

Bryan W. Shaw, Ph.D., P.E., *Chairman*
Toby Baker, *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

April 18, 2016

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 FARMERSVILLE
TCEQ DOCKET NO. 2016-0306-MWD**

Dear Ms. Bohac:

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

Sincerely,


Isabel G. Segarra Treviño, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2016-0306-MWD

**IN THE MATTER OF THE
APPLICATION BY THE CITY OF
FARMERSVILLE FOR A
RENEWAL OF TCEQ PERMIT
NO. WQ0014778001**

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**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

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

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

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Response to Requests for Hearing in the above-referenced matter and respectfully submits the following.

I. INTRODUCTION

A. Background of Facility

The City of Farmersville (City or Applicant) has applied to renew Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014778001. While the existing permit was issued on September 6, 2011, the City of Farmersville Wastewater Treatment Facility No. 3 (Facility) has not been constructed. The Facility will be located approximately 0.5 mile southeast of the intersection of State Highway 78 and County Road 550, in Collin County, Texas 75442.

The permit renewal authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 0.10 million gallons per day (MGD) in the Interim I phase, a daily average flow not to exceed 0.25 MGD in the Interim II phase, and a daily average flow not to exceed 0.50 MGD in the Final phase.

The effluent limits for Interim I phase of the draft permit, based on a 30-day average, are 10 mg/l five-day biochemical oxygen demand (BOD₅), 15 mg/l Total Suspended Solids (TSS), 0.5

mg/l Total Phosphorus, and 4.0 mg/l minimum Dissolved Oxygen (DO). The effluent limits for the Interim II and Final phases of the draft permit, based on a 30-day average, are 10 mg/l five-day carbonaceous biochemical oxygen demand (CBOD₅), 15 mg/l TSS, 3 mg/l Ammonia Nitrogen (NH₃-N), 0.5 mg/l Phosphorus, and 4.0 mg/l minimum DO. The effluent shall contain a chlorine residual of, at least, 1.0 mg/l and shall not exceed a chlorine residual of 4.0 mg/l after a detention period of at least 20 minutes, based on peak flow. Sludge generated by the Facility will be hauled by a registered transporter and disposed of at a TCEQ-authorized land application site, co-disposal landfill, or wastewater treatment plant authorized to accept sludge.

This application does not contain plans and specifications for the technology to be used by the Facility. For this type of facility: “[a]n owner is not required to submit collection system or wastewater treatment facility plans and specifications to the executive director for approval prior to the commission issuing the wastewater treatment facility’s wastewater permit.” 30 TEX. ADMIN. CODE (TAC) § 217.6(a). However, under the Other Requirements section of the draft permit, item number six requires the City to furnish the TCEQ with the Facility’s plans and specifications prior to construction. Pursuant to this permit condition, the Executive Director’s staff may require further documentation to assure compliance with the effluent limitations in the permit.

Treated effluent generated by the Facility will be discharged to an unnamed tributary; then to the Elm Creek Arm of Lavon Lake in Segment No. 0821 of the Trinity River Basin. The unclassified receiving water uses is minimal aquatic life for the unnamed tributary. The designated uses for Segment No. 0821 are recreation, public water supply, and high aquatic life use.

B. Procedural Background

The TCEQ received the City’s application on June 8, 2015 and the TCEQ Executive Director (ED) declared the application administratively complete on June 29, 2015. The TCEQ

prepared the Notice of Receipt of Application and Intent to Obtain a Water Quality Permit Renewal (NORI) and the City published it in English on July 12, 2015 in the *McKinney Courier Gazette* newspaper in Collin County. The ED's staff completed the technical review of the City's application and prepared a draft permit. The TCEQ prepared the Notice of Application and Preliminary Decision for TPDES Permit for Municipal Wastewater Renewal (NAPD) and the City published it in English on October 25, 2015 in the *McKinney Courier Gazette* newspaper in Collin County. Alternate language publication was required for this permit application; however, the City could not find a Spanish-language newspaper in Farmersville, Texas or Collin County. The public comment period ended on November 24, 2015.

The Chief Clerk mailed the Executive Director's Decision and Response to Public Comment on January 27, 2016 and the deadline to file requests for a contested case hearing was February 26, 2016.

The TCEQ Chief Clerk's office received one request for a hearing from James A. and Shirley J. Martin. As discussed below, OPIC recommends denying the hearing requests because there is no right to a contested case hearing on this permit renewal.

II. APPLICABLE LAW

As an initial matter, the Commission must determine whether a right to hearing exists under the provisions of Texas Water Code (TWC) § 26.028(d). Upon reviewing these statutory provisions, OPIC concludes that the Commission may issue this permit without holding a public hearing. According to the information reviewed by OPIC, the City's renewal application satisfies each of the requirements of TWC § 26.028(d). The application seeks to renew a permit governed by Chapter 26 of the Water Code. This application does not propose to increase the amount of effluent authorized to be discharged, nor does it change the pattern or place of discharge. The

ED's Technical Summary, dated September 14, 2015, states that effluent limitations and monitoring requirements in the draft permit remain the same as those contained in the existing permit, with the exception of minor revisions to bring the permit into compliance with recent Standard Permit updates, including a new *E. coli* monitoring requirement. Therefore, the renewed permit can be expected to maintain the quality of waste authorized to be discharged. The ED's Response to Public Comment was filed with the Chief Clerk's Office and mailed to all commenters. The Applicant's compliance history raises no issue regarding its ability to comply with the terms of its renewed permit. For these reasons, OPIC concludes that there is no right to contested case hearing on the City's permit renewal application. However, if the Commission concludes that there is a right to a hearing, OPIC recommends granting James A. and Shirley J. Martin's hearing request.

A person may request the TCEQ reconsider the ED's decision on an application or hold a contested case hearing on an application pursuant to the requirements of House Bill 801, Act of May 30, 1999, 76th Leg., R.S., § 5 (codified at TWC § 5.556). The requirements of House Bill 801 apply to applications declared administratively complete on or after September 1, 1999. The TCEQ declared the City's application administratively complete on June 29, 2015; therefore, the City's application is subject to the procedural requirements of House Bill 801.

The rules of the TCEQ require that a person seeking a hearing must substantially comply with the following: (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who filed the request, (2) identify the requestor's personal justiciable interest affected by the application, including a written statement describing the requestor's location or distance in relation to the proposed facility or activity, and, how or why the requestor believes he or she will be 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 comment period and that are the basis of the hearing request, and (5) provide any other information specified in the public notice of the application. 30 TAC § 55.201(d).

Only affected persons are granted contested case hearings. TWC § 5.556(c). An affected person is “one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application.” 30 TAC § 55.203(a). This justiciable interest does not include an interest common to the general public. *Id.* Relevant factors considered in determining whether a person is affected 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 and safety of the person, and on the use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

30 TAC § 55.203(c).

The Commission shall grant an affected person’s timely filed contested case hearing request if the request: (1) raises disputed issues of fact that were raised during the comment period and that are relevant and material to the Commission’s decision on the application, (2) is timely filed with the Chief Clerk, (3) is made pursuant to a right to hearing authorized by law, and (4) complies with the request for reconsideration and contested case hearing requirements. 30 TAC § 55.211(c). Responses to hearing requests must specifically address:

- (1) whether the requestor is an affected person;
- (2) which issues raised in the hearing request are disputed;

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

30 TAC § 55.209(e).

III. DISCUSSION

James A. and Shirley J. Martin filed a timely request for a contested case hearing on November 30, 2015 which substantially complies with the procedural requirements of 30 TAC § 55.201(d).

A. Determination of Affected Person Status

The Martins state that they own property adjacent to the northern boundary of proposed Facility. The Martins are concerned about the characterization of the discharge route and whether the discharged effluent will affect their health and use of their property. The Martins state that the discharge route may be improperly characterized because recent flooding events have changed the pattern of silting in the area. They are concerned that these changes will not only exacerbate flooding in the area, but will cause impoundment of discharged effluent on their property that may affect their health and use of their property. Given the Martins' location relative to the Facility and the nature of their concerns, OPIC finds that improper characterization of the discharge route on this permit renewal could affect the Martins in a manner not common to the general public. If the Commission determines that there is a right to a hearing on this matter, OPIC concludes that the Martins are affected persons and provides further analysis concerning the issues raised in the request below.

B. Issues Raised in the Hearing Request

The Martins' hearing request raises the following issues:

1. Whether the application properly characterizes the discharge route.
2. Whether the discharged effluent will impound on the Martins' property and pose a public health hazard.
3. Whether the application properly accounts for recent changes in silting patterns along Lake Lavon.
4. Whether the discharge route traverses U.S. Army Corps of Engineer's land without its consent.
5. Whether the Facility's discharged effluent will exacerbate flooding in the area.
6. Whether the proposed housing development to be served by the Facility will diminish the Martins' use of their property.

C. Issues Raised in the Comment Period

The Martins' issues were raised in the comment period and have not been withdrawn. 30 TAC §§ 55.201(c) & (d)(4), 55.211(c)(2)(A).

D. Disputed Issues

There is no agreement between the Martins and the ED on the issues raised in the hearing request.

E. Issues of Fact

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements. 30 TAC § 55.211(c)(2)(A). Issues No. 1–5 in § III.B. above are issues of fact and could be addressed by an evidentiary hearing. Issue No. 6 in § III.B. above is an issue of policy outside the Commission's jurisdiction that is not appropriate for referral to a hearing.

F. Relevant and Material Issues

The hearing request raises issues relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). To refer an issue to the State Office of Administrative Hearings (SOAH), the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–51 (1986). Relevant and material issues are those governed by the substantive law under which this permit is to be issued. *Id.*

Issues No. 1–3 in § III.B. above concerning the characterization of the discharge route and concerns arising from improper characterization are relevant and material to the Commission's decision on this application because the TCEQ "...may issue permits and amendments to permits for the discharge of waste or pollutants into or adjacent to water in the state." TWC § 26.027(a). Discharging treated wastewater into state watercourses is allowed under Texas law. *Domel v. City of Georgetown*, 6 S.W.3d 349, 358 (Tex. App.—Austin 1999). Requisite to a wastewater discharge permit is the existence of a watercourse. *Id.* at 353–54. In *Hoefs v. Short*, 273 S.W. 785, 787 (Tex. 1925), the Supreme Court of Texas defined a watercourse as having (1) a defined bank and beds, (2) a current of water, and (3) a permanent source of supply. The existence of a watercourse depends on the facts of each case. Therefore, the Martins' concern regarding the characterization of the discharge route is appropriate for referral to SOAH along with the associated issues of effluent impoundment, land use, and public health.

Issues No. 4–6 are not relevant and material because they are beyond the Commission's jurisdiction to review this water quality application. Pursuant to 30 TAC § 305.122(c), the Commission may not issue a permit that conveys a property right. Therefore, if the City seeks to use U.S. Army Corps of Engineers land, the City must privately bargain for this land. While the

location of a facility within a 100-year flood plain is a relevant and material issue pursuant to 30 TAC § 309.13(a), general flooding is beyond the Commission's jurisdiction. Local land planning and development is also beyond the Commission's jurisdiction on this water quality permit application.

G. Issues Recommended for Referral

If the Commission finds that there is a right to a hearing on this matter, OPIC recommends that the issues listed in § III.B.1–3 be referred to the SOAH for a contested case hearing.

H. Maximum Expected Duration of Hearing

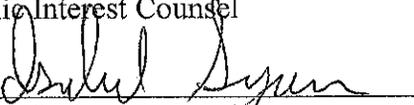
Commission Rule 30 TAC § 80.6(b)(5) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing. To assist the Commission in stating a date by which the judge is expected to issue a proposal for decision, and as required by 30 TAC § 55.209(e)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be six months from the first date of the preliminary hearing until the proposal for decision is issued.

IV. CONCLUSION

OPIC recommends denying the hearing request made by James A. and Shirley J. Martin because there is no right to a hearing on this permit renewal. If the Commission disagrees and finds there is a right to a hearing on this matter, OPIC recommends granting the Martins' hearing request and referring the issues listed in § III.B. 1–3 to SOAH for a contested case hearing.

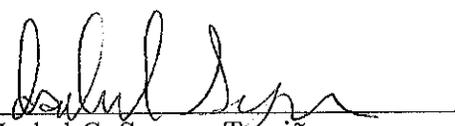
Respectfully submitted,

Vic McWherter
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CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2016 the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Requests for Hearing was filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.


Isabel G. Segarra Treviño

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TCEQ DOCKET NO. 2016-0306-MWD**

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