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Blas J. Coy, Jr., *Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

January 16, 2009

LaDonna Castañuela, Chief Clerk  
Texas Commission on Environmental Quality  
Office of the Chief Clerk (MC-105)  
P.O. Box 13087  
Austin, Texas 78711-3087

2009 JAN 16 PM 1:55  
CHIEF CLERKS OFFICE  
TEXAS COMMISSION  
ON ENVIRONMENTAL  
QUALITY

Re: **FARMERSVILLE INVESTORS, LP.**  
**TCEQ DOCKET NO. 2008-1305-MWD**

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Response to Request for Hearing in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Amy Swanhelm".

Amy Swanhelm, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 • P.O. Box 13087 • AUSTIN, TEXAS 78711-3087 • 512-239-6363

P.O. Box 13087 • Austin, Texas 78711-3087 • 512-239-1000 • Internet address: [www.tceq.state.tx.us](http://www.tceq.state.tx.us)

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TCEQ DOCKET NO. 2008-1305-MWD

2009 JAN 16 PM 1:55

IN THE MATTER OF  
THE APPLICATION OF  
FARMERSVILLE  
INVESTORS, L.P. FOR  
PERMIT NO.  
WQ0014778001

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BEFORE THE TEXAS  
CHIEF CLERKS OFFICE  
COMMISSION ON  
ENVIRONMENTAL  
QUALITY

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S**  
**RESPONSE TO REQUEST FOR HEARING**

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

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (the Commission or TCEQ) with a Response to Requests for Hearing in the above-referenced matter.

**I. INTRODUCTION**

**A. Background of Facility**

Farmersville (the Applicant) has applied to the Texas Commission on Environmental Quality (TCEQ) for a new permit, designated Permit No. WQ0014778001. The facility will be located approximately 0.5 miles southwest of the intersection of State Highway 78 and Country Road 550 in Collin County, TX. The facility would serve a new residential subdivision. The treated effluent would be discharged first to an unnamed tributary, then to the Elm Creek Arm of Lavon Lake in Segment No. 0821 of the Trinity River Basin. The use for unnamed tributary is no

significant aquatic life. The designated uses for Segment No. 8021 are contact recreation, public water supply, and high aquatic life.

The proposed permit would authorize a discharge of treated domestic wastewater not to exceed 0.1 million gallons per day (mgd) in the interim phase I, 0.25 mgd in phase II, and 0.5 mgd in the final phase. Effluent limits for interim phase I are, based on a 30-day average, 10 mg/L Carbonaceous BOD5 (CBOD5), 15 mg/L total suspended solids (TSS), 0.5 mg/L Phosphorous, and 4.0 mg/L minimum dissolved oxygen. Effluent limits for interim phase II and the final phase are, based on a 30-day average, 10 mg/L CBOD5, 15 mg/L TSS, 3 mg/L ammonium nitrogen, 0.5 mg/L Phosphorous, and 4.0 mg/L minimum dissolved oxygen. During each phase, the effluent shall contain a chlorine residual between 1.0 mg/L and 4.0 mg/L after a detention time of at least 20 minutes, based on peak flow.

The Executive Director's (ED) Preliminary Report asserts that the draft permit will maintain and protect the existing instream uses. A Tier I antidegradation review determined that existing water quality uses should not be impaired, and a Tier II review determined preliminarily that by adding a phosphorous limit of 0.5 mg/L to the permit, no significant water quality degradation is expected at Lavon Lake.

## **B. Procedural Background**

TCEQ received this application on January 31, 2007. On February 27, 2007, the Executive Director (ED) declared the application administratively complete. The Notice of Receipt and Intent to Obtain Water Quality Permit (NORI) was published in *The Farmersville Times & Princeton Herald* on March 1, 2007, and in the Collin County edition of the *Dallas Morning News* on May 11, 2007. The Notice of Application and Preliminary Decision (NAPD) was published in the Collin County edition of the *Dallas Morning News* on June 22, 2007. Further, both the NORI and NAPD were remailed to to an updated landowner list on July 31, 2007, with a letter explaining that the original mailing list contained some incorrect and omitted addresses. The Notice of Public Meeting was published on October 28, 2007, in the Collin County edition of the *Dallas Morning News*. The public comment period ended on December 4, 2007 and the deadline to request a contested case hearing was August 10, 2008.

TCEQ received letters from Texas House Representative Jodie Laubenberg on August 8, 2008, Collin County Precinct 3 Commissioner Joe Jaynes on July 24, 2007, J.A. & Shirley Martin on July 16, 2007 and August 6, 2008, Martin Rochelle on behalf of the North Texas Municipal Water District on July 23, 2007, and August 8, 2008, and Wilda Faye VanderVelde on April 28, 2007. All of these letters were timely submitted by the August 10, 2008 deadline for requesting a contested case hearing.

Based on timely hearing requests from J.A. & Shirley Martin, the North Texas Municipal Water District, and Wilda Faye VanderVelde, OPIC recommends referring this application to SOAH for a contested case hearing.

## **II. ANALYSIS OF REQUESTS FOR CONTESTED CASE HEARINGS**

### **A. Applicable Law**

This application was declared administratively complete after September 1, 1999, and is subject to the requirements of Texas Water Code (TWC) § 5.556 added by Acts 1999, 76<sup>th</sup> Leg., ch 1350 (commonly known as "House Bill 801"). Under the applicable statutory and regulatory requirements, a hearing request must substantially comply with the following: give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; identify the requestor's personal justiciable interest affected by the application showing why the requestor is an "affected person" who may be adversely affected by the proposed facility or activity in a manner not common to members of the general public; request a contested case hearing; list all relevant and material disputed issues of fact that were raised during the comment period that are the basis of the hearing request; and provide any other information specified in the public notice of application. 30 TAC § 55.201(d). Under 30 TAC § 55.203(a), an affected person is "one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application." This justiciable interest does not include an interest common to the general public. 30 TAC § 55.203(c) also provides relevant factors that will be considered in determining whether a person is affected. These factors include:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health, safety, and use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

The Commission shall grant an affected person's timely filed hearing request if:

- (1) the request is made pursuant to a right to hearing authorized by law; and
- (2) the request raises disputed issues of fact that were raised during the comment period and that are relevant and material to the commission's decision on the application. 30 TAC §55.211(c).

Accordingly, pursuant to 30 TAC § 55.209(e), responses to hearing requests must specifically address:

- (1) whether the requestor is an affected person;
- (2) which issues raised in the hearing request are disputed;
- (3) whether the dispute involves questions of fact or law;
- (4) whether the issues were raised during the public comment period;
- (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's response to Comment;
- (6) whether the issues are relevant and material to the decision on the application; and
- (7) a maximum expected duration for the contested case hearing.

#### **B. Determination of Affected Person Status**

The Office of the Chief Clerk received a request for a contested case hearing from Texas House Representative Jodie Laubenberg on August 8, 2008, Collin County Precinct 3 Commissioner Joe Jaynes on July 24, 2007, J.A. & Shirley Martin on July 16, 2007, and August 6, 2008, Martin Rochelle on behalf of the North Texas Municipal Water District on July 23, 2007 and August 8, 2008, and Wilda Faye VanderVelde on

April 28, 2007. All of these requests were submitted before the August 10, 2008 deadline for submitting a request for a contested case hearing.

## **1. Affected Parties**

### **J.A. and Shirley Martin**

In a letter dated July 16, 2007, J.A. and Shirley Martin (the Martins) request a contested case hearing, should the process be considered further by the TCEQ. They state that they own property north of and adjacent to the site of the proposed facility. They express concerns with the prevailing wind blowing from the discharge route directly towards their property, the discharge route, pollution to the surrounding land and water, the long-term effects of discharged pollutants, harm from using wastewater discharge for irrigation, impact on the Pebble Beach Public Swimming Area, odor from the facility, impact on their health, and interference with their plans to use the land for livestock, farming food crops and homes.

The Martins also request a contested case hearing in their letter dated August 6, 2008. They again state that they own property north of and adjacent to the site of the proposed facility. Because of this proximity, they state they will be affected by the facility in a manner not common to the general public. They again question whether the proposed permit complies with TCEQ rules governing siting of the discharge point and the location of the discharge route. They also express concern that there is not a sufficient buffer zone as required by TCEQ rules and that the discharge route, as proposed, would cause the tributary to back up due to a concrete conduit it must pass through, located 50 feet above the current level of the unnamed tributary.

Therefore, OPIC concludes J.A. and Shirley Martin have expressed interests not common to members of the general public. They stated that they own land in close proximity to the proposed site and discharge route. OPIC also finds a reasonable relationship between the interests claimed and the impact of the proposed permit on those interests and OPIC recommends the Commission find J.A. and Shirley Martin affected parties.

### **North Texas Municipal Water District**

On July 23, 2007 and August 8, 2008 Martin Rochelle, on behalf of the North Texas Municipal Water District (NTMWD), requested a contested case hearing. They are a governmental entity created under Article XVI, § 59 of the Texas Constitution. NTMWD is authorized to provide drinking water services and collect solid and liquid waste in the North Texas area. In their first letter, NTMWD states they are a regional sewer service agency that has several plants providing service in Collin County. They are currently considering constructing a regional wastewater treatment plant that would be capable of accommodating the area to be developed by the Applicant.

NTMWD expresses concern regarding effluent discharged into Lavon Lake. Lavon Lake is currently a primary source of drinking water for 1.5 million people served by NTMWD. Therefore, NTMWD has a unique interest in ensuring that the proposed permit is stringent enough to avoid impacting the water of Lake Lavon. This case, they argue, is small, but there are many other plans for small-scale wastewater treatment plants that would ultimately discharge into the lake. And their cumulative impacts could be substantial.

On August 8, 2008, NTMWD submitted another letter requesting a contested case hearing. In it, they state they continue to oppose the proposed permit on the basis of regionalization, water quality concerns, and operational concerns. OPIC concludes NTMWD has expressed interests not common to members of the general public. OPIC also finds a reasonable relationship between the interests claimed and the impact of the proposed permit on NTMWD's interests. Furthermore, NTMWD is a governmental entity with authority to provide drinking water and wastewater treatment in the area potentially impacted by the proposed facility. NTMWD also has an interest in maintaining Lavon Lake as a source for drinking water and in maintaining water quality in the area generally. Therefore OPIC recommends the Commission find NTMWD an affected party.

### **Wilda Faye VanderVelde**

On April 27, 2007, Wilda Faye VanderVelde requested a contested case hearing. She states that she resides about 500 feet from the proposed site. She feels she will be

adversely affected because she has severe health issues and the pollution caused by the proposed wastewater treatment plant would limit her ability to spend time outdoors and enjoy her property. Based on her letter, OPIC finds that she has interests not common to members of the general public. Therefore, OPIC recommends the Commission find she is an affected person.

## **2. Parties Not Affected**

### **Collin County Commissioner Joe Jayne**

Although Collin County Commissioner Joe Jaynes' letter was submitted before the deadline for requesting a contested case hearing and the letter requests a "public hearing," OPIC concludes that his letter is actually requesting a public meeting. In the beginning of his letter, he "requests[s] a Public Comment/Public Meeting." He also states that "a Public Meeting would be in the best interest of the community in order to address all issues of concern." In addition, his letter was submitted during the comment period. Therefore, OPIC concludes Mr. Jaynes is not requesting a contested case hearing, but instead requesting a public meeting. OPIC recommends the Commission find he is not an affected person.

## **3. Other Interested Parties**

### **Texas House Representative Jodie Laubenberg**

OPIC appreciates Ms. Laubenberg's interest in the proposed permit, and notes that although OPIC does not recommend Ms. Laubenberg be granted individual affected party status, OPIC is recommending that the Commission hold a contested case hearing on this proposed permit. For the purpose of requesting a contested case hearing and participating as an affected party in any proceedings, legislators are subject to the same inquiry under 30 TAC § 55.203, 209, and 211 as any individual or private entity. Legislators may request a public meeting on behalf of their constituents, but there is no corresponding section automatically granting a legislator's request for a contested case

hearing on behalf of their constituents.<sup>1</sup> Therefore, although OPIC concludes that Ms. Laubenberg is not an individually affected party, OPIC has found other requestors to be affected.

### **C. Issues Raised in the Hearing Requests**

In their hearing requests, J.A. & Shirley Martin question whether the proposed permit complies with TCEQ rules governing siting of the discharge point and the location of the discharge route. They also express concerns about pollution to the surrounding land and water, the long-term effects of discharged pollutants, harm from using wastewater discharge for irrigation, the impact on the Pebble Beach Public Swimming Area, odor from the facility, impact on their health, and interference with their plans to use the land for livestock, homes, and farming food crops.

NTMWD's hearing request raises issues of regionalization, the water quality of Lake Lavon and surrounding waterways, and concerns about who will oversee the operations of the proposed facility.

Wilda Faye VanderVelde raises issues regarding adverse health effects from the proposed facility.

### **D. Issues raised in Comment Period**

NTMWD submitted one hearing request during the comment period and a second during the period for requesting a contested case hearing. All of the issues raised in the second letter were also addressed in the earlier letter. Therefore all of the issues raised in the hearing requests were also raised during the comment period.

J.A. & Shirley Martin submitted one hearing request during the comment period and a second during the period for requesting a contested case hearing. All of the issues raised in their second letter were also raised in the first letter. Therefore all of the issues raised in their hearing requests were also raised during the comment period.

Wilda Faye VanderVelde submitted her hearing request during the comment period, therefore all the issues raised in her hearing request were also raised during the comment period.

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<sup>1</sup> See 30 TAC § 55.154(c)(2).

**E. Disputed Issues**

There is no agreement between hearing requesters and the Applicant or Executive Director on the issues raised in the hearing requests.

**F. Issues of Fact**

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements. All of the issues raised are issues of fact. *See* 30 TAC §55.211(b)(3)(A) and (B).

**G. Relevant and Material Issues**

Hearing requests may raise issues relevant and material to the Commission's decision under 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). In order to refer an issue to SOAH, the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit.<sup>2</sup> Relevant and material issues are those governed by the substantive law under which this permit is to be issued.<sup>3</sup>

The Martins and NTMWD raise concerns that the proposed facility will have an adverse impact upon water quality in the receiving waters. Issues concerning the permitted activity's effect on surface and ground water quality are relevant and material to the Commission's decision. 30 TAC § 307.1 charges the TCEQ with using all reasonable methods to maintain Texas water quality. Further, 30 TAC § 309.12 prohibits the TCEQ from issuing a permit unless it will minimize possible contamination of surface water and groundwater." Therefore this is a relevant and material issue.

The Martins question whether the proposed facility meets TCEQ siting requirements. They also question the location of the discharge point and the proposed

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<sup>2</sup> *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-251(1986) (in discussing the standards applicable to reviewing motions for summary judgment the Court stated "[a]s to materiality, the substantive law will identify which facts are material. ... it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs.")

<sup>3</sup> *Id.*

discharge route, including and land application of effluent. Among other specific siting issues, they question whether the applicant has taken into account the required buffer zones around the proposed facility.

These are relevant and material issues. 30 TAC § 309.10 states certain standards “to be applied in the evaluation of an application for a permit to treat and dispose of domestic wastewater and for obtaining approval of construction plans and specifications.” In addition, 30 TAC §309.13 also lists requirements that must be met when siting a wastewater treatment facility, including such requirements as a 150 foot “buffer zone” from the nearest property line. Therefore these are relevant and material issues.

The Martins and NTMWD question whether the proposed permit will be protective of the receiving waters’ designated uses. The Martins are concerned that the proposed discharge will impact the Pebble Beach swimming area, and NTMWD is concerned that the proposed discharge will impact their use of Lake Lavon as a drinking water source.

The proposed discharge’s impact on the receiving waters’ designated uses is a relevant and material issue. 30 TAC §390.41(e)(1) states that “[t]he area where surface water sources are diverted for drinking water use shall be evaluated and protected from sources of contamination.” Discharges into watersheds that are also public drinking water sources “must be in conformity with applicable regulations and state statutes.” 30 TAC § 390.41(e)(1)(B).

In addition to regulation of drinking water sources, TCEQ must maintain water quality sufficient to protect existing uses. 30 TAC § 307.5(b)(2). The TCEQ may not sanction any wastewater discharge “which would cause degradation of waters which exceed fishable/swimmable quality will be allowed unless it can be shown to the commission's satisfaction that the lowering of water quality is necessary for important economic or social development.” *Id.* Degredation is any lowering of water quality beyond a de minimus amount. Therefore, whether the proposed discharge will impact the existing uses in the receiving waters is a relevant and material issue.

The Martins state the proposed discharge may interfere with their economic interests such as using their land for raising livestock, growing food crops, and as a

homestead. 30 TAC § 307.1 requires the TCEQ to “maintain the quality of water in the state consistent with public health and enjoyment.” The purpose of the Texas Surface Water Quality Standards are to maintain “operation of existing industries,” further “economic development” and “maintain the quality of water in the state consistent with public health and enjoyment.” *Id.* Therefore this is a relevant and material issue.

NTMWD questions whether the proposed permit takes into account the trend towards regionalization of wastewater facilities. In their hearing request, they state they are currently considering constructing a regional wastewater treatment plant that would be capable of accommodating the area to be developed by the Applicant. Texas Water Code (TWC) § 26.0282 requires TCEQ to take into account regional wastewater treatment options when deciding whether to grant a wastewater treatment permit. In addition, TWC § 26.003 sets regionalization of wastewater treatment plants as an overriding policy goal of Chapter 26 of the Texas Water Code, controlling water quality. Therefore, whether the proposed permit takes into account regionalization concerns is a relevant and material issue.

The Martins and Ms. VanderVelde opine the permit will have an adverse impact upon their health and the health of those surrounding the proposed facility and discharge route. TCEQ is charged with maintaining the quality of Texas water, consistent with public health and enjoyment. TWC §26.003. *See also* 30 TAC § 307.1. Therefore this is a relevant and material issue.

The Martins question whether the proposed discharge will cause nuisance odors on their property. TCEQ rule states that “[c]oncentrations of taste and odor producing substances shall not...interfere with the reasonable use of the water in the state.” 30 TAC§ 307.4(b)(1). In addition, 30 TAC §309.13 (e) & (g) requires the inclusion of proper odor control measures in a domestic wastewater discharge permit and requires the applicant to carry out this nuisance odor prevention plan at all times. Therefore this is a relevant and material issue.

#### **H. Issues Recommended for Referral**

OPIC recommends the Commission refer the following disputed issues of fact to the State Office of Administrative Hearings for a contested case hearing:

1. Will the proposed permit adversely affect Texas water quality?
2. Does the proposed permit comply with siting requirements for the proposed facility location, discharge point, and discharge route?
3. Will the proposed permit impact designated uses of receiving waters beyond a de minimus amount?
4. Will the proposed permit amendment adversely affect the Martins' use and enjoyment of their property and their economic interests?
5. Does the proposed permit adequately address regionalization concerns?
6. Will the proposed permit adversely impact human health?

**I. Maximum Expected Duration of Hearing**

Commission Rule 30 TEX. ADMIN. CODE § 55.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. To assist the Commission in stating a date by which the judge is expected to issue a proposal for decision, and as required by 30 TEX. ADMIN. CODE §55.209(d)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be nine months from the first date of the preliminary hearing until the proposal for decision is issued.

### III. CONCLUSION

OPIC recommends the Commission grant the hearing requests of J.A. & Shirley Martin, the North Texas Municipal Water District, and Wilda Faye VanderVelde and referring the above-referenced issues to the State Office of Administrative Hearings.

Respectfully submitted,

Blas J. Coy, Jr.  
Public Interest Counsel

By:   
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**CERTIFICATE OF SERVICE**

I hereby certify that on January 16, 2009 the original and seven true and correct copies of the Office of the Public Interest Counsel's Response to Requests for Hearing were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.

  
Amy Swanholm

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CHIEF CLERKS OFFICE

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**TCEQ DOCKET NO. 2008-1305-MWD**

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**FOR ALTERNATIVE DISPUTE**

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**PUBLIC OFFICIALS-REQUESTER:**

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