



CARLS, McDONALD & DALRYMPLE, L L P
ATTORNEYS AT LAW

September 15, 2008

VIA HAND DELIVERY

Ms. LaDonna Castañuela
Chief Clerk – MC 105
Texas Commission on
Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2008 SEP 15 AM 10:56
CHIEF CLERKS OFFICE

Re: **Stewarts' Reply to the Applicant, Executive Director's and OPIC's Responses to Requests for a Contested Case Hearing Re:**
Diamond Shamrock Refining Company, L.P.
TPDES Permit No. WQ000135300
Application for Major Amendment

Dear Ms. Castañuela,

This correspondence serves as a formal written reply to the responses filed by the Diamond Shamrock Refining Company, L.P. ("Applicant"), the Office of Public Interest Counsel and the Executive Director's relating to requests for a contested case hearing regarding the application filed by Diamond Shamrock Refining Company, L.P. for a major amendment to Texas Pollutant Discharge Elimination System (TPDES) Permit, No. WQ0001353000. On August 29, 2008, the Applicant, the Office of Public Interest Counsel and the Executive Director filed responses to the Stewarts' request for a contested case hearing on the proposed permit. The Commission is scheduled to consider the request for hearing on September 24, 2008. In accordance with commission rules, Mr. Lloyd "Bubba" Stewart and Mrs. Virginia Stewart are filing a formal written reply to all three responses. This reply is timely filed, having been submitted within the deadline of nine (9) days before the Commissioners' agenda.

The Stewarts would first like to point out that the map requested by the TCEQ Office of Legal Services for the Commissioners' Agenda has a slight inaccuracy. The map fails to include in the Stewarts' property the seventeen acres across County Road 232, south of the Stewarts' main property. These seventeen acres are discussed in the original request for hearing and the reply below and referred to as the "hay fields."

The Stewarts file the following reply as discussed below.

I. THE STEWARTS' REPLY TO APPLICANT'S ALLEGATIONS

The Applicant mischaracterizes the Stewarts' request for contested case hearing. The Stewarts respond to the mischaracterization of the facts by the Applicant as follows below.

THE STEWARTS ARE AFFECTED PERSONS

To be an "affected person" entitled to request a contested case hearing, a person must have "a personal justiciable interest related to a legal right, duty, privilege, power or economic interest affected by the application." 30 TAC § 55.203(a). Relevant factors to be considered include: 1) whether there is a law protecting the interest claimed to be affected; 2) whether there are distance or other restrictions imposed by law on the interest; 3) the existence of a reasonable relationship between the regulated activity and the interest asserted; 4) the impact the regulated activity will likely have on the use of property and the health and safety of the person; and 5) the impact the regulated activity will likely have on the use of the impacted natural resource by the person. *Id.* at 55.203(c).

i. The Texas Water Code Protects the Stewarts' Interests In Their Health and Their Use of Property

The Applicant claims that no law protects the Stewarts' interests. However, the Stewarts' loss of livestock and grass crops from the Applicant's activities not only show that the Stewarts have personal justiciable interests not in common to that to of the general public, they also show that the Stewarts have a personal justiciable interest related to an economic interest adversely affected by the Applicant's activities.¹ The Texas Water Code further protects the health of the Stewarts, as well as that of their livestock and vegetation.² Therefore, Applicant's claims are unfounded and the Stewarts are affected persons.

The Applicant further contends that because the proposed permit does not authorize nuisances, the regulations regarding TPDES permits do not protect the Stewarts' interests. However, the Stewarts dispute that circular reasoning and allege that, if granted, the irrigation practices allowed by the proposed permit will cause nuisance conditions on and contamination of their property and that the proposed permit itself is defective.

ii. There Are No Distances Imposed by Law On the Stewarts' Interests

The Applicant contends that two tracts of land separate the irrigation tracts from the Stewarts' property. While two tracts of land do separate the Stewarts from the irrigation tracts, the combined distance of those two tracts is only about a quarter of a mile. The distance is so minimal that the Stewarts are almost adjacent to the irrigated tracts. Therefore, the Stewarts' extremely close proximity to the disposal activities indicates the Stewarts are affected persons.

¹ Tex. Water Code § 26.003.

² *Id.*

The Applicant also contends that the proposed permit prohibits the off-site discharge of wastewater through the irrigation tracts. The Stewarts agree that the proposed permit *should* prohibit such off-site discharge; however, the Stewarts contend that it does not have sufficient conditions and/or permitted area to ensure that there is no such off-site discharge. The Stewarts are being adversely affected by the practices authorized by the current permit and the proposed permit would authorize significantly increased land disposal, therefore increasing the impact to the Stewarts' property.

iii. A Reasonable Relationship Exists Between the Applicant's Disposal and Stewarts' Interests In Their Health and Use of Their Property

The Applicant repeatedly alleges that the Stewarts are asking for economic damages, which are not within the Commission's jurisdiction. This is not the case. The Stewarts' mention of losses of livestock and grass crops from the Applicant's activities prove that the Stewarts have personal justiciable interests not common to that of the general public. The Stewarts' losses of livestock, crops and trees establish a reasonable relationship between the Stewarts' health, safety and property interests and Applicant's disposal activities. Therefore, the Stewarts' economic damages serve to prove that the Stewarts are "affected persons," who are therefore entitled to a contested case hearing. The Applicant's argument that the Stewarts' economic damages sound only in tort is irrelevant because the Stewarts' losses indicate that the Stewarts are affected persons.

The Applicant further contends that the proposed permit is a "no-discharge" permit, which does not allow discharge of effluent from the authorized irrigated areas; and therefore, there is no potential for impact on the Stewarts or their property. Though the permit may not authorize discharge beyond the irrigation area, water already flows from the Applicant's irrigation property, over the development property and onto the Stewarts' land. As explained below, the Applicant has been subject to EPA enforcement actions at its Three Rivers site due to the rising water table and elevated concentrations of pollutants in the groundwater. Therefore, even if the proposed permit does not authorize a discharge from the irrigation areas, under the increased irrigation allowed by the proposed permit, the water from Applicant's irrigation fields can and does seep into the ground, in addition to flowing across land, and affects through those means the Stewarts' property. Therefore, the Stewarts have demonstrated personal justiciable interests so greatly affected by the Applicant's application as to be sufficient to establish that the Stewarts are affected persons.

iv. If the Permit Amendment Is Granted, the Stewarts' Health and Safety Will Be Further Detrimentially Affected

The Applicant contends that there is no link between the detrimental effects to the health and safety of the Stewarts and their livestock and the disposal from the Facility. However, as discussed in detail in the materials by Dr. Lauren Ross and included in the original request for hearing, current disposal practices are contaminating the Stewarts' property and harming their

livestock. As discussed in the original request for hearing, the proposed permit authorizes **both** greater quantities of water for disposal, as well as greater quantities of pollutants contained in that water for disposal. Therefore, the increased quantity and decreased quality of water for disposal under the proposed permit will further detrimentally affect the health and safety of both the Stewarts and their livestock.

v. If the Permit Amendment Is Granted, the Stewarts' Use of Their Property Will Be Further Detrimentially Affected

Again, the Applicant contends that the Stewarts have asked for economic damages. The Stewarts point to such losses as: death of their livestock due to selenium poisoning, the drowning of their oak trees and the loss of their hay and grass crops as proof that they and their property are **already affected** by the Applicant's activities. The permit amendment seeks a large **increase in quantity** and a **hugely decreased quality** of effluent disposal. Current disposal is already harmful to the Stewarts; therefore, if the amendment were granted, it would further greatly affect the Stewarts' use of their land. Therefore, the Stewarts' losses serve to prove that the Stewarts are "affected persons," who are therefore entitled to a contested case hearing. The Applicant's argument that the Stewarts' economic damages sound only in tort is irrelevant because the Stewarts' losses indicate that the Stewarts are affected persons.

Further, the Stewarts have standing to challenge the entire permit. The Applicant contends that the Stewarts may not challenge the entire permit, but only the portions related to disposal by land irrigation. However, by Applicant's own admission (page 12 of Applicant's response), what the facility does not directly discharge is disposed of through land irrigation. The two methods of disposal are therefore intertwined so as to be inseverable and therefore, the Stewarts may challenge the entire permit.

DISPUTED ISSUES OF FACT RELEVANT AND MATERIAL
TO THE COMMISSION'S DECISION ON THE APPLICATION

The Stewarts have presented the following disputed issues of fact for submittal to SOAH for a contested case hearing. Applicants contend that there are no issues of fact, yet addresses each issue of fact presented by the Stewarts in the request for hearing. The Stewarts address the Applicant's arguments on the disputed fact issues as below.

1) Whether The Application Was Properly Noticed As Required by Law

The proposed permit did not comply with all applicable legal requirements, contrary to Applicant's unsupported position otherwise. *United Copper Indus., Inc. v. Grissom*³ provides that notice under TCEQ rules must provide the public with notice sufficient to afford individuals who may be affected by the permit action a meaningful opportunity to voice their concerns and to

³ 17 S.W.3d 797, 802 (Tex.App.—Austin 2000, pet. dism'd as moot).

participate in the permit process. This requirement is in addition to requirements found in Texas Water Code § 26.028.

The notice published was not sufficiently detailed to alert potentially affected individuals to the fact that their interests might be affected by the application. The inadequacies of the notice are listed below:

First, the notice is impermissibly vague because the notice mentions only the increase in discharge to the Nueces/Lower Frio River and fails to mention any increase in discharge volume to the irrigation fields. The proposed permit authorizes *unlimited* quantities of the refinery's liquid waste and off-spec product to be disposed of on the increased area 1438-acre irrigation tract. In practice, Applicant has tended to rely mostly, or even wholly, on irrigation for disposal of its wastewater. Therefore, the notice is insufficient because it does not mention the increase in discharge volume to the irrigation fields.

Second, the notice makes no mention of the fact that the proposed permit includes an expansion of the definition of wastewater. The current permit authorizes irrigation and discharge into the River of treated effluent only. The proposed permit would authorize the disposal by irrigation of treated, partially treated, and untreated wastewater; fertilizers, maintenance chemicals, pesticides, treatment chemicals, and other supplements; off-spec product; deep well back flush; "and any other materials and/or substances applied to the irrigation tract sized at 1438 acres." The Notice does not mention the additional substances which, under the proposed permit, may be disposed of by irrigation well.

Third, the Amended Notice does not include the proposed hydraulic application rate. As discussed below and in the request for hearing, the flow to the irrigation site is only limited by the hydraulic application rate. Therefore, because the Notice does not contain this rate, it does not alert potentially affected persons that their interests may be affected.

Fourth, the notice does not indicate that the refinery is seeking a renewal of its permit. The permit in question expired on May 1, 2005. Therefore, the Applicant must intend that the application to serve as a renewal application and the notice is deficient.

2) Whether The Proposed Permit Does Not Satisfy Regulatory Requirements Intended to Protect Water Quality, Human Health and the Environment?

As discussed in the attachment to the request for contested case hearing prepared by Dr. Lauren Ross, the proposed permit does not satisfy the regulatory requirements intended to protect water quality, human health and the environment. The Applicant contends that the proposed permit complies with all regulatory requirements. However, the Stewarts' request for hearing and Dr. Ross' materials show that the restrictions in the proposed permit that are placed on water for disposal through direct discharge to the River are much more restrictive than those for water to be disposed of through irrigation. This is especially alarming because in practice, the Applicant has disposed of most or all of its wastewater from the Facility through irrigation

methods. The proposed permit assumes different ratios of disposal than in actual practice; therefore, by disposing of wastewater through irrigation, the Applicant effectively significantly skirts requirements to protect water quality, human health and the environment.

Applicant further contends that the effluent disposed of at the site allows vigorous growth of grasses on the disposal site. However, as discussed at length below and in the request for hearing, the disposed effluent is not confined to the Applicant's lands – instead, effluent flows across the land as well as underneath it to the Stewarts' property. If the effluent stayed on the Applicant's land, Applicant's argument would be persuasive. However, as the effluent obviously migrates to the Stewarts land, it is no wonder that the Stewarts' hay and grass crops suffer from the effects of too much contaminated water while the Applicant's grasses flourish.

The Applicant further alleges that the disposal of its wastewater through land application indicates no effect on the Stewarts' property. However, the land underneath and surrounding the irrigation fields is so saturated, water already flows across land to the Stewarts' property and into the draw on the Stewarts' land, as the Applicant repeatedly mentions. Applicant's current practices, as well as the increased disposal to be authorized under the proposed permit, are effectively a discharge into a watercourse. The Applicant does not have a separate TPDES permit for such a discharge. With the acreage covered, the amount of wastewater authorized, the hydraulic application rate, and the current high groundwater level due to decades of irrigation at the site, it is certain that there will be discharge of wastewater through the site, both overland and through the rise in the water table. Therefore, the proposed permit and the Applicant's admitted practice under that proposed permit does not meet regulatory requirements.

3) Whether The Applicant's Poor Compliance History Will Result In Its Inability to Comply with the Proposed Permit and Applicable Law?

The Applicant claims the company and the Facility have an "average" compliance history rating. However, at the Applicant's facility in Three Rivers alone, there have been several EPA enforcement actions against the Applicant due to rising groundwater levels and elevated pollutants in groundwater at the irrigation site and nearby property, which indicate that the proposed permit should be denied, or at the very least, that additional terms and conditions in the proposed permit are needed.

4) Whether the Proposed Permit Establishes Sufficient Monitoring and Reporting Requirements?

The Applicant contends that the proposed permit maintains the monitoring and reporting requirements of the prior permit for numerous pollutants and requires sampling at Outfall 002, and is therefore sufficiently protective. However, the proposed permit establishes different types and inconsistent levels of constituents or characteristics of the effluent that have to be monitored for the Outfalls and for land irrigation. The list of constituents and characteristics of the effluent for land irrigation are not as stringent as those for direct discharge via Outfall 002. However, the Applicant disposes of most of its effluent via land irrigation. Because those standards are lower,

the Applicant gets the benefit of treating the wastewater to lesser standards for land application and thus is allowed to skirt the more stringent requirements that would otherwise apply. The different monitoring standards are not appropriate and the draft permit is not adequately protective because it fails to set appropriate standards for effluent discharge via land application.

This is just one of the ways in which the monitoring and reporting requirements contained in the draft permit are inappropriate for the type of disposal at this particular Facility, especially considering the proposed increase in the quantity of wastewater to be disposed of through irrigation. The Applicant's history of poor compliance at the facility in question and at other facilities requires denial of the amendment under 30 TAC § 60.1, or in the alternative, additional conditions and terms in the proposed permit. For a full list of all the monitoring and reporting deficiencies, please see the Stewarts' original request for hearing.

5) Whether The Wastewater Disposed of by the Applicant Currently Flows and Will Flow Onto The Stewarts' Property and Whether The Wastewater Disposed of by Applicant Raises the Water Table and Percolates and Contaminates the Stewarts' Property?

The Stewarts disagree with the Applicant's contention that the semi-constant flooding of their property is due to wet weather conditions only. Further, the Applicant only addresses one feature of the Stewarts' property, the draw, and fails to address the extensive flooding of the majority of the Stewarts' property, including the hayfields at the southernmost portion of the Stewarts' property. The draw flows with water corresponding with periods of heavy irrigation by the Applicant, even in dry weather. This indicates that the Applicant's activities are currently causing nuisance conditions on the Stewarts' property, in violation of the permit.

The Applicant's activities do not simply cause nuisance conditions, but also carry pollutants from the irrigation fields to the Stewarts' property. The sampling done by Dr. Ross was taken after a period of dry weather, yet still showed increased concentrations of the types of pollutants associated with the Applicant's disposal activities. Please reference Dr. Ross' appendix to the Stewarts' original request for hearing. A period of heavy rainfall would tend to dilute such pollutants, therefore, the nuisance and contamination conditions present on the Stewarts' property during dry periods indicate that the source of the water and contaminants is not naturally occurring, but rather comes from the Applicant's facility. These facts indicate a flow across the Stewarts' property of the water disposed of by irrigation and contamination of the Stewarts' property by the irrigation waters.

Further, on information and belief, the Applicant's current irrigation activities raise the water table in the nearby area, including underneath the Stewarts' property. The Applicant's irrigation causes the nearby groundwater to percolate on the Stewarts' property, essentially flooding it and contaminating it from underneath. The amended permit seeks to increase the level of discharge to the irrigation fields, thereby worsening these existing conditions. As mentioned above, the sampling taken by Dr. Ross was taken after a period of dry weather, yet still showed increased concentrations of pollutants which are associated with the Applicant's disposal activities. In addition to water flowing on the surface from Applicant's disposal site, Dr.

Ross' data indicates that the Stewarts' property is being contaminated from below. Because the proposed permit authorizes increased disposal to the irrigation fields of more intensely contaminated water, the proposed permit would exacerbate existing nuisance and contamination conditions on the Stewarts' property. The Stewarts believe that the issue of the proposed permit's effect on the water table beneath the facility and the surrounding areas, including the Stewarts' property, is an issue of fact which merits review at a contested case hearing at SOAH.

6) Whether the Proposed Permit Impermissibly Expands the Types and Volume of Wastewater Disposed Of By The Applicant?

The Applicant contends that its application asserts that the water for disposal must be treated and is therefore limited by the permit. However, the under the draft permit, only water for disposal by direct discharge must be treated. There is no similar requirement for water to be disposed of by irrigation, by which the Applicant disposes of the majority of its wastewater.

Texas Water Code § 26.029 requires that each permit prescribe the maximum quantity of water and the character and quantity of that waste to be disposed of. The Applicant contends that the proposed permit limits the disposal. However, the permit, as drafted authorizes unlimited quantities of the refinery's liquid waste and off-spec product to be disposed of on the 1438-acre irrigation tract. The flow to the irrigation site is only limited by the hydraulic application rate, which, as applied to 1438 acres, could mean as much as 4.5 million gallons per day disposed of at the irrigation site. Because the proposed permit does not impose a maximum quantity of water to be disposed of through irrigation, it violates Water Code § 26.029.

Further, the proposed permit does not require wastewater to be treated in the refinery wastewater treatment plant prior to being piped to the irrigation field for disposal. The types of materials which may be disposed of by irrigation under the permit include contaminated and untreated groundwater, radioactive materials, materials with high concentrations of petroleum hydrocarbons, solvents, and materials containing unlimited heavy or toxic metals other than chromium. Therefore, the proposed permit impermissibly expands the types and volumes of waste to be disposed of through irrigation.

II. THE STEWARTS' REPLY TO THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE

The Stewarts agree with the Office of Public Interest Counsel's conclusion that the Stewarts are affected persons under 30 TAC § 55.203. The proximity of the Stewarts' land only slightly more than ¼ mile from the irrigated area and the conditions on the property described in the request for hearing demonstrate a reasonable relationship between the Stewarts' interests and the activity regulated. The Stewarts agree that the Water Code protects their health and safety, as well as their property. The Stewarts further agree that water source contamination is very relevant and material to the TPDES permitting process. The Stewarts also agree that compliance history is relevant and material because compliance history is addressed by substantive law under which permits are issued.

The Stewarts further agree with the Office of Public Interest Counsel's recommendations that the fact issues raised by the Stewarts in the request for hearing and as outlined above, should be referred to SOAH for a contested case hearing.

The Stewarts do not object to the Office of Public Interest Counsel's recommendation that the contested case hearing have a duration of nine months.

III. THE STEWARTS' REPLY TO EXECUTIVE DIRECTOR'S RESPONSE

The Stewarts agree with the Executive Director's conclusion in the filed response to hearing requests that the Stewarts are "affected persons" within the meaning of 30 TAC § 55.203.

The Stewarts further agree with the Executive Director's recommendation that the fact issues raised by the Stewarts in the request for hearing should be submitted to SOAH.

However, the Stewarts request clarification of the Executive Director's fact question number 5. There is a fact question as to whether wastewater from the Applicant's irrigation fields will raise the water table or cause contamination and nuisance conditions on the Stewarts' property, as discussed above. The Stewarts respectfully request clarification of the Executive Director's fact question number five to include this issue.

The Stewarts do not object to the Executive Director's recommendation that a contested case hearing be limited to nine months' duration.

SUMMARY

The Stewarts are affected persons entitled to a contested case hearing because they have demonstrated personal justiciable interests related to a legal right, duty, privilege, power or economic interest affected by the application. The Stewarts respectfully urge the Commission to submit the following questions for review at a contested case hearing at SOAH:

- 1) Whether The Application Was Properly Noticed As Required by Law?**
- 2) Whether The Proposed Permit Does Not Satisfy Regulatory Requirements Intended to Protect Water Quality, Human Health and the Environment?**
- 3) Whether The Applicant's Poor Compliance History Will Result In Its Inability to Comply with the Proposed Permit and Applicable Law?**
- 4) Whether the Proposed Permit Establishes Sufficient Monitoring and Reporting Requirements?**
- 5) Whether The Wastewater Disposed of by the Applicant Currently Flows and Will Flow Onto The Stewarts' Property and Whether The Wastewater Disposed of by Applicant Raises the Water Table and Percolates and Contaminates the Stewarts' Property?**

6) Whether the Proposed Permit Impermissibly Expands the Types and Volume of Wastewater Disposed Of By The Applicant?

Sincerely,
CARLS, McDONALD & DALRYMPLE, L.L.P.

By: _____

Mary K. Sahs
State Bar No. 17522300
Patricia E. Carls
State Bar No. 03813425
Eileen L. McPhee
State Bar No. 24060273

Encl.

Cc: Bubba and Virginia Stewart
Dr. Lauren Ross
Mailing List

CERTIFICATE OF SERVICE:

By my signature below, I certify that a true and correct copy of "Stewarts' Reply to the Applicant, Executive Director's and OPIC's Responses to Requests for a Contested Case Hearing" Re: Diamond Shamrock Refining Company, L.P., TPDES Permit No. WQ000135300, Application for Major Amendment was served on the following persons on the 15th day of September, 2008, via the methods indicated below:

MAILING LIST

For

Diamond Shamrock Refining Company, L.P.
TPDES Permit No. WQ0001353000

FOR THE APPLICANT:

Lisa Trowbridge
Diamond Shamrock Refining Company, L.P.
P.O. Box 490
Three Rivers, Texas 78071-0490
Via Certified Mail

James Miertschin, P.E.
P.O. Box 162305
Austin, Texas 78716
Via Certified Mail

Sara Burgin
Baker Botts
1500 San Jacinto Center
98 San Jacinto Blvd.
Austin, Texas 78701
Via Certified Mail

PROTESTANTS/INTERESTED PERSONS:

Lloyd Stewart, Jr.
1299 Highway 72
Three Rivers, Texas 78071-2609
Via Certified Mail

FOR THE EXECUTIVE DIRECTOR:

Anthony Tatu, Staff Attorney
Texas Commission on Environmental Quality
Environmental Law Division MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Via Hand Delivery

Michael Sunderlin, Technical Staff
Texas Commission on Environmental Quality
Water Quality Division MC-148
P.O. Box 13087
Austin, Texas 78711-3087
Via Hand Delivery

FOR OFFICE OF PUBLIC ASSISTANCE:

Bridget Bohac, Director
Texas Commission on Environmental Quality
Office of Public Assistance MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Via Hand Delivery

FOR PUBLIC INTEREST COUNSEL:

Blas J. Coy, Jr., Attorney
Texas Commission on Environmental Quality
Public Interest Counsel MC-103
P.O. Box 13087
Austin, Texas 78711-3087
Via Hand Delivery

FOR THE CHIEF CLERK:

LaDonna Castañuela
Texas Commission on Environmental Quality
Office of the Chief Clerk, MC-105
P.O. Box 13087

Austin, Texas 78711-3087
Via Hand Delivery

FOR ALTERNATIVE DISPUTE
RESOLUTION

Kyle Lucas
Texas Commission on Environmental Quality
Alternative Dispute Resolution, MC-222
P. O. Box 13087
Austin, Texas 78711
Via Hand Delivery

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2008 SEP 15 AM 10:58
CHIEF CLERKS OFFICE



Patricia E. Carls