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April 5, 2010

Ms. LaDonna Castañuela (MC 105)
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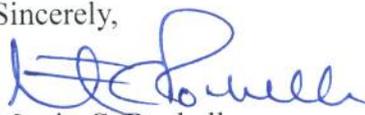
**VIA ELECTRONIC TRANSMISSION
AND FIRST-CLASS MAIL**

Re: Application of XS Ranch Fund VI, L.P. for TPDES Permit No. WQ0014946001
Response of XS Ranch Fund VI, L.P. to Request for Hearing (3025-0)

Dear Ms. Castañuela:

Attached please find the Response of XS Ranch Fund VI, L.P. to the Request for Hearing in the above-referenced matter. Please do not hesitate to contact me if you have any questions regarding this matter.

Sincerely,


Martin C. Rochelle

MCR/ldp
1097780
ENCLOSURES

cc: Service List
Mr. John Landwehr
Mr. James P. Foster
Mr. David Malish
Mr. Robert Ferguson
Mr. Joseph Longaro
Mr. John Moore

TCEQ DOCKET NO. 2010-0422-MWD

**IN THE MATTER OF THE
APPLICATION OF
XS RANCH FUND VI, L.P.
FOR TPDES PERMIT
NO. WQ0014946001**

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**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

RESPONSE OF XS RANCH FUND VI, L.P. TO REQUEST FOR HEARING

TO THE HONORABLE COMMISSIONERS:

COMES NOW, XS Ranch Fund VI, L.P. (“XS Ranch” or “Applicant”), and files this response to letters filed on behalf of the McCall Ranch, L.P. and Flying M Ranch, L.C., Ms. Jo Goertz, and Michael Goertz (the “Protestants”) in the above-referenced matter, which letters may be considered “requests for hearing.” If the Commission considers the Protestants’ letters as requests for a contested case hearing, they should be denied because Protestants have failed to present disputed issues of fact that are relevant and material to the Commission’s decision on the above-referenced XS Ranch application. In the alternative, the issues referred by the Commission for contested case hearing should be limited as proposed herein.

I. INTRODUCTION

XS Ranch applied to the Texas Commission on Environmental Quality (“TCEQ”) on June 11, 2009 for a new permit, Texas Pollutant Discharge Elimination System (“TPDES”) Permit No. WQ 0014946001 (“TPDES Permit”). The TPDES Permit, if issued, will authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 100,000 gallons per day in the Interim I phase, a daily average flow not to exceed 500,000 gallons per day in the Interim II phase, and a daily average flow not to exceed 990,000 gallons per day in the

final phase. The treated effluent will be discharged to the Colorado River above La Grange in Segment No. 1434 of the Colorado River Basin.

TCEQ declared XS Ranch's application administratively complete on July 7, 2009. The Notice of Receipt and Intent to Obtain a Water Quality Permit ("NORI") was published on August 3, 2009. The Notice of Application and Preliminary Decision ("NAPD") was published on October 1, 2009. On October 15, 2009, Protestants formally requested that a "public hearing" be held on the application and provided comments thereon. The Executive Director (the "ED") provided its Response to Public Comments on February 11, 2010, and the final decision letter on the application was mailed on February 16, 2010. Thereafter, on March 18, 2010, Protestants provided comment on the ED's Response to Public Comments and again requested a "public hearing" on the application. Pursuant to the analysis provided below, the Applicant recommends denying Protestants' request for a hearing and issuing the TPDES Permit.

II. LEGAL STANDARDS GOVERNING HEARING REQUESTS

This application was declared administratively complete on July 7, 2009. As the application was declared administratively complete after September 1, 1999, it is subject to the requirements of Title 30, Chapter 55, Subchapter G, §§ 55.200-55.211 of the Texas Administrative Code ("TAC").

A. Requirements for Requesting a Hearing

Under the provisions in 30 TAC §§ 55.200-211, a hearing requestor must make his or her request no later than 30 days after the Chief Clerk mails the ED's decision and response to comments. A contested case hearing may only be requested by the Commission, the ED, the applicant or an affected person. 30 TAC § 55.201(b). An affected person must make a request in writing and such request may not be based on an issue that was raised solely by a withdrawn

comment. 30 TAC § 55.201(c). To properly request a hearing, a requestor must substantially comply with the following requirements. First, a requestor must provide the required contact information as set forth in 30 TAC § 55.201(d)(1). The requestor must identify his or her personal justiciable interest affected by the application, specifically noting the “requestor's location and distance relative to the activity” and “how and why the requestor believes he or she will be affected by the activity in a manner not common to members of the general public.” 30 TAC § 55.201(d)(2). Additionally, a statement must clearly express that the requestor is requesting a “contested case” hearing. 30 TAC § 55.201(d)(3). Finally, the request for hearing must “list all relevant and material disputed issues of the fact that were raised during the public comment period and that are the basis of the hearing request.” 30 TAC § 55.201(d)(4).

B. Requirements for Affected Person

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.” 30 TAC § 55.203(a). 30 TAC § 55.203(c) provides relevant factors that will be considered in determining whether a person is affected. These factors include, but are not limited to:

- (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.

30 TAC § 55.203(c). The Commission shall grant a request for a contested case hearing if (1) the request is made by an affected person, (2) the request is timely filed with the chief clerk,

(3) the request is made pursuant to a right to hearing authorized by law, and (4) the request complies with the provision of 30 TAC § 55.201. 30 TAC § 55.211(c).

C. Requirements for Responses to Requests for Hearing

Pursuant to 30 TAC §55.209(e), a response to a request for hearing must specifically address the following:

- (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 of 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.

Based on the following reasons, the Commission should deny the Protestants' request for a contested case hearing.

III. ANALYSIS OF HEARING REQUEST

A. Protestants have not substantially complied with the requirements for making a request for contested case hearing.

The Protestants' hearing request should be denied because they have failed to substantially comply with the requirements for requesting a hearing pursuant to Commission rules. To make a hearing request, an affected person must substantially comply with the requirement of listing all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. 30 TAC §55.201(d)(4). TCEQ may not refer an issue for a contested case hearing unless TCEQ determines that the issue involves a disputed question of fact that is relevant and material to the decision on the application. *See* 30 TAC §55.201(d)(4).

Five issues are raised in Protestants' October 15, 2009 and March 18, 2010 letters. These issues are rife with complaints which fail to present a relevant and material question of fact for consideration by the Commission. Because each issue raised by the Protestants contains complaints which are either questions of law or immaterial and irrelevant to the application, Protestants have failed to substantially comply with the requirements for requesting a public hearing and their request should be denied. Additionally, the Protestants' request for a "public meeting" fails to comply with the requirements of 30 TAC 55.201(d)(3) of the Commission's regulations, which requires hearing requestors to "request a contested case hearing." In the event the Commission determines that Protestants' requests do comply with the requirements of 30 TAC 55.201(d)(3), XS Ranch would show the Commission the following with regard to the issues raised during the public comment period.

B. Should TCEQ grant a hearing on the application, TCEQ should limit those issues which they refer for hearing.

Protestants raised five issues during the public comment period, none of which have been withdrawn. These five issues are: 1) groundwater contamination and proximity of facilities to Protestants' water wells and property line; 2) adequacy of proposed effluent limitations; 3) odor control; 4) sludge handling; and 5) proposed plant capacity.

The first issue, addressing the proximity of facilities to Protestants' water wells and property line, does not present a relevant and material question of fact for consideration by TCEQ and thus should not be referred in the event of a contested case hearing. Further, the TCEQ should limit its consideration of the remaining four issues to only those complaints addressed by the Protestants which are germane to the instant permit application.

1. *Groundwater Contamination and Proximity of Proposed Facilities to Protestants' Water Wells and Property Line*

Protestants allege that, although the application and draft permit provide for a buffer zone well in excess of the 150-foot buffer zone required by 30 TAC §309.13(e) between treatment units and the plant site property line, such distances do not address the potential for transmission and migration of water-borne contaminants which will “negatively impact Protestants’ use and enjoyment of their existing [water] wells.” In addition to the agency’s buffer zone requirements, Commission regulations at 30 TAC §309.13(c) provide that a wastewater treatment plant unit may not be located closer than 500 feet from a public water well nor 250 feet from a private water well. The one well identified on Protestants’ property, designated as TWDB Well #5854402, is located approximately 4000 feet from any proposed wastewater treatment unit. *See* Supplemental Technical Report, Section X(b) of XS Ranch Permit Application, Appendix A. Further, no treatment unit is proposed within 1000 feet of Protestants’ property boundary. Therefore, even if Protestants own water wells on that property that are not reflected in Commission files, the 250 feet separation requirement of 30 TAC § 309.13(c) is met at least four-fold. Thus, such wells are far outside the minimum separating distances specified in the Commission’s regulations. These are the only facts relevant to the Commission’s consideration of the application as relates to Protestants’ water wells.

Commission regulations contained in Chapter 309 of the Texas Administrative Code and strictly adhered to by the Applicant in this application are intended to i) condition issuance of TPDES permits for domestic wastewater discharges such that possible contamination of ground and surface water is minimized, ii) define the characteristics that make an area unsuitable or inappropriate for a wastewater treatment facility, iii) minimize the possibility of exposing the

public to nuisance conditions, and iv) prohibit issuance of a permit for a wastewater treatment plant in an area determined to be unsuitable or inappropriate. *See* 30 TAC §309.10.

This issue raised by the Protestants does not allege any failure of the Applicant to comply with the applicable rules. This issue does not present a disputed question of fact; instead, it challenges the sufficiency of the Commission's rules and regulations. The Commission should not refer an issue for a contested case hearing unless it determines that the issue involves a disputed question of fact and is relevant and material to the decision on the application. *See* 30 TAC §55.201(d)(4). Because it is not supported by any specific allegation of failure to comply with applicable Commission regulations, this issue is not sufficiently specific to provide an identifiable fact issue that can be referred for hearing and should not be referred for hearing. However, if the Commission determines to refer a question to the State Office of Administrative Hearings("SOAH") on this comment made by Protestants, the Applicant requests that it be framed as follows:

Issue: Whether the Applicant has demonstrated that it can meet the requirement for separation of waste treatment units from private water wells as required by 30 TAC § 309.13(c)?

2. Adequacy of Proposed Effluent Limitations

Protestants argue that the modeling the ED used in determining whether the Applicant's discharge will meet water quality criteria is outdated and thus insufficient to achieve the applicable water quality standard. Protestants challenge the draft TPDES Permit's proposed effluent limits, allegedly because TCEQ has not performed a Waste Load Evaluation Study for Segment 1434 "since the 1970's", and thus Protestants assert that TCEQ's modeling cannot accurately measure whether Applicant's proposed discharge will meet the applicable surface

water quality standards. Because of this alleged deficiency, Protestants allege that to achieve the designated uses and dissolved oxygen criterion for Segment 1434 (as stated in 30 TAC §307.10, Appendix A), the proposed facilities should be required to meet effluent limitations set at no less strict than 5mg/l CBOD, 5mg/l TSS, 2mg/l NH₃-N, 1mg/l P and 6mg/l DO.

The proposed effluent limits contained in the draft TPDES Permit were derived from site-specific modeling conducted by TCEQ staff to address the surface water quality standards and criteria established by Commission rules in 30 TAC Ch. 307. This modeling, calibrated specifically for the proposed discharge to Segment 1434, is the preferred method prescribed by TCEQ for generating effluent limits. See Texas Commission on Environmental Quality, Procedures to Implement the Texas Surface Water Quality Standards (RG-194) (Dec. 2009), at 75. Thus, it has been demonstrated that, using this currently accepted modeling analysis developed by TCEQ, the effluent limits within the draft TPDES Permit are sufficient to achieve the water quality standards and criteria for Segment 1434.

Moreover, the uses designated for Segment 1434 of the Colorado River are set by Commission regulations. See, 30 TAC § 307.1, *et seq.* The Executive Director's staff performed its analysis of the application and its modeling based on those regulations. The Commission should not accept Protestants' invitation to alter those standards without engaging in a rule-making process. Because the application was evaluated by Commission staff in accordance with the adopted rules, it would be an error to apply standards different than those contained in the adopted regulations.

Protestants propose an alternative set of effluent limits for the permit, but do not provide any indication of the modeling from which such limits were derived. Rather, Protestants assert that their alternative limits are the same as were applied by the Commission to a different

facility, the LCRA's McKinney Roughs wastewater treatment plant. The Protestants do not give any indication of the modeling methods or parameters applied in that situation or why different modeling methods or parameters should be applied in this case. However, Commission regulations affirmatively address the differences between XS Ranch's proposed discharge quality and that which LCRA's McKinney Roughs facility was required to meet. Specifically, Subchapter E of 30 TAC 311 is applicable to both the proposed XS Ranch discharge and the LCRA McKinney Roughs wastewater treatment plant discharge. The Applicant's proposed discharge is subject to an effluent set prescribed by 30 TAC §311.42 which is identical to the effluent set included in the draft TPDES permit. On the other hand, LCRA's McKinney Roughs discharge is subject to a different effluent set as prescribed in 30 TAC §311.43. *See* 30 TAC §311.41, *et seq.* Neither Protestants' dissatisfaction with the Commission's regulations concerning discharges to this segment of the Colorado River nor with the site-specific modeling developed by TCEQ in its evaluation of the application are questions of fact which are relevant to the Commission's decision on the application.

This comment does not sufficiently raise disputed issues of fact relevant to and material to the Commission's decision on the application. However, if the Commission determines to refer this issue to the State Office of Administrative Hearings, Applicant requests that it be framed as follows:

Issue: Whether the proposed effluent limitations in the draft TPDES Permit comply with the dissolved oxygen criteria and designated uses of Segment 1434?

3. Odor Control

Protestants argue that the proposed buffer zone to be maintained by Applicant, while in concert with the TCEQ regulations established to meet the requirement to control and abate odor, found at 30 TAC §309.13(e)(1), might not be sufficient to control and abate odor. Further, while the design, operation, and recommended effluent limits for the proposed facility meet water quality criteria of Commission rules, Protestants maintain that the facility should conform to the effluent limits set for another facility located upstream of the Applicant's proposed wastewater treatment plant. Protestants do not dispute the fact that Applicant is providing odor control through ownership of a buffer zone or that Applicant owns ample property to provide more than the required 150 feet buffer zone between waste treatment units and the nearest property boundary. These are the facts relevant to the Commission's decision as relates to odor control.

The Applicant recommends that, should this issue be referred to SOAH, the Applicant only be required to show that the design, operation, and management of the facility, including its proposed buffer zones, will sufficiently control odor as required by 30 TAC 309.13(e). This comment does not sufficiently raise a contested issue of fact relevant and material to the Commission's decision on the Application. However, if the Commission determines to refer a question related to this comment to a hearing, the Applicant requests that it be framed as follows:

Issue: Whether the Applicant will be able to provide odor control
by ownership of buffer zones as required by 30 TAC § 309.13(e)?

4. Sludge Handling

Protestants assert that, although sludge generated from the proposed facility would be hauled by a registered transporter to the City of Austin's Walnut Creek Wastewater Treatment Facility, the application and draft TPDES Permit do not address the potential for on-site issues

arising during the temporary period in which sludge is stored and made ready for transit. Further, Protestants complain that the application presents no controls which will prevent sludge which is being processed and prepared for transit from spilling or running off into Sandy Creek, a stream adjacent to the proposed treatment facility site.

If the Commission has issued the TPDES Permit as requested by the application, the Applicant will be required to provide detailed design and construction plans on all features of the wastewater treatment plant pursuant to Chapter 217 of the Commission rules, including plans related to sludge storage prior to removal of sludge from the facility site. Applicant will be required to detail the design of the sludge storage and management facilities, as required by 30 TAC § 217.251, and obtain the Commission's approval of the design prior to the construction of such facilities. However, the design and construction details of these facilities are not a part of this proceeding, and Protestants' comments are therefore not relevant and material to the Commission's actions in this proceeding. Thus, Applicant does not believe that Protestants' comment regarding sludge storage raises a contested issue of fact that is relevant and material to the Commission's decision on the application.

If the Commissioners determine to refer a question regarding sludge handling, the Applicant requests that it be framed as follows:

Issue: Whether the Applicant has satisfied the Commission siting requirements regarding the location of sludge storage and management facilities, if any, as contained in 30 TAC 309.13.

5. Proposed Plant Capacity

Protestants argue that the proposed total capacity of .99 million gallons per day ("MGD") for the facility is too small to accommodate the Applicant's development plan. At the same time,

however, Protestants claim that it is unrealistic to expect that the Applicant's development plan will support even a .5 MGD plant during the proposed five-year permit term. The Applicant's estimated permitted and/or proposed flows are based on an assumed unit wastewater flow rate of 300 gallons per day ("gpd") per Living Unit Equivalent ("LUE"), which is a generally accepted volume for planning purposes. Such flows are consistent with the TCEQ's design criteria for flow calculation, found at 30 TAC §217.32, Table 1. Further, the draft TPDES Permit authorizes the Applicant to construct the wastewater facilities in three phases, with each new phase being initiated when appropriate percentages of capacity are reached in the previous phase of facilities, so as to remain conservative and hinge capacity of the facility on that which is actually needed. This type of phased development plan was specifically selected so as to preclude overdevelopment of the facility.

Whether they are challenging the proposed plant as being too big or not big enough, Protestants' comments regarding treatment plant capacity do not raise questions of fact that are relevant or material to the Commission's decision on the application. The various phases of the facility will only be designed and constructed when existing phases reach 75% and then 90%, respectively, of capacity, in accordance with Commission rules. *See*, 30 TAC 305.126. Protestants do not dispute that process. Protestants have not shown how their allegations of inaccurate projections of growth could result in inadequate or excess capacity. Their comments therefore do not raise issues relevant to the Commission's consideration of the application.

This comment does not raise a contested issue of fact that is relevant and material to the Commission's decision on the application. However, if the Commission determines to refer a question concerning this comment to a hearing, the Applicant requests that it be framed as follows:

Issue: Whether the capacities projected for the phased construction of the proposed facility, based on Applicant's estimation of development stages, are consistent with the flow volumes and calculations set forth in 30 TAC § 217.32?

C. Maximum Expected Duration of Hearing

Pursuant to 30 TAC § 55.209(d)(7), responses to requests for hearing must address a maximum expected duration for any contested case hearing that Commissioners may determine to be appropriate. In order to comply with this rule, the Applicant anticipates that should a hearing be granted and the issues referred are limited as to the five issues set forth above, the maximum expected duration of a hearing on this application should be no longer than six months from the first date of the preliminary hearing until the proposal for decision is issued.

IV. CONCLUSION

For the reasons set forth above, XS Ranch Fund VI, L.P. respectfully recommends that the Commission deny Protestants' hearing request and not refer this matter for a contested case hearing, and issue XS Ranch Fund VI, L.P.'s requested TPDES Permit. In the alternative, XS Ranch Fund VI, L.P. respectfully recommends that the Commission limit the issues addressed in the contested case hearing to only those the Commission determines to be relevant and material to this permit application as they have been identified herein and for the duration specified above.

Respectfully submitted,

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XS RANCH FUND VI, L.P.**

CERTIFICATE OF SERVICE

I hereby certify that on this the 5th day of April, 2010, a true and correct copy of the foregoing was sent via first-class mail, electronic mail, facsimile, or hand-delivery to the following persons:

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