

Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*
Mark R. Vickery, P.G., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

April 26, 2010

LaDonna Castañuela
Texas Commission on Environmental Quality
Attention: Docket Clerk, MC 105
P.O. Box 13087
Austin, Texas 78711-3087

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

Dear Ms. Castañuela:

Enclosed is the original and 7 copies of the Executive Director's Reply to Exceptions to the Administrative Law Judge's Proposal for Decision in the above-named and numbered cause. If you have any questions, please do not hesitate to contact me at (512) 239-3417.

Sincerely,

A handwritten signature in cursive script, appearing to read "Kathy J. Humphreys".

Kathy J. Humphreys
Staff Attorney
Environmental Law Division

Enclosure

cc: Mailing List

Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*
Mark R. Vickery, P.G., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

April 26, 2010

The Honorable Sharon Cloninger
Administrative Law Judge
State Office of Administrative Hearings
P.O. Box 13025
Austin, Texas 78711-3025

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

Dear Judge Cloninger:

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Sincerely,

A handwritten signature in cursive script that reads "Kathy J. Humphreys".

Kathy J. Humphreys
Staff Attorney
Environmental Law Division

Enclosure

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

IN THE MATTER OF THE	§	BEFORE THE STATE OFFICE
APPLICATION OF	§	
FARMERSVILLE INVESTORS, LP	§	
FOR A NEW TEXAS	§	OF
POLLUTANT DISCHARGE	§	
ELIMINATION SYSTEM (TPDES)	§	
PERMIT NO. WQ0014778001		ADMINISTRATIVE HEARINGS

**EXECUTIVE DIRECTOR'S REPLY TO EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S PROPOSAL FOR DECISION**

**TO THE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL
QUALITY:**

The Executive Director of the Texas Commission on Environmental Quality (TCEQ) submits the following Reply to Exceptions to the Administrative Law Judge's Proposal for Decision (Reply) relating to the application by Farmersville Investors, LP (Farmersville) for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014778001.

I. INTRODUCTION

The majority of the Martins' Exceptions to the Administrative Law Judge's Proposal for Decision (PFD) are simply a reiteration of the arguments made in their Closing Arguments and Reply to Closing Arguments. To avoid repetition, the Executive Director's Reply is limited to issues that the Executive Director believes need clarifying to aid the Administrative Law Judge (ALJ) and the Commission in reaching a final determination. As the Executive Director stated in his Exceptions to the PFD, he supports all of the ALJ's findings with the exception of those requiring additional dissolved oxygen modeling and those requiring a full plans and specifications review.

Additionally, in their Exceptions to the Proposal for Decision, the Martins included several documents that were not introduced as evidence at the Hearing on the Merits, but were submitted with their Closing Arguments. The Executive Director objected to Appendix 1; Appendix 2, page 1; and Appendix 4 from the Martins' Closing argument because the documents were not introduced at the hearing, the Martins did not lay a foundation for them and the other parties did not have the opportunity to cross-examine anyone to determine their accuracy or relevance.¹ The ALJ agreed and struck Appendix 1; Appendix 2, page 1 and Appendix 4.²

The Martins include these same documents in their Exceptions to the ALJ's PFD; again without laying a foundation or providing good cause. The Martins assert that the ALJ should not have stricken Appendix 4 because it is precedent.³ The Executive Director notes that his objection was to the relevance of Martins' Appendix 4 because it is a letter from the SOAH to the TCEQ's General Counsel. The letter itself is not precedent, the signed Order of the Commission is precedent; however the Martins did not attach the Order, only the letter. The Executive Director respectfully requests that the documents, including Appendix 4, be stricken from the Martins' Exceptions to the Proposal for Decision.

II. DISCUSSION

1. Burden of Proof

The Executive Director supports the ALJ's determination that Farmersville met its burden of proof. The Martins assert that Farmersville had the burden to demonstrate that unregulated contaminants in the effluent will be dangerous to their health, while their only

¹ Executive Director's Closing Arguments.

² PFD at 4.

³ Martins' Exceptions to PFD at 4.

burden was to raise the issue.⁴ The Executive Director agrees with the ALJ that the Martins did not present enough evidence to shift the burden to Farmersville.

The issue the Commission referred to SOAH was “[w]hether the contaminants in the effluent will impact the health of the hearing requesters or interfere with their use and enjoyment of their property.” For support of their argument that the Commission is willing to consider impacts of non-traditional pollutants the Martins rely on a Conclusion of Law from another hearing and excerpts from a discussion from the dais on a waste permit.⁵ The Executive Director does not dispute that the Commission will consider the impacts of non-traditional pollutants; however, the Martins did not provide any evidence that non-traditional pollutants are a concern under the facts of this case.

The Conclusion of Law the Martins rely on is from the PFD from Hays County Water Control & Improvement District No. 1 (WCID)⁶ which provides: “Conclusion of Law No. 11: Under the facts in this record, WCID has no legal obligation under existing Texas law to monitor or treat its effluent for pharmaceuticals and personal care products (PPCPs) that may enter its treatment facility.”⁷ This Order is for a permit which authorizes the discharge into a stream on the contributing zone of the Edwards Aquifer. Discharges on the contributing zone of the Edwards Aquifer are required to meet more stringent effluent limits than similar discharges in

⁴ Martins’ Exceptions to the PFD at 2.

⁵ Martins’ Exceptions to the PFD at 2-3.

⁶ Martins’ Closing Argument, Appendix 4. Hays County Water Control & Improvement District No. 1, SOAH Docket No. 582-08-0202; TCEQ Docket No. 2007-1426-MWD, TPDES Permit No. WQ0014293001.

⁷ The Martins assert that the ALJ should not have stricken Appendix 4 because it is precedent. The Executive Director notes that his objection was to the relevance of Martins’ Appendix 4 because it is a letter from the SOAH to the TCEQ’s General Counsel. The letter itself is not precedent, the signed Order of the Commission is precedent; however the Martins did not attach the Order, only the letter.

other parts of the state.⁸ Even though the discharge from Hays County WCID is to a very sensitive area, the Commission found that the Applicant did not have a legal obligation to treat its effluent for pharmaceuticals and personal care products.⁹ If a 0.5 million gallon per day (MGD) discharge to a stream on the contributing zone of the Edwards Aquifer is not a unique enough situation to require additional provisions regarding emerging contaminants, then a 0.5 MGD discharge to an intermittent stream is not unique enough either. The Martins did not provide any evidence that their situation is unique enough to require any provisions in the Farmersville permit are necessary to protect their health, beyond the provisions required for TPDES permits for similarly sized WWTPs that discharge to similar receiving waters.

In the Sunset Farm's 2008 waste permit discussion, Commissioner Soward stated that under normal circumstances an applicant can rely on TCEQ's rules to satisfy the requirement of protecting human health and the environment, but protestants can offer evidence that their situation is unique.¹⁰ If the protestants offer evidence that the permit is not protective enough, the evidence shifts back to the applicant.¹¹

The Martins' only expert does not testify that the proposed discharge is not protective of human health and the environment, nor that it will negatively affect the Martins' health. The Martins did not present any evidence that their well was used (other than once every five years), or that the location of the well was especially sensitive to infiltration from surface water, or that the effluent from the Farmersville waste water treatment plant (WWTP) would contain especially high concentrations of non-traditional pollutants. In sum, the Martins did not offer any evidence

⁸ 30 TEX. ADMIN. CODE Chptr 213.

⁹ Martins' Closing Argument, Appendix 4.

¹⁰ TCEQ Agenda, February 27, 2008, Attachment A

¹¹ *Id.*

that their situation is unique. Mr. Trede, the permit coordinator that testified on behalf of the Executive Director, testified that according to the map provided as Martin Exhibit 6, the Martins' private abandoned well is 521 feet from the location of the proposed WWTP.¹² Mr. Martin testified that a creek runs through his property and his property is in the floodplain of Lavon Lake.¹³ These may have been features that made the property unique to the Martins when they purchased it, but are far from being unique statewide. The features the Martins rely on are not sufficient to warrant any additional provisions be added to the draft permit.

2. Whether Discharges Under the Terms of the Draft Permit will Meet the Requirements of 30 TAC Chapter 307, the Texas Surface Water Quality Standards (Issue 1).

The Texas Surface Water Quality Standards ("TSWQS") implement Texas Water Code section 26.003 which provides that it is the policy of the state to "[m]aintain the quality of water . . . consistent with the public health and enjoyment, the propagation and protection of terrestrial and aquatic life and the operation of existing industries taking into consideration the economic development of the state. . ."¹⁴ To ensure this mandate is met, the Executive Director evaluated the discharge route, assigned the appropriate aquatic life uses and developed effluent limits to protect those uses.

A. The Executive Director correctly determined that the discharge route is to an unnamed tributary, thence to the Elm Creek Arm of Lavon Lake in Segment No. 0821 of the Trinity River Basin.

The Martins, OPIC, and to some extent, the ALJ are confused as to whether the discharge is into an intermittent tributary or into Lavon Lake itself. The proper classification of the

¹² Ex. ED-1 21:6-16.

¹³ Ex. Martin-1 5:1-18.

¹⁴ TEX. WATER CODE ANN. § 26.003 (West 2010).

receiving water is necessary to ensure that the effluent limits in the permit will be protective of the receiving waters. Mr. Michalk, who testified on behalf of the Executive Director, testified that he used the information from various sources and determined that the “creek [unnamed tributary] runs virtually all the way to the more open cove area before it becomes part of Lavon Lake.”¹⁵ The evidence presented at the hearing that when Lavon Lake is at normal pool elevation the lake will extend to the proposed outfall location is not sufficient to outweigh Mr. Michalk’s testimony that the information he used to determine that the lake will not reach into the unnamed intermittent tributary during normal pool elevation conditions.

According to the TSWQS an intermittent stream is “[a] stream which has a period of zero flow for at least one week during most years. Where flow records are available, a stream with a 7Q2 of less than 0.1 ft³/s is considered intermittent.”¹⁶ The definition of “intermittent stream” does not require that the stream be dry all the time. Additionally, the TSWQS define the classified segment boundary of Lavon Lake as extending *up to* the normal pool elevation of 492 feet above mean sea level (amsl).¹⁷ (*Emphasis added*). The TSWQS do not state that the pool elevation of Lavon Lake (i.e. the elevation of the water impounded by the Lake Lavon dam) is *always* at 492 feet amsl. At times the lake will be higher, hence the need for the flood easement on Mr. Martin’s property, and at times of drought the lake will be lower. The classified segment criteria for Lavon Lake apply only up to the defined normal pool elevation of 492 feet amsl.

Mr. Kyle Kruppa, an engineer who testified on behalf of Farmersville, testified that according to a survey performed after the application was filed, the elevation of the outfall is

¹⁵ Ex. ED-14 12:18-21.

¹⁶ 30 TEX. ADMIN. CODE § 307.3(29).

¹⁷ 30 TEX. ADMIN. CODE § 307.10.

around 490 feet amsl.¹⁸ There was no evidence presented at the hearing, however, that documented the source of the datum used to derive the elevation points, therefore the precision and accuracy of the survey data can not be determined. When presented with a map denoting elevations along the tributary, Mr. Kruppa testified that even though the map was prepared on behalf of Farmersville and he had no reason to believe it is not accurate, it did not provide him with enough information to determine if the lake comes up to the outfall.¹⁹ The Martins seem to believe that because 490 feet amsl is lower than 492 feet amsl, Lavon Lake must necessarily extend to the outfall. As Mr. Michalk testified, the lower elevation may be a localized depression or a deeper part of the stream channel, and does not mean the outfall is necessarily in the lake under normal conditions.²⁰

The USGS map Farmersville submitted with its application indicates where along the unnamed tributary the elevations of 490 feet amsl and 500 feet amsl occur. The elevation markings on the USGS map represent the actual elevations of the stream bed and are not impacted by whether the map shows Lavon Lake at its current normal pool elevation or its normal pool elevation prior to its increase in volume. Accounting for the relocation of County Road 550, and using the relative distances of the specific streambed elevation locations above and below the proposed outfall location, an interpolation of elevation information results in an estimated streambed elevation at the proposed outfall location of approximately 496 feet above mean sea level.²¹ Using the North Central Texas Council of Governments (NCTCOG) maps, it appears that the outfall is located somewhere between 494 feet above mean sea level and 500

¹⁸ Hr'g Tr. 191:3-7.

¹⁹ Hr'g Tr. 189-192:15-9.

²⁰ Ex. ED-14 13:5-11.

²¹ Ex. SB-2 77.

feet above mean sea level.²² Although there is variation in the depictions of streambed elevations in the vicinity of the discharge point, all of the elevations indicate the discharge points is above the defined normal pool elevation of 492 feet amsl. Because of the scale of the USGS topographic map (3 inches on the map equals 1 kilometer)²³ localized low spots and minor rises and falls along the streambed may not be reflected on the topographic map.

The Martins rely on a county highway map for their contention that 492 feet above mean sea level is at the outfall.²⁴ As Mr. Rex Hunt, an engineer for Farmersville, testified, he would use a county highway map to help define the area, but not use one in lieu of a USGS topographical map.²⁵ Mr. Hunt also testified USGS topographical maps must be used to determine elevations because county highway maps do not have elevation marks.²⁶ A generalized depiction of lake shorelines on a non-topographic map should not be misconstrued as a definitive representation of important elevation information concerning a lake and its surrounding environs.

The Martins argue that the Executive Director should have performed an independent evaluation of the outfall or location of the normal pool elevation²⁷ and Farmersville should have performed a ground survey, provided the County-TxDOT map and updated all the maps in its application.²⁸ The Martins, however, do not cite any regulations that require the Executive

²² Ex. App-11. Note, the Martins refer to the NCTCOG maps as App-10 in their Exceptions to the PFD, however the NCTCOG maps were admitted as App-11.

²³ Ex. SB-2 77.

²⁴ Martins' Exceptions to PFD at 7.

²⁵ Hr'g Tr. 400-401:9-5.

²⁶ Hr'g Tr. 401:6-12.

²⁷ Martins' Exceptions to PFD at 9.

²⁸ Martins' Exceptions to PFD at 8. According to 30 TEX. ADMIN. CODE § 305.45(a)(6) a county highway map may be submitted but it must provide (A) each well, spring, and surface water body or other water in the state within the map area; (B) the general character of the areas adjacent to the facility, including public roads, towns and the nature

Director to perform an independent survey, nor did they elicit testimony from any of the Executive Director's witnesses regarding surveys for TPDES applications. The Martins did not provide evidence that more recent USGS topographic maps were available, or that the rules require applicants to submit County-TxDOT maps. There was no evidence presented at the hearing that the definition of the normal pool elevation of Lavon Lake from the TSWQS was incorrect. The only evidence that the outfall and Lavon Lake are connected is Mr. Martin's anecdotal accounts and some unverified survey results.

Finally, the Martins argue that using the definitions in the TSWQS, lakes that fall during times of drought would become intermittent streams. The Martins, however, again ignore the fact that many lakes are defined classified segments and therefore are defined in the TSWQS,²⁹ and that the Executive Director evaluates multiple sources of data to determine the discharge route.³⁰ It is difficult to imagine the Executive Director determining that an area below the normal pool elevation of any defined lake is an intermittent stream. Contrary to the Martins' assertion, that is not what the Executive Director did in this case. As discussed above, Mr. Michalk went to great lengths to determine where the unnamed tributary reached 492 feet above mean sea level and determined that it did not reach 492 feet above mean sea level until it almost reached the open cove area of Lavon Lake.³¹

of development of adjacent lands such as residential, commercial, agricultural, recreational, undeveloped, and so forth; (C) the location of any waste disposal activities conducted on the tract not included in the application; (D) the ownership of tracts of land adjacent to the facility and within a reasonable distance from the proposed point or points of discharge, deposit, injection, or other place of disposal or activity; and (E) such other information that reasonably may be requested by the executive director.

²⁹ 30 TEX. ADMIN. CODE § 307.10(3).

³⁰ Ex. ED-10 8:14-19; Ex. App-11.

³¹ Ex. ED-14 12:2-17.

B. *The effluent limits in the draft permit are protective of the receiving waters; additional dissolved oxygen modeling is not necessary or supported by TCEQ's rules or guidance.*

OPIC opines that the Executive Director could use Ms. Murphy's initial memo as a starting point for the multiple dissolved oxygen modeling scenarios suggested by the ALJ. While OPIC is correct that Ms. Murphy's first memo, which is not in the record, assumed the Farmersville discharge would be directly to Lavon Lake, OPIC misunderstands the data necessary to model dissolved oxygen at one location, let alone the data necessary to model at various locations. The anecdotal evidence and survey information presented by the Martins challenging the Executive Director's lake elevation modeling assumptions do not provide sufficient information for the Executive Director to refine the existing dissolved oxygen model. The Executive Director went to great lengths to explain dissolved oxygen modeling in his Exceptions to the ALJ's Proposal for Decision; therefore, rather than going into great detail again concerning the problematic nature of the requested additional modeling, he instead respectfully refers the ALJ and the Commissioners to his previously filed Exceptions to the ALJ's Proposal for Decision.

3. Whether the Draft Permit Complies with the Siting Requirements for the Proposed Facility Location Including the Discharge Point, Discharge Route, and the Buffer Zone Requirements (Issue 2).

The Executive Director supports the ALJ's conclusion that the discharge route and discharge point are not subject to the TCEQ's siting requirements and that the Farmersville draft permit complies with all applicable statutes and rules regarding the siting requirements.

The Martins do not raise any new arguments in their Exceptions; rather they simply reiterate the points made in their closing. The Executive Director acknowledges that every

specific provision of the rules is not included in the draft permit verbatim; however, the draft permit provides that “[a]cceptance of the permit by the person to whom it is issued constitutes acknowledgement and agreement that such person will comply with all the terms and conditions embodied in the permit, and the rules and other orders of the Commission.”³² The Executive Director contends that this provision is sufficient to ensure the Farmersville WWTP complies with all applicable statutory and regulatory requirements.

4. Whether there is a Need for the Facility, Whether the Draft Permit Adequately Addresses Regionalization Concerns, and Whether any Additional Terms or Conditions Should be Included in the Permit Based Upon the Commission’s Consideration of Need and Regionalization Under TWC § 26.0282 (Issue 3).

The Executive Director supports the ALJ’s finding that the proposed Farmersville WWTP complies with all statutory and regulatory requirements regarding need and regionalization.

The Martins do not raise any new arguments in their Exceptions; rather they simply reargue the same points they made in their closing. According to the Martins, the Commission should deny the Farmersville permit and “work with NTMWD [North Texas Municipal Water District] to get regional [sic] facility up and running as soon as possible.”³³ The Martins are correct that NTMWD has indicated a willingness to serve the proposed subdivision, in fact the Farmersville draft permit includes Other Requirement No. 9 which provides:

“Based on an agreement between North Texas Municipal Water District, the City of Farmersville and Farmersville Investors, LP dated March 26, 2009, the following condition has been added to the permit:

³² Ex. ED-5 9:para. 2.a.

³³ Martins’ Exceptions to ALJs PFD.

This permit is granted subject to the policy of the Texas Commission on Environmental Quality to encourage the development of area wide waste collection, treatment and disposal. If economically feasible, the system covered by this permit shall be integrated into an area wide waste collection treatment and disposal system within twenty-four (24) months of such system becoming available to treat and dispose of wastes otherwise treated and disposed of pursuant to this permit, notwithstanding the loss of investment in or revenues from any then existing or proposed waste collection, treatment or disposal system.”³⁴

There is no guarantee, however, that that NTMWD will apply for a TPDES permit, or if it does the permit would be issued or that the WWTP would ever be built. As is evidenced by this proceeding, it can take a significant amount of time from the time the application is prepared to final permit issuance.

The application for a domestic wastewater discharge permit requires applicants to justify the flow needed by the facility.³⁵ Farmersville’s application included a chart detailing a 470 acre development with approximately 1,500 equivalent single family connections (calculated at 325 gallons per connection),³⁶ which was sufficient for the Executive Director’s review.³⁷

5. Whether Contaminants in the Effluent Will Impact the Health of the Hearing Requesters or Interfere with Their Use and Enjoyment of Their Property

The Executive Director concurs with the ALJ’s determination that the Martins’ health will not be negatively impacted by the discharges from the Farmersville WWTP nor will the discharges from the WWTP interfere with the Martins’ use and enjoyment of their property. The Martins do not raise any additional arguments in their exceptions, again they simply reiterate their previous points.

³⁴ Ex. ED-5 26.

³⁵ Ex. ED 1 13:19-23.

³⁶ Ex. SB-2 47.

³⁷ Ex. ED 1 24:6-8.

As discussed in detail in the Executive Director's Closing Arguments and Replies to Closing Arguments, because the Martins did not provide any evidence that unregulated contaminants would negatively impact the Martins' health, or for that matter the public health, it is not appropriate for the Executive Director to require Farmersville to comply with more stringent design criteria.

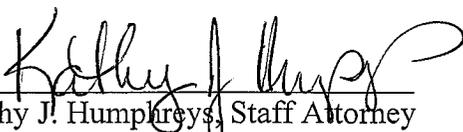
III. CONCLUSION

The Executive Director concludes that Farmersville has satisfied all applicable statutory and regulatory requirements in its application for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014778001, and that Draft TPDES Permit No. WQ0014778001 meets all applicable statutory and regulatory requirements and can be issued without any additional provisions or dissolved oxygen modeling scenarios.

Respectfully submitted,
Texas Commission on Environmental Quality

Mark R. Vickery, P.G.
Executive Director

Robert Martinez, Director
Environmental Law Division

By 
Kathy J. Humphreys, Staff Attorney
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QUALITY

Attachment A

~~the Commission is impliedly finding that the Applicant has met the requirements of all rules that~~
are not related to referred issues, and in fact, all of the issues referred by the Commission in this case relate to specific rule requirements with the exception of Issue 4.

Referred issues such as the health portion of Issue 4 give protestants an opportunity to show that their personal health is impacted in some way even if the Applicant has met all of the relevant TCEQ rules.⁶ For example, on February 27, 2008, the Commission referred the Sunset Farm's Landfill Amendment application to SOAH. Among the issues referred was an issue very similar to Issue 4 in this case. The issue as referred was "[w]hether the application proposes sufficient provisions to protect the health of requesters and their families, and to avoid causing a nuisance, in violation of Commission rules, including 30 Tex. Admin. Code § 330.5(a)(2)." In the discussion that proceeded referral of the issue, then-Commissioner Soward discussed the scope of these types of issues. Commissioner Soward stated:

When I look at these broad issues such as will it cause . . . will it provide protection of the public health and the environment. I guess inherent to me is the concept that if the applicant shows that they will meet the terms and the conditions of the proposed permit and if they can show that they meet the terms and conditions of our rules and regulations that they have presumptively shown that they will protect the public health and the environment. Now I do believe that there are and will be circumstances in which other parties to the hearing could come in and produce evidence unique to that particular application or that situation to show that maybe a permit provision or a rule was not protective of the public health or the environment in that unique setting. Our rules are developed kind of on an average basis. They are intended to cover the average situation and I think any applicant can rely on our rules on an average basis and say if I meet your permit – if I meet your rules I have satisfied the requirements protecting the public health and the environment. I think that is generally true. I think that that is only a presumption that can be then taken further by protesting party for example to show this rule or this permit provision is not protective of the public health and the environment in this unique situation because – and then they produce evidence. And if they produce evidence that makes some showing that it

⁶ Whether a finding against an Applicant on such an issue, when the application is found to otherwise meet all of the applicable statutes and regulations would be grounds for denial of a permit application is an open question. See e.g., *Schor v. Tex. Real Estate Comm'n*, 1996 WL 457440, at *5 (Tex. App.-Dallas Aug. 14, 1996, no writ) (not designated for publication) ("... the TREC's decision is arbitrary when its final order fails to demonstrate a connection between the decision and the factors made relevant to its decision by applicable statutes and regulations.") (citing to *Pub. Util. Comm'n v. Gulf States Utils. Co.*, 809 S.W.2d 201, 212 (Tex. 1991)).

is not protective enough then I believe the burden shifts back to the applicant to go further than just relying upon the rules. But I think that if an applicant comes into a hearing and proves up that they will meet the rules or a permit [inaudible] and there is nothing else in the record then they have met their burden of proof and the issue is answered. I really think – certainly when I vote to refer a general issue like number 23 it is with the idea that the applicant can show they meet the terms of the permit or the terms of the rules they have demonstrated that they are going to adequately protect the public health and the environment presumptively and then go from there depending on the unique circumstances of the case.⁷

~~The Applicant's pre-filed testimony⁸ shows that it has met the relevant TCEQ rules, and is therefore protective of the public's health. Since the TCEQ's rules must be presumed to be protective of the public in ordinary circumstances, the burden then shifts to the Protestant to show that its circumstances are not ordinary, and that therefore it is not sufficient to meet the TCEQ's rules. The Protestants must allege some reason why their circumstances are not ordinary. The Protestants have not done so in this case.~~

III. EVIDENCE REGARDING HEALTH ISSUE

The Protestants have not come forward with any evidence showing that the rules are not sufficiently protective in this case. In fact, Protestants admitted in response to the Applicant's Interrogatories, that any specific health contention they might have is irrelevant, and it is only compliance with the TCEQ's rules that is relevant in this proceeding.⁹ For purpose of complying with Texas Rule of Civil Procedure 166a(d), SOAH Rule 155.57(d), and TCEQ Rule 80.137(e), this pleading also serves as Applicant's statement of intent to use Protestants' discovery responses. The Protestant has never supplemented his answer to this interrogatory, much less ~~claimed a personal health impact.~~

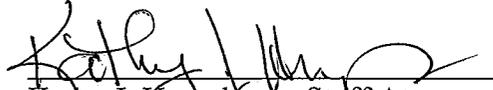
⁷ Texas Commission on Environmental Quality Agenda, February 27, 2008, Item 1.

⁸ Protestants filed objections to Applicant's pre-filed testimony and exhibits. The ALJ has ruled on those objections, preserving the great bulk of that testimony, and ample testimony to carry the Applicant's burden of proof.

⁹ See Protestants James A. And Shirley Martin's Responses to Applicant's First Set of Interrogatories, Requests for Production and Requests for Admission, Interrogatory No. 16, p. 12-13. (Attached). Relevant portions of materials obtained through discovery may be relied upon to support a Motion for Summary Disposition. 1 Tex. Admin. Code 155.505(c)(2).

CERTIFICATE OF SERVICE

I certify that on April 26, 2010, the original and 7 copies of the foregoing Executive Director's Reply to Exceptions to the Administrative Law Judge's Proposal For Decision was filed with the Office of the Chief Clerk and sent by first class, agency mail, e-mail and/or facsimile to the persons listed in the mailing list below.


Kathy J. Humphreys, Staff Attorney
Environmental Law Division

MAILING LIST
APPLICATION OF FARMERSVILLE INVESTORS, L.P.
TPDES PERMIT NO. WQ0014778001
TCEQ DOCKET NO. 2008-1305-MWD
SOAH DOCKET NO. 582-09-2895

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**REPRESENTING THE
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