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May 3, 2010

Ms. LaDonna Castañuela  
Texas Commission on Environmental Quality  
Office of Chief Clerk, MC-105  
Austin, Texas 78711-3087

*via facsimile transmission and  
first-class mail*

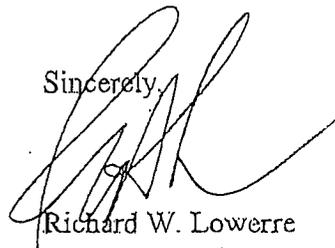
Re: SOAH Docket No. 582-09-2895; TCEQ Docket No. 2008-1305-MWD; In the  
Matter of the Application of Farmersville Investors, L.P. for TPDES Permit No.  
WQ0014778001.

To Ms. Castañuela:

Please find enclosed for filing Protestant James A. and Shirley Martin's Motion for Rehearing in the above-referenced matter. An original and seven copies have been deposited in the U.S. mail.

If you have any questions please do not hesitate to call.

Sincerely,



Richard W. Lowerre

Enclosures

cc: Service List

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

SOAH DOCKET NO. 582-09-28952011 MAY -3 PM 4: 47  
TCEQ DOCKET NO. 2008-1305-MWD

APPLICATION OF FARMERSVILLE §  
INVESTORS, L.P. FOR TPDES PERMIT §  
NO. WQ0014778001 §

CHIEF CLERKS OFFICE  
BEFORE THE TEXAS  
COMMISSION ON  
ENVIRONMENTAL QUALITY

PROTESTANTS JAMES A. AND SHIRLEY MARTIN'S MOTION FOR REHEARING

TO THE HONORABLE COMMISSIONERS:

COME NOW, James A. and Shirley Martin (hereinafter "Protestants"). Protestants are aggrieved by the Commission's April 13, 2011 decision in this docket, and therefore file this, their Motion for Rehearing. Protestants would respectfully show the following:

**I. INTRODUCTION**

TCEQ's decision to grant Applicant Farmersville Investors, LP's ("Farmersville") permit application includes errors of fact and law. Protestants' February 28, 2011, Exceptions to the Proposal for Decision are incorporated herein as if fully set forth in this document.

The Commission's errors include its failure to consider the effects of effluent pooling on Protestants' property and, thus, their use and enjoyment of it. The Commission's order and adopted permit also are in error because they do not accurately designate receiving waters and do not adequately address the evidence in the record on regionalization and the need for the facility. The permit does not meet applicable siting requirements and procedures for final plan and specification review. Moreover, the Commission erred in modifying the permit's expiration date.

**II. USE AND ENJOYMENT OF HEARING REQUESTORS' PROPERTY**

The Commission erred by either not considering or ignoring the effects the proposed facility will have on Protestants' property and their use and enjoyment of it. The record does not

support Findings of Fact Numbers 54, 55 and the adopted permit for the reasons set forth in Section 8 of Protestants' Exceptions incorporated in this brief.

At the hearing, Farmersville claimed there would be a barrier up to 493.49 feet above msl that will block the movement of water to the lake until a pool behind the barrier reaches that level. At that level the pool will be well up onto Protestants' property. The barrier is almost 1.5 feet higher than the sediment level at the point of discharge and on Protestant's property.

This pond created by the effluent will backup effluent more than 250 feet onto Protestants' property, making a significant part of that property unusable, including property above the receiving waters, onto the uplands of Protestants' property. Farmersville has no right to use any of Protestants' property. TCEQ has no authority to authorize such use. Yet this permit authorizes a taking of Protestants' property.

Moreover, this flooding of Protestants property is not the same as the use of a watercourse to carry effluent over a person's property. That downstream effect is an allowed use of the watercourse. Creating a pond to flood upstream property above the watercourse is not.

The issue referred was whether the discharge would interfere with the use and enjoyment of Protestants' property. There is no testimony, no expert opinion and no basis to find that such flooding of effluent will not adversely affect Protestants' use of their property. As an applicant, the burden is on Farmersville to prove the effluent will not adversely impact Protestants property or their use and enjoyment of it.

There is no evidence on evaporation or infiltration rates to suggest the pond would not be full at all times. According to Farmersville's survey and expert testimony, the water is going to back up until it reaches the 493.5 level and spill over any barrier. By then the water is well backed up onto Protestants' property.

Even without the proposed discharge, there is clear evidence of water pooling on Protestants' property. For example, photographs taken by Protestant Mr. Martin show water backing up under the road and onto Protestants' property.

The law is also clear. The flooding of Protestants' land would violate a long history of Texas law that one person cannot build alter drainage patterns in such a way that results in flooding of land of upstream owners. This law is, for example, codified in part in Texas Water Code § 11.086(a).<sup>1</sup> This same principle is included in TCEQ's rules for municipal solid waste landfills, where changes in the elevation of land and resulting changes in drainage patterns cannot significantly affect lands of another and the natural flow of the water off the land and into creeks.<sup>2</sup>

Again, there is no evidence that the flooding will even stay within the banks of the tributary on Protestants' property. Farmersville's survey indicates it will not. It will spread out on Protestants' land over the banks of the tributary, making that land unusable for any current or future plans or uses Protestants have for their property.

### III. SURFACE WATER QUALITY

The Commission erred by not requiring proof that the proposed facility would not result in violation of 30 TAC § 317, the Texas Surface Water Quality Standards. The record does not support Findings of Fact Numbers 24, 25, 28, 29, 36, 38, 39, 41 and the adopted permit for the reasons set forth in Section 5 of Protestants' Exceptions, filed February 28, 2011. Likewise, the Conclusions of Law Number 8, 9, 10, 11 and the Commission's order are not supported by the record for the reasons set forth in Section 5 of Protestants' Exceptions. The location of the proposed discharge has historically been in Lavon Lake.

<sup>1</sup> "No person may ... permit an impounding ... to continue in a matter that damages the property of another by the overflow of water impounded."

<sup>2</sup> 30 TAC 330.303(b) and 330.305(a)



This is a fundamental and critical issue and will set precedent in future cases. Protestants urge the Commission to reject its approach. The Commission should hold that the Lake is the Lake, whether it is up or down. The lake is defined as the normal pool, as set by the elevation when the lake was permitted and built. It does not change. If there is sedimentation and the ability of the lake to hold water is reduced, that does not change the definition of the lake. The owner can always dredge or take other actions to remove the sediments. This is something lake owners do, as testified to by Farmersville's expert, Dr. Young.

If the location or definition of a lake is allowed to change with natural changes that can be reversed, Texas will lose a lot of storage for needed water in its lakes.

The facts in the current record are clear and will be discussed in more detail below. In summary they are:

1. The cove where the outfall is proposed was historically part of the Lake when it was raised to its current pool level;
2. Both surveys by Farmersville show the level of the cove at the outfall to be below the normal pool elevation;
3. Some buildup of sediment, trees limbs and trash, possibly near the old road<sup>3</sup> that was moved when the lake level was increased, now change flow patterns;
4. Farmersville's experts claim that this buildup blocks the lake from going up the cove where it once clearly went; and
5. There is no evidence that the buildup will not naturally be removed by a storm event or cannot be removed by the Corps of Engineers to recover lost flood storage capacity in the lake.

The Commission's order will set a precedent that any cove of a lake can be removed from the lake and become an "intermittent stream" because of natural or human-made changes, even if TCEQ makes no formal decision to change the location of the lake. That departure in the way

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<sup>3</sup> CR550, the road adjacent to Protestants' property and the proposed facility, was moved in a westward direction when Lavon Lake's normal conservation pool level was raised around the 1970s.

Texas defines its lakes is a dangerous precedent when Texas is looking to increase water storage for future water demands.

Moreover, this approach would mean the location of a lake and thus its size and extent can change from day to day and year to year, to be in constant flux as materials temporarily block coves or sediments come and go along shorelines to reduce or expand the lake capacity. This raises serious property rights issues, such as eroding lake shorelines converting private property into public property.

A. The cove downstream of the discharge point was clearly in the normal pool of the Lake when it was expanded to 492 ft msl. The only evidence of the conditions of Lavon Lake at or soon after the Lake was expanded to 492 feet msl are in the TxDOT and Corps of Engineers historic maps.<sup>4</sup> Those maps are official state and federal agency positions on the location and extent of Lavon Lake by the two agencies that have needed to know where the Lake is for its own activities, such as managing flood waters and building a bridge on its relocated road. The maps are listed as the types of maps an applicant can rely upon for its application for a discharge permit in TCEQ rules.

Neither Farmersville nor the Executive Director presented any evidence to contradict these official statements of historic conditions. Farmersville's and ED's only evidence is what is the conditions were the summer of 2010, when the last survey was preformed. They never presented any witness to testify that the lake cove shown on Martin Exhibits 45 and 50 are inaccurate.

Thus, these official maps of the State and Federal government are the only evidence of conditions when the water level of Lavon Lake was raised to 492 feet msl and the old road was moved to higher ground.

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<sup>4</sup>See, for example, Martin Exhibits 45 and 50.

Moreover, Farmersville's surveyor as much as admitted that the waters of the Lake at one time reached up the cove to the areas that are below the 492 elevation. Tr. V. 3, p. 42, lines 12-23.

In his testimony, responding to the question, "why is Lavon Lake something that happens at 492 feet?" TCEQ's witness Mr. Michalk responded:

"492 feet is the defined normal pool elevation or conservation pool elevation. That is a level determined by the **operators of the lake**. TCEQ then adopts that defined normal pool elevation **as the boundaries for its classified lake segments.**" Tr V 4, p318, lines 3-9. (Emphasis added.)

He is correct. The elevation at the time the lake is created (or in this case raised) defines the boundaries of the lake. The Corps of Engineers is the operator. It has the official map which shows the cove extending up to the new road, and, consequently, the location of the outfall being in the lake.

Likewise, the TxDOT map that shows the new road the agency built displays a very similar lake-cove configuration coming to the same location as the Corps' map. This is not mere coincidence.

B. Both surveys by Farmersville show the level of the bottom of the creek that makes the cove to be well below the 492 ft. msl elevation of the normal pool elevation. See Appendix 3 of Protestants' Exceptions, filed February 28, 2011. In fact the only evidence of elevations of the creek on Protestants' property upstream of the road and outfall show it to be below the normal pool for some distance onto Protestants' property, almost up to Protestants shallow water well.

There is no question that the creek that forms the cove was an intermittent stream running downhill until it met Elm Creek. That was clearly the condition when the lake was built and when the water level was increased. There may be some buildup of sediments in that creek, but that cannot change the fact of the normal pool elevation created the boundary of the Lake at or

near the new road.

C. Some buildup of sediment, trees limbs and trash, possibly near the old road that was moved when the lake level was increased, now change flow patterns. There is no disagreement among the parties that there have been changes in topography of the receiving waters, which Farmersville's survey now show flowing uphill or dammed to an elevation of 493.49. ft. msl.

D. Farmersville's experts claim that this buildup blocks the lake from going up the cove where it once clearly went. In essence, Farmersville's experts argue that there will not be a long pool or pond behind the buildup as rainfall and/or effluent is discharged from Farmersville's facility and the pool "riffles" downstream. They argue that this pooling should not be treated as part of the lake, or even a pool, but as an intermittent stream. It is clearly not that. It is a long pond.

Again, looking at elevation measurements in Appendix 3 of Protestants Exceptions shows that this pond will back up under the road and well up onto Protestants' property. The Corps has a flood easement on that property, but not an effluent pooling easement. The effluent will clearly increase the extent and frequency of flooding, and it will change the quality of the water that floods Protestants' property.

E. There is no evidence that the buildup will not naturally be removed by a storm event or cannot be removed by the Corps of Engineers to recover flood storage capacity in the lake. What is naturally built up can naturally be removed. It can in fact be removed by people, possibly sooner than natural events.

As Farmersville's expert, Dr. Young, admitted, owners of lakes can dredge out sediment to return the lake to its original capacity to hold water. Tr. V. 3, p. 184, line 21 to p. 185, line 25.

The Corps of Engineers or the North Texas Municipal Water District (NTMWD) may

find it important and economic to remove the type of blockages that Farmersville claims exists to restore their lake's ability to function as built: to serve flood control and to store the full amount of water authorized for storage and use by municipalities, industries and agriculture.

If they do, will TCEQ revoke Farmersville's permit because it no longer meets water quality standards? It is much simpler to require an applicant to meet the water quality standards for discharge to a lake by using the stable definition of the lake, not some fluctuating definition that could increase or decrease the lake capacity.

Moreover, it is important to remember that sediments, blockages and other such conditions can change with time. A blockage today could be washed away with a flood tomorrow.

As Farmersville's surveyor admitted, his survey is basically a snap shot in time on a changing water body.<sup>5</sup> Sediments are deposited. At the time of Farmersville's second survey, sediments were 1.49 feet thick at the presumed point of discharge.<sup>6</sup>

Likewise, sediments can be scoured away and moved downstream.<sup>7</sup> Clearly, water movement also moves trees, tree limbs, tires and any other debris that ends up in the stream. Logjams, beaver work, and simply trees and trash being washed downstream could build blockages. High flows certainly could clear the blockage, especially as trees and other natural materials decay and make erosion easier. See photos of downed trees, limbs and tires in the creek in Applicant Exhibit 14, page 1 and photographs 2, 3, 6-9.<sup>8</sup> Many of Mr. Martin's photographs also confirm the extent of the debris and sources of short-term blockage.

There is no evidence that that blockage claimed by Farmersville is permanent or even

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<sup>5</sup> Tr. V. 3, p. 46, lines 11-17.

<sup>6</sup> Farmersville Exhibit 18 at 8 (see "silt" designation, in blue text, on map near point of discharge).

<sup>7</sup> See Young testimony at Tr. V. 1, p. 303, lines 15-23.

<sup>8</sup> See Appendix 5 of Protestants Exceptions, filed February 28, 2011.

more than a short-term condition. It should not be used to redefine the Lake. TCEQ Commissioners should make that clear.

It should be noted that the only eyewitness of the Lake at its normal pool elevation is Protestant Mr. Martin. Farmersville apparently could not get a surveyor, an expert, a photographer or anyone else to the bridge near its proposed development when the Lake was at normal pool or even close to normal pool over the many years - now almost 4 years - that this application has been pending at TCEQ.

And it was Farmersville's expert Dr. Young that testified at the first hearing that any survey, like the one Farmersville did for the remand hearing, should be done when the lake was at normal pool. But it was not.

It should be obvious. Farmersville knows that the water backs up to the outfall at normal pool. It may not take the same path, but the entire area of the lake near this location is so flat, that the water could take many different paths. If Farmersville really wanted to prove that the Lake waters do not reach its outfall when the Lake is at its normal pool, Farmersville could have sent someone to the bridge with a camera when the Corps' website showed the Lake was at normal pool. That would have been the end of the dispute.

Farmersville never did so. Instead, Farmersville arranged site visits when the lake was low and sent the surveyor to the site when the lake was not at the level Dr. Young said it should be for an accurate survey.

The only person who admitted that he or she was at the outfall when the Lake was a normal pool levels was Mr. Martin. He managed to get there several times, even though he lives many miles from the site. He testified about the conditions at normal pool or close to normal pool. His photos, taken at those times, show water during such conditions. Tr. V. 3, p. 210, line

20 to p. 211, line 7 and page 211, line 20 to page 212, line 1, Martin Exhibits 37C-H, 46A-H.

**The lake waters back up to the road and onto Protestants' property when the Lake is at normal pool elevation.**

The precedent sought by the ED and Farmersville here - that the cove of a lake can become an intermittent stream because of natural changes - creates significant problems. For example, is the water in the ponded effluent behind the barrier on this creek owned by NTMWD? Can Protestants not get a water right to use it for irrigation since it backs up onto their land? Would it matter if the pond was filled with floodwaters - waters that are there because the Lake level rose above 493.49? This same question can be asked for all coves around the lake as sediments or trees cause blockages.

Thus, if NTMWD needs to argue that it should be allowed to build a new reservoir somewhere, NTMWD could now be subject to claims of mismanagement of Lavon Lake for its failure to maintain the full extent of the Lake to protect water supplies.

Farmersville and the Executive Director are asking the Commissioners to open up a Pandora's box without recognizing the potential results. They see the case as a simply waste water discharge permit for a small discharge. Protestants have a different perspective, one they hope the Commissioners will understand if not adopt.

And if that is not a sufficient basis for concern, consider TCEQ rules such as the following:

**No Discharge of Pollutants.** There shall be no discharge of pollutants into the Lake Austin Water Quality Area or the Lake Travis Water Quality Area, except as provided in these sections.

Section 311.1 defines the "Lake Austin Water Quality Area" as

Those portions of the Lake Austin Watershed within ten stream miles of the pool

level of Lake Austin (492.8 feet, mean sea level).<sup>9</sup>

Thus, a blockage of a cove on Lake Austin or Lake Travis, like the blockage at Lavon Lake, that reduces the extent of the Lake means that the cut-off for the prohibition of discharges would move downstream as the Lake gets smaller. Discharges that would be banned one year could be authorized the next, if a blockage occurred.

Clearly, there are some significant issues arising from the position of Farmersville and Staff that a Lake can shrink as natural or artificial blockages arise. Presumably, the lake could also return to its original size if the blockages are removed by nature or human activity.

And does it matter for water quality? Of course it does. The standards for discharges to intermittent streams set the dissolved oxygen levels at 2.0 mg/l, while those discharges to a cove of a lake require D.O. levels of 5.0 mg/l. Moreover, TCBQ staff refused to tell the ALJ or Protestants what the discharge limits should be if the discharge was to the lake. There has never been any showing that the effluent limitations contained in the proposed permit would be protective for a discharge directly into Lavon Lake. The Commission, therefore, erred approving a permit application that without requiring proof that the proposed facility would not violate 30 TAC § 317, the Texas Surface Water Quality Standards.

#### IV. NEED FOR FACILITY AND REGIONALIZATION

A. Regional options show there is no need for the facility. The Commission erred in approving a permit application that defies legislative directives under sections 26.003 and 26.0282 of the Texas Water Code. The record does not support Findings of Fact Numbers 37, 50, 51, 52, 53 and the adopted permit for the reasons set forth in Section 7 of Protestants' Exceptions, filed February 28, 2011. Likewise, the Conclusions of Law Number 5, 6, 7 and the

<sup>9</sup> 30 TAC § 311.2. There is similar language in the rules for discharges near Lake Travis.

Commission's order violate Texas laws concerning regionalization and, therefore, need, for the reasons set forth in Section 7 of Protestants' Exceptions.

B. Moreover, the final permit does not reflect Finding of Fact No. 37. The Commission presumably based its need and regionalization determination on a proposed permit provision, "Other Requirement No. 9." This permit provision, as discussed in Section 7 of Protestants' Exceptions, does not meet the requirements of Texas law or TCEQ rules. Regardless, nowhere in the permit approved by the Commissioners is there an "Other Requirement No. 9." Pursuant to section 2003.047(m) of the Texas Government Code, any amendment by the Commission of an ALJ's proposal for decision, including any amendment to the proposed permit, shall be accompanied by an explanation of the basis for the amendment.<sup>10</sup> Removing "Other Requirement No. 9" from the draft permit was an amendment to the proposed permit. The Commission offered no explanation of the basis for this amendment. Therefore, the Commission erred by approving the permit in violation of section 2003.047(m) of the Texas Government Code.

#### V. SITING REQUIREMENTS

Farmersville has not demonstrated it can comply with applicable siting requirements. The Commission erred in approving a permit application in violation of 30 TEX ADMIN. CODE sections 217 and 305.48.

The record does not support Findings of Fact Numbers 44, 48, 49 and the adopted permit for the reasons set forth in Section 6 of Protestants' Exceptions filed February 28, 2011.

<sup>10</sup> Section 2003.047(m) of the Texas Government Code, in pertinent part, reads:

(m) . . . The commission may amend the proposal for decision, including any finding of fact, but any such amendment thereto and order shall be based solely on the record made before the administrative law judge. Any such amendment by the commission shall be accompanied by an explanation of the basis of the amendment... (Emphasis added).

Likewise, the Conclusions of Law Number 12, 13, 14 and the Commission's order violate TCEQ rules for siting requirements, for the reasons set forth in Section 6 of Protestants' Exceptions. One clear problem with the application is its failure to comply with requirement in TCEQ's rules for road access. A second is the lack of ownership and control of the land for the outfall.

A. Road Access: In addressing the second referred issue, the Commission ignores one of the key siting requirements of a facility: **whether there is at least one all-weather access road situated above the 100-year flood plain.**<sup>11</sup> The issue of road access was properly raised during the comment period.<sup>12</sup> It is relevant to the referred issue of whether the draft permit complies with the siting requirements of a proposed facility, because road access quite literally determines where a facility can and cannot be.

The only all-weather road that provides access to the facility will be blocked from either direction to the facility during flood events.<sup>13</sup> All the maps in evidence show that there is only one road that provides access to Farmersville's property, CR550.<sup>14</sup> Access is possible from either direction on this road during normal conditions.

Farmersville's FEMA floodplain map, App. Ex 3. Exh. SB 5, however, shows that the 100-year floodplain extends over this road on both sides of the proposed facility (see Appendix 4 of Protestants Exceptions filed February 28, 2011). All access will be cut off during 100-year floods, if not lesser floods.

There is no evidence of other access roads available to satisfy the requirements of 30 TAC chapter 217.<sup>15</sup> Nor is there any testimony that such a road will be built.

<sup>11</sup> 30 TAC § 217.328(d)

<sup>12</sup> See Mr. Lee Warren's comment number 22, ED's Exh. 3, *Executive Director's Response to Comments*, p. 13.

<sup>13</sup> See, Appendix 4 of Protestants Exceptions filed February 28, 2011, a copy of App. Exh 3, Exh. SB-5.

<sup>14</sup> See for example, App. Exh 3. Exh. SB 2, pp. 60, 63 & 77.

<sup>15</sup> "A facility must have at least one all-weather access road with driving surface situated above the 100-year flood plain." 30 TAC § 217.328(d). (Emphasis added.)

Moreover, given the lack of detail on the floodplain map, a flood event well below the 100-year flood-line might also flood the road and with it the discharge pipe and outfall. There is no way to tell from the map.

TCEQ rules and common sense make it clear that flood events are possibly the most important siting issue for a sewage treatment facility such as the one proposed. These small facilities are not required to have any back-up power or back-up sewage storage. They can operate when no one is at them for days, if not weeks.

Obviously, the plant operator(s), local emergency response personnel, TCEQ, EPA and local government inspectors may all need access to a sewage treatment facility during flood events. The manual addition of chlorine to the untreated sewage flowing through the plant may be needed to avoid public health impacts during such events.

TCEQ's siting limitation rule at 30 TAC § 217.328, is, in fact, included with other rules under the title of "Safety." TCEQ rules have other "safety requirements" for WWTP, including:

(E) emergency operation plans for power outages, flooding, and other site specific emergency situations that may develop; 30 TAC § 217.16(b)(3)

Farmersville may be able to justify use of a minimum treatment facility, with no back-up power or other redundancy for flooding or other unexpected events, but it then needs to be forced to comply with every other rule adopted by TCEQ to protect public health and safety. Access to the facility during flooding is not discretionary or something that Farmersville can address later. Farmersville has no authority to raise the access road. It could have put its treatment facility on other parts of its large development and not faced this limitation.

As Farmersville's witness Mr. Barry admitted, TCEQ rules, such as §217.328, apply to the application. Therefore, the Commission erred in approving the permit application.

B. Discharge point and discharge route: Farmersville failed to meet its burden of proof

on the siting of the discharge route and outfall. The first issue Protestants raised in it exceptions to the original PFD was resolved, in part, when upon remand Farmersville provided the exact location in longitude and latitude. **That exact location should be included in the permit pursuant to the Texas Water Code, which requires outfall location in the permit.**<sup>16</sup>

The other issue was the issue of ownership or control of the land on which the outfall will be located. Farmersville argues that it need not have title, control or even any showing of ability to use land for an outfall (T. 1, p. 17, ll. 2-11). **In fact, Farmersville was bold enough to claim it could use Protestants' land for the outfall in its original permit application.** If Protestants, whose current home is a number of hours away, had not received or paid attention to the notice of the application, TCEQ apparently would have issued a permit with the outfall on Protestants' property.

The application forms used for this permit application are in the record. Ownership or control is required for the entire facility, at least by TCEQ rules. The ED apparently does not follow those provisions.

In the past, the Commission has been very strict in its efforts to avoid speculative permits. There are good reasons. TCEQ staff should not have to process applications that an applicant cannot use, or even may not be able to use. Affected persons should not be forced to spend large sums of money in a contested case hearing on facilities that may not be built because of a lack of legal rights for the facility.

Requiring ownership or a right to use land for all parts of the facility is within TCEQ's authority and only make sense. If that is not required, applicants will do what Farmersville tried,

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<sup>16</sup> Section 26.029, Tex. Water Code provides: **CONDITIONS OF PERMIT; AMENDMENT.** (a) In each permit, the commission shall prescribe the conditions on which it is issued, including: ... (2) the location of the point of discharge of the waste. (Emphasis added.)

putting the facility on a private landowner's property to get the permit and then ask permission of the landowner after-the-fact.

## VII. PLANS AND SPECIFICATIONS

The Commission's Findings of Fact and Conclusions of Law regarding the proposed facility's plans and specifications requirements are internally contradictory. The Commission, therefore, erred in adopting a Finding of Fact that does not support a Conclusion of Law. Finding of Fact No. 40 requires Farmersville to submit a summary transmittal letter in accordance with the requirements in 30 TAC § 217.6 for review by the ED to ensure compliance with requirements set out in 30 TAC § 217, Design Criteria for Domestic Wastewater Systems. This Finding was adopted from the ALJ's Proposed Order as revised by the ED's Exceptions filed on February 28, 2011, and further revised by the ALJ's letter of March 22, 2011. Originally, this Finding required Farmersville to submit full plans and specifications for its proposed facility. However, at the request of the ED, this requirement was lowered to a summary transmittal letter, which merely states that the facility will be compliant with applicable design criteria.

Curiously, however, Conclusion of Law No. 14 states: "Farmersville is not required to prove compliance with 30 TEX. ADMIN. CODE ch. 217 prior to the issuance of a TPDES permit, **but must submit plans and specifications for the WWTP to the TCEQ for approval prior to construction of the facility**" (emphasis added). TCEQ rules at 30 TAC § 217.6 specify that full plans and specifications are only required at the request of the ED. Therefore, the Commission erred in approving a proposed order that contained Findings of Fact which do not support corresponding Conclusions of Law.

### VIII. PERMIT DURATION

The Commissioners erred by changing the expiration date of the draft permit from October 1, 2011 to October 1, 2015, violating section 2003.047(m) of the Texas Government Code and approving a permit without evidence in the record to support the change in expiration date. This change was prompted by a document filed by the Executive Director on April 1, 2011, requesting a change in the draft permit that was to be considered by the Commission the next week at their monthly agenda.

This change to the ED's position was improper and untimely. It was at best a late filed exception to the PFD, but without any opportunity for briefing and responses to it. At worse, it was a last minute attempt by the Executive Director to assist Farmersville and improperly place new evidence into the record. That it came at this late date also raises questions of the role that the ED took with this applicant.

It is the burden on Farmersville to get the evidence in the record it needs to support its permit. Thus, the PFD states:

**Burden of Proof.** Farmersville had the burden to prove, by a preponderance of the evidence, that the proposed discharge permit will comply with the applicable statutes and rules. 30 TEX. ADMIN. CODE § 80.17(a).

That burden includes the permit duration, a specific requirement in Texas law:

Sec. 26.029. CONDITIONS OF PERMIT; AMENDMENT. (a) In each permit, the commission shall prescribe the conditions on which it is issued, including:  
(1) the duration of the permit;<sup>17</sup>

Here the permit duration is directly related to another issue important to the legislature, regionalization, a required consideration under Section 26.0282, Texas Water Code. North

<sup>17</sup> Sec. 26.027. COMMISSION MAY ISSUE PERMITS. (a) The commission may issue permits and amendments to permits for the discharge of waste or pollutants into or adjacent to water in the state...

(b) A person desiring to obtain a permit or to amend a permit shall submit an application to the commission containing all information reasonably required by the commission. (Emphasis added.)

Texas Municipal Water District (NTMWD) protested this permit, and, only after long negotiations that delayed this permit proceeding, obtained an agreement from Farmersville here to use a proposed new Regional facility. Farmersville fought the regional approach.

In fact, Texas law provides that

Sec. 26.0285. EXPIRATION OF PERMITS WITHIN SAME WATERSHED. The commission shall, to the greatest extent practicable, require that all permits for the discharge of waste within a single watershed or within a region of a single watershed contain the same expiration date. The commission shall adopt and implement procedures for the simultaneous review and renewal of all those permits within a watershed or region of a watershed. The purpose of the review is to require comprehensive evaluation of the combined effects of permitted discharges on water quality within the watershed and to facilitate the receipt of information from the public and other entities affected by those discharges.

The Legislature understands the need for regionalization and comprehensive evaluations and has directed TCEQ to address these issues.

There is no evidence to extend the duration of the permit to 2015. All evidence was based on a proposal for a permit term in late 2011. At that point a simple renewal can be sought, if there is any need for the facility. At that time the schedule for the NTMWD regional plant may be known and a new expiration date for the permit can be set based on that information, if a renewal is even needed.

It is Farmersville's responsibility to put on evidence to support its position. Here, Farmersville has not asked to reopen the record for such evidence. Instead, the ED, in violation of Section 5.228, Texas Water Code, is attempting to do so, and in a roundabout fashion assist the applicant in meeting its burden of proof in a hearing.<sup>18</sup>

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<sup>18</sup>Section 5.228 (e) provides

The executive director or the executive director's designated representative may not assist a permit Farmersville in meeting its burden of proof in a hearing before the commission or the State Office of Administrative Hearings unless the permit Farmersville fits a category of permit Farmersville that the commission by rule has designated as eligible to receive assistance. ...

Moreover, there were no findings of fact or conclusions of law (or any evidence) to support TCEQ changes to the terms of the permit. Pursuant to section 2003.047(m) of the Texas Government Code, any amendment by the Commission of the ALJ's proposal for decision, including any amendment to the proposed permit, shall be accompanied by an explanation of the basis for the amendment, and shall be based solely on the record. Changing the expiration date of the draft permit was an amendment to the proposed permit made without reliance on the record before the Commissioners. The Commission offered no explanation of the basis for this amendment, and therefore erred by not complying with state law to rely solely on the record made before the ALJ and to provide the required justification for a change to the ALJ's Proposal for Decision and proposed permit.

#### **IX. OTHER ERRORS OF THE COMMISSION**

In addition to the errors identified in this Motion for Rehearing, the Commission erred by:

- 1) approving an application without evidence that the pooling effluent on Protestants' property would not interfere with Protestants' health, as described in section 8 of Protestants' Exceptions;
- 2) approving an application without evidence that the pooling effluent on Protestants' property would not interfere with Protestants' well or groundwater quality, as described in section 8 of Protestants' Exceptions;
- 3) approving an application without evidence that non-traditional contaminants in the pooling effluent on Protestants' property would not interfere with Protestants' health, as described in section 8 of Protestants' Exceptions; and
- 4) approving an application without considering evidence<sup>19</sup> improperly excluded by the ALJ, as described in section 10 of Protestants' Exceptions.

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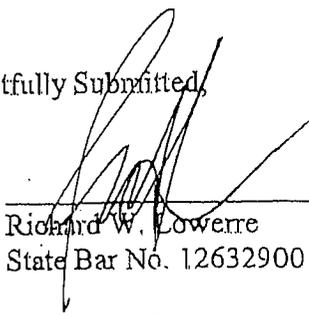
<sup>19</sup> Such as Martin Exhibits 26, 48, and stricken testimony by Mr. Martin.

**IX. PRAYER**

For the reasons stated above and in Protestants' Exceptions, Protestants pray that Farmersville Investors, LP's application for Texas Pollutant Discharge Elimination System Permit No. WQ0014668001 be denied.

Respectfully Submitted,

By:

  
Richard W. Lowerre  
State Bar No. 12632900

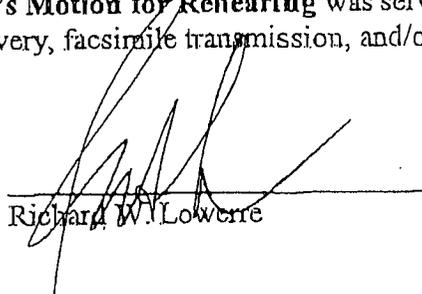
Marisa Perales  
State Bar No. 24002750

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FOR PROTESTANTS JAMES A. AND  
SHIRLEY MARTIN

**CERTIFICATE OF SERVICE**

By my signature, below, I certify that on the 3rd day of May, 2011, a true and correct copy of **Protestants James A. and Shirley Martin's Motion for Rehearing** was served upon the following *via* electronic transmission, hand-delivery, facsimile transmission, and/or deposit in the U.S. mail.



Richard W. Lowere

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**FOR THE ADMINISTRATIVE LAW  
JUDGE:**

The Honorable Sharon Cloninger  
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State Office of Administrative Hearings  
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QUALITY

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Kathy Humphrey	239-0606
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From: Richard W. Lowerre/Samuel Day-Woodruff

Date: May 3, 2011

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### Comments:

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