

TCEQ DOCKET NO. 2023-1430-MWD

PETITION FOR THE COMMISSION TO	§	BEFORE THE
INVOLUNTARILY TRANSFER, REVOKE,	§	
OR REVOKE AND REISSUE PERMIT NO.	§	TEXAS COMMISSION ON
WQ0015843001 FROM AGUILAS ROBLES,	§	
LLC TO CATALAUNIAN LLC	§	ENVIRONMENTAL QUALITY

CATALAUNIAN LLC’S REPLY ON ITS PETITION FOR THE COMMISSION TO INVOLUNTARILY TRANSFER, OR REVOKE OR REVOKE AND REISSUE PERMIT NO. WQ0015843001 FROM AGUILAS ROBLES, LLC TO CATALAUNIAN LLC

COMES NOW, Catalaunian LLC (the “Petitioner”), by and through its counsel, Paul C. Sarahan, Earth and Water Law, LLC, and files this Reply on its Petition for the Commission to involuntarily transfer TCEQ Permit No. WQ0015843001 (the “Permit”) from Aguilas Robles, LLC (“Aguilas”) to Petitioner, or in the alternative, revoke the Permit or revoke and reissue the Permit to Petitioner. In support thereof, Petitioner would show as follows:

I. FACTS PRESENT AND A QUESTION OF LAW

1. Undisputed Facts

This matter is premised on certain undisputed facts, which are as follows:

- (1) Kali Kate Services Inc. (“Kali Kate”) did not own or have any other property interest in the land located at 6281 FM 1102, New Braunfels, TX 78132 (the “Property”), on which it sought and obtained the Permit from the Commission to construct and operate a wastewater treatment plant (“WWTP”).¹
- (2) Kali Kate, to obtain the Permit, falsely asserted it owned or had a property interest in the Property, and the Commission relied on that false assertion in deciding to issue the Permit to Kali Kate.²
- (3) Aguilas sought an easement from Petitioner to allow Aguilas to construct, operate, use and maintain the WWTP, and Petitioner rejected Aguilas’s request.³

¹ See Petition, at 3.

² See Application, APP-0064 to APP-0072; Executive Director’s Response, at 1-2, 4.

³ Petition, at 5-6.

- (4) Therefore, Aguilar knew Petitioner owned the Property, and neither Aguilar nor Kali Kate owned the Property.
- (5) Aguilar did not own or have any other property interest in the Property at the time it sought and obtained the transfer of the Permit from the Commission.⁴
- (6) Aguilar identified itself as the landowner in response to Section 7 of the Commission's Transfer Application Form TCEQ-20031 (Section 7").⁵
- (7) Notice is not required for a transfer of a permit under TCEQ's rules, so Petitioner was not given notice of, and the ability to contest the Transfer Application.
- (8) Based on Aguilar's assertion of land ownership, the Commission transferred the Permit to Aguilar on February 27, 2023.⁶
- (9) Petitioner only became aware of the transfer of the Permit when Aguilar was required to provide notice of its application for a major permit amendment.

2. Additional Facts Admitted by Aguilar

Through its Response, Aguilar has admitted additional facts that are relevant to the Commission's consideration of this matter. These are as follows:

- (1) Aguilar "purchased" or "acquired" the Permit from Kali Kate.⁷
- (2) Aguilar "paid several hundred thousand dollars for the TPDES permit."⁸

3. Disputed Issue of Law

The information Aguilar provided in Section 7 of the Commission's Transfer Application Form TCEQ-20031 ("Section 7") presents a disputed issue of law. Factually, Aguilar does not dispute that, at the time of its transfer application, it did not own the Property. Instead, Aguilar contends that the information it provided in Section 7 was "true, accurate, and complete" because Section 7 asks for the name of the landowner where the facility is or will be located, and Aguilar

⁴ Aguilar's Response, at 2.

⁵ Petition, Attachment 2 (page 13-14 of the Transfer Application).

⁶ Executive Director's Response, at 4.

⁷ Aguilar's Response, at 1, 2, 7.

⁸ *Id.*, at 6.

intended to construct and operate the WWTP on property Aguilas owned adjacent to the Property. However, through its submission of the TCEQ Core Data Form, Aguilas claimed ownership and responsibility for the WWTP, and retained the location of WWTP as it was and is currently reflected in the Permit. The location Aguilas provided on its Core Data Form submitted as part of the transfer application was “750 LF EAST OF THE INTERSECTION OF HAVENWOOD BLVD & FM1102 ON THE N SIDE OF FM 1102 IN COMAL COUNTY”⁹ -- the same location description used by Kali Kate in its Application.¹⁰ It was not until Aguilas submitted its application for a major permit amendment that Aguilas indicated the WWTP would be located elsewhere.¹¹

The Executive Director agreed, “... when Aguilas submitted the transfer application, it represented to the ED that it owned the property.”¹² The Executive Director also confirmed she relied on the representation of land ownership in granting the transfer of the permit, and it is at least implied that, but for this representation, the Executive Director would not have granted the permit transfer.¹³ The Office of Public Interest Counsel (“OPIC”) evaluated Aguilas’s argument and stated, “OPIC finds the ‘will be’ clause more likely refers to unbuilt facilities authorized to be constructed at the site indicated in the permit than what lies in the mind of an applicant that may result from a future, unapproved major amendment.”¹⁴ OPIC recommended a contested case hearing “[b]ecause there may be conflicting facts within the record.”¹⁵ There are no conflicting facts, however. Either Aguilas provided the “true, accurate, and complete” information required

⁹ See Petition, Attachment 2 (page 13-14 of the Transfer Application).

¹⁰ See Petition, Attachment 1 (page 11 of the Kali Kate Application).

¹¹ See Aguilas Response, Exhibit C, Section 25. Aguilas failed to provide the Commission its initial Core Data Form.

¹² Executive Director’s Response, at 4.

¹³ *Id.*

¹⁴ OPIC Response, at 6.

¹⁵ *Id.*, at 8.

to be provided by Section 7, or it did not. The issue is a legal one as to what information the Commission requires to be provided by Section 7. This is a disputed issue of law.

Aguilas contended Section 7 required the applicant to identify the landowner of the property on which the WWTP will be located, and it provided the required information (even though the only location Aguilas cited in its transfer application was associated with the existing permit – the location on Petitioner’s Property). The Executive Director and OPIC, along with Petitioner, disagree and have each independently concluded Section 7 required Aguilas to identify the landowner of the location identified in the permit – in this case that was Petitioner, but Aguilas instead identified itself as the landowner. The Commission is within its authority to decide this issue of law as to the information required to be provided by Section 7.

II. LEGAL ISSUES FOR THE COMMISSION

This matter presents several legal issues for the Commission, as follows:

- (1) Given Kali Kate never owned or had a property interest in the Property and falsely represented it did, and the Executive Director and Commission relied on that false representation in granting the Permit, is the Permit invalid *ab initio*?
- (2) Does Section 7 require the Applicant to identify the landowner of the location identified in the permit?
- (3) Is failure to properly identify the landowner of the location identified in the permit a fatal defect that cannot be corrected once a permit transfer has been granted by the Commission in reliance on that false representation?
- (4) Did Aguilas commit a significant violation and, if so, has Aguilas failed to make a substantial attempt to correct that violation?¹⁶
- (5) Does Aguilas have sufficient property rights in the site of the proposed facilities?¹⁷

¹⁶ See 30 TEX. ADMIN. CODE § 305.66(g).

¹⁷ See 30 TEX. ADMIN. CODE § 305.64(i)(2).

- (6) If Aguilas never had sufficient property rights in the site of the proposed facilities, may Aguilas cure that failure through a major permit amendment?
- (7) If there are no disputed issues of fact, has the Commission provided Aguilas with adequate notice and opportunity to be heard such that it may take final action on this matter?

III. DISCUSSION OF LEGAL ISSUES

1. The Permit is Invalid *Ab Initio*

Given Kali Kate never owned the Property and falsely represented that it did, and the Executive Director and Commission relied on that false representation in granting the Permit, the Permit is invalid *ab initio*. From the application's initial filing, the permitting process underlying the Permit was fatally flawed, not based on any error of the Commission or the Executive Director, but instead based on affirmative misrepresentations made first by the initial applicant and permittee, Kali Kate.

The misrepresentations addressed the threshold issue of property ownership and, but for those misrepresentations, the permit application would have been denied consistent with Commission precedent. As the Commission's Chairman has recently concluded, the applicant's failure to establish ownership at the time of his submission of the application is a "fatal defect."¹⁸ Fatal defects are not ones that may be corrected. Nor may they be remedied by the passage of time or the Commission's issuance of a permit based on the applicant's material misrepresentation of fact. If Kali Kate was never eligible to obtain the Permit because it failed to own or have some other property right in the Property, issuance of the Permit did not change that eligibility.

¹⁸ See Commissioner's Marked Agenda, July 19, 2023, Item 2, TCEQ Docket No. 2021-1442-MWD; SOAH Docket No. 582-22-1885; see also [Commissioners' Agenda Meeting - July 19th, 2023 - YouTube](#).

Aguilas raises only the passage of time and its claim to be a bona fide purchaser of the Permit as arguably non-procedural defenses¹⁹ against revocation. Passage of time is insufficient to negate what is substantively a fraud on the Commission – falsely asserting ownership of property for the specific purpose of establishing eligibility for issuance of a permit.

This defense is defeated by the Commission’s rules, which allow the Commission to revoke a permit based on “the permittee's failure in the application or hearing process to disclose fully all relevant facts, or the permittee's misrepresentation of relevant facts at any time.”²⁰ By definition, the revocation would occur after the Commission has issued the permit and then discovers the permittee has failed to disclose fully all relevant facts during the permitting process or has misrepresented relevant facts either during or after the permitting process. Thus, the Commission has expressly determined through its rules that passage of time is not a valid defense against a revocation action.²¹

Aguilas’s claim to be a bona fide purchaser is irrelevant given the Permit is invalid *ab initio*. The claim is further negated by the fact Aguilas knew neither it nor Kali Kate owned or otherwise had a property interest in the Property,²² and thus neither was eligible to hold the Permit.

Because of Kali Kate’s misrepresentations regarding its ownership or property interest in the Property, the Permit was never valid, and the Commission should revoke it for good cause under its authority under 30 Tex. Admin. Code § 305.66(a)(4).

2. Section 7 Requires Applicant to Identify Landowner of Permitted Site

¹⁹ Aguilas’s procedural claim to lack of notice and opportunity for hearing is discussed below in Section III(8).

²⁰ 30 TEX. ADMIN. CODE § 305.66(a)(4).

²¹ Note in particular the Commission’s inclusion of the phrase “at any time” at the end of 30 Tex. Admin. Code § 305.66(a)(4). This rule also defeats Aguilas’s assertion that the Petition constitutes an impermissible collateral attack on the Permit. *See* Aguilas’s Response, at 1, fn. 1. The Commission has express authority to revoke at any time when the Commission discovers that a permittee has misrepresented material facts.

²² *Supra*, at 2.

Section 7 requires an applicant for a permit transfer to identify the landowner “where the facility is or will be located.” Aguilas identified itself as the landowner.²³ It also identified the location of the facility on its TCEQ Core Data Form.²⁴ That location was the same location identified by Kali Kate in its permit application, and the same location identified in the Permit issued by TCEQ.²⁵ Aguilas does not contest it is not the landowner of the location identified in the Permit issued by TCEQ.²⁶ The Executive Director and OPIC agree Section 7 requires an applicant for a permit transfer to identify the landowner of the permitted site.²⁷ Petitioner respectfully requests that the Commission confirm Aguilas was required by Section 7 to identify the landowner of the permitted site, and it failed to do so.

3. Failure to Comply with Section 7 is a Fatal Defect

Failure to properly identify the landowner of the location identified in the permit prevents the Commission from properly considering the transfer application. The Executive Director has confirmed she relies on the representation of the applicant and acted in reliance on Aguilas’s representation that it was the landowner of the location identified in the Permit.²⁸ But for that representation, the Permit would not have been issued. As such, Petitioner respectfully requests the Commission determine Aguilas’s misrepresentation is a fatal defect that cannot be corrected once a permit transfer has been granted by the Commission in reliance on that false representation.

4. Aguilas Committed a Significant Violation and One That Cannot be Corrected

Under the Commission’s rules, “A permit or other order of the commission does not become a vested right and may be suspended or revoked for good cause at any time by order of

²³ Petition, Attachment 2, at 6 (Page 8 of the Transfer Application).

²⁴ Petition, Attachment 2, at 12 (Page 14 of the Transfer Application).

²⁵ Petition, Attachment 1, at 14 (Page 11 of Kali Kate’s Application).

²⁶ Aguilas’s Response, at 2.

²⁷ Executive Director’s Response, at 4; OPIC’s Response, at 6.

²⁸ Executive Director’s Response, at 1, 2, and 4.

the commission after opportunity for a public hearing is given.”²⁹ “Good cause” includes “the permittee’s failure in the application or hearing process to disclose fully all relevant facts, or the permittee’s misrepresentation of relevant facts at any time.”³⁰ Further, “The commission may ... revoke an original or renewal permit if the commission finds after notice and hearing, that ... the permit holder or applicant 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.”³¹ Before revoking a permit, the Commission must find “that a violation or violations are significant and that the permit holder or applicant has not made a substantial attempt to correct the violations.”³²

Would the Commission have granted the permit transfer if Aguilas had provided accurate information on land ownership? The Commission’s recent decision in *Selinger* indicates the Commission would not.³³ The Commission denied Mr. Selinger’s permit because he was not the owner of the land of the proposed Facility when he filed the application, and this denial demonstrates that failure to accurately represent land ownership is a significant violation. It is unclear whether the Executive Director agrees that misrepresenting land ownership in an application is a “significant” violation,³⁴ but the Commission has seemed to so indicate.

Aguilas contends it responded to Section 7 correctly, but even if it made “omissions or misrepresentations,”³⁵ the Commission could not revoke the Permit because of Aguilas’s pending application for a major permit amendment.³⁶ Aguilas contends “there is no evidence that a

²⁹ 30 TEX. ADMIN. CODE § 305.66(a).

³⁰ 30 TEX. ADMIN. CODE § 305.66(a)(4).

³¹ 30 TEX. ADMIN. CODE § 305.66(f)(3).

³² 30 TEX. ADMIN. CODE § 305.66(g).

³³ See TCEQ Docket No. 2021-1442-MWD; SOAH Docket No. 582-22-1885

³⁴ See Executive Director’s Response, at 3. See also *id.*, at 4 (“Further, when Aguilas submitted the transfer application, it represented to the ED that it owned the property.”).

³⁵ Aguilas’s Response, at 7.

³⁶ *Id.*

substantial attempt to correct the violation has not been made.”³⁷ The Executive Director contends Aguilar’s “amendment application is a substantial attempt to correct its violation.”³⁸

However, it defies logic and presents a significant public policy issue³⁹ if an applicant can misrepresent significant information on an application to obtain a permit it would not otherwise be eligible to receive, and “correct that violation” be simply applying to amend the permit to which it was never entitled. Petitioner respectfully requests the Commission determine that Aguilar committed a significant violation by misrepresenting land ownership in its transfer application, and that violation is not one that may be corrected by an amendment application or otherwise. If the Commission so determines, Petitioner respectfully requests that the Commission revoke the Permit.⁴⁰ Aguilar would retain the option of obtaining a permit on land it actually owns, but Aguilar would have to follow the Commission’s permit application process it should have followed in the first place.

5. Aguilar Does Not Have Sufficient Property Rights in the Property

Petitioner presented alternative remedies for the Commission to consider in responding to Kali Kate’s and Aguilar’s land ownership misrepresentations. In Issues 1-4 above, the remedy is revocation of the Permit. For Issues 5-6, the remedy is involuntary transfer of the Permit. The Commission may involuntarily transfer a permit, under 30 Tex. Admin. Code § 305.64(i), after notice and an opportunity to be heard if the facilities have not been built, and the permittee no longer has sufficient property rights in the site of the proposed facilities. This rule further

³⁷ *Id.*

³⁸ Executive Director’s Response, at 3.

³⁹ See Section IV below.

⁴⁰ The Commission also has authority under Texas Water Code § 7.302(b)(5) to revoke the Permit and reissue it to Petitioner as the true landowner. Contrary to Aguilar’s claim in note 6 of its Response, Petitioner did include revocation and reissuance in its Prayer. See Petition, para. 27, 29.

emphasizes land ownership or other property interest is a critical element to establishing one's eligibility for a permit.

All parties agree the WWTP has not been built.⁴¹ It is also undisputed Aguilas does not own (and has never owned) the Property, which is the currently permitted site for the WWTP.⁴² Aguilas and OPIC assert that involuntary transfer is not appropriate because Petitioner has not demonstrated the willingness and ability to comply with the permit and all other applicable requirements.⁴³ Petitioner's filing of the Petition demonstrates its willingness to comply with the Permit, and Petitioner has the same qualifications and compliance history as Aguilas, and more qualifications than Kali Kate, who Aguilas indicates "may have even forfeited its right to transact business in Texas."⁴⁴ If the Commission found Kali Kate and Aguilas to have the willingness and ability to comply with the permit and all other applicable requirements, there can be no question that Petitioner meets that same standard. If the Commission finds it necessary, Petitioner is willing to provide evidence to support that fact. Petitioner respectfully requests that the Commission find, as a matter of law, Aguilas does not have sufficient property rights in the Property; and the Permit should be involuntarily transferred to Petitioner, the Property's owner, either directly or upon a showing in a hearing that Petitioner has the willingness and ability to comply with the permit and all other applicable requirements.

6. Aguilas Never Had Sufficient Property Rights in the Property and That Deficiency Cannot be Corrected

For the same reasons discussed in Section III(4) above, Aguilas's false representation that it owned the Property is not one that can be corrected through an amendment to the Permit. Aguilas

⁴¹ Aguilas's Response, at 2.

⁴² Petition, at 5-6; Aguilas's Response, at 2.

⁴³ See 30 TEX. ADMIN. CODE § 305.64(i)(9).

⁴⁴ Aguilas's Response, at 2.

never had sufficient property rights in the Property, though it represented it did. The Commission relied on that representation and transferred the Permit to Aguilas though Aguilas was ineligible to receive it. Just as above, it defies logic and presents a significant public policy issue⁴⁵ if an applicant can misrepresent its land ownership to obtain a permit it would not otherwise be eligible to receive and is allowed to establish sufficient property rights in a different property by simply applying to amend the permit to which it was never entitled.

Petitioner respectfully requests the Commission determine Aguilas never had sufficient property rights in the Property, and that condition is not one that may be corrected by an amendment application or otherwise. If the Commission so determines, Petitioner respectfully requests the Commission involuntarily transfer the Permit to Petitioner directly or upon a showing in a hearing that Petitioner has the willingness and ability to comply with the permit and all other applicable requirements. As before, Aguilas would retain the option of obtaining a permit on land it actually owns, but Aguilas would simply have to follow the Commission's permit application process it should have followed in the first place.

7. Without Disputed Issues of Fact, the Commission Has Authority to Take Final Action

Under 30 Tex. Admin. Code § 305.68(a), the Commission is required to conduct a public hearing on a petition to revoke or suspend a permit or other order of the commission, notice of which shall be given to the permittee not less than 30 days prior to the hearing by certified mail, return receipt requested, of the time and place of the hearing. If there are no disputed facts to be resolved, this matter need not be referred to the State Office of Administrative Hearings ("SOAH"). If the Commission determines there are no disputed issues of fact and only issues of law underlying its consideration of Petitioner's request to revoke the Permit, for example, the

⁴⁵ See Section IV below.

Commission's meeting to consider the Petition would satisfy the requirements of 30 Tex. Admin. Code § 305.68(a), provided that Aguilar was provided notice at least 30 days before the Commission meeting.⁴⁶ The Commission could decide issues as a matter of law and take action at that Commission meeting. Should the Commission determine that there are disputed issues of fact, it may choose to refer the matter to SOAH.

IV. PUBLIC POLICY ISSUES

In addition to the legal issues, Aguilar's and Kali Kate's actions raise a public policy concern that should be considered by the Commission. Aguilar has informed the Commission it "purchased" or "acquired" the Permit from Kali Kate,⁴⁷ and "paid several hundred thousand dollars for the TPDES permit."⁴⁸ Through these admissions, Aguilar has confirmed there is a market for Commission-issued permits, and that the Commission's permits are highly valued. The Executive Director has confirmed her staff relies on an applicant's representations regarding land ownership and, by implication, her staff does not confirm the accuracy of these representations as part of its application review.

These facts in combination demonstrate there are significant incentives to falsely claim land ownership in order to obtain a valuable permit, but no administrative checks in the Commission's system to identify and prevent the false claims. Given these facts, significant consequences are necessary when false claims of land ownership are identified. Without such significant consequences, the Commission will either have to divert precious resources to confirm land ownership or face the likelihood that additional applicants will attempt to obtain a permit based on false land ownership claims. Neither option benefits the Commission or the citizens of

⁴⁶ See Tex. Water Code §§ 5.102, 5.311.

⁴⁷ Aguilar's Response, at 1, 2, 7.

⁴⁸ *Id.*, at 6.

Texas. Petitioner respectfully requests that the Commission respond to false representations with the significant consequence of permit revocation.

V. PRAYER

1. Petitioner respectfully requests that the Commission grant this Petition.
2. Petitioner respectfully requests that the Commission find:
 - a. The undisputed facts support revocation of the Permit;
 - b. Kali Kate never owned or had a property interest in the Property and falsely represented that it did, and the Executive Director and Commission relied on that false representation in granting the Permit;
 - c. Kali Kate failed to disclose fully all relevant facts or misrepresented relevant facts regarding the land ownership of the Property;
 - d. Kali Kate's failure to disclose fully all relevant facts or its misrepresentation of relevant facts regarding the land ownership of the Property is a significant violation and one that cannot be corrected; and
 - e. The Permit is invalid *ab initio* and is therefore revoked.
3. Alternatively, Petitioner respectfully requests that the Commission find:
 - a. The undisputed facts support revocation of the Permit;
 - b. Section 7 of the Commission's Transfer Application requires an applicant to identify the landowner of the location identified in the permit;
 - c. Aguilar never owned or had a property interest in the Property and falsely represented that it did, and the Executive Director and Commission relied on that false representation in granting the Permit;
 - d. Aguilar failed to disclose fully all relevant facts or misrepresented relevant facts regarding the land ownership of the Property;
 - e. Aguilar's failure to disclose fully all relevant facts or its misrepresentation of relevant facts regarding the land ownership of the Property is a significant violation and one that cannot be corrected; and
 - f. The Permit is therefore revoked.

- g. Alternatively, the Permit is revoked and reissued to Petitioner, either directly or upon a showing in a hearing that Petitioner has the willingness and ability to comply with the Permit and all other applicable requirements.

4. Alternatively, Petitioner respectfully requests that the Commission find:

- a. The undisputed facts support an involuntary transfer of the Permit to Petitioner;
- b. Aguilas does not have sufficient property rights in the site of the proposed facilities authorized by the Permit;
- c. Aguilas never had sufficient property rights in site of the proposed facilities authorized by the Permit, and this failure cannot be cured through a major permit amendment; and
- d. The Permit is therefore involuntarily transferred to the Petitioner, either directly or upon a showing in a hearing that Petitioner has the willingness and ability to comply with the Permit and all other applicable requirements.

5. Petitioner respectfully requests that the Commission find that Aguilas has been provided adequate notice and opportunity to be heard such that the Commission may take final action on this matter.

6. If the Commission refers this matter to SOAH for a hearing, Petitioner respectfully requests that the Commission direct that the single issue to be addressed in that hearing is that of whether Petitioner has the willingness and ability to comply with the Permit and all other applicable requirements such that the Commission may either revoke and reissue the Permit to Petitioner or involuntarily transfer the Permit to Petitioner.

7. Petitioner further requests that the Commission stay Aguilas's pending application for a major permit amendment until the Commission acts on this Petition.

8. Finally, Petitioner further requests that the Commission grant Petitioner such other and further relief to which it may show itself to be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2023, the original of Petitioner's Reply on Its Petition to Involuntarily Transfer or Revoke was filed with the Chief Clerk of the TCEQ, and a copy was served to all persons listed on the attached mailing list via electronic mail:

By: 
Paul C. Sarahan

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