

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

APPLICATION BY STEPHEN RICHARD	§	BEFORE THE STATE OFFICE
SELINGER FOR NEW TEXAS	§	
POLLUTANT DISCHARGE	§	OF
ELIMINATION SYSTEM PERMIT NO.	§	
WQ0016103001	§	ADMINISTRATIVE HEARINGS

**PROTESTANT ELLIS COUNTY’S
EXCEPTIONS TO PROPOSAL FOR DECISION**

Ellis County, Texas (County), Protestant in this matter, files this Exceptions to Proposal for Decision and, in support thereof, would show the following:

I. Introduction

The County excepts to the Administrative Law Judge’s (ALJ) recommended actions, proposed Findings of Fact, and proposed Conclusions of Law. The proposed Texas Pollution Discharge Elimination Program (TPDES) permit that is the subject of this proceeding would allow Stephen Selinger (Applicant) to discharge a daily average flow of 500,000 gallons per day of treated wastewater (Draft Permit) that is not protective of water quality, aquatic life, wildlife, and livestock, or human health and is in violation of state law. Therefore, the Commission should deny the Application.

II. Exceptions and Corrections

- a. Exceptions to the PFD’s analysis and recommendations regarding whether the Draft Permit contains a dissolved oxygen limit that is protective of surface water quality.**

The County has provided sufficient evidence to show that the Draft Permit is not protective of surface water quality and would be in violation of the Texas Surface Water Quality Standards (TSWQS) regarding dissolved oxygen. The ALJ suggests an alternative analysis that the County’s

expert, Tim Osting, could, in her opinion, have performed to determine whether the specific stream characteristics of narrower and deeper channels would impact dissolved oxygen in the receiving waters. PFD at p. 14. However, the County is not required to provide such information. Rather, based on Mr. Osting's evidence and testimony, the TCEQ should have used site-specific information when it was clear the characteristics of the receiving waters differed from the standard assumptions used in the QUAL-TX modeling.

Mr. Osting's evidence and testimony demonstrated that the modeling inputs utilized by TCEQ to determine the impact of the proposed discharge to dissolved oxygen levels in the receiving waters are incorrect as these inputs are wider and shallower than actual site conditions. County Exhibit 1 - Page 14, lines 4-5 (Bates 17); *see* Tr. – Page 20, lines 11-13 (Osting). Such inconsistencies in modeling inputs will overestimate the surface aeration and predicted dissolved oxygen concentration. County Exhibit 1 - Page 14, lines 4-5 (Bates 17); *see* Tr. – Page 20, lines 11-13 (Osting). The purpose of the QUAL-TX modeling in the permitting process is to enable TCEQ to adequately predict the impact of the proposed discharge on dissolved oxygen in the receiving waters in order to determine whether the dissolved oxygen concentration predictions will meet the TSWQS. *See* County Exhibit 1 – Page 13, lines 7-9 (Bates 16). TCEQ neither observed directly, nor requested information from the Applicant, site-specific information to confirm whether the input assumptions used in the QUAL-TX modeling adequately reflected actual site conditions, and instead relied on assumptions that are inconsistent with site-specific conditions. The County has compared site-specific data with the QUAL-TX standard inputs, and has provided evidence that the QUAL-TX inputs are incorrect and would result in lower dissolved oxygen levels than anticipated by TCEQ. *See* County Exhibit 1 - Page 14, lines 4-5 (Bates 17); *see* Tr. – Page 20, lines 11-13 (Osting). The Draft Permit is thus not protective of water quality and in violation of the TSWQS.

The County excepts to and recommends correction of Conclusions of Law 29, 30, and 31, as follows:

~~“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. Mr. Osting provided testimony that demonstrated that the actual width and depth measurements of the receiving streams would result in less surface reaeration and a lower dissolved oxygen concentration than predicted by TCEQ modeling using standard stream coefficients.~~

30. Under Dr. Lu’s modeling, the minimum DO values in summer minimum conditions fall ~~above~~ below 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.”

The County excepts to and recommends correction of Conclusions of Law 10 and 12, as follows:

~~“10. Under the Draft Permit, DO concentrations will not be sufficient to support existing, designated, presumed and attainable aquatic life uses, as required by 30 Texas Administrative Code section 307.4(h)(1).~~

12. The facility’s discharge will ~~comply~~ not be in compliance with the TSWQS found in title 30, chapter 307 of the Texas Administrative Code.”

b. Exceptions to the PFD’s analysis and recommendations regarding whether the Draft Permit should contain a Total Phosphorus limit and total dissolved solids limit.

The County has sufficiently shown that a Total Phosphorus (TP) limit should be included in the Draft Permit in order to ensure that nutrient levels are not exceeded in violation of the TSWQS. The worksheet provided in the Executive Director’s testimony shows that the initial evaluation for TP produced a scoring level of 2.6, which indicates that a TP limit may be applied.

County Exhibit 1 – Page 14, lines 13-15 (Bates 17). In such situations, TCEQ’s procedures to implement the TSWQS provide that “when a substantial number of screening factors are rated moderate and high,” an effluent limit for TP is likely needed. ED-JL-3, Page 52 (Bates 82). With regard to the proposed permit, a scoring level of 2.6, the fact that 9 out of 10 factors for consideration were moderate or high concern, the presence of actively grazing cattle at receiving waters, and phosphorus levels above screening levels all support the need for a TP limit to prevent exceedance of phosphorus in violation of the TSWQS.

The County has also sufficiently shown that a total dissolved solids (TDS) limit should be included in the Draft Permit due to the high dissolved mineral solids within the groundwater that will be used as the proposed project’s drinking water supply. The ALJ incorrectly asserts that, because the use of groundwater for the drinking water supply is information contained in the district creation petition for the proposed development, it does not have any weight in the current matter. PFD at pp. 21-22. The County does not assert that the ALJ must review the district creation petition for the proposed project, but rather that, when considering the impact of the wastewater discharge on the region, the characteristics of the drinking water supply for the district must be taken into account. Water from the drinking water supply system will ultimately enter the sewer collection system for treatment in the proposed wastewater treatment plant that is the subject of this Application, then discharged pursuant the Draft Permit into the receiving waters. *See* County Exhibit 1 – Page 15, lines 17-20; Page 16, lines 2-5 (Bates 18-19). The groundwater source water for the proposed drinking water system has been shown to have high concentrations of dissolved mineral solids. County Exhibit 1 – Page 15, lines 14-17 (Bates 18); County Exhibit 8. Under the Draft Permit, these dissolved solids will not be removed from the wastewater, and will be discharged into the receiving waters at the concentrations in the source water. *See* County Exhibit

1 – Page 16, lines 14-15 (Bates 19). Without a TDS limit to require removal of the dissolved mineral solids, the high levels of dissolved mineral solids in the discharged wastewater will cause a violation of the TSWQS. The Applicant suggests that the potential for a groundwater as source water for the drinking water system is “preliminary,” but there will not be a chance later in the permitting process to include a protective limit on TDS in the future when final plans for the development are realized. Inclusion of a TDS limit in the Draft Permit ensures that if groundwater is used as the drinking water source for the proposed development, then a violation of the TSWQS will not occur.

The County excepts to and recommends correction of Conclusions of Law 36, 37 and 38, as follows:

“36. The Draft Permit will not be protective of the receiving water without TP monitoring or a TP limit.

~~37. The source of the drinking water that will be the base of the discharge has not been finalized.~~

~~387. Because the proposed source of the drinking water has not been finalized contains high levels of dissolved mineral solids it is ~~premature~~ necessary to impose a total dissolved solids limit on the Draft Permit to protect surface water quality.”~~

The County excepts to and recommends correction of Conclusions of Law 11 and 12, as follows:

“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~~ not be in compliance with the TSWQS found in title 30, chapter 307 of the Texas Administrative Code.”

c. Exceptions to the PFD’s analysis and recommendations regarding whether the proposed wastewater facilities are compatible with the proposed development.

The County disagrees with the ALJ’s analysis that that the incompatibility of the proposed plan of development should not be considered in the review of the Application. Although plans for development may change, in reviewing the feasibility of a wastewater discharge permit, the proposed plans for treatment and discharge of wastewater from the proposed development must be compatible to support permit feasibility.

Here, there is a direct conflict between the plans for the proposed development and the draft wastewater discharge permit. The Shankle Road Municipal Utility District (District) proposes to locate houses within the Draft Permit’s effluent discharge route. Tr. – 38, lines 18-23 (Gillespie). Additionally, the County has shown that the discharge route is not feasible with the proposed District, and at least 0.40 kilometers of the unnamed tributary will need to be rerouted, or the discharge point relocated downstream, to allow for the residential lots and roadways proposed by the Applicant. County Exhibit 1 - Page 14, lines 5-11 (Bates 17). Such a change to the discharge route and/or the discharge point could potentially change both the analysis and modeling outcomes that the decision to award the Draft Permit is based upon. If this District is in the conceptual early planning stages that can be flexible and change, then the Applicant could have adjusted the plan of development to be compatible with the Application at the time of submittal. Instead, the PFD recommends granting a permit that is incompatible with the proposed development plan, and the Draft Permit infeasible to be implemented based on this plan.

The County excepts to and recommends correction of Conclusions of Law 40 and 42, as follows:

“40. That the preliminary plan of development submitted in the separate matter shows houses along the discharge route ~~does not make~~ that makes the Application unfeasible.

42. Ellis County ~~did not show~~ showed that the discharge route will necessarily need to be moved ~~or~~ and presented evidence that any movement of the discharge route would cause a violation of the TSWQS.”

The County excepts to and recommends correction of Conclusions of Law 15, as follows:

“15. The Draft Permit ~~complies~~ does not comply 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.”

d. Exceptions to the PFD’s analysis and recommendations regarding whether no operator was included as an applicant.

The County has provided valid and sufficient arguments regarding the lack of an operator included as an applicant in the Application. The County has not, as the ALJ contends, waived such arguments. The ALJ states that no information was presented relating to this issue except for a question from protestant CAECM regarding whether the Applicant was identified as the “owner” in the Application. *See* Tr. – 40, lines 5-9 (Gillespie). However, this testimony in cross-examination that the ALJ references as failing to provide evidence that no operator was included as an applicant *is* testimony to demonstrate that the Draft Permit is deficient and excludes information as required by state or federal law. Additionally, the ALJ inaccurately states that there is no evidence regarding this issue. The County is relying on the Application itself to identify the lack of information relating to an operator. As stated by the ALJ in the PFD, the Application is included as evidence in the Administrative Record. *See* Admin. Record, Tab D. Thus, the Application is already in evidence and demonstrates the absence of an operator as argued by the County.

The ALJ errs in stating that no evidence was presented to rebut the presumption that the Application was accurate and complete. The Application should thus be denied because the Applicant did not provide information in the Application regarding the operator as required by state law. 30 Tex. Admin. Code § 305.43(a).

The County excepts to and recommends correction of Conclusions of Law 44, as follows:

~~“44. Neither Ellis County nor CAECM presented evidence that the Application was~~ The Application is incomplete because no operator was included ~~in the Application and should be denied.”~~

The County excepts to and recommends correction of Conclusions of Law 13, as follows:

“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.””

III. Conclusion

The County respectfully requests that the Commission grant its exceptions, recommend the PFD with the additional provisions and corrections as set out above and deny the Application. The County additionally requests any other relief to which it is entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2024, a copy of the foregoing document was served on all persons listed via electronic mail.

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