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

APPLICATION BY STEPHEN RICHARD SELINGER FOR TPDES PERMIT NO. WQ0016103001	§ § § § § §	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

CITIZENS AGAINST ELLIS COUNTY MUDS, INC.'S EXCEPTIONS TO THE PROPOSAL FOR DECISION

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

Based on nothing more than the *prima facie* presumption imposed by Senate Bill 709, the ALJ recommends granting the requested permit despite a blatant failure of the Application to comply with the specific requirement of state and federal law that *both* the owner *and* operator bear a duty to apply for a TPDES permit. Adoption of the ALJ's recommendation would simply confirm the manner by which TCEQ is willing to apply this presumption to nullify the minimum requirements of federal law in administration of the Texas Pollutant Discharge Elimination System ("TPDES") program, as complained of in the September 23, 2021 Citizen Petition for Corrective Action or Withdrawal of NPDES Program Delegation from the State of Texas, now under investigation by EPA Region 6. The ALJ should rethink such an invitation that the Commission violate federal law, and the Commission should not follow the ALJ's invitation to violate federal law.

I. THE PERMIT APPLICATION INDISPUTABLY FAILS TO COMPLY WITH 30 TEX. ADMIN. CODE § 305.43(a)—REQUIRING THAT *BOTH* THE OWNER AND OPERATOR APPLY FOR A PERMIT

For a TPDES permit, 30 Tex. Admin. Code § 305.43(a) provides that it is the duty of both the owner and operator to submit an application for a permit. *See also Tex. Comm'n on Envtl. Quality v. Maverick Cnty*., 642 S.W.3d 537, 544 (Tex. 2022), reh'g denied (Apr. 22, 2022). This

embodies an element of the TPDES permit application that TCEQ *must* require under federal law in administering the National Pollutant Discharge Elimination System ("NPDES") permitting program. *See* 40 C.F.R. § 122.21(b). This ensures that TCEQ, EPA, and citizens can enforce the requirements of the permit against the entity operating the facility.

In this case, the requirement of 30 Tex. Admin. Code § 305.43(a) that both the owner and operator be applicants for a permit has clearly not been met. Pursuant to 30 Tex. Admin. Code § 305.2(24), the "operator" is the person responsible for the overall operation of a facility, "not merely a passive owner who has given responsibility for overall operations to someone else." *Maverick Cnty.*, 642 S.W.3d at 548. The operator is not included as an applicant for the permit at issue in this proceeding. As pointed out in the questioning of Charles Gillespie during the hearing on the merits, the Application was submitted by Stephen R. Selinger, who is identified as the "owner" within the TCEQ Core Data Form in the Application.[1] On this same form, he is not indicated as the operator, nor is he indicated as both the owner and operator.[2] In fact, where the Application asks for the name of the Facility Operator, the Application merely indicates that the "Licensed Operator will be determined upon permit approval."[3] The prefiled testimony of Mr. Gillespie further confirms that "[t]he application does not provide the specified operator[,] as the expectation is the facility will not be in operation for several years after submittal, which holds true to date."[4] For a TPDES permit, this answer merely confirms a fatal deficiency in the Application.

The rule at issue in this case was previously addressed by the Texas Supreme Court in *Tex. Comm'n on Envtl. Quality v. Maverick Cnty*. In that case, Dos Repúblicas Coal Partnership

[1] Administrative Record ("AR") Tab D at 4 (Bates); HOM Tr. at 40:1-9.
[2] *Id.*
[3] *Id.* at 85.
[4] App. Ex. 1 at 6:19-21.

("DRCP") applied to the TCEQ for a TPDES permit for a wastewater discharge from a coal mine. *Id.* at 540. DRCP hired a contractor to conduct day-to-day operations while maintaining responsibility for the overall operation of the permitted facility. The Texas Supreme Court noted that 30 Tex. Admin. Code § 305.43(a) requires both the operator and the owner of the facility to apply for a TPDES permit and upheld TCEQ's issuance of the permit based only upon a conclusion that DRCP was, indeed, the operator of the facility. *Id.* at 548. There, the Court noted that DRCP would not have properly been considered an operator if it was "merely a passive owner who has given responsibility for overall operations to someone else." *Id.*

Mr. Selinger is merely a passive owner of the proposed facility with no evidence that he has maintained responsibility for the overall operation of the facility. Therefore, Mr. Selinger has not demonstrated that he is the "operator" of the proposed facility.

Considering that this is an application for a TPDES permit, but the operator is not an applicant for the permit, the Application does not comply with the mandatory requirement of 30 Tex. Admin. Code § 305.43(a). For this reason alone, the requested permit must be denied.

The ALJ contends that compliance with this regulatory requirement may be ignored simply because the Applicant filed the Application with SOAH (thereby creating a presumption that the Application complies with all regulatory requirements, regardless of whether that presumption is true), and Protestants allegedly did not present evidence on this issue beyond reference to the Application, while allegedly not asking enough questions about this aspect of the Application during the hearing.

The Application itself fully demonstrates the error identified in the arguments by Protestants. Neither the ALJ, nor the Executive Director, nor the Applicant, identify what additional evidence was necessary to show that the operator is not included as an applicant. No

such evidence was needed. Somehow, an inherently flawed application became perfect by the mere filing of the application with SOAH. If TCEQ is to comply with federal law, then nothing more than identifying this omission in the Application should be needed to "rebut" the *prima facie* presumption.

Rather, Protestants are faulted for not putting on evidence and asking questions that would have simply been cumulative of the facts clearly illustrated by the omissions contained within the Application itself.

The *prima facie* evidentiary presumption of Senate Bill 709 should not be allowed to displace TCEQ's duty to implement state and federal law, as the Executive Director and ALJ suggest. An agency acts arbitrarily when it violates its own rules. *Rodriguez v. Serv. Lloyds Ins. Co.,* 997 S.W.2d 248, 255 (Tex. 1999). Accordingly, TCEQ should not be allowed to issue the requested permit without requiring that both the owner and operator be applicants. If TCEQ *is* able to disregard the requirements of 30 Tex. Admin. Code § 305.43(a) based on nothing more than the *prima facie* presumption set forth in Senate Bill 709, then TCEQ is failing to faithfully comply with the elements of the federally delegated NPDES permitting program.

III. THE APPLICANT SHOULD BEAR ALL TRANSCRIPT COSTS

CAECM respectfully excepts to the ALJ's recommendation that transcript costs be equally distributed among all parties.

TCEQ rules provide that transcript costs are to be allocated based upon factors including:

(1) the party who requested the transcript;
(2) the financial ability of the party to pay the costs;
(3) the extent to which the party participated in the hearing; and,
(4) the relative benefits to the various parties of having a transcript[.][5]

[5] 30 Tex. Admin. Code § 80.23(d)(1).

The ALJ found that "the parties all participated in the hearing."[6] While it is true that CAECM participated, witnesses presented by CAECM were limited to a single fact witness and occupied very little of the transcript. Cross-examination by CAECM was limited to issues relevant to the Application at issue and was not unduly cumulative. Due to Protestants' limited witnesses and efficient cross-examination, the entire hearing lasted less than a full day.

Furthermore, Applicant derives a significantly greater relative benefit from the transcript. The most CAECM stands to gain from the current proceedings is maintenance of the status quo. On the other hand, the Applicant stands to gain considerable economic benefit from the existence of the transcript in aiding his efforts to meet his burden of proof.

Furthermore, Ellis County is a local government reliant upon taxpayers for expenses incurred and should be spared the burden of transcript costs. CAECM is an organization of local landowners dependent upon donations from individual families to fund participation in this matter.

For these reasons, CAECM urges that all transcript costs should be allocated to the Applicant.

II. EXCEPTIONS TO SPECIFIC FINDINGS OF FACT AND CONCLUSIONS OF LAW[7]

In relation to the incorrect conclusion that the Application complies with the requirement that both the owner and operator have a duty to apply for a permit, CAECM excepts to Finding of Fact No. 44 and Conclusion of Law No. 13.

It is incorrect to say that CAECM did not present evidence that the Application was incomplete because no operator was included, as is set forth in Finding of Fact No. 44. CAECM conducted cross-examination specifically confirming that the Applicant is solely the owner of the

[6] PFD at 29.
[7] CAECM also joins in, and incorporates by reference, all exceptions submitted by Ellis County.

facility.[8] This elicited testimony, particularly in combination with the Application itself, demonstrates that the Application fails to comply with the specifically applicable requirement of 30 Tex. Admin. Code § 305.43(a) that both the operator and the owner of the facility must apply for a TPDES permit.

Conclusion of Law No. 13 improperly states that the *prima facie* presumption was not rebutted regarding the requirement of 30 Tex. Admin. Code § 305.43(a), which requires 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." Protestants identified the absence of the operator as an applicant for the permit. This identification of a glaring omission in the Application constituted sufficient evidence to rebut the *prima facie* presumption that both the owner and operator were applicants for the permit. Protestants' evidence rebutting the *prima facie* presumption may consist of materials contained within the Application itself.

CAECM also objects to the findings of fact and conclusions of law addressing transcript costs.

Finding of Fact No. 48 should be deleted and replaced with the following: "Witnesses presented by CAECM were limited to a single fact witness and occupied very little of the transcript. Cross-examination by CAECM was limited to issues relevant to the Application at issue and was not unduly cumulative." CAECM proposes that the Commission further enter the following Findings of Fact:

- Protestants do not equally benefit from the transcript. The most CAECM stands to gain from the current proceedings is maintenance of the status quo. On the other hand, the Applicant stands to gain considerable economic benefit from the proceedings and from the existence of the transcript.
- The transcript facilitates the creation of a record which the Applicant can use in his attempt to meet his burden of proof.

[8] HOM Tr. at 40:1-9.

- Ellis County is a local government reliant upon taxpayers for expenses incurred and should be spared the burden of transcript costs.

CAECM further excepts to Finding of Fact No. 49 and proposes that it be revised to state: "Based on the factors set out in 30 Texas Administrative Code section 80.23(d)(1), ~~each party should bear its own transcription costs~~ the Applicant should bear all transcript costs."

III. CONCLUSION

For the reasons described above, CAECM respectfully requests that the Commission deny Steve Selinger's Application because he has not met his burden and has not demonstrated that his Application meets the applicable requirement of state and federal law that it is the duty of both the owner and the operator to apply for a TPDES permit, as set forth at 30 Tex. Admin. Code § 305.43(a). CAECM further requests that all transcript costs be allocated to Applicant, and such other and further relief to which it may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing document has been served via electronic service to the following parties of record, on October 8, 2024.

/s/ Eric Allmon
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