

Bryan W. Shaw, Ph.D., P.E., *Chairman*
Toby Baker, *Commissioner*
Zak Covar, *Commissioner*
Richard A. Hyde, P.E., *Executive Director*



Vic McWherter, Public Interest Counsel

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 12, 2015

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

**RE: CITY OF FARWELL
TCEQ DOCKET NO. 2014-1659-MWD**

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in black ink, appearing to read "Garrett Arthur", written in a cursive style.

Garrett Arthur, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

DOCKET NO. 2014-1659-MWD

CITY OF FARWELL	§	BEFORE THE
PROPOSED WATER QUALITY	§	TEXAS COMMISSION ON
LAND APPLICATION PERMIT	§	ENVIRONMENTAL QUALITY
NO. WQ0015005001	§	

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

To the Members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (OPIC) at the Texas Commission on Environmental Quality (TCEQ) files this response to the hearing request in the above-captioned matter.

I. Background

On April 26, 2011, the City of Farwell ("Applicant") applied to TCEQ for a new Texas Land Application Permit (TLAP). If issued, the permit would authorize the City of Farwell's existing wastewater treatment plant and the disposal of treated domestic wastewater via surface irrigation of 34 acres of non-public access agricultural land. The plant and disposal site are located at 300 County Road Y, approximately 1/4 mile east of Farwell in Parmer County.

The application was declared administratively complete on June 29, 2011, and the first newspaper notice was published July 21, 2011 in the *State Line Tribune*. On August 22, 2013, the second newspaper notice was published in the *State Line Tribune*, and a revised second notice was published April 17, 2014 in the same newspaper. The public comment period closed May 19, 2014, and the Executive Director's (ED)

Response to Comments (RTC) was mailed September 29, 2014. The hearing request period ended October 29, 2014.

Laurance Kriegel submitted a timely hearing request on April 22, 2014. For the reasons stated herein, OPIC respectfully recommends that the Commission deny Mr. Kriegel's hearing request.

II. Applicable Law

This application was declared administratively complete after September 1, 1999, and is therefore subject to the procedural requirements adopted pursuant to House Bill 801 (76th Leg., 1999).

Under Title 30, Texas Administrative Code (TAC) § 55.201(d), a hearing request must substantially comply with the following:

- (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request;
- (2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;
- (3) request a contested case hearing;
- (4) list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the executive director's responses to comments that the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy; and
- (5) provide any other information specified in the public notice of application.

Under 30 TAC § 55.203(a), an “affected person” is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest. Section 55.203(c) provides relevant factors to be considered in determining whether a person is affected. These factors include:

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

Under 30 TAC § 55.211(c)(2), a hearing request made by an affected person shall be granted if the request:

- (A) raises disputed issues of fact that were raised during the comment period, that were not withdrawn by the commenter by filing a withdrawal letter with the chief clerk prior to the filing of the executive director’s response to comment, and that are relevant and material to the commission’s decision on the application;
- (B) is timely filed with the chief clerk;
- (C) is pursuant to a right to hearing authorized by law; and
- (D) complies with the requirements of § 55.201.

III. Analysis of Hearing Request

A. Whether the requestor is an affected person

As indicated in his hearing request, Mr. Kriegel's concerns include air quality, health effects, odor, regionalization, and property value. However, the hearing request does not provide his location and distance relative to Farwell's plant and proposed land application site. ED staff have prepared a map for this matter, and according to that map, Mr. Kriegel is over 12 miles from the facility boundary.

Mr. Kriegel must identify his personal justiciable interest affected by this application, including a written statement explaining his location and distance relative to the facility, and how and why he believes he will be adversely affected by the facility in a manner not common to members of the general public.¹ The hearing request fails to meet this requirement and therefore does not comply with 30 TAC § 55.201(d). Further, the intervening distance between Mr. Kriegel and the Farwell facility diminishes any likelihood that the regulated activity will impact his health, safety, or use of property. By rule, Mr. Kriegel must show that he is an "affected person" who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application and distinguish that interest from interests common to the general public.² He has failed to do so, and therefore, OPIC cannot find that he is an affected person in this matter.

¹ See 30 TAC § 55.201(d).

² See 30 TAC § 55.203(a).

B. Which issues raised in the hearing request are disputed

All of the issues raised in Mr. Kriegel's hearing request are disputed.

C. Whether the dispute involves questions of fact or of law

All of the disputed issues involve questions of fact.

D. Whether the issues were raised during the public comment period

All of the issues were raised during the public comment period.

E. Whether the hearing request is based on issues raised solely in a public comment which has been withdrawn

The hearing request is not based on issues raised solely in a public comment which has been withdrawn.

F. Whether the issues are relevant and material to the decision on the application

Air Quality / Odor / Health Effects

Mr. Kriegel is concerned that pathogens from the Farwell plant will impact air quality, cause nuisance odors, and result in negative health effects for citizens who live nearby. Odor is specifically addressed by TCEQ regulations concerning the siting of domestic wastewater treatment plants and the land application of sewage sludge.³ Also, under TCEQ air quality regulations, sewage treatment facilities are permitted by rule.⁴ Therefore, air quality and odor are issues which are relevant and material to the Commission's decision on this application.

³ See 30 TAC § 309.13; 30 TAC § 312.44.

⁴ See 30 TAC § 106.531.

Regionalization

Mr. Kriegel would prefer individual septic systems to a wastewater treatment plant. He also suggests that TCEQ could furnish each house with a portable toilet. It is state policy to encourage and promote the development and use of regional and area-wide waste collection, treatment, and disposal systems to prevent pollution and maintain and enhance state water quality.⁵ This concept is called “regionalization”, and regionalization is relevant and material to the Commission’s decision on the application.

Property Value

Mr. Kriegel is concerned that the Farwell plant will cause the value of the land to become worthless. The Texas Legislature establishes the jurisdiction of the TCEQ, and the Texas Legislature has not given TCEQ the authority to consider property value. Therefore, this issue is not relevant and material to the Commission’s decision.

IV. Conclusion

Having found that Laurance Kriegel does not qualify as an affected person in this matter, OPIC respectfully recommends the Commission deny his hearing request. OPIC does not recommend a hearing. However, if the Commission chooses to refer this case for a hearing at the State Office of Administrative Hearings (SOAH), the following relevant and material issues could appropriately be referred.

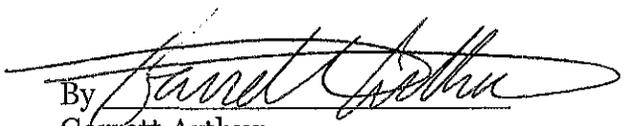
- Whether the City of Farwell wastewater treatment plant and disposal site will negatively impact air quality or cause nuisance odors?
- Whether issuance of the proposed permit would be consistent with the state policy of regionalization?

⁵ See TEX. WATER CODE § 26.081(a).

If this matter is referred to SOAH, OPIC recommends a hearing duration of six months from the first day of the preliminary hearing to issuance of the proposal for decision.

Respectfully submitted,

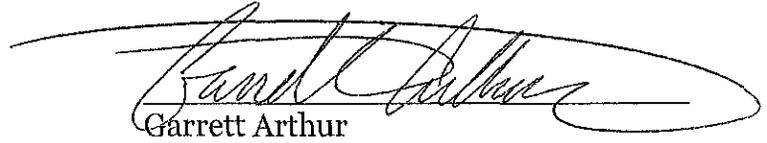
Vic McWherter
Public Interest Counsel

By 

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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2015, the foregoing document was filed with the TCEQ Chief Clerk, and copies were served to all parties on the attached mailing list via hand delivery, facsimile transmission, electronic mail, inter-agency mail, or by deposit in the U.S. Mail.



Garrett Arthur

**MAILING LIST
CITY OF FARWELL
TCEQ DOCKET NO. 2014-1659-MWD**

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FOR ALTERNATIVE DISPUTE

RESOLUTION:

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