Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*
Mark R. Vickery, P.G., *Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

2009 MAY 22 AM 11: 30

CHIEF CLERKS OFFICE

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2009 MAY 21 AM 11: 30
CHIEF CLERKS OFFICE
BG

May 22, 2009

VIA HAND DELIVERY

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

RE: Petition to Revoke TPDES Permit No. WQ0014555002 and Request for Enforcement Action submitted on behalf of Suzanne O'Neal, Judith Spencer, and Everett Simmons; TCEQ Docket No. 2009-0290-MWD

Dear Ms. Castañuela:

Enclosed for filing in the above styled application is the original and seven copies of:
"Executive Director's Response to Petition to Revoke Permit No. WQ0014555002 and Request for Enforcement Action."

If you have any questions or comments, please call me at 239-0455. Thank you for your attention to this matter.

Sincerely,

John E. Williams, Staff Attorney
Environmental Law Division MC 173

Enclosure

printed on recycled paper using soy-based ink

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2009 MAY 21 AM 11: 30
CHIEF CLERKS OFFICE

TCEQ Docket No. 2009-0290-MWD

Petition to **REVOKE** **TPDES Permit No. WQ0014555002** and **REQUEST FOR ENFORCEMENT ACTION** submitted on behalf of **SUZANNE O'NEAL, JUDITH SPENCER, and EVERETT SIMMONS**	§ § § § § § § §	Before the **TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2009 MAY 22 AM 11: 10
CHIEF CLERKS OFFICE

EXECUTIVE DIRECTOR'S RESPONSE TO PETITION TO REVOKE PERMIT NO. WQ0014555002 AND REQUEST FOR ENFORCEMENT ACTION

I. Introduction

The Executive Director of the Texas Commission on Environmental Quality (the Commission or TCEQ) files this Response to the Petition by Suzanne O'Neal, Judith Spencer, and Everett Simmons (Petitioners) to Revoke Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0014555002 issued to Far Hills Utility District (Far Hills) and Request for Enforcement Action (Petition and Request). This matter is not currently set for Commission hearing.

II. Description of the Facility

Far Hills holds a TPDES permit that authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 0.23 million gallons per day in the interim I phase, a daily average flow not to exceed 0.35 million gallons per day in the interim II phase, and a daily average flow not to exceed 0.70 million gallons per day in the final phase. The wastewater treatment facility, when completed, will serve Far Hills Utility District as well as the French Quarter, Lake Breeze, SIR Tract, Martha's Vineyard Tract, and Walker Tract.

The Far Hills Utility District Wastewater Treatment Facility will be an activated sludge process plant operated in the complete mix mode. Treatment units in the interim I phase will include a bar screen, two aeration basins, two clarifiers, two sludge digesters, and a chlorine contact chamber. Treatment units in the interim II phase will replace the interim I phase facilities. The

treatment units in the interim II phase will include a bar screen, two aeration basins, a clarifier, two sludge digesters, and a chlorine contact chamber. The final phase will include the addition of a second set of parallel treatment units, the same as those identified in the interim II phase. The facility is under construction.

Sludge generated from the treatment facility will be hauled by a registered transporter and disposed of at a TCEQ authorized land application site, Celoso, Permit No. 4518, in Waller County. The permit authorizes the disposal of sludge at a TCEQ authorized land application site or co-disposal landfill.

The plant site will be located on the east side of Cude Cemetery Road approximately 1,800 feet south of Farm-to-Market Road 830 in Montgomery County, Texas. This location is approximately 1,000 feet northeast of the location proposed in Far Hills' application for TPDES Permit No. WQ0014555001.

The treated effluent is discharged to a storm sewer; thence to Lake Conroe in Segment No. 1012 of the San Jacinto River Basin. Because the storm sewer is enclosed and not a surface water, water quality standards are not being assigned. The designated uses for Segment No. 1012 are high aquatic life use, public water supply, and contact recreation. Segment No. 1012 is not currently listed on the State's inventory of impaired and threatened waters (the CWA §303(d) list). The discharge point is approximately ½ mile east of and in a different arm of Lake Conroe than the discharge point proposed in Far Hills' application for TPDES Permit No. WQ0014555001.

III. Procedural Background

Because the Petitioners raise issues involving the first permit sought by Far Hills, the procedural background of both permits is presented here. First the current permit that is the subject of the Petition and Request, then the permit application that was denied.

Permit No. WQ0014555002: Far Hills submitted its application on April 11, 2007, and the Executive Director declared it to be administratively complete on June 15, 2007. Notice of Receipt of Application and Intent to Obtain a Water Quality Permit (NORI) was published on June 27, 2007, in the *Montgomery County News*, and on June 29, 2007, in *El Sol* of Montgomery County. The

TCEQ Executive Director completed the technical review of the application on August 30, 2007, and prepared a draft permit. Notice of Application and Preliminary Decision for a Water Quality Permit (NAPD) was published on September 12, 2007, in the *Montgomery County News*, and on September 14, 2007, in *El Sol* of Montgomery County. The comment period closed on October 15, 2007. No comments were received. The Executive Director signed and issued the permit on November 1, 2007, and the deadline for a motion to overturn the Executive Director's action was December 3, 2007. No person filed any motion to overturn. This application was administratively complete on or after September 1, 1999; therefore, this application was subject to the procedural requirements adopted pursuant to House Bill 801 (76th Legislature, 1999) during the period of time when the application was pending before the Commission.

The current Petition and Request was filed on March 3, 2009. House Bill 801 does not apply to the Petition and Request.

Permit No. WQ0014555001: Far Hills submitted its application on August 31, 2004, and the Executive Director declared it to be administratively complete on November 9, 2004. Notice of Receipt of Application and Intent to Obtain a Water Quality Permit (NORI) was published on December 1, 2004, in the *Conroe Courier*. The TCEQ Executive Director completed the technical review of the application on December 2, 2004, and prepared a draft permit. Notice of Application and Preliminary Decision for a Water Quality Permit (NAPD) was published on January 30, 2005, in the *Conroe Courier*. Notice of a Public Meeting was published on May 4, 2005, in the *Conroe Courier* and a public meeting was held in Willis on June 13, 2005, at which time the comment period closed. Nearly 200 comments were received, including 20 hearing requests. The Executive Director prepared and filed a response to public comments (RTC) on January 25, 2006, after the preliminary hearing was held. The delay was due to a change in the draft permit in response to comments that Far Hills had not yet accepted. When they did accept the change, the RTC was filed.

Far Hills requested a direct referral to the State Office of Administrative Hearings (SOAH) on December 8, 2005, and a preliminary hearing was held in Conroe on January 11, 2006. Once Far Hills accepted the change in the draft permit in response to comments, the Executive Director did not participate in the contested case hearing. The Administrative Law Judge filed her proposal for

decision on November 27, 2006, recommending denial of the permit. The Commission considered the proposal for decision on August 22, 2007, and denied the permit.

IV. Basis and Standard for Review

"A person affected by the issuance of a permit or other order of the Commission may initiate proceedings for the revocation or suspension by forwarding a petition to the Executive Director to be filed with the Commission." 30 TAC § 305.66(d). Chapter 305 of TCEQ's rules does not define "person affected" in the context of a petition to suspend or revoke. By analogy, Section 55.203, based on Texas Water Code § 5.115, defines "affected person" as "one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application."

It should be noted that the Commission has never equated "affected person" with a person entitled to notice. The Executive Director, through the permit application and instructions, directs wastewater discharge applicants to submit the names of owners of property immediately adjacent to the area proposed to be permitted and along the discharge route for a distance of one full stream mile downstream. If the discharge is to a lake, bay, estuary, or a water body affected by tides, an applicant must show and list property owners along the shoreline of the receiving water within ½ mile from the discharge point in either direction along the shoreline. These are the persons who receive mailed notice from the Office of the Chief Clerk. A person may live outside those notice parameters and still have a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application or permit.

"A permit . . . may be suspended or revoked for good cause at any time by order of the Commission after opportunity for a public hearing is given." 30 TAC § 305.66(a). Therefore, the options for the Commission are to deny a petition or to refer the matter to the State Office of Administrative Hearings to develop findings of fact and conclusions of law on the matter for Commission deliberation and decision.

Good cause for suspension or revocation includes: "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." 30 TAC §§ 305.66(a)(4); *see also* TEXAS WATER CODE § 7.302(b)(5). This is the

ground cited by the Petitioners in the current Petition and Request. In addition, in order to revoke an original permit, the Commission must find, after notice and hearing, that:

> the permit holder or applicant made a false or misleading statement in connection with an original or renewal application, either in the formal application or in any other written instrument relating to the application submitted to the commission, its officers, or its employees;

30 TAC § 305.66(f)(3).

In HB 801 permitting actions, when an application is pending before the Commission, the burden of persuasion or proof always falls on the applicant. In enforcement actions, the burden of persuasion or proof falls on the Executive Director when the Executive Director initiates the enforcement action. *See* 30 TAC § 80.17(d). In all other instances, the burden of proof is on the moving party by a preponderance of the evidence. *See* 30 TAC § 80.17(a). Accordingly, the burden of proof in this case is on the Petitioners since they are the moving parties.

A petition to suspend or revoke does not arise during the pendency of an application before the Commission, but rather comes after the issuance of the permit is final. Additionally, the Executive Director is not the petitioner in this case; rather, the petition originates from persons who allege they are affected.

It is the Executive Director's considered opinion that the burden of persuasion or proof in this instance falls on the moving parties or Petitioners; simply raising relevant or material issues (the standard used under House Bill 801), by itself, is not sufficient grounds for the Commission to refer this matter to SOAH for a contested case. If Far Hills refutes or contests the evidence put forward by the Petitioners, then the disputed issues of fact should be referred to SOAH for a hearing.

V. Analysis of the Petition

A. Affected Person Status

Petitioners claim that, but for a change in the adjacent landowner map and list submitted by Far Hills approximately six weeks after the original adjacent landowner map and list was submitted, they would be adjacent landowners and would have received notice. Instead, due to a 30-foot strip necessary for driveway access to and from the remainder of the property not used for the wastewater treatment plant, the Petitioners are no longer adjacent landowners and they never received mailed

notice of the application, never had an opportunity to comment on the application, and never had an opportunity to request a hearing on the application. The Petitioners assert that Far Hills manipulated the adjacent landowner map and list, and thus misrepresented relevant facts or failed to disclose fully all relevant facts regarding adjacent landowners to the Chief Clerk and to the Executive Director.

Far Hills claims that it never intended to own the 30-foot strip or the remainder of the 10-acre property, never asked that the 30-foot strip or the remainder of the 10-acre property be included in the permit, and that the Petitioners were never entitled to notice and therefore are not affected persons.

Petitioners include a photograph of the driveway on the 30-foot strip being used by a truck allegedly owned by Far Hills and a photograph of the stormwater control fence on Ms. O'Neal's property line adjacent to the driveway on the 30-foot strip.

As stated previously, the Commission has never equated the definition of affected person with persons entitled to notice of an application.

The Executive Director believes that the status of the Petitioners as affected persons is a disputed issue of fact that cannot be fully resolved from the information presented. The Commission may refer the issue of a person's status as an affected person to SOAH for determination. *See* 30 TAC § 55.211(b)(4). Therefore, <u>the Executive Director recommends that the issue of the Petitioners' status as affected persons should be referred to SOAH, and the issue of the Petitioners' status should be a threshold issue to be determined first before any other referred issues are considered</u>. If the Commission so chooses, it may include the issue whether the exclusion of the Petitioners from the list of persons entitled to mailed notice was intentional, or whether intent to exclude is relevant to the question of affected person status.

<u>B. Published Notice</u>

Petitioners allege that Far Hills knowingly or intentionally published notices of the application in the wrong newspaper, and that this further deprived the Petitioners an opportunity to comment on the application and an opportunity to request a hearing on the application.

Applicants are required to:

> 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.

30 TAC § 39.405(f)(1); *see also* §§ 39.418(b)(1) [for the NORI referencing § 39.405(f)(1)] and 39.419(b) [for the NAPD requiring it to be in the same newspaper as the NORI]. 30 TAC § 39.551(c)(1) imposes the additional requirement that the notices must be published "in a newspaper regularly published or circulated within each county where the proposed facility or discharge is located."

Petitioners correctly point out that Far Hills published all the notices for permit WQ0014555001 in the *Conroe Courier*, a newspaper published in the county seat of Montgomery County, including the notice of the public meeting and the notice of the SOAH hearing. Far Hills published all notices for permit WQ0014555002 in the *Montgomery County News*, a newspaper published in the City of Montgomery in Montgomery County, according to its web site. Far Hills claims the Montgomery County News is published in the City of Willis. Petitioners present circulation information for both newspapers. Far Hills presents circulation information for the *Conroe Courier* and *Houston Chronicle*.

The Executive Director cannot verify the circulation information presented by the parties, nor the municipal limits of either the City of Montgomery or the City of Willis. Which newspaper is the proper venue for notices published in Montgomery County is therefore a disputed issue of fact that cannot be fully resolved from the information presented. Therefore, the Executive Director recommends that the issue of the proper newspaper for notice should be referred to SOAH. If the Commission so chooses, it may include whether publication in the wrong newspaper, if proven, was knowing or intentional.

C. Inadequate Language in the Notice as to Point of Discharge

Petitioners assert that the language of the notice that was published and mailed did not inform owners of shoreline property on the lake where the proposed wastewater discharge would enter Lake Conroe with respect to their shoreline property.

None of the three Petitioners claims ownership of any shoreline property.

TCEQ rules require that notice contain "a brief description of the location and nature of the proposed activity." 30 TAC § 39.411(b)(3). For TPDES permits, the notice contains "a general

description of the location of each existing or proposed discharge point and the name of the receiving water." 30 TAC § 39.551(c)(4)(B). The location of a built or to-be-built facility may be described conveniently using street addresses or distance from roads or junctions. The location of a point of discharge is not so conveniently described by words and a point of discharge is not so conveniently accessible by public roads. The Executive Director relies on graphic maps to depict such locations so long as those maps are available to the public for examination and copying at a public place in the county where the facility or discharge is located.

The application contained maps, one of which was attached to the Petition and Request, showing the route of the enclosed storm sewer and a ½-mile radius centered on the point where the route reached Lake Conroe. All owners of shoreline property within ½-mile of the discharge point are numbered and listed and received mailed notice from the Office of the Chief Clerk. The application and maps were available at a public library in the City of Willis during the period that this application was being reviewed until the Executive Director took final action on the matter.

The Executive Director cannot conclude that the language of the notice was deficient or that maps of the discharge point were not available in a public place for examination and copying. The Petitioners have not met their burden of proof on this issue and the Executive Director does not recommend that the issue be referred to SOAH.

D. Request for Enforcement Action

Petitioners ask for initiation of enforcement proceedings against Far Hills under Texas Water Code § 7.149 for knowing or intentional submission of false statements to the TCEQ. Section 7.149 is a criminal statute punishable by a fine of not less than $1,000 or more than $250,000.

The Executive Director recommends that a decision on this request be delayed until after the SOAH hearing on revocation is complete and the matter is back before the Commission.

V. Recommendations

The Executive Director recommends that the Commission refer this matter to SOAH for a contested case hearing on the following issues:

1. Are the Petitioners, Suzanne O'Neal, Judith Spencer, and Everett Simmons, persons affected by the issuance of TPDES Permit No. WQ0014555002 issued to Far Hills Utility District?

2. If the Petitioners are affected persons, were the Petitioners entitled to mailed notice?

3. If the Petitioners are affected persons and were entitled to mailed notice, is the issue of intentional or knowing exclusion relevant to the question of affected person status?

4, If the Petitioners are affected persons and were entitled to mailed notice, did Far Hills intentionally or knowingly exclude the Petitioners from the list and map of adjacent landowners submitted with its application?

5. If the Petitioners are affected persons and were entitled to mailed notice, did Far Hills fail to disclose fully all relevant facts, or misrepresent relevant facts, regarding the Petitioners to the Commission, its officers, or employees?

6. If the Petitioners are affected persons, did Far Hills publish notice of its application for TPDES Permit No. WQ0014555002 in the proper or correct newspaper?

7. If the newspaper of publication for the application for TPDES Permit No. WQ0014555002 was not proper or correct, was that act intentional or knowing on the part of Far Hills?

8. If the newspaper of publication for the application for TPDES Permit No. WQ0014555002 was not proper or correct, did Far Hills fail to disclose fully all relevant facts, or misrepresent relevant facts, regarding the newspaper of publication to the Commission, its officers, or employees?

9. Should TPDES Permit No. WQ0014555002 issued to Far Hills Utility District be revoked?

The Executive Director recommends that, like enforcement actions referred to SOAH, there be no published notice of the preliminary hearing on this matter, and only the Petitioners, Far Hills, the Executive Director, and the Office of Public Interest Counsel be mailed notice by the Office of Chief Clerk.

The Executive Director recommends that the Administrative Law Judge be directed to place the burden of proof on the Petitioners as the moving parties who requested the revocation.

The Executive Director recommends that the duration of the hearing, from preliminary hearing to proposal for decision be four months.

Respectfully submitted,

Texas Commission on Environmental Quality

Robert Martinez, Director
Environmental Law Division

By _____
John E. Williams, Staff Attorney
Environmental Law Division
State Bar No. 24004991
P.O. Box 13087, MC 173
Austin, Texas 78711-3087
512-239-0455
Representing the Executive Director of the Texas Commission on Environmental Quality

CERTIFICATE OF SERVICE

I certify that on May 22, 2009, the original and seven copies of this "Response to Petition to Revoke Permit No. WQ0014555002 and Request for Enforcement Action," TCEQ Docket No. 2009-0290-MWD, was filed with the Texas Commission on Environmental Quality's Office of the Chief Clerk and a copy was mailed to all persons on the attached mailing list, faxed to all persons with a fax-number on the attached mailing list, and an electronically scanned copy was electronically mailed to all persons with an e-mail address on the attached mailing list.

John E. Williams, Staff Attorney
Environmental Law Division
State Bar No. 24004991

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2009 MAY 21 AM 11: 30
CHIEF CLERKS OFFICE

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2009 MAY 22 AM 11: 30
CHIEF CLERKS OFFICE

MAILING LIST
Petition to Revoke TPDES Permit No. WQ0014555002
TCEQ Docket No. 2005-1094-MWD

FOR THE PETITIONERS:
Eric Allmon, Attorney
Lowerre, Frederick, Perales, Allmon & Rockwell
707 Rio Grande, Suite 200
Austin, TX 78701
e-mail: eallmon@lf-lawfirm.com

FOR THE PERMIT HOLDER:
James Haymon, President
Far Hills Utility District
c/o Johnson Radcliff Petrov and Bobbitt, PLLC
1001 McKinney, Suite 1000
Houston, TX 77002-6424
FAX: 713-237-1313
e-mail: jhaymon@cebridge.net

Timothy Hardin, P.E.
Langford Engineering, Inc.
1080 West Sam Houston Parkway, North
Suite 200
Houston, TX 77043-5021
e-mail: timh@langford-engineering.net

Regina D. Adams, Attorney
Johnson Radcliff Petrov and Bobbitt, PLLC
1001 McKinney, Suite 1000
Houston, TX 77002-6424
e-mail: radams@publiclaw.com

FOR THE EXECUTIVE DIRECTOR:
John E. Williams, Staff Attorney
Texas Commission on Environmental Quality
Environmental Law Division MC-173
P.O. Box 13087
Austin, TX 78711-3087
e-mail: johwilli@tceq.state.tx.us

FOR PUBLIC INTEREST COUNSEL:
Amy Swanholm, Attorney
Texas Commission on Environmental Quality
Public Interest Counsel, MC-103
P.O. Box 13087
Austin, TX 78711-3087
e-mail: aswanhol@tceq.state.tx.us

FOR INTERESTED PERSONS:
The Honorable Robert Nichols
Texas State Senator
Senate District 3
P.O. Box 12068, Capitol Station
Austin, TX 78711
FAX: 512-463-0326

The Honorable Brandon Creighton
Texas State Representative
House District 16
P.O. Box 2910
Austin, TX 78768
FAX: 512-463-5896

FOR THE OFFICE OF CHIEF CLERK:
LaDonna Castañuela
Office of Chief Clerk, MC-105
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087
Via Hand Delivery Only

FOR THE OFFICE OF PUBLIC ASSISTANCE:
Bridget Bohac, Director
Office of Public Assistance, MC-108
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087
e-mail: bbohac@tceq.state.tx.us

FOR THE GENERAL COUNSEL:
Les Trobman, General Counsel
Office of General Counsel, MC-101
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087
e-mail: ltrobman@tceq.state.tx.us

Todd Burkey, Attorney
Office of General Counsel, MC-101
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087
e-mail: tburkey@tceq.state.tx.us