

State Office of Administrative Hearings

Kristofer S. Monson
Chief Administrative Law Judge

September 18, 2024

Stephen Richard Sellinger

VIA EFILE TEXAS

Allie Soileau and Aubrey Pawelka
ED Staff Attorneys

VIA EFILE TEXAS

Eli Martinez
OPIC Staff Attorney

VIA EFILE TEXAS

Eric Allmon and Lauren Alexander
Attorneys for Citizens Against Ellis County MUDs

VIA EFILE TEXAS

Emily Rogers and Stefanie Albright
Attorneys for Ellis County

VIA EFILE TEXAS

RE: Docket Number 582-24-08875.TCEQ; Texas Commission on Environmental Quality No. 2023-1667-MWD; Application of Stephen Richard Selinger

Dear Parties:

Please find attached a Proposal for Decision in this case.

Any party may, within 20 days after the date of issuance of the PFD, file exceptions or briefs. Any replies to exceptions, briefs, or proposed findings of fact

shall be filed within 30 days after the date of issuance on the PFD. 30 Tex. Admin. Code § 80.257.

All exceptions, briefs, and replies along with certification of service to the above parties and the ALJ shall be filed with the Chief Clerk of the TCEQ electronically at <http://www14.tceq.texas.gov/epic/eFiling/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

CC: Service List

**BEFORE THE
STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**APPLICATION BY STEPHEN RICHARD SELINGER FOR TPDES
PERMIT NO. WQ0016103001**

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BEFORE THE
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APPLICATION BY STEPHEN RICHARD SELINGER FOR TPDES
PERMIT NO. WQ0016103001

PROPOSAL FOR DECISION

Stephen Richard Selinger (Applicant) filed an application (Application) with the Texas Commission on Environmental Quality (TCEQ or Commission) for new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0016103001. Applicant seeks the permit to discharge a daily average flow not to exceed 0.5 million gallons of treated domestic wastewater per day during the final phase into an unnamed tributary, then to Fourmile Creek, to Village Creek, and ultimately to the Upper Trinity River in Segment No. 0805 of the Trinity River Basin. The Administrative Law Judge (ALJ) recommends the Application be granted.

I. NOTICE, JURISDICTION, AND PROCEDURAL HISTORY

No party has challenged notice, which is set out in the proposed order without further discussion here.

Applicant filed the application on January 31, 2022. The Executive Director (ED) of TCEQ declared the application administratively complete on March 30, 2022. The ED determined that the application was technically complete on June 15, 2022. Applicant requested that the TCEQ directly refer this matter to SOAH on December 1, 2023. It was docketed with SOAH on January 10, 2024.

A preliminary hearing was held on March 5, 2024, via Zoom videoconference and the Applicant, the Executive Director (ED) of TCEQ, the Office of Public Interest Counsel (OPIC), Ellis County, and Citizens Against Ellis County MUDs, Inc. (CAECM) were named as parties.

The hearing on the merits was held via Zoom videoconference on June 18, 2024, before ALJ Rebecca S. Smith of the State Office of Administrative Hearings (SOAH). Applicant represented himself. Ellis County was represented by attorneys Emily Rogers and Stefanie Albright. The ED was represented by attorneys Allie Soileau and Aubrey Pawelka. CAECM was represented by attorneys Eric Allmon and Lauren Alexander. OPIC was represented by attorney Eli Martinez. The record closed on July 22, 2024, with the filing of response briefs.

II. BURDEN OF PROOF

The Application was filed after September 1, 2015, and TCEQ referred it under Texas Water Code section 5.557, which governs direct referral of environmental permitting cases to SOAH. Therefore, this case is subject to Texas Government Code section 2003.047(i-1)-(i-3), which provides:

(i-1) In a contested case regarding a permit application referred under section . . . 5.557, Water Code, the filing with the office of the application, the draft permit prepared by the executive director of the commission, the preliminary decision issued by the executive director, and other sufficient supporting documentation in the administrative record of the permit application establishes a prima facie demonstration that:

(1) the draft permit meets all state and federal legal and technical requirements; and

(2) a permit, if issued consistent with the draft permit, would protect human health and safety, the environment, and physical property.

(i-2) A party may rebut a demonstration under Subsection (i-1) by presenting evidence that:

(1) relates to a matter referred under Section 5.557, Water Code . . . ; and

(2) demonstrates that one or more provisions in the draft permit violate a specifically applicable state or federal requirement.

(i-3) If in accordance with Subsection (i-2) a party rebuts a presumption established under Subsection (i-1), the applicant and the executive director may present additional evidence to support the draft permit.

Although this law creates a presumption, sets up a method for rebutting that presumption, and shifts the burden of production on that rebuttal, it does not change

the underlying burden of proof. Accordingly, the burden of proof remains with the Applicant to establish by a preponderance of the evidence that the Application would not violate applicable requirements and that a permit, if issued consistent with the draft permit, would protect human health and safety, the environment, and physical property.¹

In this case, the Application, the Draft Permit, and the other materials listed in Texas Government Code section 2003.047(i-1), which are collectively referred to as the “Prima Facie Demonstration,” were offered and admitted into the record for all purposes.²

III. BACKGROUND AND APPLICABLE LAW

A. DESCRIPTION OF THE PROPOSED FACILITY AND DISCHARGE ROUTE

Applicant seeks a wastewater discharge permit for a proposed domestic wastewater plant to be located in Ellis County, Texas (Facility). The Draft Permit prepared by the ED would authorize the discharge of treated domestic wastewater at an annual average flow not to exceed 500,000 gallons per day, or 0.5 million gallons per day (MGD). Under the Draft Permit, the treated effluent would be discharged to an unnamed tributary, then to Fourmile Creek, then to Village Creek, and then to

¹ 30 Tex. Admin. Code § 80.17(a), (c). *Granek v. Tex. St. Bd. of Med. Exam’rs*, 172 S.W.3d 761, 777 (Tex. App.—Austin 2005, no pet.) (burden is preponderance of the evidence).

² The administrative record was originally introduced as Applicant’s Exhibit 1. Because Applicant prefiled a second exhibit 1, the administrative record is renumbered as Applicant’s Exhibit AR.

Upper Trinity River in Segment No. 0805 of the Trinity River Basin.³ Segment 0805 is listed as impaired for PCBs and dioxin.⁴

The unnamed tributary that receives the initial discharge crosses into witness Jeff Pouzar’s father’s farm, which borders the proposed plant. Mr. Pouzar’s property is next door to his father’s, and he and his father run their family cattle ranching operation on both properties.⁵ The unnamed tributary crosses his father’s farm, and the confluence of Fourmile Creek and the unnamed tributary is located in the center pasture.⁶

Mr. Pouzar describes the unnamed tributary as “not like a river. In its normal state, as the [u]nnamed [t]ributary crosses my father’s farm, it is a dry, well-vegetated grassland beginning as a slight depression in the ground and feathering out into a broad flatland.”⁷ He notes that “during rain events, the flow rate is gentle and when the clay soil is saturated, it can take several days for the water to drain to Fourmile Creek. The area where Fourmile Creek runs across is flat and silted in from years of runoff pooling there and taking a long time to drain.”⁸

³ App. Ex. AR (Admin Record), Tab C at 0001.

⁴ ED Ex. JL-1 (Lueg Direct) at 0016.

⁵ CAECM Ex. 100 (Pouzar Direct) at 000004, 000006.

⁶ CAECM Ex. 100 (Pouzar Direct) at 000005.

⁷ CAECM Ex. 100 (Pouzar Direct) at 000006.

⁸ CAECM Ex. 100 at 000006

The plant Applicant proposes would use an activated sludge process operating in the extended aeration mode. Treatment units would include a bar screen, a flow splitter in the Interim II and Final phases, aeration basins, final clarifiers, sludge digesters, chlorine contact chambers, and dichlorination chambers in the Final phase.⁹

B. THE DRAFT PERMIT

The Draft Permit provides for three phases: two interim phases and a final phase. During the Interim I phase, the Draft Permit authorizes discharge of treated domestic wastewater at a volume not to exceed a daily average flow of 0.10 MGD. During the Interim I phase, the following limitations, based on a 30-day average apply: 20 milligrams per liter (mg/L) five-day biochemical oxygen demand (BOD₅), 20 mg/L total suspended solids (TSS), 126 colony forming units (CFU) or most probable number (MPN) of *E. coli* per 100 milliliters (ml), and 2.0 mg/L minimum dissolved oxygen (DO). The effluent shall contain a total chlorine residual of at least 1.0 mg/L and shall not exceed a total chlorine residual of 4.0 mg/L after a detention time of at least 20 minutes based on peak flow.¹⁰

During the Interim II phase, the Draft Permit authorizes discharge of treated domestic wastewater at a volume not to exceed a daily average flow of 0.20 MGD. The effluent limitations in the Interim II phase of the draft permit, based on a 30-day

⁹ App. Ex. AR (Admin Record), Tab C at 0001.

¹⁰ App. Ex. AR (Admin. Record), Tab C at 0008.

average, are 20 mg/L BOD5, 20 mg/L TSS, 126 CFU or MPN of E. coli per 100 ml, and 5.0 mg/L DO. The effluent shall contain a total chlorine residual of at least 1.0 mg/L and shall not exceed a total chlorine residual of 4.0 mg/l after a detention time of at least 20 minutes based on peak flow.¹¹

During the Final phase, the Draft Permit authorizes discharge of treated domestic wastewater at a volume not to exceed a daily average flow of 0.5 MGD. In the Final phase, the effluent limitations, based on a 30-day average, are 10 mg/L five-day carbonaceous biochemical oxygen demand (CBOD5), 15 mg/L TSS, 3 mg/L ammonia-nitrogen (NH3-N), 126 CFU or MPN of E. coli per 100 ml, and 4.0 mg/L minimum DO. The effluent must contain a total chlorine residual of at least 1.0 mg/L after a detention time of at least 20 minutes (based on peak flow). The effluent must be dechlorinated to less than 0.1 mg/L total chlorine residual.¹²

The unclassified receiving water uses were determined to be minimal aquatic life use for the unnamed tributary and limited aquatic life use for Fourmile Creek.¹³ The designated uses for Segment No. 0805 are primary contact recreation and high aquatic life use.¹⁴

¹¹ App. Ex. AR (Admin. Record), Tab C at 0009.

¹² App. Ex. AR (Admin. Record), Tab C at 0010.

¹³ ED Ex. DD-1 at 0007.

¹⁴ ED Ex. DD-1 at 0007.

C. TEXAS SURFACE WATER QUALITY STANDARDS

The Facility's proposed discharge is subject to the Texas Surface Water Quality Standards (TSWQS) found in title 30, chapter 307 of the Texas Administrative Code. The TSWQS identify appropriate uses for the state's surface waters (e.g., aquatic life, recreation, and public water supply), and establish narrative and numerical water quality standards to protect those uses. The TCEQ has standard procedures for implementing the TSWQS, referred to as the Implementation Procedures (IPs), which are approved by the U.S. Environmental Protection Agency (EPA).¹⁵ The TSWQS and IPs are used to set permit limits for wastewater discharges and other activities that may have an effect on water quality.

The TSWQS provide that “[DO] concentrations must be sufficient to support existing, designated, presumed, and attainable aquatic life uses.”¹⁶ In addition, the TSWQS require that “[n]utrients from permitted discharges or other controllable sources must not cause excessive growth of aquatic vegetation that impairs an existing, designated, presumed, or attainable use.”¹⁷

¹⁵ 30 Tex. Admin. Code § 307.2(e).

¹⁶ 30 Tex. Admin. Code § 307.4(h)(1).

¹⁷ 30 Tex. Admin. Code § 307.4(e).

IV. EVIDENCE

Ellis County presented the testimony of expert Tim Osting and offered nine exhibits into evidence.¹⁸ CAECM presented the testimony of landowner Jeff Pouzar and introduced five exhibits into evidence.¹⁹ Applicant presented the testimony of Charles Gillespie, along with three other exhibits.²⁰ The ED presented the testimony of Deba Dutta, Jenna Lueg, and Xing Lu and related exhibits.²¹

Some of the evidence addressed a separate proceeding to create a municipal utility district (MUD) to finance the residential development the Facility would serve.²²

¹⁸ County Ex. 1 (Osting direct), County Ex. 2 (Osting CV), County Ex. 3 (2022 Texas Integrated Report—Index of Water Quality Impairments), County Ex. 4 (2022 Texas Integrated Report—Assessment Results for basin 09—Trinity River), County Ex. 5 (wastewater treatment plant outfall location with MUD development overlay), County Ex. 6 (locations along proposed discharge route), County Ex. 7 (TCEQ QUAL-TX model output), County Ex. 8 (data sheet for four wells near the proposed Shankle Road MUD), and County Ex. 9 (National Primary Drinking Water Regulations).

¹⁹ CAECM Ex. 1 (preliminary engineering report), CAECM Ex. 100 (prefiled testimony of Jeff Pouzar), CAECM Ex. 101 (affected landowners map and list), CAECM Ex. 102 (Pouzar property map and photo), and CAECM 103 (drone video of unnamed tributary and Fourmile Creek.). CAECM Ex. 2 (marked up nutrient screening worksheet) was a demonstrative exhibit.

²⁰ App. Ex. 1 (Gillespie direct), App. Ex. 2 (Gillespie CV), App. Ex. 3 (City of Ennis wastewater permit), and App. Ex. 4 (notice from MUD application).

²¹ ED Ex. DD-1 (Dutta direct), ED Ex. DD-2 (Dutta resume), ED Ex. JL-1 (Lueg direct), ED Ex. JL-2 (Lueg resume), ED Ex. JL-3 (Procedures to Implement Texas Surface Water Quality Standards), ED Ex. JL-4 (nutrient screening), ED Ex. JL-4 (nutrient screening), ED Ex. JL-5 (Brittany Lee's worksheet), ED Ex. JL-6 (Ms. Lee's standards memorandum), ED Ex. XL-1 (Lu Direct), ED Ex. XL-2 (Lu resume), ED Ex. XL-3 (water quality team's review memo), ED Ex. XL-4 (dissolved oxygen modeling permit review checklist), ED Ex. XL-5 (uncalibrated QUAL-TX models), ED Ex. XL-6 (2018 modeling guidance), ED Ex. XL-7 (2018 methods for analyzing dissolved oxygen in freshwater streams using an uncalibrated QUAL-TX model), ED Ex. XL-8 (TDML projects 5 and 66).

²² Application for the Creation of Shankle Road MUD of Ellis County, SOAH Docket No. 582-23-26772, TCEQ Docket No. 2023-0566-DIS.

V. ISSUES RELATED TO WATER QUALITY

Ellis County and CAECM raise several arguments related to the Draft Permit's compliance with the TSWQS. Specifically, they argue that the Draft Permit is not protective because the DO modeling relied on incorrect assumptions, that a total phosphorous limit should be added to the Draft Permit, and that a total dissolved solids limit should also be added. Each of those arguments is addressed below.

A. MODELING ASSUMPTIONS

Ellis County and CAECM argue that the ED should have used site-specific data when modeling DO, as opposed to using the default modeling assumptions, which fail to represent the actual stream geometry.²³ OPIC agrees with this position.²⁴

1. Evidence

ED witness Dr. Xing Lu performed the DO modeling, which she described as steady-state modeling using an uncalibrated QUAL-TX model for the unnamed tributary and Fourmile Creek.²⁵ The model was uncalibrated because it did not use site-specific field information from multiple locations, such as real-time flow, water

²³ Ellis County Closing Brief at 2-4; CAECM Closing Brief at 5-7.

²⁴ OPIC Closing Brief at 6-10.

²⁵ ED Ex. XL-1 at 0330.

temperature, hydraulic, and water quality data.²⁶ Instead, she used default modeling inputs for stream dimensions, velocity, and flow characteristics.²⁷ Those inputs are “mean values” from a statewide survey.²⁸ Dr. Lu also testified that both TCEQ and EPA have approved the default inputs that she used in modeling.²⁹ She did not review any site-specific data, although she reviewed the map Applicant provided, along with Google Earth and GIS.³⁰

Timothy Osting, Ellis County’s expert, testified that the default inputs consist of a stream that is too wide and too shallow to represent the actual stream geometry of the receiving waters, particularly Reach 1 (the unnamed tributary) and Reach 2 (Fourmile Creek).³¹ He added that the result of using a wide and shallow stream is to “overestimate surface reaeration and therefore overestimate the resulting predicted dissolved oxygen concentration.”³²

²⁶ ED Ex. XL-1 at 0330.

²⁷ Transcript (Tr.) at 110-11; ED Ex. XL-1 at 11 0334.

²⁸ Tr. at 111.

²⁹ ED Ex. XL-1 (Lu Direct) at 11-12.

³⁰ Tr. at 111-12.

³¹ County Ex. 1 (Osting Direct) at 000016. Dr. Lu’s modeling used four reaches, one on the unnamed tributary, and three on Fourmile Creek. Ellis County Ex. 7. Mr. Osting defined a reach as “a homogeneous portion of a stream” used for modeling. County Ex. 1 (Osting Direct) at 000017.

³² County Ex. 1 (Osting Direct) at 000017.

Mr. Osting’s testimony about the stream geometry relied on measurements taken during a single site visit by one his company’s staff members.³³ Ellis County Exhibit 6 contains photographs and measurements taken during that visit at four locations along the discharge route in the two reaches.³⁴ The staff member “measured . . .the width of any existing banks and . . . where there was water, he measured the depth of the water.”³⁵ Mr. Osting did not testify when that site visit occurred. He did, however, state that “[i]t was largely dry at the time.”³⁶

Mr. Osting testified that Dr. Lu’s modeling used the default measurement of 7.2 meters (23.6 feet) for the width of both Reach 1 and Reach 2 and a depth of 0.16 meters (0.52 feet) for both reaches.³⁷ In contrast, he testified that, based on the site visit, “[o]bservations of the existing stream indicate stream width of Reach 1 and Reach 2 is approximately 4.5 meters (15 feet) wide, with Reach 2 increasing in depth to over 0.31 meters (1 foot).”³⁸ No testimony or other evidence suggests that Mr. Osting performed his own modeling analysis.

³³ Tr. at 20; County Ex. 1 (Osting Direct) at 000016.

³⁴ These locations were the unnamed tributary at Shankle Road, Fourmile Creek at Trojacek Road, Fourmile Creek at Chmelar Road, and Fourmile Creek at Novy Road. County Ex. 6. Mr. Osting’s did not expressly testify that the measurements are within the two reaches.

³⁵ Tr. at 20-21.

³⁶ Tr. at 20.

³⁷ County Ex. 1 (Osting Direct) at 000016.

³⁸ County Ex. 1 (Osting Direct) at 000016-17.

Dr. Lu testified that she followed TCEQ’s standard operating procedures (SOPs) when she performed the modeling analysis.³⁹ Those procedures include using generalized hydraulic equations when an applicant has not provided site-specific hydraulic information.⁴⁰ She agreed that actual stream dimensions could be different, and that different stream characteristics could impact the analysis.⁴¹

But Dr. Lu also testified that the modeling process set out in the SOPS is designed to be protective.⁴² The modeling assumptions—in particular, discharge at full permitted flow and at full permitted effluent limits during hot and dry conditions—represent the situation when the negative effects of a discharge would be maximized.⁴³ Thus, these assumptions are designed to model extreme conditions when DO would be at its minimum.⁴⁴ In her words, “[t]his combination of conditions is highly unlikely to simultaneously occur.”⁴⁵ Dr. Lu added that the results of her model exceed the criteria for DO:

[f]or the unnamed tributary, the model predicted a summer minimum DO value of 2.46 mg/L for the 0.1 MGD phase, 2.40 mg/L for the 0.2 MGD phase, and 4.01 mg/L for the 0.50 MGD phase, which are all above the DO criterion of 2.0 mg/L. For Fourmile Creek, the QUAL-TX model predicted a summer minimum DO value of 3.98 mg/L for

³⁹ ED Ex. XL-1 (Lu Direct) at 0330.

⁴⁰ ED Ex. XL-1 (Lu Direct) at 0334.

⁴¹ Tr. at 112-13.

⁴² ED Ex. XL-1 (Lu Direct) at 0331.

⁴³ ED Ex. XL-1 (Lu Direct) at 0331.

⁴⁴ ED Ex. XL-1 (Lu Direct) at 0331.

⁴⁵ ED Ex. XL-1 (Lu Direct) at 0331.

the 0.1 MGD phase, 2.80 mg/L for the 0.2 MGD phase, and 4.38 mg/L for the 0.50 MGD phase, which are all above the DO criterion of 3.0 mg/L. These minimum DO values fall above the criteria assigned by the Standards Implementation Team for the unnamed tributary (2.0 mg/L) and Fourmile Creek (3.0 mg/L DO).⁴⁶

Applicant's engineer, Charles Gillespie, testified regarding CAECM's site visit that "[a] simple measurement on a single day over one or two spots in the stream does not suffice to dispute the accuracy of QUAL-TX geometry."⁴⁷

2. Argument and Analysis

Ellis County presented some evidence that called into question whether the Draft Permit would comply with TSWQS regarding DO. It presented some evidence about inputs and Dr. Lu agreed that at some level, a difference in inputs would have an effect on the modeling. But Ellis County's evidence was fairly limited: Mr. Osting testified that at four specific locations the streams are narrower and deeper than the modeling inputs. He notably did not set out how much of a difference that would make for the modeling. He did not explain whether measuring at four locations was a standard method of determining inputs or testify that measurements from a single visit would be enough to get a good data set. He did not testify about the weather conditions preceding the visit. He did not run his own modeling or show how significant a difference the change would be.

⁴⁶ ED Ex. XL-1 (Lu Direct) at 0332.

⁴⁷ App. Ex. 1 (Gillespie Direct) at 16.

Dr. Lu then presented sufficient evidence to show that the Draft Permit would comply with the requirements. She showed compliance with TCEQ and EPA approved modeling. And she showed that as modeled, under the worst conditions, DO would still exceed the relevant criteria. The burden to show compliance with the TSWQS has been met.

B. TOTAL PHOSPHORUS LIMIT

Ellis County and CAECM argue that a total phosphorous (TP) limit should be added to the Draft Permit.⁴⁸ OPIC, the Applicant, and the ED disagree.

1. Evidence

ED witness Jenna Lueg, an aquatic scientist, testified about standards review, including a nutrient screening, performed in this case.⁴⁹ Although Ms. Lueg testified at hearing, she did not perform the initial nutrient screening in this case. Instead, her former colleague Brittany Lee did.⁵⁰ This screening evaluates applications to determine if a TP effluent limit is needed “to prevent violation of numerical nutrient criteria and/or preclude excessive growth of aquatic vegetation.”⁵¹

⁴⁸ Ellis County Closing Brief at 4-5; CAECM Closing Brief at 8-10.

⁴⁹ ED Ex. JL-1 (Lueg Direct) at 0014-16.

⁵⁰ ED Ex. JL-1 (Lueg Direct) at 0015.

⁵¹ ED Ex. JL-1 (Lueg Direct) at 0021.

The IPs describe the nutrient screening process.⁵² Under this process, various individual factors are scored on a worksheet, and those scores are used in the following way:

[to] provide the basis for a “weight-of-evidence” assessment to identify the need for a nutrient effluent limit. An effluent limit for TP is probably needed when a substantial number of screening factors are rated moderate and high. If the overall assessment determines that the discharge is at a moderate level of concern, a limit might be indicated if one or more of the factors was particularly elevated. A monitoring requirement may be appropriate if a TP effluent limit is not required.⁵³

Ms. Lueg testified that the nutrient scoring value was 2.6, which according to the IPs, is in the range for which TP monitoring or limits would be possible, depending on site-specific criteria and best professional judgment.⁵⁴ Ms. Lueg testified that the decision not to impose a limit was based on the low discharge amount, the minimal and limited streams in the first receiving waters, and the greater than four mile distance to the segments.⁵⁵ Usually, information used in the screening is based on historical aerial imagery and Google Earth.⁵⁶ She agreed that so far as she knew, no one from TCEQ conducted a site visit.⁵⁷

⁵² Ex. ED-JL-3.

⁵³ Ex. ED-JL-3 at 0082.

⁵⁴ Tr. at 70.

⁵⁵ Tr. at 71.

⁵⁶ Tr. at 68-69.

⁵⁷ Tr. at 71.

Ellis County and CAECM both note that in her original prefiled testimony, Ms. Lueg stated that the Draft Permit contained a TP limit of 1.0 mg/L.⁵⁸ Ms. Lueg revised her testimony at hearing, and the final, admitted version of Ms. Lueg’s testimony did not include or recommend a TP limit.⁵⁹ On cross-examination, Ms. Lueg testified that the original version of her testimony containing the TP limit was in error.⁶⁰ Her final testimony states that “a [TP] screening was conducted and concluded no limit or monitoring requirements are warranted at this time.”⁶¹

At hearing, CAECM’s attorney questioned Ms. Lueg about the values for some items on the nutrient screening worksheet and indicated that he believed that those values should be higher.⁶² Throughout the questioning, she disagreed with the proposed changes to the values. For example, while she agreed with CAECM’s counsel that the beginning of the discharge route is lightly shaded (a lightly shaded stream would lead to a high level of concern for that factor), she testified:

You can’t just look at the beginning of the discharge route, you’d have to look at the—the whole discharge route.

Q. As between extensive shading, partial shading or little shade, did the Executive Director rank this as extensive shading or partial shading?

A. Excessive shading because the notes say that the immediate stream is lightly shaded, which is the tributary which is less than a mile long but

⁵⁸ Tr. at 102-03.

⁵⁹ Tr. at 63-64.

⁶⁰ Tr. at 69 (“I was mistaken in that Brittany’s review did not implement a TP limit. . .”).

⁶¹ Ex. ED JL-1 at 0021.

⁶² Tr. at 79-99.

that there's dense canopy on Four Mile Creek, which is over three miles long.⁶³

Similarly, throughout her cross-examination, she disagreed with CAECM's counsel's suggestions that the scoring was inaccurate. She disagreed with his suggestion that there were on-channel pools on the discharge route⁶⁴ and that there was likely to be at least one impoundment greater than 300 feet along the discharge route,⁶⁵ both of which would have affected the score. Although she agreed with CAECM's counsel that the discharge is expected to clear, she assumed a high level of turbidity downstream based on other streams and runoff.⁶⁶ A clear stream scores higher on the screening.⁶⁷

Ms. Lueg then agreed that if the changes proposed by CAECM's attorney were accurate, a substantial number of screening factors would be rated moderate and high.⁶⁸ This, in turn, would affect the analysis. But she did not agree with the attorney that those changes should be made.⁶⁹

⁶³ Tr. at 84.

⁶⁴ Tr. at 88 ("So these [pools] are not on channel.")

⁶⁵ Tr. at 98 ("it's very small. I doubt it would be over 300 feet.")

⁶⁶ Tr. at 80-81 ("you also have to attribute factors farther [down]stream, not just at the discharge. . . . Just based on personal observation of streams that I've seen, due to weather conditions and if the stream is picking up sediments pr rain and -and runoff, then it's not going to make it clear anymore.").

⁶⁷ Tr. at 82.

⁶⁸ Tr. at 99.

⁶⁹ Tr. at 100.

Mr. Osting also briefly testified about TP, stating that the proposed discharge route crosses open pasture with active grazing cattle who will congregate near the discharge because it will be a consistent water source. He noted that this would “contribut[e] additional nutrient loading from manure.”⁷⁰

2. Argument and Analysis

Ellis County argues that the score on the ED’s screening worksheet was 2.6, which under the IPs, means that a TP limit may be applied.⁷¹ It also argues that specific site conditions, such as the presence of phosphorous above screening levels in the water downstream from the discharge point⁷² and the presence of active grazing cattle using the unnamed tributary and Fourmile Creek as a water source, indicate that nutrient levels will be exceeded and a TP limit is necessary.⁷³

CAECM also notes that a TP limit could have been applied and argue that the phosphorous screening value was much higher than the value assigned by ED staff, and that a TP limit should have been added to the Draft Permit.⁷⁴

CAECM’s arguments are premised on the idea that the differences in screening results presented in cross examination are correct. But they failed to

⁷⁰ County Ex. 1 (Osting Direct) at 000017.

⁷¹ Ellis County Closing Brief at 4.

⁷² County Ex. 1 (Osting Direct) at 14.

⁷³ Ellis County Closing Brief at 5.

⁷⁴ CAECM Closing Brief at 7.

present evidence showing that was the case. Instead of an expert testifying that there was light shading throughout the discharge route, CAECM showed a photograph of the immediate area of the discharge. Although Mr. Pouzar testified about a stock tank in the path of the discharge, he did not testify that it was greater than 300 feet,⁷⁵ and CAECM did not present any measurements of any impoundment. And although CAECM argues that the water throughout would be clear, Mr. Pouzar’s testimony describes the area where Fourmile Creek runs as “flat and silted in from years of runoff pooling there and taking a long time to drain.”⁷⁶ Based on the lack of an evidentiary basis to alter the screening results, CAECM did not rebut the Prima Facie Demonstration regarding TP.

As for Ellis County’s evidence about cattle, Mr. Osting failed to provide detail about the number of cattle or and did not estimate the effect of the additional nutrient loading from manure. Ellis County established that a TP limit was optional given the worksheet score. But without detail, two sentences about cattle is not evidence that the decision not to add a TP limit violated the TSQWS. The Prima Facie Demonstration was not rebutted.

C. TOTAL DISSOLVED SOLIDS LIMIT

Ellis County also argues that the Draft Permit needs to have a total dissolved solids (TDS) limit because the groundwater source for drinking water is high in

⁷⁵ CAECM Ex. 100 (Pouzar Direct) at 000008-000009.

⁷⁶ CAECM Ex. 100 at 000006.

dissolved mineral solids “with levels that exceed the water quality standards in the receiving waters.”⁷⁷ In particular, Ellis County notes that testing results from groundwater wells near the proposed development show chloride concentrations of 398 mg/L, sulfate concentrations of 369 mg/L, and TDS concentrations of 1,991 mg/L.⁷⁸ This groundwater will be consumed in residences in the development, and will after treatment, be discharged into the receiving waters. Citing to Mr. Osting’s testimony, Ellis County argues that the dissolved solids will need to be removed through reverse osmosis or another similar process in order to meet surface water quality standards. Without such treatment, according to Mr. Osting, the effluent discharged will have the same high concentrations of dissolved solids as found in the source water.⁷⁹ Mr. Osting testified that the proposed WWTP facility is not suitable for removing dissolved solids from effluent and will exceed the TSWQS.⁸⁰

The ED and Applicant disagree with this argument, saying that the information about groundwater comes from the MUD application, which is outside the scope of this proceeding, and that the source of groundwater in the MUD application is necessarily preliminary.⁸¹ In his testimony, Mr. Gillespie, Applicant’s engineer, called any assertion that the MUD application states that the water will be

⁷⁷ Ellis County Closing Brief at 6.

⁷⁸ County Ex. 8.

⁷⁹ County Ex. 1 (Osting Direct) at 000018.

⁸⁰ County Ex. 1 (Osting Direct) at 000020.

⁸¹ ED Response Brief at 4; Applicant Response Brief at 3.

groundwater-based a “misrepresentation of the record.”⁸² He also testified that a final decision about the source of the water has not yet been made.⁸³ OPIC similarly argues that the use of groundwater raises concerns that are too hypothetical for the basis of a permit limit.⁸⁴

The ALJ agrees that Ellis County has not rebutted the Prima Facie Demonstration on this issue because it has not established that groundwater will be used. If groundwater is not used, then there is no need for a TDS limit.

VI. COMPATIBILITY WITH THE PROPOSED PLAN OF DEVELOPMENT

Ellis County makes two arguments based on the plan of development that Applicant submitted as part of the separate MUD application for the proposed development the Facility would serve.

Ellis County first argues that the Draft Permit is not feasible because it conflicts with Applicant’s proposed plan of development, which proposes to locate houses within the discharge route.⁸⁵ In response, the ED notes that the MUD application is addressed in a separate proceeding and that issues relating to the MUD

⁸² App. Ex. 1 (Gillespie Direct) at 15.

⁸³ App. Ex. 1 (Gillespie Direct) at 15-16.

⁸⁴ OPIC Closing Brief at 12.

⁸⁵ Ellis County Closing Brief at 5.

are outside the scope of this proceeding.⁸⁶ The ED also argues that MUD plans are preliminary and often change during the construction process. Additionally, according to the ED, regardless of the MUD plans, the Applicant has a duty to comply with location restrictions and notes that there currently are no homes within the discharge route.⁸⁷

Ellis County also argues that, based on Applicant's proposed development plan, the tributary will need to be rerouted or the discharge point will need to be moved downstream.⁸⁸ It cites Mr. Osting's testimony that to follow the development plan, the most upstream 0.4 km of the unnamed tributary will either need to be rerouted through a man-made channel, or the discharge point will need to be relocated at least 0.4 km downstream.⁸⁹ According to Ellis County, either of these changes could potentially change the analysis and modeling outcomes underlying the Draft Permit.⁹⁰

Both of these arguments depend on the MUD development plan being more finalized than it is. Whether or not it should be in a more final stage, the evidence indicates that the development plan introduced into evidence is more of a

⁸⁶ ED Response Brief at 6.

⁸⁷ ED Response Brief at 6.

⁸⁸ Ellis County Closing Brief at 5.

⁸⁹ County Ex. 1 (Osting Direct) at 000017.

⁹⁰ Ellis County Closing Brief at 5.

conceptual, early plan subject to change, as opposed to a finalized blueprint.⁹¹ There is no reason to believe, for example, that houses will actually be built in the discharge route or that the discharge route, as opposed to other elements in the plan, will necessarily be moved. What’s more, evidence that if a discharge route changed, the modeling analysis could possibly change does not rise to the level of evidence that the Draft Permit violates specific provisions. The Prima Facie Demonstration has not been rebutted on these issues.

VII. OPERATOR

Both Ellis County and CAECM argue that the Application was defective because no operator was included as an applicant. The TCEQ’s rules provide that “for all Texas Pollutant Discharge Elimination System permits, it is the duty of the operator and the owner to submit an application for a permit.”⁹² An operator is defined as “[t]he person responsible for the overall operation of a facility.”⁹³

It is undisputed that the Application listed Applicant as the owner and provided no information about an operator.⁹⁴ Yet neither Protestant presented any evidence or testimony on this subject except for a single question about whether Applicant was identified as the owner.⁹⁵

⁹¹ Tr. at 49-50.

⁹² 30 Tex. Admin. Code § 305.43(a).

⁹³ 30 Tex. Admin. Code § 305.2(24).

⁹⁴ App. Ex. AR (Admin Record), Tab D at 000004.

⁹⁵ Tr. at 40 (“Q. And in Box 14, is he identified as the owner? A. Yes.”).

The ED argues that this issue was not addressed before the parties' closing briefs and that it was therefore "forfeited."⁹⁶ Although the ALJ would use a different term, she agrees with the ED in the result. The Protestants had a burden to present evidence that demonstrates that one or more provisions in the draft permit violate a specifically applicable state or federal requirement.⁹⁷ The Applicant and the ED then have the opportunity to present additional evidence.⁹⁸ Here, there was no indication before closing briefing that the Protestants believed there was an issue with the Application itself. The parties elicited no testimony that the Application did not comply with the rule, for example. Nor did they present testimony that no operator had applied. They did not, then, comply with the requirement of presenting evidence rebutting the presumption and so did not.

VIII. BUFFER ZONE REQUIREMENTS

A. ARGUMENT

CAECM argues that Applicant has not demonstrated compliance with 30 Texas Administrative Code section 309.13(e), which requires lagoons with zones of anaerobic activity, such as un-aerated equalization basins, to have at least a 500-foot buffer zone from the nearest property line.⁹⁹ CAECM notes that the Draft

⁹⁶ ED Response Brief at 6.

⁹⁷ Tex. Gov't Code § 2003.047 (i-2).

⁹⁸ Tex. Gov't Code §2003.047 (i-3).

⁹⁹ CAECM's Closing Brief at 10.

Permit authorizes an equalization basin without requiring aeration of the equalization basin. And the Application’s Buffer Zone Map allows it to be anywhere within the facility boundaries, including locations that are only 171 feet from the nearest property line. Thus, according to CAECM, the equalization basin could be less than 500 feet from a property line, and so “Applicant has not demonstrated that an adequate buffer zone will exist around the unaerated equalization basin necessary to comply with the location standards set forth at 30 Tx. Admin. Code § 309.13(e).”

In response, the ED points out that the application contains multiple instances of referring to the basin as an “aeration basin” and also includes an aeration design spreadsheet.¹⁰⁰

B. ANALYSIS

The filing of the administrative record resulted in the Prima Facie Demonstration. CAECM’s argument that the equalization basin is not forbidden from being unaerated (setting aside the evidence that it is intended to be aerated) and that if unaerated, it could possibly be placed less than 500 feet from a property line does not rebut that demonstration. CAECM did not present evidence demonstrating that one or more provisions in the draft permit violate a specifically applicable state or federal requirement. The most CAECM presented was conjecture that it was theoretically possible to violate a provision. That is not enough. CAECM has not rebutted the presumption on this issue.

¹⁰⁰ ED’s Response Brief at 4.

IX. LOCATION ISSUES

CAECM also argues that Applicant has not met his burden to establish that the Draft Permit complies with 30 Texas Administrative Code section 309.12, which states that the Commission “may not issue a permit for a new facility . . . unless it finds that the proposed site, when evaluated in light of the proposed design, construction or operational features, minimizes possible contamination of water in the state.”¹⁰¹ The Commission may consider the following factors in making that determination:

1. Active geologic processes;
2. Groundwater conditions such as groundwater flow rate, groundwater quality, length of flow path to points of discharge, and aquifer recharge or discharge conditions;
3. Soil conditions such as stratigraphic profile and complexity, hydraulic conductivity of strata, and separation distance from the facility to the aquifer and points of discharge to surface water in the state; and
4. Climatological conditions.¹⁰²

To begin, CAECM cites Mr. Pouzar’s testimony that the unnamed tributary where the discharge flows is not like a river, but is instead “a dry, well-vegetated grassland beginning as a slight depression in the ground and feathering out into a broad flatland.”¹⁰³ He also testified that the area receives runoff from the property

¹⁰¹ CAECM Closing Brief at 12.

¹⁰² 30 Tex. Admin. Code § 309.12.

¹⁰³ CAECM Ex. 100 at 000006.

where the facility is to be located and that the runoff “accumulates on several acres.”¹⁰⁴

CAECM then argues the following:

The proposed treatment plant will add significant impervious cover to the land upstream of these areas, thus increasing the amount of runoff from the areas where that impervious cover is placed. Yet, no demonstration has been made that this addition of impervious cover upstream of areas already vulnerable to flooding impacts will not cause erosion and contamination of waters of the State.¹⁰⁵

But this argument misplaces the burden. Although Applicant has the ultimate burden, CAECM has the burden to show, through evidence, how the Draft Permit would violate a specifically applicable requirement.¹⁰⁶ Testimony about accumulation of runoff does not show that the proposed location fails to minimize possible contamination of water in the state. CAECM has not rebutted the Prima Facie Demonstration on this issue.

¹⁰⁴ CAECM Ex. 100 at 000010.

¹⁰⁵ CAECM Closing Brief at 13-14.

¹⁰⁶ Tex. Gov’t Code § 2003.047(i-2).

X. TRANSCRIPT COSTS

The Commission may assess reporting and transcription costs to one or more of the parties participating in a proceeding, and when doing so, must consider the following factors:

- (A) the party who requested the transcript;
- (B) the financial ability of the party to pay the costs;
- (C) the extent to which the party participated in the hearing;
- (D) the relative benefits of the various parties of having a transcript; . . . and
- (G) any other factor which is relevant to a just and reasonable assessment of costs.¹⁰⁷

Applicant argues that each party should bear its own transcription costs.¹⁰⁸ CAECM argues that Applicant should bear all the transcript costs.¹⁰⁹ Ellis County did not address transcript costs. No evidence was presented about the amount of the transcript cost or who actually paid for them.

Considering the Commission's factors, the ALJ finds that the transcript was ordered by the ALJ, not requested by either party, and that no party has claimed a financial inability to pay transcript costs. The parties all participated in the hearing

¹⁰⁷ 30 Tex. Admin. Code § 80.23(d).

¹⁰⁸ Applicant's Closing Brief at 1.

¹⁰⁹ CAECM's Closing Brief at 14-15.

and all benefitted equally from having the transcript. Given that, the ALJ will accept Applicant's argument and will recommend that each party bear the transcription costs they have already incurred.

XI. CONCLUSION

For the reasons stated above the Application should be granted. In further support of this recommendation, the ALJ has prepared the Findings of Fact and Conclusions of Law incorporated within the accompanying proposed Order of the Commission.

Signed September 18, 2024

ALJ Signature:



Rebecca Smith

Presiding Administrative Law Judge

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

AN ORDER GRANTING THE APPLICATION BY STEPHEN RICHARD SELINGER FOR NEW TEXAS POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT NO. WQ0016103001 SOAH DOCKET NO. 582-24-08875 TCEQ DOCKET NO. 2023-1667-MWD

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the application of Stephen Richard Selinger (Applicant) for new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0016103001 in Ellis County, Texas. A Proposal for Decision (PFD) was presented by Administrative Law Judge (ALJ) Rebecca S. Smith with the State Office of Administrative Hearings (SOAH), who conducted an evidentiary hearing concerning the application on June 18, 2024, via Zoom videoconference.

After considering the PFD, the Commission makes the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

Application and Draft Permit

1. Applicant filed his application (Application) for a TPDES permit with the Commission on January 31, 2022.

2. The Application requested authorization to discharge treated domestic wastewater from a wastewater treatment facility (Facility), that will be located at 1008 Shankle Road, Palmer, in Ellis County, Texas.
3. The proposed discharge route is to an unnamed tributary, then to Fourmile Creek, then to Village Creek, and then to Upper Trinity River in Segment No. 0805 of the Trinity River Basin.
4. The Application requested to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 500,000 gallons per day.
5. The Executive Director (ED) of the Commission declared the application administratively complete on March 30, 2022.
6. TCEQ determined that the application was technically complete on June 15, 2022.
7. The ED prepared a draft permit (Draft Permit) and made it available for public review and comment.
8. The plant would be an activated sludge process plant operated in the extended aeration mode. Treatment units would include a bar screen, a flow splitter in the Interim II and Final phases, aeration basins, final clarifiers, sludge digesters, chlorine contact chambers, and dichlorination chambers in the Final phase.
9. The Draft Permit provides for three phases—two interim phases and a final phase.
10. During the Interim I phase, the daily average flow of effluent shall not exceed 0.1 million gallons per day (MGD).
11. During the Interim I phase, the Draft Permit authorizes discharge of treated domestic wastewater at a volume not to exceed a daily average flow of 0.10 MGD. During the Interim I phase, the following limitations, based on a 30-day average apply: 20 milligrams per liter (mg/L) five-day biochemical oxygen demand (BOD5), 20 mg/L total suspended solids (TSS), 126 colony

forming units (CFU) or most probable number (MPN) of E. coli per 100 milliliters (ml), and 2.0 mg/L minimum dissolved oxygen (DO).

12. During the Interim II phase, the daily average flow of effluent shall not exceed 0.2 MGD.
13. During the Interim II phase, the Draft Permit authorizes discharge of treated domestic wastewater at a volume not to exceed a daily average flow of 0.20 MGD. The effluent limitations in the Interim II phase of the draft permit, based on a 30-day average, are 20 mg/L BOD₅, 20 mg/L TSS, 126 CFU or MPN of E. coli per 100 ml, and 5.0 mg/L DO.
14. During the Final phase, the daily average flow of effluent shall not exceed 0.5 MGD.
15. During the Final phase, the Draft Permit authorizes discharge of treated domestic wastewater at a volume not to exceed a daily average flow of 0.5 MGD. In the Final phase, the effluent limitations, based on a 30-day average, are 10 mg/L five-day carbonaceous biochemical oxygen demand (CBOD₅), 15 mg/L TSS, 3 mg/L ammonia-nitrogen (NH₃-N), 126 CFU or MPN of E. coli per 100 ml, and 4.0 mg/L minimum DO.

Notice and Jurisdiction

16. Applicant published the Notice of Receipt and Intent to Obtain a Water Quality Permit in English on April 6, 2022, in the *Waxahachie Daily Light*.
17. Applicant published the Notice of Application and Preliminary Decision in English on August 17, 2022, in the *Waxahachie Daily Light*.
18. The comment period for the application was extended until the close of a public meeting held on April 27, 2023.
19. The Chief Clerk mailed the ED's Decision and Response to Comments on December 7, 2023.
20. Applicant requested that the TCEQ directly refer this matter to SOAH on December 1, 2023.

21. This matter was docketed with SOAH on January 10, 2024.
22. The SOAH preliminary hearing was held on March 5, 2024, via Zoom videoconference. The Applicant, the ED, the Office of Public Interest Counsel (OPIC), Ellis County, and Citizens Against Ellis County MUDs, Inc. (CAECM) were named as parties.
23. At the preliminary hearing, the administrative record was admitted into evidence.
24. The hearing on the merits was held via Zoom videoconference on June 18, 2024, before ALJ Rebecca S. Smith. Applicant represented himself. Ellis County was represented by attorneys Emily Rogers and Stefanie Albright. The ED was represented by attorneys Allie Soileau and Aubrey Pawelka. CAECM was represented by attorney Eric Allmon. OPIC was represented by attorney Eli Martinez. The record closed on July 22, 2024, with the filing of response briefs.

Dissolved Oxygen Modeling

25. Dr. Xing Lu performed steady-state DO modeling using an uncalibrated QUAL-TX model for the unnamed tributary and Fourmile Creek.
26. In doing this modeling, Dr. Lu used default modeling inputs for stream dimensions, velocity, and flow characteristics. These inputs have been approved by TCEQ and the United States Environmental Protection Agency.
27. A staff member of Ellis County's expert Timothy Osting's company made a single visit to four locations on the proposed discharge route and measured the width of the banks and the depth of any water.
28. The depth and width measurements at the four locations were not the same as the default depth and width used by Dr. Lu.
29. Although the measurements were different, Mr. Osting did not testify how the modeling would change based on width and depth measurements changing, only that the dissolved oxygen could be overestimated. He did not set out how significant a difference there would be.

30. Under Dr. Lu's modeling, the minimum DO values in summer minimum conditions fall above the criteria assigned for the unnamed tributary and Fourmile Creek.
31. The Draft Permit will not violate the Texas Surface Water Quality Standards (TSWQS) for DO.

Total Phosphorous

32. ED staff completed a nutrient screening worksheet to determine whether a total phosphorous (TP) limit should be added to the Draft Permit.
33. The worksheet results placed the application in a category where TP monitoring or a TP limit could be included in the Draft Permit, depending on site-specific criteria and best professional judgment.
34. ED staff determined that a TP limit or monitoring was not necessary, based on the low discharge amount, the minimal and limited streams in the first receiving waters, and the greater than four-mile distance to the segments.
35. CAECM did not establish that the values in the nutrient screening worksheet were incorrect.
36. The Draft Permit will be protective of the receiving water without TP monitoring or a TP limit.

Total Dissolved Solids

37. The source of the drinking water that will be the base of the discharge has not been finalized.
38. Because the source of the water has not been finalized, it is premature to impose a total dissolved solids limit on the Draft Permit.

Compatibility with the Proposed Plan of Development

39. The plan of development for the Municipal Utility District submitted to the TCEQ in a separate matter is preliminary.

40. That the preliminary plan of development submitted in the separate matter shows houses along the discharge route does not make the Application unfeasible.
41. Applicant must comply with location restrictions once the plant is constructed.
42. Ellis County did not show that the discharge route will necessarily need to be moved or present evidence that any movement would cause a violation of the TSWQS.

Operator

43. Applicant applied for a TPDES permit solely as an owner.
44. Neither Ellis County nor CAECM presented evidence that the Application was incomplete because no operator was included.

Location Issues

45. The Application anticipates that the equalization basin will be aerated.
46. Neighboring landowner Jeff Pouzar's description of runoff in the area of the discharge route does not show that the proposed location fails to minimize possible contamination of water in the state.

Transcription Costs

47. No evidence was presented about the parties' ability to pay transcription costs.
48. All parties participated in the hearing on the merits.
49. Based on the factors set out in 30 Texas Administrative Code section 80.23(d)(1), each party should bear its own transcription costs.

II. CONCLUSIONS OF LAW

1. TCEQ has jurisdiction over this matter. Tex. Water Code chs. 5, 26.

2. SOAH has jurisdiction to conduct a hearing and to prepare a PFD in contested cases referred by the Commission under Texas Government Code section 2003.047.
3. Notice was provided in accordance with Texas Water Code sections 5.114 and 26.028; Texas Government Code sections 2001.051 and .052; and 30 Texas Administrative Code chapter 39.
4. The Application is subject to the requirements in Senate Bill 709, effective September 1, 2015. Tex. Gov't Code § 2003.047(i-1)-(i-3).
5. Applicant's filing of the Administrative Record established a prima facie demonstration that: (1) the Draft Permit meets all state and federal legal and technical requirements; and (2) a permit, if issued consistent with the Draft Permit, would protect human health and safety, the environment, and physical property. Tex. Gov't Code § 2003.047(i-1); 30 Tex. Admin. Code §§ 80.17(c)(1), .117(c)(1), .127(h).
6. To rebut the prima facie demonstration established by the Administrative Record, a party must present evidence that (1) relates to one of the Referred Issues; and (2) demonstrates that one or more provisions in the Draft Permit violates a specifically applicable state or federal requirement. *See* Tex. Gov't Code § 2003.047(i-2); 30 Tex. Admin. Code §§ 80.17(c)(2), .117(c)(3).
7. If a party rebuts the prima facie demonstration, the Applicant and the ED may present additional evidence to support the Draft Permit. Tex. Gov't Code § 2003.047(i-3); 30 Tex. Admin. Code §§ 80.17(c)(3), .117(c)(3).
8. Applicant retains the burden of proof on the issues regarding the sufficiency of the Application and compliance with the necessary statutory and regulatory requirements. 30 Tex. Admin. Code § 80.17(a).
9. The burden of proof is by preponderance of the evidence. *Granek v. Tex. St. Bd. of Med. Exam'rs*, 172 S.W.3d 761, 777 (Tex. App.—Austin 2005, no pet.); *Sw. Pub. Serv. Co. v. Pub. Util. Comm'n of Tex.*, 962 S.W.2d 207, 213–14 (Tex. App.—Austin 1998, pet. denied).

10. Under the Draft Permit, DO concentrations will be sufficient to support existing, designated, presumed and attainable aquatic life uses, as required by 30 Texas Administrative Code section 307.4(h)(1).
11. Under the Draft Permit, nutrients from permitted discharges will not cause excessive growth of aquatic vegetation that impairs an existing, designated, presumed, or attainable use, as required by 30 Texas Administrative Code section 307.4(e).
12. The facility's discharge will comply with the TSWQS found in title 30, chapter 307 of the Texas Administrative Code.
13. The prima facie demonstration was not rebutted regarding 30 Tex. Admin. Code § 305.43(a), which provides that "for all Texas Pollutant Discharge Elimination System permits, it is the duty of the operator and the owner to submit an application for a permit."
14. Because the equalization basin will be aerated, 30 Texas Administrative Code section 309.13(e), which requires lagoons with zones of anaerobic activity, such as un-aerated equalization basins, to have at least a 500-foot buffer zone from the nearest property line does not apply.
15. The Draft Permit complies with 30 Texas Administrative Code section 309.12, which states that the Commission "may not issue a permit for a new facility . . . unless it finds that the proposed site, when evaluated in light of the proposed design, construction or operational features, minimizes possible contamination of water in the state."
16. No transcript costs may be assessed against the ED or OPIC because TCEQ's rules prohibit the assessment of any cost to a statutory party who is precluded by law from appealing any ruling, decision, or other act of the Commission. Tex. Water Code §§ 5.275, .356; 30 Tex. Admin. Code § 80.23(d)(2).
17. Factors to be considered in assessing transcript costs include: the party who requested the transcript; the financial ability of the party to pay the costs; the extent to which the party participated in the hearing; the relative benefits to the various parties of having a transcript; the budgetary constraints of a state or federal administrative agency participating in the proceeding; and any other

factor which is relevant to a just and reasonable assessment of the costs. 30 Tex. Admin. Code § 80.23(d)(1).

18. Considering the factors in 30 Texas Administrative Code section 80.23(d)(1), a reasonable assessment of hearing transcript costs is for each party to bear their own costs they have incurred.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. The Application of Stephen Richard Sellinger for Texas Pollutant Discharge Elimination System Permit No. WQ0016103001 is granted.
2. The parties are to bear their own transcription costs.
3. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
4. The effective date of this Order is the date the Order is final, as provided by Texas Government Code section 2001.144 and 30 Texas Administrative Code section 80.273.
5. TCEQ's Chief Clerk shall forward a copy of this Order to all parties.
6. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Jon Niermann, Chairman For the Commission