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September 3, 2010

Via Electronic Filing

LaDonna Castañuela
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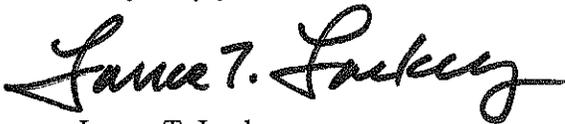
RE: **TCEQ Docket No. 2009-0290-MWD**; *Consideration of an Application for a Temporary Order by Far Hills Utility District to Discharge Treated Municipal Wastewater in Montgomery County, Texas*; TPDES Permit No. WQ0014555002 (CN600667307; RN 105234157)

Dear Ms. Castañuela:

Please find enclosed Far Hills Utility District's Brief in Support of Application for Temporary Order. Please file this document among the papers of the above-referenced matter.

Should you have any questions, please feel free to contact me.

Very truly yours,



Lance T. Lackey

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TCEQ DOCKET NO. 2009-0290-MWD

CONSIDERATION OF AN	§	BEFORE THE
APPLICATION FOR A TEMPORARY	§	
ORDER BY FAR HILLS UTILITY	§	
DISTRICT TO DISCHARGE TREATED	§	TEXAS COMMISSION ON
MUNICIPAL WASTEWATER IN THE	§	
EVENT TPDES PERMIT NO.	§	
WQ0014555002 IS REVOKED	§	ENVIRONMENTAL QUALITY

**FAR HILLS UTILITY DISTRICT'S BRIEF
IN SUPPORT OF APPLICATION FOR TEMPORARY ORDER**

TO THE HONORABLE COMMISSIONERS:

Far Hills Utility District (the "District") has applied, pursuant to TEX. WATER CODE §§ 5.502 and 30 TEX. ADMIN. CODE §§ 35.302, for a temporary order to discharge treated municipal wastewater into state waters in the event the District's TPDES permit is suspended or revoked. In support of its application, the District shows as follows:

INTRODUCTION

The District currently holds TPDES Permit No. WQ0014555002 (the "Permit"), which authorizes the discharge of 0.23 MGD of treated municipal wastewater into a storm sewer that leads to Lake Conroe, in Montgomery County, Texas. The District's wastewater treatment plant has been operating since July 2009 and currently serves approximately 400 residential connections.

On March 3, 2009, two nearby landowners, Suzanne O'Neal and Judith Spencer (collectively, "Petitioners"), filed a Petition to Revoke the District's Permit. After considering the Petition at its agenda meeting on June 26, 2009, the Commission referred the matter to the

State Office of Administrative Hearings (“SOAH”).¹ A contested case hearing was held before Administrative Law Judge (“ALJ”) Henry D. Card on February 21, 2010, and a Proposal for Decision (“PFD”) was issued on June 21, 2010. ALJ Card’s PFD recommends revocation of the Permit. But, because of the potential adverse impact on the District’s customers, ALJ Card also recommends that revocation of the Permit be postponed until the Commission has ruled on the Application for a Temporary Order that was filed by the District on November 2, 2009.²

Revoking the Permit without providing the District a means for alternative service will result in severe property damage, severe injury, and severe economic harm to the District’s residents and the general public. As discussed in greater detail below, the District currently has no viable alternative to treating and discharging its wastewater in accordance with the terms of the Permit. There is no other nearby treatment plant with the permitted capacity available to accommodate the District’s wastewater, and the District and its residents do not have the financial means to pump and haul the District’s wastewater to a remote location. Simply put, if the District cannot continue discharging its wastewater in accordance with the Permit, there is nowhere for the District’s wastewater to go.

Recognizing the likely adverse consequences of a revocation, the Executive Director (“ED”) has proposed a temporary order that authorizes the District to continue discharging, in accordance with the terms of the Permit, for a period of two years while the District applies for a new TPDES permit. Although the ED has properly concluded that a temporary order is necessary, the terms of the ED’s proposed order create more of a dilemma than a solution. Specifically, the ED’s proposed order deems all discharges by the District in compliance with the

¹ See the Commission’s July 2, 2009 Interim Order

² See PFD at pp. 1 & 15-16.

terms and conditions of that order to be a violation of Texas Water Code § 26.121(d).³ In other words, the ED's proposed temporary order authorizes the District to continue discharging, but compliant discharges will still be subject to potential EPA enforcement and lawsuits under the Clean Water Act.⁴ Discharging in potential violation of the law is simply not an option for the District. Consequently, the ED's proposed temporary order offers no real solution to the problem.

Rather than revoking the District's Permit and issuing the ED's proposed temporary order, a better course of action would be for the Commission to: (1) suspend the District's permit (assuming the Commission concludes that Petitioners have satisfied their burden in the revocation proceeding) until the District files and obtains a final decision on an application for a new TPDES permit; and (2) issue a temporary order that does not deem compliant discharges to be a violation of law. Under that scenario, the District could continue discharging until its application for a new TPDES permit has been decided, Petitioners would be given an opportunity to contest the District's application for a new TPDES permit (which remedies their chief complaint in the revocation proceeding), and the District's residents and general public would be adequately protected from the unbearable adverse consequences of a revocation.

ARGUMENT

The Commission may issue a temporary order authorizing the discharge of waste into or adjacent to state waters when necessary to enable action to be taken more expeditiously than is otherwise provided by Chapter 26 of the Texas Water Code and to effectuate the policy and purposes of that chapter.⁵

³ See Conclusion of Law No. 3 in the ED's proposed Temporary Order.

⁴ The ED's proposed temporary order does withhold any enforcement action by the ED for discharges in compliance with the terms and conditions of that order.

⁵ TEX. WATER CODE § 5.501 and 30 TEX. ADMIN. CODE § 35.301

In order to issue a temporary order, the Commission must find that: (1) the discharge is unavoidable to prevent loss of life, serious injury, or severe property damage; (2) there is no feasible alternative to the proposed discharge; (3) the discharge will not cause significant hazard to human life and health, unreasonable damage to persons other than the applicant, or unreasonable economic loss to persons other than the applicant; (4) the proposed discharge will not present a significant hazard either to the uses that may be made of the receiving water after the discharge, or the area surrounding the discharge; (5) the dates on which the proposed discharge will begin and end and the volume and quality of the proposed discharge are reasonable and attainable; and (6) the measures proposed to minimize the volume and duration of the discharge are reasonable.⁶

The District's application satisfies each of these requirements.

I. A TEMPORARY ORDER IS WARRANTED AND SHOULD BE ISSUED

A. There is No Feasible Alternative to Discharge

The District currently has no feasible alternative to discharging its wastewater in accordance with the terms of the Permit. Approximately 400 residential units are connected to the District's wastewater treatment plant and, at present, no other nearby treatment plant has available capacity to accommodate the amount of wastewater generated by these connections. The nearest permitted treatment facility, Montgomery County Utility District No. 2 ("MCUD No. 2"), has indicated that it does not currently have sufficient capacity to accept the District's wastewater. In addition, pumping and hauling the District's wastewater to a remote treatment facility is not a viable option. The District estimates the cost to haul its wastewater to a remote treatment plant would be approximately 8¢ per gallon. Because the District currently generates approximately 2 million gallons of wastewater per month, the total cost of pumping and hauling

⁶ TEX. WATER CODE § 5.509 and 30 TEX. ADMIN CODE § 35.303(a)

the District's wastewater to a remote site would be at least \$160,000.00 per month. Simply put, the District and its residents do not have the financial means to pay those excessive costs.

B. A Discharge is Unavoidable

Because the District has no feasible alternative to discharge, sewers and toilets in the District will most certainly back-up if the Permit is revoked and the District's plant cannot continue to discharge. Given these circumstances, a discharge is unavoidable to prevent serious injury, severe property damage, and severe economic loss.

C. The Discharge Will Not Cause Significant Hazard to Human Life and Health, Unreasonable Damage to Property, or Unreasonable Economic Loss

The discharge proposed in the District's application is the same discharge that is currently allowed under Phase I of the District's Permit. The Permit's average daily flow volume (0.23 MGD) and effluent characteristics (10 mg/l CBOD, 15 mg/l TSS, and 3 mg/l NH₃-N) have already been deemed protective of the Texas Surface Water Quality Standards by the Executive Director. As such, the proposed discharge will not cause a hazard, significant or otherwise, to human health nor will it damage the property of other persons or cause economic loss to other persons.

D. The Discharge Will Not Present a Significant Hazard to the Uses That May be Made of the Receiving Water After the Discharge or the Area Surrounding the Discharge

As previously stated, the discharge requested by the District under a temporary order will be the same discharge permitted under Phase I of the District's Permit. The Permit's average daily flow and effluent characteristics are protective of the Texas Surface Water Quality Standards, and there will be no hazard to the uses that may be made of the receiving water after the discharge or the area surrounding the discharge.

E. The Dates, Volume, and Quality of the Discharge are Reasonable

The discharge requested by the District would begin upon suspension or revocation of the District's Permit and continue for a period of two years thereafter. A two-year term is a reasonable amount of time to allow the District to file an application for a new TPDES permit, prosecute that new application through the TCEQ's permitting process, and obtain a final decision on that new application. Moreover, the volume of the proposed discharge will not exceed 0.23 MGD, the same as is allowed under Phase I of the Permit. And, the proposed discharge will comply with the Permit's Phase I effluent parameters of 10 mg/l CBOD, 15 mg/l TSS, and 3 mg/l NH₃-N. Furthermore, the District will be required to comply with all of the other terms and conditions of the Permit during the duration of the temporary order. The plant's design and operational history clearly demonstrate that the requested volume and quality of the requested discharge are reasonable and attainable.

F. Measures Will be Taken to Minimize the Volume and Duration of the Discharge

In accordance with the terms of the Permit, the District has enacted and instituted a water conservation plan. Strict adherence to such plan should considerably reduce the amount of wastewater generated by the District's residents that must be discharged pursuant to a temporary order. Moreover, the District has recently implemented a more stringent water/sewer rate structure for its residents to further promote conservation.

II. THE EXECUTIVE DIRECTOR'S PROPOSED TEMPORARY ORDER SHOULD BE MODIFIED TO MORE ADEQUATELY PROTECT AGAINST THE SUBSTANTIAL ADVERSE CONSEQUENCES OF A REVOCATION

As previously discussed, the ED's proposed temporary order does very little to ameliorate the substantial adverse consequences that will be suffered by the District's residents if the Permit is revoked. The reason being is that the ED's proposed temporary order deems all

discharges by the District in compliance with the terms and conditions of that order to be a violation of Texas Water Code § 26.121(d).⁷ Although the ED covenants not to pursue an enforcement action against the District for compliant discharges, the District would still be subject to potential enforcement actions by the EPA and lawsuits under the Clean Water Act. Essentially, the ED's proposed order presents the District with a classic "Morton's Fork" – a choice between two equally unpleasant alternatives that lead to the same unpleasant conclusion (i.e., continue to discharge in violation of the law and be subject to potential EPA enforcement and lawsuits, or stop discharging and force its customers and the general public to potentially suffer severe injury and economic hardship).

The District understands that the "violation of Texas Water Code" language was included in the ED's proposed temporary order in an effort to address 30 TAC §35.303(b). According to that regulation, the Commission may only issue a temporary order if the discharge is from an NPDES or TPDES permitted facility.⁸ Presumably, the ED's thought process was that if the District's Permit is revoked, the District's facility would then no longer be "permitted" and any discharges from such facility would be unlawful. However, it should be noted that there is no requirement in the Texas Water Code that a treatment facility be NPDES or TPDES permitted to obtain a temporary order.⁹

Rather than revoking the District's Permit and issuing the ED's proposed temporary order, a more reasonable solution would be for the Commission to: (1) suspend the District's permit (assuming the Commission concludes that Petitioners have satisfied their burden in the revocation proceeding) until the District files and obtains a final decision on an application for a new TPDES permit; and (2) issue a temporary order that does not deem compliant discharges to

⁷ See Conclusion of Law No. 3 in the ED's proposed Temporary Order.

⁸ 30 TEX. ADMIN. CODE § 35.303(b)

⁹ See TEX. WATER CODE §§ 5.501 and 5.509

be a violation of law. Under that scenario, the District's treatment facility would still be a "TPDES permitted facility" and any discharges pursuant to a temporary order would not run afoul of 30 TAC § 35.303(b). Moreover, the District could continue discharging until its application for a new TPDES permit has been decided, Petitioners would be given an opportunity to contest the District's application for a new TPDES permit, and the District's residents and general public would be adequately protected from the unbearable adverse consequences of a revocation.

Accordingly, the District respectfully requests that Conclusion of Law No. 3 be omitted from the ED's proposed temporary order.

CONCLUSION

For the foregoing reasons, the District requests that its Application for a Temporary Order be granted. However, the temporary order proposed by the Executive Director should be modified, as discussed herein, to adequately protect against the substantial adverse consequences that will result from revoking the District's permit.

Respectfully submitted,

BARRETT & SMITH, PLLC

A handwritten signature in black ink that reads "Lance T. Lackey". The signature is written in a cursive style with a horizontal line underneath it.

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CERTIFICATE OF SERVICE

By my signature below, I certify that on the 3rd day of September, 2010, a true and correct copy of the foregoing document was served upon the following persons via the methods indicated below:

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