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January 16, 2009

Office of the Chief Clerk
ATTN: Agenda Docket Clerk
Texas Commission on Environmental Quality
MC – 105
P.O. Box 13087
Austin, Texas 78711-3087

2009 JAN 16 AM 11:25
CHIEF CLERKS OFFICE
TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

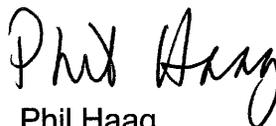
Re: Docket No. 2008-1305-MWD
Farmersville Investors, L.P.
TPDES Permit No. WQ0014778001

Dear Ms. Castañuela:

Enclosed please find an original and twelve (12) copies of the Response to Requests for Contested Case Hearing filed on behalf of Farmersville Investors, L.P. via hand delivery on this date.

Kindly return to me a file-stamped copy via the courier. We appreciate your assistance with this matter. Please feel free to contact my office should you have any questions.

Very truly yours,



Phil Haag
direct dial: (512) 370-2862
phaag@winstead.com

PSH:sr
Enclosure

TCEQ DOCKET NO. 2008-0495-WR

2009 JAN 16 AM 11: 25

APPLICATION BY FARMERSVILLE	§	BEFORE THE	CHIEF CLERKS OFFICE
INVESTORS, L.P. TO THE TEXAS	§		
COMMISSION ON ENVIRONMENTAL	§	TEXAS COMMISSION ON	
QUALITY FOR PROPOSED TPDES	§		
PERMIT NO. WQ0014778001	§	ENVIRONMENTAL QUALITY	

FARMERSVILLE INVESTORS, L.P.'S RESPONSE TO HEARING REQUESTS

COMES NOW, Farmersville Investors, L.P. (“Applicant”) and pursuant to 30 Texas Administrative Code (“TAC”), Chapter 55, Subchapter F (Sections 55.200-55.211) submits this Response to Hearing Requests to the Texas Commission on Environmental Quality (“Commission”) to challenge the standing of each party filing a hearing request on Application for Proposed TPDES Permit No. WQ0014778001 (the “Application) on the grounds that the requests for hearing do not meet applicable statutory and regulatory requirements. In support of this Response, Applicant respectfully submits the following:

I. Summary of Facts

Applicant filed the Application to discharge treated domestic wastewater in an unnamed tributary of Elm Creek; thence to Elm Creek; thence to Lake Lavon in Segment No. 0821 of the Trinity River Basin. Following publication of various notices regarding the Application, a public meeting was held on December 4, 2007, the last day of the comment period, in Farmersville, Texas. After considering comments raised by the requests for public meeting and during the public meeting, Commission staff proposed a draft TPDES Permit No. WQ0014778001 (the “Proposed Permit”), and on July 10, 2008, the Executive Director issued a letter announcing its decision to approve the Application and issue the Proposed Permit unless a valid request for contested case hearing or request for reconsideration was timely filed.

The public comment period for the Application expired August 9, 2008. James A. and Shirley Martin (“Martins”) and Texas State Representative Jodie Laubenberg (“Rep. Laubenberg”) timely filed requests for contested case hearing on August 2, 2008 and August 8, 2008, respectively. North Texas Municipal Water District (“North Texas”) submitted a request for contested case hearing dated August 8, 2008 and received August 11, 2008, which reasserted its prior request dated July 20, 2007. Other early filings included Wilda Faye VanderVelde’s (“VanderVelde”) request for contested case hearing dated April 25, 2007, and Collin County Commissioner Joe Jaynes’ (“Commissioner Jaynes”) request for public meeting dated June 15, 2007. Each of the preceding requestors was listed as a “Requestor” on the Commission’s notice of public meeting, dated December 31, 2009, and the defects of each are discussed separately below.

II. Argument

A contested case hearing may be requested by an “affected person” who timely files a request that satisfies all regulatory requirements.¹ To have standing as an “affected person,” requestors must “identify [a] personal justiciable interest *affected* by the [A]pplication, including a brief, but specific, written statement explaining...how and why requestor believes he or she will be affected by the activity.”² Thus, the language of the TAC plainly requires requestors to make a threshold showing in their respective requests that such requestor has a justiciable interest that will be affected by the Proposed Permit.³

¹ 30 TEX. ADMIN. CODE § 55.201 (2008).

² Id. § 55.2501(d)(2) (emphasis added).

³ Id. §§ 55.251(d)(2) & 55.203.

Martins

The Martins request for contested case hearing, dated August 2, 2008, alleges that they are affected as owners of property adjacent to the proposed treatment plant site. Although the request complains of “[n]umerous deficiencies in the [A]pplication,” the only specific allegations made by the Martins’ request in compliance with the TAC relate to whether the Application violates the 150 foot buffer zone for odor and whether the discharged effluent could back up a sufficient distance to affect the Martins’ property, which is located upstream of the discharge point.⁴

First, Attachment C of the Application clearly shows that all the property located within the 150 foot buffer zone is owned by Applicant. The Martins’ contention that the outfall is part of the plant unit should not be considered as it is a question of law that is inconsistent with the TAC definition of “wastewater treatment plant unit,” which is limited to apparatuses necessary for the *treatment* of wastewater.⁵ Additionally, the Martins are upstream landowners. Coupled with the extremely low volume of discharge, the “likely impact” on the Martins’ health, safety, and use of the property due to alleged backup upstream is nil.⁶ Therefore, because the Martins’ request for contested case hearing does not meet the threshold requirement of demonstrating an affected justiciable interest, the Martins’ request for contested case hearing should be denied.

Rep. Laubenberg

Rep. Laubenberg requested a contested case hearing “as the state representative for the affected area.” While Rep. Laubenberg’s interest in her district is clear, Rep. Laubenberg’s

⁴ It should be noted that the Martins’ concerns related to possible violations of the Proposed Permit (i.e., the catastrophic release of sewerage) are not proper when analyzing whether a person may be “affected” by the proposed activity. *See Collins v. Tex. Natural Res. Conservation Comm’n*, 94 S.W.3d 876, 883 (Tex. App.—Austin 2002, no pet.).

⁵ 30 TEX. ADMIN. CODE § 309.11(9) (emphasis added).

⁶ *Id.* § 55.203(c)(4)-(5).

request must satisfy the basic requirements of 30 TAC § 55.201, which it does not. Not only does Rep. Laubenberg not qualify as one of the persons who is entitled to request a contested case hearing, but Rep. Laubenberg's request on behalf of her district also fails to adequately specify how Rep. Laubenberg's district will be adversely affected by the Proposed Permit.⁷ As such, the Commission should deny Rep. Laubenberg's request for contested case hearing on the grounds that Rep. Laubenberg is not a person entitled to request a contested case hearing on behalf of herself and the request on behalf of her district does not make the threshold showings required by the TAC.

North Texas

North Texas' request for contested case hearing specifies three bases: (1) regionalization, (2) water quality concerns, and (3) operational concerns. Specifically, North Texas alleges that because North Texas and the City of Farmersville have evaluated the construction of a regional wastewater treatment to serve the vicinity, the Proposed Permit should require Applicant to connect to such regional facility if it becomes available. North Texas also raises a concern over the cumulative impact of discharge into North Texas' water supply by Applicant and other unidentified (and unknown) developers in the future. Lastly, North Texas requests that Applicant be required to select North Texas as the plant operator because North Texas operates several other facilities in the area.

Even as a governmental entity, North Texas' request must meet the basic statutory requirements, including a specific showing in the request as to how North Texas is an "affected person."⁸ Regarding regionalization, section 26.0282 of the Texas Water Code allows the Commission to consider availability of existing or proposed regional plants; however, no

⁷ Id. § 55.201(d)(2).

⁸ Id.

adequate existing or proposed regional plants are available within miles of the area of the proposed facility, and no such applications have been made. Mere evaluation of a possible future regional plant does not meet the standard set out in the Texas Water Code, and therefore, is not a justiciable interest under the TAC.⁹ Secondly, North Texas' complaint regarding water quality is based on speculation of the cumulative effect of *other* permits issued to *other* future applicants. Such interests are not valid concerns under the TAC, which requires requestors to show interests that are affected by the "proposed facility or activity" in "the [A]pplication."¹⁰ As North Texas' request admits, Applicant's discharge volume is small and only a possible issue if considered cumulatively with future permits that are not yet in process. Under the TAC, such interest is not a valid interest in this Application and is more properly considered in future permits, if any.¹¹ Lastly, while the Commission can require a certain category of operator as a condition in the permit, the Commission has no jurisdiction to mandate a specific person or entity be hired as an operator.¹² Thus, such request also is not a justiciable interest. Because (1) regionalization does not exist and is not proposed, (2) the relevant inquiry must be based on and limited to the facilities proposed in the Application, and (3) mandating specific operators is not within the Commission's jurisdiction, North Texas' request for contested case hearing does not make a threshold showing of a valid justiciable interest that will be affected by the Application and, therefore, should be denied. Alternatively, should the Commission elect to grant North Texas' or any other request, the Commission's referral to the Texas State Office of Administrative Hearings ("SOAH") should specifically exclude the issues of regionalization,

⁹ See Response 4 of Executive Director's Response to Public Comment, file-stamped July 2, 2008.

¹⁰ 30 TEX. ADMIN. CODE §§ 55.201(d)(2) & 55.203(a).

¹¹ See Responses 5 & 6 of Executive Director's Response to Public Comment.

¹² See Response 7 of Executive Director's Response to Public Comment.

cumulative impact of unknown future permits, and operator of the plant on the basis that such issues are not proper for consideration of this Application.

VanderVelde

VanderVelde's request for contested case hearing fails to provide information sufficient to show VanderVelde is an "affected person." VanderVelde's property is not within the relevant buffer zones.¹³ In fact, VanderVelde's property is not even adjacent to the property on which the proposed facilities will be located.¹⁴ Moreover, VanderVelde makes no showing of ownership of any property downstream of the discharge point, and VanderVelde's health concerns regarding air contaminants are not valid as the facility and activities proposed in this Application will not make a significant contribution of air contaminants.¹⁵ Therefore, because VanderVelde's request failed to otherwise show a "likely impact" on VanderVelde's health, safety, and use of her property, VanderVelde is not an "affected person" and VanderVelde's request should be denied.

Commissioner Jaynes

Commissioner Jaynes' request was not a request for contested case hearing and did not meet the threshold requirements of showing an affected interest. The request submitted by Commissioner Jaynes was explicitly a request for "Public Comment/Public Meeting," which falls short of the requirement to "request a contested case hearing."¹⁶ Although the term "public hearing" is used in the request, multiple other uses of "Public Meeting" make it clear that Commissioner Jaynes requested a public meeting, not a contested case hearing. Moreover, Commissioner Jaynes' request alleged no interest that would meet the threshold showing of affectedness; rather, it merely states that people want to know whether they will be affected.

¹³ See Attachment C of the Application.

¹⁴ See the property depicted as the unlabeled property due west of tract 18 on Attachment B of the Application.

¹⁵ 30 TEX. ADMIN. CODE § 106.532. See also Response 15 of Executive Director's Response to Public Comment.

¹⁶ 30 TEX. ADMIN. CODE § 55.201(d)(3).

Because the request does not properly request a contested case hearing or specify an interest that will be affected by the Application, Commissioner Jaynes' request should be denied.

III. Conclusion

Texas' regulatory and statutory requirements provide that requests for contested case hearings must make certain threshold showings, including specifying justiciable interests in the request that will be affected by the activity proposed in the Application. Because each request regarding the Application failed to adequately specify justiciable interests that will be affected by the Application or Proposed Permit, the requestors failed to demonstrate they were "affected persons" entitled to request a contested case hearing, and their requests, therefore, should be denied. Alternatively, any referral to SOAH on this Application should specifically exclude regionalization, cumulative effect of unknown future permits, and operator of the plant from the issues to be considered at a hearing.

IV. Prayer

Applicant prays that the Commission determine the requests submitted by the Martins, Rep. Laubenberg, North Texas, VanderVelde and Commissioner Jaynes did not adequately specify justiciable interests that will be affected by the Application, and thus, were not valid requests for contested case hearing. Applicant further prays that the Commission determine no other valid hearing requests were filed on the Application. Finally, Applicant prays that under its authority in 30 TAC § 55.211(b)(2), the Commission determine no hearing requests meet the relevant TAC requirements and act on the Application by approving the Proposed Permit. Alternatively, should the Commission refer the matter to SOAH, Applicant prays that the Commission order regionalization, cumulative effect of unknown future permits, and operator of the plant be specifically excluded from the issues to be considered at the SOAH hearing and that

all proceedings in the matter, including the preliminary hearing, be held in Austin, Texas at the SOAH buildings.

Respectfully submitted,

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**ATTORNEYS FOR FARMERSVILLE
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CERTIFICATE OF SERVICE

By my signature above, I hereby certify that, on this the 16 day of January, 2009, a true and correct copy of this document has been sent via Hand Delivery, First Class Mail or Facsimile to each of the person's listed on the attached Mailing List.

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2009 JAN 16 AM 11:25
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