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The Honorable Sharon Cloninger
Administrative Law Judge
William P. Clements Building
300 West 15th Street
Austin, Texas 78701

February 28, 2011

via hand-delivery

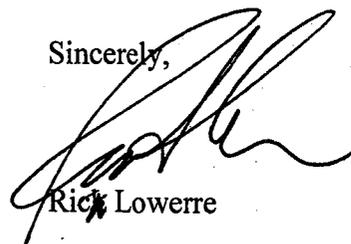
Re: SOAH Docket No. 582-09-2895; TCEQ Docket No. 2008-1305-MWD; In the
Matter of the Application of Farmersville Investors, L.P. for TPDES Permit No.
WQ0014778001.

To the Honorable Sharon Cloninger,

Please find, enclosed for filing, Protestants James A. and Shirley Martin's Exceptions to
the Proposal for Decision Following the Remand Hearing.

Thank you for your consideration of this matter. If you have any questions or concerns,
please do not hesitate to contact me

Sincerely,



Rick Lowerre

Enclosures

cc: Service List

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LaDonna Castañuela
Texas Commission on Environmental Quality
Office of Chief Clerk, MC-105
Austin, Texas 78711-3087

February 28, 2011

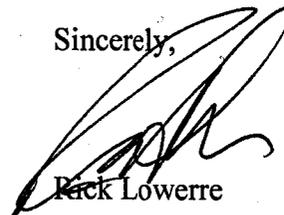
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WQ0014778001.

To Ms. Castañuela,

Please find, enclosed for filing, Protestants James A. and Shirley Martin's Exceptions to
the Proposal for Decision Following the Remand Hearing. An original and seven copies
have been deposited in the U.S. mail.

Thank you for your attention matter. If you have any questions or concerns, please do
not hesitate to contact me

Sincerely,



Rick Lowerre

Enclosures

cc: Service List

SOAH DOCKET NO. 582-09-2895

TCEQ DOCKET NO. 2008-1305-MWD

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

**PROTESTANTS JAMES A. AND SHIRLEY MARTIN'S
EXCEPTIONS TO THE PROPOSAL FOR DECISION
FOLLOWING THE REMAND HEARING**

February 28, 2011

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APPENDICES

1. Martin Exhibit 48, the November, 2010 letter from the U.S. Army Corps of Engineers.
2. Excerpts from Martin Exhibits 45 and 50, the key parts of the TxDOT and COE maps.
3. Martin Exhibit 33 and Applicant Exhibit 18 page 5, the two surveys performed for the Applicant.
4. Applicants Exhibit 3, Exh. SB-5, the floodplain map.
5. Applicant Exhibits 14, page 1 and photographs 2, 3, 6-9.

CITATIONS

References to the transcript will provide the transcript number followed by the page and line, e.g. Tr. V. 2, p. 4, ll. 10-13. The remanded hearing transcript will be referred to as transcript volumes 3 and 4.

References to prefiled testimony and exhibits will provide the exhibit number, page of that exhibit and line(s) if appropriate, e.g. App. Exh. 3, p. 5, ln. 9

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

APPLICATION OF FARMERSVILLE
INVESTORS, L.P. FOR TPDES PERMIT
NO. WQ0014778001

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BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

**PROTESTANTS JAMES A. AND SHIRLEY MARTIN'S
EXCEPTIONS TO THE PROPOSAL FOR DECISION**

TO THE HONORABLE COMMISSIONERS:

James A. and Shirley Martin ("Protestants") submit these Exceptions to the Proposal for Decision (PFD) issued February 7, 2011. The Administrative Law Judge's (ALJ's) recommendation that the Texas Commission on Environmental Quality grant this permit application is factually and legally flawed. Applicant failed to meet its burden of proof that the application complies with all legal requirements and, therefore, the permit application must be denied.

I. INTRODUCTION

The PFD incorrectly analyzed the facts and law, and the permit must be denied because:

1. Applicant failed to meet its burden of proof on all of the referred issues;
2. The Commission should use its authority under the current facts to require regionalization as it has done in the past;
3. The Commission should deny any application such as the present one that fails to meet the requirements of its rules and places an unnecessary cost on TCEQ staff and the public to participate; and
4. The Commission should make it clear that a discharge to the normal pool level of a lake in Texas occurs when the discharge is to the boundaries of the lake as it was originally designated with that normal pool level.

This case, while involving a relatively small discharge, raises a number of important issues, several of which can set important precedent, including precedent on:

1. The role of the ED in fixing inadequate applications and the costs of doing so,
2. The need to avoid taking of property by allowing flooding by the pooling of effluent discharges that backs up and floods above the banks of a creek on a landowner upstream of the outfall,
3. The risk of reducing water supplies in Texas lakes through redefining the lake in a discharge permit proceeding, and
4. The proper interpretation of the Legislature's goals and requirements for regionalization.

When the effects of setting bad precedent are considered, the Commission should clearly deny this permit.

Moreover, this is a hearing that should never have occurred, much less occurred two times with the remand hearing. The application should not have been determined administratively complete, and, thus, it should not have been referred to SOAH in the first place. The Applicant failed to present the information required by TCEQ in its rules and application forms. The inadequacies are many, but the most important is the failure of the Applicant to show it had control over the land on which it proposes to put part of the facility – the outfall.

II. SPECULATION BY APPLICANT

All of the credible evidence in the application and in other documents in the record shows that the location of the outfall is proposed for land owned by the Federal Government and managed by the Corps of Engineers. There is no evidence that Applicant has any right to use the land or that it can obtain access to use that property from the owner, the U.S. Army Corps of Engineers.

All evidence shows that the Corps of Engineers owns the land on which the outfall is proposed to be located. There is no evidence that the Corps agrees to allow the use of that property. In fact, the Corps' letter stating as such (Martin Exhibit 48, see Appendix 1), which was improperly excluded from the record, proves that the Corps does not agree to allow the land

to be used for the outfall.

This hearing should never have been held. A draft permit never should have been issued. Applicant is speculating that it can somehow change the Corps' position.

TCEQ has taken the position that the fact that an applicant has to obtain other permits, including permits from the federal government, does not justify TCEQ abating or denying its permit. That is a valid position. TCEQ should act on such permits to issue or deny them on their merits. If another state, local or federal permit is not later obtained by the applicant, the applicant may not be able to use TCEQ's permit, but that is a matter for such other proceedings.

Here, it is not another permit that is lacking; it is the lack of ownership or control of part of the facility, as that term is defined in TCEQ rules. Facilities are "all land, structures, operational units, or appurtenances used jointly to process, treat, and dispose of wastewater."¹ Clearly that definition includes the outfall equipment needed for discharge or disposal of wastewater.

The Commissioners have repeatedly rejected speculation in permits and shown that TCEQ policy also requires proof of ownership and control of the "facilities." The application forms used by Applicant require a showing of ownership or control.² TCEQ rules require submission of any information requested by the ED.³

¹ 30 TAC §217.2(15)

² See Applicant Exhibit 3, Exh. SB-2, page 6, item 4(d) and page 10, item 6. Application instructions even require a long-term lease agreement if the applicant does not own the land where the facility is located. See Applicant Exhibit 10, page 14 of 65, item 4(d).

³ TCEQ rules at 30 TAC §281.5 require information requested on the application form:

"... applications for wastewater discharge... must include...(7) any other information as the executive director or the commission may reasonably require."

The staff should not have proceeded to prepare a draft permit and notice of technical completeness without 1) a clear showing of the location of the outfall, which was not presented until this remand hearing, and 2) a clear showing of ownership or control of the outfall location.

There are good reasons for such requirements that are obvious here. TCEQ, SOAH and protestants can be required to spend their limited resources on a gamble - a gamble that is not needed, if a simple policy is enforced. Applicants simply have to obtain ownership, a lease or other showing that they can use all the land needed for the facility, including the areas of the storage, treatment and disposal activities, the discharge pipeline and outfall.

III. IMPORTANT PRECEDENT WILL BE SET

As Mr. Michalk clearly showed when he testified that he has been involved in some 1,300 applications (only a small percentage of which involve contested case hearings), TCEQ permitting process is mostly directed by the Executive Director (ED). Thus, precedent can be set through ED decisions, unless the Commissioners have the opportunity to consider such decisions.

It is the Commissioners who are charged as the policy makers of the agency.⁴ They adopt and interpret the rules. They set policy and official precedent.

And TCEQ rules at 30 TAC §305.48 also make it clear that the information requested on the application form is required.

- (a) The following **shall be included** in an application for a wastewater discharge permit.
- (1) The original and one copy of the permit application shall be submitted **on forms provided by or**

approved by the executive director,...

- (3) The applicant shall submit **any other information reasonably required by the executive director.**

⁴ See Subchapter D of Chapter 5 Tex. Water Code, which sets out the Commissioners role, including Sec. 5.105, which states; "GENERAL POLICY. Except as otherwise specifically provided by this code, the commission, by rule, shall establish and approve all general policy of the commission."

This case will result in very significant decisions on policies and practices of the ED that will affect many permits in the future. It will determine how TCEQ will address water quality permits while also carrying out its responsibilities to protect:

- 1) State resources, i.e. should TCEQ staff have to fix bad or incomplete applications?
- 2) Property rights, i.e. can such permits allow flooding of property of others?
- 3) Water supplies, i.e. can water quality permits force a reduction in lake storage?
- 4) The legislative directive to promote regionalization, i.e. can TCEQ ignore a regionalization option 3.01 miles away?

If this application had been for the larger regional facility, such as that proposed by North Texas Municipal Water District (NTMWD) for this same site, Protestants believe that the answers to all the questions raised above would be a resounding "No." Due to agency funding, and as this case shows, applications for small facilities are given a quicker review, where staff will try to fix errors and even make strange assumptions (such as the creeks running up hill) in an effort to move the applications quickly.

It is an applicant's responsibility, not the ED, to provide clear documentation for all application requirements, and, if there is a hearing, clear evidence. In fact, in a hearing, the ED is not even supposed to assist the applicant present its case,⁵ as it clearly has done here.

A. State Resources and Staff Role: This issue was addressed in detail in prior filings by Protestants and will not be discussed in detail again, except to note that a proper job of requiring correct and complete applications would have saved everyone here a year of delay and significant extra costs. The Applicant should have been required to provide a map that meets the TCEQ rules. The only maps that do are the maps that Protestants introduced: those by the Corps of Engineers and TxDOT. If the Applicant then did not agree with those maps, the TCEQ staff

⁵ Section 5.228(d)-(e), Tex. Water Code, and TCEQ's rules at 30 TAC §80.108(e)

would have required a fuller explanation, such as the survey the Applicant preformed for the remand hearing. Thus, a number of hearing days were wasted because the Applicant had not filed a valid map.

TCEQ staff ignored its own rules⁶ and practices of requiring an applicant to fix its application when the staff decided to make its own map of the outfall⁷ and other parts of the treatment facility. TCEQ rules required staff to request a correct map that qualifies under agency rules, such as TxDOT County Highway Maps. That requirement is important because applications and corrections must be filed with TCEQ under sworn statements and often engineers' seals. It is important to save TCEQ staff time and money.

B. Property Rights: To Protestants' knowledge, SOAH and the Commissioners now face an issue never before addressed if, in fact, they determine that the discharge is not into a lake: i.e.

Can a discharge permit authorize a discharge that will result in semi-permanent, if not permanent, flooding of property of others – here, Protestants?

The issue here is clearly one for which this case will set precedent. The Texas law prohibits building dams, levees, or other facilities that change the natural flow patterns that then flood property of others. See for example, Section 11.086(a), Texas Water Code, which states: "No person may ...permit an impounding ... to continue in a matter that damages the property of another by the overflow of water impounded."

And clearly, the impounding of effluent on someone else's property not only adds to the likelihood flooding but also to health risks and risks to the use and enjoyment of property by Protestants.

⁶ 30 TAC § 305.125(19) (requiring applicants to fix incorrect applications) and 30 TAC §305.45(a)(6) (specifying types of maps required in applications).

⁷ ED Exh. 14, pp. 10-13.

What Applicant claims is a dam or barrier will result in the creation of a pond or pool—really a small lake that will flood Protestants' property—backing water up to 493.5 feet msl. According to Applicant's own surveys, which are the only evidence in the record, this level of water will back up many yards onto the Martin's property, and even close to their shallow water well.

That impoundment and back-up of water onto the Martin's property not only will deny Protestants their legal rights to use and enjoy that property, it clearly could result in contamination of the shallow groundwater used by the Martins. There is no evidence of the extent of the impact of the impounded effluent on groundwater, because TCEQ did not even know there would be such an impoundment when the ED did its technical review. Nor has Applicant presented any evidence that there will not be any impacts.

Moreover, a straightforward reading of Section 11.086, where a "person" includes TCEQ,⁸ the prohibition on permitting an impoundment applies to the agency as well. Authorizing the proposed discharge that would create an impoundment of water that floods the Martin's property could be viewed as a taking of Protestants' property.⁹ It is clearly an issue the Commissioners should understand and be given a chance to consider.

C. Water Supplies: Another very significant decision that will set precedent is the proposal by the ED and Applicant to redefine the boundaries of Lavon Lake. The Commissioners will decide if a discharge permit can or should limit the ability of the Corps of Engineers or other owners of the storage capacity in a lake to fully use the lake as they are

⁸ While Chapter 11, Tex. Water Code, does not define person, Section 311.005, Tex Code Construction Act does: "Person" includes corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity.

⁹ Protestants do have a flood easement on their property for periodic flooding from operation of the Lavon Lake Dam. The Corps owns that easement, but that flood easement does not allow others to flood Protestants' property.

legally entitled.

The loss here is one small cove, but the precedent is broad. TCEQ has never before decided that, if some natural or human-made barrier blocks lake water flow back into a cove, the boundaries of the lake are changed or redefined to exclude that cove.

Clearly, the maps of the Corps of Engineers, the agency that built Lavon Lake, and the county highway maps of TxDOT, which built and moved the road across the cove, show that this cove was part of the Lake. As Applicant's surveyor admitted "something happened" to create the blockage above 492-feet msl.¹⁰ He admitted that the survey is simply a snapshot in time, and that sediments in the creek can come and go over time.¹¹

There are natural changes, such as blown-down trees from storms, that can alter natural topography, but that event should not change the location of the lake. Nor should a person be able to take steps to block a cove to obtain a discharge permit with less restrictive requirements.

In essence, Applicant and the ED argue that a human-made or natural dam or blockage, never approved by the state, redefines the extent of Lavon Lake, making an arm or cove of the Lake an "intermittent stream." That is true to them, even though the blockage is not permanent and could be washed out, returning the natural flow pattern.

At a time when Texas needs to do all it can to protect its water supplies, to maximize the use of existing supplies and to require water conservation that even affects home owners, SOAH and the Commissioners need to consider the impacts of such a precedent.

D. Regionalization: In its remand order, Commissioners showed their interest in the regionalization issue. The Commissioners are well aware of the precedent set by an earlier

¹⁰ Tr. V. 3, p. 42, lines 12-23.

¹¹ Tr. V. 3, p. 46, lines 11-17.

Commission in the Lake Travis II case, where the ED did not push for the regionalization that the Commissioners then required.

Here, as in the Lake Travis II case, the regional provider - NTMWD - protested the application because it took the position that regionalization was feasible. But for the delay by the Applicant in opposing that position, a regional plant could now be well on its way to completion. When the ED did not take NTMWD's position, it forced NTMWD to decide to pursue its protest or find a compromise. That led to a report showing that regionalization is feasible.

The Commission now has the opportunity to direct the staff to require an applicant to present a valid evaluation of regionalization at the time the application is filed or at least during the technical review. If the ED had here, this hearing on the Applicant's application would likely never have been needed. As will be discussed in the detailed argument below, there are two significant issues on regionalization:

1. Is regionalization feasible now, given the excess capacity of the City of Farmersville treatment facility and its 3+ mile distance to the far end of Applicant's development?

Because TCEQ staff treated its 3 mile guidance in the application form as a hard rule, staff did not pursue regionalization options, including the one 3.1 miles away. That facility was in the application; staff should have seen it and made a simple inquiry. Is there capacity available? Then the issue of economic feasibility could have been addressed.

There is no hard 3 mile rule.¹² Moreover, it is clear from the final regionalization study that it is economically feasible to pump the City of Farmersville wastewater the near-3 miles to where there will be a regional facility. Yet Applicant was never required to present valid

¹² Staff's treatment of most other requests for information in the application forms show that the staff treats the form not as requiring information, but only providing guidance on the extent of that information. The guidance is not treated as a rule.

evidence that it would not be feasible to use a similar approach. When the regional site was picked for the Applicant's property, the same pipeline to move the wastewater from Applicant to the City's facility could then be used to move the City's wastewater to the regional facility by reversing the flow.

Again, this case will set a precedent on whether the 3 mile guidance is in reality a rule, a rule that has never been adopted formally under the requirements of Chapter 2001. Tex. Gov. Code. It will send a clear message on how serious TCEQ is going to be to follow Legislative directives to move towards regional treatment facilities.¹³

2. What is the proper permit condition for regionalization given the final regionalization study? The second regionalization issue involves Other Requirement No. 9 in the draft permit, which clearly has several problems. First, inclusion of it is contrary to the Executive Director's policy on including settlement provisions in its permits.

Moreover, the provision was prepared by Applicant and NTMWD to give them, not TCEQ, the authority to decide if and when regionalization is feasible. That job is the responsibility of TCEQ. Also, it is now somewhat contrary to the evidence, since the only evidence is that regionalization with NTMWD is economically feasible.

Protestants have included below the permit condition that is clearly consistent with the

¹³ Section 26.0282, Tex Water Code states:

CONSIDERATION OF NEED AND REGIONAL TREATMENT OPTIONS. In considering the issuance, ... of a permit to discharge waste, the commission **may deny or alter the terms and conditions of the proposed permit**, ... based on consideration of need, including the expected volume and quality of the influent and the availability of **existing or proposed** areawide or regional waste collection, treatment, and disposal systems not designated as such by commission order pursuant to provisions of this subchapter. **This section is expressly directed to the control and treatment of conventional pollutants normally found in domestic wastewater.** (Emphasis added.)

In fact, the Commission has set some precedent supporting this provision in its decision in the Lake Travis II case.

evidence, the final regionalization plan that finds regionalization of Applicant's wastewater economically feasible. Thus, when the regional facility is available, Applicant should be required to connect, not given the option to connect. It should also not be given two years to do so. There is no evidence that two years is needed or reasonable. In any case, new language requiring regionalization is needed in the permit.

IV. SUMMARY OF EXCEPTIONS

Protestants take exception to a number of the findings and conclusions in the PFD on every issue referred. Thus,

Issue 1. Water Quality: The standards will not be met because the discharge is Lavon Lake not an intermittent stream.

Issue 2. Siting: The standard will not be met because the Applicant did not present any evidence that:

1. It can use the proposed outfall location, and
2. It has adequate access by roads that will not be flooded in a 100 year flood event.

Issue 3. Regionalization: The law and standards will not be met because the Applicant did not show that there are no reasonable and feasible alternatives in the short term or that it should not be required to use the new regional facility when it is available.

Issue 4. Protestants' Health and Property: Applicant did not present any evidence that the pooling of its effluent that will back up on the Protestants property will not adversely affect the use and enjoyment of their property, their groundwater or their health.

In addition, there are significant errors in the shifting of the burden of proof and in evidentiary decisions.

V. ISSUE 1: WATER QUALITY BASED ON OUTFALL LOCATION

Possibly the most important issue for the Commissioners to resolve is the dispute over the receiving waters. Applicant claims it is an "intermittent stream." Protestants claim it is part of Lavon Lake. The ALJ finds that "Applicant has shown that when Lavon Lake is at or below

normal pool elevation, the proposed discharge will be into an intermittent stream and not directly into the lake.”¹⁴ Protestants disagree.

This is a fundamental and critical issue here and for precedent in other cases. Protestants urge the Commission to reject such an approach. The Commission should hold that the Lake is the Lake, whether it is up or down. The lake is defined as the normal pool, as set by the elevation when the lake was permitted and built. It does not change. If there is sedimentation and the ability of the lake to hold water is reduced, that does not change the definition of the lake. The owner can always dredge or take other actions to remove the sediments. This is something lake owners do.

If the location or definition of a lake is allowed to change with natural changes that can be reversed, Texas will lose a lot of storage for needed water in its lakes.

The facts in the current record are clear and will be discussed in more detail below. In summary they are:

1. The cove where the outfall is proposed was historically part of the Lake when it was raised to its current pool level;
2. Both surveys by Applicant show the level of the cove at the outfall to be below the normal pool elevation;
3. Some buildup of sediment, trees limbs and trash, possibly near the old road that was moved when the lake level was increased, now change the flow pattern;
4. Applicant’s experts claim that this buildup blocks the lake from going up the cover where it once clearly went; and
5. There is no evidence that the buildup will not naturally be removed by a storm event or cannot be removed by the Corps of Engineers to recover flood storage capacity in the lake.

The PFD proposes to set a precedent that any cove of a lake can be removed from the lake and become an “intermittent stream” because of natural or human-made changes, even if

¹⁴ Amended Proposal for Decision, p. 7

TCEQ makes no formal decision to change the location of the lake. That is a radical change in the way Texas defines its lakes. It is a dangerous precedent when Texas is looking to increase water storage for future water demands.

Moreover, this approach would mean the location of a lake and thus its size and extent can change from day to day and year to year, to be in constant flux as materials temporarily block coves or sediments come and go along the shores to reduce or expand the lake capacity. This raises serious property rights issues, such as eroding lake shores converting private property into public property.

A. The cove downstream of the discharge point was clearly in the normal pool of the Lake when it was expanded to 492 ft msl. The only evidence of the conditions of Lavon Lake at or soon after the Lake was expanded to 492 feet msl are in the TxDOT and Corps of Engineers historic maps. (See Martin's Exhibits 45 and 50, the key parts of which are provided in Appendix 2.) Those maps are official state and federal agency positions on the location and extent of Lavon Lake by the two agencies that have needed to know where the Lake is for its own activities, such as managing flood waters and building a bridge on its relocated road. The maps are listed as the types of maps an applicant can rely upon for its application for a discharge permit.

Neither Applicant nor the ED presented any evidence to contradict these official statements of historic conditions. Applicant's and ED's only evidence is what is the conditions were last summer, when the last survey was preformed. They never presented any witness to testify that the lake cove shown on Martin Exhibits 45 and 50 are inaccurate.

Thus, these official maps of the State and Federal government are the only evidence of conditions when the water level of Lavon Lake was raised to 492 feet msl and the old road was moved to higher ground.

Moreover, Applicant's surveyor as much as admitted that the waters of the Lake reached up the cove to the areas that are below the 492 elevation. Tr. V. 3, p. 42, lines 12-23.

In his testimony, responding to the question, "why is Lavon Lake something that happens at 492 feet?" TCEQ's witness Mr. Michalk responded:

"492 feet is the defined normal pool elevation or conservation pool elevation. That is a level determined by the **operators of the lake**. TCEQ then adopts that defined normal pool elevation as **the boundaries for its classified lake segments**." Tr V 4, p318, lines 3-9. (Emphasis added.)

He is correct. The elevation at the time the lake is created, or in this case raised, defines the boundaries of the lake. The Corps of Engineers is the operator. It has the official map which shows the cove extends up to the new road and the location of the outfall to be in the lake.

Likewise, the TxDOT map that shows the new road the agency built displays a very similar lake cove configuration coming to the same location as the Corps' map. This is not mere coincidence.

B. Both surveys by Applicant show the level of the bottom of the creek that makes the cove to be well below the 492 ft. msl elevation of the normal pool elevation. See Appendix 3. In fact the only evidence of elevations of the creek on Protestants' property upstream of the road and outfall show it to be below the normal pool for some distance on to Protestants' property, almost up to Protestants shallow water well.

There is no question that the creek that forms the cove was an intermittent stream running downhill until it met Elm Creek. That was clearly the condition when the lake was built and when the water level was increased. There may not be some buildup of sediments in that creek, but that cannot change the fact that the normal pool elevation created the boundary of the Lake at or near the new road.

C. Some buildup of sediment, trees limbs and trash, possibly near the old road that was

moved when the lake level was increased, now change the flow pattern. There is not disagreement among the parties that there have been changes in the creek, which Applicant's survey now show flowing uphill or dammed to an elevation of 493.49. ft. msl.

D. Applicant's experts claim that this buildup blocks the lake from going up the cove where it once clearly went. In essence, Applicant's experts argue that there will not be a long pool or pond behind the buildup as rainfall and/or effluent is discharged from the Applicant's plant. They argue that this ponding should not be treated as part of the lake but as an intermittent stream. It is clearly not that. It is a long pond.

Again, looking at Appendix 3 shows that this pond will back up under the road and well up onto Protestants' property. The Corps has a flood easement on that property, but not an effluent pooling easement. The effluent will clearly increase the extent and frequency of flooding, and it will change the quality of the water that floods Protestants' property.

E. There is no evidence that the buildup will not naturally be removed by a storm event or cannot be removed by the Corps of Engineers to recover flood storage capacity in the lake. What is naturally built up can naturally be removed. It can in fact be removed by people, possibly sooner than natural events.

As Applicant's expert, Dr. Young, admitted, owners of lakes can dredge out sediment to return the lake to its original capacity to hold water. Tr. V. 3, p. 184, line 21 to p. 185, line 25.

The Corps of Engineers or the North Texas Municipal Water District (NTMWD) may find it important and economic to remove the type of blockages that Applicant claims exists to restore their lake's ability to function as built, to serve flood control and to store the full amount of water authorized for storage and use by cities, industries and agriculture.

If they do, will TCEQ revoke the Applicant's permit because it no longer meets water quality standards? It is much simpler to require an applicant to meet the water quality standards

to discharge to a lake by using the stable definition of the lake, not some fluctuating change that could increase or decrease the lake capacity.

Moreover, it is important to remember that sediments, blockages and other such conditions can change with time. A blockage today could be washed away with a flood tomorrow.

As Applicant's surveyor admitted, his survey is basically a snap shot in time on a changing water body. Tr. V. 3, p. 46, lines 11-17. Sediments are deposited. At the time of Applicant's second survey, they were 1.49 feet thick on the apron of the culvert under the bridge.¹⁵

Likewise, sediments can be scoured away and moved downstream. See Young testimony at Tr. V. 1, p. 303, lines 15-23. Clearly, water movement also moves tree limbs, entire trees, tires and any other debris that ends up in the stream. Logjams, beaver work, and simply trees and trash being washed downstream could build blockages. High flows clearly could clear the blockage, especially as trees and other natural materials decay and make erosion easier. See photos of downed trees, limbs and tires in the creek in Applicant Exhibit 14, page 1 and photographs 2, 3, 6-9.¹⁶ Many of Mr. Martin's photographs also confirm the extent of the debris and sources of short-term blockage.

There is no evidence that that blockage Applicant claims is permanent or even more than a short-term condition. It should not be used to redefine the Lake. TCEQ Commissioners should make that clear.

It should be noted that the only eyewitness of the Lake at its normal pool elevation is

¹⁵ Applicant Exhibit 18 at 8.

¹⁶ Attached as Appendix 5 to these Exceptions.

Protestant Mr. Martin. Applicant apparently could not get a surveyor, an expert, a photographer or anyone else to the bridge near its proposed development when the Lake was at normal pool or even close over the many years - now almost 4 years - that this application has been pending at TCEQ.

And it was Applicant's expert Dr. Young that testified at the first hearing that any survey, like the one applicant did for the remand hearing, should be done when the lake was at normal pool. But it was not.

It should be obvious. Applicant knows that the water backs up to the outfall at normal pool. It may not take the same path, but the entire area of the lake near this location is so flat, that the water could take many different paths. If the Applicant really wanted to prove that the Lake waters do not reach its outfall when the Lake is at its normal pool, Applicant could have sent someone to the bridge with a camera when the Corps website showed the Lake was at normal pool. That would have been the end of the dispute.

Applicant never did so. Instead, Applicant arranged site visits when the lake was low and sent the surveyor to the site when the lake was not at the level Dr. Young said it should be.

The only person who admitted that he or she was at the outfall when the Lake was a normal pool levels was Mr. Martin. He managed to get there several times, even though he lives many miles from the site. He testified about the conditions at normal pool or close to normal pool. His photos, taken at those times, show water during such conditions. Tr. V. 3, p. 210, line 20 to p. 211, line 7 and page 211, line 20 to page 212, line 1, Martin Exhibits 37C-H, 46A-H. The lake waters back up to the road when the Lake is at normal pool elevation.

The precedent sought by the ED and applicant here - that the cove of a lake can become an intermittent stream because of natural changes - creates significant problems. For example, is the water in the ponded effluent behind the barrier on this creek owned by NTMWD? Can

Protestants not get a water right to use it for irrigation since it backs up onto their land? Would it matter if the pond was filled with floodwaters - waters that are there because the Lake levels rose above 493.49? This same question can be asked for all coves around the lake as sediments or trees cause blockages.

Thus, if NTMWD needs to argue that it should be allowed to build a new reservoir somewhere, NTMWD could now be subject to claims of mismanagement of Lavon Lake for its failure to maintain the full extent of the Lake to protect water supplies.

Applicant and the Executive Director are asking the Commissioners to open up a Pandora's box without recognizing the potential results. They see the case as a simply waste water discharge permit for a small discharge. Protestants have a different perspective, one they hope the Commissioners will understand if not adopt.

And if that is not a sufficient basis for concern, consider TCEQ rules such as the following:

No Discharge of Pollutants. There shall be no discharge of pollutants into the Lake Austin Water Quality Area or the Lake Travis Water Quality Area, except as provided in these sections.

Section 311.1 defines the "Lake Austin Water Quality Area" as

Those portions of the Lake Austin Watershed within ten stream miles of the pool level of Lake Austin (492.8 feet, mean sea level).

There is similar language for discharges near Lake Travis. Thus, a blockage of a cove on Lake Austin or Lake Travis, like the blockage at Lavon Lake, that reduces the extent of the Lake means that the cut off for the prohibition of discharges would move down stream as the Lake gets smaller. Discharges that would be banned one year could be authorized the next, if a blockage occurred.

Clearly, there are some significant issues arising from the position of Applicant and Staff

that a Lake can shrink as natural or artificial blockages arise. Presumably, the lake could also return to its original size if the blockages are removed by nature or human activity.

And does it matter for water quality? Of course it does. The standards for discharges to intermittent streams set the dissolved oxygen levels at 2.0 mg/l, while those discharges to a cove of a lake require D.O. levels of 5.0 mg/l. Moreover, TCEQ staff refused to tell the ALJ or Protestants what the discharge limits should be if the discharge was to the lake.

VI. ISSUE 2. SITING REQUIREMENTS

There are several areas of concern involved with issue 2. One clear problem with the application is its failure to comply with requirement in TCEQ's rules for road access. A second, of course, is the lack of ownership and control of the land for the outfall, which has been discussed above.

A. Road Access: In addressing the second referred issue, the ALJ ignores one of the key siting requirements of a facility: **whether there is at least one all-weather access road situated above the 100-year flood plain.**¹⁷ The issue of road access was properly raised during the comment period (See Lee Warrens' comment number 22, ED's Exh. 3, *Executive Director's Response to Comments*, p. 13). It is relevant to the referred issue of whether the draft permit complies with the siting requirements of a proposed facility, because road access quite literally determines where a facility can and cannot be.

The only all-weather road that provides access to the facility will be blocked from either direction to the facility during flood events. See, Appendix 4, a copy of App. Exh 3, Exh. SB-5. All the maps in evidence show that there is only one road that provides access to Applicant's property, CR550. See for example, App. Exh 3. Exh. SB 2, pp. 60, 63 & 77. Access is possible

¹⁷ 30 TAC § 217.328(d)

from either direction on this road during normal conditions.

Applicant's floodplain map, App. Ex 3. Exh. SB 5, however, shows that the 100 year floodplain extends over this road on both sides of the proposed facility (see Appendix 4). All access will be cut off during 100-year floods, if not lesser floods.

There is no evidence of other access roads available to satisfy the requirements of 30 TAC Chapter 271.¹⁸ There is there any testimony that such a road will be built.

Moreover, given the lack of detail on the floodplain map, a flood event well below the 100-year flood-line might also flood the road and with it the discharge pipe and outfall. There is no way to tell from the map.

TCEQ rules and common sense make it clear that flood events are possibly the most important siting issue for a sewage treatment facility such as the one proposed. These small facilities are not required to have any back-up power or back-up sewage storage. They can operate when no one is at them for days, if not weeks.

Obviously, the plant operator(s), local emergency response personnel, TCEQ, EPA and local government inspectors may all need access to a sewage treatment facility during flood events. The manual addition of chlorine to the untreated sewage flowing through the plant may be needed to avoid public health impacts during such events.

TCEQ's siting limitation rule at 30 TAC § 217.328, is, in fact, included with other rules under the title of "Safety." TCEQ rules have other "safety requirements" for WWTP, including:

(E) emergency operation plans for power outages, flooding, and other site specific emergency situations that may develop; 30 TAC § 217.16(b)(3)

Applicant may be able to justify use of a minimum treatment facility, with no back up

¹⁸ "A facility must have at least one all-weather access road with driving surface **situated above the 100-year flood plain.**" 30 TAC § 217.328(d). (Emphasis added.)

power or other redundancy for flooding or other unexpected events, but it then needs to be forced to comply with every other rule adopted by TCEQ to protect public health and safety. Access to the facility during flooding is not discretionary or something that Applicant can address later. Applicant has no authority to raise the access road. It could have put its treatment facility on other parts of its large development and not faced this limitation. It still can.

As Applicant's witness Mr. Barry admitted, TCEQ rules, such as §217.328, apply to the application. The permit must be denied.

B. Discharge point and discharge route: Applicant failed to meet its burden of proof on the siting of the discharge route and outfall. The first issue Protestants raised in its exceptions to the original PFD was resolved, in part, when upon remand the Applicant provided the exact location in longitude and latitude. **That exact location should be included in the permit pursuant to the Texas Water Code, which requires outfall location in the permit.**¹⁹

The other issue was the issue of ownership or control of the land on which the outfall will be located, discussed above briefly. The details are:

Applicant argues that it need not have title, control or even any showing of ability to use land for an outfall (T. 1, p. 17, ll. 2-11). **In fact, Applicant was bold enough to claim it could use Protestants' land for the outfall in its permit application.** If Protestants, whose current home is a number of hours away, had not received or paid attention to the notice of the application, TCEQ apparently would have issued a permit with the outfall on Protestants' property.

The application forms used for this application are in the record. Ownership or control is

¹⁹ Section 26.029, Tex. Water Code provides: CONDITIONS OF PERMIT; AMENDMENT. (a) In each permit, the commission shall prescribe the conditions on which it is issued, including: ... (2) the location of the point of discharge of the waste. (Emphasis added.)

required for the entire facility, at least by TCEQ rules. The ED apparently does not follow those provisions. Thus, that part of the facility to be used for the outfall does not have to meet the requirements of ownership or control.

In the past, the Commission has been very strict in its efforts to avoid speculative permits. There are good reasons. TCEQ staff should not have to process applications that an Applicant cannot use, or even may not be able to use. Affected persons should not be forced to spend money in a contested case hearing on facilities that may not be built because of a lack of legal rights for the facility.

Requiring ownership or a right to use land for all parts of the facility is within TCEQ's authority and only make sense. If that is not required, applicants will do what this Applicant tried, putting it on a private landowner's property to get the permit and then ask permission of the landowner.

VII. ISSUE 3: REGIONALIZATION

There are several issues involved with regionalization. The original issue referred, separated into its three parts, is:

Whether there is a **need** for the facility or whether the need can be reasonable meet by another facility, including a regional facility,

Whether the **draft permit** adequately addresses regionalization concerns, and

Whether any **additional terms or conditions should be included in the permit** based on the Commissioners consideration of need and regionalization under Texas Water Code §26.0282. (Emphasis added)

The order on remand directed the Judge to consider the admission of the final regionalization report. The subsequent admission of it requires that the implications of the study for all three parts of the referred issues be considered.

The new study, together with the other evidence, now shows that there is no need for the

facility. There is no need in the long-term or the short term.

A. Long-term Regionalization and Permit Terms: Martin Exhibit 40 is the only evidence in the record on the economic feasibility of regionalization. Thus, the final feasibility study conclusively proves that regionalization is feasible for this facility.²⁰

Protestants offered to call Mr. Kruppa to ask if he agreed with, had any problems with or otherwise did not agree with the findings of the final study. He would not testify. Thus, there is no evidence to counter what the final feasibility study states.

The Commission should do what they did in the Lake Travis II case. As the law states, a viable alternative can even be a **proposed** regional facility; it does not need to be in the formal application process or designated as such by the Commission. Thus, in the Lake Travis II case, the Commissioners denied the permit for the proposed WWTP, even though the PFD found that there was no facility available **and there would not be one for 10 years.**

In the alternative, if a permit is going to be issued to allow this facility to operate, the permit must reflect the evidence in the record. The regionalization terms in Other Requirement 9 on page 26 of the Draft Permit must be revised. That requirement states:

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.

The permit is granted subject to the policy of the Texas Commission on Environmental Quality to encourage the development of area wide 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 pursuant to this permit,** notwithstanding the loss of investment in or revenues from any then existing or proposed waste collection, treatment or disposal system. (ED Exh 5, Emphasis added.)

There are several obvious problems with this provision.

²⁰ Martin Exh. 40, p. 22.

First, the permit term was requested by Applicant and NTMWD as a result of their settlement. It is a settlement provision. Yet, the inclusion of such settlement provisions in permits appears to conflict with the current ED policy that it will not put third party settlement provisions in TCEQ permits.

More importantly, TCEQ staff, in effect, admitted that the provision is one it cannot and would not enforce because they consider it contingent upon the Applicant to provide information on whether regionalization is feasible. Tr. V. 2, pp. 556 - 7. It leaves regionalization entirely up to Applicant. If Applicant says the regionalization is not economically feasible, it does not have to participate in a regional facility. ED's permit engineer, Mr. Trede, admitted that TCEQ does not make such feasibility determinations once a permit is issued. Tr. V. 2, p. 556, line 17 to p. 557, line 18.

And even more importantly, there is now evidence that clearly shows that a regional hook-up is feasible. There was no evidence to even suggest that the regional facility is not going to be built on schedule or in the way the report recommends. The final report is the best and only evidence.

There is, however, no evidence that it should take 24 months for Applicant to hook up to the regional facility. There is no evidence to support the settlement provision that Applicant requested and staff added to the permit.

Given that they will be at the same location, the Applicant's wastewater should be the first to go to the regional facility. Any piping or other facilities can be built as the regional plant is built.

Thus, the current language of the permit terms should be changed to read

“The wastewater authorized to be treated under this permit shall be routed to the Elm Creek Regional wastewater treatment facility or the equivalent area wide waste collection treatment and disposal system at the time the facility or system is

put into operations for treatment and disposal of wastewaters.”

Protestants have provided Findings of Fact and Conclusions of Law below to support this permit term.

B. Even if Applicant is not required to use the new regional plant, regionalization should be required in the short-term. There is no need for the proposed treatment facility at all. That is even clearly in the record now given the introduction of the final regionalization study demonstrating that the large regional facility will be available in just a few years. Now the question is, Whether there is available capacity that is economically feasible in the region for Applicant to use until the regional facility is on line?

The City of Farmersville WWTP is available for Applicant to use until the regional facility is built. While the WWTP and its associated collection lines are just a few feet more than three miles from Applicant’s proposed WWTP, the three-mile guidance in the application form is not a barrier. It is "rule of thumb." It is not a rule and cannot, under Texas law, be used as such since it has not been adopted by rulemaking.

The City of Farmersville WWTP should have been considered as one of the alternatives that Applicant here must evaluate.²¹ Even if the costs of pumping Applicant's wastewater to the City are more than the cost of the Applicant's new package WWTP, the issue is not a comparison of costs, but whether the use of the City's WWTP is economically feasible.

Applicant presented no credible evidence that it is not. Applicant presented no evidence, because it did no evaluation of costs or feasibility.

Most of Applicant's houses will in fact be well within 3 miles of the Farmersville WWTP. Applicant should not be allowed to ignore the City of Farmersville option, by locating

²¹ Tr. V. 2, p. 551.

its WWTP on land over 3 miles away from the City's WWTP when the vast majority of the development is within 3 miles.

Moreover, it is not the position of the TCEQ that regionalization stops at three miles.

The testimony of Mr. Kent Trede, the TCEQ permit writer for this facility, makes that clear:

Q: (Mr. Lowerre) But if you had the information -- let's say Applicant or someone else, maybe the treatment operator, brought you information about a facility 3.1 miles, would you consider that as a possible regional hook-up?

A: (Mr. Trede) Yes.²²

Applicant did not bring such information, and TCEQ staff apparently did not make its own inquiry.

It is not Protestants' burden to prove that short-term regionalization is feasible. Applicant has the burden of proof on regionalization, and all reasonable options for both the short term and long term. Texas law does not distinguish short or long term regionalization.

The law is clearly intended to force reductions in small facilities and encourage use of larger facilities that have better designs, with back-up equipment and back-up power, and other benefits that economies of scale can bring to regional facilities.

Here regionalization can be accomplished so that Applicant's package plant is never needed.

There is clearly credible evidence that the City of Farmersville has the capacity to accept waste from Farmersville Investors for at least three years, probably much longer, and until there is a regional facility available.

First, all of Applicant's evidence of regional or area-wide alternatives was focused on

²² Tr. V. 2, p. 552, line 25 to p.553, line 5

those plants serving the “ultimate” 0.5 mgd needs of Applicant, i.e. the long-term need.²³ Yet obvious short-term options exist to serve the lower flows that are expected by Applicant's own experts. In neither its original or supplemental pre-filed testimony did Applicant even attempt to address the feasibility of the City's facility for the short term.

Mr. Barry, Applicant's application engineer, concludes that the City cannot provide the ultimate .5 mgd service. That was the end of his inquiry. He stated that that there was no need to consider anything else.

That is clearly not true. Once the regional facility becomes a possibility, the short-term use of the City should have been considered by Applicant and considered by TCEQ staff. It is a logical solution.

Mr. Barry stated that the City of Farmersville has .18 mgd of excess capacity.²⁴ That is almost twice what Applicant needs for the initial phase of operation and more than it will need for the first three years of operations.²⁵

Applicant admitted that it did no economic feasibility study of this alternative²⁶

Moreover, Clearly, Applicant could have evaluated the feasibility of pumping the sewage some three miles to the City of Farmersville's existing plant (operated by NTMWD) until a regional plant is on-line. It could have, in fact, evaluated the cost of using **the same pipeline that will be used to pump the sewage from that City to the Regional plant at the Applicant's site and, thus, partnering with the City for a pipeline that would help both entities.**

²³ See, for example, APP. Exh. 3, SB-2, p. 64.

²⁴ App. Exh. 4, p. 15, lines 16-17.

²⁵ App. Exh. 4 p. 15, lines 13 -20 and p. 16, lines 9-15.

²⁶ App. Exh. 4, p. 15, ll. 13-20.

Applicant did nothing to look at such options. It simply failed to meet its burden of proof on the regionalization issue - an issue that needs more serious attention than the ED is currently providing.

Texas Water Code §26.0282 makes clear that the need for a facility is weighed against the availability of **existing or proposed regional systems**. Chapter 26.0282 further specifies that this existing or proposed regional system need not be sponsored by government action, as existing or proposed systems include “those not designated as such by commission order.” Therefore, even if the City of Farmersville WWTP has not been designated as a “regional facility,” all it would take is a decision by TCEQ to order it as such. The Legislature plainly contemplated such orders and gave TCEQ the authority to issue such orders.

Applicant did not show that an arrangement to pump sewage to the City of Farmersville is not economically feasible. Applicant presented no evidence on the feasibility of using the City of Farmersville’s plant. Staff should have seen the City on Applicant's maps and asked for the assessment of the feasibility. Staff, however, apparently takes the position that once an applicant has done a 3-mile review, staff's responsibilities to encourage regionalization end. That is not what the law, nor any TCEQ rule, provides.

C. The Applicant proposes a misinterpretation of Texas law. Finally, Protestants need to not that the PFD adopts a narrow a view of the need consideration of TWC § 26.0282 that Applicant put forward. It is clearly not the interpretation of the Commission in the past.

Applicant proposed and the PFD adopts the position that, in determining whether a WWTP is needed, TCEQ need only consider the start date, projected size, and projected growth of the proposed development.²⁷ This interpretation is based off a limited reading of section §

²⁷ Amended Proposal for Decision, p. 37.

26.0282, Tex. Water Code. This law, however, calls for consideration of existing **or proposed regional options**. It states:

...the commission may deny or alter the terms and conditions of the proposed permit, amendment, or renewal based on consideration of need, **including**, the expected volume and quality of the influent **and** the availability of existing or **proposed area-wide or regional waste collection, treatment, and disposal systems** not designated as such by commission order... (emphasis added)

That of course is what the Commission did in the Lake Travis II decision where it required regionalization, even though the regional facility would not be built for some time. The PFD also ignores the option of the City of Farmersville existing capacity, not even requiring the Applicant to evaluate it as an option.

The ALJ also errs in interpreting “proposed” in TWC § 26.0282 to include only government action that has been taken to propose an area-wide system. Government action does not need to be taken for a regional system to be considered “proposed.” This is plainly stated in TWC § 26.0282, which requests consideration of existing or proposed regional systems “not designated as such by commission order.”

VIII. ISSUE 4: PROTESTANTS’ HEALTH AND PROPERTY

A. Interference with Protestants’ use and enjoyment of their property: Until the remand hearing, no one know that Applicant was relying upon a dam or barrier to block flow of lake water up the cove and block flow of effluent and rainwater down the cove to the lake. At the hearing, the Applicant claimed that there will be a barrier up to 493.49 feet msl that will block the movement of water to the lake until the pool behind the barrier reaches that level.

At that level the pool will be well up onto Protestants’ property.

The ALJ ignores this fact. She accepts and relies first upon the Applicant’s position that the sediment build up at the bridge to 492.17 feet will block movement up on Protestants property some of the time. The problem with that is, of course, that this sediment build up is not

a permanent barrier to water moving upstream. The second survey found sediment on the concrete apron a foot and a half deep. Thus, any heavy rain storm that moves water down the creek could erode the sediment barrier and any blockage of water up on Protestant's property.

The survey itself notes almost a foot-and-a-half of silt at the point of discharge.²⁸ And it was Applicant's expert, Dr. Young, who testified at the original hearing that such sediments can accumulate and disperse over time.

The second problem for the ALJ is the fact that the barrier is almost 1.5 feet higher than this sediment level. Thus, a full pond of effluent will flow back above the sediment buildup and well onto Protestants' property.

The pond created by the effluent will backup effluent more than 250 feet onto Protestants' property, making a significant part of that property unusable, including property above the creek, onto the uplands of Protestants.²⁹ Applicant has no right to use any of Protestants' property. TCEQ has no authority to authorize such use. In fact, such an action would take Protestants' property.

The Corps of Engineers has a flood easement, but only for natural conditions. It has no right to cause unnatural flooding, which of course will occur due to the ponding in the creek.

Moreover, this flooding of Protestants property is not the same as the use of a water course to carry effluent over a person's property. That downstream effect is an allowed use of the water course. Creating a pond to flood upstream property is not.

The issue referred was whether the discharge would interfere with the use and enjoyment of Protestants' property. That issue was not properly or adequately evaluated because the

²⁸ Applicant Exhibit 18, p. 6 (the first part of the over-sized survey).

²⁹ See Appendix 3. As can be seen, elevation measurements west of CR 550, on Protestants' property, read as follows: 491.91, 491.96, 493.95.

Applicant simply did not present any evidence on it other than the surveys that show the flooding.

There is no testimony, no expert opinion and no basis to find such flooding with effluent will not adversely affect Protestants' use of their property. The burden is on Applicant.

Applicant did not present any evidence on the frequency of the level of the effluent pond being full, i.e. at 493.5 feet msl. The Applicant did not present any evidence on how that frequency would be affected due to rainfall adding to the water.

There is no evidence on evaporation or infiltration rates to suggest the pond would not be full at all times. According to Applicant's survey, the water is going to back up until it reaches the 493.5 level and spill over any barrier. By then, the water is well backed up onto Protestants' property.

Is this a precedent this Commission wants? Surely the Commissioners respect private property rights enough to require some evidence on the issue it referred.

And there is clear evidence of the flooding. Photographs taken by Protestant Mr. Martin show water backing up under the road and onto Protestants' property.

The law is also clear. The flooding of Protestants' land would violate a long history of Texas law that one person cannot build a dam or a levee or do other steps that result in flooding of land of upstream owners. This law is, for example, codified in part in Texas Water Code § 11.086(a).³⁰ This same principle is included in TCEQ's rules for municipal solid waste landfills, where changes in the elevation of land and resulting changes in drainage patterns cannot significantly affect lands of another and the natural flow of the water off the land and into

³⁰ "No person may ... permit an impounding ... to continue in a matter that damages the property of another by the overflow of water impounded."

creeks.³¹

Again, there is no evidence that the flooding will even stay within the banks of the creek on Protestants property. Applicant's first survey indicates it will not. It will spread out on Protestants' land around the banks of the creek, making that land unusable, if not contaminated.

B. Other adverse impacts from ponding of effluent that have not been addressed by

Applicant: A number of potential effects of the 700+ foot long pond of effluent will be created under Applicant new scenario of blockages in the cove. Some fall within the scope of the issues referred. Others would likely have been raised had the potential for such a pond been part of the initial application. The ones that will be addressed are

- a. Contamination of the shallow ground water under Protestants' property and thus, Protestants shallow well.
- b. Risks of public exposure at the road.
- c. Inadequate public notice.

The key documents in evidence on extent of flooding are Applicant's surveys. The second is the basis for the claim that the pond will rise to a height of 493.49 feet msl, as that is what the survey says is the low spot on the dam or barrier across the Creek. The first survey provides the elevations on Protestants' lands, which even if off by half a foot, as Applicant may claim,³² still means that effluent will back up more than 250 feet on the Protestants' property.³³ It will back up almost to Protestants' shallow hand dug water well.

The large pond of effluent (and rain water after storm events) can, therefore be more than 700 feet in length – over two football fields in length with undetermined widths. The surveys did

³¹ 30 TAC 330.303(b) and 330.305(a)

³² Tr. V. 3, p. 126, lines 12-22.

³³ This distance can be approximated on Martin Exhibit 33 by using a scale and measuring the distance to the elevation reading of "491.96" on Protestants' property.

not provide elevation measurements of the banks or above the banks.

Such a large pond of effluent has impacts on Protestants, the public and the operations of Lavon Lake for water supply and flood storage, but the pond was not identified until the remand hearing.

One obvious concern of Protestants is the potential risk of contamination of ground water. Mr. Martin testified that his well is approximately 15 feet deep.³⁴ This shows how shallow ground water is in the immediate areas.

Once Protestants identified the well and raised the issues of ground water contamination as relevant under two referred issues, an impact of their use of the land or a risk to their health, Applicant had the burden to show that the ponded effluent would not affect groundwater quality or Protestants rights to groundwater elsewhere. Applicant presented no evidence on the issue.

Because Applicant did not advise the TCEQ staff of the pond when it applied, the staff did not refer the application to any staff for any groundwater impact evaluation. Thus, there is no evidence in the record from the ED on the ground water contamination issue either.

Others no doubt would have concerns if the new ponding evidence was available at the beginning of this process. With new evidence that there will be water standing in a large pond, people driving over the bridge or otherwise coming to the area can easily believe the water is Lavon Lake and available for swimming. The Lake waters are shown to come to this bridge on all public maps of the area. TxDOT and Corps maps show the lake up to the bridge over the cove.³⁵

Would county or state health officials, Corps of Engineers, or others have concerns with

³⁴ Martin Exhibit 1, page 5, line 16.

³⁵ Martin Exhibits 45 and 50; see Appendix 2.

public access to the effluent pond? We will not know in this process because there was no notice of these facts in the application at the time of notice.

C. Health of the Protestants: The issue of health impacts was, however, clearly raised by Protestants and referred to SOAH. It was based in large part to the risks to Protestants' water in their well.

Before the evidence of the effluent pond, the concern was

1. the health risk of water backing up and flowing into the top of the well when the lake was above the normal pool level. That concern remains. And,
2. the health risk from the failure of applicant to address non-traditional pollutants:

This second issue was addressed in detail in Protestants' original exceptions. No new evidence relevant to the issue resulted from the remand, except evidence of ponding.

There are easy solutions that any qualified expert could have recommended to help address such non-traditional pollutants – to keep many of these pollutants from being flushed into the sewage system. Applicant could have, for example, proposed common sense solutions such as establishing a voluntary drop off location for out of date or unneeded pharmaceuticals. More effective would be for Applicant to add a deed restriction its plots prohibiting residents from disposing of such contaminants "down the drain."

But as with the ground water contamination issue, Applicant simply ignored this concern, hoping the ALJ and Commission would do so also. Protestants believe Texas courts will not.

The risk of groundwater is, however, the key issue, as there is now a second pathway for water to the 15 foot well. The contaminants, can not only enter from the top, they can enter as contaminated ground water, infiltrating through the nearby pond of effluent.

It is important to remember that the evidence puts the bottom of the well at about 486 or 7 feet msl. That is only a foot or two below the lowest point of the effluent pond. The

groundwater is very shallow. Protestants' well is shown on Applicant's survey at an elevation of 501.84 feet msl.³⁶ The well is only 15 feet deep.³⁷ Thus, if ground water is at the bottom of the well, it is at this 486 to 487-foot level. The bottom of the effluent pond is 490.81 feet msl just 3 or 4 feet above the bottom of the well. The bottom of the pond/creek on Protestant's property is only foot or so higher.

Thus, there is not much separation between the surface and ground water. There is no evidence of any clay or impervious layer to protect the ground water. There is no evidence that there no risk to ground water. Applicant simply ignored the issue. The PFD also ignores the risk, and, thus, the issue referred.

To avoid any questions about the length of the effluent pond, the evidence is clear: Applicant's surveys demonstrate that the effluent water in the pond will back several hundred feet onto Protestants' property. The pond of effluent will be more than 700 feet in length. The pond will start to back-up at the downstream end – where Applicant claims there is a 493.49 high point.³⁸ This blocks flows in either direction. According to the survey, it is almost 400 feet upstream to the road.³⁹ The road is another 50 feet in width. The pond will back up the creek until it come to the 493.49 feet msl level, which is measurably more then 250 feet onto Protestants' property, west of the west side of the bridge.

The 250-foot distance on the Martin's land is actually less than what the actual distance is likely to be. Applicant's survey shows the elevation of the creek just west of the road at 491.91

³⁶ Martin Exhibit 33.

³⁷ Martin Exhibit 1, page 5, line 16.

³⁸ See Applicant Exhibit 18, page 6. Station 3+88.00 shows an elevation of 493.49 feet above msl.

³⁹ 388 feet, to be exact. See Applicant Exhibit 18, page 6.

feet msl on Protestants' property.⁴⁰ Going back further upstream, the survey shows an elevation point 491.96 feet above msl several hundred feet farther west on Mr. Martin's property.⁴¹ That, of course, is still 1.5 feet below the 493.5 elevation. The survey does not go further back or west, so the evidence in the record does not indicate how far west the creek remains under that 493.5 elevation.

The ponding at the 493.49 feet elevation will, however, likely back up much farther than that 250 feet and be more than 700 feet in length. It appears that the ponded effluent will come close to Protestants' well which is only 100 feet farther west.

Even if we accept Applicant's discrediting of its own first survey, claiming that the original is half-a-foot lower than the second survey, the surveyed point in the creek some 250 feet from the road would still be below the 493.49-foot downstream high-mark. Moreover, there is simply no evidence to suggest that a major section of Protestants' property will not be flooded, at least at times, and possibly permanently.⁴² No evidence was presented other than the effluent will create the pond behind the 493.49-high barrier.

D. Applicant has not met its burden of proof: The real issue is simply the failure of the Applicant to address these issues once it had the new survey and could determine the potential elevation of the pond.

Applicant simply failed to address the issues that arise with Applicant's new theory of a large downstream barrier to flow. Applicant has the burden of proof on the health and property

⁴⁰ Martin Exhibit 33.

⁴¹ Martin Exhibit 33. Even considering Mr. McCulah's testimony that this survey was half-a-foot off, it would still be at least a foot under the 493.49-foot level of the effluent pond. Tr. V. 3, pp. 47-49.

⁴² Again, it should be stressed that the flood easement that exists on Protestants' property only allows the Corps of Engineers to flood part of Protestants' land for its purposes of storing flood waters to protect downstream properties from flooding. The flood easement does not provide any rights to Applicant to create additional flooding.

impact issues referred by the Commissioners. Contamination of ground water is clearly an issue well within the jurisdiction of the Commission in a discharge permit hearing. In fact, it is a violation of Texas law to contaminate ground water unless the contamination is pursuant to a permit or other authorization from the TCEQ. Section 26.121, Texas Water Code.

E. Surface Water Quality in the Pond: There is one other related issue that these exceptions will discuss briefly, and that is the question of modeling of the discharge and whether the effluent standards in the permit are adequate, even if the discharge location is not in the lake. In brief, Mr. Michalk did not consider the 700 foot long pond. He assumed a small ponding, a "pool." Mr. Michalk looked at the pond as less than 400 feet in length, because he assumed it would not back-up under the bridge and onto Protestants property. There is no explanation for why he made that assumption and used a pond that is only half the real size. There is no evidence that a correct assumption of the size of the pond would result in effluent standards that are met by the proposed permit. There is simply no evidence of the actual situation.

Moreover, Michalk only evaluated the 400 foot long pond for dissolved oxygen levels⁴³ It has not been, for example, evaluated by TCEQ staff for nutrients standards as the original discharge to a dry creek was evaluated. There have been no evaluations for other constituents, human health impacts or any other possible impact or pollution it may cause.

IX. BURDEN OF PROOF

The ALJ is correct in asserting that, per 30 TAC § 80.17, the Applicant has the burden of proof—*by a preponderance of the evidence*—in this proceeding. Protestants, however, take exception to the ALJ's position that the burden of proof on the fourth referred issue, the health issue. The ALJ holds that "in this proceeding, the burden shifted to Protestants to demonstrate

⁴³ Tr. V. 4, p. 409, lines 7-20.

that unregulated contaminants in the effluent will be harmful to their health.”⁴⁴

Protestants assert that their burden is to raise the issue only. The burden of proof remains with the Applicant once the issue is properly raised in comments and referred as an issue to SOAH by the Commission.

Moreover, Protestants went further, specifying their concern over a set of pollutants. The issue was not ill defined and the Applicant had the burden of proof to present evidence to show that the application and permit would protect water quality and public health from the risks of such pollutants.

Protestants raised their concern that non-traditional pollutants and risk to ground water and their well from Applicant's discharge early in the process, They claimed that the discharge would adversely affect their health, the public health and the environment in their comments on July 11, 2007. The Executive Director (ED) responded basically that there were no federal standards for such emerging pollutants (ED Exh. 3. p. 7 comment No. 9 and response thereto) and treated the well issue as a buffer zone issue.

Chapter 26 of the Water Code requires TCEQ to determine if the discharge will adversely affect public health. This issue was referred to SOAH, and the underlying issues was clear to Applicant from the start.

As Applicant pointed out, if the concern was just health risks from traditional pollutants, the Commission would not have referred the issue. Protestants agree. Applicant cites Commission Soward for this idea. (Applicant's first motion for partial summary disposition, p. 3 & 4.)

While Commissioner Soward goes further to suggest that the burden may shift to

⁴⁴ Proposal for Decision, p. 6

Protestants to present evidence, Protestants disagree. Under Texas law, as discussed above, Applicant has the burden of proof by a preponderance of the evidence (30 TAC § 80.17).

In this case, however, it does not matter. Protestants presented their proof: 1) a well on Protestants' adjacent property leading to groundwater that will be contaminated by pollutants from Applicant's facility, and 2) pooling effluent on Protestants' property that could harm those that come in direct contact with it.⁴⁵

There is nothing in the law or rules to suggest that the water quality standards alone do anything to protect groundwater and public health from exposure to contaminants in ground water. TCEQ will examine the groundwater contamination issue when it appears that there could be a risk. Here, staff did not, because it did not have the information on the large effluent pond that Applicant now claims will exist.

When the Commission referred the health issue, it knew it included non-traditional pollutants and it knew there was the issue of contamination of the well. The Commission did not suggest in any way that the public health issue should be treated differently from other issues, where the Applicant has the burden of proof. Applicant simply has the burden to prove that the discharge would not adversely affect public health. The PFD improperly shifts that burden.

In early 2009, the Commission, in fact, made it clear in a final order on a waste water permit that it can and will consider impacts of non-traditional pollutants, under some circumstances. In granting the permit, the Commission changed the ALJ's proposed conclusion of law to make that clear. In essence, the new Commission added, "Under the facts in this record," to the proposed conclusion of the ALJ that there is no legal obligation for applicants to present evidence on non-traditional pollutants. The new conclusion of law states:

⁴⁵ See discussion in Section VIII (C), above.

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.⁴⁶

Thus, the question of how emerging pollutants will be addressed is fact specific. The present case has the unique set of “facts in the record,” including the shallow well that could be contaminated with traditional and non-traditional pollutants, and polling effluent on Protestants’ property. These are the facts that justify Protestants’ position that the Applicant must present evidence and prove that there is no significant health risk due to contamination of the ground water and thus, water under Protestants’ property and in their shallow, hand dug well.

The TCEQ rule 30 TAC §217.3(b) provides that the agency "may require more stringent design criteria of a collection system or treatment facility **if the executive director determines it is necessary to protect public health.**" Obviously the Commission can determine that it is necessary, even if the ED did not.

Since, under certain conditions, the discharge limitations and WWTP plant design may need to be made more stringent to protect public health, an applicant has the burden of proof to show the facts do not justify more stringent conditions in the permit. The Commission has, in effect, announced just that in a recent case involving the Hays County WCID. Applicant ignored the issue and presented no such facts.

Protestants take exception to the ALJ’s conclusion that the Applicant has created a rebuttal presumption that Protestants’ health will be protected. That is not the case. The burden to prove protection of public health does not shift to Protestants. They have the burden of raising the issue sufficient to get it referred to SOAH. The issue was referred.

⁴⁶ The ALJ has stricken this document from the record, but Protestants believe it is proper. This document was presented in closing argument to ALJ. The ED objected. This is not evidence; this is precedent. The Commission has a right to consider what it has done in the past in similar situations.

It should also be noted that in 2009, a new Texas law highlighting the need to address the risks of non-traditional pollutants was enacted. See SB 1757. Thus, Protestants' concerns are shared by the Legislature.

X. EVIDENTIARY ERRORS

Counsel for Applicant repeatedly made erroneous objections to evidence offered by Protestants in the original hearing and in the remand hearing. While most were properly rejected, several were sustained. Three of those rejections of Protestants' evidence are significant and have denied Protestants their rights to have relevant and significant evidence before the Commissioners.

The excluded evidence discussed below is clearly relevant and probative. The Commissioners should be able to consider these exhibits and base their decisions on them.

The two exhibits discussed below apparently were excluded based on Applicant's argument that they are hearsay. That is not so. Both were copies of documents prepared by Federal agency officials. The relevant exception to the hearsay rule that applies is therefore discussed first.

Section 801(8) of the Texas Rules of Evidence, Hearsay Exceptions, lists, among other items:

(8) Public Records and Reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies setting forth:

(A) the activities of the office or agency

The two Corps of Engineers letters (certified copies of which were offered in Exhibit 48) are exactly the type of document that the hearsay exception is meant to cover. Such documents are admissible for the purpose of showing what actions an agency has taken.

In some cases, an official government document may quote a statement from someone

else, which quote could then be hearsay. Even the inclusion of such hearsay in an official government document does not allow exclusion of the entire document as hearsay. The hearsay within the document is simply no evidence. It cannot be relied upon. The document that set forth government policy or actions is still admissible for the purposes allowed under TRCP Section 801(8).

Without this exception, an official from the relevant agency would have to be called to testify to its policies or actions. The rule was created in part to avoid such requirements. The rule was created to avoid extending hearings by having to bring in employees of any agency, including TCEQ.

Furthermore, this letter is something that should be in the record in any case. This is information applicants are instructed to submit to the TCEQ (See App. Exh. 10, p. 17 of 65, item 5(k).)

A. Martin Exhibit 48: This exhibit is the 2010 Corps of Engineers letter prohibiting Applicant the right to use the proposed site of the outfall. Protestants obtained this letter at the same time as all other parties, in October, 2010. It clearly could not have been offered in the initial SOAH hearing, which occurred well before then. It also could not have been included in Protestants' notice of exhibits for the remand hearing, again because it did not exist at the time. Protestants proved good cause for not offering it before the remand hearing.

The letter falls under the hearsay exception and is clearly relevant to the decision to grant or deny the permit. It is also clearly relevant to issues on remand.

Applicant objected to the offer of the letter, arguing it is not relevant to two referred issues, the water quality and siting issues. The letter is relevant to the water quality issue since, if the proposed outfall location cannot be used, there is no evidence of whether the discharge will be to the Lake or not. Moreover, it is clearly relevant to the siting issue on whether the

Applicant has ownership or control of the site of the facility, which is defined to include the outfall, as well as other fixtures for treatment operations.

Without this letter in the record, Applicant will continue to argue they can use the Corps property. Applicant's representative, Mr. Kruppa, a lay witness, stated under oath that is how he reads a prior Corps letter. That letter is discussed below. The new letter is clearly relevant, as it shows that Mr. Kruppa's interpretation is not the same as the owner, the Corps of Engineers. The letter corrects the record. It is also relevant to the credibility of the Applicant's main witness.

Moreover, the letter is exactly the type of new evidence that can be presented in a contested case hearing at any time, once good cause is shown.

Under Applicant's theory of evidence, bankruptcy by this Applicant between the time of the initial hearing and remand would not be relevant, because it is not within the scope of the remanded issues. Likewise, if the Applicant sold the wastewater treatment site and permit application to a regional government, such as NTMWD, Applicant would argue that fact is not relevant, as it is not an issue on remand. And if the Applicant here found a fatal problem, such as a fault or sink hole that would allow the treated effluent to go directly into the groundwater, this Applicant would argue that it has no responsibility to let TCEQ know and that even Protestants could not present such new evidence.

There are clearly important facts of which the Commissioners should be advised, even if the information is only known after closure of the initial phase of a contested case hearing. In fact, contested case hearings have been reopened to allow new important evidence. The remand here was done, in part, to allow new evidence into the record. Here, a reopening would not have been needed if Applicant had not misled the ALJ into error.

B. Martin Exhibit 26: This is the 2008 Corps of Engineers letter prohibiting Applicant the right to use the proposed site of the outfall. Protestants offered Martin Exhibit 26 during the

first hearing. Applicant objected. The Judge took the letter under advisement and then issued Order No. 9, which "sustains Applicant's hearsay objection but admits the letter in relation to testimony elicited about the document."

This 2008 letter is also attached to the 2010 letter that is Martin Exhibit 48. This 2010 letter refers to that 2008 letter and further explains the letter. Again, Martin Exhibit 26 falls within an exclusion to the hearsay rule.

The 2008 letter was admitted for limited purposes, to help explain the testimony of Applicant's witness Mr. Kruppa, who testified about the letter. Mr. Kruppa gave a lay opinion about what it meant to him.

That testimony and the limited admittance of Exhibit 26 also requires the admittance of Exhibit 48 at least for the same purposes, since it is directly related to the testimony about the location of the outfall.

The 2008 letter is clearly relevant to the issue of ownership of the outfall location and potential use of it. It should have been admitted as part of the first hearing or in conjunction with Exhibit 48 during the remand hearing.

C. The testimony by Mr. Martin on the distance from the old road to the new road.

Applicant's efforts to keep Mr. Martin's lay testimony out of the record shows how worried it was with that testimony. Applicant's counsel argued that Mr. Martin lacked the expertise to make simple measurements with a ruler.

Yet, TCEQ's staff witness said he could have done that measurement in the tenth grade.⁴⁷ Taking a ruler and measuring distances on a map does not require any special expertise.

Moreover, this matter was addressed properly by the ALJ in the initial hearing in a way

⁴⁷ Tr. V. 4, p. 342, lines 5-12.

that directly conflicts with the ALJ's ruling on Mr. Martin's testimony.

JUDGE CLONINGER: But I think he can give his opinion on what he measured on a map that someone prepared. I think a layperson can do that.⁴⁸

The excluded testimony, which has been preserved in a bill, explains how Mr. Martin measures distances on a map with a ruler and the scale on the map. He sought to testify to "what he measured on a map."

The testimony is relevant and important as it shows that Applicant's testimony on the location of the old road, prior to relocation, is not correct.⁴⁹ It shows that much of the premise of what Applicant argued about the barrier is not correct. It confirms that Applicant did not even attempt to locate the old road or any culvert that may continue to allow water to slowly back up into the unnamed tributary and up to the outfall location.

Protestants did not need to spend money and hire an expert to present simple measurements on maps. They have a right to present lay testimony to the results of simple tests or skills lay persons can do. If Mr. Martin's measurements had been allowed in and if Applicant then believed they were wrong, Applicant has the opportunity to rebut with simple testimony of lay witness or even its experts that were at the hearing. Moreover, the Judge or the Commissioners can always then determine whether the testimony is sufficient as a basis for findings or decision.

There was simply no harm or prejudice in letting in the testimony. Applicant misled the judge into thinking the evidence was something technical, when it is clear from Mr. Martin's testimony in the record and arguments of counsel that this was not testimony that only experts can give.

⁴⁸ Tr. V. 1, p. 148, line 24 to p. 149, line 14.

⁴⁹ The testimony was preserved as a bill and is available for the ALJ's review.

There were many other efforts by Applicant to lead the Judge into erroneous rulings. For example, Applicant objected to the Corps of Engineers' project map (Martin Exhibit 50) despite the fact that it is clearly relevant as showing the Lake and roads at issue. It was also a certified copy of an official government document. The Judge sustained the objection.⁵⁰ When Protestants offered the exhibit again later in the hearing, Applicant did not even object. Its counsel understood it had gone too far with the initial objection. Thus, the document was admitted.⁵¹

That is also true of the county map (Martin Exhibit 45), which was admitted for only a limited purpose, when Applicant strongly objected.⁵² When offered in the remand hearing, Applicant did not even object.⁵³

Here, counsel for Applicant clearly pushed too hard to keep legitimate evidence out of the record. But the ALJ accepted Applicant's erroneous arguments.

XI. PROPOSED FINDINGS, CONCLUSIONS AND PERMIT TERMS

Proposals are provided for all major issues in the following order:

- A. Location, ownership and control of the outfall,
- B. State resources and staff roles,
- C. Regionalization (long-term, short-term and permit conditions),
- D. Discharge to lake or intermittent stream,
- E. Ponding, flooding of Protestants' property and added health risks,
- F. Access to the facility, and
- G. Protestants' use and enjoyment of their property and public health.

⁵⁰ Tr. V. 3, p. 108, lines 22-23.

⁵¹ Tr. V. 4, p. 329, line 7.

⁵² Tr. V. 1, p. 353, lines 7-24.

⁵³ Tr. V. 3, p. 214, line 14

Protestants' proposed findings of fact, conclusions of law and permit terms are provided below.

A. Location, Ownership and Control of the Outfall

Findings of Fact:

- a. The Federal Government, through the Corps of Engineers, owns in fee the property that Applicant proposes to use for its outfall and much of its discharge pipe for its proposed facility.
- b. Applicant did not provide in its application or as evidence in the hearing any document showing a lease or other right to use or control the land on which the outfall and part of the discharge pipe are proposed and has not shown any authority from the Corps of Engineers or other agent of the Federal Government to use the land for its discharge pipe or outfall equipment for the proposed treatment facility.
- c. The Corps of Engineers has advised Applicant that Applicant cannot use its property for the discharge pipe and outfall.
- d. The Applicant has proposed a number of locations for its outfall, and the application and public record may not clearly show the actual location.
- e. The longitude and latitude provided by Applicant in the remand hearing provide the best description of the outfall location and should be included on the first page of any permit that is issued.

Conclusions of Law:

- a. Applicant has failed to meet its burden to provide documentation in its application and to prove in the hearing of its ownership or control over the land owned by the Federal Government and controlled by the Corps of Engineers on which Applicant proposes to locate part of its discharge pipe and outfall.
- b. The inclusion of the longitude and latitude of the outfall in the permit satisfies the requirements of Section 26.029(a) (2), Texas Water Code.

B. State Resources and Staff Roles

Findings of Fact:

- a. The application filed with TCEQ included a number of errors and omissions that were not corrected by the Applicant, including a United States Geological Survey map that was out of date and did not correctly show the location of Lavon Lake, the location of the proposed treatment units, the location of the proposed outfall, or the location of CR 550.

b. Staff attempted to provide information not properly filed by the Applicant. the work of the staff was not and cannot be a substitute for the Applicant meeting the requirements of the rules and application requirements.

c. The failure of the Applicant to provide important information on the conditions at the location of the outfall has resulted in significant delay and costs in this proceeding.

Conclusions of Law:

a. Applicant has failed to meet its burden, prepare a complete and accurate application or to correct errors and omissions in its application. Staff's effort to provide the missing data in the hearing cannot be used to support the Applicant in meeting its burden of proof.

C. Regionalization

1. Long-term

Findings of Fact:⁵⁴

a. It is economically feasible to route the wastewater that would be treated under this permit to the Elm Creek Regional wastewater treatment facility or an equivalent area-wide waste collection treatment and disposal system at the time the facility or system is put into operation for treatment and disposal of wastewaters.

b. The Elm Creek Regional wastewater treatment facility or an equivalent area-wide waste collection treatment and disposal system is scheduled to be in operation by 2014 or 2015.

c. There is no long-term need for Applicant's proposed wastewater treatment facility.

Conclusions of Law:

a. Applicant has failed to meet its burden of proof to show a need for the proposed wastewater treatment plant in the long-term that cannot be met by the new regional or area-wide system.

b. Section 26.0282 and TCEQ rules justify, if not require, the use of the regional or area-wide system for the long-term wastewater management needs of

⁵⁴ All findings are supported by the results shown in Martin's Exhibit 40 , the February 2010 Final *Wastewater Feasibility Study*.

Applicant.

2. Short-term:

- a. The City of Farmersville has capacity to treat all of Applicant's short term needs for wastewater management and half of the long-term needs.
- b. The City of Farmersville collection and treatment system for its wastewater is within 3 to 3.5 miles from the proposed site of Applicant's treatment facility and within 3 miles of most of Applicant's property that would be served by Applicant's proposed facility.
- c. It is economically feasible for the City of Farmerville to route its wastewater that is currently treated by its facility to the Elm Creek Regional wastewater treatment facility or an equivalent area-wide waste collection treatment and disposal system at the time the facility or system is put into operation for treatment and disposal of wastewaters.⁵⁵
- d. Applicant has not evaluated the economic feasibility of using the City of Farmersville for its short-term treatment needs until the Elm Creek Regional wastewater treatment facility or an equivalent area-wide waste collection treatment and disposal system is in operation.
- e. Applicant has not shown a short-term need for Applicant's proposed wastewater treatment facility that cannot be met by the City of Farmersville.

Conclusions of Law:

- a. Applicant has failed to meet its burden of proof to show that it is not economically feasible to use the City of Farmersville treatment facilities to meet its short-term need for wastewater treatment until a new regional or area-wide system is in operation.
- b. Section 26.0282 and TCEQ rules justify, if not require, denial of the permit. Because of the failure of Applicant to perform the required evaluations of regionalization options to fill its wastewater needs in the short and long term.

3. Regionalization Permit Term

Findings of Fact

- a) The Elm Creek Regional wastewater treatment facility (WWTF) or an area-wide system is planned to be built by 2014 or 2015.⁵⁶

⁵⁵ This finding is supported by the conclusions of feasibility in Martin's Exhibit 40, the February 2010 Final *Wastewater Feasibility Study*.

⁵⁶ See pages 22 & 23 of Martin's Exhibit 40, the February 2010 Final *Wastewater Feasibility Study*.

b) The Elm Creek Regional WWTF is planned to be built at or adjacent to the site of Applicant's proposed WWTF on property owned by Applicant.⁵⁷

c) It is economically feasible for Applicant to send the wastewater that would be treated by its proposed WWTF to the Elm Creek Regional WWTF.

d) There has been no reason provided to indicate that Applicant's wastewater that is proposed to be treated by Applicant's treatment facility could not be sent to the Elm Creek Regional WWTF or an equivalent area-wide treatment and disposal system at the time that the WWTF or system is initially available to treat wastewaters.

e) The following provision should be added to any permit issued to require such regionalization of Applicant's wastewaters and to provide TCEQ with the authority to enforce regionalization.

The wastewater authorized to be treated under this permit shall be routed to the Elm Creek Regional wastewater treatment facility or an equivalent area-wide waste collection treatment and disposal system at the time the facility or system is put into operations for treatment and disposal of wastewaters.

Conclusions of Law:

a) The permit term requiring regionalization of wastewaters that may be treated under this permit with the Elm Creek Regional facility or an equivalent area-wide waste collection, treatment and disposal system at the time the facility or system is put into operations is consistent with and satisfies the requirements of Section 26.0282 of the Texas Water Code.

D. Discharge to the Lake or Intermittent Stream

a) The proposed location of the outfall will result in a discharge to a cove of Lavon Lake.

b) The proposed discharge will be to waters of Lavon Lake when the Lake is at its conservation pool of 492 ft. msl.

c) There is no evidence on the discharge limits that will be required to protect the water quality of Lavon Lake and meet the water quality standard for the Lake.

2. Conclusions of Law:

⁵⁷ See page 23 of Martin's Exhibit 40, the February 2010 Final *Wastewater Feasibility Study*.

a) Applicant failed to meet its burden to provide the information required for its application and to prove it will meet the requirements of 30 TAC § 305.48 and 30 TAC §281.5.

b) Applicant has failed to meet its burden of proof that its discharge will comply with surface water quality requirements of 30 TAC §307.

E. Ponding, Flooding of Protestants' Property and Health Risks

In the alternative, if the determination is made that the waters of Lavon Lake are blocked from entering the cove and flow up to the outfall location, Protestants request the following findings and conclusions:

Findings of Fact

a) The blockage in the tributary to which the discharge will be made will create a significant pond of effluent, at times filling up an area 700 feet long or greater.

b) The blockage is created by a high spot in the tributary at an elevation of 493.49 feet msl.

c) The blockage will result in a ponding of effluent that will back up and flood an area of Protestants' land at least 250 feet long.

d) There is no evidence that Protestants' use and enjoyment of their property will be protected and not adversely affected by the ponding of effluent on their property.

e) The bottom of the effluent pond will be in the order of 5 feet above the shallow ground water on the property of Protestants.

f) There is no evidence that groundwater below the ponded effluent, including that on the property of Protestants, will not be contaminated by the effluent or that Protestants' health will not be adversely affected as a result of such contamination.

g) There is no evidence that the groundwater below the ponded effluent will not be contaminated by the effluent and adversely affect public health.

Conclusions of Law:

a) Applicant has failed to satisfy its burden of proof to show that the contaminants in the effluent will not impact the health of the hearing requesters or interfere with their use and enjoyment of their property.

b) Applicant has failed to satisfy its burden of proof to show that the contaminants

in the effluent will not pollute the groundwater in the area of its discharge in violation of Section 26.121, Texas Water Code.

F. Access to the Facility

Findings of Fact:

- a) The only access road to Applicant's proposed facility is CR 550.
- b) During 100-year flood events, this road, and, thus, access to the facility will be blocked in both directions by flood waters over the road.

Conclusion of Law:

Applicant has failed to meet its burden of proof that it will comply with the TCEQ rule at 30 TAC § 217.328 requiring a least one access road that will not be inundated during the 100-year flood.

G. Protestants' Use and Enjoyment of Their Property and Public Health

Findings of Fact:

- a) Discharge from Applicant's facility will flow back onto Protestants' lands and, under flood level conditions, into Protestants' water well.
- b) Neither Applicant nor any other party provided any facts or analysis that demonstrates that there is not an unacceptable risk to the groundwater under Protestants' property and Protestants' water well from the movement of contaminants in the discharge from Applicant's facilities to ground water below the creek or to Protestants' well, especially from the large ponded area of treated effluent.
- c) Applicant's application contains inaccuracies and omissions of information required by TCEQ rules and application forms, including out-of-date maps, inaccurate location of the outfall, and lack of any information on barriers to movement of wastewater downstream or ponding of such wastewater at, above or below the outfall.
- d) Applicant's map of its buffer zone between its facility units and Protestants' land does not provide the information needed to determine if it is accurate.
- e) There is no evidence that non-traditional contaminants such as pharmaceuticals will not contaminate the ground water by entering Protestants' water well.

Conclusions of Law:

- a) Applicant failed to meet its burden of proof that its discharge will not cause pollution of ground water in violation of Section 26.121, Tex. Water Code.
- b. Applicant failed to meet its burden of proof under Section 26.121, Tex. Water Code that its discharge will not cause an unacceptable health risks to Protestants and others from the discharge or the potential contamination of ground water and Protestants' water well.
- c. Applicant failed to meet its burden of proof to protect ground water and public health pursuant to Section 26.121 and 26.003 of the Tex. Water Code.
- d. Applicant failed to meet its burden of proof that it has adequate buffer zones required by 30 TAC § 309.13(e)(1).

XII. CONCLUSION AND PRAYER

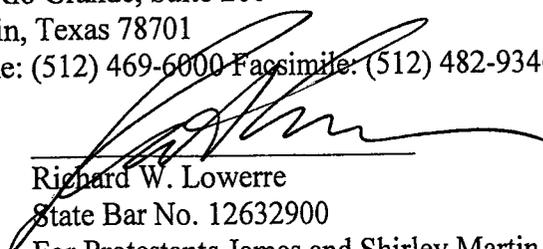
Applicant has failed to meet its burden of proof on an number of issues, even with unprecedented assistance by the Executive Director in preparing the application and in presenting its evidence.

The Commission has an opportunity to set precedent that will save the agency time and money and better protect the environment, public health and the Protestants in this matter.

WHEREFORE, PREMISES CONSIDERED, Protestants respectfully request that the Commission issue an order denying this permit and adopting the findings of fact and conclusions of law proposed herein.

Respectfully Submitted,

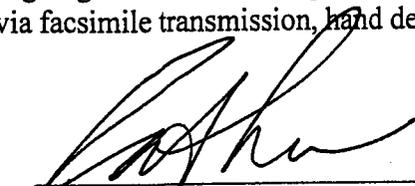
LOWERRE, FREDERICK, PERALES,
ALLMON & ROCKWELL
707 Rio Grande, Suite 200
Austin, Texas 78701
Phone: (512) 469-6000 Facsimile: (512) 482-9346

By: 

Richard W. Lowerre
State Bar No. 12632900
For Protestants James and Shirley Martin

CERTIFICATE OF SERVICE

I hereby certify that, on February 28, 2011, the foregoing Protestants' Exceptions for the hearing on remand was served on all parties listed below via facsimile transmission, hand delivery, or deposit in the U.S. mail.


Richard W. Lowerre

Mr. John Moore
Lloyd, Gosselink, Rochelle & Townsend, P.C.
816 Congress Avenue, Suite 1900
Austin, Texas 78701

Facsimile: (512) 472-0532

Ms. Kathy Humphreys & Mr. Michael Parr
Environmental Law Division, MC-173
Texas Commission on Environmental Quality
P. O. Box 13087
Austin, Texas 78711-3087

Facsimile: (512) 239-0606

Ms. Amy Swanholm
Public Interest Counsel, MC-103
Texas Commission on Environmental Quality
P. O. Box 13087
Austin, Texas 78711-3087

Facsimile: (512) 239-6377

Ms. LaDonna Castañuela
Office of the Chief Clerk, MC-105
Texas Commission on Environmental Quality
Austin, Texas 78711-3087

~~Facsimile: (512) 239-3311~~

E-file

The Honorable Sharon Cloninger
Administrative Law Judge
William P. Clements Building
300 West 15th Street
Austin, Texas 78701

~~Facsimile: (512) 322-2061~~

Hand Delivery

Appendix 1

Certified November 2010 U.S. Army Corp of
Engineers Letter



DEPARTMENT OF THE ARMY
FORT WORTH DISTRICT, CORPS OF ENGINEERS
P. O. BOX 17300
FORT WORTH, TEXAS 76102-0300

November 16, 2010

Office of Counsel

SUBJECT: Freedom of Information Act 11-027 (FP-11-006552)

Mr. Samuel Day-Woodruff
Lowerre, Frederick, Perales, Allmon & Rockwell
707 Rio Grande, Ste 200
Austin, Texas 78701

Dear Mr. Day-Woodruff:

This is in response to your Freedom of Information Act request wherein you requested a certified copy of the letter dated October 25, 2010 from the U.S. Army Corps of Engineers, Trinity Regional Project Office, with attachments that you provided with your request.

Attached, pursuant to your request, please find a copy of a Certificate of Custodian signed by Mr. Brian G. Phelps and the specific documents as outlined in the Certificate.

As the cost of processing this request was less than \$15.00, there is no charge for providing you with this information. If you have any questions regarding this matter contact the undersigned at (817) 886-1148 and reference FOIA No. 11-027.

Sincerely,

A handwritten signature in cursive script that reads "Delene R. Smith".

Delene R. Smith
Alternate Freedom of Information
Act Officer

Enclosure

STATE OF TEXAS §
 §
COUNTY OF TARRANT §

CERTIFICATE OF CUSTODIAN

I, the undersigned, BRIAN G. PHELPS, *Operations Project Manager, Trinity Regional Project*, for the Fort Worth District, U.S. Army Corps of Engineers, Fort Worth, Texas, in the performance of the functions of my office, hereby certify that the attached copies (listed below), are true and correct copies from the original work files compiled by the U.S. Army Corps of Engineers.

DOCUMENTS FOR CERTIFICATION

1. Letter dated 25 October 2010 from the Operations Project Manager, Trinity Regional Project to Farmersville Investors, LP. SUBJECT: Proposed Outfall on US Army Corps of Engineers Property Related to New TPDES Permit Application WQ0014778001, Lavon Lake, Collin, County, TX, with 2 Enclosures.
 - Letter dated February 1, 2008 signed by Mike S. McInnis, Chief Natural Resources and Recreation Section, US Army Corps of Engineers, Ft Worth District, to Mr. Bryan Kennedy, PE, Jones & Carter, Inc.
 - Mailing List, Application of Farmersville Investors, L.P.

I further certify that I am the Operations Project Manager, Trinity Regional Project, that I have legal custody of the above-described documents, and that am the lawful possessor and keeper of the above-described records in the Fort Worth District of the U.S. Army Corps of Engineers, Fort Worth, Tarrant County, Texas.

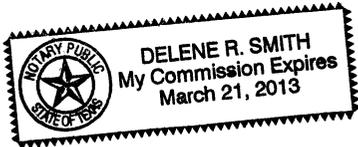
IN WITNESS WHEREOF, I hereunto set my hand this 17th day of NOVEMBER, 2010.



BRIAN G. PHELPS
Operations Project Manager
Trinity Regional Project

STATE OF TEXAS §
 §
COUNTY OF TARRANT §

Subscribed and sworn to BEFORE ME, the undersigned authority, by the said, BRIAN G. Phelps, this 17th day of November, 2010, to certify which witness my hand and seal of office.



Deleene R. Smith
NOTARY PUBLIC IN AND FOR THE
STATE OF TEXAS



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
FORT WORTH DISTRICT, CORPS OF ENGINEERS
TRINITY REGIONAL PROJECT
1801 N. MILL STREET
LEWISVILLE, TEXAS 75057-1821
25 OCTOBER 2010

RECEIVED
OCT 27 2010
BY: LM

Trinity Regional Project Office

Farmersville Investors, LP
975 One Lincoln Centre
5400 LBJ Freeway
Dallas, TX 75240

Subject: Proposed Outfall on US Army Corps of Engineers Property Related to New TPDES Permit Application WQ0014778001, Lavon Lake, Collin County TX

To Whom it may Concern,

It has been brought to the attention of the US Army Corps of Engineers, Lavon Lake and Trinity Regional Project Offices, that an application for a new TPDES Permit, Number WQ0014778001, has been requested by Farmersville Investors, LP. It is our understanding that the proposed project related to the referenced application involves placement of an outfall structure from a wastewater treatment facility on US Army Corps of Engineers fee-owned property at Lavon Lake, adjacent on County Road 550.

This letter serves as notification that the placement of an outfall structure on US Army Corps of Engineers fee-owned property has not been authorized and approved. In addition, this project was denied by the US Army Corps of Engineers, Fort Worth District Office in a letter dated 1 February 2008. A copy of that letter is provided. In that letter, it is clearly defined that:

"Corps of Engineers policy states that storm sewers and outfalls are not allowed on Corps fee-owned land, unless for technical reasons, they cannot be located on private land and there is an overriding public need for the facility. In this instance, there are other alternatives available to Farmersville Investors, LP."

The position of the US Army Corps of Engineers has not changed on this project, and therefore it is still not authorized on fee-owned property. Any actions that are undertaken on US Army Corps of Engineers property without permission may result in legal action. We appreciate your consideration and cooperation with this matter. If you have questions or comments, please contact Mr. Eric Pedersen, Deputy Operations Project Manager, Trinity Regional Project, at 469-645-9108.

2 Enclosure(s)

CC: Enclosed Mailing List

Brian G. Phelps
Operations Project Manager
Trinity Regional Project



REFRY TO
ATTENTION OF

Operations Division

DEPARTMENT OF THE ARMY
FORT WORTH DISTRICT, CORPS OF ENGINEERS
P. O. BOX 17388
FORT WORTH, TEXAS 76102-0388

February 1, 2008

Farmville
RECEIVED *GMS/*
2-11-08

Mr. Bryan Kennedy, PE
Vice President- Dallas Operations Manager
Jones & Carter, Inc.
3030 LEJ Freeway, Suite 910
Dallas, Texas 775234-7747

Dear Mr. Kennedy:

This letter is in reference to an easement request for a 24-inch pipeline that will be used to discharge treated domestic wastewater into an unnamed ditch; thence to Elm Creek; thence to Lavon Lake. Upon review, it has been determined that the proposed utility easement is not an appropriate use of Government fee-owned property; therefore, the request is denied.

Corps of Engineers policy states that storm sewers and outfalls are not allowed on Corps fee-owned lands unless, for technical reasons, they cannot be located on private land and there is an overriding public need for the facility. In this instance, there are other alternatives available to Farmville Investors, LP. Placing storm sewers and outfalls on Government fee-owned land can lead to cumulative negative impacts on natural resources and public use.

Questions concerning this request may be directed to Mr. James Murphy, the Lavon Lake Manager, at 972-442-3141 or Mr. Chris Byrd at 817-886-1569.

Sincerely,

Mike S. McInnis
Chief, Natural Resources and Recreation Section

Martin 26

APP 1214

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

REPRESENTING THE APPLICANT:

John R. Moore, *Attorney At Law*
Lloyd, Gosselink, Rochelle & Townsend, P.C.
816 Congress Ave., Suite 1900
Austin, Texas 78701
Tel: (512) 322-5881
Fax: (512) 472-0532

REPRESENTING THE PROTESTANTS

Rick Lowerre, *Attorney At Law*
Lowerre, Frederick, Perales, Allmon & Rockwell
707 Rio Grande, Suite 200
Austin, Texas 78701
Tel: (512) 469-6000
Fax: (512) 482-9346

FOR THE CHIEF CLERK:

Ms. LaDonna Castañuela
Texas Commission on Environmental Quality
Office of Chief Clerk, MC-105
P. O. Box 13087
Austin, TX 78711-3087
Tel: (512) 239-3300
Fax: (512) 239-3311

**REPRESENTING THE
PUBLIC INTEREST COUNSEL:**

Amy L. Swanholm, *Staff Attorney*
Texas Commission on Environmental Quality
P. O. Box 13087, MC 103
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Tel: (512) 239-6823
Fax: (512) 239-6377

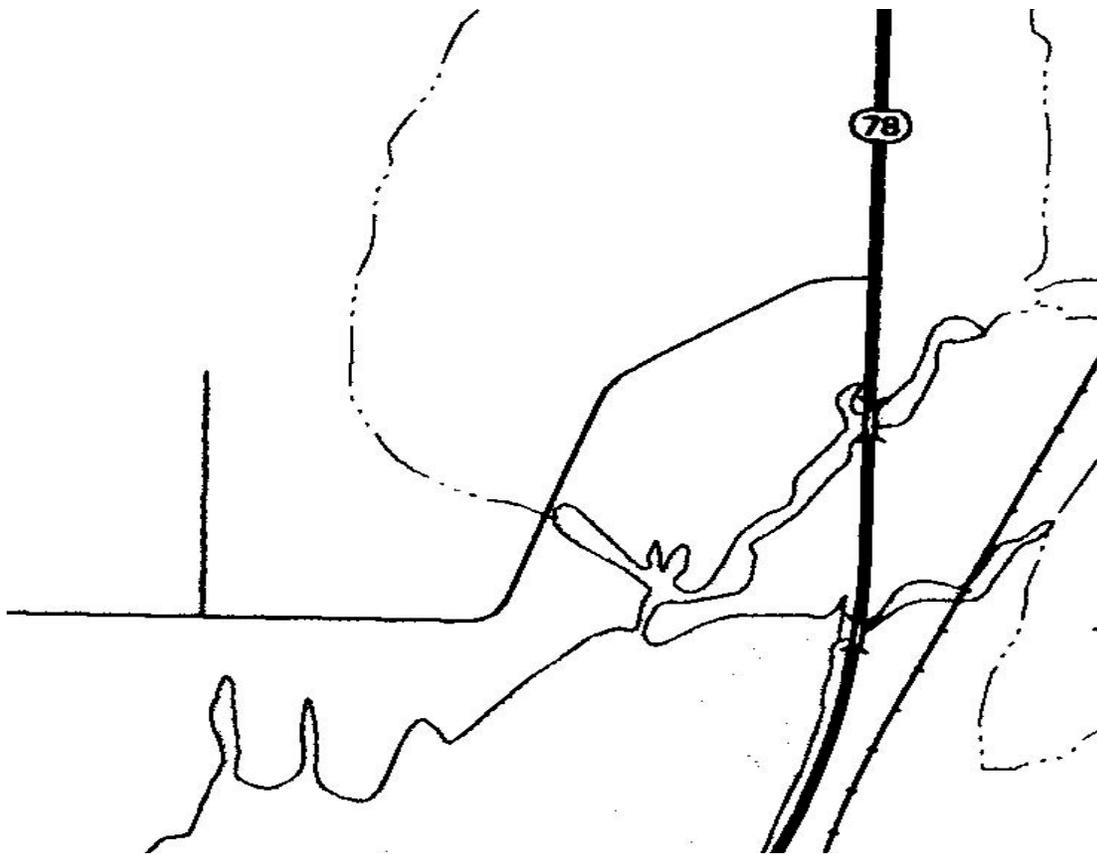
**REPRESENTING THE
EXECUTIVE DIRECTOR:**

Kathy Humphreys, *Staff Attorney*
Texas Commission on Environmental Quality
P. O. Box 13087, MC 173
Austin, TX 78711-3087
Tel: (512) 239-3417
Fax: (512) 239-0606

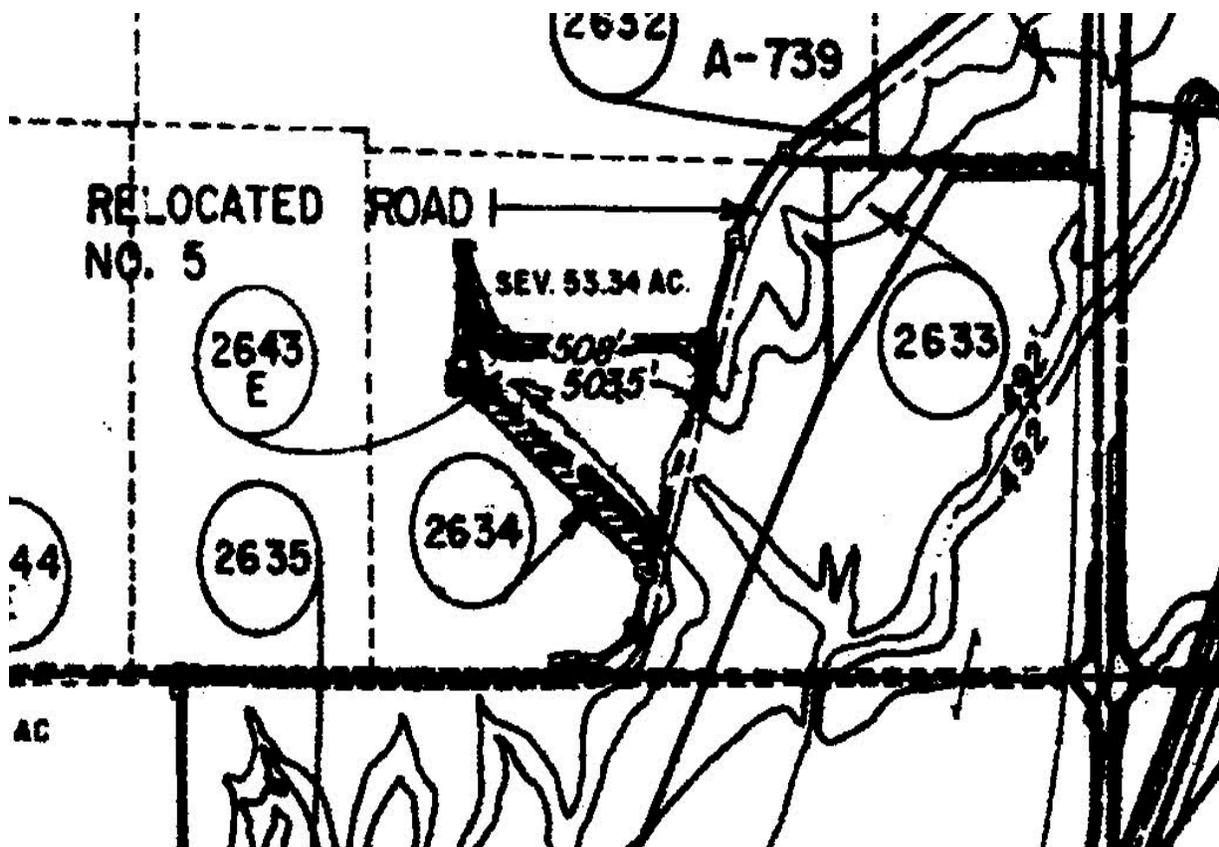
Appendix 2

Excerpts from Martin Exhibits 45 and 50,
TxDOT County Highway Map and U.S. Corps
of Engineers Project Map

Close-up of Martin Exhibit 45, the certified
TxDOT County Highway Map
dated September 1, 20001



Close-up of Martin Exhibit 50, the certified U.S. Army Corps of Engineers Project Map for Lavon Lake, Segment 26, dated August 4, 1969



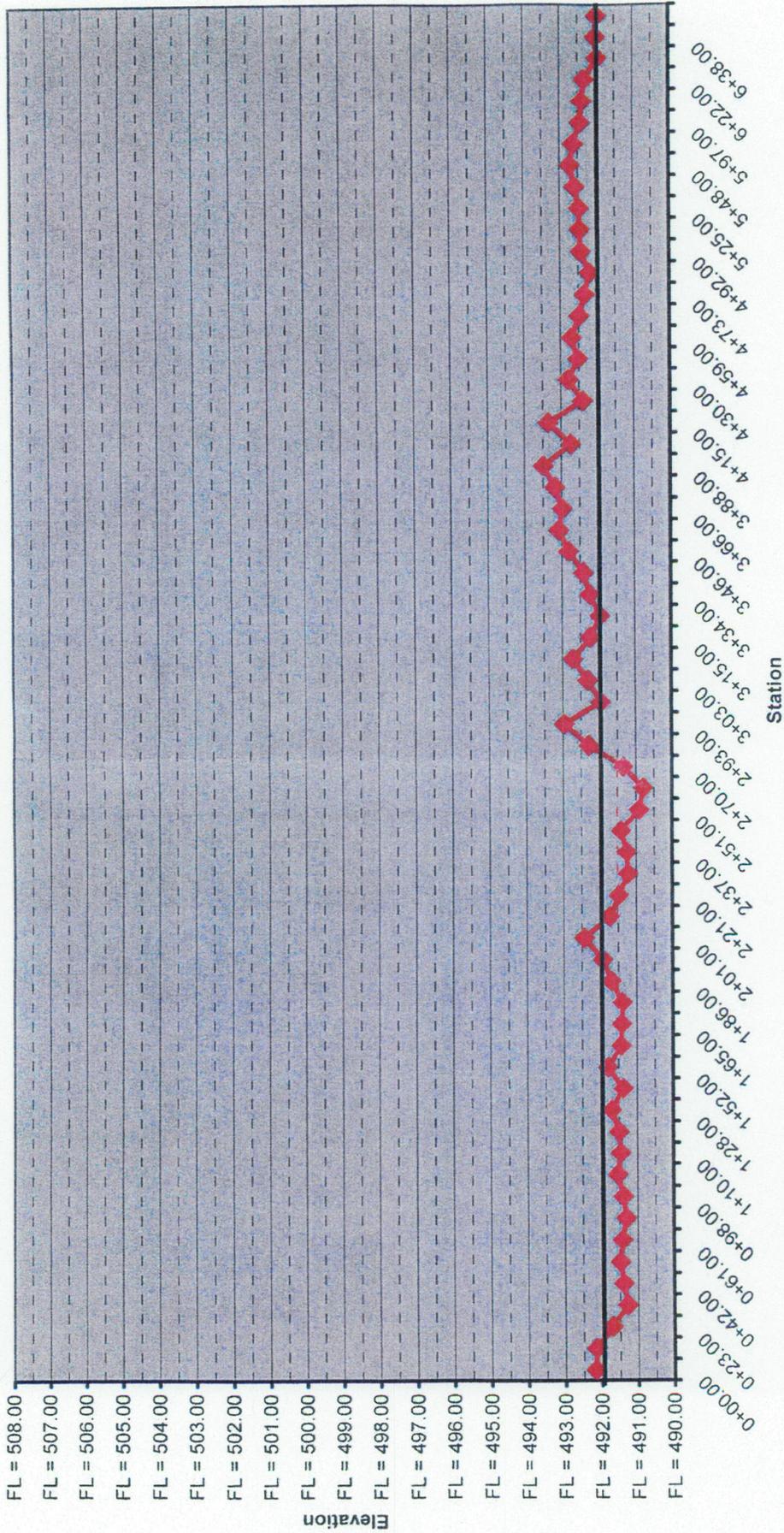
Appendix 3

Martin Exhibit 33 and
Applicant Exhibit 18, page 5,
Applicant's two surveys

Martin Ex. 33

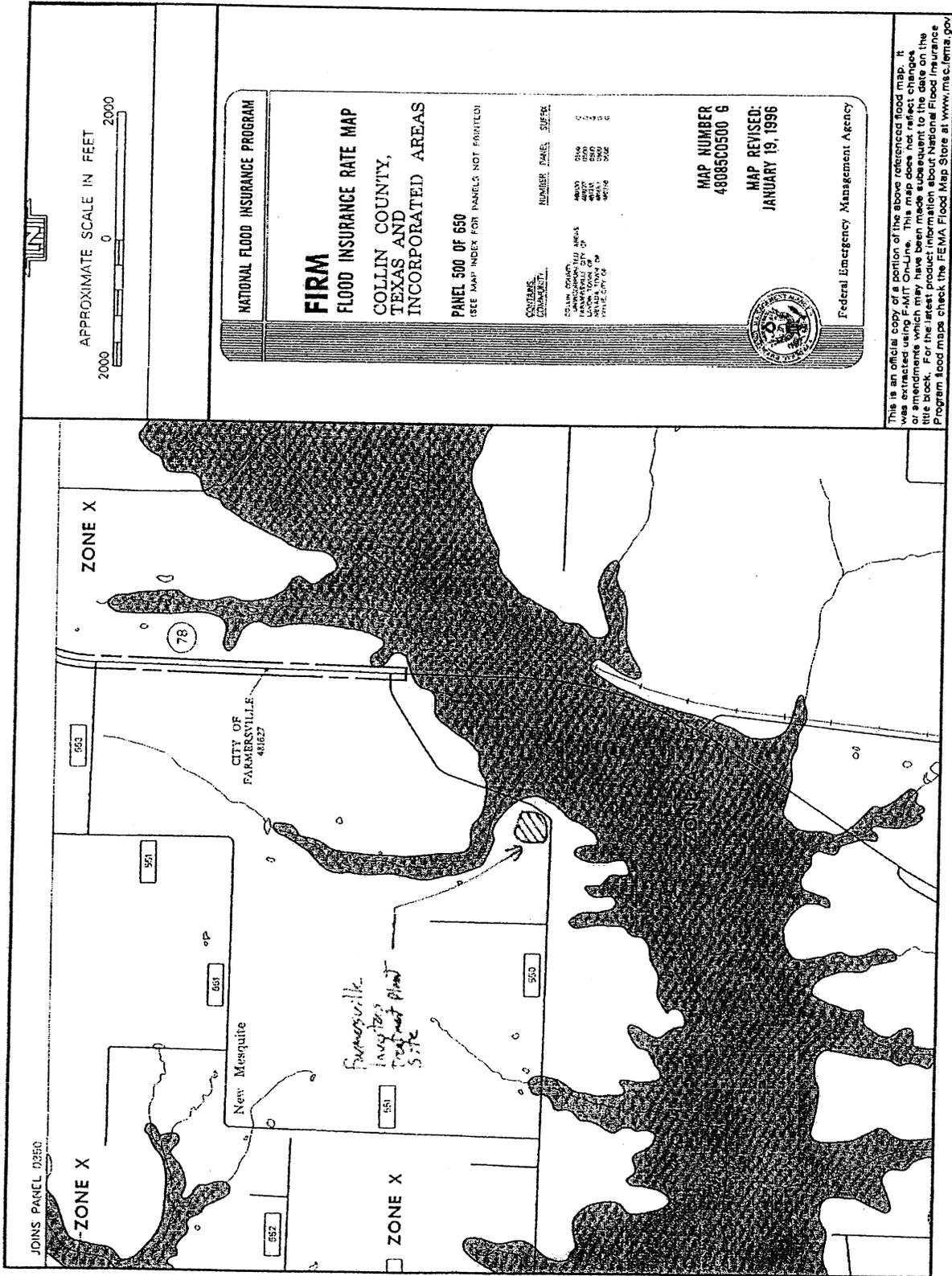


FARMERSVILLE
SURVEYED FLOW LINE (THALWEG)



Appendix 4

Applicant Exhibit 3, Exh. SB-5,
Floodplain Map



Appendix 5

Applicant Exhibit 14, page 1 and
photographs 2, 3, 6, 7, 8, and 9





