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TCEQ DOCKET NO. 2005-1899-MWD

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CHIEF CLERKS OFFICE

IN THE MATTER OF
THE APPLICATION OF
FAR HILLS UTILITY DISTRICT
FOR TPDES PERMIT NO. 14555-001

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BEFORE THE
STATE OFFICE OF
ADMINISTRATIVE HEARINGS

FAR HILLS UTILITY DISTRICT'S REPLY TO EXCEPTIONS
FILED BY CAPPS CONCERNED CITIZENS AND PUBLIC INTEREST COUNSEL

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"), files this Reply to the Exceptions filed by Capps Concerned Citizens ("Capps") and the Office of Public Interest Counsel ("PIC").

I. REPLY TO CAPPS' EXCEPTIONS ON THE STANDARD OF REVIEW APPLICABLE TO COMMISSION REVIEW OF THE PROPOSAL FOR DECISION

Capps makes the erroneous legal assertion that §361.0832 of the Texas Health & Safety Code applies to this case so that a stricter standard of review applies to any Commission action to overturn the ALJ's proposed findings of fact and conclusions of law. To the contrary, §361.0832 only applies to contested case permitting decisions arising under the Texas Solid Waste Disposal Act as set forth in Chapter 361 of the Texas Health & Safety Code. As made clear by its title, the Texas Solid Waste Disposal Act applies only to the Commission's jurisdiction over industrial and municipal solid waste matters, and the term "solid waste" does not include solid or dissolved material in domestic sewage¹ which is the type of waste at issue in this case. Subchapter C of Chapter 361 (entitled "Permits") which contains §361.0832, deals

¹ TEX. HEALTH & SAFETY CODE ANN. §361.003(34) (Vernon 2001).

with permits for treatment, storage and disposal of solid waste,² not permits for wastewater discharges which are regulated under Chapter 26 of the Texas Water Code.

Section 361.0832 was originally enacted as part of S.B. 1099 in 1991 which was a bill intended to modify the Commission's hazardous waste permitting procedures and it could well be argued that §361.0832 was intended to apply only to hazardous waste permitting cases³, although that is not clear from a reading of §361.0832 itself. Nevertheless, it is abundantly clear that §361.0832 cannot be interpreted to apply to anything but solid waste permitting cases. Section 361.0832 does not apply to all permitting decisions of the Commission and the Commission has never applied the §361.0832 standards to all contested cases that come before it.

Even though §361.0832 does not apply to this contested case proceeding, it is nevertheless true that the two issues on which the ALJ bases her recommendation for permit denial are classic "policy" issues for which the Commission should feel no reluctance to assert its rightful authority to decide. As discussed in Far Hills' Exceptions, the regionalization issue in this case requires a Commission policy decision as to how the State's regionalization policy goal stated in §26.0282 will be applied in this case. Likewise, the wetlands issue in this case requires a Commission policy decision on whether or not the Commission should defer to the U.S. Army Corps of Engineers ("USACE") in cases where the existence of wetlands is an issue. As discussed in its Exceptions, Far Hills believes that it has fully complied with all regionalization requirements, and that because State law requires the Commission to adhere to the federal definition of "wetlands", the Commission should re-open the record to receive the USACE official verification of Far Hills' expert's wetlands determination. Thus, although

² TEX. HEALTH & SAFETY CODE ANN. §361.061 (Vernon 2001).

³ Indeed, the *Tan Terra Environmental Services* case cited by Capps and included with its Exceptions as Attachment C was a municipal solid waste case where the Commission overturned the ALJ's decision yet the Commission did not make any of the findings required by §361.0832 to overturn the ALJ's recommendations.

§361.0832 does not apply in this case, the two issues upon which the ALJ based her recommendation are true “policy” issues for which the Commission owes the ALJ little or no deference.

II. REPLY TO CAPPS’ EXCEPTIONS ON REGIONALIZATION ISSUE

In the introductory section of its Exceptions, Capps erroneously asserts that the only reason §54.209 of the Texas Water Code did not prevent Far Hills from acquiring the 5-acre Zboyan tract through eminent domain is that this section of the Water Code was not applicable to the Far Hills’ eminent domain action because the eminent domain action was “instituted prior to the [June 9, 2005] effective date of the legislation.”⁴ This is a clear misrepresentation of the content of §54.209 since that section only applies to municipal utility districts (“MUDs”) whereas Far Hills is a water control and improvement district⁵ and not governed by Chapter 54 of the Texas Water Code. Therefore §54.209 would not apply to Far Hills even if the Far Hills’ eminent domain action had been initiated after the effective date of the legislation. Like its erroneous assertion that §361.0832 applies to this case, Capps has erroneously represented that §54.209 would have applied to this case if not for the effective date of the statute.

On the regionalization issue itself, Capps makes no new arguments other than to mischaracterize MCUD No. 2 President Larry Folk’s deposition testimony that “he did not see that such a change was needed”. Capps insinuates that that the “change” Mr. Folk was referring to was Far Hills’ withdrawal from the MCUD No. 2 wastewater plant when in fact Mr. Folk was clearly referring to the amending of the agreement between Far Hills and MCUD No. 2.⁶

⁴ Capps’ Exceptions at pgs. 1-2.

⁵ Exh. A-4, testimony of Jim Haymon at page 3 (Bates Stamp A00554).

⁶ See Exh. P-5, page 21. “Q: Why did you [MCUD No. 2] feel the necessity to amend the agreement? A: I don’t know that we felt we had to amend it.”

As discussed in detail in Far Hills' Exceptions, the agreement between Far Hills and MCUD No. 2 under which both parties agreed to the withdrawal of Far Hills from the MCUD No. 2 plant and the construction of a new wastewater plant by Far Hills is the dispositive proof of MCUD No. 2's unwillingness and inability to continue to treat Far Hills' present and future wastewater needs. Contrary to Capps statement in its Exceptions that MCUD No. 2 is an "alternate service provider", the record in this case shows that the MCUD No. 2 plant is old, overloaded and in need of significant upgrades and repairs.⁷ Moreover, Far Hills has complied with the regionalization mandates of §§26.082 and 26.0282 by sending requests for service to nearby providers and having none of such providers agree to accept Far Hills' wastewater. The process of designating and requiring tie-on to a regional facility is set forth in §§26.081 – 26.087 but none of these statutory requirements have been met or triggered, and so they do not apply in this case.

Finally, Capps argues that the *Lake Travis II Investments* case is supporting precedent for the Commission's denial of Far Hills' permit on the grounds of regionalization. However, in that case, the Commission only found that "There is a regional entity, [the Travis County W.C.I.D. No. 17], that holds a CCN to serve the area, and regional service is proposed for this area."⁸ Unlike the *Lake Travis II Investments* case, MCUD No. 2 has not been designated or proposed as a regional entity and MCUD No. 2 does not hold a CCN to serve Far Hills' service area; rather Far Hills is the only entity which is authorized to provide retail wastewater service within its boundaries. These are two clear and critical distinctions between the *Lake Travis II Investments* case and Far Hills' case. Another critical difference is that in the *Lake Travis II Investments* case, the alternate service provider was a party in the case who sought to demonstrate its desire

⁷ See Far Hills' Exceptions at pages 1 – 9.

⁸ Finding of Fact No. 14 in Order re: Application of lake Travis II Investments, Ltd. for a Water Quality Land Application Permit; TCEQ Dk. No. 2002-1378-MWD; SOAH Dk. No. 582-03-2828 (February 28, 2005).

and ability to serve the permit applicant's needs and therefore actively opposed the permit, whereas in this case MCUD No. 2 has contractually obligated itself to not serve Far Hills and to not oppose Far Hills' wastewater permit.

In summary, there are three crucial differences between the *Lake Travis II Investments* case and this case:

- In the *Lake Travis II Investments* case the alternate service provider was legally authorized through its CCN to provide retail service in the permit applicant's proposed service area, whereas in this case Far Hills is the legally authorized retail service provider within its service area.
- In the *Lake Travis II Investments* case the alternate service provider was found to be a regional service provider, whereas in this case MCUD No. 2 has not been designated as a regional provider.
- In the *Lake Travis II Investments* case the alternate service provider actively sought to serve the permit applicant's needs and participated as a party to oppose the permit, whereas in this case MCUD No.2 has not agreed to serve Far Hills' wastewater needs and has not opposed Far Hills' permit to construct its own wastewater plant.

It is clear that the two cases could not be more different on the regionalization issue and therefore the *Lake Travis II Investments* case provides no precedential support for Capps' position in this case.

III. REPLY TO CAPPS' EXCEPTIONS ON WETLANDS ISSUE

In its Exceptions, Far Hills has described the numerous deficiencies in Dr. Jacob's wetlands evaluation and shown how his study is not suitable for submission to USACE as a wetlands delineation.⁹ Far Hills has also shown how every point cited by the ALJ as a basis of her adoption of Dr. Jacob's opinions is answered by the facts in evidence (even though the ALJ failed to even mention any of those answering arguments of Far Hills).

⁹ See Far Hills' Exceptions at pages 23 – 25.

In contrast to Dr. Jacob's conclusory opinions based on only three documented sample sites and no surveyed points, Far Hills' expert Nick Laskowski did a complete wetlands determination using 154 surveyed pin flags and at 7 different documented observation points. Mr. Laskowski's wetlands delineation was in complete compliance with all USACE requirements and he submitted it for official verification by the USACE which has now rendered its decision on Mr. Laskowski's study.

Mr. Laskowski is well qualified to perform professional wetlands determinations, both academically and by experience.¹⁰ The record shows that Mr. Laskowski has a Master of Science degree in Soil Science and Environmental Biophysics and a Bachelor of Science degree in Agronomy from Texas A&M University. A member of the Society of Wetlands Scientists, he obtained his certification as a wetlands delineator in February of 2005 and is a Soil Scientist in-training who testified that he would receive his certification as a soils scientist in November of 2006.¹¹ Mr. Laskowski has done numerous wetlands delineations and is currently solely responsible for 20 different wetlands mitigation areas. Although Dr. Jacob may have more years' experience in doing wetlands delineations than Mr. Laskowski, the record is clear in this case that Dr. Jacob simply did not do as thorough and detailed a wetlands delineation as Mr. Laskowski did.

Because a USACE official determination of wetlands constitutes a federal determination of wetlands, and because §§11.502 and 11.506 of the Texas Water Code require TCEQ to adhere to a federal determination of wetlands in administering any of TCEQ's rules concerning wetlands, Far Hills has requested that the Commission re-open the record to receive the USACE verification of Mr. Laskowski's study.

¹⁰ Exh. A-6-NL-1 (Resume of Nicholas Laskowski).

¹¹ Transcript at pgs. 166-167.

Capps further relies on a finding of fact in the TCEQ municipal solid waste permitting case of *Tan Terra Environmental Services, Inc.* which states, “Neither the Commission’s nor the federal definition of wetlands limits their classification to only those waters designated as jurisdictional waters of the United States.” First, one finding of fact in a municipal solid waste case should not be relied on to decide the purely legal issue of whether the state or federal definition of wetlands applies in construing 30 TAC §309.13. For example, in the *Tan Terra* case the Commission was construing the definition of wetlands contained in 30 TAC §307.3(a)(69) which is the definition of wetlands solely for purposes of Chapter 307. In this case, the Commission must apply the definition of wetlands contained in §309.11 which is the definition of wetlands solely for purposes of Chapter 309.

More importantly, Finding of Fact No. 29 in the *Tan Terra* case only states that a state or federal wetlands can encompass an area broader than “waters of the United States” - - but whether “wetlands” can have a broader reach than “waters of the United States” is not the issue presented in *Far Hills* case. The issue in this case is whether the ALJ is correct in stating that the Commission can apply a broader definition of wetlands than the federal government does. The answer must be “No” because §11.502 of the Texas Water Code requires TCEQ in its administration of the federal Clean Water Act permitting program to utilize the §11.502 definition of wetlands which is the federal definition of wetlands, and §11.506 of the Texas Water Code prohibits the Commission from utilizing any state law definition of wetlands which conflicts in any manner with the federal definition of wetlands (note: §11.506 states that “if the state definition [of wetlands] conflicts with the federal definition in any manner, the federal definition prevails.” [emphasis added]). Thus, even if Finding of Fact No. 29 in the *Tan Terra* case means that the Commission believed in that case that it could utilize a broader state

definition of wetlands than the federal definition, it was simply wrong in making such a finding of fact.¹² Indeed, there is nothing in the *Tan Terra* case order to suggest that the parties or the Commission were even aware of the requirements §§11.502 and 11.506. Because these provisions of the State Wetlands Act require uniformity between a state agency's definition of wetlands and the federal definition of wetlands, the ALJ is clearly wrong in stating that TCEQ can regulate a broader class of wetlands than the federal government can. For these reasons, Finding of Fact No. 29 in the *Tan Terra* case is of little, if any, relevance to this case.

IV. REPLY TO CAPPS' AND PIC'S EXCEPTIONS ON OTHER ISSUES NOT ADDRESSED IN PFD

Capps and the PIC have set forth arguments on various issues not raised by the ALJ in her PFD. In order to respond on these other issues, Far Hills sets forth below its arguments from its post-hearing briefing.

1. Far Hills Has Fully Demonstrated That the Proposed Discharge of Treated Effluent Will Meet All Applicable State Water Quality Standards.

A. Compliance with Texas Water Quality Standards in General.

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). The Executive Director ("E.D.") staff of the Texas Commission on Environmental Quality ("TCEQ") conducted an administrative and technical review of Far Hills's application in accordance with their normal procedures¹³ and concluded that, under the application and the E.D.'s draft permit, the proposed wastewater

¹² Finding of Fact No. 29 in the *Tan Terra* is actually not a finding of fact at all, but rather a legal conclusion, and an unsupported legal conclusion at that.

¹³ Exhibit A-3 (Oral Deposition of Lori Hamilton), page 10 (lines 3-6) (Bates Stamp A00439).

discharge would meet all applicable state water quality standards.¹⁴ The E.D. does not anticipate that constituents in the discharge will have an adverse effect on the receiving water or its designated uses.¹⁵ In addition, TCEQ staff member Lori Hamilton testified that 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.¹⁶ 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 criteria¹⁷ and no whole effluent toxicity testing of the effluent is required under TCEQ rules.¹⁸

The designated uses for Segment No. 1012 are high aquatic life uses, public water supply and contact recreation.¹⁹ 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.²⁰ The effluent limitations in the draft permit will maintain and protect the existing instream uses,²¹ and numerical and narrative criteria to protect existing uses will be maintained.²² In addition, aquatic

¹⁴ 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).

¹⁵ Exhibit A-1-17 (E.D.'s Preliminary Response to Public Comments), pages 10 and 13 (Bates Stamp A00285 and A00288).

¹⁶ Exhibit A-3 (Oral Deposition of Lori Hamilton), page 28 (lines 5-17) (Bates Stamp A00457).

¹⁷ Exhibit A-3 (Oral Deposition of Lori Hamilton), page 23 (line 11) through page 24 (line 9) (Bates Stamp A00452 - A00453).

¹⁸ Exhibit A-1-17 (E.D.'s Preliminary Response to Public Comments), page 13 (Bates Stamp A00288).

¹⁹ 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).

²⁰ Exhibit A-1-10 (Statement of Basis/Technical Summary and E.D.'s Preliminary Decision), page 2 (second paragraph) (Bates Stamp A00225).

²¹ Exhibit A-1-10 (Statement of Basis/Technical Summary and E.D.'s Preliminary Decision), page 1 (bottom paragraph) (Bates Stamp A00224).

²² Exhibit A-1-10 (Statement of Basis/Technical Summary and E.D.'s Preliminary Decision) page 2 (top paragraph) (Bates Stamp A00225).

scientist Lori Hamilton for the E.D. testified that 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.²³

The E.D.'s modeling and assessment specialist, Karen Holligan, 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.²⁴ In fact, as a result of Ms. Holligan's modeling evaluations, 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.²⁵ These draft permit effluent limits are now included in the EPA-approved Water Quality Management Plan for the State of Texas.²⁶

The E.D. further stated that 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.²⁷ Based on the size of Lake Conroe and the amount of dilution expected, the E.D. does not anticipate any likely effects of potential chlorine by-

²³ 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).

²⁴ 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).

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

²⁶ Exhibit A-2 (Oral Deposition of Karen Holligan), page 33 (line 8) through page 34 (line 18) (Bates Stamp A00368-A00369).

²⁷ Exhibit A-1-17 (E.D.'s Preliminary Response to Public Comments), page 10 (Bates Stamp A00285).

products in the effluent on aquatic life in Lake Conroe.²⁸ 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.²⁹ The E.D. further sees no 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.³⁰ The E.D. believes that 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.³¹

B. Compliance with State Water Quality Standard for Dissolved Oxygen.

The only evidence offered at the hearing to raise an issue concerning compliance with the Texas Surface Water Quality Standards was the testimony of Capps' witness Bruce Wiland. Mr. Wiland disagreed with TCEQ staff witness Karen Holligan's testimony that there will be no violation of the state water quality standard for D.O. of 5.0 mg/l. It is important to note however that Mr. Wiland never testified that the state water quality standard for D.O. would not be met in this case; he merely testified that, for several reasons, the proposed discharge should be subjected to further study based on site specific factors rather than acceptance of the modeling as performed by Ms. Holligan.³² However, because none of the reasons given by Mr. Wiland are significant enough for even warranting further study, there is no reason to conduct further studies and certainly no reason to deny the permit.

²⁸ 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).

²⁹ Exhibit A-1-17 (E.D.'s Preliminary Response to Public Comments), page 11 (Bates Stamp A00286).

³⁰ Exhibit A-1-17 (E.D.'s Preliminary Response to Public Comments), page 12 (Bates Stamp A00287).

³¹ Exhibit A-1-17 (E.D.'s Preliminary Response to Public Comments), page 12 (Bates Stamp A00287).

³² See, e.g., Exhibit P-4, page 5, lines 11-14; page 6, lines 22-23; page 8, lines 21-22; page 8, lines 36-37; page 9, lines 31-41.

The first reason advanced by Mr. Wiland for his belief that the proposed discharge warrants further study is that Ms. Holligan's modeling produced a D.O. outflow value of 4.8 mg/l which is 0.2 mg/l below the state water quality D.O. standard for Lake Conroe. However, Ms Holligan clearly testified that this does not present an issue of concern for her 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.³³ The primary element of conservatism is that this model does not assume any mixing or dilution of the effluent with the surrounding waters upon discharge of the effluent into the lake.³⁴ Other elements of conservatism include the fact that the model does not assume any other runoff into the cove from the surrounding watershed,³⁵ and the fact that TCEQ staff models all discharges at full permitted flow and at their full permitted concentrations.³⁶ 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.³⁷ 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).³⁸ Accordingly, Ms. Holligan concluded that 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

³³ Exhibit A-2 (Oral Deposition of Karen Holligan), page 21 (lines 12-18) (Bates Stamp A00356); Hearing Transcript, page 34 (lines 10-13).

³⁴ Exhibit A-2 (Oral Deposition of Karen Holligan), page 21 (line 18) through page 22 (line 5) (Bates Stamp A00356-A00357).

³⁵ Exhibit A-2 (Oral Deposition of Karen Holligan), page 22 (lines 6-11) (Bates Stamp A00357).

³⁶ Exhibit A-2 (Oral Deposition of Karen Holligan), page 22 (lines 11-13) (Bates Stamp A00357).

³⁷ Exhibit A-2 (Oral Deposition of Karen Holligan), page 22 (lines 14-25) (Bates Stamp A00357).

³⁸ Exhibit A-2 (Oral Deposition of Karen Holligan), page 29 (line 9) through page 30 (line 11) (Bates Stamp A00364-A00365).

quality standard for D.O. in Lake Conroe.³⁹ With respect to the safety factor of 0.2 mg/l in D.O. utilized by TCEQ water quality modeling staff as general practice, EPA has approved the use of this factor, and in fact TCEQ staff formerly allowed a departure of 0.3 mg/l in D.O. as a standard practice, so the TCEQ staff's current practice is more conservative than the practice they formerly followed.⁴⁰

The second reason advanced by Mr. Wiland for his belief that the proposed discharge warrants further study is that the cell size of 10 acres used by Ms. Holligan in her modeling exercise was too large and should have been 5 acres. However, Ms. Holligan has been doing TCEQ water quality modeling for over seven years⁴¹ and she followed the standard TCEQ modeling protocol as set forth in the TCEQ's Standard Operating Procedure ("SOP") for the Evaluation of TPDES Permit Applications Using a CSTR Model.⁴² Ms. Holligan did not see any reason to utilize a cell size smaller than ten acres.⁴³ 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; however, in this case the cove that would be receiving the wastewater effluent is not distinct from other portions of the lake and therefore Ms. Holligan saw no reason to utilize a smaller cell size based upon her best professional judgment.⁴⁴ At the hearing, Ms. Holligan further testified that if her 10 acre cell were divided up into two smaller parts as Mr. Wiland did, you introduce a much larger conservative factor into the model which is

³⁹ Exhibit A-2 (Oral Deposition of Karen Holligan), page 31 (lines 9-12) (Bates Stamp A00366); page 36, lines 6-7 (Bates Stamp A00371).

⁴⁰ Hearing Transcript, page 34 (lines 16-19).

⁴¹ Exhibit A-2 (Oral Deposition of Karen Holligan), page 7 (lines 2-5) (Bates Stamp A00342).

⁴² Exhibit A-2 (Oral Deposition of Karen Holligan), page 11 (lines 1-25) (Bates Stamp A00346); Exhibit A-2-4 (Bates Stamp A00415-A00427).

⁴³ Exhibit A-2 (Oral Deposition of Karen Holligan), page 29 (lines 12-15) (Bates Stamp A00364).

⁴⁴ 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).

unwarranted.⁴⁵ Making a model more conservative does not necessarily make it more accurate.⁴⁶ Moreover, 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.⁴⁷ 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.⁴⁸ 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.⁴⁹ 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.⁵⁰ In conclusion, there is a large factor of conservatism built into Ms. Holligan's modeling and the effluent limits established by the E.D. in the draft permit are sufficient.⁵¹

Another reason advanced by Mr. Wiland for his belief that the proposed discharge warrants further study is that the depths used by Ms. Holligan were derived as an average of maximum and minimum cell depths rather than from individual transects across the topographic contour lines of the receiving cove.⁵² Although the use of transects can provide a more precise measure of depths, such method may not necessarily render more accurate depths than Ms. Holligan's method because the accuracy of elevation lines on topographic maps comes into question as years go by and lakes tend to silt in over time.⁵³

⁴⁵ Hearing Transcript, page 31 (lines 9-22).

⁴⁶ Hearing Transcript, page 32 (lines 21-25); page 50 (lines 10-15).

⁴⁷ Hearing Transcript, page 49 (lines 12-17); page 49 (line 24) through page 50 (line 4).

⁴⁸ Hearing Transcript, page 62 (lines 9-14); page 66 (lines 17-18).

⁴⁹ Hearing Transcript, page 62 (line 19) through page 63 (line 1).

⁵⁰ Hearing Transcript, page 66 (lines 10-12).

⁵¹ Hearing Transcript, page 65 (lines 2-8).

⁵² Hearing Transcript, page 50 (line 16) through page 51 (line 8); page 395 (lines 2 – 17).

⁵³ Hearing Transcript, page 52 (lines 16-19); page 583 (line 19) through page 584 (line 9).

Another reason advanced by Mr. Wiland for his belief that the proposed discharge warrants further study is that site specific factors, such as water temperature and effluent flow rates, should have been used rather than the default values utilized in running the CSTR model. With respect to water temperature, Ms. Holligan's modeling utilized a 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.⁵⁴ 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.⁵⁵ In fact, 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)⁵⁶ indicate that such temperatures are slightly lower than the 30.5 degrees Celsius used as a model input by the TCEQ staff.⁵⁷ With respect to variable flow rates, 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.⁵⁸

Mr. Wiland also believes that the TCEQ modeling should have been performed using lower lake levels than the normal pool elevation as shown on U.S.G.S. topographic maps because of the possibility that the level of the lake could be lower in summertime months.⁵⁹ However, standard TCEQ modeling practice calls for using normal pool elevation because that is

⁵⁴ Exhibit A-2 (Oral Deposition of Karen Holligan), page 13 (lines 21-23) (Bates Stamp A00348); page 56 (lines 3-8) (Bates Stamp A00391).

⁵⁵ Hearing Transcript, page 63 (line 14) through page 64 (line 2); Hearing Transcript, page 384 (lines 9-12).

⁵⁶ Hearing Transcript, page 585 (lines 18 -21).

⁵⁷ Hearing Transcript, page 578 (line 20) through page 579 (line 2).

⁵⁸ Hearing Transcript, page 382 (lines 1-17); Exhibit A-2 (Oral Deposition of Karen Holligan), page 55 (lines 5-13) (Bates Stamp A00390).

⁵⁹ Exhibit P-4 (Prefiled Testimony of Bruce Wiland), page 8 (lines 24-37).

the boundary of the water body segment as stated in the Texas Water Quality Standards.⁶⁰

Ms. Holligan was asked about the effect of modeling a lower pool elevation and she stated that she would not know how lowering of the pool elevation would impact the predicted D.O. level because of other variables that would have to be considered, but in another permitting case where she did re-model using lower pool elevations, the predicted D.O. level was actually higher.⁶¹

Notwithstanding the extensive testimony and evidence regarding the modeling of D.O. levels resulting from the wastewater discharge in this case, it is important to keep in mind that the CSTR model is only a general tool for assisting TCEQ staff in exercising their best professional judgment about the adequacy of the permitted effluent limits.⁶² 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.⁶³ 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.⁶⁴ Therefore, merely raising questions about the modeled D.O. outflow number calculated by TCEQ staff as Mr. Wiland has done merely demonstrates that setting of permit effluent limits is a matter of best professional judgment. As the agency personnel statutorily authorized to review and approve water quality permits, TCEQ staff is better qualified to exercise that judgment than a paid professional testifying expert such as Mr. Wiland.

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

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

⁶² Hearing Transcript, page 386 (lines 11-14); Exhibit A-2-4, page 1 (Bates Stamp A00415).

⁶³ Hearing Transcript, page 388 (line 20) through page 390 (line 4); page 570 (line 6) through page 572 (line 15).

⁶⁴ Hearing Transcript, page 572 (line 16) through page 573 (line 18).

2. Far Hills Has Fully Demonstrated That the Proposed Discharge of Treated Effluent Will Comply With All Applicable Anti-Degradation Requirements.

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.⁶⁵ Under those procedures, TCEQ 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.⁶⁶ In accordance with §307.5 and the Texas Surface Water Quality Implementation procedures, TCEQ 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.⁶⁷ The TCEQ 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.⁶⁸

Although these TCEQ staff Tier 1 and 2 determinations were preliminary, there was no other evidence at the hearing that would negate these determinations. Mr. Wiland believes that a modeled drop of 1.0 mg/l in D.O. would exceed an assumed 0.5 mg/l de minimis level of degradation under the Texas Surface Water Quality Standards implementation procedures. These implementation procedures provide some examples as guidance to help TCEQ 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

⁶⁵ Exhibit A-3-3 (Procedures to Implement the Texas Surface Water Quality Standards), page 23 (Bates Stamp A00535).

⁶⁶ 30 TAC §307.5(b)

⁶⁷ Exhibit A-3-2 (Lori Hamilton Memo of November 12, 2004) (Bates Stamp A00503).

⁶⁸ Exhibit A-3-2 (Lori Hamilton Memo of November 12, 2004) (Bates Stamp A00503).

changes in dissolved oxygen.⁶⁹ First, there is no evidence in this case of the existence of a sag zone or what the sag zone might be. But even if the first cell used by Karen Holligan in her 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. Indeed, all evidence shows that aquatic life in Lake Conroe will not be impacted by the change in D.O. resulting from the proposed discharge.⁷⁰ 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 aquatic life and a relatively unique and potentially sensitive community of aquatic organisms.⁷¹ 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.⁷²

Notwithstanding the non-applicability of these examples to this case, Mr. Wiland believes that a decrease in D.O. of more than 0.5 mg/l by itself could be considered a non-de minimis degradation of water quality. But even if a decrease of 0.5 mg/l in D.O. was sufficient to constitute a non-de minimis degradation in water quality, the implementation procedures clearly state 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.⁷³ It is only intended as general guidance to

⁶⁹ Exhibit A-3-3 (Procedures to Implement the Texas Surface Water Quality Standards), page 33 (Bates Stamp A00545).

⁷⁰ Hearing Transcript, page 77 (lines 19-22); page 78 (lines 1-17).

⁷¹ Exhibit A-3-3 (Procedures to Implement the Texas Surface Water Quality Standards), page 34 (Bates Stamp A00546).

⁷² Hearing Transcript, page 92 (lines 18-24); page 393 (line 22) through page 394 (line 10).

⁷³ Exhibit A-3-3 (Procedures to Implement the Texas Surface Water Quality Standards), page 31 (Bates Stamp A00543).

indicate when an increase in loading is small enough to preclude the need for additional evaluation.⁷⁴

TCEQ staff member Lori Hamilton, an aquatic scientist, testified that 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.⁷⁵ Lori Hamilton provided an example of a situation where a non-de minimis decrease could trigger further evaluation,⁷⁶ but in this case there was no need to conduct further evaluation following her initial antidegradation screening review. Rather, Lori Hamilton repeatedly testified on cross-examination that there would be no degradation of water quality from the proposed discharge.⁷⁷

3. Far Hills Has Fully Demonstrated That
All Applicable Odor Control Requirements Will Be Met.

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.⁷⁸ 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.⁷⁹ Under the draft permit, Far Hills is required to submit evidence of such ownership interest or legal restrictions in

⁷⁴ Exhibit A-3-3 (Procedures to Implement the Texas Surface Water Quality Standards), page 31 (Bates Stamp A00543).

⁷⁵ 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).

⁷⁶ Hearing Transcript, page 82 (line 22) through page 83 (line 20).

⁷⁷ 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).

⁷⁸ Exhibit A-5 (Prefiled Testimony of Tim Hardin), page 16 (Bates Stamp A00625).

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

the buffer zone land prior to construction of the wastewater treatment facilities and Far Hills may meet the buffer zone requirement by using the right-of-way of Cude Cemetery Road and Virginia Street.⁸⁰ Far Hills 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 Far Hills has met the buffer zone requirement of §309.13(e)(3) so as to abate and control potential nuisance odors.⁸¹ The area comprising the buffer zone is shown on Attachment 4 to the Domestic Administrative Report 1.1 in the application.⁸²

In addition, the proposed Far Hills 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.⁸³

Minimizing the generation of odors from a treatment plant depends on the design of the plant and its operation and maintenance.⁸⁴ 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.⁸⁵ 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.⁸⁶ 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

⁸⁰ 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).

⁸¹ Exhibit A-5 (Prefiled Testimony of Tim Hardin), page 16 (Bates Stamp A00625).

⁸² Exhibit A-5-TBH-4 (Application of FAR HILLS for TPDES Permit) (Bates Stamp A00743).

⁸³ 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).

⁸⁴ Exhibit A-1-17 (E.D.'s Preliminary Response to Public Comments), page 19 (Bates Stamp A00294).

⁸⁵ Exhibit A-1-17 (E.D.'s Preliminary Response to Public Comments), page 19 (Bates Stamp A00294).

⁸⁶ Exhibit A-1-17 (E.D.'s Preliminary Response to Public Comments), page 19 (Bates Stamp A00294).

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.⁸⁷

Testifying for Capps, Daryl Knowles expressed concerns that odors would be generated during times of sludge pumping,⁸⁸ but Far Hills' engineer Tim Hardin clarified that sludge transfer would be done using a vacuum connection and therefore no odors would result from sludge transfer operations.⁸⁹ Moreover, Mr. Knowles testified that the only way to eliminate odors is with covered wastewater treatment units with odor control devices,⁹⁰ but such odor control technology is not required, and has not been utilized, in any wastewater plants to his knowledge, primarily because of the expense of such technology.⁹¹

With respect to odor nuisances and other types of nuisances, the TCEQ 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.⁹² Specifically with respect to nuisance conditions potentially caused by the excessive buildup of nutrients resulting in algae blooms in the receiving cove, the TCEQ permit writer testified that the special permit provision requiring a 9-foot submergence of the discharge pipe was added to the draft permit specifically to ensure against such a nuisance condition.⁹³ The E.D.'s Response to Public Comments similarly describes the special draft permit provision and the reason for it as follows: "Upon review of the information [concerning the location of the discharge point], and in order to obtain adequate mixing and dilution and to preclude nuisance conditions at the discharge point, TCEQ staff has

⁸⁷ Exhibit A-1-17 (E.D.'s Preliminary Response to Public Comments), page 19 (Bates Stamp A00294).

⁸⁸ Hearing Transcript, pages 458-460.

⁸⁹ Hearing Transcript, pages 495 (lines 2-20).

⁹⁰ Exhibit P-3 (Prefiled Testimony of Daryl Knowles), page 11.

⁹¹ Hearing Transcript, page 459 (lines 9-15); page 459 (line 25) through page 460 (line 6).

⁹² Exhibit A-1 (Oral Deposition of June Ella Martinez), page 47 (lines 16-21) (Bates Stamp A00049).

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

included a requirement in the draft permit” that establishes a minimum depth of 9 feet below normal operating pool elevation for the top of the discharge pipe [emphasis added].⁹⁴ That special permit provision is set forth as “Other Requirements” provision No. 8 on page 24 of the draft permit.⁹⁵ Since there was no other evidence indicating that the proposed facility would cause a nuisance, the applicant has demonstrated that no nuisance conditions will result from the proposed facility.

4. Far Hills Has Fully Demonstrated Compliance With All Facility Design Requirements.

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.⁹⁶ As described in the application, 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.⁹⁷ 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.⁹⁸ 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

⁹⁴ Exhibit A-1-17 (E.D.’s Preliminary Response to Public Comments), page 28 (Bates Stamp A00303).

⁹⁵ A-1-18 (Draft Permit), page 24 (Bates Stamp A00331).

⁹⁶ Exhibit A-1 (Oral Deposition of June Ella Martinez), page 19 (line 24) through page 20 (line 15) (Bates Stamp A00021-A00022).

⁹⁷ Exhibit A-5 (Prefiled Testimony of Tim Hardin), page 9 (Bates Stamp A00618); Exhibit A-5-TBH-4 (FAR HILLS Application) (Bates Stamp A00748 – A00757).

⁹⁸ Exhibit A-5-TBH-4 (FAR HILLS Application) (Bates Stamp A00774 – A00782).

50% design flow conditions so as to allow its companion component to be taken out of service if needed.⁹⁹

In accordance with normal TCEQ procedures for reviewing wastewater discharge permit applications, TCEQ staff determined that the design information submitted by the applicant did meet the design criteria for wastewater plants.¹⁰⁰ TCEQ 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, 2005.¹⁰¹ 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.¹⁰² If a permittee does not submit final designs and specifications meeting TCEQ design criteria, the facilities will not be allowed to be constructed.¹⁰³

Capps' witness Daryl Knowles testified that more technical detail should be provided by Far Hills 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.¹⁰⁴ Mr. Knowles also believed that Far Hills 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.¹⁰⁵ Mr. Knowles also admitted that he did not

⁹⁹ Exhibit A-5-TBH-4 (FAR HILLS Application) (Bates Stamp A00776 – A00777).

¹⁰⁰ 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).

¹⁰¹ Exhibit A-5 (Prefiled Testimony of Tim Hardin), page 14 (Bates Stamp A00623).

¹⁰² 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).

¹⁰³ Hearing Transcript, page 486 (lines 9-19).

¹⁰⁴ Hearing Transcript, page 436 (lines 11-15).

¹⁰⁵ Hearing Transcript, page 436 (line 21) through page 437 (line 8).

know for sure whether such case-specific information actually exists, only that it “could have” existed.¹⁰⁶ 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.¹⁰⁷

Mr. Knowles also complained that the firm pumping capacity of the proposed plant could not be determined because of a lack of information on the capacity of the pumps; however, the TCEQ permit writer in this case testified that design specifications for lift station pumps are not required to be submitted with the application.¹⁰⁸ Mr. Knowles also complained that the application did not contain the configuration of the air distribution piping, but Far Hills’ engineer testified that the proposed plant will not use distribution piping but instead would use air injection through blowers.¹⁰⁹ The 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.¹¹⁰

Mr. Knowles also assumed that if a wastewater plant had 10% infiltration and inflow (“I&I”) in its collection lines, the lift station at the Far Hills plant could overflow, but he admitted that this logic could apply to any wastewater plant in the state of Texas and that there is nothing in the design of the Far Hills plant indicating that I&I would be a problem any greater than experienced at any other plant.¹¹¹

Mr. Knowles also objected that the proposed plant is not designed to hydraulically pass the design 2-hour peak flow with one aeration basin out of service in Phase 1 and Phase 2; to do

¹⁰⁶ Hearing Transcript, page 437 (lines 9-20).

¹⁰⁷ Hearing Transcript, page 484 (line 14) through page 485 (line 13).

¹⁰⁸ Hearing Transcript, page 25 (lines 6-18).

¹⁰⁹ Hearing Transcript, page 489 (line 19) through page 490 (line 2).

¹¹⁰ Hearing Transcript, page 490 (lines 2-15).

¹¹¹ Hearing Transcript, page 446 (lines 1-11); page 447 (line 20) through page 448 (line 5).

so, the Far Hills plant would need two aeration basins in Phase 1 and three aeration basins in Phase 2.¹¹² However, Mr. Knowles admitted that TCEQ does not require this and that it is not typical to see two aeration basins at every stage for facilities of this type.¹¹³ Although it is highly unlikely that an aeration basin would ever have to be taken out of service,¹¹⁴ 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,¹¹⁵ or possibly bringing in a temporary modular or portable treatment unit.¹¹⁶ In the case of Far Hills' proposed plant, the applicant's engineer testified that Far Hills' clarifiers are oversized by a factor of 2 and that the aeration basins are oversized almost by a factor of 2;¹¹⁷ therefore substantial extra-capacity does exist in the proposed Far Hills plant to handle those situations where a unit would have to be taken out of service or where excessive I&I occurred.

The above survey of the testimony in this case concerning the design of the proposed plant clearly shows that Far Hills has submitted design plans and specifications for its treatment plant that fully comply with TCEQ's design criteria. There is no evidence that any aspect of such design plans and specifications fail to meet TCEQ's design criteria. Mr. Knowles' complaints about Far Hills' proposed plant are not based on violation of any applicable TCEQ requirements, but only on what he personally would like to see in an ideal regulatory world.

¹¹² Hearing Transcript, page 438 (lines 9-23).

¹¹³ Hearing Transcript, page 438 (lines 24-25); page 431 (lines 1-3).

¹¹⁴ Hearing Transcript, page 490 (line 22) through page 491 (line 10).

¹¹⁵ Hearing Transcript, page 443 (line 25) through page 444 (line 17).

¹¹⁶ Hearing Transcript, page 472 (line 9) through page 474 (line 6); page 492 (lines 1-20).

¹¹⁷ Hearing Transcript, page 492 (line 17) through page 493 (line 25).

V. CONCLUSION AND PRAYER

For the reasons set forth in these Exceptions and in its post-hearing briefing, Far Hills Utility District prays that its 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 fact and conclusions of law proposed by the ALJ be rejected; that the findings of fact and conclusions of law attached as Exhibit 1 to Far Hills' Exceptions be adopted by the Commission; and that Permit No. 14555-001 be issued.

Respectfully submitted,

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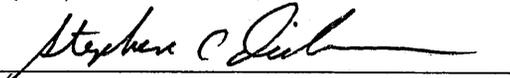
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This is to certify that on this the 28th day of December, 2006, a true and correct copy of the foregoing document was forwarded to the following persons in accordance with TCEQ and SOAH rules by the means indicated:

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