

TCEQ DOCKET NO. 2023-1430-MWD

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| PETITION BY CATALAUNIAN LLC | § | BEFORE THE |
| REQUESTING INVOLUNTARY | § | |
| TRANSFER OF TPDES PERMIT NO. | § | TEXAS COMMISSION ON |
| WQ0015843001 OR REVOCATION | § | |
| AND REISSUANCE OF PERMIT TO | § | ENVIRONMENTAL QUALITY |
| PETITIONER | | |

**AGUILAS ROBLES, LLC’S REPLY TO THE RESPONSES TO CATALAUNIAN LLC’S
PETITION REQUESTING INVOLUNTARY TRANSFER OR REVOCATION
AND REISSUANCE OF PERMIT TO PETITIONER**

COMES NOW, Aguilas Robles, LLC (Aguilas) and files this Reply to the Responses to Catalaunian LLC’s (Petitioner or Catalaunian) Petition Requesting Involuntary Transfer or Revocation and Reissuance of Permit to Petitioner (Petition), and in support thereof, would respectfully show the following:

I. REPLY TO EXECUTIVE DIRECTOR

The Executive Director’s response to the Petition, particularly Catalaunian’s request for involuntary transfer, is insightful. The Executive Director’s inclusion of the 1989 preamble to title 30 Texas Administrative Code (TAC) § 305.64 clarifies that the involuntary transfer process applies only in those situations where the “existing permittee cannot or will not comply with a permit” and the transfer will minimize or eliminate damage to the environment.¹ As the Executive Director correctly and repeatedly points out, the facility authorized by the permit has not yet been constructed, so there is no potential for damage to the environment and thus no reason to use the involuntary transfer process to strip the permit from Aguilas.² At no time has Catalaunian even argued that involuntary transfer to itself would minimize or eliminate environmental damage, let alone articulate *any* concern that relates to the protection of human health, the environment, or water quality for doing so. The absence of a claim of environmental harm alone demonstrates that

¹ 14 Tex. Reg. 3297(1989).

² Executive Director’s Response to Catalaunian LLC’s Petition to Involuntarily Transfer or Revoke, or Revoke and Reissue Permit No. WQ0015843001 at 2-3.

Catalaunian's self-serving Petition has no merit.³ The Executive Director, who is charged with review and approval of transfer applications, conclusively demonstrates that Catalaunian's Petition for involuntary transfer should be denied.

Likewise, the Executive Director correctly argues that Catalaunian's Petition to revoke must also fail. As Aguilas argued in its Response to Catalaunian's Petition, the two-part test for revocation pursuant to 30 TAC § 305.66(g) creates a high standard. Divesting a permittee of its authorization is a rare and stringent process by design to protect against violations of due process. It is not a trivial matter to revoke an authorization that has gone through staff review, extensive public notice, and, as in this case, a contested hearing process. Before revoking Aguilas' permit, the Commission must find that Aguilas' violations at its unbuilt, non-operational facility were significant *and* that Aguilas has not made a substantial attempt to correct said violations.⁴ Catalaunian cannot even meet one prong of the revocation standard; thus, referral for a hearing to take evidence on grounds for revocation would be a catastrophic misuse of the hearing process.

II. REPLY TO OPIC

The Office of Public Interest Counsel's (OPIC) Response to Catalaunian's Petition reads more like an evaluation of a hearing request than an actual answer to the Petition. After only one sentence of discussion of revocation, OPIC announces that it "finds" Petitioner is an affected person – both impacted and personally affected by the issuance of the permit. OPIC does not bother to explain how that is even possible when Catalaunian was not a property owner at the time the Commission issued the original permit. How is Catalaunian personally affected, in the present tense, by a permit that was issued more than 2 years ago for a facility that is still unbuilt? As Aguilas previously stated, Catalaunian's petition is an unlawful collateral attack on a duly-issued final order of the Commission.⁵

³ Neither has Catalaunian shown itself to be capable of resuming responsibility for the permit in accordance with 30 TAC § 305.64(i)(9).

⁴ 30 TAC § 305.66(g).

⁵ *Carr v. Bell Sav. & Loan Ass'n*, 786 SW2d 761, 765 (Tex. App. – Texarkana 1990, writ denied); *Alamo Express, Inc. v. Union City Transfer*, 309 SW2d 815, 827 (1958) (concluding that a collateral attack on Railroad Commission order was impermissible because administrative statutes provide sole method of attack).

Even if Catalaunian's current land ownership could automatically qualify it as an affected person regarding an existing permit issued more than two years ago, OPIC does not address why a contested revocation proceeding is warranted today in the specific case where Catalaunian cannot meet the two-part revocation test. Would OPIC have Kali Kate Services, Inc. (Kali Kate) joined as a necessary and indispensable party to the revocation of its originally-issued permit? Who would bear the burden of proof – Catalaunian, Aguilas, or Kali Kate? What is the legal standard and, again, as applicable to what party? Would there be a second or separate revocation proceeding for the permit transfer only? What procedural requirements would apply to the revocation of a transferred permit that the Executive Director issued long ago and the time for Catalaunian to file a motion for reconsideration passed long ago? Recall the Petition claims the permit is "invalid ab initio."⁶ How and why would the Commission revoke a void permit and how can Catalaunian be the recipient, even temporarily, of a permit it claims is void? Also, if an Administrative Law Judge imposed a lesser penalty of suspension, how and to whom would that apply, Kali Kate or Aguilas? OPIC's recommendation does not grapple with any of these issues, nor would a contested case hearing address them.

OPIC next "finds" without analysis that it is more likely that the "will be located" clause on the Commission's permit transfer form relates back to the original site, not the future site next door that Aguilas purchased in 2021 and 2022 which is subject to the pending major permit amendment application. OPIC does not have any responsibility for review and approval of transfer applications, or any input in the development of the Commission's form over the years, as that is entirely the job of the Executive Director. There is no basis for OPIC's inference that Aguilas' intent in filling out the transfer form could be false and, therefore, the proper subject of a revocation hearing. Even assuming Catalaunian is correct that the transfer form Section 7 ownership question was answered falsely, which Aguilas obviously and vehemently disputes, OPIC still does not address how the two-part revocation standard can be met. In this case, the two-part standard in § 305.66(g) would not allow for revocation of the permit. OPIC's recommendation to refer the factual issues to SOAH's does not resolve that problem.

⁶ Petition at 9.

As to OPIC's rush to judgment about "what lies in the mind" of Aguilas when it filed the transfer permit form TCEQ-20031 (10/20/2017) in January 2023, that question is easily addressed without a referral to SOAH. As attached Exhibit A clearly shows, after multiple attempts to negotiate a service agreement with Catalaunian in the spring-fall 2022, Aguilas engaged LJA Engineering, Inc. in the later fall of 2022 to prepare both an application for permit transfer (from Kali Kate) and a major amendment (to the same permit) that would move the location of the WWTP and outfall to Aguilas' property. Both filings were clearly part of the same enterprise, intended for the same location belonging to Aguilas. The location of the WWTP identified in the transfer application form is the same location as depicted in the March 17, 2023 major amendment application, the 362 acres Aguilas completed purchase of in the fall of 2022 before the subsequent two 2023 filings.

OPIC's involuntary transfer recommendation also lacks analysis and, frankly, common sense. OPIC recommends a SOAH referral on involuntary transfer, but also concludes that Catalaunian is not a proper interim transferee under 30 TAC § 305.64(i)(9).⁷ Why hold an evidentiary hearing on an involuntary transfer if there is no party to whom the permit could be transferred? Is OPIC suggesting such involuntary transfer proceeding would function more like a traditional permit hearing where Catalaunian could prove up its capacity to own and operate the facility originally permitted on the Hunter Creek Enterprises, LP property? Would Catalaunian be required to prepare an application for review by the Executive Director first, which must undergo two public notices as well as intervention by potential third parties? Again, OPIC's proposed "list of issues" to be referred functions more like a hearing request analysis than a serious evaluation of Catalaunian's demands for revocation or involuntary transfer.

III. CONCLUSION

The Executive Director's analysis is spot on. Involuntary transfer is for situations of non-compliance that leads to environmental damage, and revocation demands a high standard, neither process which is appropriate in the present case. At the same time, OPIC misses the fact that there is no entity to whom the permit could be transferred to involuntarily and Catalaunian is a subsequent land purchaser, two owners removed, who now claims a right to the very permit it

⁷ OPIC's Response to Petition to Involuntarily Transfer or Revoke at 7.

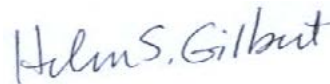
argued is void. Moreover, Aguilas purchased the TPDES permit and adjacent land in good faith, properly and transparently undertook the permit transfer, and now filed an amendment so that the wastewater treatment facility (WWTP) *will be located* on property it owns and controls. These circumstances simply do not rise to the level of significant violation(s) (and lack of substantial attempt to correct said violation) warranting a revocation proceeding.

Catalaunian's real problem is with Kali Kate, which is wholly unrelated to Aguilas. Neither the involuntary transfer nor revocation process should be misused to take the TPDES permit from a competitor. The Petition should be denied and the major permit amendment allowed to proceed without abatement.

IV. PRAYER

WHEREFORE, PREMISES CONSIDERED, Aguilas Robles, LLC respectfully requests that the Commission deny Catalaunian LLC's Petition, and for other further relief to which it may be entitled.

Respectfully submitted,



By: _____

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**ATTORNEYS FOR AGUILAS ROBLES,
LLC**

CERTIFICATE OF SERVICE

I hereby certify that I have served or will serve a true and correct copy of the foregoing document via hand delivery, facsimile, electronic mail, overnight mail, U.S. mail, or Certified Mail Return Receipt Requested on all parties on this 1st day of December 2023:

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Helen S. Gilbert

By: _____
Helen S. Gilbert

EXHIBIT A

JM

From: Joshua Majors josh@trioakdevelopment.com

Subject: Re: Proposal

Date: November 22, 2022 at 11:03 AM

To: Daniel Ryan dryan@lja.com, Jeffrey McKinnie PE jmckinnie@cudeengineers.com, Andy Lowry alowry@cudeengineers.com

Cc: P.E. David Cupit dcupit@cudeengineers.com

Dan

We are tired of waiting on neighbors to the west. Would you mind preparing proposals for a new TPDES permit on our site?

Andy, would you mind sending Dan the land plan that shows the proposed locations of the WWTP?

JSM

Sent from my iPhone

On Sep 26, 2022, at 7:35 AM, Daniel Ryan <dryan@lja.com> wrote:

Rough schedule:

Preparation of transfer and review by legal counsel for submittal – 2 weeks

Review by TCEQ – 30 days (per 30TAC 305.64)

Preparation of major amendment – 60 days from approval, runs parallel to transfer.

Submittal of amendment to administrative completeness – 30 days

NORI publication 30-45 days

Technical review 60 days max

Draft permit / NAPD review – 30 days

NAPD publication & comment – 45 days

ED review of comments and RTC – 60 days if any, if not, goes to commissioners for approval

11 months total is generally the guideline for a new or major amendment.

Daniel Ryan, P.E.

P: 512-767-7325

C: 512-633-8122

From: Joshua Majors <josh@trioakdevelopment.com>

Sent: Monday, September 26, 2022 6:33 AM

To: Daniel Ryan <dryan@lja.com>

Subject: Re: Proposal

[EXTERNAL EMAIL]