited aquatic life use for both the unnamed tributary and Buffalo Creek. The designated uses for Segment No. 0826 are high aquatic life use, public water supply, and primary contact recreation. The effluent limitations in the Permit will maintain and protect the existing instream uses. In accordance with 30 TAC § 307.5 and the TCEQ's *Procedures to Implement the Texas Surface Water Quality Standards* (June 2010) (**Ips, TSWQS**) an antidegradation review of the receiving waters was performed. The Tier 1 antidegradation review preliminarily determined that existing water quality uses will not be impaired by the discharge,

numerical and narrative criteria to protect existing uses would be maintained and protected, that no water bodies with exceptional, high, or intermediate aquatic life uses were present within the stream reach assessed, and a Tier 2 antidegradation review was not required. However, significant degradation of water quality is not expected in water bodies with exceptional, high, or intermediate aquatic life uses downstream.

Effluent limits in the Permit for the conventional effluent parameters (e.g., 5-day Biochemical Oxygen Demand or Carbonaceous Biochemical Oxygen Demand (**BOD₅**, **CBOD₅**) and Ammonia Nitrogen (**NH₃-N**)) are based on stream standards and waste load allocations for water-quality limited streams as established in the TSWQS and the State of Texas Water Quality Management Plan (**WQMP**). Additionally, the effluent limits were reviewed for consistency with the WQMP, and while the limits, including the limits for Total Suspended Solids (**TSS**) and Dissolved Oxygen (**DO**), are not contained in the approved WQMP, the limits will be included in the next WQMP update.

The effluent limits, based on a 30-day average, are 10 mg/l CBOD₅, 15 mg/l TSS, 3.0 mg/l NH₃-N, 126 colony forming units (CFU) or most probable number (MPN) of *E. coli* per 100 ml and 4.0 mg/l minimum DO. The effluent must contain a chlorine residual of at least 1.0 mg/l and must not exceed a chlorine residual of 4.0 mg/l after a detention time of at least 20 minutes based on peak flow. These effluent limits and other permit conditions comply with the TSWQS (30 TAC §§ 307.1-10, *eff.* 7/22/2010) and the EPA-approved portions of the 2014 TSWQS (*eff.* 3/6/2014). Finally, the effluent limits meet the requirements for secondary treatment and the requirements for disinfection according to 30 TAC Chapter 309, Subchapter A: Effluent Limitations.

The SigmaPro discharge is not expected to influence any federal endangered or threatened aquatic or aquatic-dependent species or proposed species or their critical habitat. That determination is based on the United States Fish and Wildlife Service's (USFWS's) biological opinion on the State of Texas authorization of the TPDES (September 14, 1998; October 21, 1998, update). To make that determination for TPDES permits, TCEQ and EPA considered aquatic or aquatic-dependent species occurring in watersheds of critical concern or high priority as listed in Appendix A of the USFWS biological opinion. The determination is subject to reevaluation due to subsequent updates or amendments to the biological opinion. The Permit did not require EPA review with respect to the presence of endangered or threatened species.

The Permit includes Sludge Provisions according to the requirements of 30 TAC

Chapter 312, Sludge Use, Disposal, and Transportation. Sludge generated from the treatment facility may be disposed of at a TCEQ-authorized land application site, co-disposal landfill, or wastewater treatment facility, but will be hauled by a registered transporter to the City of Maypearl Wastewater Treatment Facility, permit No. WQ0010431001, to be digested, dewatered, and then disposed of with the bulk of the sludge from the plant accepting the sludge.

Lastly, the Permit includes a requirement for SigmaPro to provide nuisance odor prevention plan for the treatment facility according to 30 TAC § 309.13(e)(2), which SigmaPro submitted on August 30, 2018.

II. PROCEDURAL BACKGROUND

The TCEQ received SigmaPro's application on August 30, 2018, and declared it administratively complete on October 8, 2018. SigmaPro published the Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) in English in the *Ft. Worth Star Telegram* and in Spanish in *La Estrella* on October 20, 2018. On November 29, 2018, the ED completed the technical review of the application and prepared the Permit establishing the conditions under which the SigmaPro facility must operate. SigmaPro published a Combined NORI and Notice of Application and Preliminary Decision for a Water Quality Permit (NAPD) in English on January 26, 2019, in the *Ft. Worth Star Telegram*, and in Spanish on February 9, 2019, in *La Estrella*, to add to the description of the discharge route in the original NORI by including Elizabeth Creek. Once the NORI was published, SigmaPro placed the application at the Haslet Public Library in Haslet, Texas for viewing and copying. The ED's preliminary decision, and the Permit were available for viewing and copying at the library, as well. The public comment period closed on March 11, 2019, and the ED signed the Permit on March 21, 2019. The filing date for a Motion to Overturn the ED's decision to issue the permit, was April 22, 2019. SigmaPro's application was received after September 1, 2015, and declared administratively complete after September 1, 1999, thus it is subject to the procedural requirements and rules adopted pursuant to HB 801,¹ and SB 709,² implemented by the TCEQ in its rules in 30 TAC Chapters 39, 50, and 55.

¹ House Bill 801, 76th Legislature, 1999.

² Senate Bill 709, 84th Legislature, 2015.

III. LEGAL AUTHORITY

(A) **SigmaPro Facility**

As part of the permit application for discharging wastewater from the SigmaPro facility, SigmaPro was required to identify the property boundaries of landowners surrounding SigmaPro's property, the property boundaries of the SigmaPro facility, as well as the property boundaries of all landowners adjacent to the discharge route for at least on stream-mile.³

(B) **Mailed Notice**

As part of the permit application process at the TCEQ, the Office of the Chief Clerk (**the OCC**) is required to mail notice to "landowners named on the application map or supplemental map, or the sheet attached to the application map or supplemental map."⁴ The OCC must mail notice to "the landowners named on the application map . . . or the sheet attached to the application map."⁵ For a municipal TPDES permit application, this information is submitted as part of Domestic Administrative Report 1.1. The information must include the adjacent landowners' names and addresses "as can be determined from the current county tax rolls or other reliable sources."⁶

(C) **Petition to revoke**

"A person affected by the issuance of a permit or other order of the Commission may initiate proceedings for the revocation or suspension by forwarding a petition to the [ED] to be filed with the Commission."⁷ A TPDES permit is not a vested right and can be revoked for good cause after the Commission provides an opportunity for a public hearing.⁸ Therefore, the options for the Commission are to deny a petition or to refer the matter to the State Office of Administrative Hearings (**SOAH**) to develop findings of fact and conclusions of law on the matter for Commission deliberation and decision. Good cause for suspension or revocation includes: "the permittee's failure in the

³ TCEQ Domestic Wastewater Permit Application, Domestic Administrative Report 1.1 Section 1. (June 1, 2017).

⁴ 30 TEX. ADMIN. CODE § 39.413(1) (West 2022).

⁵ *Id.*

⁶ 30 TEX. ADMIN. CODE § 305.48(a)(2) (West 2022).

⁷ *Id.* § 305.66(d).

⁸ TEX. WATER CODE ANN. § 7.302(b)(5) (West 2022); 30 TEX. ADMIN. CODE § 305.66(a) (West 2022).

application or hearing process to disclose fully all relevant facts, or the permittee's misrepresentation of relevant facts at any time."⁹ This is the "significant" violation cited by Petitioner in its Petition to Revoke.

Under the TCEQ rules for petitions to revoke, the Commission may revoke a permit if it finds after notice and hearing that the permittee "made a false or misleading statement in connection with an original or renewal application either in the formal application or in any other written instrument relating to the application submitted to the commission, its officers, or its employees."¹⁰ However, before doing so, the Commission must find that the violation is significant and the permittee "has not made a substantial attempt to correct" the violation.¹¹ In HB 801 permitting actions, when an application is pending before the Commission, the burden of persuasion or proof always falls on an applicant. In all other instances, the burden of proof is on the moving party by a preponderance of the evidence.¹² See 30 TAC § 80.17(a). Accordingly, the burden of proof in this case is on the Petitioner because they are the moving party. A petition to suspend or revoke does not arise during the pendency of an application before the Commission, but rather comes after the issuance of the permit is final. Additionally, the ED is not the petitioner in this case; rather, the petition originates from persons who allege they are affected.

IV. ANALYSIS OF THE PETITION TO REVOKE

(A) Petitioner's Allegations

Petitioner states they are the owner of 1817 Lacy Drive, the property immediately adjacent to the wastewater discharge point authorized by the Permit, since 2005, and that the discharge, directly and negatively, affects Petitioner's property.

Petitioner alleges that SigmaPro misrepresented facts on the landowner map and the affected landowner information sheet attached to the landowner map, that was submitted with the Permit's application. Specifically, Petitioner alleges that SigmaPro falsely identified a different entity as the owner of 1817 Lacy Drive.

Petitioner alleges that because of SigmaPro's alleged misrepresentation related

⁹ *Id.* § 305.66(a)(4).

¹⁰ *Id.* § 305.66(f)(3).

¹¹ *Id.* § 305.66(g)(1).

¹² 30 TEX. ADMIN. CODE § 80.17(a). (West 2022).

to the inaccurate Adjacent Landowner Map and List submitted with the Permit's application, Petitioner would have been considered an adjacent landowner and entitled to receive mailed notice of public notices issued by the OCC for the application. However, Petitioner states that the OCC never mailed the notices Petitioner was entitled to, and the notices would have afforded an opportunity to comment and request a hearing on the Permit's application.

As proof of its claims, Petitioner cites the affidavit of Mabel Simpson, President of the General Partner of 1817 Lacey, Ltd., that Petitioner did not receive any notice of the Permit's application.¹³ Further, Petitioner cites to the affidavit of Mabel Simpson for proof that Petitioner would have vigorously opposed the Permit's application, had Petitioner received proper notice of the Permit's application.

To summarize, Petitioner alleges that SigmaPro manipulated the adjacent landowner map, and thus misrepresented relevant facts or failed to disclose fully all relevant facts regarding adjacent landowners to the Chief Clerk and to the ED. As proof for these allegations, Petitioner points out that 1817 Lacey Drive was marked as "4" on the Adjacent Landowners' Map, but the Adjacent Landowners' List falsely states that "Closner Equipment Co Inc" is the owner of property "4" on the Adjacent Landowners' Map.¹⁴

Further Petitioner alleges that SigmaPro made a material misrepresentation in Attachment C to the Permit's application because Petitioner, not Closner Equipment Co. Inc, was the owner of property "4" at the time the Permit's application was filed and remains the owner today. Critically, SigmaPro's misrepresentation resulted in a lack of notice to Petitioner related to the public notices issued by the OCC for the Permit's application. Petitioner states that nowhere on the Landowner Map or the accompanying Affected Landowner Information sheet, or anywhere else in the Permit's application, is Petitioner's name or mailing address provided as an affected landowner, as it should have been. Furthermore, Petitioner highlights that even the mailing labels included by SigmaPro in the Permit's application for the mailed notice from the OCC to adjacent landowners required by TCEQ rules also falsely lists Closner Equipment as an adjacent landowner and completely fails to include 1817 Lacey, Ltd. as an adjacent

¹³ Petitioner's Exhibit D, Affidavit of Mabel Simpson.

¹⁴ Petitioner's Exhibit A at p.55.

landowner to whom notice of the Permit's application should be mailed.¹⁵ In addition, on Attachment E to the Permit's application, the Buffer Zone Map, Petitioner alleges that SigmaPro again misrepresented Closner Equipment Co. Inc. as the owner of 1817 Lacy Drive.¹⁶

Petitioner alleges that SigmaPro's complete failure to correctly identify in the Permit's application the owner of an adjoining tract, across which the requested discharge would flow, constitutes a clear basis upon which to apply 30 TAC § 305.66, and convene a public hearing and find good cause to revoke the Permit, which was obtained without providing notice to an affected-adjacent landowner. Similarly, Petitioner notes that 30 TAC § 305.66(d) provides that a person affected by the issuance of a TCEQ permit may initiate proceedings for revocation or suspension by forwarding a petition to the ED to be filed with the Commission. Petitioner also notes that 30 TAC § 305.66(e) provides that an affected person must serve notice of the intention and a copy of the petition to be filed on the permittee by, *inter alia*, certified mail, sent to the permittee's last address of record with the Commission, at least 15 days before the Petition for Revocation is submitted to the ED or filed with the Commission for further proceedings. In support, Petitioner points to the affidavit of Casey A. Bell, which Petitioner states shows that Petitioner fulfilled this requirement by mailing to SigmaPro's last address of record with the TCEQ via certified mail a copy of this petition and notice of Petitioner's intention to file the same.¹⁷

Finally, Petitioner alleges that SigmaPro has not made any attempt to correct the violation, which was brought to its attention by letter sent in August 2020; and despite having knowledge that it provided false information in the Permit application's Adjacent Landowner Map and List, related to property immediately adjacent to the discharge point, SigmaPro has rested upon the issuance of the Permit by the TCEQ to continue its discharge, in blatant disregard of the applicable rules. To bolster its allegation, Petitioner references 30 § TAC 305.66(g) that provides that revocation of a permit must be predicated on a finding that the violation at issue is "significant," and that the permit holder or applicant has not made a substantial attempt to correct the violation. Petitioner alludes to TCEQ's adoption of rules that require mailed notice of a NORI and NAPD to adjacent landowners identified in the permit application signifies a

¹⁵ *Id.* at pp. 97-98.

¹⁶ *Id.* at p. 62.

¹⁷ Petitioner's Exhibit E, Affidavit of Casey A. Bell.

fundamental policy choice by the TCEQ that a TPDES permit should not be granted in the absence of such notice.¹⁸ Further, Petitioner argues that SigmaPro's alleged misrepresentation of relevant facts during the application process related to the Adjacent Landowners' Map and List, constitutes a misrepresentation of relevant facts at any time, and qualifies as significant violation of the TCEQ Public Notice Rules.

(B) Affected Person Status

The TCEQ rules, at 30 TAC § 305.66(d), do not define "person affected" in the context of a petition to revoke. However, by analogy, 30 TAC § 55.203, which the ED has looked to in past revocation cases, defines "affected person as one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application."¹⁹ The Commission does not typically equate an "affected person" with a person entitled to mailed notice under the rules. The ED, through the permit application and instructions, directs wastewater permit applicants to submit the names of owners or property immediately adjacent to the area proposed to be permitted. The OCC keeps on file a mailing list of these adjacent landowners.²⁰ These individuals receive mailed notice from the Office of the Chief Clerk; however, a person need not show that they are entitled to receive mailed notice in order to show that they have a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application or permit. Combining this information with 30 TAC § 305.66(d), an affected person in a petition to revoke case would be someone with a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by an issued permit. The interest cannot be common to members of the public.²¹ Section 55.203(c) lists several examples of factors for the Commission to consider when determining if someone meets the affected person definition. They include considering the likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person, and on use of the impacted natural resource by the person²²

A review of the TCEQ's records for the Permit and its application reveals that the mailing list and mailing labels for both the NORI and NAPD do not identify

¹⁸ 30 TAC §§ 39.551(b)(1), (c)(2); 30 TAC § 39.418(b)(2); 30 TAC § 39.413(1) (West 2022).

¹⁹ 30 TEX. ADMIN. CODE § 55.203(a). (West 2022).

²⁰ 30 TEX. ADMIN. CODE § 39.407 (West 2022).

²¹ *Id.* § 55.203(a).

²² *Id.* § 55.203(c)(4)-(5).

Petitioner as the owner of 1817 Lacy Drive, otherwise known as property "4" on the Adjacent Landowners Map and List. Likewise, a review of the online records from the Tarrant County Appraisal District (TCAD) provided by Petitioner, identifies Petitioner as the owner of 1817 Lacy Drive.²³ Given that it appears that Petitioner is the actual owner of 1817 Lacy Drive, otherwise known as property "4" on the Adjacent Landowners Map and List, it is likely that Petitioner should have been included on the Adjacent Landowner List and Map for the Permit's application. Additionally, had Petitioner been afforded mailed notice of the NORI and NAPD for the Permit's application, Petitioner would have had an opportunity to submit comments on the application and request a contested case hearing to ensure that its interests were protected.

Therefore, ED finds that Petitioner is an adjacent landowner, possibly affected by the Permit's application, and should have been provided notice of the Permit's application.

V. RECOMMENDATIONS

Because SigmaPro identified Closner Equipment Co., and not Petitioner, as the adjacent landowner of property "4;" it appears from TCAD records that Petitioner is the owner of 1817 Lacy Dr. (otherwise known as property "4"); the ED found Petitioner to be an adjacent landowner, possibly affected by the Permit's application and likely entitled to notice of the Permit's application; the ED recommends the Commission refer the Petition to SOAH for a hearing on the issues raised in the Petition based on the allegation that SigmaPro made a material misrepresentation during the permitting process by failing to identify the Petitioner as an adjacent landowner in the Permit's application for a new TPDES permit submitted on August 30, 2018.

²³ Petitioner's Exhibit B, web printout of TCAD account no. 0698551: 1817 Lacy Dr., *see also* Exhibit C, a printout of the interactive map linked to the webpage of TCAD account no. 0698551: 1817 Lacy Dr.

Respectfully submitted,

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REPRESENTING THE EXECUTIVE DIRECTOR OF
THE TEXAS COMMISSION ON
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CERTIFICATE OF SERVICE

I certify that on June 3, 2022, the Executive Director's Response to Petition to Revoke TCEQ Permit No. WQ0015722001 was filed with the TCEQ's Office of the Chief Clerk, and a copy was served to all persons listed on the attached mailing list via hand delivery, electronic delivery, inter-agency mail, or by deposit in the U.S. Mail.



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