

SOAH DOCKET NO. 582-24-08875  
TCEQ DOCKET NO. 2023-1667-MWD

APPLICATION OF STEPHEN RICHARD SELINGER FOR TPDES PERMIT NO. WQ0016103001	§ § § § §	BEFORE THE STATE OFFICE  OF  ADMINISTRATIVE HEARINGS
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**EXECUTIVE DIRECTOR’S REPLY TO PROTESTANTS EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE’S PROPOSAL FOR DECISION**

The Executive Director of the Texas Commission on Environmental Quality (TCEQ or Commission) maintains her position that the draft permit meets the applicable statutory and regulatory requirements and will be protective of human health and the environment.<sup>1</sup> Ellis County and Citizens Against Ellis County MUDs (CAECM) continue to belabor an issue introduced for the first time in Protestants’ closing arguments regarding the completeness of the application.

In Protestants’ exceptions to the ALJ’s Proposal for Decision (PFD), both Ellis County and CAECM argue, in opposition to the ALJ’s conclusions, that the draft permit should not be granted because the application failed to identify an operator.<sup>2</sup> Protestants claim that the ALJ erred in determining that there was not sufficient evidence presented to rebut the prima facie case.<sup>3</sup> Protestant CAECM also asserts that there was no further evidence that could have been presented without being “cumulative of the facts clearly illustrated by the omissions contained within the Application itself.”<sup>4</sup>

The ED maintains her position that the ALJ’s determination as stated in her Proposal for Decision is correct, and that the draft permit should be issued without changes. Protestants raised this issue for the first time in their closing arguments. This case was a direct referral, and as such required the parties to submit an agreed list of issues to be addressed at the hearing. *Only* these issues were to be addressed at the hearing.<sup>5</sup> The operator issue was not included in this list and was not raised at any

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<sup>1</sup> 582-24-08875 Administrative Record, Tab C, at bates 0001.

<sup>2</sup> Protestant Ellis County’s Exceptions to Proposal for Decision at 7-8; Citizens Against Ellis County MUDs, Inc.’s Exceptions to the Proposal for Decision at 1-4.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> 582-24-08875 Parties’ Agreed List of Issues, filed March 15, 2024.

point during the hearing process or prior thereto, despite the extensive time that elapsed between the filing of the application and the end of the hearing on the merits, which was over two years. In fact, as the ALJ correctly noted in her PFD, Protestants failed to allege at any point prior to their closing argument that there was an issue with the application itself.<sup>6</sup> This deprived Applicant, OPIC, and the ED from an opportunity to present any evidence on this issue. Therefore, the ED concluded, and continues to maintain, that the issue cannot be spontaneously raised at the closing argument stage of the process.

Secondly, Protestants assert that the application itself, coupled with two very short statements by Mr. Gillespie, is all the evidence needed to rebut the prima facie demonstration. Protestant CAECM also faults the ALJ, ED, and Applicant for not identifying what additional evidence was necessary to show that the operator is not included as an applicant, but in doing so mischaracterizes the question at hand. The crux of the issue here is whether Protestants, who bear the burden of proof to rebut the prima facie evidentiary demonstration, provided sufficient evidence to do so. The ED maintains her position that they did not.

One of the two pieces of testimony that Protestants reference in an attempt to argue that they did, in fact, raise the issue during the hearing is thus:

CAECM: Is [Mr. Selinger] the applicant here?

Gillespie: Yes.

CAECM: And in Box 14, is he identified as the owner?

Gillespie: Yes.<sup>7</sup>

The conversation then turns to equalization basins and buffer zone requirements.<sup>8</sup> There is no reference made to the issue of operator identity, completeness of the application, any rules or statutes, or any of the arguments raised in Protestants' closing arguments and filings thereafter. The ED fails to see how, as Protestant Ellis County argues, this testimony "*is* testimony to demonstrate that the Draft Permit is deficient and excludes information as required by state or federal law," or how it is sufficient to rebut the prima facie presumption.

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<sup>6</sup> 582-24-08875 ALJ's Proposal for Decision at 24-25.

<sup>7</sup> 582-24-08875 Transcript of the Hearing on the Merits at 40:5-9.

<sup>8</sup> *Id.* at 40:10-49:10.

Protestant CAECM cites state and federal requirements, case law, and a statement made by Mr. Gillespie in his prefiled testimony regarding operatorship in its closing argument and filings thereafter, and is fighting diligently to have it considered. The ED notes that none of this evidence was mentioned during the cross-examination of Mr. Gillespie by Protestants, or earlier in the process, when the other parties would have had an opportunity to provide their own evidence on the issue.

The Executive Director supports the Administrative Law Judge's conclusions that Stephen Richard Selinger has met his burden of proof on all eight agreed issues, that Ellis County and CAECM failed to rebut the prima facie demonstration, and that the draft permit be issued without changes.<sup>9</sup> Therefore, the Executive Director respectfully requests that the Commission adopt the ALJ's proposed order and issue the proposed permit.

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<sup>9</sup> 582-24-08875 ALJ's Proposal for Decision.

Respectfully submitted,

Texas Commission on Environmental Quality

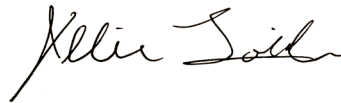
Kelly Keel,  
Executive Director

Charmaine Backens, Deputy Director  
Environmental Law Division



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Aubrey Pawelka, Staff Attorney  
Environmental Law Division  
State Bar No. 24121770  
P.O. Box 13087, MC-173  
Austin, Texas 78711-3087  
Phone (512) 239-0622  
Fax (512) 239-0626



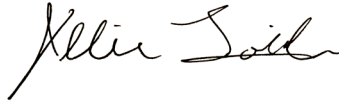
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Allie Soileau, Staff Attorney  
Environmental Law Division  
State Bar No. 24137200  
P.O. Box 13087, MC 173  
Austin, Texas 78711-3087  
Phone: 512-239-6033  
Fax: 512-239-0626  
[Allie.soileau@tceq.texas.gov](mailto:Allie.soileau@tceq.texas.gov)

REPRESENTING THE EXECUTIVE DIRECTOR  
OF THE TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the following by U.S. Regular Mail, Certified Mail (return receipt requested), electronic mail, hand delivery and/or facsimile at the addresses listed below on this 17<sup>th</sup> day of October 2024.



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Allie Soileau, Staff Attorney  
Environmental Law Division

**For the Applicant:**

Stephen R. Selinger  
[Steve\\_selinger@yahoo.com](mailto:Steve_selinger@yahoo.com)

**For the Protestants:**

Emily Rogers  
[erogers@bickerstaff.com](mailto:erogers@bickerstaff.com)  
Joshua Katz  
[jkatz@bickerstaff.com](mailto:jkatz@bickerstaff.com)  
Stefanie Albright  
[salbright@bickerstaff.com](mailto:salbright@bickerstaff.com)  
Kimberly Kelley  
[kkelley@bickerstaff.com](mailto:kkelley@bickerstaff.com)  
Eric Allmon  
[eallmon@txenvirolaw.com](mailto:eallmon@txenvirolaw.com)

**For the Public Interest Counsel:**

Eli Martinez  
[Eli.martinez@tceq.texas.gov](mailto:Eli.martinez@tceq.texas.gov)