

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

February 10, 2011

Les Trobman, General Counsel  
Texas Commission on Environmental Quality  
PO Box 13087  
Austin Texas 78711-3087

VIA FACSIMILE 239-5533

Re: **SOAH Docket No. 582-09-2895; TCEQ Docket No.2008-1305-MWD; In the Matter of the Application by Farmersville Investors, LP, for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014778001**

Dear Mr. Trobman:

It has been brought to my attention that there was an error in the February 7, 2011 cover letter for the Amended Proposal for Decision and Order that have been recommended to the Commission for approval in the above-referenced case. Any party may file exceptions or briefs by filing the original documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than **February 28, 2011**, as opposed to the February 27, 2011 date stated in the letter. Any replies to exceptions or briefs must be filed in the same manner no later than **March 10, 2011**.

I apologize for any confusion this error may have caused.

Sincerely,

A handwritten signature in cursive script that reads "Sharon Cloninger".

Sharon Cloninger  
Administrative Law Judge

SC/th  
cc: Mailing List

**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

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**AGENCY:** Environmental Quality, Texas Commission on (TCEQ)  
**STYLE/CASE:** FARMERSVILLE INVESTOR, LP  
**SOAH DOCKET NUMBER:** 582-09-2895  
**REFERRING AGENCY CASE:** 2008-1305-MWD

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**STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

**ADMINISTRATIVE LAW JUDGE**  
**ALJ SHARON CLONINGER**

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FARMERSVILLE INVESTORS, L.P.

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xc: Docket Clerk, State Office of Administrative Hearings

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

February 7, 2011

Les Trobman, General Counsel  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin Texas 78711-3087

Re: **SOAH Docket No. 582-09-2895; TCEQ Docket No.2008-1305-MWD; In the Matter of the Application by Farmersville Investors, LP, for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014778001**

Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Amended Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than February 27, 2011. Any replies to exceptions or briefs must be filed in the same manner no later than March 9, 2011.

This matter has been designated **TCEQ Docket No. 2008-1305-MWD; SOAH Docket No. 582-09-2895**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www10.tceq.state.tx.us/epic/efilings/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in cursive script that reads "Sharon Cloninger".

Sharon Cloninger  
Administrative Law Judge

SC/lh  
Enclosures  
cc: Mailing List

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**STYLE/CASE:** FARMERSVILLE INVESTOR, LP

**SOAH DOCKET NUMBER:** 582-09-2895

**REFERRING AGENCY CASE:** 2008-1305-MWD

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**STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

**ADMINISTRATIVE LAW JUDGE  
ALJ SHARON CLONINGER**

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**REPRESENTATIVE / ADDRESS**

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cc: Docket Clerk, State Office of Administrative Hearings

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

<p><b>IN THE MATTER OF THE APPLICATION BY FARMERSVILLE INVESTORS, LP, FOR TEXAS POLLUTANT DISCHARGE ELIMINATION SYSTEM (TPDES) PERMIT NO. WQ0014778001</b></p>	<p>§ § § § § §</p>	<p><b>BEFORE THE STATE OFFICE  OF  ADMINISTRATIVE HEARINGS</b></p>
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**SOAH DOCKET NO. 582-09-2895  
TCEQ DOCKET NO. 2008-1305-MWD**

**IN THE MATTER OF THE  
APPLICATION BY FARMERSVILLE  
INVESTORS, LP, FOR TEXAS  
POLLUTANT DISCHARGE  
ELIMINATION SYSTEM (TPDES)  
PERMIT NO. WQ0014778001**

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**BEFORE THE STATE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**AMENDED PROPOSAL FOR DECISION**

Farmersville Investors, LP (Applicant or Farmersville) has applied to the Texas Commission on Environmental Quality (TCEQ or Commission) for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014778001. The permit would authorize the discharge of treated wastewater effluent from a new proposed municipal wastewater facility that would be located in Collin County, approximately 0.5 miles southwest of the intersection of Highway 78 and County Road 550. The Commission originally referred the application (Application) to the State Office of Administrative Hearings (SOAH) for a contested case hearing on four specific issues. After considering the resulting Proposal for Decision (PFD), the Commission remanded the case to SOAH for the taking of additional evidence. To minimize confusion, this Amended Proposal for Decision (PFD) addresses all issues in the case; hence, re-reading the original PFD should not be necessary. For the reasons set out below, the Administrative Law Judge (ALJ) recommends adoption of the draft permit (Draft Permit).

Applicant, the ED, and the Office of Public Interest Counsel (OPIC) take the position that Applicant has carried its burden of proof on all issues and that the Application should be granted in the form of the Draft Permit.<sup>1</sup> James A. and Shirley Martin (Protestants) believe Applicant has not carried its burden and argue that the Application should be denied.<sup>2</sup>

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<sup>1</sup> ED Ex. 5 (Draft Permit). See Applicant's Response to Closing Arguments on Remanded Issues at 19; ED's Closing Arguments on Remand at 1; and OPIC's Closing Argument on Remand at 9.

<sup>2</sup> In Protestants' Closing Argument Following the Remand Hearing, Protestants raised arguments unrelated to the issues that were referred by the Commission either for the initial contested case hearing or in the Commission's June 22, 2010 Interim Order remanding this case to SOAH. The ALJ considered only the arguments related to the issues referred by the Commission.

## I. PROCEDURAL HISTORY

The Application was received by TCEQ on January 31, 2007, and declared administratively complete on February 23, 2007.<sup>3</sup> The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published on March 1, 2007, in the *Farmersville Times & Princeton Herald* and on May 11, 2007, in the Collin County edition of *The Dallas Morning News*.<sup>4</sup> The Notice of Application and Preliminary Decision (NAPD) for a Water Quality Permit was published on June 22, 2007, in the Collin County edition of *The Dallas Morning News*.<sup>5</sup> Both the NORI and NAPD were re-mailed to a corrected list of landowners on July 31, 2007.<sup>6</sup>

The Notice of Public Meeting was published on October 28, 2007, and a public meeting was held December 4, 2007, in Farmersville, Texas. Following the consideration of five contested case hearing requests at its public meeting on February 11, 2009, the Commission referred this matter to the SOAH.

The Commission established a nine-month deadline from the date of the preliminary hearing for issuance of the proposal for decision, and referred the following issues:<sup>7</sup>

1. Whether discharges under the terms of the Draft Permit will meet the requirements of 30 TEX. ADMIN. CODE (TAC) ch. 307, the Texas Surface Water Quality Standards (TSWQS);
2. Whether the Draft Permit complies with siting requirements for the proposed facility location including the discharge point, discharge route, and the buffer zone requirements;

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<sup>3</sup> ED Ex. 3.

<sup>4</sup> ED Ex. A and ED Ex. B.

<sup>5</sup> ED Ex. C.

<sup>6</sup> ED Ex. 3.

<sup>7</sup> See Commission's Interim Order dated February 23, 2009. ED Ex. E. Note also that when the original hearing on the merits was continued, the parties agreed to an April 1, 2010 deadline for issuance of the PFD. See SOAH Order No. 9 revising the procedural schedule. The original PFD was issued March 26, 2010.

3. Whether there is a need for the facility, whether the Draft Permit adequately addresses regionalization concerns, and whether any additional terms or conditions should be included in the permit based upon the Commission's consideration of need and regionalization under TEX. WATER CODE ANN. § 26.0282; and
4. Whether the contaminants in the effluent will impact the health of the hearing requesters or interfere with their use and enjoyment of their property.

The Notice of Hearing was published in *The Dallas Morning News* on March 13, 2009.<sup>8</sup> The preliminary hearing was held on April 29, 2009, at SOAH, William P. Clements State Office Building, 300 West 15th Street, Fourth Floor, Austin, Texas. After determining that proper notice had been given and that the Commission and SOAH have jurisdiction over this matter, the ALJ designated the following parties: Applicant, the ED, Protestants, and the North Texas Municipal Utility District (District).<sup>9</sup> Via letter dated May 11, 2009, Assistant Public Interest Counsel Amy Swanholm entered an appearance on behalf of the Office of Public Interest Counsel (OPIC).

The hearing on the merits was held in Austin on December 16-17, 2009. The record closed on January 29, 2010, after the parties submitted closing arguments.<sup>10</sup> The PFD was issued March 26, 2010, and considered by the Commission at its open meeting on June 16, 2010. The Commission determined that the case should be remanded to SOAH for the taking of additional evidence, as set out in its June 22, 2010 Interim Order:

1. Take additional evidence on whether the outfall will discharge into an intermittent stream or directly into Lavon Lake;

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<sup>8</sup> ED Ex. D.

<sup>9</sup> The District filed a Motion to Withdraw that was granted on May 18, 2009.

<sup>10</sup> On January 29, 2010, the ED filed a Motion to Strike the following documents attached to Protestants' Closing Argument: Appendix 1; Appendix 2, page 1; and Appendix 4. The ED objects because the documents were not introduced as evidence at the hearing on the merits, Protestants did not lay a foundation for them, and the other parties did not have an opportunity to cross-examine anyone to determine the accuracy or relevance of the documents. No party responded to the ED's motion. The ALJ finds the motion to have merit and it is granted.

2. Should the ALJ determine from the evidence that the outfall will discharge directly into Lavon Lake, take additional evidence as to whether the effluent limits in the Draft Permit will meet the requirements of 30 TAC ch. 307, and if not, take additional evidence as to what effluent limits are necessary to meet the requirements of 30 TAC ch. 307;
3. Upon an offer into evidence, consider the admission into the record of the final February 2010 *Wastewater Feasibility Report*; and
4. Make recommended Findings of Fact and Conclusions of Law to the Commission on the above evidentiary issues.

The remand hearing was held November 29-30, 2010. Applicant was represented by John R. Moore, attorney. Protestants were represented by Richard W. Lowerre, attorney. Kathy J. Humphreys, Staff Attorney, appeared on behalf of the ED. Ms. Swanholm, Assistant Public Interest Counsel, appeared for OPIC. The record closed January 10, 2011, after the parties submitted closing arguments and replies.

## II. PROPOSED FACILITY AND DRAFT PERMIT CONDITIONS

Farmersville's proposed wastewater treatment plant (WWTP) will be located approximately 0.5 miles southwest of the intersection of State Highway 78 and County Road 550 in Collin County, Texas, and will serve a new residential subdivision. The Draft Permit would authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 0.1 million gallons per day (MGD) in the Interim I Phase, 0.25 MGD in the Interim II Phase, and 0.5 MGD in the Final Phase.<sup>11</sup>

The treated effluent would be discharged into an unnamed tributary, then to the Elm Creek Arm of Lavon Lake in Segment No. 0821 of the Trinity River Basin.<sup>12</sup> The receiving water use for the unclassified, unnamed tributary is no significant aquatic life use. The

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<sup>11</sup> ED Ex. 6 at 1-2.

<sup>12</sup> Protestants claim the discharge will be directly into Lavon Lake when the lake is above normal pool elevation. The issue is addressed more fully later in this Amended PFD.

designated uses for Segment No. 0821 are contact recreation, public water supply, and high aquatic life use.

The WWTP will be a single-stage nitrification activated sludge process plant.<sup>13</sup> Treatment units for the Interim I and II phases will include a lift station, bar screen, aeration basin, final clarifier, sludge digester, and a chlorine contact chamber.<sup>14</sup> Treatment units for the final phase will include a lift station, splitter box, bar screen, two aeration basins, two final clarifiers, two aerobic digesters, and two chlorine contact chambers.<sup>15</sup>

The Draft Permit includes the following effluent limitations based on a 30-day average for Interim Phase I: 10 milligrams per liter (mg/L) Biochemical Oxygen Demand (5-day)(BOD<sub>5</sub>), 15 mg/L Total Suspended Solids (TSS), 0.5 mg/L Phosphorus (P), and 4.0 mg/L minimum dissolved oxygen (DO). The effluent limitations in the Interim II Phase and Final Phase of the Draft Permit, based on a 30-day average, are 10 mg/L Carbonaceous BOD<sub>5</sub> (CBOD<sub>5</sub>) 15 mg/L TSS, 3 mg/L Ammonia Nitrogen (NH<sub>3</sub>-N), 0.5 mg/L Phosphorus, and 4.0 mg/L minimum DO. In addition, for each phase, the effluent shall contain a chlorine residual of at least 1.0 mg/L and shall not exceed a chlorine residual of 4.0 mg/L after a detention time of at least 20 minutes based on peak flow.

The ED's Preliminary Decision<sup>16</sup> asserts that the Draft Permit will maintain and protect the existing instream uses. The ED's Tier 1 anti-degradation review determined that existing water quality uses should not be impaired, and a Tier II review determined preliminarily that by adding a phosphorus limit of 0.5 mg/L to the Draft Permit no significant water quality degradation is expected at Lavon Lake.

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<sup>13</sup> ED Ex. 6 at 1.

<sup>14</sup> ED Ex. 6 at 1.

<sup>15</sup> ED Ex. 6 at 1.

<sup>16</sup> ED Ex. 6 at 1-2.

### III. BURDEN OF PROOF

Applicant has the burden to prove that the proposed discharge permit will comply with the applicable statutes and rules regarding wastewater discharges into or adjacent to the waters of the State.<sup>17</sup>

Protestants claim that to prevail on the issue of whether contaminants in the effluent will impact their health or the use and enjoyment of their property, Applicant must also prove that unregulated contaminants in the effluent—such as endocrine disrupters and pharmaceuticals—will not impact Protestants' health. Protestants argue it is not their burden to provide evidence that non-traditional pollutants will be discharged from the Farmersville facility or that such pollutants would be harmful to their health. Protestants state their burden regarding this issue was met when they sufficiently raised it for the Commission to refer it to SOAH. Protestants cite no law in support of their position.<sup>18</sup>

The ALJ disagrees with Protestants. Applicant's demonstration that the Draft Permit complies with applicable law creates a rebuttable presumption that Protestants' health will be protected, because it can be presumed that TCEQ regulatory requirements are protective of public health.<sup>19</sup> In this proceeding, the burden shifted to Protestants to demonstrate that unregulated contaminants in the effluent will be harmful to their health. Applicant must meet the requirements of 30 TAC § 80.17(a) to prevail in this proceeding, but is not required to "put on a qualified expert on those non-traditional pollutants to testify that they do not create additional health risks and no stringent standards or design [of the WWTP] is needed."<sup>20</sup>

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<sup>17</sup> 30 TAC § 80.17(a).

<sup>18</sup> Protestants' Closing Argument at 39-42. *See also* Applicant's Response to Closing Arguments at 22-23.

<sup>19</sup> The ED notes there are no federal standards for the regulation of non-traditional pollutants. ED Ex. 3 at 7, Comment 9 and response.

<sup>20</sup> Protestants' Closing Argument at 41.

**IV. WHETHER DISCHARGES UNDER THE TERMS OF THE  
DRAFT PERMIT WILL MEET THE REQUIREMENTS  
OF 30 TAC CHAPTER 307, THE TEXAS SURFACE  
WATER QUALITY STANDARDS (ISSUE 1)**

The chief contested issues in this case with respect to water quality protection are whether the WWTP discharge outfall is into Lavon Lake when the lake level is high, thus possibly requiring a more protective DO requirement than the 4 mg/L proposed in the Draft Permit, and whether the WWTP effluent will contaminate Protestants' private well if the lake floods onto their property as it has in the past.

The ALJ finds 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. The ALJ further finds that when the lake level is high enough to flood into the intermittent stream, the discharge will be into a temporarily flooded portion of the unnamed tributary, as discussed below. Applicant also has shown that WWTP effluent will not contaminate Protestants' private well if the lake floods onto Protestants' property.

**A. Protection of Surface Water**

**1. Overview of TCEQ Regulations and Implementation Procedures**

The TSWQS implement TEXAS WATER CODE ANN. § 26.003, which provides that it is the policy of the state to “[m]aintain the quality of water . . . consistent with the public health and enjoyment, the propagation and protection of terrestrial and aquatic life and the operation of existing industries taking into consideration the economic development of the state . . . .” The ED evaluates TPDES permit applications using the TSWQS when issuing permits for wastewater discharges into the surface water of the state. The TSWQS describe the general criteria for surface water and the anti-degradation policy, establish criteria and control procedures for specific toxic substances and total toxicity, define appropriate water uses and supporting criteria for site-specific standards, describe conditions where the TSWQS do not apply, define

appropriate sampling and analytical procedures for determination of standards attainment, and describe site-specific standards.<sup>21</sup>

Additionally, the ED uses the Procedures to Implement the TSWQS (IPs)<sup>22</sup> to ensure consistency in the interpretation of the TSWQS.<sup>23</sup> The EPA reviewed and conditionally approved the IPs in November 2002.<sup>24</sup> Chapters 307 (TSWQS) and 309 (Domestic Wastewater Effluent Limitations and Plant Siting) of the Commission's rules establish the regulatory framework for protection of surface water quality in the permitting of domestic wastewater treatment plants.<sup>25</sup> Commission rules at 30 TAC §§ 307.4 and 307.5 most directly apply to the review of a municipal wastewater discharge permit application and are discussed in full below.

## **2. General Criteria (30 TAC § 307.4)**

Section 307.4 delineates general criteria that apply to surface water in the state specifically applicable to substances that can be attributed to waste discharges or the activities of man. The Draft Permit explicitly addresses some of the general criteria by prohibiting the discharge of "floating solids or visible foam in other than trace amounts and no discharge of visible oil."<sup>26</sup> Other general criteria are not specifically addressed in the Draft Permit because those criteria address substances or conditions that are unlikely to be found in domestic wastewater discharges, such as elevated temperature and radiological substances. However, the Draft Permit includes a requirement that Applicant must comply with all the "terms and conditions embodied in the permit, and the rules and other orders of the Commission."<sup>27</sup>

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<sup>21</sup> 30 TAC § 307.2(a).

<sup>22</sup> The IPs are included in ED Ex. 12.

<sup>23</sup> ED Ex. 10 at 3:10-11.

<sup>24</sup> ED Ex. 12 at 1.

<sup>25</sup> 30 TAC chs. 307 and 309.

<sup>26</sup> ED Ex. 5 at 2-2b.

<sup>27</sup> ED Ex. 5 at 9.

**B. Receiving water: Intermittent stream or Lavon Lake? (Remanded Issue 1)**

In its June 22, 2010 Interim Order, the Commission asked that additional evidence be taken on whether the outfall will discharge directly into Lavon Lake or into an intermittent stream. As discussed below, Applicant had the entire discharge route surveyed to provide evidence regarding this issue. Based on their review of the survey, two of Applicant's expert witnesses and the ED's expert witness testified at the remand proceeding that the Farmersville discharge will be into an intermittent stream then into Lavon Lake.<sup>28</sup>

But Protestants contended at the initial hearing and continued to argue at the remand hearing that the ED mischaracterized the receiving water as an intermittent stream and thus, did not correctly model for DO.<sup>29</sup> According to Protestants, the receiving water will sometimes be Lavon Lake, when the lake level is high enough to extend to the discharge point. They believe, under that circumstance, that the ED's proposed DO level will not protect the lake.

At the initial proceeding, OPIC argued that Applicant had not presented enough evidence to show that the discharge would not be directly into Lavon Lake when the lake is above normal pool elevation.<sup>30</sup> OPIC agreed that the evidence presented at the remand proceeding established that the discharge would be into an intermittent stream when the lake is at or below normal pool level.<sup>31</sup> But OPIC expressed concern that when the lake level is above normal pool elevation, the discharge may be into water hydrologically connected to the lake and, should the topography of the intermittent stream change, the normal pool elevation of the lake may reach up to the discharge point. However, OPIC conceded that its concerns do not compel a conclusion that the proposed outfall will discharge into Lavon Lake.<sup>32</sup>

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<sup>28</sup> Remand Tr. at 299:20-25, 314:12-19, 319:4-13, 321:21-25 (Michalk); Remand Tr. at 23:23-24 (McCullah); Remand Tr. at 148:25-149:10, 190:10-15 (Dr. Young).

<sup>29</sup> Protestants' Closing Argument Following the Remand Hearing at 16-23.

<sup>30</sup> OPIC's Closing Argument at 3-4.

<sup>31</sup> OPIC's Closing Argument on Remand at 3 and 5.

<sup>32</sup> OPIC's Closing Argument on Remand at 5-6.

The ED does not dispute that at times there will be water at the outfall location or even all along the intermittent stream.<sup>33</sup> The ED points out that by definition, an intermittent stream is a stream that has a period of zero flow for at least one week during most years,<sup>34</sup> which means it could be flowing all but one week of the year most years. The ED argued that when the outfall and Lavon Lake are hydrologically connected, the discharge will be into a temporarily flooded portion of the intermittent stream, not into the defined classified segment of Lavon Lake.<sup>35</sup>

### 1. Survey of discharge route

Representatives of the ED and OPIC met with Applicant's representatives and Protestant Mr. Martin at the proposed outfall on July 16, 2010. From the outfall, the group walked the stream bed down to the open water portion of Lavon Lake. Following the site visit, the ED requested additional information from Applicant.<sup>36</sup>

In response to the ED's request for additional information, Applicant performed a detailed survey on August 17-18, 2010, to identify the location of the 492-foot elevation contour of Lavon Lake to ascertain the reach of the lake at normal pool elevation.<sup>37</sup> The detailed survey also determined the route of the thalweg<sup>38</sup> of the intermittent stream from the point of discharge to the point where it reached Lavon Lake at the 492-foot elevation contour.<sup>39</sup>

The on-site survey of the proposed discharge route was performed by David McCullah, a registered professional surveyor who testified on Applicant's behalf. Mr. McCullah testified that

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<sup>33</sup> ED's Replies to Closing Arguments on Remand at 19.

<sup>34</sup> ED Ex. 12 at 3, as cited in ED's Reply to Closing Arguments on Remand at 17.

<sup>35</sup> ED's Replies to Closing Arguments on Remand at 19, citing Remand Tr. at 300:17-22.

<sup>36</sup> Applicant Ex. 17.

<sup>37</sup> Applicant Ex. 18. *See also* Remand Tr. at 14:3-16:11 and 17:22-18:18 (McCullah); and 137:11-138:1, 140:1-141:5, and 146:24-147:16 (Young).

<sup>38</sup> A thalweg is the same thing as a flow line, the lowest point where water runs in a channel. Remand Tr. at 19:25-20:1 and 142:1-4.

<sup>39</sup> Remand Tr. at 18:20-22:5 (McCullah); 138:2-6 and 141:6-143:22 (Young); and 299:13-300:8 (Michalk).

he first established a benchmark using the tile gauge at the Lavon Lake dam that is the base gauge for the lake.<sup>40</sup> Next, he went to the proposed discharge point to determine the 492-foot elevation contour.<sup>41</sup> Mr. McCullah also determined the elevations of the thalweg of the unnamed tributary channel at various locations along its length.<sup>42</sup> He testified that the maps, stream profile, and the table contained in his survey<sup>43</sup> accurately represent the thalweg of the proposed discharge route and the 492-foot elevation contour of Lavon Lake.<sup>44</sup> Mr. McCullah further stated that the survey data is accurate within about one inch.<sup>45</sup>

According to the survey, the discharge point is 492.17 feet above msl.<sup>46</sup> At 293 feet downstream from the discharge point, the elevation of the stream bed rises to one foot above Lavon Lake's normal pool elevation and remains above the normal pool elevation until it enters the Elm Creek arm of the lake. The survey shows that the intermittent stream flows 638 feet from the discharge point before it reaches Lavon Lake at its normal pool elevation of 492 feet above msl.<sup>47</sup>

Paul Jonathan Young, who holds a Ph.D. in environmental and civil engineering, testified that he was on site when the survey data was obtained and oversaw the gathering of the survey data.<sup>48</sup> He also helped develop information that went into the drawings and attachments included with the survey.<sup>49</sup> Dr. Young confirmed that the information in Mr. McCullah's survey,

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<sup>40</sup> Remand Tr. at 16:14-18.

<sup>41</sup> Remand Tr. at 18:7-10.

<sup>42</sup> Remand Tr. at 19:20-24. The data from Mr. McCullah's survey is depicted on maps, a stream profile, and a table included in Applicant Ex. 18.

<sup>43</sup> Applicant Ex. 18.

<sup>44</sup> Remand Tr. at 23:5-11.

<sup>45</sup> Remand Tr. at 29:12-21 and 118:7-119:5.

<sup>46</sup> Applicant Ex. 18 at 1.

<sup>47</sup> Remand Tr. at 23:16-24:6 (McCullah); 147:18-149:10 (Young); and 299:13-300:8 (Michalk).

<sup>48</sup> Remand Tr. at 139: 3-7.

<sup>49</sup> Remand Tr. at 138:22-25.

including the cover letter, accurately describes the discharge point and discharge route.<sup>50</sup> Dr. Young further testified that because of the rise in elevation to 493.49 feet between the discharge point and Lavon Lake, the lake will not reach into the unnamed tributary all the way up to the outfall at times of normal pool elevation.<sup>51</sup> Based on the aforementioned information, his participation in preparing the onsite survey, and his professional experience characterizing streams under the TSWQS, he testified that when Lavon Lake is at or below normal pool elevation, the discharge will be into an intermittent stream and not directly into the lake.<sup>52</sup>

James Michalk, the ED's Water Quality Modeler for the Application, testified that after reviewing Mr. McCullah's stream profile, he determined there is an elevated area above the 492-foot line that effectively separates the unnamed tributary from the classified segment of Lavon Lake.<sup>53</sup> Mr. Michalk further testified that the information provided in Mr. McCullah's survey supported the observations he made during the July 16, 2010 site visit.<sup>54</sup>

Protestant Mr. Martin, a lay witness, testified he took photographs on October 30, 2009, that show water in the intermittent stream, although not for the entire length of the stream.<sup>55</sup> Mr. Martin took a second set of photos on August 25, 2010,<sup>56</sup> a week after Mr. McCullah surveyed the intermittent stream. None of the August 25, 2010 photos depicts water in the intermittent stream.<sup>57</sup> He testified he has seen water under the bridge both when the U.S. Army Corps of Engineers' website states the lake level is at or above 492 feet above msl, and when the website

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<sup>50</sup> Remand Tr. at 148:10-16. See Applicant Ex. 18.

<sup>51</sup> Remand Tr. at 190:10-15 and 190:24-191:3.

<sup>52</sup> Remand Tr. at 148:25-149:10.

<sup>53</sup> Remand Tr. at 299:15-19.

<sup>54</sup> Remand Tr. at 300:4-8.

<sup>55</sup> Remand Tr. at 229:1-20 and 269:8-22. The handwritten notations on the photos might not be reliable. Remand Tr. at 236:22-237:5 and 238:4-11.

<sup>56</sup> Remand Tr. at 240:1-24.

<sup>57</sup> Remand Tr. at 271:18-273:21. According to the U.S. Army Corps of Engineers' website, the elevation of Lavon Lake on August 25, 2010, was 487.21 above msl. Applicant Ex. 18 at 1.

states the lake level is below its normal pool elevation.<sup>58</sup> The ALJ notes that, by definition, an intermittent stream may have water in it all but one week of most years.

Both Mr. Michalk and Dr. Young testified that when the lake is about one-and-a-half feet above normal pool elevation, the lake water will reach into the unnamed tributary to the outfall location and any discharge will be directly into the lake's standing water, which Mr. Michalk said would be a "temporarily flooded portion of the unnamed tributary."<sup>59</sup> Conversely, during floods and heavy rainfall, water entering the intermittent stream above the discharge point might flow down the unnamed tributary to the lake.<sup>60</sup> Dr. Young explained that the TSWQS do not apply to elevated lake levels or anything above normal pool elevation; rather, the criteria in the Draft Permit are designed to be protective of the lake at normal pool elevation.<sup>61</sup> Protestants offered no evidence to rebut the testimony of Mr. Michalk and Dr. Young on this point.

Protestants expressed concern that Applicant surveyed the intermittent stream on August 17-18, 2010, when Lavon Lake was between 487.78 feet above msl and 487.69 feet above msl,<sup>62</sup> and not when the lake was at its normal pool elevation of 492 feet above msl. But Protestants presented no evidence as to how the lake elevation would affect the survey results.

Experts for both Applicant and the ED testified that the quality of the survey data was superior to the type of data the ED typically has available for his review. Dr. Young testified that the quality of the survey information was "about as good information as [Mr. Michalk] could have had . . ." and he has only seen this high quality information on four of the approximately 200 projects he has worked on.<sup>63</sup> Dr. Young also testified that the site-specific survey data is far superior to any other information provided and is better information than is normally available to

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<sup>58</sup> Remand Tr. at 211:5-19. The evidence shows the bridge is the proposed outfall location.

<sup>59</sup> Remand Tr. at 25:14-21 and 34:14-18 (Young); and 300:12-22; 318:19-319:10 (Michalk). Mr. Michalk used the terms "intermittent stream" and "unnamed tributary" interchangeably. Remand Tr. at 317:17-23.

<sup>60</sup> Remand Tr. at 193:21-25 and 195:12-197:12.

<sup>61</sup> Remand Tr. at 192:6-11.

<sup>62</sup> Applicant Ex. 18 at 1.

<sup>63</sup> Remand Tr. at 151:10-152:4.

someone modeling a stream.<sup>64</sup> Mr. McCullah testified that his survey data is more accurate than any of the maps offered by Protestants.<sup>65</sup> Mr. Michalk confirmed that Mr. McCullah's survey data is of higher quality than what he usually receives and agreed the data quality is in the top five of the more than 1,300 applications he has reviewed.<sup>66</sup>

Protestants also argued that Applicant's survey presented at the initial hearing on the merits, conflicts with Mr. McCullah's survey, presented at the remand proceeding.<sup>67</sup> The survey data presented at the initial hearing was used to depict the location of Protestants' well relative to a culvert and the location of the well relative to Applicant's proposed WWTP.<sup>68</sup> Mr. McCullah prepared both surveys for Applicant and testified that he obtained his benchmark for the first survey from a class 3 USGS monument in Farmersville.<sup>69</sup> By comparison, the data from the second survey was used to find the thalweg line of the intermittent stream.<sup>70</sup> Mr. McCullah testified that he used a class 1 tile gauge in the Lavon Lake dam for the benchmark for the second survey.<sup>71</sup> He said he is confident that every place he marked a thalweg in the channel was in fact a thalweg<sup>72</sup> and that he is confident his surveys are accurate.<sup>73</sup> Protestants did not present any evidence that either survey is inaccurate or flawed.

The ALJ finds that Applicant's survey of the discharge route provided more detailed information than the ED usually receives and the survey data was sufficient to determine that there is a high point along the intermittent stream that prohibits water from Lavon Lake from reaching the proposed outfall when the lake is at normal pool elevation. The ALJ further finds

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<sup>64</sup> Remand Tr. at 155:23-156:8.

<sup>65</sup> Remand Tr. at 123:14-17. *See* Applicant Ex. 18.

<sup>66</sup> Remand Tr. at 321:5-16.

<sup>67</sup> Protestants' Closing Argument Following the Remand Hearing at 16 and 19-21.

<sup>68</sup> Remand Tr. at 121:1-6.

<sup>69</sup> Remand Tr. at 124:9-10 and 125:17-19.

<sup>70</sup> Remand Tr. at 122:8-10.

<sup>71</sup> Remand Tr. at 16:12-18 and 125:20-22.

<sup>72</sup> Remand Tr. at 93:22-24.

<sup>73</sup> Remand Tr. at 123:11-13.

that if the lake is above normal pool elevation and reaches the outfall site, the Farmersville discharge will be into standing water that is part of the intermittent stream, even if the water is connected to the lake.

## 2. Elevated Portion of Intermittent Stream

As stated above, at 293 feet from the discharge point, the elevation of the stream bed rises to one foot above Lavon Lake's normal pool elevation and remains above the normal pool elevation until it enters the Elm Creek arm of the lake.<sup>74</sup> Protestants assert that the high point along the intermittent stream, as identified in the survey, was caused by natural silting or a man-made obstruction, and there is no evidence that the high point is permanent.<sup>75</sup> However, Protestants offered no evidence that the high point is temporary, that the lake contour has been redefined in any way since the normal pool elevation of the lake was raised, or that a hypothetical change in the contour of the lake changed the volume of the lake.

Mr. McCullah agreed with Protestants' counsel on cross-examination that the contour line on the survey map, associated with the raised elevations along the discharge route, could possibly be elevated because this was the former location of County Road 550,<sup>76</sup> before the normal pool level of the lake was raised. He said the elevation could cause the discharge to run into a culvert, over the elevated area, or along the elevated area until meeting a culvert or a pass.<sup>77</sup> But on redirect examination, he stated he did not find a relic culvert, indicating the existence of an old road, in the intermittent stream.<sup>78</sup>

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<sup>74</sup> Remand Tr. at 23:16-24:6 (McCullah); 147:18-149:10 (Young); and 299:13-300:8 (Michalk).

<sup>75</sup> Protestants' Closing Argument Following Remand Hearing at 17-19.

<sup>76</sup> Remand Tr. at 95:11-96:11. The uncontroverted evidence is that County Road 550 was moved when the normal pool elevation of Lavon Lake was raised to 492 feet above msl. But the evidence was inconclusive as to whether the raised elevation along the discharge route is the old roadbed.

<sup>77</sup> Remand Tr. at 94:18-95:1.

<sup>78</sup> Remand Tr. at 122:20-123:10.

Protestants' counsel asked Mr. Michalk repeatedly about the location of former County Road 550, and Mr. Michalk responded that he looked for it on both the aerial images and on the site visit, but could find no evidence of it.<sup>79</sup> He added that the existence of the old road was not important to his modeling.<sup>80</sup> In fact, Mr. Michalk said his model would not change if the 492 foot point were caused by a roadbed, dam or any other geologic feature.<sup>81</sup>

Based on the evidence presented, the ALJ finds that the physical composition of the high point in the intermittent stream that separates Lavon Lake from the rest of the stream is not relevant to the determination of whether the Farmersville discharge would be into an intermittent stream or into Lavon Lake.

### **C. Ms. Murphy's Review**

The Application was reviewed by Lili Murphy, an Aquatic Scientist on staff with the ED. Because the discharge will be into an unclassified water body, Ms. Murphy reviewed the Application according to 30 TAC § 307.4(k) (anti-degradation) and 30 TAC § 307.4(h) (aquatic life uses and dissolved oxygen).<sup>82</sup>

#### **1. Multi-tiered review**

The Commission's anti-degradation rule at 30 TAC § 307.5 establishes a multi-tiered policy.<sup>83</sup> Only the first two tiers apply to the Application.

Tier 1 review, performed by TCEQ staff on all new and renewal permit applications, provides that existing uses and water quality sufficient to protect those uses will be maintained.

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<sup>79</sup> Remand Tr. at 337:10-23; 340:8-15; 374:17-23; 376:9-19; 378:9-12; 382:18-383:5; and 463:1-3.

<sup>80</sup> Remand Tr. at 423:24-424:1 and 463:8-9.

<sup>81</sup> Remand Tr. at 424:17-21.

<sup>82</sup> ED Ex. 13.

<sup>83</sup> See also ED Ex. 12 at 24-25.

The TSWQS include numerical criteria for some parameters, such as DO, and narrative criteria for other parameters, such as nutrients (phosphorus, nitrogen) and aesthetic parameters (odor, taste).

Tier 2 review applies to water bodies that have intermediate, high, or exceptional aquatic life use and existing designated or presumed contact recreation use.<sup>84</sup> According to the TSWQS:

[n]o activities subject to regulatory action which would cause degradation of waters which exceed fishable/swimmable quality will be allowed unless it can be shown to the commission's satisfaction that the lowering of water quality is necessary for important economic or social development. Degradation is defined as a lowering of water quality by more than a *de minimis* extent, but not to the extent that an existing use is impaired. Water quality sufficient to protect existing uses will be maintained.<sup>85</sup>

Determinations about whether water bodies exceed fishable and swimmable quality, and about whether a proposed activity will impair existing uses or degrade water quality, are to be made in accordance with procedures set out in the IPs.<sup>86</sup>

## 2. ED's Anti-degradation Review of the Application

As part of the technical review of the Application, Ms. Murphy first confirmed the location of the proposed discharge and the water bodies in the discharge route.<sup>87</sup> According to the Application, the discharge route would be to an unnamed tributary; thence to Elm Creek; thence to the Elm Creek arm of Lavon Lake at Segment 0821 of the Trinity River Basin.<sup>88</sup>

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<sup>84</sup> ED Ex. 10 at 6.

<sup>85</sup> 30 TAC § 307.5(b)(2).

<sup>86</sup> 30 TAC § 307.5(c). The rule goes on to say that authorized discharges will not lower water quality to a point that TSWQS will be violated. 30 TAC § 307.5(b)(4). And, the anti-degradation rule states that anyone discharging wastewater which would constitute a new source of pollution will be required to provide a level of wastewater treatment consistent with the provisions of the Texas Water Code and the federal Clean Water Act. 30 TAC § 307.5(b)(5).

<sup>87</sup> ED Ex. 10 at 8.

<sup>88</sup> Applicant Ex. 3, SB-2 at 7.

However, after discussion with Mr. Michalk, Ms. Murphy determined the Farmersville discharge would be into an unnamed tributary; thence to the Elm Creek Arm of Lavon Lake in Segment 0821 of the Trinity River Basin.<sup>89</sup> The correct discharge route is reflected in both the Standards Memo and the Draft Permit.<sup>90</sup>

After determining the exact discharge route, Ms. Murphy assigned uses and water quality criteria based on the flow characteristics of the water bodies inferred from available data, including USGS topographical maps and aerial photographs.<sup>91</sup> Ms. Murphy determined that the unnamed tributary is intermittent.<sup>92</sup>

All TPDES applications for WWTPs that may negatively affect a water body's DO are evaluated to determine what effluent limits are needed to maintain appropriate DO levels.<sup>93</sup> Because Texas has established numerical criteria for DO,<sup>94</sup> when Ms. Murphy determined the aquatic life use, she by definition determined the DO criteria that must be met in order to protect that use. Ms. Murphy assigned no significant aquatic life uses to the unnamed tributary with a corresponding DO requirement of 2.0 mg/L.<sup>95</sup> Lavon Lake is a classified water body (Segment 0821); therefore, using Appendix A of the TSWQS, Ms. Murphy assigned it contact recreation, public water supply, and high aquatic life use with a corresponding DO criterion of 5.0 mg/L.<sup>96</sup> No testimony was offered during the original hearing or the remand proceeding that the DO criteria assigned by the ED were incorrect.

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<sup>89</sup> ED Ex. 10 at 11 and ED Ex. 14 at 10-11.

<sup>90</sup> ED Ex. 13 and ED Ex. 5.

<sup>91</sup> ED Ex. 10 at 8.

<sup>92</sup> The definition of intermittent stream is “[a] stream which has a period of zero flow for at least one week in most years.” 30 TAC § 307.3(29).

<sup>93</sup> ED Ex. 12 at 17.

<sup>94</sup> 30 TAC § 307.4(h).

<sup>95</sup> ED Ex. 13.

<sup>96</sup> ED Ex. 10 at 8:23-9:3; Applicant Ex. 6 at 15:7-16:5. ED Ex. 13 and 30 TAC § 307.10(1).

Ms. Murphy then performed a Tier 1 and Tier 2 anti-degradation review of the discharge to ensure that the applicable surface water quality standards of each water body would not be violated by a discharge from the proposed WWTP.<sup>97</sup> As a result of her Tier 1 anti-degradation review, Ms. Murphy preliminarily determined that existing water quality uses will not be impaired by the issuance of Farmersville's permit.<sup>98</sup>

Because Lavon Lake is classified as having high aquatic life use, Tier 2 anti-degradation review was applied to the discharge that would reach the lake. After performing the Tier 2 anti-degradation review, Ms. Murphy preliminarily determined that by adding an effluent limitation of 0.5 mg/L Total Phosphorus, existing water quality uses would be maintained and protected, and no significant degradation of Lavon Lake would occur.<sup>99</sup> There was no testimony offered during the original hearing or remand proceeding that the anti-degradation review was incorrect or that Ms. Murphy's conclusions were flawed.<sup>100</sup>

#### **D. Computer Modeling for Effluent Limitations (Remanded Issue 2)**

The Commission required additional evidence on remand of whether the effluent limitations set forth in the Draft Permit will meet the requirements of 30 TAC ch. 307 if the ALJ found that the discharge will be directly into Lavon Lake. Mr. Michalk, Mr. McCullah, and Mr. Young all testified that the discharge will be to an intermittent stream.<sup>101</sup> No controverting evidence was presented. The ALJ finds the discharge will not be directly into Lavon Lake. Therefore, pursuant to the June 22, 2010 Interim Order, the ED presented additional evidence at the remand proceeding as to what effluent limits are necessary to meet the requirements of 30 TAC ch. 307, given that the discharge will be into an intermittent stream. Mr. Michalk

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<sup>97</sup> ED Ex. 10 at 8.

<sup>98</sup> ED Ex. 13; ED Ex. 10 at 11; ED Ex. 10 at 9:3-5; *see also* Applicant Ex. 6 at 13:7-17 and 15:7-16:5.

<sup>99</sup> ED Ex. 13; ED Ex. 10 at 9: 5-8 and 17-21.

<sup>100</sup> ED's Closing Argument at 8.

<sup>101</sup> *See* Remand Tr. at 23:16-24:6 (McCullah); 147:18-149:10 (Young); 299:13-300:8 (Michalk).

performed no modeling that would evaluate whether the effluent limits would be protective if the discharge were directly into Lavon Lake.<sup>102</sup>

Mr. Michalk testified that Lavon Lake is a classified segment<sup>103</sup> and, for modeling purposes, the classified segment of Lavon Lake is defined as the normal or conservation pool of the lake as defined by operators of the lake and adopted in the TSWQS.<sup>104</sup> Normal pool elevation of Lavon Lake is defined in the TSWQS as “from Lavon Dam in Collin County up to the normal pool elevation of 492 feet (impounds East Fork Trinity River).”<sup>105</sup>

After the remand Interim Order was issued and prior to the remand proceeding, Mr. Michalk performed additional computer modeling of the intermittent stream based on the new and more site-specific details contained in Applicant’s survey of the discharge route.<sup>106</sup> According to Mr. Michalk and Dr. Young, the new computer modeling confirms that the effluent limitations set forth in the Draft Permit will meet the requirements of 30 TAC ch. 307.<sup>107</sup> The ALJ finds that the additional modeling performed by the ED, which incorporates the site-survey data generated by Applicant, shows the effluent limits in the Draft Permit meet the requirements of the TSWQS.<sup>108</sup>

Protestants did not produce any credible evidence to attack the validity of the effluent limitations produced by the original model, the original model itself, the unchanged effluent limitations produced by the refined model, the refined model itself, or the process employed by Mr. Michalk to generate either model. Protestants’ counsel elicited testimony from Mr. Michalk

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<sup>102</sup> Remand Tr. at 331:10-19. Mr. Michalk did not need to model for discharge of effluents into the lake, because the evidence shows the discharge will be into the intermittent stream.

<sup>103</sup> Remand Tr. 347:3-7.

<sup>104</sup> Remand Tr. 318:3-18 and 394:15-21.

<sup>105</sup> 30 TAC § 307.10(3).

<sup>106</sup> See Remand Tr. at 150:3-8 and 150:15-151:16 (Young); 301:2-7. (Michalk).

<sup>107</sup> See Remand Tr. at 156:15-157:10 (Young); 301:2-12 (Michalk).

<sup>108</sup> 30 TAC § 307.1.

on cross-examination that confirmed Mr. Michalk was correct to be thorough and evaluate the outfall in light of the site-specific information.<sup>109</sup>

Prior to the original proceeding, Mr. Michalk modeled the discharge to determine what effluent limits must be in the Draft Permit to maintain the DO criteria, using Ms. Murphy's assigned appropriate uses and corresponding DO requirements of the receiving waters. To ensure the numerical criteria for DO are met, numerical models are used to develop permit limits for oxygen-demanding constituents.<sup>110</sup>

Mr. Michalk used a default QUAL-TX model in combination with a simplified pond model to evaluate the DO impact from the proposed discharge and made effluent limit recommendations.<sup>111</sup> Mr. Michalk testified that the model simulates low base flow conditions and a high temperature at the fully permitted flow.<sup>112</sup> Based on modeling results, Mr. Michalk determined that, at the proposed final phase permitted discharge of 0.5 MGD, an effluent set of 10 mg/L CBOD<sub>5</sub>, 3 mg/L NH<sub>3</sub>-N, and 4 mg/L DO would be adequate to ensure that the 2.0 mg/L DO criterion for the unnamed tributary and the 5.0 mg/L DO criterion for Lavon Lake established by Ms. Murphy would be maintained.<sup>113</sup> The Draft Permit accurately reflects Mr. Michalk's recommendations.<sup>114</sup>

At the first hearing on the merits for this application Mr. Michalk testified that to determine the discharge route, he reviewed a USGS topographic map, aerial imagery and information from the North Central Texas Council of Governments' website.<sup>115</sup> At the remand

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<sup>109</sup> Remand Tr. at 353:8-14; 356: 2-6; 364:17-23.

<sup>110</sup> ED Ex. 12 at 17.

<sup>111</sup> ED Ex. 16. Mr. Michalk's original model was based on the assumption that the receiving water is always the intermittent stream, an assumption confirmed by the survey information contained in Applicant Ex. 18.

<sup>112</sup> ED Ex. 14 at 4.

<sup>113</sup> ED Ex. 16.

<sup>114</sup> ED Ex. 14 at 14: 2-5.

<sup>115</sup> ED Ex. 12 at 12:13-17.

hearing, Mr. Michalk testified that he also used Mr. McCullah's survey data and again concluded that the discharge route would be to an unnamed tributary and then to the Elm Creek Arm of Lavon Lake, Segment 0821.<sup>116</sup>

At the original hearing, Mr. Michalk testified that he contacted Applicant's representative and confirmed that the correct location of the proposed discharge point was at the re-routed road crossing location. This was the discharge point he then used in his original model<sup>117</sup> and in the refined model. The discharge point is not within Lavon Lake because of the elevated area shown in Applicant's surveyed flow line, stretching from 293 feet downstream from the discharge route to about 638 feet downstream of the discharge route (where the lake segment begins).<sup>118</sup>

Based on the survey information and the aerial imagery of the shoreline provided by Applicant, Mr. Michalk modified the general surface area dimensions of the open-water lake area in the refined model, shortened the distance from the outfall to the lake from 850 feet to 638 feet, and added an assumption that at times a pool would form between the outfall and the high point of the thalweg in the unnamed tributary channel.<sup>119</sup>

When preparing the refined model, Mr. Michalk assumed there would be pooling between the outfall and the elevated portion of the discharge route,<sup>120</sup> because the discharge could be impounded by the elevated feature<sup>121</sup> identified in the site-specific survey and reach the lake only when it flows over the elevated point.<sup>122</sup> He testified that when the lake is at normal pool elevation, the standing pool of effluent would have a maximum length of 388 feet, in

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<sup>116</sup> Remand Tr. at 299:20-25.

<sup>117</sup> ED Ex. 14 at 10-11.

<sup>118</sup> Applicant Ex. 18.

<sup>119</sup> Remand Tr. at 305:17-307:10 and 306:7-15. Mr. Michalk testified that the removal from the modeled lake surface area of a "tree island" within the open-water part of the lake (approximately 4.6 acres surface area) affected some of the average depth estimates, but did not make much difference overall in his model. *See also* ED Ex. 22.

<sup>120</sup> Remand Tr. at 356:2-9.

<sup>121</sup> Remand Tr. at 354:20-355:15.

<sup>122</sup> Remand Tr. at 356:18-24.

between the discharge point and the elevated area shown on the survey of the thalweg.<sup>123</sup> Mr. Michalk used the additional site-specific data to refine his DO model to account for the effect of the potential pool on the hydraulics of the model.<sup>124</sup>

In the refined model, as in the original model, the immediate receiving waters of the discharge would still be designated as an intermittent stream, Mr. Michalk said.<sup>125</sup> This, he stated, is because TCEQ normally adopts the defined normal pool elevation as the boundary between classified lake segments and other bodies of water.<sup>126</sup> Mr. Michalk explained that when a discharge is entering a lake via a stream channel, as in the Farmersville discharge route, the lake is assumed to begin at the farthest upstream extent of the lake at normal pool elevation.<sup>127</sup>

Protestants challenged Mr. Michalk's conclusion regarding the location of the farthest upstream extent of the lake at normal pool elevation. At the remand hearing, Protestants' counsel repeatedly questioned Mr. Michalk as to why he did not rely on either Texas Department of Transportation Maps (TxDot maps) or a Corps of Engineer's Project Map (project map) to determine where the normal pool elevation crossed the proposed Farmersville discharge route. In response, Mr. Michalk testified that TxDot maps are applicable for some parts of an application review.<sup>128</sup> However, he would not use a TxDot map as his primary source for determining where the normal pool elevation of a lake intersects with a tributary of the lake,<sup>129</sup> because he believes that the TxDot map provides only an approximation of the location of the lake.<sup>130</sup> As for relying on the project map, Mr. Michalk testified that he would "tend to believe elevations on a topographic map from the U.S. Geological Survey with more detailed elevation

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<sup>123</sup> Remand Tr. at 307:11-20 and 353:15-24. *See also* ED Ex. 22.

<sup>124</sup> Remand Tr. at 301:2-7; 319:11-14; and 360:23-361:4.

<sup>125</sup> Remand Tr. at 318:19-319:3.

<sup>126</sup> Remand Tr. at 318:3-18.

<sup>127</sup> ED Ex. 14 at 11-12.

<sup>128</sup> Remand Tr. at 323:14-17; 324:12-20; 325:21-24

<sup>129</sup> Remand Tr. at 311:5-314:11.

<sup>130</sup> Remand Tr. at 454:17-25.

topographic information than I would believe the map from the Corps of Engineers that appeared to contradict that elevation information from the topographic type of map.”<sup>131</sup> Mr. Michalk added that the purpose of the project map seemed to be more related to property tracts rather than specific aspects of the lake.<sup>132</sup>

Applicant was not required to submit TxDot maps or the project map with the Application. TCEQ’s rules require that an application include:

a topographic map, ownership map, county highway map, or a map prepared by a Texas licensed professional engineer, Texas licensed professional geoscientist, or a registered surveyor which shows the facility and each of its intake and discharge structures and any other structure or location regarding the regulated facility and associated activities.<sup>133</sup>

The instructions for completing the domestic wastewater permit application address the required maps in several places. First, under the heading “Location Information” the instructions state that “[t]he location description must use easily identifiable landmarks found on the USGS map submitted with the application.”<sup>134</sup> Second, still under the heading of “Location Information,” item (g) requires applicants to “[p]rovide a complete **original** USGS Topographic Quadrangle Map(s),” and then delineates ten locations that must be included on the map.”<sup>135</sup> (Emphasis in original). Later in the instructions, under the heading “Affected Landowner Information,” the instructions state that “[t]he landowners map should be a USGS map, a city or county plat, or another map sketch, or drawing **with a scale adequate enough to show the cross-referenced affected landowners.**”<sup>136</sup> (Emphasis in original). Page 6 of the Domestic

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<sup>131</sup> Remand Tr. at 328:11-18.

<sup>132</sup> Remand Tr. at 327:4-328:22.

<sup>133</sup> 30 TAC § 305.45.

<sup>134</sup> Applicant Ex. 10 at 3748, item 5.a.

<sup>135</sup> Applicant Ex. 10 at 3748, item 5.g.

<sup>136</sup> Applicant Ex. 10 at 3752, item 1.a.5. The locations that must be shown on the USGS map include: the applicant’s property boundary; the boundaries of the treatment plant; the point of discharge; the highlighted discharge route for three stream miles; boundaries of the effluent disposal site; all ponds; the sewage sludge disposal site; all new and future commercial developments, housing developments, . . . ; all springs, water wells, water supply intakes . . . ; all parks, playgrounds and schoolyards.

Administrative Report section of the application requires applicants to provide, among other things, an original USGS Map indicating the applicant's property boundary, the point of discharge and highlighted discharge route.<sup>137</sup> Mr. Michalk testified that it was his understanding that an application would not be declared administratively complete without a USGS map.<sup>138</sup>

Neither TCEQ's rules, nor the application preclude a TxDot map from being included in an application, but the rules and instructions are clear that a USGS map must be included in the application. Mr. Michalk testified that if a TxDot map were the only map he received, we would have to use other resources, such as a USGS map, to find the necessary information for his review.<sup>139</sup>

Protestants did not provide any evidence that the TxDot maps or the project map would be sufficient to determine how far down the unnamed tributary goes before reaching Lavon Lake. Protestants did not produce any evidence that Mr. Michalk was incorrect in relying on the USGS topographic map, the aerial imagery, the map from the North Central Texas Council of Governments' website, and data from Farmersville's survey. Protestants did not produce any evidence as to why Mr. Michalk should have used the TxDot maps or the project map in lieu of the USGS topographic map, the aerial imagery, the map from the North Central Texas Council of Governments' website and data from Farmersville's survey. Instead, Protestants' counsel attempted to elicit testimony from Mr. Michalk on cross examination that the TxDot maps and the project map would have been adequate for modeling purposes. As discussed above, Mr. Michalk said that he relied on the best data available, which was a combination of the USGS topographic maps, the aerial imagery, the map from the NCTCG website and data from Mr. McCullah's survey.

After updating his model to account for the new site-specific data, Mr. Michalk determined that the effluent limits in the Draft Permit are still appropriate for all three phases of

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<sup>137</sup> Applicant Ex. 3, SB-2, at 7, item g.

<sup>138</sup> Remand Tr. at 312:25-313:3.

<sup>139</sup> Remand Tr. at 312:12-21.

the Draft Permit.<sup>140</sup> He also noted that to ensure his evaluation was conservative and protective of water quality, his model was designed to represent the critical conditions of hot temperatures and dry weather; discharge at the full permitted flow and effluent limits; and the lake at its conservation pool elevation.<sup>141</sup> Evidence presented at the original hearing showed the effluent limitations contained in the Draft Permit will be adequate to ensure that the DO levels will be maintained above the criteria set for the unnamed tributary and Lavon Lake.<sup>142</sup> At the remand hearing, Dr. Young concurred with Mr. Michalk's modeling and results.<sup>143</sup>

Protestants did not offer any expert testimony that contradicted Mr. Michalk's modeling procedure or results nor did they offer expert testimony that modeling as though the outfall were directly into Lavon Lake was practical, reliable or necessary.

#### **E. Conclusion**

All of the data, the survey information, the stream profile, and the various maps confirm that Lavon Lake does not come all the way up to the outfall when it is at normal pool elevation. Protestants did not call any expert to challenge any of the site-specific survey information and were not otherwise able to create a legitimate issue of fact as to whether Lavon Lake goes any farther upstream than what Mr. McCullah's survey determined.

Therefore, the ALJ finds that the discharge from the proposed wastewater treatment plant will be to an intermittent stream and will flow 638 feet before it reaches the Elm Creek arm of Lavon Lake in Segment 0821 at its normal pool elevation of 492 feet above msl.

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<sup>140</sup> Remand Tr. at 301:8-12; 310:10-11; and 322:1-4.

<sup>141</sup> Remand Tr. at 319:18-320:8.

<sup>142</sup> Applicant Ex. 6 at 19:8-13 (Young); Tr. at 488:1-4 (Knowles); Tr. at 504:8-13 (Knowles); Tr. at 521:8-10 (Knowles).

<sup>143</sup> Remand Tr. at 151:3-6.

The ALJ finds that based on the anti-degradation review performed by Ms. Murphy and the original and refined computer modeling performed by Mr. Michalk, the proposed DO levels in the unnamed tributary and Lavon Lake will be maintained and existing water quality uses will be protected. In addition, the ALJ finds that the effluent limitations contained in the Draft Permit satisfy the requirements of 30 TAC ch. 307.

**V. WHETHER THE DRAFT PERMIT COMPLIES  
WITH THE SITING REQUIREMENTS FOR THE PROPOSED  
FACILITY LOCATION INCLUDING THE DISCHARGE POINT,  
DISCHARGE ROUTE, AND THE BUFFER ZONE REQUIREMENTS (ISSUE 2)**

**A. Overview**

TCEQ's rules regarding siting requirements are found at 30 TAC §§ 309.10-309.14. These sections establish minimum standards for the location of domestic wastewater treatment facilities to minimize possible contamination of ground and surface waters, and to minimize the possibility of exposing the public to nuisance conditions. The rules governing plant siting only apply to the location of domestic wastewater treatment plant units. The location of a discharge route or discharge point is not specifically addressed in TCEQ rules. 30 TAC § 309.10(a). The definition of a wastewater treatment plant unit only includes apparatuses used for treating wastewater. 30 TAC § 309.11(9). An outfall does not meet the definition of a wastewater treatment unit; therefore, the provisions of 30 TAC §§ 309.10-14 do not apply to discharge routes or outfalls.

Location and buffer zone requirements are established at 30 TAC § 309.13, including in relevant part:

- a. Prohibiting the placement of a wastewater treatment plant unit in a 100-year floodplain;
- b. Prohibiting the placement of a wastewater treatment plant unit in wetlands;

- c. Prohibiting the placement of a wastewater treatment plant unit closer than 250 feet from a private water well
- d. Prohibiting the placement of a wastewater treatment plant unit within 150 feet of the nearest property line.

Additionally, 30 TAC § 309.11(9) defines a WWTP unit as:

Any apparatus necessary for the purpose of providing treatment of wastewater (*i.e.*, aeration basins, splitter boxes, bar screens, sludge drying beds, clarifiers, overland flow sites, treatment ponds or basins that contain wastewater, etc.).<sup>144</sup>

Both the ED's expert and Applicant's expert testified that the discharge route and outfall are not "treatment plant units" as those terms are defined in the rules, and no buffer zone applies to them.<sup>145</sup> That testimony was never rebutted. Applicant also provided a surveyed plat of the site, showing it meets buffer zone requirements.<sup>146</sup>

## **B. The Outfall Is Not Part of the WWTP Facility**

Protestants claim that the outfall is part of the facility and is therefore subject to all rules regarding facilities, including the 150-foot buffer zone rule. But the ED asserts that the outfall is not part of the facility and is not subject to all regulations regarding facilities.<sup>147</sup> The ED cites the following rules in support of its contention:

A facility is "[a]ll land, structures, operational units, or appurtenances used jointly to process, treat, and dispose of wastewater." 30 TAC § 217.2(14).

An outfall is the point where the effluent from a facility is discharged to water in the state. 30 TAC § 305.2.

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<sup>144</sup> See also ED Ex. 1 at 20:9-11.

<sup>145</sup> ED Ex. 1 at 20:12-19 and Applicant Ex. 3 at 23:6-19, as cited in Applicant's Closing Argument at 9.

<sup>146</sup> Applicant Ex. 5 at TS-2; see also Protestants Ex. 33. Mr. Synatschk testified that the layout on TS-2 might not be the final design; the purpose of the drawing is to show it is possible to preserve the buffer zones while including tertiary filters and meeting the effluent requirements. Applicant Ex. 5 at 14: 9-18.

<sup>147</sup> ED's Reply to Closing Argument at 9.

Witnesses for both the ED and Applicant testified that an outfall is not part of a “facility.” Mr. Barry, a professional engineer with more than 20 years experience in wastewater permitting, testified on behalf of Applicant that a “facility” does not include an outfall.<sup>148</sup> Kent H. Trede, ED Permit Coordinator, testified that the term “facility” does not include the outfall.<sup>149</sup> Protestants did not offer any evidence to contradict the “outfall” testimony of Mr. Barry or Mr. Trede.

The ED asserts that Protestants’ arguments that Applicant is required to own the outfall location, that the permit must include the outfall’s exact location, and that the Application is fatally flawed because the latitude/longitude of the outfall is incorrect, are misguided and beyond the scope of the issues referred to SOAH.<sup>150</sup> The ALJ agrees. The only issue regarding the outfall referred to SOAH for a contested case hearing is whether the WWTP complies with siting requirements, and the ALJ finds that it does.

### **C. WWTP Site Meets 100-Year Floodplain and Wetlands Requirements**

Protestants asserted that the Farmersville Draft Permit should not be issued because the proposed location of the WWTP, discharge route, and outfall would be located in either the 100-year floodplain or a wetland. According to the information presented, the ALJ has determined that the WWTP is not in the 100-year flood plain and although the outfall appears to be located in a wetland, the outfall is not a WWTP unit subject to the TCEQ’s siting requirements.

Addressing the 100-year flood plain issue first, according to TCEQ’s rules a “wastewater treatment plant unit may not be located in the 100-year floodplain . . . .”<sup>151</sup> According to the Application, the proposed facilities will be located above the 100-year flood plain.<sup>152</sup> A

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<sup>148</sup> Tr. at 205:11-17.

<sup>149</sup> Tr. at 537:20-538:16, and at 545:14-25.

<sup>150</sup> ED’s Reply to Closing Argument at 11.

<sup>151</sup> 30 TAC § 309.13(a).

<sup>152</sup> Applicant Ex. 5, SB-2 at 20.

“facility,” by definition, is “[a]ll land, structures, operational units, or appurtenances used jointly to process, treat, and dispose of wastewater.”<sup>153</sup> Thus, a “facility” includes WWTP units. The rule requires that WWTP units not be located in the 100-year floodplain.

According to the Application and witness testimony, no WWTP unit will be located in a floodplain.<sup>154</sup> Therefore, the ALJ finds that if the WWTP is built on the intended site, Applicant will be in compliance with TCEQ’s floodplain siting rule.

Next, addressing the wetlands issue, the rules also prohibit a WWTP unit from being located in wetlands.<sup>155</sup> There was disagreement at the hearing as to whether the outfall would be to a wetland, Lavon Lake, or to an intermittent tributary. But as discussed above, the outfall is not a WWTP unit, and no evidence was presented to demonstrate that any of the WWTP units would be located in a wetland.

Daryl Knowles, Protestants’ expert, testified that the Farmersville outfall will be to a wetland; however, he relied solely on a map taken from the Fish and Wildlife website and some unverified elevations he obtained with a GPS.<sup>156</sup> There is no evidence in the record that Mr. Knowles or anyone working on behalf of Protestants prepared a wetlands delineation.

The ED’s witness Ms. Murphy testified that after she reviewed Mr. Knowles’ pre-filed testimony, to ensure her wetlands evaluation of the Application was correct, she looked at the National Wetlands Inventory map viewer on the U.S. Fish and Wildlife Service website, several aerial photographs on Google Earth<sup>®</sup> and Bing<sup>®</sup> and noticed two ponds near the discharge route but none in the channel. She did not find any indication of wetlands.<sup>157</sup> At the hearing,

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<sup>153</sup> 30 TAC § 217.2(15).

<sup>154</sup> Applicant Ex. 3 at 25 (Barry); Applicant Ex. 5 at 14 (Synatschk); Tr at 488:1-4; at 504:13; and at 521:8-10 (Knowles).

<sup>155</sup> 30 TAC § 309.13(b).

<sup>156</sup> Protestants Ex. 11 at 11-12.

<sup>157</sup> ED Ex. 10 at 14-15.

Ms. Murphy testified that the National Wetlands Inventory map indicated that the outfall was in a wetland;<sup>158</sup> however, she also testified that the National Wetlands Inventory map was prepared by analysis of high altitude aerial maps and was not the same thing as a wetlands delineation.<sup>159</sup>

Based on the evidence presented, including the testimony of several expert witnesses,<sup>160</sup> the ALJ finds that the outfall is not a WWTP unit and no WWTP unit will be located in a wetlands area.

#### **D. Draft Permit Meets Buffer Zone Requirements**

Applicants for TPDES permits are given three options to abate and control nuisance odors.<sup>161</sup> The first option provides that “lagoons with zones of anaerobic activity . . . may not be located closer than 500 feet from the nearest property line” and that “all other wastewater treatment plant units may not be located closer than 150 feet to the nearest property line.” 30 TAC § 309.13(e)(1). No lagoons with zones of anaerobic activity are proposed and Applicant has provided the required 150-foot buffer zone.<sup>162</sup>

Farmersville intends to treat its wastewater by aerobic biological processes.<sup>163</sup> Therefore, all land within 150 feet of each treatment unit is part of the buffer zone. According to the Application, Farmersville intends to control nuisance odors by owning the required buffer zone.<sup>164</sup>

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<sup>158</sup> Tr. 603. *See also* National Wetlands Map, Protestants Ex. 39.

<sup>159</sup> Tr. 612-613.

<sup>160</sup> Applicant Ex. 3 at 25 (Barry); Applicant Ex. 7 at 21 (Hunt); Tr at 488:1-4; Tr at 504:13; Tr at 521:8-10 (Knowles).

<sup>161</sup> 30 TAC § 309.13(e); Applicant Ex. 3 at 28:20-29:7 (Barry). One of three options is required under 30 TAC § 309.13(e) to abate and control odor. Option I was chosen for the Application. Applicant Ex. 3 at 28-29.

<sup>162</sup> Applicant Ex. 3 at 29:8-11 and Applicant Ex. 5 at TS-2.

<sup>163</sup> Applicant Ex. 5, SB-2 at 41-55.

<sup>164</sup> Applicant Ex. 5, SB-2 at 13 and 33.

The crux of Protestants' argument regarding Applicant's ownership of the buffer zones is that the maps in the Application are wrong. As the evidence demonstrates: (1) Farmersville submitted the required maps in its Application;<sup>165</sup> (2) based on the ED's requirement that the permit contain an effluent limit for total phosphorus and Farmersville's settlement with the District, the treatment units have changed;<sup>166</sup> (3) the required treatment units might be changed again;<sup>167</sup> (4) Farmersville must submit final plans and specifications after the Permit is issued, but before initiating construction;<sup>168</sup> and (5) Farmersville will meet the buffer zone requirements by ownership of the property.<sup>169</sup>

Applicant admits the buffer zone map needs to be corrected. During cross examination, Mr. Barry testified for Applicant that the buffer zone map included in the Application, while correct when the Application was filed, does not accurately depict the location of the treatment units as currently proposed.<sup>170</sup> According to Mr. Barry, the buffer zone map included with the original Application did not include tertiary filters, and the "basic concept" of the WWTP has changed since the Application was filed.<sup>171</sup>

However, a change in the treatment units based on technical considerations does not render the Application inaccurate, because the Draft Permit contains four specific provisions to address changes made to applications during processing. First, the Draft Permit provides that "[a]cceptance of the permit by the person to whom it is issued constitutes acknowledgement and agreement that such person will comply with all the terms and conditions embodied in the permit, and the rules and other orders of the Commission."<sup>172</sup> Second, the Draft Permit states

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<sup>165</sup> Applicant Ex. 5, SB-2 at 33.

<sup>166</sup> Applicant Ex. 3 at 13:3-19.

<sup>167</sup> ED Ex. 1 at 18:16-21.

<sup>168</sup> ED Ex. 1 at 18:13-15.

<sup>169</sup> Applicant Ex. 5, SB-2 at 13, item 2.b.

<sup>170</sup> Tr. at 179.

<sup>171</sup> Tr. at 242-243. Farmersville agreed to add tertiary filters to the WWTP as part of the settlement agreement between Farmersville and the District. Tr. at 263:9-16.

<sup>172</sup> ED Ex. 5 at 11.

that the Application is incorporated in the permit and that if there is a conflict between the Application and the Permit, the Permit controls.<sup>173</sup> Third, “Other Requirement 5” requires the permittee to comply with the requirements of 30 TAC § 309.13(a) through (d), related to buffer zone requirements.<sup>174</sup> Finally, by ownership of the required buffer zone area, Farmersville shall comply with the requirements of 30 TAC §309.13(e).<sup>175</sup> Because of the various provisions discussed above, Farmersville will be required to own the buffer zone, regardless of where the treatment units are finally located. Moreover, according to the ED’s witness Mr. Trede, if Farmersville fails to comply with the buffer zone requirement, it will be subject to enforcement action.<sup>176</sup>

The ALJ finds Applicant has met its burden to show the WWTP site complies with TCEQ rules. The evidence shows that no WWTP units are located within 150 feet of Applicant’s property line.<sup>177</sup> In fact, the WWTP units as proposed are 152 feet from Protestants’ property line and 150 feet from the nearest property line.<sup>178</sup>

#### **E. WWTP Site Meets Distance to Water Well Requirement**

According to TCEQ’s rules, WWTP units may not be located closer than 250 feet from a private water well.<sup>179</sup> Mr. Trede testified that Protestants’ private well is 521 feet from the location of the proposed WWTP,<sup>180</sup> much farther than required by the rules. As discussed above, the Draft Permit requires Farmersville to comply with all applicable rules; therefore, even if the final design of the WWTP results in a WWTP unit being relocated, it must still be farther than

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<sup>173</sup> ED Ex. 5 at 11.

<sup>174</sup> ED Ex. 5 at 25, paragraph 5.

<sup>175</sup> ED Ex. 5 at 25, paragraph 5.

<sup>176</sup> Tr. at 576:21-577: 4.

<sup>177</sup> Applicant’s Closing Argument at 9.

<sup>178</sup> See Applicant Ex. 5 at TS-2. See also Applicant Ex. 5 at 17 (Synatschk); Tr at 488:104; Tr at 504:13; Tr at 521:8-10 (Knowles).

<sup>179</sup> 30 TAC § 309.13(c).

<sup>180</sup> ED Ex. 1 at 21. See map at Protestants Ex. 6.

250 feet from Protestants' water well. Protestants did not provide any evidence that their water well is less than 250 feet from the nearest proposed treatment unit. The evidence shows that no proposed WWTP unit is located within 250 feet of the Martins' well.<sup>181</sup> Therefore, the information contained in the Application satisfies the requirements of 30 TAC § 309.13(c).

#### **F. Discharge Point and Discharge Route**

The Texas Water Code (TWC) authorizes the Commission to issue permits for the discharge of waste into the water in the state.<sup>182</sup> TPDES permits do not give permit holders the right to use private or public property to convey wastewater, without first obtaining all necessary property rights.<sup>183</sup> The outfall location (point of discharge) submitted with the original Application was moved to the other side of County Road 550 based on Protestants' concerns that the original proposed outfall was on their property.<sup>184</sup> Because the outfall was simply moved across a road, the discharge route remains the same.<sup>185</sup>

Discharge route and discharge point locations are not specifically addressed by TCEQ's rules. The rules governing plant sites only apply to the location of domestic wastewater treatment facilities.<sup>186</sup> The definition of a wastewater treatment unit only includes apparatuses used for providing treatment of wastewater.<sup>187</sup> Neither the discharge route nor the outfall are defined as a wastewater treatment unit; therefore, the siting provisions of 30 TAC §§ 309.10-14 do not apply to discharge routes or outfalls.

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<sup>181</sup> Applicant Ex. 5 at TS-2 shows Protestants' well to be 521 feet from the nearest WWTP unit and 292 feet from Applicant's property line. *See also* Applicant Ex. 5 at 15 (Synatschk); Tr at 488:1-4; Tr. at 504:13, and Tr. at 521:8-10 (Knowles).

<sup>182</sup> TWC § 26.027.

<sup>183</sup> ED Ex. 5 at 1.

<sup>184</sup> ED Ex. 1 at 18.

<sup>185</sup> ED Ex. 1 at 18.

<sup>186</sup> 30 TAC § 309.10(a).

<sup>187</sup> 30 TAC § 309.11(9).

## G. Conclusion

The ED asserts that the buffer zones, outfall description, and discharge route comply with all applicable statutory and regulatory requirements.<sup>188</sup>

OPIC agrees that the Draft Permit appears to comply with siting requirements.<sup>189</sup> OPIC notes that while Applicant has acknowledged that the location of the discharge point in the Application is not correct,<sup>190</sup> the discharge point is adequately described in the Draft Permit. Furthermore, OPIC points out that Applicant is supportive of including a precise location of the discharge point in the Draft Permit.<sup>191</sup> Should the Application become part of the Permit itself, OPIC recommends the Application be amended to conform to the specifications of the Draft Permit. The Draft Permit should also include language explicitly stating that instances where the Application and the Permit are inconsistent, the terms of the Draft Permit supersede the terms of the Application, OPIC suggests.

Based on the above discussion, the ALJ finds the discharge route and discharge point are not subject to the TCEQ's siting requirements and that the Draft Permit complies with all applicable statutes and rules regarding the siting requirements for the proposed facility. The ALJ further recommends that the Commission adopt OPIC's suggestions regarding amending the Application to conform to the Draft Permit specifications and adding language to the Draft Permit stating the provisions of the Draft Permit supersede the terms of the Application when the two are inconsistent.

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<sup>188</sup> ED's Closing Argument at 10-11.

<sup>189</sup> OPIC's Closing Argument at 5.

<sup>190</sup> Tr. at 68:15-69:3, as cited in OPIC's Closing Argument at 5.

<sup>191</sup> Tr. at 70:12-23

**VI. WHETHER THERE IS A NEED FOR THE  
FACILITY, WHETHER THE DRAFT PERMIT ADEQUATELY  
ADDRESSES REGIONALIZATION CONCERNS, AND WHETHER  
ANY ADDITIONAL TERMS OR CONDITIONS SHOULD BE INCLUDED  
IN THE PERMIT BASED UPON THE COMMISSION'S CONSIDERATION  
OF NEED AND REGIONALIZATION UNDER TWC § 26.0282 (ISSUE 3)**

**A. Overview**

The Legislature authorized the Commission to consider need and regional treatment options when issuing, amending, or renewing a permit to discharge waste. As provided by TWC § 26.0282 (Consideration of Need and Regional Treatment Options):

. . . 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 pursuant to provisions of this subchapter.

As indicated by the title, this section applies only to need as it relates to regionalization. It does not apply to the “need” for a particular development. The ED explains that “regionalization” is encouraged by TCEQ to reduce the number of small wastewater treatment plants; “need” is the analysis of whether the proposed facility will be sized to appropriately treat the volume of wastewater that Applicant anticipates the development will produce.<sup>192</sup>

**B. The WWTP Is Needed**

The method for evaluation of need is not addressed in either the TWC or TCEQ rules. However, the application for a domestic wastewater discharge permit requires applicants to justify the flow need by a facility.<sup>193</sup> The instructions for completing an application for a municipal WWTP state that “[t]he Commission is charged with the responsibility of determining

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<sup>192</sup> ED’s Reply to Closing Arguments at 5.

<sup>193</sup> ED Ex. 1 at 13:19-23.

the need for a permit.” The instructions go on to ask the applicant to provide information regarding the start date, projected size, and projected growth rate of the development. There is nothing in the application form or instructions that require the applicant to evaluate the underlying “need” for the development. According Applicant’s witness Rex Hunt, P.E., the analysis of need is limited to an evaluation of the existence of a new or existing development that needs wastewater service.<sup>194</sup> Farmersville submitted such an evaluation with the Application,<sup>195</sup> and Mr. Trede testified that the evaluation Farmersville submitted was sufficient for his analysis of need.<sup>196</sup> Mr. Trede testified that his evaluation of need is based on Applicant’s justification for the facility and the flow volume requested,<sup>197</sup> but he does not evaluate the need for the underlying development.<sup>198</sup>

Farmersville’s chart detailing a 470-acre development with approximately 1,500 equivalent single family connections (calculated at 325 gallons per connection),<sup>199</sup> which was sufficient for the ED’s review,<sup>200</sup> establishes there is a current and pressing need for a WWTP to serve the Farmersville development. Provident Investment—the development owner—anticipates build-out of the WWTP on the following schedule:<sup>201</sup>

Month	Equivalent Single-Family Connections	Avg. flow (gal/day)
January 2010	0	0
January 2011	200	65,000
January 2012	450	147,000

<sup>194</sup> Tr. at 423.

<sup>195</sup> Applicant Ex. 5, SB-2 at 57.

<sup>196</sup> ED Ex. 1 at 24.

<sup>197</sup> ED Ex. 1 at 23.

<sup>198</sup> Tr. at 568-569.

<sup>199</sup> Applicant Ex. 5, SB-2 at 47.

<sup>200</sup> ED Ex. 1 at 24:6-8.

<sup>201</sup> Applicant Ex. 2 at 7:11-20 (Kruppa Supplemental). The ALJ notes that the average flow projected for January 2016 and December 2017 exceeds the Final Phase average flow of 0.5 MGD.

January 2013	750	250,000
January 2014	1,050	350,000
January 2015	1,350	449,000
January 2016	1,650	549,000
December 2017	1,800	600,000

On cross examination of Mr. Hunt, Protestants explored the possibility of Farmersville using septic systems or irrigation as an alternative for discharge. Mr. Hunt testified that he did not think septic systems are a viable option for the proposed Farmersville development.<sup>202</sup> He explained that septic systems do not provide treatment,<sup>203</sup> and if Farmersville were to use septic systems rather than the WWTP, and if a septic system were to fail, then untreated sewage could eventually drain into the same unnamed tributary where Farmersville intends to discharge its WWTP effluent.<sup>204</sup> Mr. Hunt also stated that the use of septic tanks or irrigation is not part of the need analysis under TWC § 26.0282.<sup>205</sup>

The ALJ concurs with Applicant and the ED<sup>206</sup> that Farmersville has demonstrated a need for the proposed WWTP.

### C. Regionalization

#### 1. Area-wide or Regional Plant Not Available

Mr. Trede testified that as part of the application process, applicants are asked if there are any wastewater and/or collection systems within three miles of the area to be served by the

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<sup>202</sup> Tr. at 372-374 and 395-396.

<sup>203</sup> Tr. at 397.

<sup>204</sup> Tr. at 398.

<sup>205</sup> Tr. at 423.

<sup>206</sup> ED's Closing Argument at 18.

proposed facility,<sup>207</sup> to which Farmersville responded that there are not.<sup>208</sup> Protestants did not provide any evidence that there is a WWTP within three miles of the area Farmersville intends to serve that has the capacity and is willing to provide service to Farmersville.

Mr. Knowles, Protestants' expert, testified that the "three-mile distance requirement in the rules should be from the development, not the proposed plant, since the goal is to find an alternative plant for the development."<sup>209</sup> First, argues the ED,<sup>210</sup> Mr. Knowles misstates the three-mile "rule." As Mr. Trede, a permit writer for the TCEQ who has reviewed more than 800 domestic wastewater permit applications, states, the three-mile distance requirement is not mandated by rule or statute; rather, it is a "rule of thumb"<sup>211</sup> used to provide guidance for applicants.<sup>212</sup>

Mr. Knowles also testified that Farmersville should have done more to explore the option of connecting to the U.S. Army Corps of Engineers (Corps) plant that is within three miles of Farmersville's proposed location.<sup>213</sup> But Mr. Trede testified that, as part of its Application, Farmersville included a document from the Corps which indicated that the Corps did not currently have capacity to serve Farmersville and that the Corps of Engineers is not looking to stay in the business of wastewater treatment."<sup>214</sup> According to Mr. Trede, the document from the Corps was sufficient for his review, and based on the documents provided in the Application, there are no wastewater treatment facilities within three miles of the proposed Farmersville facility with the capacity to accept wastewater from the Farmersville development.<sup>215</sup>

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<sup>207</sup> ED Ex. 1 at 22.

<sup>208</sup> ED Ex.1 at 22.

<sup>209</sup> Protestants Ex. 11 at 9.

<sup>210</sup> ED's Closing Argument at 20-21.

<sup>211</sup> Tr. at 551.

<sup>212</sup> Tr. at 553.

<sup>213</sup> Protestants Ex. 11.

<sup>214</sup> ED Ex. 8 at 3.

<sup>215</sup> ED Ex. 1 at 23.

Protestants also argued that Farmersville did not adequately evaluate all potential WWTPs that might be able to serve the Farmersville development,<sup>216</sup> and that there are 29 existing water quality permits in Segment 0821.<sup>217</sup> The ED points out<sup>218</sup> that Farmersville requested authorization to discharge 0.5 MGD in the final phase, yet the facilities Protestants believe Farmersville should have contacted are only authorized to discharge between 0.0035 MGD (Fairview Joint Venture, TPDES Permit No. WQ0013806001)<sup>219</sup> and 0.53 MGD (City of Farmersville, TPDES Permit No. WQ0010442002).<sup>220</sup> Obviously, a WWTP that is only authorized to discharge 0.0035 MGD does not have the capacity to accept 0.50 MGD of additional waste, even if the existing permit were next door to the proposed facility. TCEQ rules do not require existing WWTPs to expand to accommodate more flows from outside their service area.

## **2. February 2010 Waste Feasibility Report (Remanded Issue No. 3)**

Shortly before the originally scheduled hearing on the merits, Applicant provided Protestants with a draft Feasibility Study concerning the prospect of developing a regional facility or facilities on the east side of Lavon Lake.<sup>221</sup> The original proceeding was delayed so Protestants could investigate whether the draft Feasibility Study created a regional option available to Applicant. Applicant argues that a draft study that contemplates a plant—absent even a final study, much less acceptance of the study by those who would pay for a system

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<sup>216</sup> Protestants Ex. 11 at 9.

<sup>217</sup> Protestants Ex. 11 at 9. (Excerpts from the permits are included in Protestants Ex. 15).

<sup>218</sup> ED's Closing Argument at 20.

<sup>219</sup> Protestants Ex. 15 at 24-25.

<sup>220</sup> Protestants Ex. 15 at 26-27. Protestants also provided information on TPDES Permit No. WQ0001923000 which authorizes the discharge of 404 MGD; however, this is an industrial permit for the discharge of once-through cooling water, steam condensate, and storm water from the Ray Olinger Steam Electric Station. Industrial WWTPs have very different treatment processes from municipal WWTPs, therefore, even if there were excess capacity, the treatment technology would not be appropriate for wastewater from Farmersville. ED's Closing Argument at 20, FN 109.

<sup>221</sup> Applicant Ex. 2 at KK8.

application for a permit, on any design plans—is not a proposed facility.<sup>222</sup> No evidence was presented that government action has been taken to propose an area-wide or regional plant. At the original hearing, no final study recommending that any entity proposes an area-wide or regional plant was offered into evidence. Applicant argued that it was quite possible that there will never be an area-wide or regional plant to serve the needs of the Farmersville development.<sup>223</sup>

Pursuant to the Interim Order, the February 2010 *Wastewater Feasibility Report* was offered into evidence by Protestant's counsel and admitted without objection from any party.<sup>224</sup> Applicant argues that while the feasibility of establishing a regional plant to serve the east side of Lavon Lake has been studied, there is no existing or proposed area-wide or regional collection, treatment, or disposal system available to treat the waste from the proposed Farmersville development.<sup>225</sup> Applicant concludes that it, the ED, and the Commission have satisfied TWC § 26.0282 by considering the availability of existing or proposed area-wide or regional waste collection, treatment, and disposal systems.

The ALJ agrees with Applicant that no evidence of an existing or proposed area-wide or regional waste collection, treatment, or disposal system was presented. Therefore, the Application meets the requirements of TWC § 26.0282.

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<sup>222</sup> Applicant's Closing Argument at 14.

<sup>223</sup> Applicant's Closing Argument at 14.

<sup>224</sup> Protestants Ex. 40. *See* Remand Tr. at 208:12-13 and 24-25; 209:1-17. The Commissioners did not request further argument or briefing regarding the originally referred issue of regionalization, and none was made at the hearing. Even so, Protestants addressed regionalization in Protestants' Closing Argument Following the Remand Hearing at 7, 12, 30-36, and 44-46.

<sup>225</sup> Applicant Ex. 2 at KK8. *See also* Applicant's Response to Closing Arguments on Remanded Issues at 16.

### **3. Draft Permit Contains Regionalization Language**

In the event an area-wide waste treatment system becomes available to serve the Farmersville development, the Draft Permit includes Other Requirement No. 9,<sup>226</sup> which provides:

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

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

#### **D. Additional Terms**

It should be noted that the Draft Permit contains the following language:

Permits for domestic wastewater treatment plants are granted subject to the policy of the Commission to encourage the development of area-wide waste collection, treatment, and disposal systems. The Commission reserves the right to amend any domestic wastewater permit in accordance with applicable procedural requirements to require the system covered by this permit to be integrated into an area-wide system, should such be developed; to require the delivery of the waste authorized to be collected in, treated by or discharged from said system to such area-wide system; or to amend this permit in other particular to effectuate the Commission's policy. Such amendments may be made when the changes required are advisable for water quality control purposes and are feasible on the basis of waste treatment technology, engineering, financial, and related considerations existing at the time the changes are required, exclusive of the loss

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<sup>226</sup> ED Ex. 5 at 26.

of investment in or revenues from any then existing or proposed waste collection, treatment or disposal system.<sup>227</sup>

#### **E. Conclusion**

Based on the evidence presented, the ALJ finds that the proposed WWTP complies with all statutory and regulatory requirements regarding need and regionalization, and no additional requirements should be added to the Draft Permit. The ED and OPIC also conclude that Applicant has met its burden as to the referred issue related to need and regionalization.<sup>228</sup>

### **VII. WHETHER CONTAMINANTS IN THE EFFLUENT WILL IMPACT THE HEALTH OF THE HEARING REQUESTERS OR INTERFERE WITH THEIR USE AND ENJOYMENT OF THEIR PROPERTY (ISSUE 4)**

#### **A. Overview**

According to the ED, “contaminants” is not a word typically used in wastewater permitting and is not defined by the TCEQ’s rules in the context of wastewater permitting.<sup>229</sup> Contamination is, however, defined in the rules governing public drinking water as: “The presence of any foreign substance (organic, inorganic, radiological or biological) in water which tends to degrade its quality so to constitute a health hazard or impair the usefulness of the water.”<sup>230</sup> The ALJ will use the this definition of “contamination” in considering the referred issue.

According to the Legislature, the policy of the state is to “maintain the quality of water in the state consistent with the public health and enjoyment, the propagation and protection of

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<sup>227</sup> ED Ex. 5 at 13, paragraph 8c.

<sup>228</sup> ED’s Closing Argument at 22; OPIC’s Closing Argument at 5-6.

<sup>229</sup> ED’s Closing Argument at 23.

<sup>230</sup> 30 TAC § 290.38(16).

terrestrial and aquatic life . . . .<sup>231</sup> TCEQ is the agency responsible for implementing the Legislature's policy and has adopted various rules designed to ensure the policy is consistently met.

The ED ensures that water quality in the state will be maintained consistent with the public health and enjoyment and the propagation and protection of terrestrial and aquatic life by reviewing all applications for TPDES permits for consistency with the Federal Clean Water Act § 402 (National Pollutant Discharge Elimination System), TWC ch. 26 (Water Quality Control), 30 TAC chs. 30 (Occupational Licenses and Registrations), 305 (Consolidated Permits), 307 (Texas Surface Water Quality Standards), 309 (Domestic Wastewater Effluent Limitations and Plant Siting), 312 (Sludge Use, Disposal and Transportation), 317 (now 217—Design Criteria for Domestic Wastewater Systems), 319 (General Regulations Incorporated into Permits), Commission policies, and EPA guidelines.<sup>232</sup>

But Protestants argue that the referred issue is not whether health-based water quality standards are met by Applicant. Instead, Protestants aver, the issue is whether their health will be adversely affected by non-traditional contaminants which are not regulated by TCEQ.<sup>233</sup> Specifically, Protestants are concerned that the water in their private well will be adversely affected by the discharge of non-traditional pollutants, such as endocrine disrupters and pharmaceuticals, that could endanger their health.<sup>234</sup>

As discussed previously concerning the burden of proof, once Applicant has demonstrated compliance with applicable law, the burden shifts to Protestants to show that contaminants in the effluent will impact their health. Every expert, including Protestants' expert,

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<sup>231</sup> TWC § 26.003.

<sup>232</sup> Tr. at 2-3.

<sup>233</sup> Protestants' Closing Argument at 11. *See also* Applicant's Closing Argument at 15.

<sup>234</sup> Protestants' Closing Argument at 11.

testified that the Application and Draft Permit meet TCEQ's minimum requirements.<sup>235</sup> In addition, the ED and OPIC conclude Applicant has met its burden as to this issue.<sup>236</sup>

Protestants did not provide any evidence that the proposed discharge will contain "contaminants" rendering it a health hazard or that TCEQ's rules are insufficient to protect human health and the environment. Protestants put forth no medical or other expert testimony to show that their health would be affected by the effluent. The ALJ finds Applicant met its burden of proof on this issue, and Protestants did not rebut the presumption that their health will be protected if Applicant complies with applicable TCEQ rules.

## **B. Impact of the Farmerville Proposed Discharge on the Protestants' Health**

### **1. Protestants' water well**

"Groundwater" was not an issue referred to SOAH; however, the Commission did refer the issues of the siting of the facility and the impact of the discharge on Protestants' health. The location of the WWTP in relation to Protestants' well could have an impact on their health or the use and enjoyment of their property.

The relevant requirement for siting WWTP units in relation to water wells is found at 30 TAC § 309.13(c), which states that a WWTP unit may not be located closer than 250 feet from a private well. As previously discussed, Protestants' private well is 521 feet from the nearest WWTP unit.<sup>237</sup> Applicant argues that the well on Protestants' property is not likely to be

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<sup>235</sup> Tr. at 488:1-4, Tr. at 504: 8-13; Tr. at 521: 8-10 (Knowles); Applicant Ex. 3 at 20:5-8 and at 39 (Barry); Applicant Ex. 5 at 8:11-20, 17:8-12, 18:18-19, and 19:8-16 (Synatschk); Applicant Ex. 7 at 16: 4-17:2; 26: 1-21, 31:21-32:21, and 34:20-35:20 (Hunt); Applicant Ex. 6 at 21:4-14 and 28:1-5 and ED Ex. 1 at 24:16-18 (Trede); ED Ex. 10 at 15:10-13 (Murphy); ED Ex. 14 at 14:2-5 (Michalk).

<sup>236</sup> ED's Closing Argument at 23-25; OPIC's Closing Argument at 7.

<sup>237</sup> Protestants Ex. 6; Applicant Ex. 5 at 15:10-20; Applicant Ex. 5, TS-2 (Synatschk.)

a conduit for groundwater contamination from effluent, since the distance between the well and the nearest treatment plant unit is more than twice the distance required by regulation.<sup>238</sup>

But Protestants are not concerned about contamination of their well under ordinary conditions.<sup>239</sup> They are concerned that their well will be contaminated by effluent when Lavon Lake is high enough to flood into the Corps' flood easement on their property, particularly because the top of their well is below the level of flood easement for Lavon Lake.<sup>240</sup> Applicant's experts have admitted that effluent could enter the well when the lake is high enough to flood into the Corps' flood easement on Protestants' property.<sup>241</sup> When the water is high, Lavon Lake water mixed with treated sewage (or possibly, during floods, bypassed and untreated sewage) could flow back under the road to Protestants' well.<sup>242</sup> Protestants are concerned that the flood easement could be used even when there is no rain, because Lavon Lake receives about 84,000 acre feet of water pumped to it from Lake Texoma.<sup>243</sup>

Applicant responds that if the flood easement is used, the evidence shows that Farmersville's treated effluent would be a miniscule component of waters in the area and that floodwaters entering Protestants' well would include agricultural runoff and other contaminants far in excess of any minute contribution of treated effluent from Farmersville's WWTP.<sup>244</sup>

Applicant also argues that Protestants' well is abandoned and should be plugged.<sup>245</sup> In support of its argument, Applicant points out that Protestants have used the well only twice over the 25 years that they have owned the property.<sup>246</sup> The well was used for the first time more than

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<sup>238</sup> Applicant's Closing Argument at 10.

<sup>239</sup> Protestants' Closing Argument at 11 and 36-39.

<sup>240</sup> Protestants' Closing Argument at 37 and Protestants Ex. 1 at 11: 2.

<sup>241</sup> Tr. 1 at 367:16-23.

<sup>242</sup> Tr. 1 at 366:20-25.

<sup>243</sup> Protestants Ex. 36 at 1.

<sup>244</sup> Tr. at 411:20-412:11.

<sup>245</sup> Applicant's Closing Argument at 10.

<sup>246</sup> Tr at 473:25-475:1.

5 years ago, to water pecan trees.<sup>247</sup> The only other time the well was used was around June 4, 2009.<sup>248</sup> In addition, Mr. Martin testified that he would not want to use the well for drinking water if other water were available.<sup>249</sup> But Protestants respond that they intend to use their land for residential purposes<sup>250</sup> and construction<sup>251</sup> and they expect to use water from the well for irrigation and possibly for drinking.<sup>252</sup>

Protestants believe that instead of being required to plug their well, as Applicant suggests, the outfall should be moved to a different location that does not create risks of contamination through Protestants' well.<sup>253</sup>

The ALJ finds neither party's arguments persuasive. Applicant's argument that the well should be plugged is outside the scope of this proceeding and irrelevant. Protestants' argument that the outfall location should be moved to protect their well from contaminants is not persuasive because the Draft Permit complies with the WWTP unit siting requirements, and no TCEQ rule addresses the location of WWTP units in relation to discharge points. Protestants did not offer any credible evidence regarding the potential impact of Farmersville's effluent to their well. They solicited testimony that under a specific set of circumstances, Lavon Lake could back up and could enter their well, and some of the lake water would have treated effluent in it.<sup>254</sup> The evidence does not support a recommendation that Farmersville be required to relocate the discharge point as Protestants request.

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<sup>247</sup> Tr at 474:19-22.

<sup>248</sup> Tr. at 473:14-20.

<sup>249</sup> Pre-filed testimony of Mr. Martin, Protestants Ex.1 at 9.

<sup>250</sup> Protestants Ex. 1 at 9: 8-9; Tr. 2 at 474: 12-14.

<sup>251</sup> Tr. 2 at 473:25-474: 3.

<sup>252</sup> Protestants Ex. 1 at 9:8-9.

<sup>253</sup> Protestants' Reply to Closing Arguments at 9.

<sup>254</sup> Tr. at 367:18-23.

## 2. More Stringent Standards Not Required

Protestants argue that because the TCEQ rules allow the ED to impose more stringent design criteria for a WWTP in order to protect public health, he should do so in this case.<sup>255</sup> Protestants rely on 30 TAC § 217.3(b), which states:

The executive director may require more stringent criteria of a collection system or treatment facility if the executive director determines it is necessary to protect public health or to meet water quality standards established by the commission.

Protestants' expert Mr. Knowles acknowledged that the Draft Permit meets traditional pollutant limitations.<sup>256</sup> But they point out that the problems with WWTPs that meet only minimum requirements are laid out clearly in Mr. Knowles' testimony.<sup>257</sup> Applicant's experts did not rebut Mr. Knowles' opinion. However, in reviewing Mr. Knowles' testimony, the ALJ finds he did not address how contaminants in the effluent would impact Protestants' health or their use and enjoyment of their property.

The ALJ finds that because Protestants did not provide any evidence that non-traditional pollutants would negatively impact their health or public health, it is not appropriate for the ED to require Farmersville to comply with more stringent design criteria.

### C. Impact of Farmersville Discharge on Protestants' Use and Enjoyment of Their Property

The only allegation by Protestants with respect to the enjoyment of their property is Mr. Martin's concern regarding odor from the facility.<sup>258</sup> Mr. Martin claimed that he visited three other WWTPs and found the odors objectionable.<sup>259</sup> Applicant argues that Mr. Martin

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<sup>255</sup> Protestants' Closing Argument at 35 and 41.

<sup>256</sup> Protestants' Closing Argument at 42.

<sup>257</sup> Protestants Ex. 11 at 4:11-5:18 and at 16:14-17:9.

<sup>258</sup> Protestants Ex. 1 at 14:12-20.

<sup>259</sup> Protestants Ex. 1 at 14:16.

lacks the expertise to know whether those three WWTPs are substantially similar to Farmersville's proposed WWTP; that Mr. Martin did not testify how close he was to the WWTPs when he smelled the odors; and that he did not know if the WWTPs he visited were operating in compliance with TCEQ rules.<sup>260</sup>

As discussed above in relation to the siting requirements, to prevent unpleasant odors from impacting Protestants, the Draft Permit requires Farmersville to maintain a 150-foot buffer zone between its WWTP units and Protestants' property line. Additionally, the Draft Permit requires Farmersville to obtain Protestants' permission before Applicant may use any part of Protestants' property.<sup>261</sup> But the deed to the proposed WWTP property confirms that the entire plant site within the property boundaries is owned by Farmersville.<sup>262</sup>

Protestants argue that the maps submitted with the Application are wrong,<sup>263</sup> and they cite the following examples. The Application's final buffer zone map shows a 152-foot buffer zone, but that is the distance to the Corps' flood easement, not to Protestants' property.<sup>264</sup> The topography map<sup>265</sup> was prepared before the normal pool of Lavon Lake was raised and the road moved. The landowner maps<sup>266</sup> purport to show Protestants' property, but show instead the Corps' flood easement on Protestants' property. This is clear by looking at the northeast corner of the map,<sup>267</sup> which shows that the map used the Corps' flood easement, not Protestants' property. This can be seen by Protestant Ex. 4, a map that came with Protestants' deed. The

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<sup>260</sup> Applicant's Closing Argument at 18, citing Tr. at 471:18-472:1.

<sup>261</sup> ED Ex. 5 at 1.

<sup>262</sup> Applicant Ex. 5 at 17:4-7 (Synatschk). The drawing that shows the buffer zone distance is Applicant Ex. 5, TS-2. Protestants did not cross-examine Mr. Synatschk, the author and sponsor of TS-2. See Applicant Ex. 5 at 13:22-14:8; Applicant Ex. 5 at TS-2; Tr. at 261:16-262:9.

<sup>263</sup> Protestants' Closing Argument at 10.

<sup>264</sup> Protestants' Closing Argument at 35-36.

<sup>265</sup> Applicant Ex. 3, SB-2 at 77.

<sup>266</sup> Applicant Ex. 3, SB-2 at 28 and SB-3 at 2.

<sup>267</sup> Number 15 on Applicant Ex. 3, SB-2 at 28.

USGS topography map<sup>268</sup> is out of date; TCEQ staff had created a map with the road in approximately the new location. Here, Protestants argue, there is no room for error, as Applicant has shoehorned its facility into an area that allows 152 feet of buffer, only two feet more than the minimum distance required.<sup>269</sup>

But Protestants have not alleged that the Draft Permit contains incorrect distances for the buffer zone. Applicant responds that assurance that the 150-foot setback will be maintained must be provided during the design and construction phase of permitting, which, pursuant to 30 TAC ch. 217, requires detailed drawings showing exactly what WWTP units will be constructed and where, and showing that all treatment units are at least 150 feet from the property boundary.<sup>270</sup>

The ALJ finds that the fact that the maps included in the Application must be modified because of changes made during permit review and the contested case hearing does not mean that Protestants' health or their use and enjoyment of their property will be impacted by the discharge from the Farmersville WWTP.

#### **D. Conclusion**

Based on the evidence presented, the ALJ finds Applicant has met its burden to show that contaminants in the effluent will not impact the health of the hearing requesters or interfere with their use and enjoyment of their property. Applicant has shown by a preponderance of the evidence that the Draft Permit meets buffer zone requirements, that ground water will be protected, and that it meets all water quality standards to protect public health.

Protestants did not provide any evidence that non-traditional pollutants would be discharged from the Farmersville facility, or that if they were, they would negatively impact

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<sup>268</sup> Applicant Ex. 3, SB-2 at 77.

<sup>269</sup> See Applicant Ex. 5, TS-2 at 1.

<sup>270</sup> Applicant's Response to Closing Arguments at 16-17.

Protestants' health. They did not present evidence that the effluent would contain especially high concentrations of non-traditional pollutants. Protestants have not produced any evidence by way of any expert opinions that the proposed discharge is not protective of human health and the environment, that it will contain any "contaminants," or that "contaminants" in the discharge will negatively affect their health.

### VIII. TRANSCRIPTION COSTS

The ALJ required a transcript because the hearing was scheduled to last longer than one day. The ALJ also directed Applicant to arrange for the court reporter and to pay the cost of the transcript, subject to an allocation of those costs at the conclusion of the case.<sup>271</sup> Applicant has not provided information concerning these costs, and no party briefed the issue of allocation of the costs in their post-hearing arguments. Nevertheless, the ALJ will briefly discuss the allocation of transcript costs.

The Commission's rules at 30 TAC § 80.23(d) list the factors to be considered in assessing reporting and transcription costs. The factors relevant to this case include the following:

- (A) The party who requested the transcript. The ALJ ordered the transcript.
- (B) The financial ability of the party to pay costs. The Martins are private citizens who own the property adjacent to Farmersville's proposed WWTP site. Farmersville is a business entity that appears to have greater financial ability to pay costs.
- (C) The extent to which the party participated in the hearing. The Martins were the only protestants that participated in the hearing. Although some minor straying

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<sup>271</sup> Order No. 1 (April 30, 2009); 30 TAC § 80.23(b)(4).

from the limited scope of issues occurred, the questioning of witnesses by the parties was generally to the point and directed toward relevant issues. Farmersville presented five witnesses in its direct case. Mr. Martin testified and called one other witness for brief testimony. The ED called three witnesses. The ALJ finds that the extent of participation by all parties was appropriate and that none of the parties unduly burdened the transcript with unnecessary questioning of witnesses. Indeed, although originally scheduled for three days, the parties completed the hearing in one and a half days.

- (D) The relative benefits to the various parties of having a transcript. All parties benefited from having a transcript, but as the party bearing the burden of proof, Farmersville had the greatest potential benefit from an ability to cite and reassemble the information within the record.
  
- (E) The budgetary constraints of a state or federal administrative agency participating in the proceeding. The broad responsibilities and limited budgets of the agency parties in this case make it unreasonable to assess costs against them. The rules also preclude the Commission from assessing costs against parties that cannot appeal a Commission decision (the ED and OPIC).<sup>272</sup>
  
- (F) in rate proceedings, the extent to which the expense of the rate proceeding is included in the utility's allowable expenses. This factor is inapplicable.
  
- (G) Any other factor which is relevant to a just and reasonable assessment of costs.  
None.

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<sup>272</sup> 30 TAC § 80.23(d)(2).

After considering these factors, and particularly the financial ability of Applicant and the benefit it received from having a transcript, the ALJ finds it appropriate to assess all transcript costs to Applicant.

### IX. CONCLUSION

The ALJ recommends that the Commission find in favor of Applicant on all issues referred to SOAH, including those for which additional evidence was taken on remand. The discharges under the terms of the Draft Permit will meet the requirements of 30 TAC ch. 307. The Draft Permit complies with siting requirements for the proposed facility location including the discharge point, discharge route, and the buffer zone requirements. There is a need for the facility and the Draft Permit adequately addresses regionalization concerns. No additional terms or conditions should be included in the permit based upon the Commission's consideration of need and regionalization under TWC § 26.0282. The contaminants in the effluent will not impact the health of the hearing requesters or interfere with their use and enjoyment of their property.

An Amended Proposed Order is attached to this Amended PFD setting out findings of fact and conclusions of law addressing these referred issues. In addition, the Amended Proposed Order includes a conclusion of law and an ordering provision stating that the terms of the permit and the ED's review of the Application comply with all applicable federal and state requirements. These items are included as a convenience to the Commission in order to allow it to more easily issue a single decision on the Application in accordance with 30 TAC § 50.117(g). The ALJ makes no recommendation regarding issues not referred for hearing.

**SIGNED February 7, 2011.**

  
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SHARON CLONINGER  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**



**ORDER**

**CONCERNING THE APPLICATION BY  
FARMERSVILLE INVESTORS, LP,  
FOR TEXAS POLLUTANT DISCHARGE ELIMINATION SYSTEM (TPDES)  
PERMIT NO. WQ0014778001**

On \_\_\_\_\_, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the application of Farmersville Investors, LP (Farmersville or Applicant) for a permit to discharge treated wastewater effluent in Collin County, Texas. A Proposal for Decision (PFD) was presented by Sharon Cloninger, Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH).

The following are parties to the proceeding: Farmersville; the Executive Director (ED); James A. and Shirley Martin (Protestants); and the Office of Public Interest Counsel (OPIC).

After considering the PFD, the Commission makes the following Findings of Fact and Conclusions of Law.

**FINDINGS OF FACT**

1. Farmersville has applied to the TCEQ for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014778001.

2. The permit would authorize the discharge of treated wastewater effluent from a new proposed municipal wastewater treatment plant (WWTP) that would be located in Collin County, approximately 0.5 miles southwest of the intersection of State Highway 78 and County Road 550.

**Procedural History**

3. Farmersville filed its application for a new TPDES permit on January 31, 2007.
4. The ED declared the application (Application) administratively complete on February 23, 2007.
5. Farmersville published the Notice of Receipt of Application and Intent to Obtain a Water Quality Permit (NORI) on March 1, 2007, in the *Farmersville Times & Princeton Herald* and on May 11, 2007, in the Collin County edition of the *Dallas Morning News*.
6. The ED completed the technical review of the application and prepared an initial draft permit (Draft Permit).
7. The Notice of Application and Preliminary Decision (NAPD) for a Water Quality Permit was published on June 22, 2007, in the Collin County edition of the *Dallas Morning News*.
8. Both the NORI and NAPD were re-mailed to a corrected list of landowners on July 31, 2007, along with a letter explaining that the original mailing list required corrections for some incorrect addresses and the omission of some landowners.
9. The ED determined that the application and draft TPDES Permit No. WQ0014778001 met all of the requirements of 30 Texas Administrative Code and recommended issuance of the Draft Permit.
10. Notice of the Public Meeting was published on October 28, 2007.

11. A public meeting was held December 4, 2007, in Farmersville, Texas.
12. Following receipt of several requests for a contested case hearing, the Commission considered the requests in an open meeting on February 11, 2009.
13. The Commission referred this matter to SOAH. The Commission established a nine-month deadline for issuance of the PFD (from the date of the preliminary hearing), and referred four issues.
14. Notice of Hearing was published in the *Dallas Morning News* on March 14, 2009.
15. The preliminary hearing was held on April 29, 2009, at SOAH in Austin. After determining that proper notice had been given and that the Commission and SOAH have jurisdiction over this matter, the ALJ designated the following parties: Farmersville; the ED; OPIC; and Protestants.
16. When the hearing on the merits was continued, the parties waived the deadline established by the Commission for the completion of the hearing process and agreed the PFD should be issued by April 1, 2010.
17. The hearing on the merits was held at SOAH in Austin on December 16-17, 2009. The record closed on January 29, 2010, with the submission of the parties' final closing arguments.
18. The PFD was issued March 26, 2010.
19. The PFD was considered by the Commission at its open meeting on June 16, 2010.
20. The Commission determined the case should be remanded to SOAH for the taking of additional evidence, as set out in its June 22, 2010 Interim Order.
21. The remand proceeding was held November 29-30, 2010, and the record closed January 10, 2011, after the parties submitted closing arguments and replies.

### **Proposed Facility and Draft Permit Conditions**

22. The proposed WWTP would serve a new subdivision, and would be located approximately 0.5 miles southwest of the intersection of State Highway 78 and County Road 550 in Collin County, Texas.
23. The Draft Permit would authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 0.1 million gallons per day (MGD) in the Interim I Phase, 0.25 MGD in the Interim II Phase, and 0.5 MGD in the Final Phase.
24. The effluent would not be discharged into Lavon Lake, but into an unnamed tributary, thence to the Elm Creek arm of Lavon Lake in Segment No. 0821 of the Trinity River Basin, flowing 638 feet before reaching Lavon Lake at its normal pool elevation of 492 feet above mean seal level.
25. The immediate receiving stream, the unnamed tributary, is an intermittent stream with no significant life use and was properly assigned a dissolved oxygen (DO) tributary requirement of 2.0 mg/L.
26. Lavon Lake is a classified water body (Segment No. 0821) and is assigned contact recreation, public water supply, and high aquatic life use.
27. Lavon Lake is properly assigned a dissolved oxygen (DO) requirement of 5.0 mg/L.
28. Existing water quality uses will be maintained and protected and no significant degradation of Lavon Lake will occur if the Draft Permit is issued with a modified DO requirement of 4.0 mg/L to protect Lavon Lake when the water backs into the intermittent stream and discharge is directly into the lake.

29. Existing water quality uses would be maintained and protected and no significant degradation of Lavon Lake will occur if the Draft Permit is issued with a DO requirement of 4.0 mg/L.
30. The WWTP would be a single stage nitrification activated sludge process facility.
31. Treatment units for the Interim I and II phases will include a lift station, bar screen, aeration basin, final clarifier, sludge digester, and a chlorine contact chamber.
32. Treatment units for the Final Phase will include a lift station, splitter box, bar screen, two aeration basins, two final clarifiers, two aerobic digesters, and two chlorine contact chambers.
33. The Draft Permit includes the following daily average effluent limitations, based on a 30-day average, for Interim Phase I: 10 milligrams per liter (mg/L) 5-day Biochemical Oxygen Demand (BOD<sub>5</sub>); 15 mg/L Total Suspended Solids (TSS); 0.5 mg/L total Phosphorus (P); and 4.0 mg/L minimum dissolved oxygen (DO).
34. The Draft Permit includes the following daily average effluent limitations, based on a 30-day average, for Interim Phase II and the Final Phase: 10 mg/L 5-day Carbonaceous Biochemical Oxygen Demand (CBOD<sub>5</sub>); 15 mg/L TSS; 3 mg/L ammonia nitrogen (NH<sub>3</sub>-N); 0.5 mg/L P; and 4.0 mg/L minimum DO.
35. For all phases, the Draft Permit includes requirements that the effluent contain a chlorine residual of at least 1.0 mg/L and shall not exceed a chlorine residual of 4.0 mg/L after a detention time of at least 20 minutes based on peak flow.
36. The correct discharge route is reflected in both the Standards Memo and the Draft Permit.
37. Based on an agreement between North Texas Municipal Water District, the City of Farmersville, and Applicant dated March 26, 2009, Other Requirement No. 9 of the Draft

Permit requires that if economically feasible, Farmersville's WWTP shall be integrated into an area-wide waste collection treatment and disposal system within 24 months of such system becoming available to treat and dispose of Farmersville's wastes, notwithstanding the loss of investment in or revenues from any then-existing or proposed waste collection, treatment, or disposal system.

### **Surface Water Quality**

38. At the proposed Final Phase permitted discharge of 0.5 MGD, an effluent set of 10 mg/L CBOD<sub>5</sub>, 3 mg/L NH<sub>3</sub>-N, and 4 mg/L DO will be adequate to ensure that the DO criterion of 2.0 mg/L for the unnamed tributary will be maintained.
39. At the proposed Final Phase permitted discharge of 0.5 MGD, an effluent set of 10 mg/L CBOD<sub>5</sub>, 3 mg/L NH<sub>3</sub>-N, and 4.0 mg/L DO will ensure that the dissolved oxygen levels will be maintained above the criteria for the unnamed tributary (2.0 mg/L) and Lavon Lake (5.0 mg/L).
40. If the Draft Permit is approved, Farmersville will be obligated to then submit its design plans and specifications for review by the ED to ensure compliance with requirements set out in 30 TEX. ADMIN. CODE ch. 307, the Texas Surface Water Quality Standards.
41. The discharges under the terms of the Draft Permit will meet the requirements of 30 TAC ch. 307 and will protect the water quality of the unnamed tributary and Lavon Lake.

### **Siting Requirements**

42. The proposed Farmersville WWTP units will not be located closer than 500 feet from any public water well or closer than 250 feet from any private water well.
43. The private water well located on Protestants' property is 521 feet from the proposed WWTP.

44. The siting of the Farmersville facility would minimize the contamination of groundwater.
45. The proposed Farmersville WWTP is not in the 100-year floodplain.
46. No WWTP units will be located in a wetland.
47. Farmersville will control nuisance odors by owning a buffer zone of at least 150 feet around the WWTP units.
48. The planned facility will meet the 150-foot buffer zone requirement; and the plant site and required buffer zone are owned by Farmersville; therefore, Farmersville does not have to acquire additional easements or other property interests.
49. The Draft Permit complies with the siting requirements for the proposed WWTP location including the discharge point, discharge route, and the buffer zone requirements.

**Need for Facility and Regionalization**

50. There is sufficient need for Farmersville's proposed WWTP under TEX. WATER CODE ANN. § 26.0282 based upon the construction schedule for the Farmersville property.
51. There is currently no regional wastewater treatment plant available for Farmersville to connect into, and no agreements for the building of any such regional plant have been finalized or are set for the foreseeable future.
52. No area-wide, regional, or other wastewater treatment plant and/or collection system is available to serve the needs of the Farmersville development.
53. Onsite sewage facilities are not a viable option for wastewater treatment for the Farmersville development based on the location of the property.

### **Use and Enjoyment of Property**

54. The Farmersville WWTP will not interfere with Protestants' use and enjoyment of their property.
55. The contaminants in the effluent will not impact the health of the hearing requestors or interfere with the use and enjoyment of their property.

### **Transcription Costs**

56. Reporting and transcription of the hearing on the merits was warranted because the hearing lasted two days.
57. All parties fully participated in the hearing by presentation of witnesses and cross examination.
58. All parties benefitted from preparation of a transcript.
59. There was no evidence that any party subject to allocation of costs was financially unable to pay a share of the costs.
60. Farmersville is a limited partnership.
61. Protestants are private individuals.

## **CONCLUSIONS OF LAW**

### **Jurisdiction**

1. The Commission has jurisdiction over this matter. TEXAS WATER CODE chs. 5 and 26.
2. SOAH has jurisdiction over this hearing process and the authority to issue a proposal for decision with findings of fact and conclusions of law. TEXAS WATER CODE §§ 5.311 and 26.021; TEXAS GOV'T CODE ch. 2003.

**Notice**

3. Notice of the Farmersville application and the hearing was properly provided to the public and to all parties. TEXAS WATER CODE ANN. §§ 5.115 and 26.028; TEXAS GOV'T CODE ANN. §§ 2001.051 and 2001.052; 30 TEX. ADMIN. CODE §§ 39.405 and 39.551.

**Burden of Proof**

4. Applicant had the burden to prove, by a preponderance of the evidence, that the proposed discharge permit will comply with the applicable statutes and rules. 30 TEX. ADMIN. CODE § 80.17(a).

**Need for facility and regionalization**

5. Farmersville's proposed WWTP is needed based on the Commission's consideration of regionalization and need under TEX. WATER CODE ANN. § 26.0282.
6. The Draft Permit adequately addresses regionalization concerns based on the Commission's consideration of need and regionalization under TEX. WATER CODE ANN. § 26.0282.
7. No additional terms or conditions should be included in the permit based on the Commission's consideration of need and regionalization under TEX. WATER CODE ANN. § 26.0282.

**Surface Water Quality**

8. The proposed discharge route was properly identified and modeled as discharging into an intermittent stream.

9. The Draft Permit will protect the water quality of Lavon Lake and Applicant's proposed discharge will satisfy the requirements of the Commission's numerical stream standards. 30 TEX. ADMIN. CODE ch. 307.
10. The Draft Permit would ensure that the narrative standards applicable to the immediate receiving stream, the unnamed tributary, would be met. 30 TEX. ADMIN. CODE § 307.4.
11. The discharges under the terms of the Draft Permit will meet the requirements of 30 TEX. ADMIN. CODE ch. 307.

**Siting Criteria**

12. The proposed Farmersville facility meets the siting requirements for domestic wastewater effluent and plants. 30 TEX. ADMIN. CODE § 309.12.
13. By ownership of the required buffer zone area, Farmersville shall comply with the requirements of 30 TEX. ADMIN. CODE § 309.13(e).
14. Applicant is not required to prove compliance with 30 TEX. ADMIN. CODE ch. 217 prior to the issuance of a TPDES permit, but must submit the plans and specifications for the WWTP to the TCEQ for approval prior to construction of the facility.

**Nuisance Odors**

15. The proposed Farmersville facility would comply with the requirements intended to reduce nuisance odor conditions. 30 TEX. ADMIN. CODE § 309.13(e).

**Other Requirement No. 9**

16. Other Requirement No. 9 of the Draft Permit is adequate to ensure Farmersville participates in regionalization when an area-wide treatment facility becomes available.

**Transcription Costs**

17. Allocating 10 percent of reporting and transcription costs for the hearing on the merits to Farmersville and none of the costs to Protestants is a reasonable allocation of costs under the factors set forth in 30 TEX. ADMIN. CODE § 80.23(d).
18. In accordance with 30 TEX. ADMIN. CODE § 50.117, the Commission issues this Order and the attached permit as its single decision on the permit application. Information in the agency record of this matter, which includes evidence admitted at the hearing and part of the evidentiary record, documents the Executive Director's review of the permit application, including that part not subject to a contested case hearing, and establishes that the terms of the final version of the attached permit are appropriate and satisfy all applicable federal and state requirements.

**NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:**

1. The application of Farmersville, LP, for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ001478001 is granted.
2. The Commission adopts the Executive Director's Response to Public Comment in accordance with 30 TEX. ADMIN. CODE § 50.117. Also, in accordance with Section 50.117, the Commission issues this Order and the attached permit as its single decision on the permit application. Information in the agency record of this matter, which includes evidence admitted at the hearing and part of the evidentiary record, documents the Executive Director's review of the permit application, including that part not subject

to a contested case hearing, and establishes that the terms of the attached permit are appropriate and satisfy all applicable federal and state requirements.

3. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
4. The effective date of this Order is the date the Order is final, as provided by TEX. GOV'T CODE § 2001.144 and 30 TEX. ADMIN. CODE § 80.273.
5. The Commission's Chief Clerk shall forward a copy of this Order to all parties.
6. If any provision, sentence, clause, or phase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

**ISSUED:**

**TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY**

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**Bryan W. Shaw, Ph.D., Chairman**