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April 12, 2013

Via Electronic Submission & Mail

Bridget C. Bohac, Chief Clerk
TCEQ, MC-105
P.O. Box 13087
Austin, Texas 78711-3087

REVIEWED

APR 15 2013

By

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CHIEF CLERKS OFFICE

2013 APR 15 AM 11:09

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

Re: Tall Timbers Utility Company, Inc., TPDES Permit No. WQ0013000001, City of Tyler's Request for Contested Case Hearing

Dear Ms. Bohac:

We are legal counsel for the City of Tyler and have been authorized by Tyler to make the following request for contested case hearing of the referenced TPDES permit amendment application and request for reconsideration of the ED's determination.

Request for Contested Case Hearing

The City of Tyler requests a contested case hearing. Tyler disputes the ED's decision to allow Tall Timbers to significantly expand its treatment plant capacity from 0.312 MGD to 0.445 MGD. The ED's decision is contrary to the Commission's permitting rules and the Commission's goal of promoting regionalization, which is particularly relevant in this case since Tyler is ready, willing, and able to treat Tall Timbers' additional wastewater flows. Tyler additionally disputes the ED's decision to issue the permit without adequate odor prevention and control provisions. Tall Timbers' facility is located less than 22 feet from its closest property boundary and approximately 1,500 feet from a Tyler City Park. The permit needs to contain adequate odor prevention and control requirements. Tyler also disputes the interim 2-hour peak flow limit contained in the draft permit.

Identity of Requester

The City of Tyler is a home-rule municipality located in Smith County, Texas. Tyler's contact information for this proceeding is as follows:

Tyler Contact
Mr. Gregory M. Morgan, P.E.
Director of Utilities and Public Works
City of Tyler
P.O. Box 2039
Tyler, Texas 75710
(903) 531-1234
Fax: (903) 531-1259

Authorized Representative
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Austin, Texas 78701
(512) 404-7800
Fax: (512) 703-2785
jfreeland@mandf.com

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Tyler's Demonstration of Affected Person Status

The City of Tyler has interests related to legal rights, duties, privileges, powers, or economic interests affected by this application. Some of Tyler's specific interests are as follow:

- Tall Timbers' wastewater treatment facility, which is the subject of the application, is located entirely inside Tyler's corporate boundaries, and the discharge is located inside Tyler's boundaries.
- The activity sought to be authorized by the permit application has the potential to reduce the quality of water in Tyler's separate storm sewer system and in the streams located inside Tyler's boundaries. Tyler's charter and ordinances obligate Tyler to protect the quality of water inside the city, and pursuant to state and federal water protection laws, Tyler adopted an illicit discharge ordinance, which expressly prohibits the disposal of waste into Tyler's separate storm sewer system. Portions of Tall Timbers' sewage collection system, which is part of the treatment facility, are located inside Tyler's corporate boundaries. Releases from Tall Timber's collection system have previously flowed into Tyler's separate storm sewer system, possibly affecting Tyler's compliance with its stormwater permit.
- Tyler owns property immediately adjacent to and downstream of the location where Tall Timbers' discharge reaches West Mud Creek. Tyler's property is located approximately 1,500 feet from the discharge point. Tyler's property includes a public park adjacent to the permitted plant site. Use and enjoyment of the park by Tyler residents could be adversely affected by the permitted activities.
- Tyler owns and operates a 9MGD wastewater treatment plant located less than one-mile upstream from the location of Tall Timbers' facility. Tyler's plant discharges to the same receiving stream as Tall Timbers' facility. Discharges from Tall Timbers' facility will consume part of the waste load capacity of the shared receiving stream, which could adversely affect Tyler's ability to expand its own treatment plant in the future.

Facts

Tyler believes that the following facts are undisputed:

- On May 23, 2002, the Commission issued a permit to Tall Timbers authorizing Tall Timbers to expand its treatment plant capacity from 0.250 MGD to 0.445 MGD. Tall Timbers was given until August 1, 2006, to complete that expansion.
- In December 2005, Tall Timbers submitted a renewal application in which it claimed to have completed the expansion to 0.445 MGD. During the renewal process, the ED determined that Tall Timbers had not expanded its plant sufficiently to meet Commission standards and ordered Tall Timbers to expand the plant by July 2008. Tall Timbers intentionally chose not to comply with the Commission's order. Tall Timbers did not expand the plant by July 2008 and did not notify the Commission of its failure.
- On February 14, 2011, Tall Timbers submitted a renewal application in which it again claimed to have fully expanded the plant. On review, the ED again determined that Tall

Timbers had failed to adequately expand its plant. The ED determined that Tall Timbers plant, as built, has a capacity of 0.312 MGD rather than 0.445 MGD.

- Prior to 2002, Tall Timbers appears to have owned or controlled sufficient property around its treatment plant to comply with the Commission's buffer zone requirements (30 TAC §309.13(e)). In 2002, Tall Timbers sold the property adjacent to the plant site. The property on which the plant sits is now less than 300 feet wide, with existing treatment units located as close as 22 feet from a property boundary. Tall Timbers failed to notify the Commission of this change to its buffer zones.
- In its December 2005 renewal application, Tall Timbers affirmatively represented that the buffer zone requirements had been met and referenced the prior buffer zone map, which indicated that Tall Timbers owned sufficient property to meet the buffer zones. The permit issued by the Commission contained a site map that misrepresented Tall Timbers' ownership of buffer zones.
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- In its February 2011 renewal application, Tall Timbers again affirmatively represented that it met the buffer zone requirements and that nothing further needed to be done to comply with buffer zone requirements. This statement was not accurate. To date, Tall Timbers has never formally notified the Commission about the misrepresentations in its applications and its permit.
- Tall Timbers' requested the renewal of its permit with an interim two-hour peak flow limit of 527 gpm instead of the existing limit of 927 gpm. The ED denied this request stating that Tall Timbers' request could not be granted because the 18-month compliance period could not be renewed.

Tyler's Disputed Issues

1. Tyler disputes the ED's decision to authorize Tall Timbers to expand its treatment plant from the current capacity of 0.312 MGD to 0.445 MGD.

The ED recommends a permit with a new interim phase with a daily average flow limit of 0.312 MGD (rather than the requested 0.445 MGD) and a two-hour peak flow limit of 650 gpm rather than 927 gpm. This is a change that Tall Timbers did not request in its application. The ED initiated this change after determining that Tall Timbers' existing plant could not meet either of the authorized flow limits contained in the existing permit. The ED fully acknowledges that Tall Timbers will have to significantly expand its treatment plant to meet even its existing permit limits (which Tall Timbers should have been capable of meeting since 2006).

Tyler opposes granting Tall Timbers any authorization to expand this wastewater treatment plant. Tyler opposes the expansion of this facility because such expansion should only be allowed as a permit amendment rather than as a permit renewal. Moreover, such an expansion is not needed and is contrary to the Commission's policy of regionalization.

Tyler disputes the ED's decision to treat this application as a renewal application. The Commission's rules treat the two types of applications differently, with more public protection given to amendment application. The ED's decision to treat this application as a renewal rather than as an amendment has significant real-world impacts. The public has been denied proper notice of the true character of Tall Timbers' application. Tall Timbers is not seeking to merely continue discharging in the same manner authorized by its existing permit. To meet the discharge limits in the final phase of the draft permit, Tall Timbers will have to construct new treatment units, including expanding its clarifiers and constructing new sludge handling facilities. The public deserves to be properly placed on notice of such changes and be given the opportunity to question the need for such changes through the permit amendment process.

As set out above, the Commission first authorized Tall Timbers to expand its plant to 0.445 MGD in 2002. That permit gave Tall Timbers until August 1, 2006, to complete the expansion. Tall Timbers failed to fully expand the plant. Pursuant to Commission rules and practice, the Commission cannot extend the time to construct additional facilities except as a permit amendment. The Commission cannot extend compliance times through a permit renewal since the extension of compliance periods is considered to be a major modification.

The ED argues that he can make "minor" amendments to a permit during the renewal process without triggering the amendment procedures. (ED Response, p. 5). For support, the ED cites 30 TAC §305.65(6). That rule and the Commission's other rules, however, do not support the ED's conclusion. Commission rules state **"if an application for renewal in fact requests a modification of requirements and conditions of the existing permit, an application for amendment shall be filed in place of an application for renewal."** (30 TAC §305.65(3)). This rule does not distinguish between "minor" or "major" modifications or amendments. If the applicant or the ED seek to modify an existing permit (whether minor or major modification) that modification must be processed as an amendment and not a renewal. Moreover, the extension of the compliance period is defined by rule (30 TAC §305.62(c)) to be a major amendment.

Pursuant to the Commission's rules, the ED should have halted consideration of Tall Timbers' renewal application once the ED determined that Tall Timbers' request for renewal of the prior interim limits was improper. Tall Timbers permit can be a renewal only if the permit has a daily average flow limit of 0.445 MGD and a two-hour peak flow limit of 927 gpm, but the ED cannot recommend such a permit because Tall Timbers' plant is not capable of adequately treating such flows. The ED should have directed Tall Timbers to file an amendment application at that time.¹ Because the ED failed to properly follow Commission rules, the Commission should treat this application as an amendment and not a renewal.

¹ During the processing of this application, Tyler informed the ED that Tyler would not object to the ED processing Tall Timbers' application as a renewal if the ED would limit the authorized flow rates to the as-built capacity of the plant. The ED declined Tyler's offer.

It is the policy of the State of Texas to encourage and promote development and use of regional and area-wide wastewater collection, treatment, and disposal systems. Tall Timbers' existing treatment plant is undersized to treat its existing customer base and will require significant improvements to be able to adequately treat its existing and future demand. Tyler has the ability to treat and is willing to offer wholesale treatment service to Tall Timbers.

If this application was properly viewed as an amendment, Tall Timbers would be required to demonstrate that it would not be more economical to divert additional wastewater flows to Tyler's adjacent wastewater treatment plant rather than to expand its plant. Tall Timbers cannot make this demonstration. Tyler is ready, willing, and able to provide wholesale wastewater treatment service to Tall Timbers. Tyler has communicated this offer to Tall Timbers.

Not only is Tyler willing and able to provide service, but Tyler can also provide wholesale wastewater treatment services to Tall Timbers at a lower cost than Tall Timbers can provide itself. Tyler has an existing treatment plant with excess capacity located less than a mile from Tall Timbers' plant. Tyler has engaged in long-term sewer planning for most of Smith County, including the entire area served by Tall Timbers' facility, and has purchased property for the construction of a future wastewater treatment plant that will meet Smith County's treatment needs for at least the next 30 years.

In response to Tyler's comments, the ED admits that a regionalization evaluation would be appropriate if Tall Timbers was seeking an increase in flow. In such cases, the applicant would be required to provide an analysis of the costs to connect to the existing wastewater plant. The ED also states that in such cases, the applicant must demonstrate that connecting to the existing plant will be expensive. The ED did not require Tall Timbers to make such a demonstration solely because the ED concluded that this is a renewal application. The ED's position, however, ignores the fact that Tall Timbers will have to expand its plant to provide the required treatment capacity. Allowing Tall Timbers to expand its plant without making the required demonstration defeats the purpose served by the regionalization requirement, avoiding the inefficient construction of wastewater facilities.

In accordance with the Commission's adopted policy, the Commission should determine whether it would be appropriate for Tall Timbers to obtain wholesale treatment service from Tyler rather than expanding its own plant. Integration into Tyler's area-wide system would improve water quality, and is feasible when considering waste treatment technologies, engineering, financial and other considerations. Integration into Tyler's system would also lower Tall Timbers' treatment costs (which are passed directly on to Tall Timbers' ratepayers).

Tyler requests a contested case hearing to determine whether Tall Timbers' application is an amendment application, and if so, whether Tall Timbers permit should be limited to its existing, as-built, capacity based on the Commission's policy on regionalization. If the Commission wants to issue a permit authorizing additional capacity, Tall Timbers must first demonstrate that connection to Tyler's existing facility is impractical.

2. Tyler disputes the ED's decision not to require additional odor prevention and control requirements in the draft permit.

The draft permit does not contain requirements sufficient to adequately protect the public from nuisance odors from the facility. Tyler requests a contested case hearing on this issue.

Commission rules (30 TAC §309.13(e)) set out minimum requirements for the abatement and control of nuisance odors. Tall Timbers' existing permit was issued based on Tall Timbers' representation that it satisfied the buffer zone requirements, which require that no treatment facility be located closer than 150 feet from the nearest property line. The permittee is required to hold legal title, or other sufficient property interest to satisfy the buffer zone.

When Tall Timbers' permit was issued in 2002, Tall Timbers may have met the buffer zone requirement, but shortly after issuance of the permit Tall Timbers sold the property. After the sale, Tall Timbers' treatment facilities were located within 22 feet of the nearest property line. Additionally, Tall Timbers misrepresented its ownership of the adjacent property in its 2005 renewal application and in this application.

Again, this issue has real-world impacts. The facility has a history of nuisance odor problems and complaints. A review of the Commission's enforcement records show that Commission received nuisance odor complaints on October 14, 2010, and September 20, 2011. The October 14, 2010, complaint led to a notice of violation relating to improper sludge management. The September 20, 2011, odor complaint led to formal enforcement by the Commission that is still ongoing (TCEQ Docket No. 2012-0629-MWD-E). Nuisance odor prevention is critical for this facility. The facility has virtually non-existent buffer zones. The facility is also located adjacent to Faulkner Park, a city park owned by Tyler, with picnic areas, tennis courts, baseball field, and nature trails. Tyler has received numerous odor complaints linked to the facility.

The ED's position (ED Response 4) is that Tall Timbers satisfied the buffer zone requirement by submitting a nuisance odor prevention plan to the ED. The ED's approval of a nuisance odor prevention plan after the expiration date of the existing permit is contrary to Commission rules (30 TAX 309.12(e)(2)), which specifically state that such plans should be "subject to review during the permitting process." The substitution of a prevention plan for actual buffer zone constitutes a modification of the permit that must be addressed as a permit amendment. Additionally, the ED's approval of the plan submitted by Tall Timbers was expressly conditioned on the lack of odor complaints and the Commission subsequently commenced an enforcement action against Tall Timbers based on such a complaint.

Tyler requests a contested case hearing to determine whether the nuisance odor prevention plan submitted by Tall Timbers is sufficient to abate and control nuisance odors at the site.

3. Tyler disputes the ED's decision to issue the permit with an interim 2-hour peak limit of 650 gpm.

The draft permit contains an interim 2-hour peak flow limit of 650 gpm. In its comments, Tyler questioned the appropriateness of the interim 2-hour flow limit contained in the draft permit. Based on the current configuration of the plant, Tyler believes that the plant cannot meet the Commission's minimum chlorine contact requirements at the peak flow of 650 gpm.

In its last permit renewal, Tall Timbers' was ordered to expand its chlorine contact chamber within 18 months of permit issuance. Tall Timbers failed to comply with this requirement. Tall Timbers filed no notice of completion of construction with the Commission, nor did Tall Timbers indicate in its renewal application that such expansion had been constructed.

The ED responded to Tyler's comment stating that "with minor modifications" the existing plant can adequately treat peak flows of 650 gpm. The ED does not explain what these "minor modifications" might be, and Tyler disputes this conclusion. Based on the existing plant layout, as shown in the renewal application, the peak flow should be limited to 527 gpm (as contained in the interim limit of the existing permit).

Tyler disputes the ED's conclusion that that Tall Timbers' existing plant can adequately treat peak flows of greater than 527 gpm and requests a contested case hearing to allow the parties to develop a record to allow the Commission to make an informed decision on this issue.

Bases for Granting Contested Case Hearing under §26.028(d)

Texas Water Code §26.028(d) and 30 TAC 55.201(i)(5) set out some bases on which the Commission may approve an application to renew or amend a TPDES permit without a contested case hearing. Tyler asserts that Tall Timbers' application does not satisfy these bases. Even if they did, Tyler requests that the Commission use its discretion and refer this application for hearing to address regionalization and the need for odor control requirements.

The Commission may approve a TPDES application without a contested case hearing if the applicant is not seeking to significantly increase the quantity of waste authorized to be discharged. As explained previously, the draft permit provides Tall Timbers with the authority to expand the capacity of its treatment plant from 0.312 MGD to 0.445 MGD. This is a 42% increase in average daily flow. This is a significant increase in the quantity of waste authorized to be discharged.

The Commission may approve a TPDES application without a contested case hearing if the activities in the amended permit will maintain or improve the quality of waste authorized to be discharged. The increase in discharges of waste will not maintain or improve the quality of waste. The replacement of reed filter beds with sludge drying beds will not improve or maintain the quality of waste. Tyler does concede that the addition of the *E. coli* limit will improve or

maintain the quality of waste discharged, and Tyler does not seek a contested case hearing on that issue.

The Commission may approve a TPDES application without a contested case hearing if the Commission determines that the applicant's compliance history raises no issue regarding the applicant's ability to comply with a material term of the permit. Tall Timbers' prior conduct clearly raises issues regarding its ability to comply with the permit. Tall Timbers is in violation of its existing permit by having failed to expand its plant. Tall Timbers has misrepresented material facts in its last two permit applications. Tall Timbers has entered into several agreed enforcement orders relating to the unauthorized discharge of sewage sludge into the receiving stream. All of these compliance issues raise concerns regarding Tall Timbers' ability to comply with its permit.

Request for Reconsideration of ED's Determination

In its comments, Tyler requested that the ED deny the application pursuant to 30 TAC §§305.65(5) and 305.66(a)(1) and (4) because Tall Timbers failed to construct facilities necessary to comply with its existing permit and because Tall Timbers' application contains misrepresentations regarding buffer zones and the capacity of the plant. The ED failed to respond to this request, but the ED did not deny the application as requested. Tyler respectfully requests the Commission to reconsider the ED's determination and deny the application.

Pursuant to 30 TAC §305.65(5), the Commission "may deny an application for renewal on the grounds set forth in §305.66." Section 305.66(a)(1) authorizes denial of a permit renewal if:

"The permittee has failed or is failing to comply with the conditions of the permit or a commission order, including failure to construct, during the life of the permit, facilities necessary to conform with the terms and conditions of the permit."

Tall Timbers has admitted that it failed to construct facilities necessary to treat the authorized flow rates. Tall Timbers failed to construct these facilities during the term of the permit issued in 2002 and again during the term of the permit issued in 2006. Additionally, Tall Timbers failed to enlarge its chlorine contact chamber within 18 months after issuance of its last permit, as required by the permit. The intentional decision not to construct facilities necessary to conform with the terms and conditions of a permit is a serious infraction that the Commission should not treat lightly, especially since Tall Timbers did not even notify the Commission of its decision not to construct the facilities.

Section 305.66(a)(4) authorizes denial of a permit renewal based on:

"The permittee's failure, in the application or hearing process to disclose fully all relevant facts, or the permittee's misrepresentation of relevant facts at any time."

Tall Timbers misrepresented and failed to disclose relevant facts regarding its buffer zones in its prior applications and in its current application. Tall Timbers also misrepresented relevant facts in its February 14, 2011, application. In that application, Tall Timbers represented that no unbuilt phases remained on the existing permit and that the existing permit did not contain a phase that had not been constructed within five years of being authorized by the TCEQ. This representation was untrue with regard to both the obligation to expand the chlorine contact chamber and to expand plant capacity to 0.445 MGD. The misrepresentation of material facts in permit applications is also a serious infraction. The Commission should not condone behavior that undermines the foundation of its permitting system – that applicants fully and accurately represent material facts relating to their applications.

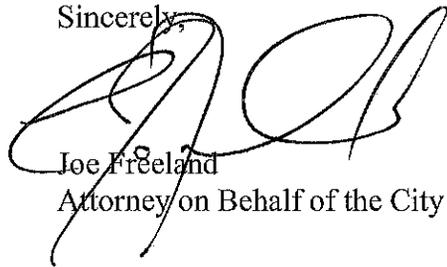
Based on the facts alleged above, Tyler requests that the Commission reconsider the ED's determination and deny Tall Timbers' renewal application. To the extent that any of the alleged facts are in dispute, Tyler requests a contested case hearing to resolve any factual issues. The public will not be harmed by a denial of the permit renewal. As stated previously, the City of Tyler is willing to provide wholesale treatment service to Tall Timbers.

Conclusion

Tyler has a justiciable interest in the Commission's decision on this permit application that could be adversely affected if the Commission were to grant the requested permit. As such, Tyler is an "affected person." Tyler requests a contested case hearing to address issues raised in Tall Timbers' application. Alternatively, Tyler requests that the Commission deny Tall Timbers' application based on Tall Timbers' failure to construct facilities as required by permit and based on Tall Timbers' misrepresentation of material facts.

Please do not hesitate to contact me if you have any questions regarding this request for a contested case hearing.

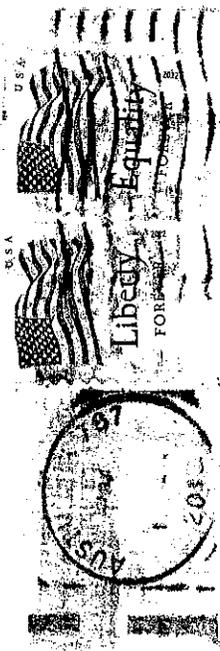
Sincerely,



Joe Freeland
Attorney on Behalf of the City of Tyler

cc: Gary Landers, City Attorney
Greg Morgan, Director of Utilities and Public Works

MATHEWS & FREELAND, LLP
327 Congress Avenue, Suite 300
Austin, TX 78701



TEXAS
COMMISSION
ON ENVIRONMENTAL
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2013 APR 15 AM 11:00

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TCEQ MAIL CENTER
AJ

Bridget C. Bohac, Chief Clerk
TCEQ, MC-105
P.O. Box 13087
Austin, TX 78711-3087

Marisa Weber

From: PUBCOMMENT
Sent: Friday, April 12, 2013 4:17 PM
To: PUBCOMMENT-OCC2
Subject: FW: Public comment on Permit Number WQ0013000001
Attachments: WQ0013000001 Tyler Request for Contested Case Hearing.pdf

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From: PUBCOMMENT-OCC
Sent: Friday, April 12, 2013 2:57 PM
To: PUBCOMMENT
Subject: FW: Public comment on Permit Number WQ0013000001

*MWD
7.7.2008*

From: jfreeland@mandf.com [<mailto:jfreeland@mandf.com>]
Sent: Friday, April 12, 2013 2:48 PM
To: donotReply@tceq.state.tx.us
Subject: Public comment on Permit Number WQ0013000001

REGULATED ENTY NAME TALL TIMBERS STP

RN NUMBER: RN101519981

PERMIT NUMBER: WQ0013000001

DOCKET NUMBER: 2012-0629-MWD-E

COUNTY: SMITH

PRINCIPAL NAME: TALL TIMBERS UTILITY COMPANY INC

CN NUMBER: CN600794945

FROM

NAME: Joe Freeland

E-MAIL: jfreeland@mandf.com

COMPANY: Mathews & Freeland, LLP

ADDRESS: 327 CONGRESS AVE Suite 300
AUSTIN TX 78701-4058

PHONE: 5124047800

CM

FAX:

COMMENTS: See attached Request for Contested Case Hearing.

MATHEWS & FREELAND, L.L.P.

ATTORNEYS AT LAW

JIM MATHEWS
JOE FREELAND

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FAX: (512) 703-2785

April 12, 2013

Via Electronic Submission & Mail

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Tyler disputes the ED's decision to treat this application as a renewal application. The Commission's rules treat the two types of applications differently, with more public protection given to amendment application. The ED's decision to treat this application as a renewal rather than as an amendment has significant real-world impacts. The public has been denied proper notice of the true character of Tall Timbers' application. Tall Timbers is not seeking to merely continue discharging in the same manner authorized by its existing permit. To meet the discharge limits in the final phase of the draft permit, Tall Timbers will have to construct new treatment units, including expanding its clarifiers and constructing new sludge handling facilities. The public deserves to be properly placed on notice of such changes and be given the opportunity to question the need for such changes through the permit amendment process.

As set out above, the Commission first authorized Tall Timbers to expand its plant to 0.445 MGD in 2002. That permit gave Tall Timbers until August 1, 2006, to complete the expansion. Tall Timbers failed to fully expand the plant. Pursuant to Commission rules and practice, the Commission cannot extend the time to construct additional facilities except as a permit amendment. The Commission cannot extend compliance times through a permit renewal since the extension of compliance periods is considered to be a major modification.

The ED argues that he can make "minor" amendments to a permit during the renewal process without triggering the amendment procedures. (ED Response, p. 5). For support, the ED cites 30 TAC §305.65(6). That rule and the Commission's other rules, however, do not support the ED's conclusion. Commission rules state "**if an application for renewal in fact requests a modification of requirements and conditions of the existing permit, an application for amendment shall be filed in place of an application for renewal.**" (30 TAC §305.65(3)). This rule does not distinguish between "minor" or "major" modifications or amendments. If the applicant or the ED seek to modify an existing permit (whether minor or major modification) that modification must be processed as an amendment and not a renewal. Moreover, the extension of the compliance period is defined by rule (30 TAC §305.62(c)) to be a major amendment.

Pursuant to the Commission's rules, the ED should have halted consideration of Tall Timbers' renewal application once the ED determined that Tall Timbers' request for renewal of the prior interim limits was improper. Tall Timbers permit can be a renewal only if the permit has a daily average flow limit of 0.445 MGD and a two-hour peak flow limit of 927 gpm, but the ED cannot recommend such a permit because Tall Timbers' plant is not capable of adequately treating such flows. The ED should have directed Tall Timbers to file an amendment application at that time.¹ Because the ED failed to properly follow Commission rules, the Commission should treat this application as an amendment and not a renewal.

¹ During the processing of this application, Tyler informed the ED that Tyler would not object to the ED processing Tall Timbers' application as a renewal if the ED would limit the authorized flow rates to the as-built capacity of the plant. The ED declined Tyler's offer.

It is the policy of the State of Texas to encourage and promote development and use of regional and area-wide wastewater collection, treatment, and disposal systems. Tall Timbers' existing treatment plant is undersized to treat its existing customer base and will require significant improvements to be able to adequately treat its existing and future demand. Tyler has the ability to treat and is willing to offer wholesale treatment service to Tall Timbers.

If this application was properly viewed as an amendment, Tall Timbers would be required to demonstrate that it would not be more economical to divert additional wastewater flows to Tyler's adjacent wastewater treatment plant rather than to expand its plant. Tall Timbers cannot make this demonstration. Tyler is ready, willing, and able to provide wholesale wastewater treatment service to Tall Timbers. Tyler has communicated this offer to Tall Timbers.

Not only is Tyler willing and able to provide service, but Tyler can also provide wholesale wastewater treatment services to Tall Timbers at a lower cost than Tall Timbers can provide itself. Tyler has an existing treatment plant with excess capacity located less than a mile from Tall Timbers' plant. Tyler has engaged in long-term sewer planning for most of Smith County, including the entire area served by Tall Timbers' facility, and has purchased property for the construction of a future wastewater treatment plant that will meet Smith County's treatment needs for at least the next 30 years.

In response to Tyler's comments, the ED admits that a regionalization evaluation would be appropriate if Tall Timbers was seeking an increase in flow. In such cases, the applicant would be required to provide an analysis of the costs to connect to the existing wastewater plant. The ED also states that in such cases, the applicant must demonstrate that connecting to the existing plant will be expensive. The ED did not require Tall Timbers to make such a demonstration solely because the ED concluded that this is a renewal application. The ED's position, however, ignores the fact that Tall Timbers will have to expand its plant to provide the required treatment capacity. Allowing Tall Timbers to expand its plant without making the required demonstration defeats the purpose served by the regionalization requirement, avoiding the inefficient construction of wastewater facilities.

In accordance with the Commission's adopted policy, the Commission should determine whether it would be appropriate for Tall Timbers to obtain wholesale treatment service from Tyler rather than expanding its own plant. Integration into Tyler's area-wide system would improve water quality, and is feasible when considering waste treatment technologies, engineering, financial and other considerations. Integration into Tyler's system would also lower Tall Timbers' treatment costs (which are passed directly on to Tall Timbers' ratepayers).

Tyler requests a contested case hearing to determine whether Tall Timbers' application is an amendment application, and if so, whether Tall Timbers permit should be limited to its existing, as-built, capacity based on the Commission's policy on regionalization. If the Commission wants to issue a permit authorizing additional capacity, Tall Timbers must first demonstrate that connection to Tyler's existing facility is impractical.

2. Tyler disputes the ED's decision not to require additional odor prevention and control requirements in the draft permit.

The draft permit does not contain requirements sufficient to adequately protect the public from nuisance odors from the facility. Tyler requests a contested case hearing on this issue.

Commission rules (30 TAC §309.13(e)) set out minimum requirements for the abatement and control of nuisance odors. Tall Timbers' existing permit was issued based on Tall Timbers' representation that it satisfied the buffer zone requirements, which require that no treatment facility be located closer than 150 feet from the nearest property line. The permittee is required to hold legal title, or other sufficient property interest to satisfy the buffer zone.

When Tall Timbers' permit was issued in 2002, Tall Timbers may have met the buffer zone requirement, but shortly after issuance of the permit Tall Timbers sold the property. After the sale, Tall Timbers' treatment facilities were located within 22 feet of the nearest property line. Additionally, Tall Timbers misrepresented its ownership of the adjacent property in its 2005 renewal application and in this application.

Again, this issue has real-world impacts. The facility has a history of nuisance odor problems and complaints. A review of the Commission's enforcement records show that Commission received nuisance odor complaints on October 14, 2010, and September 20, 2011. The October 14, 2010, complaint led to a notice of violation relating to improper sludge management. The September 20, 2011, odor complaint led to formal enforcement by the Commission that is still ongoing (TCEQ Docket No. 2012-0629-MWD-E). Nuisance odor prevention is critical for this facility. The facility has virtually non-existent buffer zones. The facility is also located adjacent to Faulkner Park, a city park owned by Tyler, with picnic areas, tennis courts, baseball field, and nature trails. Tyler has received numerous odor complaints linked to the facility.

The ED's position (ED Response 4) is that Tall Timbers satisfied the buffer zone requirement by submitting a nuisance odor prevention plan to the ED. The ED's approval of a nuisance odor prevention plan after the expiration date of the existing permit is contrary to Commission rules (30 TAX 309.12(e)(2)), which specifically state that such plans should be "subject to review during the permitting process." The substitution of a prevention plan for actual buffer zone constitutes a modification of the permit that must be addressed as a permit amendment. Additionally, the ED's approval of the plan submitted by Tall Timbers was expressly conditioned on the lack of odor complaints and the Commission subsequently commenced an enforcement action against Tall Timbers based on such a complaint.

Tyler requests a contested case hearing to determine whether the nuisance odor prevention plan submitted by Tall Timbers is sufficient to abate and control nuisance odors at the site.

3. Tyler disputes the ED's decision to issue the permit with an interim 2-hour peak limit of 650 gpm.

The draft permit contains an interim 2-hour peak flow limit of 650 gpm. In its comments, Tyler questioned the appropriateness of the interim 2-hour flow limit contained in the draft permit. Based on the current configuration of the plant, Tyler believes that the plant cannot meet the Commission's minimum chlorine contact requirements at the peak flow of 650 gpm.

In its last permit renewal, Tall Timbers' was ordered to expand its chlorine contact chamber within 18 months of permit issuance. Tall Timbers failed to comply with this requirement. Tall Timbers filed no notice of completion of construction with the Commission, nor did Tall Timbers indicate in its renewal application that such expansion had been constructed.

The ED responded to Tyler's comment stating that "with minor modifications" the existing plant can adequately treat peak flows of 650 gpm. The ED does not explain what these "minor modifications" might be, and Tyler disputes this conclusion. Based on the existing plant layout, as shown in the renewal application, the peak flow should be limited to 527 gpm (as contained in the interim limit of the existing permit).

Tyler disputes the ED's conclusion that that Tall Timbers' existing plant can adequately treat peak flows of greater than 527 gpm and requests a contested case hearing to allow the parties to develop a record to allow the Commission to make an informed decision on this issue.

Bases for Granting Contested Case Hearing under §26.028(d)

Texas Water Code §26.028(d) and 30 TAC 55.201(i)(5) set out some bases on which the Commission may approve an application to renew or amend a TPDES permit without a contested case hearing. Tyler asserts that Tall Timbers' application does not satisfy these bases. Even if they did, Tyler requests that the Commission use its discretion and refer this application for hearing to address regionalization and the need for odor control requirements.

The Commission may approve a TPDES application without a contested case hearing if the applicant is not seeking to significantly increase the quantity of waste authorized to be discharged. As explained previously, the draft permit provides Tall Timbers with the authority to expand the capacity of its treatment plant from 0.312 MGD to 0.445 MGD. This is a 42% increase in average daily flow. This is a significant increase in the quantity of waste authorized to be discharged.

The Commission may approve a TPDES application without a contested case hearing if the activities in the amended permit will maintain or improve the quality of waste authorized to be discharged. The increase in discharges of waste will not maintain or improve the quality of waste. The replacement of reed filter beds with sludge drying beds will not improve or maintain the quality of waste. Tyler does concede that the addition of the *E. coli* limit will improve or

maintain the quality of waste discharged, and Tyler does not seek a contested case hearing on that issue.

The Commission may approve a TPDES application without a contested case hearing if the Commission determines that the applicant's compliance history raises no issue regarding the applicant's ability to comply with a material term of the permit. Tall Timbers' prior conduct clearly raises issues regarding its ability to comply with the permit. Tall Timbers is in violation of its existing permit by having failed to expand its plant. Tall Timbers has misrepresented material facts in its last two permit applications. Tall Timbers has entered into several agreed enforcement orders relating to the unauthorized discharge of sewage sludge into the receiving stream. All of these compliance issues raise concerns regarding Tall Timbers' ability to comply with its permit.

Request for Reconsideration of ED's Determination

In its comments, Tyler requested that the ED deny the application pursuant to 30 TAC §§305.65(5) and 305.66(a)(1) and (4) because Tall Timbers failed to construct facilities necessary to comply with its existing permit and because Tall Timbers' application contains misrepresentations regarding buffer zones and the capacity of the plant. The ED failed to respond to this request, but the ED did not deny the application as requested. Tyler respectfully requests the Commission to reconsider the ED's determination and deny the application.

Pursuant to 30 TAC §305.65(5), the Commission "may deny an application for renewal on the grounds set forth in §305.66." Section 305.66(a)(1) authorizes denial of a permit renewal if:

"The permittee has failed or is failing to comply with the conditions of the permit or a commission order, including failure to construct, during the life of the permit, facilities necessary to conform with the terms and conditions of the permit."

Tall Timbers has admitted that it failed to construct facilities necessary to treat the authorized flow rates. Tall Timbers failed to construct these facilities during the term of the permit issued in 2002 and again during the term of the permit issued in 2006. Additionally, Tall Timbers failed to enlarge its chlorine contact chamber within 18 months after issuance of its last permit, as required by the permit. The intentional decision not to construct facilities necessary to conform with the terms and conditions of a permit is a serious infraction that the Commission should not treat lightly, especially since Tall Timbers did not even notify the Commission of its decision not to construct the facilities.

Section 305.66(a)(4) authorizes denial of a permit renewal based on:

"The permittee's failure, in the application or hearing process to disclose fully all relevant facts, or the permittee's misrepresentation of relevant facts at any time."

Tall Timbers misrepresented and failed to disclose relevant facts regarding its buffer zones in its prior applications and in its current application. Tall Timbers also misrepresented relevant facts in its February 14, 2011, application. In that application, Tall Timbers represented that no unbuilt phases remained on the existing permit and that the existing permit did not contain a phase that had not been constructed within five years of being authorized by the TCEQ. This representation was untrue with regard to both the obligation to expand the chlorine contact chamber and to expand plant capacity to 0.445 MGD. The misrepresentation of material facts in permit applications is also a serious infraction. The Commission should not condone behavior that undermines the foundation of its permitting system – that applicants fully and accurately represent material facts relating to their applications.

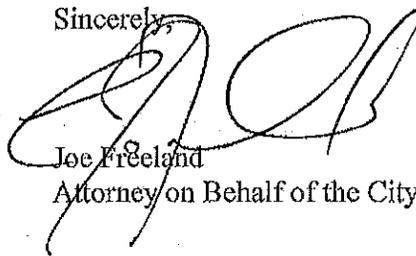
Based on the facts alleged above, Tyler requests that the Commission reconsider the ED's determination and deny Tall Timbers' renewal application. To the extent that any of the alleged facts are in dispute, Tyler requests a contested case hearing to resolve any factual issues. The public will not be harmed by a denial of the permit renewal. As stated previously, the City of Tyler is willing to provide wholesale treatment service to Tall Timbers.

Conclusion

Tyler has a justiciable interest in the Commission's decision on this permit application that could be adversely affected if the Commission were to grant the requested permit. As such, Tyler is an "affected person." Tyler requests a contested case hearing to address issues raised in Tall Timbers' application. Alternatively, Tyler requests that the Commission deny Tall Timbers' application based on Tall Timbers' failure to construct facilities as required by permit and based on Tall Timbers' misrepresentation of material facts.

Please do not hesitate to contact me if you have any questions regarding this request for a contested case hearing.

Sincerely,



Joe Freeland
Attorney on Behalf of the City of Tyler

cc: Gary Landers, City Attorney
Greg Morgan, Director of Utilities and Public Works

MATHEWS & FREELAND, L.L.P.

ATTORNEYS AT LAW

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January 8, 2013

Via Electronic Submission & Mail

Office of the Chief Clerk
MC105
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

REVIEWED *H*

JAN 11 2013

By *BR*

Re: Notice of Application and Preliminary Decision for TPDES Permit No. WQ0013000001, Tall Timbers Utility Company, Inc.

To Whom It May Concern:

We are legal counsel for the City of Tyler, and have been authorized to offer the following comments and requests. Tyler appreciates the opportunity to provide input to the process. Tyler's comments are timely filed. Tall Timbers' notice was published in the Tyler Morning Telegraph on December 10, 2012, and the copy of the draft permit was made available to the public on December 11, 2012.

Tyler hereby requests that the Executive Director summarily deny Tall Timbers' application for failing to comply with its existing permit and for misrepresenting material facts in the current and prior applications. Alternatively, Tyler requests that the Executive Director halt further consideration of this application until such time as the applicant files an application to amend its permit. The application seeks to amend substantive terms of the existing permit and the draft permit contains the amendments sought by Tall Timbers and other changes to terms in the existing permit. The application is an amendment application, not a renewal application, and the draft permit recommends permit amendments and not a renewed permit. Tall Timbers needs to provide proper public notice that it is seeking to amend its existing permit rather than merely renew its existing permit. Finally, Tyler provides comments on the draft permit pursuant to 30 TAC § 55.152.

Failure to Comply with Existing Permit/Misrepresentations

Tyler requests that the Commission deny the renewal application pursuant to 30 TAC 305.65(5). Under the terms of its existing permit, Tall Timbers was obligated to expand its chlorine contact basin by June 2008, at the latest. Tall Timbers failed to expand its facility to comply with the permit. Tall Timbers also failed to notify the Commission of its failure to expand the plant as required. Additionally, Tall Timbers was obligated to construct a treatment facility capable of treating an average daily flow of 0.445 MGD. This permit requirement was first established in the permit issued to Tall Timbers on May 23, 2002. To date, Tall Timbers has failed to construct a treatment plant capable of treating permitted flows. Pursuant to 30 TAC

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§§ 305.65(5) and 305.66(a)(1), the Commission is authorized to deny a renewal application if the permittee has failed to construct facilities necessary to conform with the terms and conditions of its permit. Tyler therefore requests that the Commission deny the renewal application.

Tall Timbers has also misrepresented and failed to disclose relevant facts regarding its buffer zones in its prior applications and in its current application. Prior to 2002, Tall Timbers appears to have owned or controlled sufficient property around its treatment plant to comply with the Commission's buffer zone requirements (30 TAC §309.13(e)). In 2002, Tall Timbers sold the property adjacent to the plant site. The property on which the plant sits is now less than 300 feet wide, with existing treatment units located as close as 22 feet from a property boundary. Tall Timbers failed to notify the Commission of this change to its buffer zones. On December 22, 2005, Tall Timbers filed an application to renew its permit for the plant. The application affirmatively represented that the buffer zone requirements had been met and referenced the prior buffer zone map, which indicated that Tall Timbers owned sufficient property to meet the buffer zones. The permit issued by the Commission contained a site map that misrepresented Tall Timbers' ownership of buffer zones. In March 2007, Tall Timbers' engineer notified Tall Timbers that it did not have adequate buffer zones. Tall Timbers did not notify the Commission of this fact. On February 14, 2011, Tall Timbers submitted its pending renewal application. Once again Tall Timbers affirmatively represented that it met the buffer zone requirements and that nothing further needed to be done to comply with buffer zone requirements. This statement was not accurate. To date, Tall Timbers has never formally notified the Commission about the misrepresentations in its applications and its permit.

Tall Timbers also misrepresented additional, relevant facts in its February 14, 2011, application. In that application, Tall Timbers represented that no unbuilt phases remained on the existing permit and that the existing permit did not contain a phase that had not been constructed within five years of being authorized by the TCEQ. This representation was untrue with regard to both the obligation to expand the chlorine contact chamber and to expand plant capacity to 0.445 MGD.

Pursuant to 30 TAC §§ 305.65(5) and 305.66(a)(4), the Commission is authorized to deny a renewal application if the permittee has failed to disclose fully all relevant facts or has misrepresented relevant facts. Tyler therefore requests that the Commission deny the renewal application.

Permit Amendment not Permit Renewal

The notice states that the application is for renewal of an existing discharge authorization without amendment. The application, however, actually seeks to modify the existing permit to make the permit less restrictive and to excuse Tall Timbers for failing to construct facilities as required by its existing permit. Tall Timbers' existing permit contains a maximum 2-hour flow limit of 927 gpm and a daily average flow limit of .445 MGD. Tall Timbers is in the final phase of its existing permit. In its "renewal" application, Tall Timbers seeks to modify the permit to reduce the maximum 2-hour flow limit from 927 gpm to 527 gpm, without making a change in the daily average flow limit. As the application reveals, Tall Timbers' facility is incapable of

meeting the terms and conditions of its existing permit. The modification sought by Tall Timbers is needed to allow Tall Timbers to meet minimum detention times in the chlorine contact basin. The modification sought by Tall Timbers is clearly an amendment to the permit as defined in 30 TAC 305.62.

Additionally, the statement of basis identifies, and the draft permit includes, other changes to the existing permit. These changes constitute major amendments to the existing permit. The draft permit contains the following amendments to the existing permit:

- Change in daily average flow from 0.445 MGD to 0.312 MGD.
- Change in 2-hour peak flow from 927 gallons per minute to 650 gallons per minute.
- Addition of *E. coli* bacteria limits.
- Replacement of reed filter beds with sludge drying beds.

Pursuant to 30 TAC §305.65(2), an application for renewal shall request continuation of the same requirements and conditions of the expiring permit. Pursuant to 30 TAC 305.65(3), if an application for renewal in fact requests a modification of requirements and conditions of the existing permit, the Executive Director should halt consideration of the renewal application until an application for amendment is filed. Because Tall Timbers requests a modification of both the daily average flow and the 2-hour flow limits, the Executive Director should not have considered the application as a renewal but should have directed Tall Timbers to file an application for amendment and to provide the appropriate public notice.

The additional changes to the existing permit discussed previously also change the character of the application from a renewal to an amendment. Pursuant to 30 TAC § 305.62(a) "a change in a term, condition or provision of a permit requires an amendment." The changes discussed previously change the substantive terms, provisions, requirements, and limitations of the existing permit. The changes also relax standards or criteria that may result in a potential deterioration of quality of the water in the state.

The public has been denied proper notice of the true character of Tall Timbers' application. Tall Timbers is not seeking to merely continue discharging in the same manner authorized by its existing permit. To meet the discharge limits in the final phase of the draft permit, Tall Timbers will have to construct new treatment units, including expanding its clarifiers and constructing new sludge handling facilities. Tall Timbers also seeks approval of its failure to maintain adequate buffer zones. The public deserves to be properly placed on notice of such changes and be given the opportunity to question the need for such changes through the permit amendment process. The Executive Director should halt further consideration and return Tall Timbers' renewal application and direct Tall Timbers to promptly file an application to amend its permit to address the capacity and other changes needed to bring the plant into compliance.

Comments on Draft Permit

1. Effluent Limits – Daily Average Flow

Tyler submits that to be a permit renewal rather than a permit amendment, the permit cannot contain interim and final phases with different daily average flows. Tyler suggests that the final limits be deleted from the draft permit and the interim limits be made final.

Tall Timbers previously represented that its plant was sized to adequately treat average daily flows of 0.445 MGD. This was not the case. Tall Timbers' plant, based on Tall Timbers' own representation, is only sized to adequately treat average daily flows of 0.312 MGD. Tall Timbers' renewal permit should reflect the status quo, which in this case is 0.312 MGD. If Tall Timbers wishes to expand its plant, Tall Timbers should be required to submit an application to amend its permit to obtain the appropriate authorization.

2. Effluent Limits – 2-Hour Peak Flow

Tyler questions the 2-hour peak flow limit contained in the interim phase of the draft permit. The draft permit contains a 2-hour peak flow limit of 650 gallons per minute, which Tyler believes is based on the capacity of the final clarifiers. Tyler has not seen a notice of completion for the improvements to the chlorine contact chamber that was required by Tall Timbers' existing permit, nor does the statement of basis indicate that these improvements have been completed. Without those required changes to the chlorine contact chamber, the plant's 2-hour peak flow limit should be 527 gallons per minute and not 650 gallons per minute.

3. 75/90 Violation

The draft permit contemplates reducing the daily average flow limit from 0.445 MGD to 0.312 MGD. If the limit is reduced, the permittee will be in violation of the Commission's 75/90 rule (30 TAC § 305.126(a)). Tyler is concerned that the facility is significantly under-sized to provide adequate treatment to the expected flows into the facility. Given this fact, Tyler believes that the draft permit should establish express deadlines (*i.e.*, 60 days after issuance) for Tall Timbers to address its lack of capacity by either applying for a permit amendment to construct improvements to the facility to provide adequate service to the expected population to be served by the facility or obtain sufficient wastewater treatment service from another provider to meet Tall Timbers' expected demands.

4. Buffer Zones

The draft permit contains a Facility Map With Buffer Zones. This map identifies buffer zones to the north of the plant site and identifies that the property to the south of the plant is owned by Tall Timbers. Based on review of Smith County property records, Tyler believes that both of these statements are incorrect. In particular, Tall Timbers sold the property to the south in 2002 and misrepresented ownership in the property in its 2005 renewal application. The property on which the plant sits is less than 300 feet wide, and Tall Timbers has existing treatment units located as close as 22 feet from a property boundary. The Executive Director should not rely upon representations in this map as a basis for development of the draft permit.

The Executive Director should direct Tall Timbers to file a map that accurately reflects actual buffer zones and property ownership and then ensure that all aspects of the draft permit reflect the actual buffer zone.

5. Nuisance Odor

The draft permit references a nuisance odor prevention plan submitted by Tall Timbers on July 25, 2011, and conditionally approved by the Executive Director on September 28, 2011. In the plan, Tall Timbers represents that the plant has no history odor complaints. In the conditional approval letter, the Executive Director states that he could find no indication of odor complaints but that the approval of the plan was conditioned on future odor complaints. These statements appear to be inconsistent with the Commission's records.

The facility has a history of nuisance odor problems and complaints. A review of the Commission's enforcement records show that Commission received nuisance odor complaints on October 14, 2010, and September 20, 2011. The October 14, 2010, complaint led to a notice of violation relating to improper sludge management. The September 20, 2011, odor complaint led to formal enforcement by the Commission that is still ongoing (TCEQ Docket No. 2012-0629-MWD-E).

Nuisance odor prevention is critical for this facility. The facility has virtually non-existent buffer zones. The facility is also located adjacent to Faulkner Park, a city park owned by Tyler, with picnic areas, tennis courts, baseball field, and nature trails. Tyler requests that Tall Timbers be required to implement, as a permit requirement, a detailed and comprehensive odor prevention program, and that Tall Timbers be required to submit a revised odor prevention program that can be reviewed and evaluated as part of the permit amendment process.

6. Regionalization

It is the policy of the State of Texas to encourage and promote development and use of regional and area-wide wastewater collection, treatment, and disposal systems. Tall Timbers' existing treatment plant is undersized to treat its existing customer base and will require significant improvements to be able to adequately treat its existing and future demand. Tyler has the ability to treat and is willing to offer wholesale treatment service to Tall Timbers.

Tyler currently provides wastewater treatment services to most of Tyler and has additional capacity to provide wholesale or retail service to the area currently served by Tall Timbers. Tyler has engaged in long-term planning to ensure that adequate treatment capacity is available to serve all of Tyler's extraterritorial jurisdiction, including all of Tall Timbers service area, for the next 30 years. Tyler has commenced purchasing land for the location of a future treatment plant to serve the entire southern portion of Tyler and southern Smith County.

Consistent with the Commission's adopted policy, the Commission should determine whether it would be appropriate for Tall Timbers to obtain wholesale treatment service from Tyler rather than expanding its own plant. Integration into Tyler's area-wide system at this point in time would improve water quality and is feasible when considering waste treatment

technologies, engineering, financial and other considerations. Integration into Tyler's system could also lower Tall Timbers' treatment costs (which could be passed on to Tall Timbers' ratepayers). Based on a review of regionalization considerations, Tyler requests that the Commission deny Tall Timbers' request to expand its treatment plant from 0.312 MGD to 0.445 MGD and direct Tall Timbers to obtain its additional treatment services from Tyler.

Request for Contested Case Hearing

The City of Tyler is a home-rule municipality located in Smith County, Texas. Tall Timbers' wastewater treatment facility, which is the subject of the application, is located entirely inside Tyler's corporate boundaries, and the discharge is located inside Tyler's boundaries. Portions of the sewage collection system, which is part of the treatment facility, are located inside Tyler's corporate boundaries. The activity sought to be authorized by the permit application has the potential to reduce the quality of water in Tyler's separate storm sewer system and in the streams located inside Tyler's boundaries. Tyler's charter and ordinances obligate Tyler to protect the quality of water inside the city, and pursuant to state and federal water protection laws, Tyler adopted an illicit discharge ordinance, which expressly prohibits the disposal of waste into Tyler's separate storm sewer system. Additionally, Tyler owns property immediately adjacent to and downstream of the location where Tall Timbers' discharge reaches West Mud Creek. Tyler's property is located approximately 1,500 feet from the discharge point.

Tyler owns a public park adjacent to the permitted plant site. Use and enjoyment of the park by Tyler residents could be adversely affected by the permitted activities. Also, Tyler could be adversely affected by the discharge by increasing the costs to treat water from the receiving stream for use as drinking water. Tyler could also be adversely affected by the permitted activity because the discharges could put Tyler out of compliance with its stormwater permit and could damage Tyler's storm sewer system. The discharges from the facility will also consume part of the waste load capacity of the receiving stream, which could adversely affect Tyler's ability to expand its own treatment plant in the future.

Tyler requests a contested case hearing and asks that the application be immediately referred to the State Office of Administrative Hearings for such a hearing. Tyler asserts that a contested case hearing is appropriate despite the application being classified as a renewal application. As explained previously, Tall Timbers is requesting changes to substantive terms of the permit, making the request an application for an amendment rather than a renewal. Moreover, pursuant to 30 TAC §55.201(i)(5), even a renewal application would be subject to a contested case hearing because Tall Timbers' compliance history for the prior five years raises issues regarding the applicant's ability to comply with the permit, in particular the effluent discharge limits, odor control, and sludge management provisions.

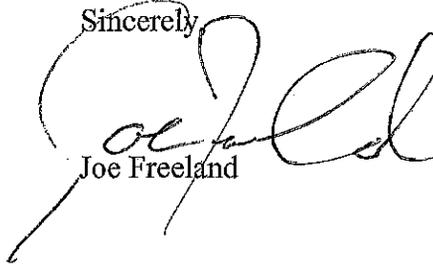
Summary

The Commission should deny the application pursuant to 30 TAC §§ 305.65(5) and 305.66(a)(1) and (4) because Tall Timbers failed to construct facilities necessary to comply with its existing permit and because Tall Timbers' application contains misrepresentations regarding buffer zones and the capacity of the plant. Alternatively, the Executive Director should deny Tall

Timbers' renewal application and order Tall Timbers to file an application for amendment and provide the appropriate public notice. If the Executive Director decides to proceed with issuance of the permit as a renewal rather than requiring Tall Timbers to file an application for amendment, Tyler requests that its comments regarding the draft permit be considered.

Please do not hesitate to contact me if you have any questions.

Sincerely

A handwritten signature in black ink, appearing to read "Joe Freeland". The signature is written in a cursive style with a large initial "J" and "F".

Joe Freeland

cc: Greg Morgan

MATHEWS & FREELAND, L.L.P.
ATTORNEYS AT LAW
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AUSTIN, TEXAS 78768-1568

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Marisa Weber

From: PUBCOMMENT
Sent: Wednesday, January 09, 2013 8:31 AM
To: PUBCOMMENT-OCC2
Subject: FW: Public comment on Permit Number WQ0013000001
Attachments: Tyler Comments.pdf

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From: PUBCOMMENT-OCC
Sent: Wednesday, January 09, 2013 8:02 AM
To: PUBCOMMENT
Subject: FW: Public comment on Permit Number WQ0013000001

*MWD
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From: jfreeland@mandf.com [<mailto:jfreeland@mandf.com>]
Sent: Tuesday, January 08, 2013 5:28 PM
To: donotReply@tceq.state.tx.us
Subject: Public comment on Permit Number WQ0013000001

REGULATED ENTY NAME TALL TIMBERS STP

RN NUMBER: RN101519981

PERMIT NUMBER: WQ0013000001

DOCKET NUMBER:

COUNTY: SMITH

PRINCIPAL NAME: TALL TIMBERS UTILITY COMPANY INC

CN NUMBER: CN600794945

FROM

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AUSTIN TX 78701-4058

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Orly

FAX:

COMMENTS: Comments of the City of Tyler are attached.

MATHEWS & FREELAND, L.L.P.

ATTORNEYS AT LAW

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January 8, 2013

Via Electronic Submission & Mail

Office of the Chief Clerk
MC105
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Re: Notice of Application and Preliminary Decision for TPDES Permit No. WQ0013000001, Tall Timbers Utility Company, Inc.

To Whom It May Concern:

We are legal counsel for the City of Tyler, and have been authorized to offer the following comments and requests. Tyler appreciates the opportunity to provide input to the process. Tyler's comments are timely filed. Tall Timbers' notice was published in the Tyler Morning Telegraph on December 10, 2012, and the copy of the draft permit was made available to the public on December 11, 2012.

Tyler hereby requests that the Executive Director summarily deny Tall Timbers' application for failing to comply with its existing permit and for misrepresenting material facts in the current and prior applications. Alternatively, Tyler requests that the Executive Director halt further consideration of this application until such time as the applicant files an application to amend its permit. The application seeks to amend substantive terms of the existing permit and the draft permit contains the amendments sought by Tall Timbers and other changes to terms in the existing permit. The application is an amendment application, not a renewal application, and the draft permit recommends permit amendments and not a renewed permit. Tall Timbers needs to provide proper public notice that it is seeking to amend its existing permit rather than merely renew its existing permit. Finally, Tyler provides comments on the draft permit pursuant to 30 TAC § 55.152.

Failure to Comply with Existing Permit/Misrepresentations

Tyler requests that the Commission deny the renewal application pursuant to 30 TAC 305.65(5). Under the terms of its existing permit, Tall Timbers was obligated to expand its chlorine contact basin by June 2008, at the latest. Tall Timbers failed to expand its facility to comply with the permit. Tall Timbers also failed to notify the Commission of its failure to expand the plant as required. Additionally, Tall Timbers was obligated to construct a treatment facility capable of treating an average daily flow of 0.445 MGD. This permit requirement was first established in the permit issued to Tall Timbers on May 23, 2002. To date, Tall Timbers has failed to construct a treatment plant capable of treating permitted flows. Pursuant to 30 TAC

§§ 305.65(5) and 305.66(a)(1), the Commission is authorized to deny a renewal application if the permittee has failed to construct facilities necessary to conform with the terms and conditions of its permit. Tyler therefore requests that the Commission deny the renewal application.

Tall Timbers has also misrepresented and failed to disclose relevant facts regarding its buffer zones in its prior applications and in its current application. Prior to 2002, Tall Timbers appears to have owned or controlled sufficient property around its treatment plant to comply with the Commission's buffer zone requirements (30 TAC §309.13(e)). In 2002, Tall Timbers sold the property adjacent to the plant site. The property on which the plant sits is now less than 300 feet wide, with existing treatment units located as close as 22 feet from a property boundary. Tall Timbers failed to notify the Commission of this change to its buffer zones. On December 22, 2005, Tall Timbers filed an application to renew its permit for the plant. The application affirmatively represented that the buffer zone requirements had been met and referenced the prior buffer zone map, which indicated that Tall Timbers owned sufficient property to meet the buffer zones. The permit issued by the Commission contained a site map that misrepresented Tall Timbers' ownership of buffer zones. In March 2007, Tall Timbers' engineer notified Tall Timbers that it did not have adequate buffer zones. Tall Timbers did not notify the Commission of this fact. On February 14, 2011, Tall Timbers submitted its pending renewal application. Once again Tall Timbers affirmatively represented that it met the buffer zone requirements and that nothing further needed to be done to comply with buffer zone requirements. This statement was not accurate. To date, Tall Timbers has never formally notified the Commission about the misrepresentations in its applications and its permit.

Tall Timbers also misrepresented additional, relevant facts in its February 14, 2011, application. In that application, Tall Timbers represented that no unbuilt phases remained on the existing permit and that the existing permit did not contain a phase that had not been constructed within five years of being authorized by the TCEQ. This representation was untrue with regard to both the obligation to expand the chlorine contact chamber and to expand plant capacity to 0.445 MGD.

Pursuant to 30 TAC §§ 305.65(5) and 305.66(a)(4), the Commission is authorized to deny a renewal application if the permittee has failed to disclose fully all relevant facts or has misrepresented relevant facts. Tyler therefore requests that the Commission deny the renewal application.

Permit Amendment not Permit Renewal

The notice states that the application is for renewal of an existing discharge authorization without amendment. The application, however, actually seeks to modify the existing permit to make the permit less restrictive and to excuse Tall Timbers for failing to construct facilities as required by its existing permit. Tall Timbers' existing permit contains a maximum 2-hour flow limit of 927 gpm and a daily average flow limit of .445 MGD. Tall Timbers is in the final phase of its existing permit. In its "renewal" application, Tall Timbers seeks to modify the permit to reduce the maximum 2-hour flow limit from 927 gpm to 527 gpm, without making a change in the daily average flow limit. As the application reveals, Tall Timbers' facility is incapable of

meeting the terms and conditions of its existing permit. The modification sought by Tall Timbers is needed to allow Tall Timbers to meet minimum detention times in the chlorine contact basin. The modification sought by Tall Timbers is clearly an amendment to the permit as defined in 30 TAC 305.62.

Additionally, the statement of basis identifies, and the draft permit includes, other changes to the existing permit. These changes constitute major amendments to the existing permit. The draft permit contains the following amendments to the existing permit:

- Change in daily average flow from 0.445 MGD to 0.312 MGD.
- Change in 2-hour peak flow from 927 gallons per minute to 650 gallons per minute.
- Addition of *E. coli* bacteria limits.
- Replacement of reed filter beds with sludge drying beds.

Pursuant to 30 TAC §305.65(2), an application for renewal shall request continuation of the same requirements and conditions of the expiring permit. Pursuant to 30 TAC 305.65(3), if an application for renewal in fact requests a modification of requirements and conditions of the existing permit, the Executive Director should halt consideration of the renewal application until an application for amendment is filed. Because Tall Timbers requests a modification of both the daily average flow and the 2-hour flow limits, the Executive Director should not have considered the application as a renewal but should have directed Tall Timbers to file an application for amendment and to provide the appropriate public notice.

The additional changes to the existing permit discussed previously also change the character of the application from a renewal to an amendment. Pursuant to 30 TAC § 305.62(a) "a change in a term, condition or provision of a permit requires an amendment." The changes discussed previously change the substantive terms, provisions, requirements, and limitations of the existing permit. The changes also relax standards or criteria that may result in a potential deterioration of quality of the water in the state.

The public has been denied proper notice of the true character of Tall Timbers' application. Tall Timbers is not seeking to merely continue discharging in the same manner authorized by its existing permit. To meet the discharge limits in the final phase of the draft permit, Tall Timbers will have to construct new treatment units, including expanding its clarifiers and constructing new sludge handling facilities. Tall Timbers also seeks approval of its failure to maintain adequate buffer zones. The public deserves to be properly placed on notice of such changes and be given the opportunity to question the need for such changes through the permit amendment process. The Executive Director should halt further consideration and return Tall Timbers' renewal application and direct Tall Timbers to promptly file an application to amend its permit to address the capacity and other changes needed to bring the plant into compliance.

Comments on Draft Permit

1. Effluent Limits -- Daily Average Flow

Tyler submits that to be a permit renewal rather than a permit amendment, the permit cannot contain interim and final phases with different daily average flows. Tyler suggests that the final limits be deleted from the draft permit and the interim limits be made final.

Tall Timbers previously represented that its plant was sized to adequately treat average daily flows of 0.445 MGD. This was not the case. Tall Timbers' plant, based on Tall Timbers' own representation, is only sized to adequately treat average daily flows of 0.312 MGD. Tall Timbers' renewal permit should reflect the status quo, which in this case is 0.312 MGD. If Tall Timbers wishes to expand its plant, Tall Timbers should be required to submit an application to amend its permit to obtain the appropriate authorization.

2. Effluent Limits -- 2-Hour Peak Flow

Tyler questions the 2-hour peak flow limit contained in the interim phase of the draft permit. The draft permit contains a 2-hour peak flow limit of 650 gallons per minute, which Tyler believes is based on the capacity of the final clarifiers. Tyler has not seen a notice of completion for the improvements to the chlorine contact chamber that was required by Tall Timbers' existing permit, nor does the statement of basis indicate that these improvements have been completed. Without those required changes to the chlorine contact chamber, the plant's 2-hour peak flow limit should be 527 gallons per minute and not 650 gallons per minute.

3. 75/90 Violation

The draft permit contemplates reducing the daily average flow limit from 0.445 MGD to 0.312 MGD. If the limit is reduced, the permittee will be in violation of the Commission's 75/90 rule (30 TAC § 305.126(a)). Tyler is concerned that the facility is significantly under-sized to provide adequate treatment to the expected flows into the facility. Given this fact, Tyler believes that the draft permit should establish express deadlines (*i.e.*, 60 days after issuance) for Tall Timbers to address its lack of capacity by either applying for a permit amendment to construct improvements to the facility to provide adequate service to the expected population to be served by the facility or obtain sufficient wastewater treatment service from another provider to meet Tall Timbers' expected demands.

4. Buffer Zones

The draft permit contains a Facility Map With Buffer Zones. This map identifies buffer zones to the north of the plant site and identifies that the property to the south of the plant is owned by Tall Timbers. Based on review of Smith County property records, Tyler believes that both of these statements are incorrect. In particular, Tall Timbers sold the property to the south in 2002 and misrepresented ownership in the property in its 2005 renewal application. The property on which the plant sits is less than 300 feet wide, and Tall Timbers has existing treatment units located as close as 22 feet from a property boundary. The Executive Director should not rely upon representations in this map as a basis for development of the draft permit.

The Executive Director should direct Tall Timbers to file a map that accurately reflects actual buffer zones and property ownership and then ensure that all aspects of the draft permit reflect the actual buffer zone.

5. Nuisance Odor

The draft permit references a nuisance odor prevention plan submitted by Tall Timbers on July 25, 2011, and conditionally approved by the Executive Director on September 28, 2011. In the plan, Tall Timbers represents that the plant has no history odor complaints. In the conditional approval letter, the Executive Director states that he could find no indication of odor complaints but that the approval of the plan was conditioned on future odor complaints. These statements appear to be inconsistent with the Commission's records.

The facility has a history of nuisance odor problems and complaints. A review of the Commission's enforcement records show that Commission received nuisance odor complaints on October 14, 2010, and September 20, 2011. The October 14, 2010, complaint led to a notice of violation relating to improper sludge management. The September 20, 2011, odor complaint led to formal enforcement by the Commission that is still ongoing (TCEQ Docket No. 2012-0629-MWD-E).

Nuisance odor prevention is critical for this facility. The facility has virtually non-existent buffer zones. The facility is also located adjacent to Faulkner Park, a city park owned by Tyler, with picnic areas, tennis courts, baseball field, and nature trails. Tyler requests that Tall Timbers be required to implement, as a permit requirement, a detailed and comprehensive odor prevention program, and that Tall Timbers be required to submit a revised odor prevention program that can be reviewed and evaluated as part of the permit amendment process.

6. Regionalization

It is the policy of the State of Texas to encourage and promote development and use of regional and area-wide wastewater collection, treatment, and disposal systems. Tall Timbers' existing treatment plant is undersized to treat its existing customer base and will require significant improvements to be able to adequately treat its existing and future demand. Tyler has the ability to treat and is willing to offer wholesale treatment service to Tall Timbers.

Tyler currently provides wastewater treatment services to most of Tyler and has additional capacity to provide wholesale or retail service to the area currently served by Tall Timbers. Tyler has engaged in long-term planning to ensure that adequate treatment capacity is available to serve all of Tyler's extraterritorial jurisdiction, including all of Tall Timbers service area, for the next 30 years. Tyler has commenced purchasing land for the location of a future treatment plant to serve the entire southern portion of Tyler and southern Smith County.

Consistent with the Commission's adopted policy, the Commission should determine whether it would be appropriate for Tall Timbers to obtain wholesale treatment service from Tyler rather than expanding its own plant. Integration into Tyler's area-wide system at this point in time would improve water quality and is feasible when considering waste treatment

technologies, engineering, financial and other considerations. Integration into Tyler's system could also lower Tall Timbers' treatment costs (which could be passed on to Tall Timbers' ratepayers). Based on a review of regionalization considerations, Tyler requests that the Commission deny Tall Timbers' request to expand its treatment plant from 0.312 MGD to 0.445 MGD and direct Tall Timbers to obtain its additional treatment services from Tyler.

Request for Contested Case Hearing

The City of Tyler is a home-rule municipality located in Smith County, Texas. Tall Timbers' wastewater treatment facility, which is the subject of the application, is located entirely inside Tyler's corporate boundaries, and the discharge is located inside Tyler's boundaries. Portions of the sewage collection system, which is part of the treatment facility, are located inside Tyler's corporate boundaries. The activity sought to be authorized by the permit application has the potential to reduce the quality of water in Tyler's separate storm sewer system and in the streams located inside Tyler's boundaries. Tyler's charter and ordinances obligate Tyler to protect the quality of water inside the city, and pursuant to state and federal water protection laws, Tyler adopted an illicit discharge ordinance, which expressly prohibits the disposal of waste into Tyler's separate storm sewer system. Additionally, Tyler owns property immediately adjacent to and downstream of the location where Tall Timbers' discharge reaches West Mud Creek. Tyler's property is located approximately 1,500 feet from the discharge point.

Tyler owns a public park adjacent to the permitted plant site. Use and enjoyment of the park by Tyler residents could be adversely affected by the permitted activities. Also, Tyler could be adversely affected by the discharge by increasing the costs to treat water from the receiving stream for use as drinking water. Tyler could also be adversely affected by the permitted activity because the discharges could put Tyler out of compliance with its stormwater permit and could damage Tyler's storm sewer system. The discharges from the facility will also consume part of the waste load capacity of the receiving stream, which could adversely affect Tyler's ability to expand its own treatment plant in the future.

Tyler requests a contested case hearing and asks that the application be immediately referred to the State Office of Administrative Hearings for such a hearing. Tyler asserts that a contested case hearing is appropriate despite the application being classified as a renewal application. As explained previously, Tall Timbers is requesting changes to substantive terms of the permit, making the request an application for an amendment rather than a renewal. Moreover, pursuant to 30 TAC §55.201(i)(5), even a renewal application would be subject to a contested case hearing because Tall Timbers' compliance history for the prior five years raises issues regarding the applicant's ability to comply with the permit, in particular the effluent discharge limits, odor control, and sludge management provisions.

Summary

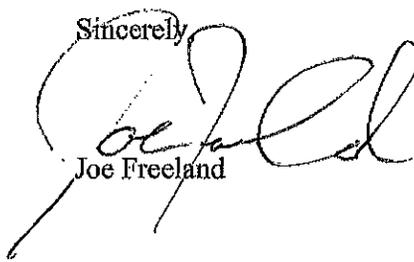
The Commission should deny the application pursuant to 30 TAC §§ 305.65(5) and 305.66(a)(1) and (4) because Tall Timbers failed to construct facilities necessary to comply with its existing permit and because Tall Timbers' application contains misrepresentations regarding buffer zones and the capacity of the plant. Alternatively, the Executive Director should deny Tall

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Timbers' renewal application and order Tall Timbers to file an application for amendment and provide the appropriate public notice. If the Executive Director decides to proceed with issuance of the permit as a renewal rather than requiring Tall Timbers to file an application for amendment, Tyler requests that its comments regarding the draft permit be considered.

Please do not hesitate to contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Joe Freeland", is written over the word "Sincerely,". The signature is fluid and cursive.

Joe Freeland

cc: Greg Morgan



MATHEWS & FREELAND, L.L.P.

ATTORNEYS AT LAW

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BY *[Signature]*

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TEXAS
COMMISSION ON
ENVIRONMENTAL
QUALITY

Office of the Chief Clerk
MC105
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Re: Proposed TPDES Permit No. WQ0013000001, Tall Timbers Utility Company, Inc.

To Whom It May Concern:

We are legal counsel for the City of Tyler. On behalf of the City of Tyler, we hereby protest approval of the application for renewal of the referenced permit. Tyler has standing to protest this application and requests that the Executive Director halt consideration of the application until applicant files an application for amendment. Alternatively, Tyler requests that the application be referred to SOAH to commence contested case proceedings or denied summarily without hearing.

Tyler offers the following comments in support of its request for a contested case hearing.

Information About Tyler/Standing

The City of Tyler is a home-rule municipality located in Smith County, Texas. Tyler has a justiciable interest in the application. Tall Timbers' wastewater treatment facility, which is the subject of the application, is located entirely inside Tyler's corporate boundaries, and the discharge is located inside Tyler's boundaries. Portions of the sewage collection system, which is part of the treatment facility, are located inside Tyler's corporate boundaries. Tyler has an interest in protecting the water quality in its separate storm sewer system and in the waters within its city limits. Tyler also has regulatory jurisdiction over activities related to activities for which this permit is sought. Tyler's charter and ordinances obligate Tyler to protect the quality of water inside the city, and pursuant to state and federal water protection laws, Tyler adopted an illicit discharge ordinance, which expressly prohibits the illicit disposal of waste into Tyler's separate storm sewer system. Tyler also discharges into the same receiving stream and has interest in developing water projects on the receiving stream downstream from Tall Timbers' discharge location.

MWD



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Amendment not Renewal

The notice states that the application is for renewal of an existing discharge authorization without amendment. Tyler notes that the application, however, actually seeks to modify the existing permit to make the permit less restrictive and to excuse Tall Timbers for failing to construct facilities as required by its existing permit. Pursuant to 30 TAC 305.65(3), Tyler requests the Executive Director halt consideration of the renewal application and direct the applicant to file an application for amendment in place of the application for renewal.

Tall Timbers' existing permit contains a maximum 2-hour flow limit of 927 gpm and a daily average flow limit of .445 MGD. In the "renewal" application, Tall Timbers seeks to modify the permit to reduce the maximum 2-hour flow limit from 927 gpm to 527 gpm, without making a change in the daily average flow limit. As the application reveals, Tall Timbers' facility is incapable of meeting the terms and conditions of its existing permit. The modification sought by Tall Timbers is needed to allow Tall Timbers to meet minimum detention times in the chlorine contact basin. The modification sought by Tall Timbers is clearly an amendment to the permit as defined in 30 TAC 305.62.

Pursuant to 30 TAC 305.65(3), if an application for renewal in fact requests a modification of requirements and conditions of the existing permit, the Executive Director should halt consideration of the renewal application until an application for amendment is filed. Because Tall Timbers requests a modification of the 2-hour flow limit, Tyler requests that the Executive Director halt consideration of the renewal application and direct Tall Timbers to file an application for amendment and to provide the appropriate public notice.

Alternatively, if the Commission proceeds with consideration of the renewal application, Tyler requests that the Commission deny the renewal application pursuant to 30 TAC 305.65(5). Under the terms of its existing permit, Tall Timbers was also obligated to expand its chlorine contact basin by June 2008, at the latest. Tall Timbers failed to expand its facility to comply with the permit. The Commission is authorized to deny a renewal application if the permittee has failed to construct facilities necessary to conform with the terms and conditions of its permit. Tyler therefore requests that the Commission deny the renewal application.

Regionalization

Tyler also questions the continued need for this discharge. It is the policy of the State of Texas to encourage and promote development and use of regional and area-wide wastewater collection, treatment, and disposal systems. Tyler currently provides wastewater treatment services to most of Tyler and has additional capacity to provide wholesale or retail service to the area currently served by Tall Timbers. Tyler believes that cost of transferring these flows to Tyler's existing facilities would be less than the cost of upgrading this facility to meet existing and future demands. Consistent with that adopted policy, the TCEQ should determine whether it



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would be appropriate for the area served by Tall Timbers' existing facility to be served by Tyler rather than by Tall Timbers before taking final action on the application.

Summary

Tall Timbers is seeking to amend its permit under the disguise of a permit renewal. The Executive Director should halt consideration of Tall Timbers' renewal application until Tall Timbers files an application for amendment and provides the appropriate public notice. Alternatively, if the Commission proceeds with consideration of Tall Timbers' renewal application, the Commission should deny the application because Tall Timbers failed to construct facilities necessary to comply with its existing permit.

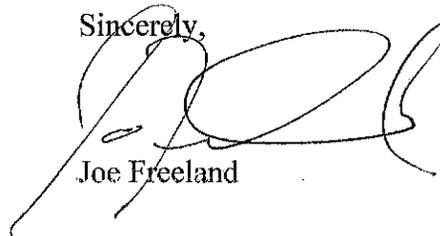
Tyler understands that application is currently undergoing technical review. Tyler may have additional comments regarding the draft permit, if one is issued. Tyler also requests that the matter be referred directly to SOAH for a contested case hearing.

To ensure that Tyler receives future notices, please add me to the mailing list for notice in this matter:

Joe Freeland
Mathews & Freeland, LLP
327 Congress Ave., Ste 300
Austin, TX 78701

Please do not hesitate to contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to be "Joe Freeland", written over a horizontal line.

Joe Freeland

cc: David Pasieka
Firoj Vahora, TCEQ
Greg Morgan



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MATHEWS & FREELAND, L.L.P.

ATTORNEYS AT LAW

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