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December 18, 2006

LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
12100 Park 35 Circle, Building F/1st Floor
Austin, TX 78753

Re: *In the Matter of the Application of Far Hills Utility District for TPDES Permit
No. 14555-001; SOAH Docket No. 582-06-0568*

Dear Ms. Castañuela:

Please find enclosed an original and 12 copies of **Far Hills Utility District's Exceptions to Administrative Law Judge's Proposal for Decision**. Please return a file stamped copy to the waiting paralegal.

Should you have any questions, please do not hesitate to contact my office.

Sincerely yours,



Stephen C. Dickman

SCD/ow

Enclosures

cc: Service list

CHIEF CLERK'S OFFICE

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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

SOAH DOCKET NO. 582-06-0568
TCEQ DOCKET NO. 2005-1899-MWD

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CHIEF CLERK'S OFFICE

IN THE MATTER OF	§	
THE APPLICATION OF	§	BEFORE THE
FAR HILLS UTILITY DISTRICT	§	STATE OFFICE OF
FOR TPDES PERMIT NO. 14555-001	§	ADMINISTRATIVE HEARINGS

**FAR HILLS UTILITY DISTRICT'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S PROPOSAL FOR DECISION**

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY ("TCEQ") AND THE HONORABLE ADMINISTRATIVE LAW JUDGE ("ALJ"):

COMES NOW Far Hills Utility District ("Far Hills" or "the Applicant") and pursuant to 30 Tex. Admin. Code §80.257 and the ALJ'S letter dated November 27, 2006 transmitting the Proposal for Decision ("PFD") in this case, files these exceptions to the PFD.

I. EXCEPTIONS ON REGIONALIZATION ISSUE

For the reasons stated below, Far Hills excepts to Finding of Fact No. 17 as well as the ALJ's Analysis on the regionalization issue and respectfully requests that the Commission adopt Far Hills' proposed Findings of Fact Nos. 90 through 97 and Conclusion of Law No. 7 as previously submitted to the ALJ. A copy of all of Far Hills' proposed Findings of Fact and Conclusions of law is attached as Exhibit 1 hereto.

1. MCUD No. 2's Agreement to Allow Far Hills to Withdraw From the MCUD No. 2 Plant Conclusively Establishes that MCUD No. 2 Will Not Serve Far Hills.

The ALJ recommended denial of the permit because Far Hills had not established a need for the proposed wastewater plant. The basis for this conclusion was the ALJ's mistaken and unsupported finding that Far Hills' current wholesale wastewater service provider, Montgomery

County Utility District No. 2 (“MCUD No. 2”), “has the ability and willingness to serve” Far Hills.¹

The facts about MCUD No. 2’s “ability and willingness to serve” Far Hills are simple and uncontroverted: The MCUD No. 2 wastewater plant is old, overloaded, and in need of significant upgrades and repairs.² Existing and future growth in Far Hills’ retail service area requires that it increase available wastewater capacity from its current level of approximately 300 connections to 1,000 connections.³ MCUD No. 2 agreed to allow Far Hills to withdraw from the MCUD No. 2 plant so that, being freed up of the current and projected service demands from Far Hills, MCUD No. 2 would not have to undertake an immediate and major expansion of the MCUD No. 2 plant,⁴ but instead would only need to make needed but less costly plant repairs.⁵ Therefore MCUD No. 2 and Far Hills amended their existing wastewater treatment service contract to allow Far Hills to withdraw from the MCUD No. 2 plant and apply for a TCEQ permit to construct its own new wastewater plant to serve Far Hills’ current and projected service needs.⁶ As between MCUD No. 2 and Far Hills, there was nothing acrimonious or controversial about the withdrawal of Far Hills from MCUD No. 2’s plant as it provided a reasonable solution to the problems faced by both parties.⁷ The contract amendment was

¹ ALJ’s Proposal For Decision, page 9; ALJ’s proposed Finding of Fact No. 17.a.

² Exh. A-4, testimony of Jim Haymon at pages 4-5 (Bates Stamp A00555 – A00556); see discussion of the extensive repairs needed for the MCUD No. 2 plant in the testimony of Tim Hardin, Exh. A-5 at pgs. 5-6; MCUD No. 2’s president Larry Folk stated in his deposition that the MCUD No. 2 plant was in need of substantial repairs and that, given the approximate 30 years age of the plant, the substantial amount of plant repairs needed did not surprise him. Exh. P-5 at pgs. 16-17.

³ Exh. A-4, testimony of Jim Haymon at page 4 (Bates Stamp A00555).

⁴ MCUD No. 2’s president Larry Folk stated in his deposition that such a major plant expansion would have necessitated going to TCEQ for a permit amendment. Exh. P-5 at pg. 22.

⁵ Exh. A-4, testimony of Jim Haymon at pages 4-6 (Bates Stamp A00555 – A00557); Exh. P-5 at pg. 25; Exh. P-5, Exhibit No. 2 (letter of February 10, 2004 to MCUD No. 2 from Far Hills’ attorney).

⁶ Exh. A-4, testimony of Jim Haymon at page 6 (Bates Stamp A00557); Exh. A-4-JH-4, agreement for withdrawal of FHUD from MCUD No. 2 plant (Bates Stamp A00571 – A00587).

⁷ MCUD No. 2’s president Larry Folk stated in his deposition that when Far Hills proposed the three options for resolving the capacity problem at MCUD No. 2’s plant, MCUD No. 2 had no preference as to which option was chosen. Exh. P-5 at pg. 14.

negotiated over the Summer of 2004 and finalized by a Letter of Understanding dated October 29, 2004 which was incorporated into a final contract amendment of November 24, 2004.

However, an agreement in principal on the main concept of the deal, i.e., that Far Hills would withdraw from the MCUD No. 2 plant and construct its own plant, had been reached several months before then.⁸

The amended contract allowing Far Hills to withdraw from the MCUD No. 2 plant expressly states that “*MCUD2 desires to re-acquire at the earliest possible time the wastewater treatment plant capacity in the Plant previously assigned to Far Hills,*”⁹ and the Letter of Understanding attached to the contract amendment states that MCUD No. 2 would not contest Far Hills’ effort to obtain a permit to construct its own wastewater plant.¹⁰

Despite this straightforward and imminently reasonable resolution of this matter freely agreed to by MCUD No.2 and Far Hills, the ALJ has somehow determined that MCUD No. 2 has the “ability and willingness” to meet Far Hills’ current and future growth needs. Moreover, the ALJ cavalierly brushes off the binding legal obligations embodied in the agreement between the parties with the unsupported legal opinion that under §26.003, the Commission “can demand that Far Hills continue to send its wastewater to the [MCUD No. 2] plant for treatment” and “can require MCUD No. 2 to continue treating” Far Hills’ wastewater.¹¹ As discussed below, the ALJ’s interpretation of the Commission’s authority under its regionalization policy as allowing the Commission to force Far Hills and MCUD No. 2 to abrogate their agreement and force a structurally deficient and over-utilized MCUD No. 2 plant to continue to serve Far Hills is a strange and unprecedented application of TCEQ’s wastewater regionalization requirements.

⁸ Exh. A-4, testimony of Jim Haymon at page 6 (Bates Stamp A00557).

⁹ Exh. A-4-JH-4, agreement for withdrawal of FHUD from MCUD No. 2 plant (Bates Stamp A00572).

¹⁰ Exh. A-4-JH-4, agreement for withdrawal of FHUD from MCUD No. 2 plant (Bates Stamp A00581); Exh. P-5 (Deposition of MCUD No. 2’s president Larry Folk) at pg. 13.

¹¹ ALJ’s Proposal For Decision, page 9.

2. MCUD No. 2 Never Stated That It Was Willing to Expand Its Plant to Serve Far Hills' Wastewater Needs.

One basis for the ALJ's determination on this issue was that "MCUD No. 2 has expressed a willingness to expand its plant to continue accepting Far Hills' wastewater."¹² Apparently the ALJ is referring to the September 17, 2004 response of MCUD No. 2 to Far Hills' request for service sent to MCUD No. 2. As part of TCEQ's policy for complying with the regionalization mandate of Sections 26.003 and 26.081 of the Texas Water Code, a wastewater permit applicant is required to send requests for service to all wastewater plants located within three miles of the proposed plant to determine whether they have the capacity and willingness to provide the wastewater service needs of the applicant.¹³ In response to Far Hills' letter sent to MCUD No. 2 inquiring whether MCUD No. 2 had sufficient capacity to accept 250,000 gals/day of wastewater as sought in the Applicant's first phase permit, MCUD No. 2 responded: "*No, the existing MCUD No. 2 facility is currently permitted for an average daily flow of 250,000 gallons per day.*"¹⁴ In response to the Applicant's question as to whether MCUD No. 2 would be agreeable to expanding its facility if necessary in order to accept the 250,000 gals/day of wastewater, MCUD No. 2 responded: "*Yes. However MCUD No. 2 would have to properly evaluate the possibility of expanding this facility to accommodate the requested volume of wastewater from far Hills Utility District.*"¹⁵

MCUD No. 2's answer to the first question clearly states that MCUD No. 2 does not have the current capacity to serve Far Hills.¹⁶ MCUD No. 2's answer to the second question is a more

¹² ALJ's Proposal For Decision, page 9; ALJ's proposed Finding of Fact No. 17.d.

¹³ Exh. A-1 (Oral Deposition of TCEQ staff person June Ella Martinez), page 47 (line 22) through page 48 (line 24) (Bates Stamp A00049 – A00050); Exh. A-5 (Testimony of Tim Hardin), page 11 (Bates Stamp A00620).

¹⁴ Exh. A-5-TBH-6 (Bates Stamp A00837).

¹⁵ Exh. A-5-TBH-6 (Bates Stamp A00837).

¹⁶ MCUD No. 2's president Larry Folk confirmed this fact in his deposition when he stated that the problem giving rise to the amended contract with Far Hills was that the MCUD No. 2 plant is only permitted for 250,000

equivocal response¹⁷, but it is clear MCUD No. 2 only stated that it would have to “properly evaluate the possibility” of expanding its facility;¹⁸ MCUD No. 2 did not state, as erroneously indicated by the ALJ,¹⁹ that it was willing to expand its plant to accept 250,000 gals/day of wastewater from Far Hills.

Regardless of how one interprets MCUD No. 2’s response letter of September 17, 2004, the dispositive fact is that, after evaluating the possibility of plant expansion, MCUD No. 2 proceeded to amend its wastewater contract with Far Hills to allow Far Hills to withdraw from the MCUD No. 2 plant thus foregoing the need to expand the plant’s capacity. Under the amended wastewater contract, MCUD No. 2 has formally and legally disavowed any intention of meeting Far Hills’ wastewater service needs and has agreed that Far Hills would construct its own plant. This fact conclusively negates any possible contrary interpretation of MCUD No. 2’s response letter of September 17, 2004. Another salient fact is that MCUD No. 2 never participated in this hearing as a party nor object in any way to Far Hills’ wastewater permit in this case; of course, MCUD No. 2 could not do that because it had contractually agreed not to do so.

3. The Fact that the Agreement to Have Far Hills Withdraw From the MCUD No. 2 Plant Was Executed After the Application Filing Date is Irrelevant.

The ALJ seems to put great weight on the fact that the amended contract of November 24, 2004 allowing Far Hills to withdraw from the MCUD No. 2 plant was not executed until

gals/day and they “were bumping that amount and so that was the concern,” especially since “there was more building going on so there would be more use.” Exh. P-5 at pg. 21.

¹⁷ When MCUD No. 2’s president Larry Folk was asked in his deposition why MCUD No. 2’s engineer phrased the answer in this manner, Mr. Folk repeatedly stated that he did not know. Exh. P-5 at pgs. 8-9.

¹⁸ Consistent with MCUD No. 2’s letter of September 17, 2004, MCUD No. 2’s president Larry Folk stated in his deposition that he did not know whether it would be economically feasible for MCUD No. 2 to expand its plant to accept Far Hills’ wastewater because that question would have to be studied. Exh. P-5 at pg. 9.

¹⁹ ALJ’s proposed Finding of Fact No. 17.d.

after Far Hills had filed its permit application on August 31, 2004.²⁰ But the timing of that agreement in relation to the filing of the permit application is completely irrelevant to the Commission's determination of whether MCUD No. 2 has the ability and willingness to serve Far Hills' wastewater needs. There is nothing in TCEQ's rules indicating that the ability of other potential providers to serve a permit applicant must be ascertained as of the date of filing of the permit application. The Commission is being asked to make findings of fact in this case based on the facts as adduced in the evidentiary record, not the facts as they existed as of August 31, 2004. The evidentiary facts in this case, as embodied in the agreement to have Far Hills withdraw from the MCUD No. 2 plant, undeniably show that MCUD No.2 does not have the legal ability or willingness to serve Far Hills' wastewater needs.

4. The Deposition Statements of MCUD No. 2's President, Larry Folk, Do Not Support a Finding that MCUD No. 2 has the Ability and Willingness to Serve Far Hills.

The ALJ also relies on a deposition statement of Larry Folk, President of MCUD No. 2, that MCUD No. 2 has never stated that it would refuse to extend service to Far Hills past 2012.²¹ First, the relevant inquiry is whether MCUD No. 2 ever affirmatively agreed to serve the Far Hills' wastewater needs, not whether it had ever refused to extend service past the contract termination date. But more importantly, regardless of how one interprets Mr. Folk's statement or what he had in mind when he was deposed, the controlling fact is that MCUD No. 2 legally committed itself not to serve Far Hills when it entered into the agreement to have Far Hills withdraw from the MCUD No. 2 plant.²² Such a binding contractual agreement carries much greater evidentiary value than Mr. Folk's simple statement – a statement that does not even speak

²⁰ ALJ's Proposal For Decision, pg. 9; ALJ's proposed Finding of Fact No. 17.e.

²¹ ALJ's proposed Finding of Fact No. 17.f.; Exh. P-5 at pg. 7. The question and answer were: Q: "...Has [MCUD No. 2] ever stated it would refuse to extend service past 2012?" A: "No."

²² MCUD No. 2's president Larry Folk stated in his deposition that as a result of the amended contract, MCUD No. 2 is not going to be providing any wastewater service to Far Hills (Exh. P-5 at pg. 25-26), that the amended contract with Far Hills was unanimously approved by the MCUD No. 2 Board (Exh. P-5 at pg. 27), and that MCUD No. 2 intends to stand by its agreement with Far Hills (Exh. P-5 at pg. 27).

to the relevant issue. Mr. Folk's other statement that the MCUD No. 2 board has "an obligation as caretakers of an agency of the state to do... whatever TCEQ tells us"²³ is a mere truism that adds nothing as a justification of MCUD No. 2's supposed ability and willingness to serve Far Hills. In fact, there are other and more numerous deposition statements of Larry Folk as cited in the footnotes herein all tending to show that MCUD No. 2 does not have the ability or willingness to serve Far Hills.

5. MCUD No. 2 Is Not a Viable Alternative Wastewater Provider Because It Does Not Have the Physical Ability to Serve Far Hills.

Not only does MCUD No. 2 not have the legal ability to serve Far Hills under its amended contract with Far Hills, the evidence was uncontroverted that the MCUD No. 2 plant is in need of extensive physical repairs and upgrades making the plant an unviable alternative to Far Hills' proposal to build its own plant.²⁴ In 2003, MCUD No. 2's engineer investigated the condition of the MCUD No. 2 lift station and treatment plant. He prepared a report dated February 2003 on the lift station and determined that the wet well section and dry well section of the plant's lift station were built in 1972 and were now both "severely deteriorated". A significant amount of concrete had eroded away and the metal piping was exposed all around the circumference of the wet well section. The wet well required a significant amount of rehabilitation, and even rehabilitation may not be feasible since its structural integrity may be inadequate. The dry pit was severely corroded in the entrance tube and the piping was severely corroded as well, so that the piping had to be replaced. A copy of Mr. Adams' February 2003 engineering report on the lift station is attached to Tim Hardin's testimony as Exhibit TBH-2.

²³ Exh. P-5 at 24.

²⁴ The description of physical problems and repairs needed at the MCUD No. 2 plant is taken from the testimony of Tim Hardin, Exh. A-5 at pgs. 5-6. Moreover, MCUD No. 2's president Larry Folk acknowledged in his deposition that the MCUD No. 2 plant was in need of substantial repairs and that, given the approximate 30 years age of the plant, the substantial amount of plant repairs needed did not surprise him. Exh. P-5 at pgs. 16-17.

MCUD No. 2's engineer prepared another report dated October 2003 which evaluated rehabilitation options and costs for the MCUD No. 2 plant. His report determined that there were several "high priority" items that needed immediate attention such as replacement of corroded electrical conduit and junction boxes; replacement of corroded access stairways; replacement of corroded handrail connector sleeves; grouting of cracks in concrete basin walls; repair and recoating of steel divider walls between basins and around the clarifier; replacement of a corroded section of galvanized steel over aeration basin; installation of a containment structure for chemical barrels stored on-site; and replacement of a corroded electrical control box. There were also various other "moderate priority" and "low priority" repair items. The total rehabilitation costs estimated by MCUD No. 2's engineer was \$393,500, and this estimate did not include the costs of increasing the capacity of the plant to handle increased flow volumes from future development. A copy of the October 2003 engineering report on the MCUD No. 2 plant is attached to Tim Hardin's testimony as Exhibit TBH-3. MCUD No. 2's president Larry Folk stated that, as of the May 12, 2006 date of his deposition, nothing had changed technically at the MCUD No. 2 plant²⁵ and that the MCUD No. 2 plant is still in need of substantial repairs.²⁶

The evidence is also uncontroverted that in order to serve Far Hills' current and future needs, the MCUD No. 2 plant would have to undergo a major expansion in capacity. In response to Far Hills' letter sent to MCUD No. 2 inquiring whether MCUD No. 2 had sufficient capacity to accept 250,000 gals/day of wastewater as sought in the Applicant's first phase permit, MCUD No. 2 responded: "*No, the existing MCUD No. 2 facility is currently permitted for an average daily flow of 250,000 gallons per day.*"²⁷ MCUD No. 2's president also acknowledged that the MCUD No. 2 plant needed to be expanded to handle Far Hills' wastewater service needs

²⁵ Exh. P-5 at pg. 9.

²⁶ Exh. P-5 at pg. 16.

²⁷ Exh. A-5-TBH-6 (Bates Stamp A00837).

because the MCUD No. 2 plant was presently “bumping up” against its permitted limits of 250,000 gals/day;²⁸ but due to execution of the amended contract allowing Far Hills to withdraw from the MCUD No. 2 plant, MCUD No. 2 has no plans to engage in any plant expansion.²⁹

From this uncontroverted evidence about the present poor and aged condition of the MCUD No. 2 plant and its current operation at permitted capacity, the MCUD No. 2 plant cannot reasonably be considered a viable alternative to Far Hills’ proposal to construct its own new plant. Accordingly, the ALJ’s Proposed Finding of Fact No. 17.c. that “much of the infrastructure is already in place to continue providing service” to Far Hills is not supported by the evidence.

6. Section 26.0282 of the Texas Water Code Does Not Authorize TCEQ to Deny the Permit on the Basis of Regionalization Concerns.

The legal authority cited by the ALJ for permit denial due to regionalization concerns is Section 26.0282 of the Texas Water Code which provides that the Commission may deny or alter a proposed wastewater discharge permit “*based on consideration of need, including... the availability of existing or proposed areawide or regional waste collection, treatment, disposal systems not designated as such by commission order pursuant to the provisions of this subchapter.*” However, the ALJ has misconstrued the extent of the Commission’s legal authority to deny a permit under this statute in this case since the statute requires the Commission to evaluate need only in relation to designated regional wastewater facilities, or facilities proposed to be designated as a regional wastewater facility. In this case, the MCUD No. 2 plant has not been either designated or proposed for designation as a regional wastewater treatment facility, and therefore a consideration of “need” under Section 26.0282 is not triggered.

²⁸ Exh. P-5 at pg. 21.

²⁹ Exh. P-5 at pg. 24.

The ALJ apparently interprets §26.0282 to mean that the Commission may consider need for a proposed permit whenever there is any possible alternative wastewater provider such as the MCUD No. 2 plant in this case. Such a statutory construction may at first blush appear to be reasonable given the wording of the statute: “...*based on consideration of need, including...availability of existing or proposed areawide or regional waste collection, treatment, and disposal systems not designated as such by commission order pursuant to provisions of this subchapter.*” Upon closer examination however, it becomes clear that such a construction is not proper since the underscored phrase is meant to modify the phrase “*proposed areawide or regional waste collection, treatment, and disposal systems...*”. The phrase “*not designated as such by commission order*” cannot be construed as giving TCEQ authority to consider need when there is any possible alternative provider; to consider need, there must be an alternative provider who is either an actually designated or a proposed-to-be-designated regional provider which has not yet advanced to the point in the regional facility designation process to be actually designated as a regional facility.

This interpretation of §26.0282 is perfectly reasonable when one examines the statutory process for designating regional wastewater facilities. The statutory process for designating regional and area-wide wastewater facilities is set forth in sections 26.081 through 26.087 of the Texas Water Code and it is a long and detailed process which has not occurred in this case. First, the regional facility designation process only applies in a standard metropolitan statistical area (SMSA) designated by the U.S. Office of Management and Budget³⁰, but the rural area proposed for the Far Hills wastewater plant is not within a SMSA. Accordingly, under the law, TCEQ may only “encourage”, but not require, the development of regional wastewater systems. Second, the regionalization process must be initiated by a public hearing and a TCEQ

³⁰ TEX. WATER CODE ANN. §26.081 (Vernon 2000).

determination that a regional or areawide system is necessary to prevent pollution or maintain or enhance the quality of water in the state.³¹ Next, the process requires the TCEQ to enter an order proposing the regionalized area and the designated regional provider, so long as that regional provider agrees to act as a regional provider.³² Finally, an election must be held to formally approve and establish the regional system.³³

In light of the lengthy process for proposing and officially designating regional wastewater facilities, it makes perfect sense for §26.0282 to state that the Commission may consider need when there exists a wastewater facility which has either been officially designated as such, or when there is a facility that has been proposed for designation as a regional facility but has not yet completed the lengthy process for obtaining official designation as a regional facility. Since the MCUD No. 2 plant has neither been designated nor proposed for designation as a regional wastewater facility, the consideration of need under §26.0282 is not triggered. Accordingly, the ALJ's citation of §26.0282 of the Texas Water Code as authority for the Commission to consider need in this case is the apparent result of a faulty legal construction of §26.0282.

7. Far Hills Has Fully Complied With All Applicable TCEQ Regionalization Requirements

The ALJ has phrased the issue in her PFD as “whether issuance of the proposed permit would further the State policy for promoting regionalization as set forth in Water Code §26.082.” However, that statement of the issue is incorrect because there is no statutory or other legal requirement that a permit applicant “further” the State’s regionalization policy. Indeed, the ALJ’s formulation of the issue is incorrect also because it misstates the issue to be briefed as

³¹ TEX. WATER CODE ANN. §26.082 (Vernon 2000).

³² TEX. WATER CODE ANN. §26.083 (Vernon 2000).

³³ TEX. WATER CODE ANN. §26.087 (Vernon 2000).

agreed to by all the parties in this case which was: "Has Applicant Complied With All Applicable Regionalization Requirements?"³⁴ Demonstrating compliance with applicable regionalization requirements is a much different issue than the ALJ's issue of whether the Applicant has "furthered" the State's regionalization policy.

With respect to the issue of whether Far Hills has complied with all applicable regionalization requirements, the evidence shows that Far Hills has done so. The TCEQ's policy on regionalization of wastewater service requires that a permit applicant make inquiries of other wastewater plants located within three miles of the proposed plant to determine whether they have the capacity and willingness to provide the wastewater service to meet the needs of the applicant.³⁵ In this case, the applicant sent inquiries to the five existing wastewater providers within three miles and received back negative responses from three of the systems,³⁶ the somewhat equivocal response of September 17, 2004 from MCUD No. 2 as described above,³⁷ and no response from MCUD No. 3.³⁸

As described above, the MCUD No. 2's response stated that it did not currently have sufficient capacity to accept Far Hills' proposed wastewater volume and that MCUD No. 2 would have to properly evaluate the possibility of expanding its facility to accommodate the requested volume from FHUD.³⁹ However as described above, the subsequent agreement of November 24, 2004 for withdrawal of Far Hills from the MCUD No. 2 plant conclusively establishes the intention of MCUD No. 2 not to serve Far Hills. Accordingly, there are no entities within 3 miles of the proposed facility which have the ability or willingness to serve Far

³⁴ See, Agreed Motion for Briefing Outline filed with the ALJ on August 2, 2006.

³⁵ Exh. A-1 (Oral Deposition of June Ella Martinez), page 47 (line 22) through page 48 (line 24) (Bates Stamp A00049-A00050); Exh. A-5 (Prefiled Testimony of Tim Hardin), page 11 (Bates Stamp A00620).

³⁶ The three systems were MCUD No. 8, Lake Conroe Hills M.U.D., and Point Aquarius M.U.D. See Exh. A-1-2 (Bates Stamp Nos. A00143 – A00145).

³⁷ Exh. A-5-TBH-6 (Bates Stamp A00837); Hearing Transcript, page 8 (line 13) through page 9 (line 7).

³⁸ Exh. A-1-17 (E.D.'s Preliminary Response to Public Comments), page 8 (Bates Stamp A00282).

³⁹ Exh. A-5-TBH-6 (Bates Stamp A00837).

Hills and the applicant has complied with all applicable TCEQ regionalization requirements concerning requesting service from nearby wastewater facilities.⁴⁰

The Executive Director (“E.D.”) also believes that the regionalization requirements applicable in this case have been met by Far Hills.⁴¹ According to the E.D., the Commission’s jurisdiction in a TPDES permit application does not authorize TCEQ staff to evaluate alternatives to what the applicant requested.⁴² TCEQ evaluates applications for wastewater treatment plants based on the information provided in the application, and does not have the authority to mandate a different facility location, different discharge location, alternative means of conveyance, or different type of wastewater treatment plant.⁴³

As discussed above, the regionalization requirements of §§26.081 through 26.087 is a voluntary process and none of the prerequisites necessary for designating a regional facility has occurred in this case. Only when these procedural prerequisites have been satisfied can TCEQ require a wastewater permittee to tie onto a designated regional provider. Accordingly, all applicable TCEQ regionalization requirements have been met in this case, and the ALJ’s suggestion that TCEQ can “demand” and “require” that Far Hills continue to be served by the MCUD No. 2 plant is not supported by law or the factual evidence in this case.

II. EXCEPTIONS ON WETLANDS ISSUE

For the reasons stated below, Far Hills excepts to Finding of Fact Nos. 18 and 19 as well as the ALJ’s Analysis on the wetlands issue and respectfully requests that the Commission adopt

⁴⁰ Exh. A-1 (Oral Deposition of June Ella Martinez), page 47 (line 22) through page 48 (line 24) (Bates Stamp A00049-A00050).

⁴¹ Exh. A-1-17 (E.D.’s Preliminary Response to Public Comments), at pgs. 8 - 10 (Bates Stamp A00282 – A00284).

⁴² Exh. A-1-17 (E.D.’s Preliminary Response to Public Comments), at pg. 15 (Bates Stamp A00290).

⁴³ Exh. A-1-17 (E.D.’s Preliminary Response to Public Comments), at pg. 15 (Bates Stamp A00290).

Far Hills' proposed Findings of Fact Nos. 74 through 89 and Conclusion of Law No. 6 as previously submitted to the ALJ, and as set forth in Exhibit 1 hereto.

1. The Record of This Case Should be Re-Opened to Receive the Verification by the U.S. Army Corps of Engineers of Far Hills' Expert's Wetlands Delineation.

The ALJ recommended denial of the permit because she concluded that a portion of the proposed Far Hills wastewater treatment units would be located in a wetlands. The wetlands issue in this case is a classic "battle of the experts" wherein Capps Concerned Citizens' ("Capps") wetlands expert, John Jacob, concluded that a portion of the area proposed for Far Hills' wastewater treatment units consisted of wetlands, whereas Far Hills' expert wetlands delineator, Nick Laskowski, concluded that only a very small portion of his study area contained wetlands and that such wetlands were located well away from the proposed site of the Far Hills wastewater treatment units. Although the ALJ accorded more weight to the opinions of Dr. Jacob in evaluating the factual evidence on hydrophytic vegetation, hydric soils and wetlands hydrology, the record shows that Mr. Laskowski's wetlands delineation was done in complete accordance with the U.S. Army Corps of Engineers' ("USACE") Wetlands Delineation Manual and was submitted for verification by the Corps of Engineers.⁴⁴ On the other hand, Dr. Jacob's wetlands determination departed in numerous significant ways from USACE requirements⁴⁵ and was not submitted for USACE verification.⁴⁶

The evidence also shows that submission of a wetlands delineation to the USACE for verification is a necessary step for obtaining USACE approval and official designation as a

⁴⁴ Exh. A-7-NL-5 (Berg-Oliver Associates, Inc. Wetland Assessment of April 2006) (Bates Stamp A00927 and A00928); Hearing Transcript, pg. 211 (lines 19 – 23).

⁴⁵ See Attachment 2, Far Hills Proposed Findings of Fact Nos. 80 – 84) describing the deficiencies in Dr. Jacob's wetlands delineation.

⁴⁶ Hearing Transcript, pg. 280 (lines 17 – 19).

federal jurisdictional wetlands.⁴⁷ Dr. Jacob himself acknowledged that a USACE-verified wetlands delineation would be determinative of where wetlands actually existed at the subject property, and that he would defer to any such USACE-verified delineation of wetlands.⁴⁸ Obtaining USACE designation as a federal wetlands is highly significant because state law makes clear that there is no distinction between “federal wetlands” and “state wetlands” and state law further requires TCEQ to abide by federal determinations of wetlands.⁴⁹

On July 26, 2006, the ALJ denied Far Hills’ motion to hold the record open to receive the USACE verification of Mr. Laskowski’s wetlands delineation. And on August 24, 2006, the USACE issued its official verification of Mr. Laskowski’s wetlands delineation. Accordingly, Far Hills respectfully requests that the Commission re-open the record to receive this vital piece of evidence. Far Hills’ request to receive the USACE wetlands verification into the record of this case is not based on any lack of diligence on Far Hills’ part in failing to have obtained the USACE verification at an earlier point in time since issuance of the USACE verification could not and did not occur until the normal USACE processes for issuing such wetlands verifications could take place.

Now that the USACE verification has been issued, Far Hills can represent, and offers to prove, not only that it verifies Mr. Laskowski’s wetlands delineation, but that it also includes a USACE conclusion stating that Dr. Jacob’s wetlands delineation was not performed in accordance with USACE requirements. Since state law requires the Commission to abide by federal determinations of wetlands, and since the Commission has plenary authority to re-open the record in this case, the Commission should re-open the record in this case to receive the USACE’s verification of Mr. Laskowski’s wetlands delineation. With such wetlands verification

⁴⁷ Hearing Transcript, pgs. 160 (line 4) – 162 (line 3).

⁴⁸ Hearing Transcript, pg. 299 (lines 1 – 21).

⁴⁹ TEX. WATER CODE §§11.502 and 11.506 (Vernon 2000).

from the USACE, the Commission can only find that no wetlands exist in the area where Far Hills' wastewater treatment plants will be located.

2. There is No Difference Between the Federal and State Definitions of "Wetlands."

A. The Federal Definition of "Wetlands."

Under the federal Clean Water Act, both the U.S. Environmental Protection Agency ("EPA") and the USACE have regulatory jurisdiction over wetlands and both agencies have adopted identical definitions of the term "wetlands." EPA defines "wetlands" as follows:

*"Wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas."*⁵⁰

For purposes of implementing its regulatory jurisdiction under the Federal Clean Water Act, the USACE has an identical definition of the term "wetlands":

*"The term wetlands means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas."*⁵¹

B. The State Definition of "Wetlands."

TCEQ has adopted a definition of "wetlands" that virtually matches the above-quoted federal definition:

*"Wetlands – Those areas that are inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, playa lakes, and similar areas."*⁵²

⁵⁰ 40 C.F.R. §122.2.

⁵¹ 40 C.F.R. §230.3(t).

⁵² 30 Tex. Admin. Code ("TAC") §309.11(10).

In addition, the Texas Legislature has enacted the State Wetlands Act as Subchapter J of Chapter 11 of the Texas Water Code, a copy of which is attached hereto as Exhibit 2. That Act states that the definition of the term “wetlands” within the State of Texas **for purposes of the Federal Clean Water Act, six other named federal laws or programs, “and all Texas laws, rules, and regulations adopted...and interpretation and implementation of any kind whatsoever of both federal and state laws by agencies of the state, including any amendment or revision thereto, relating to wetlands,**

*means an area (including a swamp, marsh, bog, prairie pothole, or similar area) having a predominance of hydric soils that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support and that under normal circumstances supports the growth and regeneration of hydrophytic vegetation.*⁵³

Because of the very close similarity of the above-quoted statutory definition and the TCEQ and federal definitional formulations, and because the State Wetlands Act requires all Texas state agencies to utilize the statutory definition for purposes of the Federal Clean Water Act and all Texas laws, rules and regulations, it is clear that in Texas “wetlands” must be defined the same under both federal and state law. If there was any room for doubt on this point, the Legislature removed any such doubt by expressly providing in Section 11.506 of the State Wetlands Act that: *“If the state definition conflicts with the federal definition in any manner, the federal definition prevails.”* Therefore, under the State Wetlands Act, the term “wetlands” absolutely cannot have a broader meaning under state law than under federal law.

The ALJ’s stated legal position that “wetlands” can be defined for purposes of TCEQ’s administration of Chapter 309 of the Texas Water Code in a broader manner than under the federal law for determining jurisdictional waters of the U.S. is clearly incorrect since the State Wetlands Act expressly provides that the definition of “wetlands” applies for purposes of “all

⁵³ TEX. WATER CODE §11.502 (Vernon 2000).

Texas laws, rules, and regulations... and interpretation and implementation of any kind whatsoever of both federal and state laws by agencies of the state... relating to wetlands.” For the same reason, any argument that the State Wetlands Act applies only to water rights cases because it appears in Chapter 11 of the Texas Water Code is clearly erroneous since the Act expressly provides that the definition of “wetlands” applies for purposes of all State laws, rules and regulations relating to wetlands.

3. Under the State Wetlands Act, the Meaning of “Wetlands” is Determined by the USACE Under Its Wetlands Delineation Manual.

Although both USACE and EPA have jurisdiction over wetlands under Section 404 of the Federal Clean Water Act, both federal agencies have agreed on a single definition of “wetlands” (as cited above) and that the USACE will take the lead role in identifying and defining what constitutes “wetlands.”⁵⁴ Under the 1989 MOA between the two agencies, EPA follows USACE procedures for determining what constitutes wetlands, i.e., the USACE’s Wetlands Delineation Manual. Thus, the delineation of wetlands under federal law is determined under the procedures set forth in the USACE’s Wetlands Delineation Manual.

The State Wetlands Act prescribes the definition of “wetlands” within the State of Texas for purposes of Sections 301 (33 U.S.C. §1311) and 404 (33 U.S.C. §1344) of the Federal Clean Water Act (as well as for purposes of all other federal laws), and for purposes of any state agency’s administration of any federal or state law or rule relating to wetlands. The State Wetlands Act mandates TCEQ to use the Act’s definition of “wetlands” in this TPDES permitting case, especially since the Act specifically cites 33 U.S.C. §1311 (Section 301 of the Federal Clean Water Act) as one of the federal statutes for which the State Wetlands Act’s definition of wetland applies in Texas and Section 301 is the general authority under which the

⁵⁴ See, MOA of January 19, 1989 between USACE and EPA.

Texas' TPDES permitting program is established. Since any differences between the State's definition and the federal definition are resolved in favor of the federal definition, it is clear that the meaning of "wetlands" to be interpreted and applied in this TPDES permitting case is the meaning determined by the USACE in accordance with its procedures set forth in the USACE Wetlands Delineation Manual.

4. The USACE Wetlands Verification of August 24, 2006 is an Official USACE Determination of Wetlands Which, Under the State Wetlands Act, Should Be Considered By the Commission.

At the hearing-on-the-merits, Far Hills made a motion to hold the record of this case open to receive the USACE's response to Nicholas Laskowski's request for verification of his delineation of jurisdictional wetlands. Far Hills made this request because, as CAPPs' own wetlands expert John Jacob testified, obtaining a USACE verification of wetlands would answer all legal issues concerning the existence of wetlands on the subject property; indeed, Dr. Jacob testified that he would defer to a USACE verification of wetlands.⁵⁵ Since the USACE has now completed its internal review process and on August 24, 2006 issued its verification of Mr. Laskowski's wetlands delineation, it is entirely appropriate for the Commission to re-open the record of this case to receive this vitally important piece of evidence. Having the USACE jurisdictional verification in the record would definitively answer for the Commission the question of where the wetlands do and do not exist on the subject property and will avoid the needless and daunting task of the Commission having to make highly technical judgments as between the conflicting opinions of the two wetlands experts in this case.

Far Hills' request to re-open the record is authorized under TCEQ's rules at 30 TAC §80.265 ("Reopening the Record"). This rule expressly authorizes the Commission, on motion

⁵⁵ Hearing transcript at pg. 299.

of any party or its own motion, to order the ALJ to reopen the record for further proceedings on specific issues in dispute.

Although Capps objected to Far Hills' motion to hold the record open to receive the USACE wetlands verification on the ground that Far Hills should not be allowed extra time to meet its burden of proof, such objection is without merit. Far Hills has already sustained its burden of proof on the wetlands issue through the testimony and exhibits of Nicholas Laskowski. The USACE verification is not needed to sustain Far Hills' burden of proof, but it is appropriate to receive into the record as an extremely helpful, indeed dispositive, piece of evidence on the highly technical issue of wetlands delineation. Indeed, more than being helpful, it could well be argued that under the State Wetlands Act, TCEQ is duty-bound to consider the USACE determination of wetlands since all state agencies are required to implement any of their rules relating to wetlands in accordance with the federal definition.

Far Hills was diligent in having its wetlands delineation conducted and submitted as part of the record and this fully satisfies Far Hills' evidentiary burden on the wetlands issue in this case. In seeking to re-open the record to receive the USACE wetlands verification of August 24, 2006, Far Hills is not seeking special leave to get something into the record which it should have been able to get into the record upon the exercise of due diligence. On behalf of Far Hills, Mr. Laskowski submitted his initial request for USACE wetlands verification on May 3, 2006⁵⁶ and a final request for verification on July 3, 2006. The July 3, 2006 request incorporates changes requested by USACE in a wetlands verification site visit on June 1, 2006. Obtaining a USACE verification is subject to the normal bureaucratic delays, as well as unexpected delays, involved in obtaining a federal agency's review and approval of a regulatory submittal. Following submission of the request for wetlands verification, the USACE Galveston District, along with

⁵⁶ Exh. NL-6 (Bates Stamp A00975).

all USACE district offices, were instructed to refrain from finalizing any more wetlands verifications until the district offices received guidance from USACE headquarters in Washington, D.C. on how to apply the important U.S. Supreme Court ruling issued June 19, 2006 in the case of *Rapanos v. United States*.⁵⁷ This further delayed the issuance of the USACE wetlands verification. Fortunately, the USACE has now issued its verification in time for the Commission to consider it in deciding the highly complex wetlands issues in this case.

In order for the Commission to determine wetlands in this case in accordance with the federal definition as required by the State Wetlands Act, the Commission should naturally desire to receive the USACE wetlands verification into the record. The USACE wetlands verification is the single most relevant and crucial piece of evidence possible on this subject – and it is evidence that did not come into existence until after the record closed. Therefore, if there is any particular case where the Commission should not hesitate to order the record re-opened, this is that case.

5. The Evidentiary Record Supports Mr. Laskowski's Determination of Wetlands.

The evidence in this case clearly shows that Far Hills' wastewater treatment units are not located in a wetlands. In April 2006, Nicholas Laskowski, a Certified Wetlands Delineator, performed a jurisdictional wetlands determination in accordance with USACE standards and determined that, of the 4.287-acre tract on the northwest corner of Cude Cemetery Road and Virginia Street, only 0.0045 acres would be classified as adjacent headwater wetlands and 0.0082 acres would be classified as headwaters.⁵⁸ Both of these two small acreage areas are located on

⁵⁷ ___ S.Ct. ___; 2006 WL 1667087 (U.S.).

⁵⁸ Exh. A-7-NL-5 (Bates Stamp A00924) and Appendix F thereto (Wetland Delineation Map) (Bates Stamp A00972).

the far western side of the study area and nowhere near where Far Hills proposes to construct its wastewater treatment units.⁵⁹

Although the ALJ cites all the evidence supporting Dr. Jacob's conclusions, the ALJ cites none of the field observations done by Mr. Laskowski which support his wetlands determination as set forth in detail in Mr. Laskowski's wetlands study.⁶⁰ In addition, Mr. Laskowski's conclusion about where wetlands exist is based on fully documented observations taken at 7 different observation points as opposed to only 3 documented observation points done by Dr. Jacob. Moreover, Mr. Laskowski determined exact wetlands acreage areas using 154 surveyed pin flags⁶¹ whereas Dr. Jacob did not use any pin flags or undertake any surveying as required by the USACE Wetlands Delineation Manual.⁶²

Mr. Laskowski's wetlands determination is consistent with two other wetlands studies of the subject tract: (1) a wetlands due diligence study performed by Mr. Laskowski and his firm, Berg-Oliver Associates, Inc. ("Berg-Oliver") in September 2005;⁶³ and (2) a January 11, 2005 finding by the Galveston District USACE in response to a request for jurisdictional determination submitted by Jonell Nixon for Capps.⁶⁴ As discussed above, the April 2006 Berg-Oliver jurisdictional wetlands delineation⁶⁵ was initially submitted for official verification by the Galveston District of the USACE by letter dated May 3, 2006.⁶⁶ USACE staff member Jason Hudson visited the site with Mr. Laskowski on June 1, 2006 as part of USACE's on-site

⁵⁹ Exh. A-7-NL-5 (Bates Stamp A00924); compare Appendix F (Wetland Delineation Map) (Bates Stamp A00972) with Exh. A-5-TBH-5 (Revised Site Diagram) (Bates Stamp A00836).

⁶⁰ Exh. A-7-NL-5.

⁶¹ Hearing Transcript, pg. 215 (line 19) through page 216 (line 18).

⁶² Hearing Transcript, pg. 254 (line 20) through pg. 255 (line 12); pg. 255 (line 23) through pg. 256 (line 5).

⁶³ Exh. A-6-NL-2 (Bates Stamp A00894 – A00898).

⁶⁴ Exh. A-6-NL-3 and A-6-NL-4 (Bates Stamp A00900 – A00921).

⁶⁵ Exh. A-7-NL-5 (Bates Stamp A00925 – A00973).

⁶⁶ Exh. A-7-NL-6 (Bates Stamp A00975); Hearing Transcript, pg. 160 (lines 4-11).

investigation work for the USACE verification,⁶⁷ and a final request for verification was submitted to USACE on July 3, 2006. If the Commission grants Far Hills' request to re-open the record, the USACE official wetlands verification dated August 24, 2006 will show that Mr. Laskowski's wetlands determination, and not Dr. Jacob's determination, is the correct one.

6. The Evidentiary Record Shows That Dr. Jacob's Wetlands Delineation Was Not Performed in Accordance With USACE Requirements and Is Not Credible.

Capps' wetlands expert John Jacob concluded that that a large portion of the tract of land on the northwest corner of Cude Cemetery Road and Virginia Street constituted wetlands.⁶⁸ Although Dr. Jacob is a professional wetlands scientist and claims to have performed his wetlands delineation in accordance with the USACE's 1987 Wetlands Delineation Manual,⁶⁹ his wetlands delineation report exhibits a surprising number of deficiencies and careless errors all tending to cast doubt on the reliability of his delineation of the wetlands. The following is a list of these deficiencies and errors:

- Dr. Jacob did not define a specific study area or determine its acreage. The "study area" which Dr. Jacob investigated is shown as a square configuration on figure 1 of his report (Exhibit P-2B) but as a rectangular configuration on Figure 2. The defining of a specific tract and its exact acreage for a wetlands delineation study is required by the USACE's 1987 Wetlands Delineation Manual.⁷⁰ When asked about this discrepancy, Dr. Jacob admitted that he was "*not particularly concerned about that because ... I didn't really, to tell you the truth, have a precise study area boundary when I went out there.*"⁷¹ Since he was not asked to define a study area, he also failed to determine the acreage of the study area which is also required by USACE's Wetlands Delineation Manual.⁷²
- Dr. Jacob did not determine wetland acreages. The defining of specific acreage constituting wetlands through surveying or use of GPS instruments is a requirement of USACE's Wetlands Delineation Manual.⁷³ However, Dr. Jacob did not even attempt to determine the acreage constituting the area he believed were wetlands

⁶⁷ Hearing Transcript, pg. 161, (lines 4-14); pg. 199 (lines 8-12); pg. 208 (line 25) through pg. 211 (line 9).

⁶⁸ Exh. P-2D.

⁶⁹ Exh. P-2, pg. 4 (lines 1-4).

⁷⁰ Exh. P-2C, pg. 40; Hearing Transcript, pg. 544 (line 25) through pg. 545 (line 4).

⁷¹ Hearing Transcript, pg. 253 (lines 1-4).

⁷² Hearing Transcript, pg. 254 (lines 5-12).

⁷³ Hearing Transcript, pg. 211 (line 24) through pg. 213 (line 7).

because that was not within the scope of what he was asked to do.⁷⁴ In contrast to Dr. Jacob's work which involved no surveying of acreages, Mr. Laskowski did determine exact acreages through the use of 154 surveyed pin flags.⁷⁵

- Dr. Jacob's delineation of his wetland boundary was based only on hydrologic conditions, not documented observations of hydric soils or hydrophytic vegetation. Although Dr. Jacob failed to determine wetland acreage because the sole focus of his study was to delineate a wetlands boundary line,⁷⁶ even the determination of his wetlands boundary failed to comply with the fundamental USACE principle that wetlands must meet the three criteria of (1) hydrologic conditions; (2) hydric soils; and (3) hydrophytic vegetation.⁷⁷ In response to questions from Ms. Mann for OPIC concerning how he drew his wetland boundary in Figure 3 of Exhibit P-2B, Dr. Jacob stated that he evaluated "the lay of the land" and showed how the tree line matched up closely with his wetland boundary.⁷⁸ In speaking of "lay of the land" Dr. Jacob was referring to hydrologic conditions of the land or geomorphology.⁷⁹ Dr. Jacob claims to have investigated for the existence of hydric soils and hydrophytic vegetation in drawing his wetlands boundary line.⁸⁰ However, in response to questions from Far Hills' attorney about how Dr. Jacob could determine the irregular boundaries of his alleged wetlands area by only taking three samples (one of which was outside his wetlands boundary), Dr. Jacob admitted that in drawing his wetland boundary he took no soil samples nor made any documented observations of the vegetation around the area to be sampled as required by the USACE wetlands manual.⁸¹ It is clear that Dr. Jacob's wetlands boundary line is based on nothing more than the tree line existing at the site (indicated by reviewing tonal patterns on aerial photography) and his walking about the property making informal, undocumented observations.⁸² Although reviewing tonal patterns on aerial photography can be a valid preliminary or "desktop" method of delineating wetlands,⁸³ relying solely on tonal patterns to delineate wetlands is not an accurate method for an area of bottomland hardwoods such as this property because tree canopy obscures the actual wetlands on aerial photography.⁸⁴
- Dr. Jacob failed to include documentation of hydric soils in his wetland delineation. Dr. Jacob was admittedly careless in his failure to include information on soils for any of his three observation points such as map unit name, taxonomy, drainage class

⁷⁴ Hearing Transcript, pg. 254 (line 20) through pg. 255 (line 12); pg. 255 (line 23) through pg. 256 (line 5).

⁷⁵ Hearing Transcript, pg. 215 (line 19) through pg. 216 (line 18).

⁷⁶ Hearing Transcript, pg. 254 (lines 10-12); pg. 255 (lines 6-8).

⁷⁷ Exhibit P-2C, pg. 8 and pgs. 12-34; Hearing Transcript, pg. 238 (lines 2-3).

⁷⁸ Hearing Transcript, pg. 238 (line 4) through pg. 240 (line 1).

⁷⁹ Hearing Transcript, pg. 257 (lines 3-8); pg. 257 (line 25) through pg. 258 (line 16).

⁸⁰ Hearing Transcript, pg. 258 (line 20) through pg. 259 (line 15).

⁸¹ Hearing Transcript, pg. 213 (lines 11-25); pg. 275 (line 17) through pg. 277 (line 20); pg. 279 (line 6) through pg. 280 (line 1).

⁸² Hearing Transcript, pg. 275 (line 24) through pg. 277 (line 25); pg. 238 (line 17) through pg. 239 (line 1); pg. 264 (line 18) through pg. 265 (line 2); pg. 285 (lines 17-25).

⁸³ Hearing Transcript, pg. 178 (lines 3-9).

⁸⁴ Hearing Transcript, pg. 202 (line 23) through pg. 204 (line 15); pg. 177 (lines 2-23).

or field observations.⁸⁵ Since this information is required under the USACE prescribed wetlands data forms, Dr. Jacob's failure to include this information is further indication of his careless attitude toward compliance with USACE requirements for performing wetland delineations. Similarly, even though the USACE wetlands manual requires soil observation pits to be dug to a depth of 16 inches,⁸⁶ Dr. Jacob admitted that his three soil observation pits were only dug to a depth of 11, 10 and 8 inches.⁸⁷

The above deficiencies and careless errors on the part of Dr. Jacob indicate that his wetlands delineations was not performed in accordance with USACE requirements. When contrasted with the much more detailed study performed by Mr. Laskowski, a study which was submitted to the USACE for verification following an on-site review by USACE, it is clear that Dr. Jacob's facile conclusion about the location of wetlands is highly suspect.

In particular, Dr. Jacob's drawing of his wetlands boundaries based only on walking about the property to evaluate the "lay of the land" without taking soil samples or making documented observations of vegetation appears to be nothing more than a slipshod "quick-and-dirty" effort to determine wetlands. The fact that Dr. Jacob's admitted that his wetlands determination was not submitted for USACE verification, whereas Mr. Laskowski's wetlands determination was submitted for USACE verification (which verification has now been issued by USACE) shows that Mr. Laskowski's is the more credible wetlands determination.

7. The ALJ's Analysis of the Technical Wetlands Issues Only Recites Facts Supporting Dr. Jacob's Conclusions, But Not Any Facts In Opposition to Such Conclusions.

In purporting to analyze the highly technical and complex issues involved in wetlands determinations, including the three primary wetlands criteria of hydrophytic vegetation, hydric soils and wetlands hydrology, the ALJ merely quotes Dr. Jacob's statements from the record and Capps' arguments as presented in its brief and simply states that she "concur[s]" with those

⁸⁵ Hearing Transcript, pg. 265 (lines 6-17); pg. 266 (lines 2-22).

⁸⁶ Exh. P-2C, pg. 54; Hearing Transcript, pg. 214 (lines 8-14).

⁸⁷ Hearing Transcript, pg. 268 (lines 5-10).

statements and arguments. While the ALJ's decision to accord more weight to Dr. Jacob's testimony appears to be the sole basis for her concurrence with the opinions of Dr. Jacob, the ALJ did not even make mention of any evidence or arguments in opposition to those of Capps.

For example:

- Capps' Argument: Wetlands vegetation exists throughout the area Dr. Jacob designated as wetlands as shown by Dr. Jacob's determination that wetlands vegetation exists at Observation Point 2 and Observation Point 3. Far Hills' Response: Although Observation Points 2 and 3 are near the area where Far Hills proposes to locate its wastewater treatment units, the two points are not actually within the area where the units will be located, so this argument is hardly compelling.
- Capps' Argument: Although Dr. Jacob only formally documents his observations at three locations, he walked around the remainder of the area he designated as wetlands to confirm the presence of wetlands vegetation. Far Hills' Response: As discussed above, merely walking about an area to visually identify wetlands vegetation is not a proper method of performing a wetlands delineation. A proper wetlands delineation performed in accordance with the USACE Wetlands Delineation Manual requires documented observations of vegetation, soil and hydrology at specific points, not a "walking about the property" to visually identify only vegetation. Dr. Jacob admitted that he took no soil samples nor made any documented observations of vegetation as required by the USACE wetlands manual in drawing the boundaries of the area be determined to be wetlands.⁸⁸
- Capps' Argument: Mr. Laskowski observed wetland vegetation in many areas which he did not ultimately determine to be wetlands (e.g., at Points Up1 through Up5). Far Hills' Response: The most fundamental proposition of wetlands delineation is that in order to determine wetlands the wetlands delineator must identify and document all three wetlands characteristics (vegetation, soils, and hydrology), not just vegetation. Therefore, the fact that the area determined by Mr. Laskowski not to be wetlands had wetlands vegetation proves nothing.
- Capps' Argument: Dr. Jacob determined that wetlands hydrology exists throughout the area he determined to be wetlands as indicated by the fact that Dr. Jacob documented a watermark on a tree at his Observation Point 2. Far Hills' Response: Although Observation Point 2 is near the area where Far Hills proposes to locate its wastewater treatment units, that point is not actually within the area where the units will be located, so this argument is not compelling. Moreover, during high rainfall event preceding Mr. Laskowski's site visit, channelized surface runoff from the construction site across Cude Cemetery Road carried sediment that left marks on trees that Dr. Jacob interpreted as an indicator of wetlands hydrology; however, this was only the temporary effect of high

⁸⁸ Hearing Transcript, pg. 275 (line 17) through pg. 277 (line 20); pg. 279 (line 6) through pg. 280 (line 1).

volume channelized flow, not wetlands hydrology.⁸⁹ Observation Point 2 does not have a predominance of wetlands vegetation or hydric soils, so it cannot be wetlands.⁹⁰

- Capps' Argument: Wetlands hydrology exists throughout the area Dr. Jacob determined to be wetlands as indicated by the fact that drift lines and drainage patterns exist at his Observation Points 2 and 3. Far Hills' Response: Again, Observation Points 2 and 3 are not actually within the area where Far Hills proposes to locate its wastewater treatment units, so this argument is not compelling.
- Capps' Argument: By observing the "lay of the land," Dr. Jacob determined the boundaries of the area he determined to be wetlands. Far Hills' Response: Dr. Jacob documented the existence of his relatively vast wetlands area by only three observation points, and at only two of these points did Dr. Jacob determine that wetlands exist, neither of which is located where Far Hills proposes to locate its wastewater treatment units. It is clear from his testimony that Dr. Jacob's wetlands boundary line is based on nothing more than the tree line existing at the site (indicated by reviewing tonal patterns on aerial photography) and his walking about the property making informal, undocumented observations.⁹¹ Although reviewing tonal patterns on aerial photography can be a valid preliminary or "desktop" method of delineating wetlands,⁹² relying solely on tonal patterns to delineate wetlands is not an accurate method for an area of bottomland hardwoods such as this property because tree canopy obscures the actual wetlands on aerial photography.⁹³
- Capps' Argument: Dr. Jacob's observation of inundation is a primary indicator of wetlands hydrology and inundation is shown in Mr. Laskowski's photos of inundation of eastern areas of the site; photographs by Capps' lay witness Patsy Clemons; and Far Hills' map showing the site to be normally inundated with water in a continuous swath from the western boundary to the eastern boundary. Far Hills' Response: To argue that wetlands hydrology exists because a photograph shows signs of inundation is patently ridiculous because photos can be taken at or around the time of a heavy rainfall and whether or not any particular area has recently been inundated does not prove that wetlands hydrology exists. Indeed, Mr. Laskowski testified that the inundation shown on his photographs was due to runoff from a construction site across Cude Cemetery Road and because it had rained for three days prior to Mr. Laskowski's site visit.⁹⁴ Moreover to cite the map in Exhibit A-7 (Bates Stamp A00937) as proving the existence of a continuous swath of water covering the study area is a completely unfair misrepresentation of the record because Mr. Laskowski made clear in his testimony that that particular map was only intended to show general location of the site and not to show where wetlands or a water body existed.⁹⁵ That map itself shows that it is a

⁸⁹ Hearing Transcript, pg. 182 (line 15) through pg. 185 (line 7); pg. 204 (line 22) through pg. 206 (line 20).

⁹⁰ Hearing Transcript, pg. 183 (lines 18 – 20).

⁹¹ Hearing Transcript, pg. 275 (line 24) through pg. 277 (line 25); pg. 238 (line 17) through pg. 239 (line 1); pg. 264 (line 18) through pg. 265 (line 2); pg. 285 (lines 17-25).

⁹² Hearing Transcript, pg. 178 (lines 3-9).

⁹³ Hearing Transcript, pg. 202 (line 23) through pg. 204 (line 15); pg. 177 (lines 2-23).

⁹⁴ Hearing Transcript, pg. 182 (line 15) through pg. 185 (line 2).

⁹⁵ Hearing Transcript, pg. 201 (line 22) through pg. 202 (line 22).

Montgomery County “key map”, not a geophysical map designed to show the specific boundaries of water bodies for wetlands delineation purposes. A FEMA floodplain map is the best evidence of whether a site is subject to general inundation and the evidence is clear in this case that none of the study area lies within the FEMA-mapped 100-year floodplain.⁹⁶ Accordingly, there is no evidentiary basis for the statement in the ALJ’s proposed Finding of Fact No. 19 that “the area is frequently flooded.”

- Capps’ Argument: Wetlands soils exists throughout the area Dr. Jacob determined to be wetlands as indicated by the fact that wetland soils were documented at Dr. Jacob’s Observation Points 2 and 3. Far Hills’ Response: Again, the fact that wetlands soils exist at Observation Points 2 and 3, which are not actually within the area where Far Hills proposes to locate its wastewater treatment units, is not a compelling argument.

The above recitation of Far Hills’ responses to Capps’ arguments show that the evidence does not support the ALJ’s Proposed Findings of Fact No. 18, including all subparts of that proposed Finding of Fact.

III. EXCEPTIONS ON ALLOCATION OF TRANSCRIPT COSTS

Far Hills excepts to the ALJ’s Proposed Finding of Fact No. 20 as well as the ALJ’s Analysis on the allocation of transcript costs issue and respectfully requests that the Commission adopt Far Hills’ proposed Findings of Fact Nos. 130 and 131 and Conclusion of Law No. 12 as previously submitted to the ALJ, and as set forth in Exhibit 1 hereto.

Far Hills made an in-hearing motion under 30 TAC §80.23 that the costs of the hearing transcript be divided equally between Far Hills and all other protesting (non-statutory) parties, and the ALJ stated that assessment of transcript costs should be addressed in closing arguments.⁹⁷ In accordance with the factors set forth in 30 TAC §80.23(d), Far Hills believes that the protesting parties should equally split the costs of the hearing transcript with Far Hills. The protesting parties participated in the case to a roughly equal extent as the applicant. Protestants had 5 witness in their direct cases compared to seven witness in the applicant’s direct case. Capps’ counsel engaged in cross-examination roughly to the same extent as the applicant. All

⁹⁶ Hearing Transcript, pg. 256 (lines 6 – 12).

⁹⁷ Hearing Transcript, pg. 590 (line 14) through pg. 591 (line 1).

parties equally benefit from having a transcript. Accordingly, it would be fair and appropriate to assess transcript costs 50% to the applicant and 50% jointly to Capps and the Sandalls.

**IV. EXCEPTIONS TO ALJ'S FAILURE TO MAKE RECOMMENDATIONS
ON ALL OF FAR HILLS' PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

Far Hills excepts to the ALJ's failure to make recommended rulings on all proposed findings of fact submitted by Far Hills and the other parties. TCEQ rules are clear that if any party has filed proposed findings of fact upon the judge's request, the judge shall include with the proposal for decision recommended rulings on all findings of fact so proposed.⁹⁸

Although the ALJ has not evaluated the evidence on the various other issues briefed by the parties in this case nor made recommendations on all of Far Hills' proposed findings of fact, the Commission should be familiar with the record and the briefings of all parties and therefore is authorized to make a final decision on all contested issues and to issue Findings of Fact and Conclusions of Law on all relevant statutory and rule criteria for issuance of the TPDES permit sought by Far Hills. Based on these Exceptions filed by Far Hills, and based on Far Hills' post-hearing briefing on all contested issues, there is more-than-adequate evidence of record to support a TCEQ order adopting the Findings of Fact and Conclusions of Law attached hereto as Exhibit 1 and issuing Permit No. 14555-001 to Far Hills.

V. CONCLUSION AND PRAYER

For the reasons set forth in these Exceptions and in Far Hills' post-hearing briefing, Far Hills Utility District prays that these Exceptions be granted; that the Exceptions and proposed findings of fact and conclusions of law filed by the other parties be denied; that the Findings of

⁹⁸ 30 TAC §80.252(c).

Fact and Conclusions of Law attached as Exhibit 1 be adopted by the Commission; and that
Permit No. 14555-001 be issued.

Respectfully submitted,

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**ATTORNEYS FOR FAR HILLS UTILITY
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CERTIFICATE OF SERVICE

This is to certify that on this the 18th day of December, 2006, a true and correct copy of the foregoing document was forwarded to the following persons in accordance with TCEQ and SOAH rules by the means indicated:

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EXHIBIT 1

**SOAH DOCKET NO. 582-06-0568
TCEQ DOCKET NO. 2005-1899-MWD**

IN THE MATTER OF	§	
THE APPLICATION OF	§	BEFORE THE
FAR HILLS UTILITY DISTRICT	§	STATE OFFICE OF
FOR TPDES PERMIT NO. 14555-001	§	ADMINISTRATIVE HEARINGS

**FAR HILLS UTILITY DISTRICT'S
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE ("ALJ"):

COMES NOW Far Hills Utility District ("FHUD" or "Applicant") and pursuant to the ALJ'S request, files these proposed Findings of Fact and Conclusions of Law.

I. WHETHER APPLICANT DEMONSTRATED THAT ALL APPLICABLE STATE WATER QUALITY STANDARDS WILL BE MET

Findings of Fact:

1. The state water quality standards for Lake Conroe, located in Segment 1012 of the San Jacinto River Basin, are set forth at 30 Tex. Admin. Code ("TAC") Chapter 307 and include general criteria (§307.4), toxicity standards (§307.6), site-specific uses and criteria (§307.7) and site-specific standards for classified segments (§307.10).
2. The staff of the Texas Commission on Environmental Quality ("TCEQ") conducted an administrative and technical review of FHUD's application in accordance with their normal procedures¹ and concluded that, under the application and the Executive Director's ("E.D.") draft permit, the proposed wastewater discharge would meet all applicable state water quality standards.²

¹ Exhibit A-3 (Oral Deposition of Lori Hamilton), page 10 (lines 3-6) (Bates Stamp A00439).

² Exhibit A-3 (Oral Deposition of Lori Hamilton), page 27 (line 24) through page 28 (line 4) (Bates Stamp A00456-A00457); Exhibit A-1-17 (E.D.'s Preliminary Response to Public Comments), pages 10 and 13 (Bates Stamp A00285 and A00288).

3. The Commission staff does not anticipate that constituents in the discharge will have an adverse effect on the receiving water or its designated uses.³
4. If operated in compliance with the draft permit, the discharge will comply with all applicable federal effluent guidelines and standards and domestic wastewater effluent limitations.⁴
5. Since the proposed wastewater discharge will consist only of normal domestic wastewater and not any industrial wastewater contributions, the proposed discharge will also meet all toxic pollutant discharge criteria⁵ and no whole effluent toxicity testing of the effluent is required under TCEQ rules.⁶
6. The designated uses for Segment No. 1012 are high aquatic life uses, public water supply and contact recreation.⁷
7. The draft permit's effluent limitations for conventional effluent parameters (e.g., Carbonaceous Biochemical Oxygen Demand, Ammonia Nitrogen) are based on stream standards and waste load allocations for water quality limited streams as established in the Texas Water Quality Standards and the water quality management plan.⁸
8. The effluent limitations in the draft permit will maintain and protect the existing instream uses,⁹ and numerical and narrative criteria to protect existing uses will be maintained.¹⁰

³ Exhibit A-1-17 (E.D.'s Preliminary Response to Public Comments), pages 10 and 13 (Bates Stamp A00285 and A00288).

⁴ Exhibit A-3 (Oral Deposition of Lori Hamilton), page 28 (lines 5-17) (Bates Stamp A00457).

⁵ Exhibit A-3 (Oral Deposition of Lori Hamilton), page 23 (line 11) through page 24 (line 9) (Bates Stamp A00452 – A00453).

⁶ Exhibit A-1-17 (E.D.'s Preliminary Response to Public Comments), page 13 (Bates Stamp A00288).

⁷ Exhibit A-1-10 (Statement of Basis/Technical Summary and E.D.'s Preliminary Decision), page 1 (bottom paragraph) (Bates Stamp A00224); 30 TAC §307.10, Appendix A; Exhibit A-3-2 (Lori Hamilton Memo of November 12, 2004) (Bates Stamp A00503).

⁸ Exhibit A-1-10 (Statement of Basis/Technical Summary and E.D.'s Preliminary Decision), page 2 (second paragraph) (Bates Stamp A00225).

⁹ Exhibit A-1-10 (Statement of Basis/Technical Summary and E.D.'s Preliminary Decision), page 1 (bottom paragraph) (Bates Stamp A00224).

¹⁰ Exhibit A-1-10 (Statement of Basis/Technical Summary and E.D.'s Preliminary Decision) page 2 (top paragraph) (Bates Stamp A00225).

9. The proposed discharge is not expected to have an effect on any federal endangered or threatened aquatic or aquatic-dependent species or proposed species or their critical habitat.¹¹
10. The Commission staff conducted modeling exercises and determined that the effluent limits set forth in the draft permit (10 milligram per liter (“mg/l”) 5-day carbonaceous biochemical oxygen demand (“CBOD₅”); 15 mg/l total suspended solids (“TSS”); 3 mg/l ammonia-nitrogen; 4 mg/l dissolved oxygen (“D.O.”)) will ensure that the D.O. level will be maintained above the criterion for Lake Conroe and will satisfy the requirements of the statewide lake rule.¹²
11. The effluent limits recommended by the E.D. and included in the draft permit were made more stringent than those proposed in the application in that the final effluent limits now include a 3 mg/l limit for ammonia-nitrogen.¹³ These draft permit effluent limits are now included in the EPA-approved Water Quality Management Plan for the State of Texas.¹⁴
12. Resulting bacteria and fecal coliform levels in the receiving cove will not adversely impact recreational use of the cove due to the permit requirement for disinfection of the wastewater effluent through minimum chlorination detention time and minimum/maximum chlorination residuals.¹⁵
13. Based on the size of Lake Conroe and the amount of dilution expected, it is unlikely that there will be adverse effects of potential chlorine by-products in the effluent on aquatic life in

¹¹ Exhibit A-3 (Oral Deposition of Lori Hamilton), pages 13 (line 18) through 16 (line 16) (Bates Stamp A00442-A00445); page 10 (lines 7-10) (Bates Stamp A00439); Exhibit A-3-2 (Lori Hamilton Memo of November 12, 2004) (Bates Stamp A00503).

¹² Exhibit A-2 (Oral Deposition of Karen Holligan), page 23 (lines 11-25) (Bates Stamp A00358), page 10 (lines 1-10) (Bates Stamp A00345); page 45, lines 1-9 (Bates Stamp A00380); Exhibit A-2-2 (Karen Holligan Memo of November 17, 2004) (Bates Stamp A00408).

¹³ Exhibit A-2 (Oral Deposition of Karen Holligan), page 23 (line 11) through page 25 (line 10) (Bates Stamp A00358-A00360).

¹⁴ Exhibit A-2 (Oral Deposition of Karen Holligan), page 33 (line 8) through page 34 (line 18) (Bates Stamp A00368-A00369).

¹⁵ Exhibit A-1-17 (E.D.’s Preliminary Response to Public Comments), page 10 (Bates Stamp A00285).

Lake Conroe.¹⁶ Although chlorine-resistant pathogens are an emerging national concern, outbreaks of such pathogens to date have not been seen in Texas even in receiving waters that are more effluent dominated than Lake Conroe.¹⁷

14. There is no demonstrated reason for additional water quality or benthic studies to be conducted for Lake Conroe since it is not on the 2002 nor the draft 2004 Section 303(d) list of impaired waters for any parameters.¹⁸ The water quality of Lake Conroe is being adequately monitored already by TCEQ and its Clean Rivers Program partners at 19 monitoring stations on Lake Conroe.¹⁹
15. The fact that Commission staff's water quality modeling produced a dissolved oxygen ("D.O.") outflow value of 4.8 mg/l, which is 0.2 mg/l below the state water quality D.O. standard of 5.0 mg/l for Lake Conroe, does not present an issue of concern since TCEQ water quality modeling staff routinely allows a 0.2 mg/l departure from the modeling output reading because of the substantial conservatism built into the Continuously Stirred Tank Reactor ("CSTR") model used in this case.²⁰
16. The primary element of conservatism is that the CSTR model does not assume any mixing or dilution of the effluent with the surrounding waters upon discharge of the effluent into the lake.²¹ Other elements of conservatism include the fact that the model does not assume any other runoff into the cove from the surrounding watershed,²² and the fact that Commission

¹⁶ Exhibit A-1-17 (E.D.'s Preliminary Response to Public Comments), page 11 (Bates Stamp A00286) and pages 16-17 (Bates Stamp A00291-A00292).

¹⁷ Exhibit A-1-17 (E.D.'s Preliminary Response to Public Comments), page 11 (Bates Stamp A00286).

¹⁸ Exhibit A-1-17 (E.D.'s Preliminary Response to Public Comments), page 12 (Bates Stamp A00287).

¹⁹ Exhibit A-1-17 (E.D.'s Preliminary Response to Public Comments), page 12 (Bates Stamp A00287).

²⁰ Exhibit A-2 (Oral Deposition of Karen Holligan), page 21 (lines 12-18) (Bates Stamp A00356); Hearing Transcript, page 34 (lines 10-13).

²¹ Exhibit A-2 (Oral Deposition of Karen Holligan), page 21 (line 18) through page 22 (line 5) (Bates Stamp A00356-A00357).

²² Exhibit A-2 (Oral Deposition of Karen Holligan), page 22 (lines 6-11) (Bates Stamp A00357).

staff models all discharges at full permitted flow and at their full permitted concentrations.²³

In actual practice, if a permittee is approaching full permitted flow, TCEQ rules require the permittee to initiate a permitting action to expand the permitted flow capacity, so it is unlikely that permittees will ever be able to discharge at full permitted flow for a substantial period of time.²⁴

17. It is also significant that the 4.8 mg/l of D.O. in the modeled outflow is only within the first "cell" used for the modeling exercise, and that cells further out into the Lake Conroe showed increasing concentrations of modeled D.O. (5.84 mg/l for Cell No. 2 and 6.01 mg/l for cell No. 3).²⁵

18. Based upon the modeled outflow of D.O. of 4.8 mg/l in the first cell only, there would be no violation of the state water quality standard for D.O. in Lake Conroe.²⁶

19. With respect to the safety factor of 0.2 mg/l in D.O. utilized by Commission staff as general practice, EPA has approved the use of this factor, and Commission staff formerly allowed a departure of 0.3 mg/l in D.O. as a standard practice, so the Commission staff's current practice is more conservative than the practice they formerly followed.²⁷

20. The use of the 0.2 mg/l margin of error used by Ms. Holligan in interpreting the modeled results for D.O. is a longstanding agency policy authenticated by Ms. Holligan who testified

²³ Exhibit A-2 (Oral Deposition of Karen Holligan), page 22 (lines 11-13) (Bates Stamp A00357).

²⁴ Exhibit A-2 (Oral Deposition of Karen Holligan), page 22 (lines 14-25) (Bates Stamp A00357).

²⁵ Exhibit A-2 (Oral Deposition of Karen Holligan), page 29 (line 9) through page 30 (line 11) (Bates Stamp A00364-A00365).

²⁶ Exhibit A-2 (Oral Deposition of Karen Holligan), page 31 (lines 9-12) (Bates Stamp A00366); page 36, lines 6-7 (Bates Stamp A00371).

²⁷ Hearing Transcript, page 34 (lines 16-19).

that use of the factor was general agency practice.²⁸ She also testified twice that it was “a longstanding practice” of TCEQ and that EPA has no objection to the use of this factor.²⁹

21. Use of the 0.2 mg/l margin-of-error factor does comport with the TCEQ’s Standard Operating Procedure (“SOP”) for the Evaluation of TPDES Permit Applications Using a CSTR Model³⁰ because the SOP expressly allows some latitude to exercise professional judgment.³¹
22. The cell size of 10 acres used by Commission staff in its water quality modeling was in accordance with standard TCEQ modeling protocol as set forth in the CSTR guidance standard operating procedure (“SOP”) guidance document.³²
23. Although the SOP does allow for cell sizes to be smaller than ten acres where the receiving water body geometry is a distinct constricted area such as a constricted backwater area or an area where there is a genuine restriction in flow from other parts of the lake, in this case the cove that would be receiving the wastewater effluent is not distinct from other portions of the lake.³³ Therefore, based upon the best professional judgment of the Commission staff’s experienced water quality modeler, Karen Holligan, there is no reason to utilize a cell size smaller than ten acres.
24. If Ms. Holligan’s 10-acre cell were divided up into two smaller parts as CCC’s witness Bruce Wiland did, a much larger conservative factor is introduced into the model which is

²⁸ Hearing Transcript, page 36 (lines 6-7).

²⁹ Hearing Transcript, page 34 (lines 16-19); Exhibit A-2 (Oral Deposition of Karen Holligan), page 22 (lines 3-5) (Bates Stamp A00357).

³⁰ Exhibit A-2, Appendix 4 (Bates Stamp A00415 – A00427).

³¹ Exhibit A-2, Appendix 4 (Bates Stamp A00415).

³² Exhibit A-2 (Oral Deposition of Karen Holligan), page 11 (lines 1-25) (Bates Stamp A00346); Exhibit A-2-4 (Bates Stamp A00415-A00427).

³³ Exhibit A-2 (Oral Deposition of Karen Holligan), page 29 (lines 12-15) (Bates Stamp A00364); page 58 (line 3) through page 59 (line 11) (Bates Stamp A00393-A00394); Hearing Transcript, page 33 (lines 3-14).

unwarranted.³⁴ Making a model more conservative does not necessarily make it more accurate.³⁵

25. The mere fact that Ms. Holligan's ten-acre cell is a rectangular shape, rather than a square shape as used by Mr. Wiland, does not justify use of a smaller cell size.³⁶ There is nothing in the CSTR Standard Operating Procedure that requires or even suggests that a square-shaped cell is preferable to a rectangular shaped cell as used by Ms. Holligan.³⁷
26. Under the CSTR Standard Operating Procedure, it is more important that the cell be configured to the particular geometry of the receiving water than that it be a square-shaped cell.³⁸ In this case, there was no reason for Ms. Holligan to use a smaller cell size and doing so would have been inconsistent with how she reviews other wastewater discharge permits.³⁹
27. Although the use of transects across topographic contour lines can provide a more precise measure of cove depths than Commission staff's use of an average of maximum and minimum cell depths of the receiving cove,⁴⁰ such method does not necessarily render more accurate depths because the accuracy of elevation lines on topographic maps comes into question as years go by and lakes tend to silt in over time.⁴¹
28. The depth of the receiving water body is one of only numerous model inputs that go into determining D.O. In addition to cell size, the other model inputs include water temperature, effluent flow rates, and background concentrations of biochemical oxygen demand, ammonia

³⁴ Hearing Transcript, page 31 (lines 9-22).

³⁵ Hearing Transcript, page 32 (lines 21-25); page 50 (lines 10-15).

³⁶ Hearing Transcript, page 49 (lines 12-17); page 49 (line 24) through page 50 (line 4).

³⁷ Hearing Transcript, page 62 (lines 9-14); page 66 (lines 17-18).

³⁸ Hearing Transcript, page 62 (line 19) through page 63 (line 1).

³⁹ Hearing Transcript, page 66 (lines 10-12).

⁴⁰ Hearing Transcript, page 50 (line 16) through page 51 (line 8); page 395 (lines 2 – 17).

⁴¹ Hearing Transcript, page 52 (lines 16-19); page 583 (line 19) through page 584 (line 9).

and D.O.⁴² The possibility that the transect method of determining cove depth may be more accurate for this one input did not deter Ms. Holligan from re-affirming her opinion formed during permit review that the modeled D.O. result was accurate and met the state water quality standard.⁴³

29. A greater water depth does not in and of itself dictate whether modeled D.O. output will be higher or lower due to the numerous other factors that must be considered in determining the modeled D.O.⁴⁴

30. Commission staff's modeling utilized a default temperature value of 30.5 degrees Celsius which is the summertime 90th percentile temperature for the state of Texas as indicated in the CSTR Standard Operating Procedure.⁴⁵ Although site specific temperature data could help in making more accurate predictions of D.O. levels, there is no site-specific data on temperatures available for the receiving cove involved in this case.⁴⁶

31. The only data available on summertime near-surface water temperatures in Lake Conroe (taken from sampling stations about two to three miles from the proposed discharge point in this case)⁴⁷ indicate that such temperatures are slightly lower than the 30.5 degrees Celsius used as a model input by the TCEQ staff.⁴⁸

⁴² Exhibit A-2 (Oral Deposition of Karen Holligan), page 13 (line 5) through page 14 (line 20) (Bates Stamp A00348-A00349).

⁴³ Exhibit A-2 (Oral Deposition of Karen Holligan), page 45 (lines 7-9) (Bates Stamp A00380); Hearing Transcript, page 65 (lines 2-8).

⁴⁴ Hearing Transcript, page 398 (line 3) through page 399 (line 1).

⁴⁵ Exhibit A-2 (Oral Deposition of Karen Holligan), page 13 (lines 21-23) (Bates Stamp A00348); page 56 (lines 3-8) (Bates Stamp A00391).

⁴⁶ Hearing Transcript, page 63 (line 14) through page 64 (line 2); Hearing Transcript, page 384 (lines 9-12).

⁴⁷ Hearing Transcript, page 585 (lines 18 -21).

⁴⁸ Hearing Transcript, page 578 (line 20) through page 579 (line 2).

32. The CSTR model is a steady state model and is not designed to consider dynamic variations in effluent discharge rates; this is something that could only be done with a more detailed model, but that is very seldom done.⁴⁹
33. Standard TCEQ modeling practice calls for using normal pool elevation because that is the boundary of the water body segment as stated in the Texas Water Quality Standards.⁵⁰ It is not known how the modeling of a lower pool elevation would impact the predicted D.O. level because of other variables that would have to be considered. In another permitting case where Commission staff did re-model using lower pool elevations, the predicted D.O. level was actually higher.⁵¹
34. The CSTR model is only a general tool for assisting Commission staff in exercising their best professional judgment about the adequacy of the permitted effluent limits.⁵² The CSTR model does not take into account the significant impacts on D.O. of photosynthesis which can cause wide variations in D.O. readings over the course of a day.⁵³ This is especially true for a eutrophic body of water like Lake Conroe which is characterized by greater amounts of algae as a result of runoff of nutrients to the lake over the years.⁵⁴
35. Notwithstanding that the 2002 Texas Water Quality Inventory shows a D.O. use concern for the area of Lake Conroe from Walden Estates to the dam, TCEQ is not prohibited by federal law from issuing the FHUD permit since there is no evidence that the proposed discharge would cause or contribute to a violation of water quality standards.

⁴⁹ Hearing Transcript, page 382 (lines 1-17); Exhibit A-2 (Oral Deposition of Karen Holligan), page 55 (lines 5-13) (Bates Stamp A00390).

⁵⁰ Exhibit A-2 (Oral Deposition of Karen Holligan), page 60 (line 5) through page 61 (line 2) (Bates Stamp A00395-A00396).

⁵¹ Exhibit A-2 (Oral Deposition of Karen Holligan), page 61 (line 3) through page 62 (line 12) (Bates Stamp A00396-A00397).

⁵² Hearing Transcript, page 386 (lines 11-14); Exhibit A-2-4, page 1 (Bates Stamp A00415).

⁵³ Hearing Transcript, page 388 (line 20) through page 390 (line 4); page 570 (line 6) through page 572 (line 15).

⁵⁴ Hearing Transcript, page 572 (line 16) through page 573 (line 18).

36. Even if the San Jacinto River below Lake Conroe is impaired for bacteria in the 2004 "Section 303(d)" list, there is no evidence in this case showing that bacteria in FHUD's treated wastewater effluent, which is discharged well above the Lake Conroe dam, would contribute toward a water quality problem in the San Jacinto River segment below the dam.

Conclusions of Law:

1. The effluent limits established by the E.D. in the draft permit are sufficient.⁵⁵
2. The proposed discharge of treated effluent will meet all applicable state water quality standards.

II. WHETHER APPLICANT DEMONSTRATED COMPLIANCE WITH ALL APPLICABLE ANTI-DEGRADATION REQUIREMENTS

Findings of Fact (cont.)

37. The state anti-degradation requirements are set forth at 30 TAC §307.5 and the TCEQ guidance document concerning implementation of the Texas Surface Water Quality Standards.⁵⁶ Under those procedures, Commission staff performs a Tier 1, Tier 2 and/or Tier 3 antidegradation review and ensures that wastewater discharges will not lower water quality to the extent that the Texas Surface Water Quality Standards are not attained.⁵⁷
38. In accordance with §307.5 and the Texas Surface Water Quality Implementation procedures, Commission staff performed a Tier 1 anti-degradation review and determined that existing water quality uses will not be impaired by the proposed permitting action and that numerical and narrative criteria to protect existing uses will be maintained.⁵⁸

⁵⁵ Hearing Transcript, page 65 (lines 2-8).

⁵⁶ Exhibit A-3-3 (Procedures to Implement the Texas Surface Water Quality Standards), page 23 (Bates Stamp A00535).

⁵⁷ 30 TAC §307.5(b)

⁵⁸ Exhibit A-3-2 (Lori Hamilton Memo of November 12, 2004) (Bates Stamp A00503).

39. The Commission staff's Tier 2 review determined that no significant degradation of water quality is expected in Lake Conroe which has been identified as having high aquatic life uses, and that existing uses will be maintained and protected.⁵⁹
40. Although the Commission staff's Tier 1 and 2 determinations were preliminary, there was no other evidence at the hearing that would negate these determinations. The predicted lowering of D.O. as determined by Mr. Wiland is not persuasive evidence of a violation of TCEQ's anti-degradation policy because the methodology he employed to obtain his lowered D.O. outflow is not as credible as the methodology employed by Commission staff in modeling D.O. outflow for the reasons stated in the Findings of Fact on the first contested issue.
41. The TCEQ water quality standards implementation procedures provide some examples as guidance to help Commission staff in determining whether there will be degradation. An example of where degradation is unlikely to occur is where D.O. in the "sag zone" is lowered by less than 0.5 mg/l from baseline instream concentrations, if the potentially affected aquatic organisms are not unusually sensitive to changes in dissolved oxygen.⁶⁰ But in this case there is no evidence of the existence of a sag zone or what the sag zone might be. Even if the first cell used by Commission staff in its modeling is assumed to be a sag zone, there is no evidence in this case that potentially affected aquatic organisms are unusually sensitive to changes in D.O. Rather, the evidence shows that aquatic life in Lake Conroe will not be impacted by the change in D.O. resulting from the proposed discharge.⁶¹
42. An example of where degradation is likely to occur is where D.O. is projected to decrease by more than 0.5 mg/l for a substantial distance in a water body that has exceptional quality

⁵⁹ Exhibit A-3-2 (Lori Hamilton Memo of November 12, 2004) (Bates Stamp A00503).

⁶⁰ Exhibit A-3-3 (Procedures to Implement the Texas Surface Water Quality Standards), page 33 (Bates Stamp A00545).

⁶¹ Hearing Transcript, page 77 (lines 19-22); page 78 (lines 1-17).

aquatic life and a relatively unique and potentially sensitive community of aquatic organisms.⁶² However in this case, there is no evidence that D.O. will be decreased for a “substantial distance”, nor does Lake Conroe have exceptional quality aquatic life or a relatively unique and potentially sensitive community of aquatic organisms.⁶³

43. The TCEQ’s implementation procedures provide that proposed increases in loading are initially merely screened to determine whether sufficient potential for degradation exists to require further analysis; this initial screening procedure does not define degradation.⁶⁴ It is only intended as general guidance to indicate when an increase in loading is small enough to preclude the need for additional evaluation.⁶⁵

44. The determination of what constitutes a de minimis decrease in D.O. depends on the use of best professional judgment in light of site specific conditions such as the type, size, location of the discharge and site specific water quality data.⁶⁶

45. In this case there was no need to conduct further evaluation following Commission staff’s initial antidegradation screening review. Rather, Commission staff repeatedly testified on cross-examination that there would be no degradation of water quality from the proposed discharge.⁶⁷

⁶² Exhibit A-3-3 (Procedures to Implement the Texas Surface Water Quality Standards), page 34 (Bates Stamp A00546).

⁶³ Hearing Transcript, page 92 (lines 18-24); page 393 (line 22) through page 394 (line 10).

⁶⁴ Exhibit A-3-3 (Procedures to Implement the Texas Surface Water Quality Standards), page 31 (Bates Stamp A00543).

⁶⁵ Exhibit A-3-3 (Procedures to Implement the Texas Surface Water Quality Standards), page 31 (Bates Stamp A00543).

⁶⁶ Hearing Transcript, page 72 (line 21) through page 73 (line 3); page 74 (lines 18-23); page 95 (line 6) through page 96 (line 3).

⁶⁷ Hearing Transcript, page 73 (lines 7-10); page 74 (lines 10-17); page 75 (lines 9-12); page 75 (line 24 through page 76 (line 3).

Conclusions of Law (cont.)

3. The proposed discharge of treated effluent will comply with all applicable TCEQ anti-degradation requirements.

III. WHETHER APPLICANT DEMONSTRATED COMPLIANCE WITH ALL APPLICABLE ODOR CONTROL REQUIREMENTS

Findings of Fact (cont.)

46. The TCEQ's odor control requirements are set forth at 30 TAC §309.13(e) which prescribes three methods to control odor nuisances at wastewater plants. In this case, the applicant has elected to establish a 150-foot buffer zone between wastewater treatment plant units and the nearest property line.⁶⁸ To establish the buffer zone, the permittee must hold legal title or have such other sufficient property interest in the buffer zone prohibiting residential structures within the part of the buffer zone not owned by the permittee.⁶⁹
47. Under the draft permit, FHUD is required to submit evidence of such ownership interest or legal restrictions in the buffer zone land prior to construction of the wastewater treatment facilities and FHUD may meet the buffer zone requirement by using the right-of-way of Cude Cemetery Road and Virginia Street.⁷⁰
48. FHUD has condemned by eminent domain proceeding a fee simple interest in 3.287 acres comprising the needed buffer zone area to the west and north of the proposed plant site, so FHUD has met the buffer zone requirement of §309.13(e)(3) to abate and control potential

⁶⁸ Exhibit A-5 (Prefiled Testimony of Tim Hardin), page 16 (Bates Stamp A00625).

⁶⁹ 30 TAC §307.13(e)(3); Exhibit A-1-17 (E.D.'s Preliminary Response to Public Comments), page 14 (Bates Stamp A00289).

⁷⁰ Exhibit A-1-18 (Draft Permit), page 23 (Bates Stamp A00330); Exhibit A-1-17 (E.D.'s Preliminary Response to Public Comments), page 14 (Bates Stamp A00289).

nuisance odors.⁷¹ The area comprising the buffer zone is shown on Attachment 4 to the Domestic Administrative Report 1.1 in the application.⁷²

49. The proposed FHUD wastewater plant will be a state-of-the-art design operated by licensed, experienced, and reputable plant operations company and modern plants of this type do not produce nuisance odors if they are operated in a competent manner.⁷³
50. Minimizing the generation of odors from a treatment plant depends on the design of the plant and its operation and maintenance.⁷⁴ Maintaining an adequate D.O. concentration in the early stages of treatment helps to minimize sulfide generation and reduce odors and aeration basins and aerobic digesters are the primary means of odor control at treatment plants of any size as oxygen turns the sulfide compounds into odorless sulfates.⁷⁵ Designing a plant to facilitate cleaning as well as the frequent removal of sludge and the cleaning of components are also important factors in odor control.⁷⁶
51. In this case, the draft permit contains operational requirements to ensure the facility is properly operated and maintained and further requires that the wastewater discharge contain a minimum of 4.0 mg/l of D.O. so that the treated effluent will be constantly and adequately oxygenated once it is discharged.⁷⁷
52. Odors will not be generated during times of sludge pumping because sludge transfer would be done using a vacuum connection.⁷⁸

⁷¹ Exhibit A-5 (Prefiled Testimony of Tim Hardin), page 16 (Bates Stamp A00625).

⁷² Exhibit A-5-TBH-4 (Application of FHUD for TPDES Permit) (Bates Stamp A00743).

⁷³ Exhibit A-5 (Prefiled Testimony of Tim Hardin), page 16 (Bates Stamp A00625); Exhibit A-4 (Prefiled Testimony of Jim Haymon), page 12 (Bates Stamp A00563).

⁷⁴ Exhibit A-1-17 (E.D.'s Preliminary Response to Public Comments), page 19 (Bates Stamp A00294).

⁷⁵ Exhibit A-1-17 (E.D.'s Preliminary Response to Public Comments), page 19 (Bates Stamp A00294).

⁷⁶ Exhibit A-1-17 (E.D.'s Preliminary Response to Public Comments), page 19 (Bates Stamp A00294).

⁷⁷ Exhibit A-1-17 (E.D.'s Preliminary Response to Public Comments), page 19 (Bates Stamp A00294).

⁷⁸ Hearing Transcript, pages 495 (lines 2-20).

53. Covering wastewater treatment units with odor control devices is not required by TCEQ rules, and such technology is not generally utilized in wastewater plants primarily because of the expense of such technology.⁷⁹
54. The FHUD lift station on the corner of Cude Cemetery Road and Virginia Street is an existing, already authorized lift station⁸⁰ and therefore is not the subject of this permit application. Only new proposed treatment units are the subject of this permit application, not existing units, and therefore the TCEQ's buffer zone requirements only apply to new units being sought for authorization in the pending application.
55. Because the lift station currently is situated on the one-acre site already owned by FHUD and located at the corner of Cude Cemetery Road and Virginia Street, the one-acre lift station site is not part of the wastewater treatment plant site being sought for authorization in this permit proceeding.
56. The wastewater treatment plant site for which FHUD seeks authorization in this permit proceeding is the northwest quadrant of the square-shaped area on the corner of Cude Cemetery Road and Virginia Street as shown on Exhibit TBH-5.⁸¹ Treatment units will exist only in that northwest quadrant as shown on the exhibit and therefore only that area is the focus of the 150-foot buffer zone rule requirement.
57. Because the existing lift station is "off-site" of the proposed wastewater treatment plant, it is not considered a treatment unit subject to the TCEQ's buffer zone requirements.⁸²

⁷⁹ Hearing Transcript, page 459 (lines 9-15); page 459 (line 25) through page 460 (line 6).

⁸⁰ Bates Stamp A00836 shows that the lift station is "Ex. Lift Station #1" (the "Ex." meaning "existing").

⁸¹ See Exhibit A-5 (page 16) (Bates Stamp A00625) in which Mr. Hardin testified that "FHUD has condemned by eminent domain proceeding a fee simple interest in 3.287 acres comprising the needed buffer zone area to the west and north of the proposed plant site so FHUD has met the buffer zone requirement of §309.13(e)(3) so as to abate and control potential nuisance odors."

⁸² 30 TAC §309.11(9).

58. The proposed chlorine contact chambers will be located in the northwest quadrant of the square-shaped area shown on Exhibit TBH-5 and will comply with the 150-foot buffer zone requirement. Even though the chlorine contact chambers are not clearly delineated on the site plan, the draft permit expressly provides that “prior to construction of the wastewater treatment facilities” the permittee shall comply with the 150-foot buffer zone requirement as shown on the attached site plan.⁸³ That site plan shows that the 150-foot buffer zone separation distance is measured from the facilities located in the northwest quadrant of the square-shaped area at the corner of Cude Cemetery Road and Virginia Street.
59. Commission staff considers the 150-foot buffer zone distance as being measured from the facilities located in that northwest quadrant, not from the existing lift station.
60. Under the draft permit, the actual location of all treatment units, including the chlorine contact chambers, in the final design plans will be submitted to TCEQ for final approval prior to construction and no construction of any treatment units in violation of the 150-foot buffer zone rule will be allowed to be approved by TCEQ for construction. Therefore, there is no possibility that a chlorine contact chamber or any other treatment unit will be constructed in violation of the 150-foot buffer zone requirement.
61. It is specious and speculative to argue that, if Montgomery County owns the right-of-way on Cude Cemetery Road and Virginia Street, it might possibly sell that right-of-way to a developer who might build residential structures on what is now a dedicated right-of-way. Merely because Virginia Street is subject to private maintenance and not county maintenance does not mean it has not been legally dedicated for use as a right-of-way. If CCC’s argument was accepted, no right-of-way could be used to satisfy TCEQ’s buffer zone requirement because there could always be at least a theoretical possibility that in the future it could be

⁸³ Exhibit A-1-18 (Draft Permit, page 23, “Other Requirements” No. 5) (Bates Stamp A00330).

converted from use as a right-of-way to a residential use. Such an interpretation flies in the face of the plain meaning of TCEQ's rules which expressly allow rights-of-way to satisfy the buffer zone distance requirement.⁸⁴

62. The only evidence of record in this case is that Cude Cemetery Road and Virginia Street are rights-of-way that are allowed to satisfy the requirements of the TCEQ's buffer zone rule for odor control.⁸⁵

63. The requirement under Section 26.030 of the Texas Water Code for TCEQ to consider unpleasant odor qualities of effluent in issuing a wastewater permit into a water body with an established recreational standard has been met by evidence that the effluent, if properly treated in accordance with the draft permit, will meet all State water quality standards.⁸⁶ That is because one of the applicable State water quality standards requires elimination of offensive odors arising from the receiving waters or interfering with reasonable use of the water.⁸⁷

64. The draft permit requires that the wastewater discharge contain a minimum of 4.0 mg/l of D.O. so that the treated effluent will be constantly and adequately oxygenated once it is discharged.⁸⁸

65. In considering the need for odor control facilities under 30 TAC §317.4(a)(10), the 5-day biochemical oxygen demand (BOD₅) concentration of the incoming sewage meets the TCEQ's criteria of 200 mg/l for organic strength of sewage for the type of wastewater being

⁸⁴ 30 TAC §309.13(e)(3).

⁸⁵ Exhibit A-1-18 (Draft Permit, page 23, "Other Requirements" No. 5) (Bates Stamp A00330).

⁸⁶ Exhibit A-3 (Oral Deposition of Lori Hamilton), page 27 (line 24) through page 28 (line 4) (Bates Stamp A00456-A00457); Exhibit A-1-17 (E.D.'s Preliminary Response to Public Comments), pages 10 and 13 (Bates Stamp A00285 and A00288).

⁸⁷ 30 TAC §307.4(b)(1).

⁸⁸ Exhibit A-1-17 (E.D.'s Preliminary Response to Public Comments), page 19 (Bates Stamp A00294).

generated.⁸⁹ Although BOD₅ is not strictly speaking the same criterion as dissolved oxygen, it is a measure of the oxygen demanding concentration of the effluent and thus amounts to a consideration of the same water quality constituent (i.e., oxygen) as dissolved oxygen.

66. §317.4(a)(10) is part of the TCEQ's Design Criteria for Sewerage Systems and the testimony in this case was that all applicable design criteria have been met.⁹⁰ The need for odor control facilities as set forth in §317.4(a)(10) must be read consistently with the need for odor control facilities as described in §309.13(e). If the comprehensive odor control requirements of §309.13(e) are met, as they are in this case, then it would be inconsistent for TCEQ to find that odor control requirements were not met merely because the D.O. level of the incoming sewage had not been specifically considered.

Conclusions of Law (cont.)

4. FHUD has fully demonstrated that all applicable odor control requirements will be met.

**IV. WHETHER THE APPLICANT DEMONSTRATED THAT THE FACILITY
WILL NOT CREATE NUISANCE CONDITIONS**

Findings of Fact (cont.)

67. The Commission's permit review staff testified that if the facility is operated in accordance with the draft permit, there would not be any nuisance conditions from the proposed wastewater plant.⁹¹

68. With respect to nuisance conditions potentially caused by the excessive buildup of nutrients resulting in algae blooms in the receiving cove, TCEQ staff has included a special provision in the draft permit that establishes a minimum depth of 9 feet below normal operating pool

⁸⁹ Exhibit A-5-TBH-4 (Bates Stamp A00761).

⁹⁰ Exhibit A-1 (Oral Deposition of June Ella Martinez), page 21 (lines 1-5) (Bates Stamp A00023); page 46 (lines 16-20) (Bates Stamp A00048).

⁹¹ Exhibit A-1 (Oral Deposition of June Ella Martinez), page 47 (lines 16-21) (Bates Stamp A00049).

elevation for the top of the discharge pipe.⁹² This special permit provision was added to the draft permit specifically to obtain adequate mixing and dilution and to preclude nuisance conditions at the discharge point.⁹³ That special permit provision is set forth as “Other Requirements” provision No. 8 on page 24 of the draft permit.⁹⁴

69. The receiving cove is not a constricted receiving water body⁹⁵ and there will be sufficient mixture with the main body of Lake Conroe.⁹⁶ The only evidence which CCC presented to show that the receiving cove is stagnant is the visual observation of Mr. Knowles of trash debris on the surface of the cove near Virginia Street but this is inadequate evidence on which to draw a conclusion concerning the stagnating qualities of the cove.⁹⁷ Therefore it is not credible to argue that nuisance conditions in the receiving cove might occur because the cove is a restricted area where waters tend to stagnate.

70. There is no testimony or evidence showing that the nutrient contributions from the proposed facility will result in algae blooms, or that any algae blooms created in the cove will be of such size or persistence as to constitute a nuisance.

71. The testimony of Commission staff was that the proposed facility would comply with all Texas Surface Water Quality Standards,⁹⁸ one of which is the narrative criterion prohibiting excessive growth of aquatic vegetation (e.g., algae) from nutrients.⁹⁹

⁹² Exhibit A-1-17 (E.D.’s Preliminary Response to Public Comments), page 28 (Bates Stamp A00303).

⁹³ Exhibit A-1 (Oral Deposition of June Ella Martinez), page 35 (line 19) through page 37 (line 25) (Bates Stamp A00037-A00039).

⁹⁴ A-1-18 (Draft Permit), page 24 (Bates Stamp A00331).

⁹⁵ Exhibit A-2 (Oral Deposition of Karen Holligan), page 58 (line 3) through page 59 (line 11) Bates Stamp A00393-A00394); Hearing Transcript, page 33 (lines 3-14).

⁹⁶ Hearing Transcript, page 580 (lines 11-23).

⁹⁷ Hearing Transcript, page 579 (line 3) through page 580 (line 10).

⁹⁸ Exhibit A-3 (Oral Deposition of Lori Hamilton), page 27 (line 24) through page 28 (line 4) (Bates Stamp A00456-A00457); Exhibit A-1-17 (E.D.’s Preliminary Response to Public Comments), pages 10 and 13 (Bates Stamp A00285 and A00288).

⁹⁹ 30 TAC §307.4(e).

72. The proposed FHUD wastewater plant will be a state-of-the-art design operated by licensed, experienced, and reputable plant operations company and modern plants of this type do not produce nuisance odors if they are operated in a competent manner.¹⁰⁰

73. The Commission permit writer testified that based on her overall review of the application and the draft permit, if the facility is operated in accordance with the draft permit, she would not expect that there would be any nuisance conditions from the proposed wastewater plant.¹⁰¹

Conclusions of Law (cont.)

5. No nuisance conditions will result from the proposed facility.

V. WHETHER APPLICANT DEMONSTRATED COMPLIANCE WITH ALL APPLICABLE LOCATION STANDARDS WITH REGARD TO WETLANDS

Findings of Fact (cont.)

74. The TCEQ's location standards provide that a wastewater treatment plant unit may not be located in a wetlands.¹⁰² If a treatment unit were proposed to be located in a wetlands, the applicant would need to obtain a permit from the U.S. Army Corps of Engineers ("USACE") to authorize construction of the treatment unit in the wetland.¹⁰³

75. The United States Army Corps of Engineers (USACE) regulates certain activities occurring in waters of the United States, including wetlands, under Section 404 of the Clean Water Act and Section 10 of the River and Harbors Act of 1899. A USACE permit is required for the discharge of dredged or fill material into waters of the U.S., including wetlands.¹⁰⁴

¹⁰⁰ Exhibit A-5 (Prefiled Testimony of Tim Hardin), page 16 (Bates Stamp A00625); Exhibit A-4 (Prefiled Testimony of Jim Haymon), page 12 (Bates Stamp A00563).

¹⁰¹ Exhibit A-1 (Oral Deposition of June Ella Martinez), page 47 (lines 16-21) (Bates Stamp A00049).

¹⁰² 30 TAC §309.13(b).

¹⁰³ Exhibit A-1 (Oral Deposition of June Ella Martinez), page 43 (line 24) through page 44 (line 9) (Bates Stamp A00045-A00046); Hearing Transcript, page 93 (lines 1-11).

¹⁰⁴ Exhibit A-1-17 (E.D.'s Preliminary Response to Public Comments), page 22 (Bates Stamp A00297).

76. The proposed FHUD wastewater facility is located within the USACE Galveston District and the applicable standard for determining which wetlands are subject to the TCEQ's location standards in this case are those used for making USACE jurisdictional determinations as administered by the USACE Galveston District office.¹⁰⁵
77. In April 2006, Nicholas Laskowski, a Certified Wetlands Delineator, performed a jurisdictional wetlands determination in accordance with USACE standards and determined that, of the 4.287-acre tract on the northwest corner of Cude Cemetery Road and Virginia Street, only 0.0045 acres would be classified as adjacent headwater wetlands and 0.0082 acres would be classified as headwaters.¹⁰⁶
78. Neither of these two small acreage areas are located on or even near where FHUD proposes to construct its wastewater treatment units.¹⁰⁷ This conclusion is consistent with two other wetlands studies of the subject tract: (1) a wetlands due diligence study performed by Mr. Laskowski and his firm, Berg-Oliver Associates, Inc. ("Berg-Oliver") in September 2005;¹⁰⁸ and (2) a January 11, 2005 finding by the Galveston District USACE in response to a request for jurisdictional determination submitted by Jonell Nixon for CCC.¹⁰⁹
79. The April 2006 Berg-Oliver jurisdictional wetlands delineation¹¹⁰ was submitted for official verification by the Galveston District of the USACE by letter dated May 3, 2006¹¹¹ and

¹⁰⁵ Exhibit A-1-17 (E.D.'s Preliminary Response to Public Comments), page 22 (Bates Stamp A00297).

¹⁰⁶ Exhibit A-7-NL-5 (Bates Stamp A00924) and Appendix F thereto (Wetland Delineation Map) (Bates Stamp A00972).

¹⁰⁷ Exhibit A-7-NL-5 (Bates Stamp A00924); compare Appendix F (Wetland Delineation Map) (Bates Stamp A00972) with Exhibit A-5-TBH-5 (Revised Site Diagram) (Bates Stamp A00836).

¹⁰⁸ Exhibit A-6-NL-2 (Bates Stamp A00894 – A00898).

¹⁰⁹ Exhibits A-6-NL-3 and A-6-NL-4 (Bates Stamp A00900 – A00921).

¹¹⁰ Exhibit A-7-NL-5 (Bates Stamp A00925 – A00973).

¹¹¹ Exhibit A-7-NL-6 (Bates Stamp A00975); Hearing Transcript, page 160 (lines 4-11).

USACE staff member Jason Hudson visited the site with Mr. Laskowski on June 1, 2006 as part of USACE's on-site investigation work for the USACE verification.¹¹²

80. CCC's wetlands expert John Jacob concluded that that a large portion of the tract of land on the northwest corner of Cude Cemetery Road and Virginia Street constituted wetlands,¹¹³ but his wetlands delineation report exhibits a number of deficiencies and errors all tending to cast doubt on the reliability of his delineation of the wetlands. The following is a list of these deficiencies and errors:

81. Mr. Jacob did not define a specific study area or determine its acreage. The "study area" which Mr. Jacob investigated is shown as a square configuration on figure 1 of his report (Exhibit P-2B) but as a rectangular configuration on Figure 2. The defining of a specific tract and its exact acreage for a wetlands delineation study is required by the USACE's 1987 Wetlands Delineation Manual.¹¹⁴ When asked about this discrepancy, Mr. Jacob admitted that he was "*not particularly concerned about that because ... I didn't really, to tell you the truth, have a precise study area boundary when I went out there.*"¹¹⁵ Since he was not asked to define a study area, he also failed to determine the acreage of the study area.¹¹⁶

82. Mr. Jacob did not determine wetland acreages. The defining of specific acreage constituting wetlands through surveying or use of GPS instruments is a requirement of USACE's 1987 Wetlands Delineation Manual.¹¹⁷ However, Mr. Jacob did not even attempt to determine the acreage constituting the area he believed were wetlands because that was not within the scope of what he was asked to do.¹¹⁸ In contrast to Mr. Jacob's work which involved no surveying of acreages, Mr. Laskowski did determine exact acreages through the use of 154 surveyed pin flags.¹¹⁹

83. Mr. Jacob's delineation of his wetland boundary was based only on hydrologic conditions, not documented observations of hydric soils or hydrophytic vegetation. Although Mr. Jacob failed to determine wetland acreage because the sole focus of his study was to delineate a wetlands boundary line,¹²⁰ even the determination of his

¹¹² Hearing Transcript, page 161, (lines 4-14); page 199 (lines 8-12); page 208 (line 25) through page 211 (line 9).

¹¹³ Exhibit P-2D.

¹¹⁴ Exhibit P-2C, page 40; Hearing Transcript, page 544 (line 25) through page 545 (line 4).

¹¹⁵ Hearing Transcript, page 253 (lines 1-4).

¹¹⁶ Hearing Transcript, page 254 (lines 5-12).

¹¹⁷ Hearing Transcript, page 211 (line 24) through page 213 (line 7).

¹¹⁸ Hearing Transcript, page 254 (line 20) through page 255 (line 12); page 255 (line 23) through page 256 (line 5).

¹¹⁹ Hearing Transcript, page 215 (line 19) through page 216 (line 18).

¹²⁰ Hearing Transcript, page 254 (lines 10-12); page 255 (lines 6-8).

wetlands boundary failed to comply with the fundamental USACE principle that wetlands must meet the three criteria of (1) hydrologic conditions; (2) hydric soils; and (3) hydrophytic vegetation.¹²¹ In response to questions concerning how he drew his wetland boundary in Figure 3 of Exhibit P-2B, Mr. Jacob stated that he evaluated “the lay of the land” and showed how the tree line matched up closely with his wetland boundary.¹²² In speaking of “lay of the land” Mr. Jacob was referring to hydrologic conditions of the land or geomorphology.¹²³ Mr. Jacob claims to have investigated for the existence of hydric soils and hydrophytic vegetation in drawing his wetlands boundary line.¹²⁴ However, in response to questions from FHUD’s attorney about how Mr. Jacob could determine the irregular boundaries of his alleged wetlands area by only taking three samples (one of which was determined not to constitute wetlands and the other two of which are not located where FHUD proposes to construct wastewater treatment units), Mr. Jacob admitted that in drawing his wetland boundary he took no soil samples nor made any documented observations of the vegetation around the area to be sampled as required by the USACE wetlands manual.¹²⁵ It appears that Mr. Jacob’s wetlands boundary line is based on little more than the tree line existing at the site (indicated by reviewing tonal patterns on aerial photography) and his walking about the property making informal, undocumented observations.¹²⁶ Although reviewing tonal patterns on aerial photography can be a valid preliminary or “desktop” method of delineating wetlands,¹²⁷ relying solely on tonal patterns to delineate wetlands is not an accurate method for an area of bottomland hardwoods such as this property because tree canopy obscures the actual wetlands on aerial photography.¹²⁸

84. Mr. Jacob failed to include documentation of hydric soils in his wetland delineation.

Mr. Jacob was admittedly careless in his failure to include information on soils for any of his three observation points such as map unit name, taxonomy, drainage class or field observations.¹²⁹ Since this information is required under the USACE prescribed wetlands data forms, Mr. Jacob’s failure to include this information is further indication of a careless attitude toward compliance with USACE requirements for performing wetland delineations. Similarly, even though the USACE wetlands manual requires soil observation pits to be dug to a depth of 16 inches,¹³⁰ Mr. Jacob admitted that his three soil observation pits were only dug to a depth of 11, 10 and 8 inches.¹³¹

¹²¹ Exhibit P-2C, page 8 and pages 12-34; Hearing Transcript, page 238 (lines 2-3).

¹²² Hearing Transcript, page 238 (line 4) through page 240 (line 1).

¹²³ Hearing Transcript, page 257 (lines 3-8); page 257 (line 25) through page 258 (line 16).

¹²⁴ Hearing Transcript, page 258 (line 20) through page 259 (line 15).

¹²⁵ Hearing Transcript, page 213 (lines 11-25); page 275 (line 17) through page 277 (line 20); page 279 (line 6) through page 280 (line 1).

¹²⁶ Hearing Transcript, page 275 (line 24) through page 277 (line 25); page 238 (line 17) through page 239 (line 1); page 264 (line 18) through page 265 (line 2); page 285 (lines 17-25).

¹²⁷ Hearing Transcript, page 178 (lines 3-9).

¹²⁸ Hearing Transcript, page 202 (line 23) through page 204 (line 15); page 177 (lines 2-23).

¹²⁹ Hearing Transcript, page 265 (lines 6-17); page 266 (lines 2-22).

¹³⁰ Exhibit P-2C, page 54; Hearing Transcript, page 214 (lines 8-14).

¹³¹ Hearing Transcript, page 268 (lines 5-10).

85. Mr. Jacobs testified that a USACE-verified wetlands delineation would be determinative of where wetlands actually existed at the subject property, and that he would defer to any such USACE-verified delineation.¹³²
86. The above deficiencies and errors on the part of Mr. Jacob indicate that his wetlands delineations was not performed in accordance with USACE requirements. When contrasted with the much more detailed study performed by Mr. Laskowski, a study which was submitted to the USACE for verification following an on-site review by USACE, it is clear that Mr. Laskowski's wetlands delineation is more credible.
87. In Mr. Laskowski's wetlands report, photographs of the eastern portion of the site showing inundation do not demonstrate that wetlands hydrology exists in the area because such inundation was due to runoff from a construction site across Cude Cemetery Road and because it had rained for three days prior to Mr. Laskowski's site visit.¹³³
88. Mr. Laskowski's location map¹³⁴ is not evidence of a continuous swath of water across the site because this map was only intended to show the general location of the site and not to show where wetlands or a water body existed.¹³⁵ The proposed wastewater plant site is not only devoid of surface water, it is not even located in the official FEMA-designated 100-year floodplain.¹³⁶
89. Even though a FHUD newsletter describes the area as "low and swampy", that statement was referring to an area well north of the plant site where a man-made pond is located.¹³⁷ Any

¹³² Hearing Transcript, page 299 (lines 1 -21).

¹³³ Hearing transcript, page 182 (line 15) through page 185 (line 2).

¹³⁴ Exhibit A-7 (Bates Stamp A00937).

¹³⁵ Hearing transcript, page 201 (line 22) through page 202 (line 22).

¹³⁶ Hearing transcript, page 256 (lines 6-12).

¹³⁷ Hearing transcript, page 106 (lines 2-9).

such characterization of the site in a FHUD newsletter does not qualify as expert testimony on whether wetlands exist or where wetlands may be located.

Conclusions of Law (cont.)

6. FHUD has demonstrated compliance with all TCEQ location standards regarding wetlands.

VI. WHETHER APPLICANT COMPLIED WITH ALL APPLICABLE REGIONALIZATION REQUIREMENTS

Findings of Fact (cont.)

90. The TCEQ's policy on regionalization of wastewater service requires that a permit applicant make inquiries of other wastewater plants located within three miles of the proposed plant to determine whether they have the capacity and willingness to provide the wastewater service to meet the needs of the applicant.¹³⁸
91. In this case, the applicant sent inquiries to the five existing wastewater providers within three miles and received back negative responses from three of the systems,¹³⁹ a qualified response from Montgomery County Utility District ("MCUD") No. 2,¹⁴⁰ and no response from MCUD No. 3.¹⁴¹
92. The response from MCUD No. 2 dated September 17, 2004 stated that it did not currently have sufficient capacity to accept FHUD's proposed wastewater volume and that MCUD No. 2 would have to properly evaluate the possibility of expanding its facility to accommodate the requested volume from FHUD.¹⁴² Although that letter states that MCUD No. 2 would consider expanding its facility to accept FHUD's request for service, a subsequent agreement of November 24, 2004 between FHUD and MCUD No. 2 for

¹³⁸ Exhibit A-1 (Oral Deposition of June Ella Martinez), page 47 (line 22) through page 48 (line 24) (Bates Stamp A00049-A00050); Exhibit A-5 (Prefiled Testimony of Tim Hardin), page 11 (Bates Stamp A00620).

¹³⁹ The three systems were MCUD No. 8, Lake Conroe Hills M.U.D., and Point Aquarius M.U.D. See Exhibit A-1-2 (Bates Stamp Nos. A00143 – A00145).

¹⁴⁰ Exhibit A-5-TBH-6 (Bates Stamp A00837); Hearing Transcript, page 8 (line 13) through page 9 (line 7).

¹⁴¹ Exhibit A-1-17 (E.D.'s Preliminary Response to Public Comments), page 8 (Bates Stamp A00282).

¹⁴² Exhibit A-5-TBH-6 (Bates Stamp A00837).

withdrawal of FHUD from the MCUD No. 2 plant expressly acknowledges that MCUD No. 2 will not voluntarily apply for authorization to expand the MCUD No. 2 plant and that MCUD No. 2 will support the FHUD permit for a new wastewater plant.¹⁴³

93. MCUD No. 2 engaged in extensive discussions with FHUD about several options for meeting FHUD's wastewater service needs, but ultimately the two parties decided to terminate FHUD's wastewater services agreement with MCUD No. 2 and allow FHUD to construct its own wastewater plant.¹⁴⁴
94. Accordingly, there are no entities within 3 miles of the proposed facility which have the ability or willingness to serve FHUD and the applicant has complied with all applicable TCEQ regionalization requirements.¹⁴⁵
95. The State of Texas has a statutory regionalization process under Sections 26.081 through 26.087 of the Texas Water Code; however, that process is a voluntary process and none of the prerequisites necessary for triggering or utilizing this regionalization process has occurred in this case.¹⁴⁶
96. The possibility of MCUD No. 2 continuing to serve FHUD has been foreclosed by MCUD No. 2's contractual agreement to allow FHUD to withdraw from the MCUD No. 2 plant and to not contest FHUD's application for a wastewater permit.¹⁴⁷ It was not the expiration of FHUD's now-terminated wastewater contract with MCUD No. 2 in 2012 that created the

¹⁴³ Exhibit A-5 (Prefiled Testimony of Tim Hardin), page 11 (Bates Stamp A00620); Exhibit A-4-JH-4 (Bates Stamp A00571 – A00587).

¹⁴⁴ Exhibit A-4 (Prefiled Testimony of Jim Haymon), pages 4 through 7 (Bates Stamp Nos. A00555 - A00558); Exhibit A-4-JH-4 (Bates Stamp Nos. A00571 – A00587). See also Exhibit A-1-17 (E.D.'s Preliminary Response to Public Comments), pages 8 - 9 (Bates Stamp A00282 and A00284).

¹⁴⁵ Exhibit A-1 (Oral Deposition of June Ella Martinez), page 47 (line 22) through page 48 (line 24) (Bates Stamp A00049-A00050).

¹⁴⁶ Exhibit A-1-17 (E.D.'s Preliminary Response to Public Comments), page 9 (Bates Stamp A00284); Exhibit A-5 (Prefiled Testimony of Tim Hardin) page 11 (Bates Stamp A00620).

¹⁴⁷ Exhibit A-4-JH-4 (Bates Stamp Nos. A00571 – A00587).

need for the proposed FHUD plant; rather, it is the mutual agreement of FHUD and MCUD No. 2 to terminate that wastewater contract that created the need for the proposed plant.

97. TCEQ's jurisdiction in a TPDES permit application does not authorize TCEQ staff to evaluate alternatives to what the applicant requested.¹⁴⁸ TCEQ evaluates applications for wastewater treatment plants based on the information provided in the application, and does not have the authority to mandate a different facility location, different discharge location, alternative means of conveyance, or different type of wastewater treatment plant.¹⁴⁹

Conclusions of Law (cont.)

7. FHUD has complied with all applicable regionalization requirements.

VII. WHETHER APPLICANT DEMONSTRATED COMPLIANCE WITH ALL APPLICABLE FACILITY DESIGN REQUIREMENTS

Findings of Fact (cont.)

98. TCEQ's Design Criteria for Sewerage Systems are set forth at 30 TAC Chapter 317. The wastewater permit application requests information to help TCEQ staff determine whether a proposed plant will meet those design criteria.¹⁵⁰
99. The proposed wastewater plant will be a standard activated sludge plant operated in complete mix mode, and the major treatment units for each phase will consist of a bar screen, aeration basin, aerobic digester, final clarifier, chlorine contact chamber, and flow sampling and measurement devices.¹⁵¹

¹⁴⁸ Exhibit A-1-17 (E.D.'s Preliminary Response to Public Comments), page 15 (Bates Stamp A00290).

¹⁴⁹ Exhibit A-1-17 (E.D.'s Preliminary Response to Public Comments), page 15 (Bates Stamp A00290).

¹⁵⁰ Exhibit A-1 (Oral Deposition of June Ella Martinez), page 19 (line 24) through page 20 (line 15) (Bates Stamp A00021-A00022).

¹⁵¹ Exhibit A-5 (Prefiled Testimony of Tim Hardin), page 9 (Bates Stamp A00618); Exhibit A-5-TBH-4 (FHUD Application) (Bates Stamp A00748 – A00757).

100. Design calculations are set forth in the application as well as the features of the plant to help ensure a proper margin of safety in the event of emergency events.¹⁵² These safety features include a standby power system, an autodialer alarm monitor and audible alarm, a lift station high level beacon, excess lift station pumping capacity, excess blower capacity, sufficient freeboard in all treatment units to allow additional time to prevent overflow conditions, and in the final phase, there will be duplicate treatment units which can operate continuously under 50% design flow conditions so as to allow its companion component to be taken out of service if needed.¹⁵³
101. In accordance with normal TCEQ procedures for reviewing wastewater discharge permit applications, Commission staff determined that the design information submitted by the applicant did meet the design criteria for wastewater plants.¹⁵⁴ Commission staff completed its technical review and signified its preliminary approval of the application by issuance of a draft permit and a Notice of Application and Preliminary Decision on January 21, 2005.¹⁵⁵
102. To ensure that final as-built design plans and specifications are in compliance with TCEQ's design criteria, a permittee is required to submit detailed final design plans and specifications to TCEQ for review and approval.¹⁵⁶ If a permittee does not submit final designs and specifications meeting TCEQ design criteria, the facilities will not be allowed to be constructed.¹⁵⁷

¹⁵² Exhibit A-5-TBH-4 (FHUD Application) (Bates Stamp A00774 – A00782).

¹⁵³ Exhibit A-5-TBH-4 (FHUD Application) (Bates Stamp A00776 – A00777).

¹⁵⁴ Exhibit A-1 (Oral Deposition of June Ella Martinez), page 21 (lines 1-5) (Bates Stamp A00023); page 46 (lines 16-20) (Bates Stamp A00048).

¹⁵⁵ Exhibit A-5 (Prefiled Testimony of Tim Hardin), page 14 (Bates Stamp A00623).

¹⁵⁶ Exhibit A-1 (Oral Deposition of June Ella Martinez), page 20 (lines 16-20) (Bates Stamp A00022); Exhibit A-1-17 (E.D.'s Preliminary Response to Public Comments), page 21 (Bates Stamp A00296); Hearing Transcript, page 23 (line 14) through page 24 (line 9); Exhibit A-1-18 (Draft Permit), page 23 ("Other Requirements" Provision No. 7) (Bates Stamp A00330).

¹⁵⁷ Hearing Transcript, page 486 (lines 9-19).

103. CCC's witness Daryl Knowles testified that more technical detail should be provided by FHUD about process flow and instrumentation in its application, but he admitted that he does not have a lot of experience with TCEQ procedures for reviewing wastewater permit applications.¹⁵⁸
104. Mr. Knowles also believed that FHUD should have utilized existing data about flow rates and organic strength of wastewater in designing its plant, but he admitted that his opinions were not based on what TCEQ actually requires, but only on his own ideas about what a sufficient level of detail should be in an application.¹⁵⁹ Mr. Knowles also admitted that he did not know for sure whether such case-specific information actually exists, only that it "could have" existed.¹⁶⁰ In fact, such information does not exist in this case, and in any event, the default values set by TCEQ rules for organic strength of wastewater are more environmentally conservative than the site-specific values would be.¹⁶¹
105. Design specifications for lift station pumps are not required to be submitted with the application.¹⁶²
106. The proposed plant will not use distribution piping but instead would use air injection through blowers.¹⁶³ The final arrangement of the piping in the aeration basin will be addressed as part of final design plans and specifications submitted to TCEQ for review and approval following issuance of the permit per normal TCEQ procedures.¹⁶⁴
107. Mr. Knowles assumed that if a wastewater plant had 10% infiltration and inflow ("I&I") in its collection lines, the lift station at the FHUD plant could overflow, but he admitted that

¹⁵⁸ Hearing Transcript, page 436 (lines 11-15).

¹⁵⁹ Hearing Transcript, page 436 (line 21) through page 437 (line 8).

¹⁶⁰ Hearing Transcript, page 437 (lines 9-20).

¹⁶¹ Hearing Transcript, page 484 (line 14) through page 485 (line 13).

¹⁶² Hearing Transcript, page 25 (lines 6-18).

¹⁶³ Hearing Transcript, page 489 (line 19) through page 490 (line 2).

¹⁶⁴ Hearing Transcript, page 490 (lines 2-15).

this logic could apply to any wastewater plant in the state of Texas and that there is nothing in the design of the FHUD plant indicating that I&I would be a problem any greater than experienced at any other plant.¹⁶⁵

108. TCEQ does not require that the FHUD plant have two aeration basins in Phase 1 and three aeration basins in Phase 2¹⁶⁶ and it is not typical to see two aeration basins at every stage for facilities of this type.¹⁶⁷

109. Although it is highly unlikely that a new aeration basin would ever have to be taken out of service,¹⁶⁸ if an aeration basin did fail and needed to be taken out of service, there are several other options that a wastewater plant operator could utilize to address that situation including trucking wastewater off-site, utilizing capacity within oversized units and within the collection lines,¹⁶⁹ or possibly bringing in a temporary modular or portable treatment unit.¹⁷⁰

110. In the case of FHUD's proposed plant, FHUD's clarifiers are oversized by a factor of 2 and the aeration basins are oversized almost by a factor of 2;¹⁷¹ therefore substantial extra-capacity does exist in the proposed FHUD plant to handle those situations where a unit would have to be taken out of service or where excessive I&I occurred.

Conclusions of Law (cont.)

8. The Proposed FHUD wastewater plant complies with all applicable facility design requirements.

¹⁶⁵ Hearing Transcript, page 446 (lines 1-11); page 447 (line 20) through page 448 (line 5).

¹⁶⁶ Hearing Transcript, page 438 (lines 9-23).

¹⁶⁷ Hearing Transcript, page 438 (lines 24-25); page 431 (lines 1-3).

¹⁶⁸ Hearing Transcript, page 490 (line 22) through page 491 (line 10).

¹⁶⁹ Hearing Transcript, page 443 (line 25) through page 444 (line 17).

¹⁷⁰ Hearing Transcript, page 472 (line 9) through page 474 (line 6); page 492 (lines 1-20).

¹⁷¹ Hearing Transcript, page 492 (line 17) through page 493 (line 25).

VIII. WHETHER APPLICANT DEMONSTRATED THAT THE PERMIT INCLUDES ADEQUATE MONITORING AND REPORTING REQUIREMENTS

111. There are detailed monitoring and reporting requirements in the draft permit which are set forth at various places including pages 2 - 3 (“Interim and Final Effluent Limitations and Monitoring Requirements”); pages 4 - 6 (“Monitoring and Reporting Requirements”); pages 12 -16 (sludge testing requirements); pages 16 -18 (sludge monitoring requirements); pages 18 - 19 (sludge recordkeeping requirements); pages 19-20 (sludge reporting requirements); and page 23 (“Other Requirements” Provision No. 6).¹⁷² The latter draft permit provision incorporates the monitoring and recordkeeping requirements of TCEQ rules at 30 TAC §§319.1 – 319.11.
112. Following a determination of administrative and technical completeness, the E.D. made a preliminary decision to issue the FHUD permit and prepared a draft permit in compliance with TCEQ rules and procedural requirements.¹⁷³
113. The TCEQ permit writer testified that the draft permit meets all applicable requirements of 30 TAC Chapter 305, Subchapter F (“Permit Characteristics and Conditions”) and Subchapter O (“Additional Conditions and Procedures for Wastewater Discharge Permits and Sewage Sludge Permits”).¹⁷⁴ The TCEQ permit writer also testified that the draft permit provisions incorporating the monitoring and recordkeeping requirements of 30 TAC Chapter 319, Subchapter A (“Monitoring and Reporting System”) are designed to ensure compliance with those rule requirements.¹⁷⁵
114. The E.D. has also stated in his official Response to Public Comments that the draft permit includes a testing frequency for CBOD₅, TSS, and ammonia-nitrogen based on the

¹⁷² Exhibit A-1-18 (Draft Permit).

¹⁷³ Exhibit A-1-10 (Bates Stamp A00219-A00253).

¹⁷⁴ Hearing Transcript, page 41 (line 5) through page 42 (line 9).

¹⁷⁵ Hearing Transcript, page 46 (line 21) through page 47 (line 15).

requirements found in TCEQ rules for facilities designed to discharge less than 1.0 million gallons per day.¹⁷⁶

115. In response to a public comment that pH and D.O. should be monitored more often than on a monthly basis because a “use concern” for pH and D.O. applies to Lake Conroe in the 2004 draft of the Texas Water Quality Inventory Report, the E.D. stated that it is not the usual practice of TCEQ to increase permit sampling frequencies for constituents that have use concerns, and that the monitoring frequencies for pH and D.O. contained in the draft permit were based on TCEQ rule requirements.¹⁷⁷
116. There is no evidence that the levels of bacteria resulting from the discharge of FHUD’s treated effluent into the cove would expose swimmers to significantly high levels of bacteria. Because TCEQ rules do not require monitoring of bacteria and because there is nothing in the record to support a concern about unhealthy levels of bacteria in the receiving cove, there is no justification for establishing special permit provision requiring monitoring of bacteria levels in the cove or for more frequent monitoring of D.O.
117. The draft permit also requires compliance with toxicity testing requirements,¹⁷⁸ but since there will be no industrial wastewater contributors to the FHUD wastewater system, the presence of toxic constituents is not of concern to Commission staff in this case.¹⁷⁹
118. There is no evidence in the record of this case that the draft permit does not include adequate monitoring and reporting requirements.

¹⁷⁶ Exhibit A-1-17 (E.D.’s Preliminary Response to Public Comments), page 23 (Bates Stamp A00298).

¹⁷⁷ Exhibit A-1-17 (E.D.’s Preliminary Response to Public Comments), page 24 (Bates Stamp A00299).

¹⁷⁸ Exhibit A-1-18 (Draft Permit), page 6 (Bates Stamp A00313).

¹⁷⁹ Exhibit A-1-17 (E.D.’s Preliminary Response to Public Comments), page 13 (Bates Stamp A00288); Exhibit A-3 (Oral Deposition of Lori Hamilton), page 23 (line 1) through page 24 (line 9) (Bates Stamp A00452-A00453); Hearing Transcript page 87 (line 19) through page 88 (line 17).

Conclusions of Law (cont.)

9. The applicant has demonstrated that the permit includes adequate monitoring and reporting requirements.

IX. WHETHER APPLICANT DEMONSTRATED THAT ITS COMPLIANCE HISTORY DOES NOT JUSTIFY DENIAL OR MODIFICATION OF THE PERMIT APPLICATION

Findings of Fact (cont.)

119. TCEQ rules do not place a burden on a permit applicant to demonstrate that its compliance history does not justify denial or modification of a permit application. The TCEQ's Chapter 60 compliance history rules state that the compliance history of a permit applicant is a relevant issue in any permit proceeding¹⁸⁰ and that any party in a contested case hearing may submit information pertaining to a person's compliance history.¹⁸¹
120. If a permit applicant has a poor compliance history, TCEQ can subject the applicant to additional oversight necessary to improve environmental compliance.¹⁸² However in this case, there is no evidence of any instance of non-compliance by FHUD with TCEQ rules, let alone a history of poor compliance sufficient to justify denial or modification of the permit.
121. The only matters in this case related to compliance history were (1) a TCEQ complaint investigation conducted on December 13, 2004 regarding a manhole cover that was not properly sealed, and (2) an overflow from the lift station on April 20, 2006.
122. In the first incident, a manhole was discovered to have been broken on December 8, 2004 and FHUD's operator fixed the manhole the next day.¹⁸³ During a complaint investigation

¹⁸⁰ 30 TAC §§60.1(a); 60.3(a)(4)(B).

¹⁸¹ 30 TAC §60.3(g).

¹⁸² 30 TAC §60.3(a)(2).

¹⁸³ Exhibit A-1-17 (E.D.'s Preliminary Response to Public Comments), page 20 (Bates Stamp A00295).

on December 13, 2004 it was discovered that the manhole was not properly sealed and FHUD's operator sealed the manhole the same day.¹⁸⁴ There is no evidence that this incident resulted in any TCEQ enforcement action nor even a notice of violation.

123. In the second incident, there was a reported spill of 300 gallons of untreated sewage from the FHUD lift station resulting from a broken air release valve.¹⁸⁵ Upon discovery of the spill, FHUD's operator shut off the pumps to minimize the amount of the spill.¹⁸⁶ The spill was reported to TCEQ within 24 hours as required by TCEQ rules¹⁸⁷ and the broken air valve was replaced the next day.¹⁸⁸ The spill did not exit property owned by FHUD¹⁸⁹ nor enter the ditch along Cude Cemetery Road.¹⁹⁰

124. There is no evidence that either of the two incidents resulted in any TCEQ enforcement action nor even a notice of violation.

125. As of the date of the E.D.'s Response to Public Comments in January of 2006, there had not been any reports of an overflow from the FHUD lift station.¹⁹¹

126. Since the only evidence of compliance issues are incidents where FHUD responded promptly to correct the problem and did not result in any enforcement action, there is no evidence upon which to find that FHUD has a poor compliance history.

Conclusions of Law (cont.)

10. FHUD has demonstrated that its compliance history does not justify denial or modification of the permit.

¹⁸⁴ Exhibit A-1-17 (E.D.'s Preliminary Response to Public Comments), page 20 (Bates Stamp A00295).

¹⁸⁵ Hearing Transcript, page 515 (lines 7-17).

¹⁸⁶ Hearing Transcript, page 524 (lines 9-12).

¹⁸⁷ Hearing Transcript, page 526 (lines 15-20).

¹⁸⁸ Hearing Transcript, page 524 (lines 17-21).

¹⁸⁹ Hearing Transcript, page 525 (line 24) through page 526 (line 11); page 526 (line 21) through page 527 (line 4).

¹⁹⁰ Hearing Transcript, page 526 (lines 12-14).

¹⁹¹ Exhibit A-1-17 (E.D.'s Preliminary Response to Public Comments), page 28 (Bates Stamp A00303).

X. WHETHER THE DISCHARGE POINT IS ADEQUATELY DEFINED IN THE PERMIT?

Findings of Fact (cont.)

127. A permit applicant is bound by the representations made in the permit application.¹⁹² In the application, FHUD showed that its discharge point will be at the location shown on the map shown as Attachment 1 to the Domestic Administrative Report 1.0.¹⁹³ That discharge point location is also shown in the application at Attachment 2 to the Supplemental Permit Information Form (“SPIF”),¹⁹⁴ Attachment 1 to the Domestic Administrative Report 1.1,¹⁹⁵ Attachment 5 to the Domestic Administrative Report 1.1,¹⁹⁶ and Attachment 4 to the Domestic Technical Report 1.0.¹⁹⁷ The latitude and longitude coordinates of the outfall are shown in the application on page 6 of the Domestic Administrative Report.¹⁹⁸
128. The depth of the discharge point has been specifically addressed in the draft permit in “Other Requirements” Provision No. 8.¹⁹⁹
129. There is no evidence in the record that the discharge point has not been adequately identified.

Conclusions of Law (cont.)

11. The discharge point is adequately defined in the permit.

¹⁹² Exhibit A-1-18 (Draft Permit), page 7 (Permit Condition 1) (Bates Stamp A00314).

¹⁹³ Exhibit A-1-2 (Original Application) (Bates Stamp A00089).

¹⁹⁴ Exhibit A-1-2 (Original Application) (Bates Stamp A00095).

¹⁹⁵ Exhibit A-1-2 (Original Application) (Bates Stamp A00103 and A00175).

¹⁹⁶ Exhibit A-1-2 (Original Application) (Bates Stamp A00119).

¹⁹⁷ Exhibit A-1-2 (Original Application) (Bates Stamp A00134).

¹⁹⁸ Exhibit A-1-2 (Original Application) (Bates Stamp A00085).

¹⁹⁹ Exhibit A-1-18 (Draft Permit) (Bates Stamp A00331).

XI. ALLOCATION OF HEARING TRANSCRIPT COSTS

Findings of Fact (cont.)

130. FHUD made an in-hearing motion under 30 TAC §80.23 that the costs of the hearing transcript be divided equally between FHUD and all other protesting (non-statutory) parties, and the ALJ ruled that assessment of transcript costs should be addressed in closing arguments.²⁰⁰
131. Under the factors set forth in 30 TAC §80.23(d), the protesting parties participated in the case to a roughly equal extent as the applicant. Protestants had 5 witness in their direct cases compared to seven witness in the applicant's direct case. CCC's counsel engaged in cross-examination roughly to the same extent as the applicant. All parties equally benefit from having a transcript.

Conclusions of Law (cont.)

12. It would be fair and appropriate to assess transcript costs 50% to FHUD and 50% to CCC and the Sandalls.

Respectfully submitted,

KELLY HART & HALLMAN LLP

Stephen C. Dickman

State Bar No. 05836500

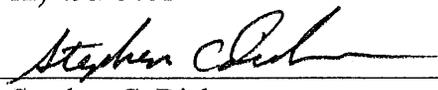
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**ATTORNEYS FOR FAR HILLS UTILITY
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²⁰⁰ Hearing Transcript, page 590 (line 14) through page 591 (line 1).

CERTIFICATE OF SERVICE

This is to certify that on this the 25th day of September, 2006, a true and correct copy of the foregoing document was forwarded by in accordance with SOAH rules by the means indicated:

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Stephen C. Dickman

EXHIBIT 2

SUBCHAPTER J. WETLANDS

§ 11.501. Title of Act

This Act shall be known and may be cited as the "Wetlands Act."

Added by Acts 1989, 71st Leg., ch. 1202, § 1, eff. Aug. 28, 1989.

§ 11.502. Definition

(1) The definition of the term "wetlands" within the State of Texas, for purposes of the Clean Water Act, 33 U.S.C. 1311, 1344; the Erodible Land and Wetland Conservation and Reserve Program, 16 U.S.C. 3801-3845; the Emergency Wetlands Resources Act of 1986, 16 U.S.C. 3901-3932; the National Environmental Policy Act of 1969, 42 U.S.C. 4321-4370a, all statutory foundation for the Federal Wildlife Service's National Wetlands Inventory mapping, including the Water Bank Program for Wetlands Preservation, 16 U.S.C. 1301-1311; the Water Resources development project (wetland areas), 42 U.S.C. 1962d-5e; and the Migratory Bird Conservation Act, 16 U.S.C. 715-715r; and all Texas laws, rules, and regulations adopted pursuant to Chapter 2001, Government Code and interpretation and implementation of any kind whatsoever of both federal and state laws by agencies of the state, including any amendment or revision thereto, relating to wetlands, means an area (including a swamp, marsh, bog, prairie pothole, or similar area) having a predominance of hydric soils that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support and that under normal circumstances supports the growth and regeneration of hydrophytic vegetation.

(2) The term "hydric soil" means soil that, in its undrained condition, is saturated, flooded, or ponded long enough during a growing season to develop an anaerobic condition that supports the growth and regeneration of hydrophytic vegetation.

(3) The term "hydrophytic vegetation" means a plant growing in water or a substrate that is at least periodically deficient in oxygen during a growing season as a result of excessive water content.

(4) The term "wetlands" does not include:

(A) irrigated acreage used as farmland;

(B) man-made wetlands of less than one acre; or

(C) man-made wetlands not constructed with wetland creation as a stated objective, including but not limited to impoundments made for the purpose of soil and water conservation which have been approved or requested by soil and water conservation districts.

Added by Acts 1989, 71st Leg., ch. 1202, § 1, eff. Aug. 28, 1989. Amended by Acts 1995, 74th Leg., ch. 76, § 5.95(49), eff. Sept. 1, 1995.

§ 11.502

WATER ADMINISTRATION Title 2

Historical and Statutory Notes

The 1995 amendment, in subd. (1), substituted "Chapter 2001, Government Code" for "the Administrative Procedure and Texas Register Act (Article 6252-13a, Vernon's Texas Civil Statutes)".

Cross References

State-owned coastal wetlands, definition of "wetlands" in conservation plan as consistent with the definition under this subchapter, see V.T.C.A., Parks & Wildlife Code § 14.002. "Wetlands", under Coastal Public Lands Management Act, to have meaning assigned under this subchapter, see V.T.C.A., Natural Resources Code § 33.233.

Library References

Health and Environment ⇔ 25.5-25.7. C.J.S. Health and Environment § 61 et seq.
Navigable Waters ⇔ 38. C.J.S. Navigable Waters §§ 113-114.
WESTLAW Topic Nos. 199, 270.

§ 11.503. Applicability to Man-Made Wetlands

Section 11.502(4)(C) applies only to man-made wetlands, the construction or creation of which commences on or after the effective date of this Act.

Added by Acts 1989, 71st Leg., ch. 1202, § 1, eff. Aug. 28, 1989.

Library References

Health and Environment ⇔ 25.5-25.7. C.J.S. Health and Environment § 61 et seq.
Navigable Waters ⇔ 38. C.J.S. Navigable Waters §§ 113-114.
WESTLAW Topic Nos. 199, 270.

§ 11.504. Applicability to Surface Mining and Reclamation ¹

This Act shall not apply to surface mining and reclamation.

Added by Acts 1989, 71st Leg., ch. 1202, § 1, eff. Aug. 28, 1989.

¹ Section heading editorially supplied.

Library References

Health and Environment ⇔ 25.5-25.7. WESTLAW Topic Nos. 199, 260, 270.
Mines and Minerals ⇔ 92.8-92.11. C.J.S. Health and Environment § 61 et seq.
Navigable Waters ⇔ 38. C.J.S. Navigable Waters §§ 113-114.

§ 11.505. Applicability to State Revolving Loan Fund Program ¹

This Act shall not apply to the state revolving loan fund program.

Added by Acts 1989, 71st Leg., ch. 1202, § 1, eff. Aug. 28, 1989.

¹ Section heading editorially supplied.

WATER RIGHTS
Ch. 11

§ 11.506

§ 11.506. Conflict Between State and Federal Definitions¹

If the state definition conflicts with the federal definition in any manner, the federal definition prevails.

Added by Acts 1989, 71st Leg., ch. 1202, § 1, eff. Aug. 28, 1989.

¹ Section heading editorially supplied.

Library References

States ⇨ 18.31, 18.91.
WESTLAW Topic No. 360.
C.J.S. States § 24.