

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 26, 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 Reply to Exceptions to the ALJ's Proposal for Decision in the above-entitled matter.

Sincerely,

  
Amy Swanholm, Attorney *by file*  
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  
REPLY TO 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 Reply to Exceptions to the Administrative Law Judge's Proposal for Decision (PFD) in the above-referenced matter.

**I. DISCUSSION**

**A. Reply to the ED's Exceptions to the PFD**

The ED argues first that the DO modeling performed during its technical review of the application is proper and the ALJ improperly interpreted TCEQ's modeling procedures. OPIC does not challenge the sufficiency of the ED's modeling, nor was the ED's modeling challenged by any other party during the hearing. Instead, OPIC and ultimately the ALJ concluded that the facts used to create the ED's modeling were, as shown through the contested case hearing, not reflective of the actual characteristics of the receiving waters. The modeling is based on the assumption that the intermittent stream is always the receiving water. But evidence presented during the hearing could

not show, beyond a preponderance of the evidence, that this assumption was the true. The modeling does not account for occasions where Lake Lavon may reach up to the discharge point, placing the discharge point, and the effluent, at times directly into Lake Lavon.

The ED also argues that additional modeling will require multiple models and create a daunting and dangerous precedent. OPIC disagrees. The ALJ's recommendation that the ED perform modeling that more accurately reflects the receiving waters will require the ED to spend some additional time and resources. The ALJ's recommendation may require additional modeling for this permit that may use more variables than the ED typically uses in performing DO modeling. But performing additional modeling in this case does not require the ED to change its rules, guidance documents, or implementation procedures. The ALJ simply found that in this situation, the information relied upon by the ED was not proven to be accurate. And to issue a permit with dissolved oxygen-related limits based on modeling that does not accurately reflect the receiving waters may lead to the degradation of water quality in Lake Lavon.

Further, this outcome is the result of a hearing where the Applicant did not meet its burden of proof on a referred issue. Additional modeling offers the Applicant an opportunity to be issued a permit, that complies with the Texas Surface Water Quality Standards (TSWQS), instead of having its application denied outright because the Applicant did not meet its burden of proof to show the discharge will comply with the TSWQS. If the ED cannot perform additional modeling, the proper outcome may be to not issue Farmersville a permit.

Although the modeling necessary to accurately reflect these receiving waters may deviate in some ways from the procedures set out in the IP's and SOPs, approving the ALJ's recommendation does not set a dangerous precedent and is supported by TCEQ rules. Absent evidence to the contrary, the process contemplated by the IPs and SOPs (created to offer more specific and simultaneously less binding information to the public) should be followed. The ALJ has not proposed any changes to these documents and OPIC does not support any change to the ED's standard modeling procedures. Because of the contested case hearing process, though, the ED now has an opportunity to create modeling that more accurately reflects the nature of these specific receiving waters. This

may require modeling that deviates from standard modeling performed by the ED. But, this additional modeling is supported by the Applicant's failure to meet its burden of proof during the contested case hearing, and offers an alternative to denying the application.

Second, additional modeling *is* supported by TCEQ rules and Texas statutes. The additional modeling is supported by TCEQ rules that protect against degradation of Texas waterways.<sup>1</sup> It is also directly supported by TCEQ rules establishing site-specific DO criteria for Lavon Lake,<sup>2</sup> as the additional modeling will ensure that when the discharge is, at times, directly into Lavon Lake, it will contain effluent limits that are sufficiently protective.

Furthermore, the Commission has powers delegated by the Texas legislature to "perform any acts whether specifically authorized by [the Texas Water Code] or other law or *implied* by [the Texas Water Code] or other law, necessary and convenient"<sup>3</sup> to perform its function as the state agency charged with issuing permits to "discharge waste into or adjacent to waters of the state."<sup>4</sup> In addition, the purpose of the chapter under which the TCEQ grants wastewater discharge permits is to:

maintain the quality of water in the state 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...and to require the use of *all reasonable methods* to implement this policy.

The Applicant's failure to meet its burden on an issue referred to SOAH could be grounds for denial of the permit.<sup>5</sup> But the ALJ, and ultimately the Commission, instead of denying the permit, may utilize *reasonable methods*, such as requiring additional DO

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<sup>1</sup> 30 TAC § 307.5.

<sup>2</sup> 30 TAC § 307.7 and 10.

<sup>3</sup> Texas Water Code (TWC) § 5.102 (emphasis added).

<sup>4</sup> TWC § 26.027.

<sup>5</sup> *Id.*, stating that the commission may refuse to issue a permit where the commission finds the issuance of the permit would violate the provisions of any state or federal law or rule or regulation promulgated thereunder, or when the commission finds that issuance of the permit would interfere with the purpose of [Chapter 26 of the Texas Water Code].

modeling, to allow the ED to modify this draft permit in accordance with the results of the contested case hearing.

Finally, OPIC also supports the ALJ's Finding of Fact No. 36 and Conclusion of Law No. 13, as they are currently presented in the Order. The ED is correct that there was little discussion of whether a full plans and specifications review is necessary. But there was considerable discussion regarding the inaccuracies in the application, including inaccurate maps,<sup>6</sup> inaccurate and contradictory descriptions of the discharge point,<sup>7</sup> and other inaccuracies as addressed by Protestants.<sup>8</sup> Requiring the Applicant to submit additional information specifically contemplated by TCEQ rule<sup>9</sup> may address some of the accuracy issues in the application. It would also ensure the Applicant is designing the facility in a manner that complies with TCEQ rules, as might not be evident were the Applicant only required to submit a summary transmittal letter.

**B. Reply to the Applicant's Exceptions to the PFD**

Applicant argues that the preponderance of the evidence shows the discharge is to an intermittent stream, and that there is no evidence showing the ED's modeling was improper or that the DO-related effluent limits were improper. These arguments do not address the ALJ's reasoning for requesting additional DO modeling.

OPIC does not take issue with the characterization of the immediate receiving waters. The discharge will be directly into an unnamed tributary that has been classified as intermittent. But, at times Lavon Lake may reach up into the unnamed tributary, causing the discharge to enter Lavon Lake directly. This is problematic because the unnamed tributary and Lavon Lake have very different DO criteria. The Applicant had the opportunity to shown that the discharge will not, at times, be directly into Lake Lavon. But as discussed in OPIC's Closing Argument, the Applicant did not meet this burden.

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<sup>6</sup> Transcript at p. 213.

<sup>7</sup> Transcript at p. 53 and 68.

<sup>8</sup> See Protestants James A. and Shirley Martin's Exceptions to the Proposal for Decision, Appendix 1.

<sup>9</sup> 30 TAC § 217.6(f).

Likewise, OPIC takes no issue with the modeling completed by the ED, although it does find issue with the underlying facts supporting the modeling. Based on the information the ED had when performing the technical review, the modeling was performed correctly. Yet the modeling does not take into account situations where Lake Lavon may reach up to the discharge point, and the discharge may be directly into the lake.

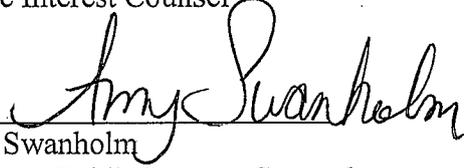
Applicant argues that to require the ED to perform additional modeling would place an undue burden on TCEQ permitting staff. This is not the case. As discussed above, this additional modeling, in this specific case, will require some additional time and resources from TCEQ. But this additional modeling is the result of this contested case hearing. Additional modeling in this situation would not require the ED to change its modeling procedures. No party has challenged the sufficiency of the ED's modeling, only the facts and assumptions that it was based on.

## II. CONCLUSION

OPIC supports the ALJ's Proposal for Decision and requests that the ALJ and the Commission not adopt the changes to the Findings of Fact and Conclusions of Law proposed by the ED and the Applicant.

Respectfully submitted,

Blas J. Coy, Jr.  
Public Interest Counsel

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 26, 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 Swanholm

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**TCEQ DOCKET NO. 2008-1305-MWD**

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