

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*

May 26, 2010

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

Re: **FARMERSVILLE INVESTORS, LP.**  
**SOAH DOCKET NO. 582-09-2895**  
**TCEQ DOCKET NO. 2008-1305-MWD**

Dear Ms. Castañuela

Enclosed for filing is the Executive Director's Response to the Office of Public Interest Counsel's Motion to Strike in the above-entitled matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael T. Parr II".

Michael T. Parr II, Staff Attorney  
Environmental Law Division

cc: Mailing List

Enclosure



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

IN RE THE APPLICATION OF § BEFORE THE STATE OFFICE  
FARMERSVILLE INVESTORS, L.P., §  
FOR TPDES PERMIT § of  
NO. WQ0014778001 §  
IN COLLIN COUNTY, TEXAS § ADMINISTRATIVE HEARINGS

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THE EXECUTIVE DIRECTOR'S RESPONSE TO THE OFFICE OF PUBLIC  
INTEREST COUNSEL'S MOTION TO STRIKE

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

COMES NOW THE EXECUTIVE DIRECTOR, ("ED") of the Texas  
Commission on Environmental Quality (TCEQ) and files the ED's Response to the  
Office of Public Interest Counsel's (OPIC's) Motion to Strike.

It is the ED's position that the suggestion by the Administrative Law Judge (ALJ)  
in her letter dated May 18, 2010 to the General Counsel, that "should the Commission  
deem it necessary for arriving at a final decision...that the record be re-opened for the  
limited purpose of admitting the deposition testimony of James Michalk," is just that, a  
suggestion to the Commissioners and not directed in any way to the parties. Furthermore,  
the suggestion was not intended to attract any additional pleadings. While the ALJ  
considered the deposition testimony of Mr. Michalk, it was not necessary for the ALJ to  
reach her conclusion, nor is it necessary for the Commission to make its decision. The

facts of the case are sufficient to support all of the ALJ's findings without Mr. Michalk's deposition testimony.

The ALJ did not solicit any pleading in response to her May 18, 2010 correspondence. Therefore, any pleadings addressing or directed at the ALJ's suggestion are untimely pursuant to TCEQ rules. *See* 30 TAC § 80.257(a) stating that "unless right of review has been waived, any party may within 20 days after the date of issuance of the proposal for decision, file exceptions or briefs... any replies to exceptions, briefs, or proposed findings of fact shall be filed within 30 days after the date of issuance on the proposal of decision." As the ALJ correctly noted, "the Applicant did not ask to re-open the record to admit the testimony; no party objected to its inclusion in the Applicant's Response to Exceptions." Any attempts by any party, including a motion to strike intended to object to the inclusion of the testimony in the Applicant's Response to Exceptions at this stage in the proceeding is untimely and cannot be done without leave from the General Counsel. *See* 30 TAC § 80.257(b). The time to object to the Applicant's use of the testimony has passed and therefore the motion to strike is improper and untimely. Not only is the motion to strike untimely, OPIC forfeited the right to object to the Applicant's response to exceptions.

Additionally, there is no active pleading before the Commission that would compel a motion to strike. OPIC's motion to strike is tantamount to an objection to the admission of evidence which must be made when the evidence is offered. A motion to strike is subject to the requirement of timeliness. It must be invoked "as soon as the ground for it becomes manifest." *Rhoades v. State*, 934 S.W.2d 113, 127

(Tex.Cr.App.,1996). OPIC slumbered when the Applicant attached the deposition testimony at issue to its exception to PFD. OPIC awoke too late and only after the ALJ made a suggestion to the Commission to open the record for the limited purpose of admitting the deposition testimony.

The filing of a motion to strike is improper at this stage because a motion is a request for an order from the court, in this case the ALJ who conducted the hearing in this case. *Durbin v. Culberson City*, 132 S.W.3d 650, 656 (Tex.App.--El Paso 2004, no pet.). The Commission did not hear the evidence in this case as such a motion to strike is inappropriate and should never have been filed with the Commission. The ALJ's suggestion to the Commission is not a pleading to which the parties should have filed responses. Having failed to file a responsive pleading to Applicant's attachment to its Exceptions when the case was still before the ALJ, OPIC cannot now resurrect this issue before the Commission under the guise of a motion to strike. All the parties had the opportunity to file closing arguments, exceptions to PFD, and replies to exceptions. OPIC failed to avail itself of the opportunity to file a reply to the Applicant's exception and no purpose will be served to reopen the record to give this statutory party another bite at the apple.

The ALJ has made her recommendation to the Commission, and the Commission has the option to accept or reject the ALJ's recommendation to reopen the record for the limited purpose of admitting the deposition testimony. A separate hearing is not needed to accomplish this purpose by the Commission.

“[R]eplies to exceptions, briefs, or proposed findings of fact shall be filed within 30 days after the date of issuance on the proposal of decision.” 30 TAC § 80.257(a). The general counsel may alter this deadline if certain conditions are met under 30 TAC § 80.257(b). Section 80.257(b) states in pertinent parts that:

On his own motion or at the request of a party, the general counsel may change the deadlines to file pleadings following the proposal for decision. A party requesting a change must file a written request with the chief clerk, and must serve a copy on the general counsel, the judge, and the other parties. The request must explain that the party requesting the change has contacted the other parties, and whether the request is opposed by any party. The request must include proposed dates (preferably a range of dates) and must indicate whether the judge and the parties agree on the proposed dates.

None of the parties filed a request with the General Counsel to extend the briefing deadline beyond that required by the Commission rules before all the post PFD filings in this case. Not having filed a request for extension of the post PFD deadline, no party is therefore entitled to file any post PFD pleading in this case. Nothing will be accomplished if the General Counsel on his own motion were to request briefing in this case.

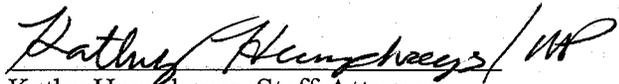
The Executive Director concludes that there is no justification to reopen this case and recommends that the Commission proceed to a decision on this case based on the ALJ’s recommendation and all the pleadings in the administrative record on or before May 18, 2010 when the ALJ filed her Response to Exceptions and Replies.

Respectfully submitted,

Texas Commission on Environmental  
Quality

Mark R. Vickery, P.G.  
Executive Director

Robert Martinez, Director  
Environmental Law Division



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REPRESENTING THE EXECUTIVE  
DIRECTOR OF THE TEXAS  
COMMISSION ON ENVIRONMENTAL  
QUALITY

### CERTIFICATE OF SERVICE

I certify that I have served a true and correct copy of the foregoing by certified mail, return receipt requested, regular mail, hand delivery, electronic mail, and/or fax transmission on May 26, 2010, to the following parties:



Kathy Humphreys  
Environmental Law Division

**MAILING LIST**  
**APPLICATION OF FARMERSVILLE INVESTORS, L.P.**  
**TPDES PERMIT NO. WQ0014778001**

**REPRESENTING THE APPLICANT:**

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**FOR THE CHIEF CLERK:**

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