

Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*



Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
Protecting Texas by Reducing and Preventing Pollution

April 15, 2010

LaDonna 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 Office of Public Interest Counsel's Exceptions to the ALJ's Proposal for Decision in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Amy Swanhholm".

Amy Swanhholm, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

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

**IN THE MATTER OF
THE APPLICATION OF
FARMERSVILLE
INVESTORS, L.P. FOR
PERMIT NO.
WQ0014778001**

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**BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL
QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S
EXCEPTIONS TO THE ALJ'S PROPOSAL FOR DECISION**

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

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (the Commission or TCEQ) with its Exceptions to the ALJ's Proposal for Decision (PFD) in the above-referenced matter.

I. DISCUSSION

A. Whether discharge under the terms of the draft permit will meet the requirements of 30 TAC Chapter 307 of the TSWQS.

OPIC agrees with the ALJ's conclusions that Farmersville has not presented enough evidence to show, by a preponderance of the evidence, the discharge will not be into Lavon Lake when the lake reaches average elevation levels. OPIC also agrees with the ALJ's conclusion that the discharge will comply with the TSWQS if the ED conducts additional DO modeling to address occasional discharges directly into Lavon Lake. Conducting additional modeling would ensure the discharge will not adversely impact Lake Lavon and allow the ED to establish permit limits specific to the receiving waters, based on the scientific resources available to the TCEQ. Therefore OPIC supports the PFD with minor changes, as outlined below. But, because the additional modeling would

not have been entered into the record, OPIC recommends the Commission reopen the record for the sole purpose of taking evidence on the ED's additional DO modeling.¹

In support of the recommendation that the ED conduct further modeling, OPIC notes the ED had previously conducted an antidegradation review which assumed a discharge directly into Lake Lavon. Lili Murphy's prefiled testimony states that she drafted two water quality memos.² When reviewing the application, she assumed the discharge was directly into Lake Lavon, but later discovered the discharge was actually into an unnamed tributary and then into Lake Lavon. Because she did not include the unnamed tributary in her standards technical review, she revised her memo.³ This revised memo was then used by James Michalk to conduct modeling for DO and other oxygen-related constituents.⁴ This initial water quality memo, created by Lili Murphy on February 28, 2007, is not part of the record. However, the ED may use Lili Murphy's initial water quality memo as a starting point for conducting further modeling.

The Commission can, on its own motion or the motion of any party, reopen the record for further proceedings.⁵ Reopening the record so the ALJ and parties may consider the additional modeling would allow the ED to enter the additional modeling results into the record. It would also allow named parties to present their own evidence on the ED's modeling and to cross examine ED and other witnesses. Following this hearing of limited scope, the Commission may base any changes to the effluent limits on evidence that has been fully vetted at SOAH. Therefore, OPIC recommends the record be reopened for the sole purpose of taking evidence on the ED's additional DO modeling.

After further proceedings following the consideration of additional modeling, Findings of Fact Nos. 24, 25, 35 and Conclusions of Law Nos. 1 and 10, may need to be reworded to account for possible changes to the effluent limits, beyond changes to the DO limit. The ALJ's analysis indicates that other constituent permit limits may require

¹ 30 TAC §80.265.

² ED Ex-10, p. 10-12.

³ *Id.* at 12.

⁴ ED Ex-14, p. 8.

⁵ 30 TAC §80.265.

modification, in order to ensure that the DO criterion for Lake Lavon is maintained.⁶ Therefore, following further proceedings, OPIC respectfully requests that Finding of Fact #24, #25, #35 and the corresponding Conclusion of Law #10 be modified to account for other constituent changes beyond changes to the DO permit limit. Specifically, OPIC contemplates the Findings of Fact and Conclusions of Law would be revised as follows:

FINDINGS OF FACT

Proposed Facility and Draft Permit Conditions

24. Existing water quality uses will be maintained and protected and no significant degradation of Lake Lavon will occur if the Draft Permit is issued with a ~~modified DO requirement of _____~~ the following modifications to protect Lake Lavon when the water backs into the intermittent stream and discharges directly into the lake; _____ mg/L CBOD5, _____ mg/L NH3-N, and _____ mg/L DO.
25. Existing water quality uses would be maintained and protected and no significant degradation of Lavon Lake would occur if the Draft Permit is issued with the ~~DO~~ effluent requirements set out in Finding of Fact No. 24.

Surface Water Quality Standards

35. At the proposed Final Phase permitted discharge of 0.5 MGD, an effluent set of ~~10~~ _____ mg/L CBOD5, 3 _____ mg/L NH3-N, and _____ mg/L DO will be adequate to ensure that 5.0 mg/L DO criterion for Lake Lavon will be maintained and its existing water quality use will be protected.

CONCLUSIONS OF LAW

Surface Water Quality

1. The application of Farmersville, LP, for TPDES permit No. WQ100478001 is granted with the aforementioned change to the ~~DO~~ effluent requirements.
10. The discharges under the terms of the Draft Permit will meet the requirements of 30 TAC Ch. 307 because the ~~DO~~ effluent requirements of

⁶ PFD at p. 16.

mg/L CBOD5, mg/L NH3-N, and mg/L DO will protect the water quality of Lavon Lake.

B. Whether the draft permit complies with siting requirements for the proposed facility location including the discharge point, discharge route, and buffer zone requirements.

OPIC agrees with the ALJs finding that the draft permit complies with all TCEQ rules regarding siting for the proposed facility. OPIC also agrees with the ALJ's finding that the application should be amended to conform to the terms in the draft permit, as they exist after the ED has made changes to account for intermittent discharge directly into Lavon Lake. OPIC also agrees with the ALJ's finding that the draft permit should include language stating the provisions of the draft permit supersede the terms of the application, when the two documents are inconsistent.

These two changes will ensure the consistency and enforceability of Farmersville's permit. The draft permit already contains language stating that "the application pursuant to which the permit has been issued is incorporated herein; provided, however, that in the event of a conflict between the provisions of this permit and the application, the provisions of the permit shall control."⁷ But, this language provides no guidance on which document controls in situations where the permit and the application are not necessarily in conflict, but are still not consistent. Providing language that explicitly indicates the permit supersedes the application in all instances where the two documents are inconsistent will strengthen the enforceability of the permit and provide clear guidance for Farmersville.

The ALJ recommends including these suggestions in the draft permit,⁸ but has not included any language in her Order directing the draft permit be amended. Therefore, based on the ALJ's conclusions, OPIC asks to include the following provision in any issued Order:

XX. Permit Condition No. 10 in the Draft Permit should be amended to state "the application pursuant to which the permit has been issued is incorporated herein; provided, however, that in the event of a conflict or

⁷ ED Ex-5, p. 11.

⁸ PFD at p. 27.

inconsistency between the provisions of this permit and the application, the provisions of the permit shall control and supersede the application.”

II. CONCLUSION

OPIC generally agrees with the ALJ's findings of fact and conclusions of law. However, OPIC requests the record be reopened for the sole purpose of taking evidence on the ED's additional DO modeling. This will enable the Commission to determine, based on evidence in the SOAH record, appropriate revisions to Findings of Fact Nos. 24, 25, and 35 and Conclusions of Law Nos. 1 and 10. OPIC also respectfully requests that any Order ultimately issued include additional language to support the ALJ's recommendations for ensuring constancy between the application and permit.

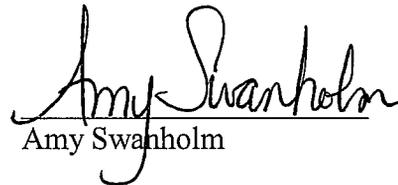
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2010 the original and seven true and correct copies of the *Office of the Public Interest Counsel's Exceptions to the Proposal for Decision* were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.


Amy Swanholt

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

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