

Buddy Garcia, *Chairman*
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Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

May 15, 2009

LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

2009 MAY 15 PM 1:43
CHIEF CLERKS OFFICE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Re: **FAR HILLS UTILITY DISTRICT**
TCEQ DOCKET NO. 2009-0290-MWD

Dear Ms. Castañuela:

Enclosed for filing is the Office of Public Interest Counsel's Response to Petition to Revoke and Request for Enforcement against Far Hills Utility District in the above-entitled matter.

Sincerely,

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

Amy Swanholm, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2009-0290-MWD

2009 MAY 15 PM 1:43

PETITION TO REVOKE
TCEQ WATER
QUALITY PERMIT NO.
WQ0014555002 ISSUED
TO FAR HILLS
UTILITY DISTRICT

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BEFORE THE TEXAS
COMMISSION ON ENVIRONMENTAL
QUALITY
CHIEF CLERKS OFFICE

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO PETITION
TO REVOKE AND REQUEST FOR ENFORCEMENT AGAINST FAR HILLS
UTILITY DISTRICT, PERMIT NO. WQ0014555002**

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (the Commission or TCEQ) and files this response to *Petition by Suzanne O'Neal, Judith Spencer, and Everett Simmons to Revoke Permit No. WQ0014555002 Allegedly Authorizing the Construction and Operation of a Wastewater Treatment Plant by Far Hills Utility District and Request for Enforcement Action* in the above-referenced matter.

I. BACKGROUND

Far Hills Utility District (Far Hills) is currently constructing a wastewater treatment plant under Permit No. WQ0014555002, issued on November 1, 2007. The permit authorizes the construction and operation of a wastewater treatment plant located on the east side of Cude Cemetery Road, approximately 1,800 feet south of Farm-To-Market Road 830 in Montgomery County, Texas. According to the published notice, the discharge route is from the plant site via a storm sewer to an existing storm sewer collection system and then to Lake Conroe.

Far Hills applied for Permit No. WQ0014555002 on April 11, 2007, after an earlier application for a wastewater treatment facility in Montgomery County, Texas underwent a contested case hearing.¹ As a result of that contested case hearing, the administrative law judge issued a proposal for decision on November 27, 2006,

¹ See TCEQ Docket No. 2005-1899-MWD; SOAH Docket No. 582-06-0568.

recommending denial of the earlier permit because the proposed plant violated TCEQ regionalization policy and did not meet TCEQ siting requirements. In an order signed on September 7, 2007, the Commission denied the permit application because it did not meet facility siting requirements.²

II. PETITION TO REVOKE PERMIT NO. WQ0014555002

On March 3, 2009, Suzanne O'Neal, Judith Spencer, and Everett Simmons (Petitioners) petitioned the TCEQ to revoke Far Hills Utility District's Permit No. WQ0014555002 (Permit). Petitioners also request that the TCEQ initiate an enforcement action for violations of Texas Water Code (TWC) § 7.149, prohibiting the submission of knowingly or intentional misstatements to the TCEQ.

Petitioners argue that when Far Hills' earlier permit was denied after a contested case hearing,³ it applied for a new wastewater discharge permit in the same area as the previously denied one, but attempted to skirt notice requirements in an effort to avoid the contested case hearing process. The Permit should be denied, Petitioners argue, because notice deficiencies in the application deprived TCEQ of jurisdiction to issue the permit, making the existing permit legally invalid. Notice was deficient, petitioners argue, because Far Hills misrepresented the ownership and configuration of property in the area of the proposed treatment plant; Far Hills submitted a landowner list that excluded adjacent landowners; Far Hills misled the TCEQ into believing newspaper notice requirements were met; and Far Hills' description of the discharge route failed to apprise the public of the true location of the discharge route.

III. APPLICABLE RULES

A. Permit Revocation and Suspension

"A permit or other order of the commission does not become a vested right and may be suspended or revoked for good cause at any time by order of the commission

² *Id.*

³ TCEQ Docket No. 2005-1899-MWD; SOAH Docket No. 582-06-0568.

after opportunity for a public hearing is given.”⁴ Good cause for revocation includes, among others, “the permittee's failure in the application or hearing process to disclose fully all relevant facts, or the permittee's misrepresentation of relevant facts at any time.”⁵

“Before denying, suspending, or revoking a permit under [section 305], the commission must find: (1) that a violation or violations are significant and that the permit holder or applicant has not made a substantial attempt to correct the violations; or (2) that the permit holder or applicant is indebted to the state for fees, payment of penalties, or taxes imposed by Title 5, Sanitation and Environmental Quality, of the Texas Health and Safety Code (Vernon 1991) or by rule of the commission.”⁶

Revocation of a permit may be requested by “a person affected by the issuance of a permit or other order of the commission.” Affected persons “may initiate proceedings for revocation or suspension by forwarding a petition to the executive director to be filed with the commission.”⁷ “In the absence of a request filed by the permittee or of sufficient consent and waiver, the commission shall conduct a public hearing on a petition to revoke or suspend a permit or other order of the commission.”⁸

B. Notice

When mailed notice is required,⁹ the Chief Clerk shall mail notice to “the landowners named on the application map or supplemental map, or the sheet attached to the application map or supplemental map,”¹⁰ among others. The map submitted with an application for a wastewater discharge permit must include “a list of adjacent and potentially affected landowners and their addresses along with a map locating the

⁴ 30 Texas Administrative Code (TAC) § 305.66(a).

⁵ 30 TAC § 305.66(a)(4); see also 30 TAC § 305.66(f)(3) and Texas Water Code § 7.302(b)(5).

⁶ 30 TAC § 305.66(g).

⁷ 30 TAC § 330.66(d).

⁸ 30 TAC § 305.68(a).

⁹ 30 TAC § 39.551(b)(1) and 30 TAC § 39.418(b)(2); 30 TAC § 39.551(c)(2).

¹⁰ 30 TAC § 39.413(1).

property owned by these persons.”¹¹ TCEQ is required to mail out notice to this group of people once the Executive Director (ED) has declared the application administratively complete,¹² and again when the ED has declared the application technically complete.¹³

When published notice is required,¹⁴ “the applicant shall publish notice in the newspaper of largest circulation in the county in which the facility is located or proposed to be located or, if the facility is located or proposed to be located in a municipality, the applicant shall publish notice in any newspaper of general circulation in the municipality.”¹⁵

IV. DISCUSSION

As a preliminary matter, in order to petition for the revocation of a permit, the petition must be brought by “a person affected by the issuance of a permit or other order of the commission.”¹⁶ Suzanne O’Neal, Judith Spencer, and Everett Simmons have submitted signed and notarized affidavits stating that they own and live on property within ½ mile of the facility, use groundwater wells located on their property for drinking, gardening, and pets and that they received no mailed notice of the application. Even though all three of their names and addresses were included on a landowners map submitted by Far Hills, that map was later revised to exclude their property.¹⁷ Therefore, because of their proximity to the facility, their use of area groundwater for drinking, and fact that the Applicant may have been required to give mailed notice to these individuals,

¹¹ 30 TAC § 281.5(6).

¹² 30 TAC § 39.418(b)(2).

¹³ 30 TAC § 39.419.(c).

¹⁴ 30 TAC § 39.551(b)(1), (c), and (c)(1).

¹⁵ 30 TAC § 39.405(f)(1).

¹⁶ 30 TAC § 330.66(d).

¹⁷ *Petition by Suzanne O’Neal, Judith Spencer, and Everett Simmons to Revoke Permit No. WQ0014555002 Allegedly Authorizing the Construction and Operation of a Wastewater Treatment Plant by Far Hills Utility District and Request for Enforcement Action (Petition to Revoke)*, Attachment J, K and L.

OPIC finds that Suzanne O’Neal, Judith Spencer, and Everett Simmons have been affected by the issuance of the permit and may petition for the permit’s revocation.

Based on Far Hills’ application and arguments raised by Petitioners, OPIC is concerned that Far Hills may have made misrepresentations and/or failed, during the application process, to disclose all relevant facts to TCEQ.¹⁸ First, Far Hills may have misrepresented that it owned the property on which the facility was to be located, leading to insufficient mailed notice. Petitions appear to have submitted documentation showing that Far Hills asserted it owned the property on which the facility is located.¹⁹ Yet, it also appears that Far Hills entered into a lease agreement with an option to purchase the land on which the facility was to be located, after the TCEQ approved Far Hill’s permit application.²⁰ This may have led the ED to, in reliance upon the Applicant’s statements, improperly conclude the only landowner whose property abutted the facility boundaries on the north and north-east sides of the facility was Broussard Christie, L.P.,²¹ If Far Hills did not own the tract of land it proposed to build the facility on, the land owned by Broussard Christie L.P. perhaps should have been treated as the property boundary for the facility itself, instead of as an adjacent landowner. This would mean that notice should have been given to the Petitioners, as adjacent landowners.

But, even if Petitioners did not technically share property boundary line with the facility, Petitioners live in very close proximity to the facility and possibly should have been included on the landowner map and list, as potentially affected landowners.²² Petitioners were included on an early landowner list, but later excluded from a revised landowner list.²³ The application contains Far Hills’ reasons for submitting an updated

¹⁸ 30 TAC § 305.66(a)(4); see also 30 TAC § 305.66(f)(3).

¹⁹ See *Petition to Revoke*, Attachment E

²⁰ See *Petition to Revoke*, Attachment G.

²¹ See *Petition to Revoke*, Attachment O, containing the final landowner map and a portion of the corresponding landowner list.

²² 30 TAC § 281.5(6). requiring applicants to submit “a list of adjacent *and potentially affected* landowners and their addresses along with a map locating the property owned by these persons” (emphasis added).

²³ See *Petition to Revoke*, Attachment M and O.

map and landowner list, but there is no reference to Far Hills' reason for excluding the Petitioners from the updated list.²⁴

Further, the Petitioners question whether Far Hills provided sufficient published notice.²⁵ Petitioners claim that Far Hills should have been required to publish notice in the newspaper of largest circulation in Montgomery County, the *Conroe Courier*. But instead, Petitioners argue, Far Hills published in the *Montgomery County News*, a newspaper that may not meet the requirements of 30 TAC § 39.405(f)(1). Petitioners argue that because the facility is not located within a municipality, Far Hills should have published in the *Conroe Courier*, as it did when applying for its earlier permit. Petitioners do not fault the ED, but rather argue that Far Hills misled the ED by twice creating and submitting a Publishers Affidavit that appeared to meet the publication requirements, but in fact did not.

OPIC is hesitant to make any recommendation on whether Permit No. WQ0014555002 should be suspended, revoked, or upheld before all interested parties have had an opportunity to present evidence. But, unless Far Hills, the ED and the Petitioners stipulate to the facts presented in the application and Commission-requested briefing, OPIC must recommend the Commission refer the matter to the State Office of Administrative Hearings (SOAH). Therefore, absent all parties' stipulation, OPIC recommends the Commission refer this matter to SOAH, giving interested parties an opportunity to present evidence on whether there is good cause to revoke Hills' Permit No. WQ0014555002²⁶ and whether Far Hills met notice requirements for Permit No. WQ0014555002.

²⁴ See *Petition to Revoke*, Attachment O.

²⁵ 30TAC § 39.405(f)(1).

²⁶ 30 TAC § 305.66(a)(4); see also 30 TAC § 305.66(f)(3).

V. ISSUES RECOMMENDED FOR REFERRAL

Because there may be conflicting facts within the record, OPIC recommends the following issues be referred to the State Office of Administrative Hearings for a contested case hearing:

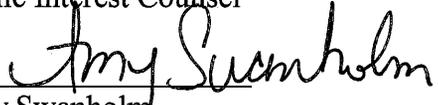
1. In relation to Permit No. WQ0014555002, has Far Hills failed, during the application or hearing process, to disclose fully all relevant facts regarding its ownership of property, potentially affected parties, or the appropriate newspaper for publication of notice?
2. In relation to Permit No. WQ0014555002, has Far Hills misrepresented any relevant facts regarding its ownership of property, potentially affected parties, or the appropriate newspaper for publication of notice?
3. With respect to issues 1 and 2, if Far Hills has failed to disclose or misrepresented relevant facts, was this significant and did Far Hills make a substantial attempt to correct these omissions or misrepresentations?
4. Was mailed notice sufficient for the ED to approve Permit No. WQ0014555002?
5. Was published notice sufficient for the ED to approve Permit No. WQ0014555002?

VI. CONCLUSION

Petitioners may bring their petition to revoke, as they are affected by the permit at issue. In addition to hearing this petition, the Commission should refer several factual issues to SOAH, as interested parties should be given an opportunity to present evidence on whether there is good cause to revoke Far Hills permit and whether there was sufficient mailed and published notice for the ED to approve Permit No. WQ0014555002. OPIC makes no recommendation at this time as to whether an enforcement action should be initiated.

Respectfully submitted,

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By 
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TEXAS
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QUALITY
2009 MAY 15 PM 1:43
CHIEF CLERKS OFFICE

CERTIFICATE OF SERVICE

I hereby certify that on this May 15, 2009, the original document and seven copies were served upon the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.


Amy Swanholm

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TCEQ DOCKET NO. 2009-0290-MWD

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