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May 16, 2011

Ms. LaDonna Castañuela
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Texas Commission on Environmental Quality
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VIA ELECTRONIC FILING

RE: SOAH Docket No. 582-09-2895; TCEQ Docket No. 2008-1305-MWD;
Application of Farmersville Investors, LP, for TPDES Permit No.
WQ0014778001

Dear Ms. Castañuela:

Enclosed for filing please find Applicant Farmersville Investors LP's Response to Motion for Rehearing in the above-referenced matter.

If you have any questions regarding this matter, please feel free to contact me.

Respectfully submitted,

John R. Moore

cc: *Service List*

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of May, 2011, a true and correct copy of the foregoing document was provided by U.S. mail, hand-delivery or facsimile to the persons listed below:

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JOHN R. MOORE

**SOAH DOCKET NO. 582-09-2895
TCEQ DOCKET NO. 2008-1305-MWD**

APPLICATION OF FARMERSVILLE	§	BEFORE THE STATE OFFICE
	§	
INVESTORS, LP, FOR TPDES	§	OF
	§	
PERMIT NO. WQ0014778001	§	ADMINISTRATIVE HEARINGS

RESPONSE TO MOTION FOR REHEARING

TO THE HONORABLE COMMISSIONERS:

Applicant, Farmersville Investors, LP (“Farmersville” or “Applicant”) files its Response to the Motion for Rehearing filed by James A. and Shirley Martin (“Martins” or “Protestants”), respectfully showing:

I. INTRODUCTION

Protestants point out two errors with the Order of the Commission issued April 14, 2011. Applicant believes these two errors are clerical and can be easily corrected. However, the substance of the Commission’s Order is sound and should be reaffirmed with correction of the two clerical errors.

Other than the two clerical errors, Protestants have not provided any basis for rehearing or reversal. Instead, they are re-asserting tired arguments that have been duly considered, and properly rejected, by the ALJ and now the Commissioners. With correction of the two clerical errors, the findings of fact, conclusions of law and proposed permit will be fully supported by the record and the law.

II. CLERICAL ERRORS

A. *“OTHER REQUIREMENT 9.”*

Protestants accurately point out that Finding of Fact 37 makes reference to “Other Requirement No. 9” that was contained in the Draft Permit as that document was in evidence as Exhibit ED-5 in the record. That Draft Permit with Other Requirement No. 9 was approved and

recommended to the Commissioners. Applicant believes the attachment of a draft permit that does not contain Other Requirement No. 9 was a clerical error. Applicant requests that the Commission reissue its Order with that clerical error corrected.

B. CONCLUSION OF LAW NO. 14

Based on exceptions filed by the ED, the ALJ recommended changes to Finding of Fact No. 40 to accurately reflect the requirements of 30 TEX. ADMIN. CODE § 217.6 which allows the ED to accept a summary transmittal letter demonstrating compliance with the design criteria of Chapter 217 and does not require submission of engineered design plans unless requested by the ED. The Commission accepted the ALJ's recommendation and changed Finding of Fact 40. What no one noticed at the time was the corresponding Conclusion of Law No. 14 which tracked the original language of Finding of Fact No. 40. Applicant requests that the Commission revise Conclusion of Law No. 14 to read:

14. Farmersville is not required to prove compliance with 30 TEX. ADMIN CODE, ch. 217 prior to the issuance of a TPDES permit, but will be required to submit a summary transmittal letter in accordance with the requirements of 30 TEX. ADMIN. CODE, § 217.6.

C. CONCLUSION

Protestants accurately point out two inadvertent clerical errors with the Order as signed by the Commission. Applicant requests that those errors be corrected as set forth above. Other than those two errors, Protestants' Motion for Rehearing is without merit as set forth below.

III. PROTESTANTS ARGUMENTS

Except for the clerical errors discussed above, Protestants' arguments in its Motion for Rehearing lack merit. Several generalities apply to the arguments made by Protestants in their motion for rehearing:

Nothing New. The motion for rehearing fundamentally fails to raise anything new. All of these issues have been thoroughly briefed several times before in the parties' Closing Arguments, Responses to Closing Arguments, Exceptions, and Responses to Exceptions as those pleadings were prepared for the original hearing and proposal for decision, for the hearing and proposal for decision on remand, or for both.

Arguments not Based on any Evidence in the Record. For the most part, Protestants base their arguments on assumptions, extrapolations and wholesale fabrications that find no support in the record and misrepresent the evidence that is actually in the record. Protestants presented no expert witnesses on the issues they argue in their motion and provided precious little lay witness testimony from Protestant James Martin himself. Lacking any evidence of their own, Protestants misinterpret maps and surveys made by others for other purposes and make dire predictions of calamities which find no support in the record, but which exist only in the legal arguments of their counsel.

Ignoring Substantial Portions of the Record. Protestants continue to ignore substantial portions of the record in asserting that the ALJ and Commissioners have erroneously considered the evidence. The complete record is replete with evidence that shows that (a) Applicant prevailed on every referred issue by a preponderance of the evidence, and thus (b) there is substantial evidence to support each and every aspect of the Commission's final order on any appeal.

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

Protestants' continued insistence that the discharge of treated effluent will back up behind a temporary blockage and cause a 250-foot long pool of effluent on their property provides a good case study regarding the general observations set out above. Protestants did not disclose this theory in comments prior to the determination of referred issues or in response to discovery

requests by Applicant. The issue has been briefed inside and out by the parties. It was thoroughly addressed by the ALJ in her PFD. Protestants are now raising the matter yet again – this time as an alleged basis for rehearing – but fail to raise anything new in their motion.

What the record does show, and what is ignored by Protestants, is that Applicant performed a detailed survey to determine the location of the 492 foot elevation contour of Lavon Lake to determine the reach of the Lake at “normal pool” elevation.¹ The detailed survey also determined the route of the thalweg of the intermittent stream from the point of discharge to the point where it reached Lavon Lake at the 492 foot elevation contour.² The detailed survey and the testimony of qualified experts demonstrate conclusively that the discharge is to an intermittent stream, and that the intermittent stream flows 638 feet from the discharge point before it reaches Lavon Lake at its “normal pool” elevation.³

B. SURFACE WATER QUALITY

Protestants assert that the “Commission erred by not requiring proof that the proposed facility would not result in violation of 30 TAC § 317[sic], The Texas Surface Water Quality Standards.” Protestants entire argument is based on the premise that, before the lake was built to its current normal pool elevation of 492 feet msl, the Corps of Engineers created a map of the area that would be affected by the raising of the lake.

Protestants essentially concede that the site specific survey performed by Applicant conclusively demonstrates that the proposed discharge will be to an intermittent stream and that it will travel 638 feet before reaching Lavon Lake at its normal pool elevation of 492 feet msl.

¹ *E.g.*: Tr. pg. 14, ln. 3 through pg. 16, ln. 11; pg. 17, ln. 22 through pg. 18, ln. 18 (McCullah); pg. 137, ln. 11 through pg. 138, ln. 1; pg. 140, ln. 1 through pg. 141, ln. 5; pg. 146, ln. 24 through pg. 147, ln. 16 (Young). The survey was admitted as Exhibit APP-18. Tr. pg. 139, lns.13 through 24.

² *E.g.*: Tr. pg. 18, ln. 20 through pg. 22, ln. 5 (McCullah); pg. 138, lns. 2 through 6; pg.141, ln. 6 through pg. 143, ln. 22 (Young); pg. 299, ln. 13 through pg. 300, ln. 8 (Michalk).

³ *E.g.*: Tr. pg. 23, ln. 16 through pg. 24 ln. 6 (McCullah) pg. 147, ln. 18 through pg. 149, ln. 10 (Young); pg. 299, ln. 13 through pg. 300, ln. 8 (Michalk).

But Protestants ask the Commissioners to set those essential facts aside and rely instead on maps of the U.S. Army Corps of Engineers and Texas Department of Transportation that contradict the reality of the area as demonstrated by the survey information.

Most of Protestants' allegations derive from Protestants' flawed argument that the best evidence of what constitutes the shoreline of Lavon Lake is the Corps of Engineers map that was admitted as Protestants' Exhibit 50. This map is dated August 4, 1969, and predates the raising of Lavon Lake to 492 feet normal pool elevation by some 5 to 6 years.⁴ This "Project Map" was developed for property tract information rather than specific aspects of the lake.⁵ Counsel for Protestants repeatedly attempted to have Mr. Michalk use the map and pretend "you had no reason to think it was incorrect . . ."⁶ Mr. Michalk would have none of it.⁷ Site specific information is always preferable.⁸ The information provided by Applicant to the TCEQ to allow Mr. Michalk to make his determinations was of a quality far above the vast majority of cases where those determinations are made.⁹

There is no evidence to suggest, and no logic to assume, that the Corps map (and the TxDOT maps derived therefrom) was intended to establish the shoreline of the lake for future permitting of wastewater treatment plant discharges. Moreover, if the TCEQ were to accept maps that contradict the known geometry of receiving waters, its computer modelers would be forced to make assumptions that contradict reality in order to determine the effluent limitations for such discharges. This cannot be a proper way to assure the protection of the quality of the waters of the State of Texas.

⁴ The lake level was raised in 1974 or 5. See, e.g.; Tr., pg. 224, lns. 7-14 (Martin).

⁵ E.g., Tr. Pg. 327, lns. 16 through 25 (Michalk).

⁶ E.g., Tr. pg 328, ln. 1 through pg. 329, ln. 1(Michalk).

⁷ *Id.*

⁸ Tr. pg. 408, lns. 7 through 25 (Michalk).

⁹ Tr. pg. 321, lns. 5 through 20; pg. 444, lns. 18 through 25; pg. 457, ln 12 through pg. 460, ln. 5 (Michalk).

Protestants also repeatedly refer to some “blockage” of the intermittent stream that is somehow altering the natural conditions to create an intermittent stream where a cove would theoretically exist. Protestants cite the testimony of Mr. McCullah for the statement that “something happened to create the blockage about 492”.¹⁰ He said no such thing, despite Counsel’s hypothetical questioning:

Q OK. And do you have any doubt that *if* that was the 492 contour line, *if* those were accurate, that in the past that creek ran downhill and stayed below 492 all the way from the outfall to the lake?

A That’s assumable.

Q. That’s a reasonable assumption?

A. (Nodded)

Q Okay. Something happened. *If* that was correct, the USGS map and the TxDOT maps were correct, something happened to create an elevation above 492 within that finger?

A Yes, sir.

(Emphasis added.) And *if* the USGS, TxDOT and Corps of Engineers maps are wrong about the shoreline of Lavon Lake, nothing was done to create some blockage. To the extent Protestants claim the TxDOT, USGS and Corps of Engineers maps show some cove near the discharge point, those maps are wrong now and they have been wrong since 1969. That is why the TxDOT and Corps maps are not used for the purposes of establishing shorelines or elevations or to determine the characteristics of receiving waters. In fact, TxDOT maps include a disclaimer on them stating that they have no official status.¹¹

Protestants offered no evidence of their own, and were unable to elicit testimony from any qualified witness on cross-examination to support their theory that there is some temporary blockage that could be washed away. The overwhelming weight of the evidence is that the discharge is to an intermittent stream and that the treated effluent will travel 638 feet before

¹⁰ Protestants’ Closing Argument, pgs. 11-12.

¹¹ Tr. pg. 155, lns 1 through 6 (Young)

reaching Lavon Lake at its normal pool elevation of 492 feet msl, as defined in the Commission Rules.

C. NEED FOR FACILITY AND REGIONALIZATION

Protestants make the conclusory statement that the Commission erred in approving a permit application that “defies legislative directives under sections 26.003 and 26.0282 of the Texas Water Code.” Protestants also assert the record does not support certain findings of fact and conclusions of law. However, Protestants do not deign to advise the Commission as to how those findings of fact and conclusions of law are wrong or how the Water Code is violated. Applicant will not chase the ghosts suggested by these claims, but refers the Commission to its responses on the regionalization issue in its prior briefing.

Also under the heading of “Need for Facility and Regionalization” Protestants raise the clerical error of the Commission having inadvertently attaching the wrong version of the draft permit to the signed order. Please refer to Applicant’s prior response under Section II., A. above.

D. SITING REQUIREMENTS

Protestants make two argument under the heading of “Siting Requirements”. First, Protestants allege that Applicant failed to demonstrated that it currently has all weather access to the facility site. Second, Protestants assert that Applicant’s permit should be denied because Applicant has not demonstrated that it owns the proposed point of discharge.

1. ALL WEATHER ACCESS

Protestants entire argument under this heading is based on the premise that Applicant filed to carry a burden to prove during the TPDES permitting phase that the facility will have all weather access at a future point in time when it wishes to construct and operate the facility. The

Commissioners considered this argument and properly rejected it. Protestants are wrong on the law and the evidence.

Failure to Disclose Legal Theory:

First, this is a legal theory that was never disclosed during discovery in response to a request for disclosure under Tex R. Civ. P. 194.2. Rule 194.2 states that:

A party may request disclosure of any or all of the following:

(c) the legal theories and, in general, the factual basis of the responding party's claims or defenses (the responding party need not marshal all evidence that may be offered at trial).

The comments to the 1999 changes to Rule 194.2 state: "Paragraphs (c) and (d) are intended to require disclosure of a party's basic assertions, whether in prosecution of claims or in defense. . . ." TRCP 215(5) states that "[A] party who fails to respond to . . . a request for discovery shall not be entitled to present evidence which the party was under a duty to provide in a response . . ." ¹² The Commissioners should not even consider this new and flawed claim.

Not Relevant to Siting Issue:

Confirmation that there is all-weather access to the site is a requirement under Chapter 217 of the Commission rules which must be addressed during the design and construction phase of permitting, not in the original wastewater treatment plant permitting under Chapters 307 and 309. When the time comes after Farmersville has obtained its wastewater treatment plant discharge permit, it will need to demonstrate, through at least a summary transmittal letter, that it is compliant with the Chapter 217 design criteria. Compliance with Chapter 217 is a permit requirement. Exh. ED-5.

¹² See also; *James v. Texas Dept. of Human Services*, 836 S.W.2d 236, 241-242 (Tex.App. – Texarkana 1992, no writ).

Protestants Ignore Specific Evidence:

In Protestants' words: "As can be seen from all of Applicant's maps, there is no other access road available to satisfy the requirement of 30 TAC Chapter 217."¹³ As is the case with much of Protestants' arguments, they offer no testimony to support their interpretation that the road is submerged by a flood event. Protestants ignore Mr. Martin's own testimony that the flood elevation is 503.3 feet. Exh. Martin 1, pg. 9, ln. 28. Exh. Martin 33 shows the road elevation at the culvert crossing the intermittent stream as 508 feet. The road itself is clearly higher than the flood elevation.

More importantly, Exhibit APP-1 (KK-3) is an exhibit entered in the record for all purposes. This Exhibit shows that the floodplain relied upon by Protestants from 1996 (see dot and dash line) is no longer the floodplain since it was redrawn in 2007 to reflect the relocation of CR 550 (see shaded area). This Exhibit clearly shows that the road is out of the floodplain. This same exhibit shows that alternative access to the site is available from CR 551 to the north via a proposed 70-foot right-of-way that never crosses any floodplain.

Conclusion:

Protestants' argument regarding the alleged lack of access is a microcosm of their case overall. They laid behind the log to make it. They misapplied the law. They violated procedural requirements. They misstated the evidence in the record. They offered no evidence of their own on this issue of supposed paramount importance. The Commissioners should again reject this point along with Protestants' other histrionic cries of "wolf".

¹³ Protestants' Motion for Rehearing, p. 13.

2. OWNERSHIP OF DISCHARGE POINT

Protestants assert that Farmersville's permit should be denied because the Applicant has not demonstrated that it owns the location of the discharge point. This is not relevant to any referred issue. Moreover, the TCEQ has no jurisdiction over property rights and the Draft Permit provides that the grant of the permit does not convey property rights.¹⁴ If Farmersville is not able to acquire the property right to place its outfall structure at the discharge point as described in the permit, it will not be able to discharge.

E. PLANS AND SPECIFICATIONS

Protestants accurately point out that Conclusion of Law No. 14 is inconsistent with Finding of Fact No. 40. Please refer to Applicant's response in Section II., B. above.

F. PERMIT DURATION

Protestants' essential argument under this heading is that Applicant had a burden to prove that the term of the permit as originally set forth in the draft permit would satisfy the requirement that it have a minimum term of 2 years and be on track with other permits in the same basin as required by 30 TEX. ADMIN. CODE § 305.71. No Applicant should be expected to foresee that after filing its application on January 31, 2007, it would still be involved in post-hearing briefing in May, 2011. It would have been inappropriate in 2007 to set a future term starting in 2011 and expiring in 2015.

There is no evidence issue, and hence no burden of proof issue involved in this question. It is May of 2011. 30 TEX. ADMIN. CODE § 305.71 requires that a permit have a minimum term of 2 years and that a TPDES permit has a termination date the same as the other permits in the basin. The Commission properly applied the law to determine the termination date of the permit.

¹⁴ Exhibit 5, Draft Permit, Permit Condition 8.

G. OTHER ERRORS OF THE COMMISSION

Protestants list four “other” errors of the Commission, presumably to preserve those claims of error for some further appeal. Protestants add nothing new to their arguments and are simply throwing the spaghetti at the wall in hopes that some will stick. Protestants make reference to their prior exceptions. To the extent the Commission determines to consider these “other” error allegations, Applicant refers the Commission to its responses to Protestants’ Exceptions.

IV. INCORPORATION OF PRIOR BRIEFING BY REFERENCE

Farmersville incorporates the following briefing it has filed in this proceeding by reference for all purposes herein:

- Applicant’s “Closing Argument” (filed January 19, 2010);
- Applicant’s “Response to Closing Arguments” (filed January 29, 2010);
- Applicant’s “Exceptions” (filed April 15, 2010);
- Applicant’s “Response to Exceptions” (filed April 26, 2010);
- “Applicant’s Closing Argument on Remanded Issues” (filed December 22, 2010);
- Applicant’s “Response to Closing Arguments on Remanded Issues” (filed January 10, 2011);
- Applicants’ “Response to Exceptions on Remand (filed March 10, 2011).

V. CONCLUSION AND PRAYER

For all of the reasons set forth herein and in Farmersville's prior briefing as described above, Farmersville prays that the Commissioners correct the two clerical errors described in Section II above and otherwise deny Protestants' motion for rehearing outright or simply let it be denied by operation of law. Farmersville prays for any and all other relief to which it is entitled.

Respectfully submitted,

LLOYD GOSSELINK

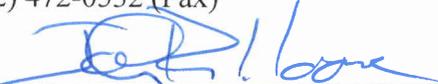
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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of May, 2011, a true and correct copy of the foregoing Applicant's Response to Exceptions was provided by U.S. mail, hand-delivery or facsimile to the persons listed below:

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