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CHIEF CLERKS OFFICE

LOWERRE & FREDERICK
ATTORNEYS AT LAW
44 East Avenue, Suite 100
Austin, Texas 78701
(512) 469-6000 • (512) 482-9346 (facsimile)
Mail@LF-LawFirm.com

June 8, 2007

Ms. LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711

Via hand-delivery

Re: *SOAH Docket No. 582-06-0568, TCEQ Docket No. 2005-1899-MWD;
Application of Far Hills Utility District for Permit No. WQ0014555001*

Dear Ms. Castañuela,

Enclosed please find an original and eleven copies of Protestant Capps Concerned Citizens' Response to the Applicant Far Hills Utility District's Motion to Reopen the Record in the above-titled matter. Please call if you have any questions.

Sincerely,



Eric Allmon
LOWERRE & FREDERICK
Attorneys for Capps Concerned Citizens

Enclosure
cc: Service List

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

2007 JUN -8 PM 4:09

IN THE MATTER OF THE
APPLICATION OF FAR HILLS
UTILITY DISTRICT FOR PERMIT
NO. WQ0014555001

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BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL QUALITY

CHIEF CLERKS OFFICE

**PROTESTANT CAPPs CONCERNED CITIZENS' RESPONSE TO APPLICANT
FAR HILLS UTILITY DISTRICT'S MOTION TO REOPEN THE RECORD**

TO THE HONORABLE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

Comes Now Protestant Capps Concerned Citizens (Capps or Protestant) and files this its
Response to Applicant's Motion to Reopen the Record.

I. Applicable Standard

The reopening of an agency record must be considered carefully, and the burden
to justify reopening the record lies upon the movant. As the Texas Commission on
Environmental Quality (TCEQ) recently stated, "A state agency (like a court) must be
able to close the record of a case even to relevant evidence proffered by a party who
opposes the outcome. If this were not the rule, final decisions could be long delayed."¹
Because a gap will inevitably exist between the close of evidence and the decision of the
agency, or a decision of the agency and consideration of that decision in court, TCEQ has
noted that, "a proffer should usually be rejected even if the proffered evidence is
relevant."²

A motion to reopen the evidentiary record of a contested case hearing is
analogous to a motion to present new evidence in civil court under Texas Rule of Civil

¹ Defendant Texas Commission on Environmental Quality's Brief in Response to Plaintiff's Motion
Regarding Additional Evidence, at p. 9, filed April 11, 2007 in the matter of Tan Terra Environmental
Services, Inc. vs. Texas Commission on Environmental Quality, Cuase No. D-1-GN-06-002425, 345th Dist.
Ct, Travis County. (Attachment A to this brief).

² Id.

Procedure 270.³ In considering such a motion, the court is called upon to consider whether: (1) due diligence was exercised by the movant in obtaining the evidence; (2) the additional evidence is decisive; (3) allowing additional evidence will cause undue delay; and (4) allowing additional evidence will cause an injustice.⁴ A consideration of these factors shows that Applicant's motion should be denied.

II. Wetlands Document

A. The Proffered Evidence Goes Only to the Extent of the Jurisdiction of the United States Army Corps of Engineers, and Thus is of Limited Relevance, and Certainly Not Decisive

Applicant confuses the question before the commission – the existence of wetlands at the site -- with a question of whether Clean Water Act § 404 *jurisdictional* wetlands exist at the site. Applicant's evidence provides no new information that would contradict the evidence in the record on the extent of relevant wetlands at the site.

1. TCEQ Must Consider All Wetlands at the Site

The wetlands issue in this case involves the application of 30 TAC § 309.13(b), which states that "A wastewater treatment plant may not be located in wetlands. (This prohibition is not applicable to constructed wetlands)." This regulation includes all wetlands, not just federally jurisdictional wetlands. Applicant's motion ignores this fact.

2. "Wetlands" and "Jurisdictional Wetlands" Are Not Equivalent Terms

As considered by both the US Army Corps of Engineers (the Corps) and TCEQ, determining the location of "wetlands" is a technical question that involves evaluating the presence of certain vegetation, soil types, and hydraulic features. Both TCEQ, and the

³ See e.g. *Pretzer v. Motor Vehicle Board* 125 S.W.3d 23, 41 (Tex. App. – Austin, 2003) *aff'd in part, rev'd in part on other grounds*.

⁴ *In re A.F.*, 895 S.W.2d 481, 484 (Tex. App. – Austin, 1995).

Corps, treat this question as different from a question of where jurisdictional wetlands exist at a site. TCEQ has previously noted:

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.⁵

Consistent with this position of the TCEQ, the Corps of Engineers Wetlands Delineation Manual states:

Determination that a water body or wetland is subject to interstate commerce and therefore is a "water of the United States" shall be made *independently* of procedures described in this manual.⁶

This reflects the view of both agencies that wetlands may exist that are not federal jurisdictional wetlands.

3. TCEQ's Water Quality Jurisdiction is Broader than Corps' Jurisdiction

The extent of wetlands under the Corps' jurisdiction is not controlling because TCEQ derives its water quality jurisdiction from an additional source to that of the Corps. The Corps' source of jurisdiction is the definition of "navigable waters" at 33 USC § 1362(7), and the prohibition on the discharge of any pollutant at 33 USC § 1311(a). TCEQ also has jurisdiction over these areas insofar as it is implementing a delegated federal program. TCEQ, however, has additional jurisdiction and responsibilities derived from the definition of "water" or "water in the state" at Texas Water Code § 26.001(5):

groundwater, percolating or otherwise, lakes, bays, ponds, impounding reservoirs, springs, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Gulf of Mexico inside the territorial limits of the state, and all other bodies of surface water, natural or artificial, inland or coastal, fresh or salt, *navigable or nonnavigable*, and including the beds and banks of all

⁵ AN ORDER Regarding the Application by Tan Terra Environmental Services, Inc., L.L.C. for a Permit to Operate a Type I Municipal Solid Waste Facility (Permit No. MSW-2305); TCEQ Docket No. 2004-0743-MSW; SOAH Docket No. 582-05-0868. April 20, 2006. Finding of Fact No. 29 at p.5 (Attachment C to Capps' Previously Filed Exceptions to the Proposal for Decision).

⁶ Ex. P-2C, p. 2. (emphasis added).

watercourses and bodies of surface water, that are wholly or partially inside or bordering the state or inside the jurisdiction of the state. (emphasis added)

This definition is much broader than the federal definition of “Navigable Waters,” and TCEQ’s jurisdiction is consequently more broad.

4. Applicant’s Site is a “Wetland” Under Texas Water Code §§ 11.502 and 11.506

Section 11.502 of the Texas Water Code explicitly includes swamps in listing the types of areas that qualify as a wetland. This is precisely how applicant has described the property at issue.⁷ Section 11.506 of the Texas Water Code requires that TCEQ employ a definition of “wetlands” that does not conflict with the federal definition. This statutory provision ensures that Texas does not imperil its delegated authority by failing to protect wetlands that would be protected by federal law. The approach to determining the presence of wetlands previously employed by TCEQ, adopted by the administrative law judge (ALJ) in this case, and advocated by both the Protestants and OPIC in this case, applies a definition of term “wetland” that is the same as the federal definition of that term for all practical purposes.

4. Dr. Jacob Has Not Stated that a Corps’ Jurisdictional Decision Is Determinative of the Question Before the Commission

Applicant misrepresents the testimony of Dr. John Jacob, Protestant’s witness. Dr. Jacob made clear that the Corps’ determination of its own jurisdiction serves a distinct purpose, and that a determination of wetlands for state purposes must follow state law because the jurisdiction of the Corps and the TCEQ are not necessarily co-extensive.⁸

⁷ Ex. P-14, p. 2 (last full paragraph)

⁸ Tr. P. 300, l. 3-20.

B. Applicant Failed to Diligently Obtain Exhibit A

Despite being aware early in the permitting process that the location of obvious wetlands on the site would be an issue, Applicant did not seek to obtain the evidence at issue until after the deadline for its pre-filed testimony. An applicant should be required to investigate issues prior to the submission of an application, and certainly make reasonable efforts to prepare evidence before the deadline for pre-filed testimony.

1. Wetland Information Was Required in the Application Submitted in August, 2004.

In submitting its application in August of 2004, Applicant represented that its proposed facility met all location requirements relative to wetlands. It was aware of the need to examine the wetlands question at this early stage of the process. Yet, Applicant sought no jurisdictional wetlands determination from the Corps.

2. The Existence of On-Site Wetlands Was Confirmed During the Comment Period in February of 2005, With Applicant Acknowledging Soon Thereafter that the Site is "Low and Swampy."

By public comments filed in February of 2005, Capps notified both TCEQ and Applicant that the Corps had determined that jurisdictional wetlands existed on the site, although no exact delineation of those wetlands had been made. Then, in May of 2005, Far Hills itself acknowledged that, "[t]he property in question is low and swampy and has an easement recorded on it by the San Jacinto River Authority to prevent any homes from being constructed in the floodplain."⁹ At this point, nine months after submission of the application, Applicant knew the Corps believed jurisdictional wetlands to exist on-site, and Applicant knew that the site was subject to frequent inundation. Yet, Applicant made

⁹ Ex. P-14.

no efforts to obtain a jurisdictional wetlands determination by the Corps. In November of 2005, Applicant requested a direct referral of the application to the State Office of Administrative Hearings (SOAH), a step that would reduce the amount of time remaining until the consideration of evidence on the matter. Yet, Applicant still did not even begin the process of seeking any wetlands determination from the Corps.

3. Applicant First Sought A Jurisdictional Wetlands Determination From the Corps After Its Deadline for Pre-Filed Testimony.

Applicant's pre-filed testimony was due on April 21, 2006.¹⁰ On that date, Applicant filed brief testimony from Nicholas Laskowski, who primarily said that he was still working on evaluating the wetlands issue. Over Capps' objection, the judge allowed Applicant to submit additional testimony regarding wetlands on May 4, 2006. This testimony shows that Applicant did not submit a request to the Corps for a jurisdictional wetlands determination until May 3, 2006.¹¹ This was over 20 months after Applicant had represented to TCEQ in its application that it had adequately investigated the wetlands issue.

4. Applicant's Persistent Disregard of the Wetlands Issue, and Late Pursuit of a Corps Opinion, Reflects a Lack of Diligence

The fact that Exhibit A to Applicant's motion did not exist at the time of the hearing on the merits at SOAH is a result of Applicant's lack of diligence in developing this evidence. Applicant was on notice that it needed to investigate this issue to complete its application form in August of 2004, and was repeatedly made aware of the wetlands issue as a concern during the permitting process. Yet, Applicant waited until 10 days

¹⁰ ALJ's Order No. 2, Issued January 18, 2006.

¹¹ Ex. A-7, p. A00924, 1. 16.

after its deadline for pre-filed testimony to seek this opinion from the Corps. Applicant's failure to exercise diligence in pursuing this evidence warrants denial of Applicant's motion to now reopen the record for its acceptance.

C. Admission of the Additional Evidence will Cause an Undue Delay

Protestants have actively participated in the TCEQ permitting process since the filing of the application in August of 2004. Until the process is complete, Protestants continue to be burdened with litigation costs and with demands on their time. Roy Zboyan is a member of Capps Concerned Citizens, and his land has been recently condemned by Applicant as the site for the proposed plant. A denial of the permit will remove the public necessity for this land,¹² and could thus result in the return of his land to him. Thus, the status of his private property rights remain in question as long as the TCEQ's decision is delayed.

Furthermore, a delay in the TCEQ's decision only further delays the development of a regional solution to Far Hills wastewater needs. The sooner the application is denied the sooner Far Hills can begin the process of moving on to select an alternate site within its own boundaries,¹³ or renewing negotiations with MCUD No. 2 to find a way to continue to combine wastewater service.

D. Admission of the Additional Evidence Will Cause an Injustice

As a party with the burden of proof, Applicant should fully evaluate the sufficiency of its application prior to submitting that application. For the public participation process to have any meaning, an Applicant should be expected to examine

¹² *Roy W. Zboyan v. Far Hills Utility District*, 2007 Tex. App. LEXIS 3190, *18 (Tex. App. – Beaumont, 2007) (“It is possible that Far Hills will ultimately be denied a permit on this basis and that the declared purpose for the exercise of eminent domain will be lost.”)

¹³ The ALJ prohibited Protestant from obtaining or presenting evidence regarding alternative sites available for the plant within Far Hills' own district boundaries. ALJ's Order No. 3, issued April 11, 2006.

its application in light of the issues raised to address any potential problems. For the contested case hearing process to be fair to all parties, an applicant should be expected to develop its direct case for presentation during the hearing, and not delay seeking evidence it believes to be relevant until after its deadline to file its direct case. To excuse Applicant for its failure to present the evidence at issue during the hearing in this case is to encourage all applicants for permits from TCEQ to submit applications, and evidence, they know to be insufficient and only put forth the effort to present a case if they later find that their initial effort was inadequate. A process that allows such gamesmanship by applicants only results in unfairly compounding the costs of the process for the State and the public.

Admission of the additional evidence will impose a significant burden on the other parties. As discussed below, remand to SOAH will be required, and another hearing with the opportunity for discovery by all parties and the submission of additional evidence by all parties. This would require the outlay of significant additional costs, and significant additional time, by the other parties that would be wholly attributable to Applicant's failure to timely meet its obligations in the process. Thus, if a remand is ordered, Protestant prays that Applicant be ordered to reimburse all other private parties for all reasonable additional expenses and fees incurred as a result of the remand.

III. Not Only Did Applicant Fail to Diligently Seek Information From MCUD No. 2, Applicant Improperly Withheld Earlier Information From Montgomery County Utility District No. 2 That Was Contrary to Exhibit B.

In accordance with standard TCEQ practice, the initial application materials included a specific questionnaire that Applicant was required to send to each potential

wastewater service provider within three miles of the proposed facility.¹⁴ Consistent with the standard form, Applicant sent a questionnaire to Montgomery County Utility District No. 2 (MCUD No. 2) asking:

Does the Montgomery County Utility District 2 have sufficient capacity to accept the volume of wastewater described above [the permitted volume of 250,000 GPD]?

Would the Montgomery County Utility District 2 be agreeable to expanding its facility (if necessary) in order to accept the volume of wastewater described above?

By letter dated September 17, 2004, the Engineers for MCUD No. 2 responded to this inquiry by stating that MCUD No. 2 *would* be agreeable to expanding its facility to accept the proposed volume of wastewater, but it would need to further evaluate this option.¹⁵ ***Applicant never provided this response to TCEQ:***

Q(Allmon): [Y]ou received nothing that was a copy of correspondence from [MCUD No. 2]?

A(Martinez): No, I didn't, not from Montgomery county MUD No. 2, no.¹⁶

In the application, Applicant simply provided TCEQ a blank form with regard to MCUD No. 2, and never supplemented this information.¹⁷

Had Applicant timely disclosed this information, TCEQ could have most effectively examined the potential for the regionalization of wastewater service. While the continued combination of flows is certainly still possible, the state policy of regionalization would have been easier to implement at a time when MCUD No. 2 was still in the early stages of planning how to approach the expansion and repair of its Seven

¹⁴ Ex. A-1, p. 52, l. 18-23. Ex. A-1, Attachment 17, p. 8.

¹⁵ Ex. P-5, Ex. 1 thereto (Deposition of Larry Folk, President of MCUD No. 2)(Attachment B to this brief).

¹⁶ Ex. A-1, p. 54, l. 1-4.

¹⁷ Ex. A-1, Exhibit 2 thereto, at p. A00146 (Attachment C to this Brief).

Coves plant. TCEQ's regionalization review is rendered meaningless if any applicant can undermine that review simply by denying TCEQ information on alternative providers while the costs of using an alternative provider increases.

Regionalization can hardly be more relevant than a situation where an applicant is already receiving service from an alternate provider, and wants to discontinue that service and instead build a new plant. The resulting proliferation of wastewater facilities exemplifies the reasons that the Legislature requires TCEQ to consider regionalization. By failing to timely disclose information relevant to this issue, Applicant has undermined TCEQ's ability to implement this policy. Applicant now asks TCEQ to reward its decision to hide information from TCEQ. The evidence involved shows nothing more than the unsurprising fact that Applicant's efforts to delay consideration of MCUD No. 2 as an alternative provider has impacted the costs of using this alternative provider. Applicant should not be allowed to benefit from this increase in costs that is a direct result of its failure to disclose contrary information in the early stages of the permitting process.

IV. Any Reopening Must Include Remand

If the Commission determines to reopen the record to accept additional evidence, Protestant objects to the admission of any additional evidence without remand of the matter to SOAH for the opportunity for all parties to conduct discovery regarding the additional evidence, present additional evidence of their own, and participate in an additional evidentiary hearing where additional evidence and testimony may be

presented. Anything less would violate Protestant's right to cross-examination,¹⁸ and Protestant's right to respond and present evidence on each issue involved in the case.¹⁹

V. The Permit May Not Be Issued Without A Remand to SOAH

Applicant repeatedly asserts that wetlands and regionalization are the sole contested issues in this case. This is not true. The agreed briefing outline for closing arguments, adopted by the ALJ in Order No. 7, set forth the following issues of the case:

- (1) Has Applicant demonstrated that all applicable state water quality standards will be met?
- (2) Has Applicant demonstrated compliance with all applicable anti-degradation requirements?
- (3) Has Applicant demonstrated compliance with all applicable odor requirements?
- (4) Has Applicant demonstrated that construction and operation of the facility will not cause a nuisance?
- (5) Has Applicant demonstrated compliance with all applicable location standards with regard to wetlands?
- (6) Has Applicant complied with all applicable regionalization requirements?
- (7) Has Applicant demonstrated compliance with all applicable facility design requirements?
- (8) Has Applicant demonstrated that the permit includes adequate monitoring and reporting requirements?
- (9) Has Applicant demonstrated that its compliance history does not justify denial or modification of the permit application?
- (10) Is the discharge point adequately defined in the permit?²⁰

Of these ten, the ALJ only addressed issues (5) and (6). Yet, Capps presented evidence that challenged the application on each of these grounds. In particular, the volume of evidence and argument in the record addressing (1), (2) and (7) above is no less than the volume of evidence and argument addressing wetlands and regionalization.

It would be arbitrary and capricious for TCEQ to grant the permit without findings of fact and conclusions of law on each issue raised in the hearing. The

¹⁸ Tex. Gov't Code § 2001.087.

¹⁹ Tex. Gov't Code § 2001.051(2).

²⁰ ALJ's Order No. 7, issued August 3, 2006.

commission simply cannot defend its decision on an issue without having made such findings with respect to that issue. Further, it would not be appropriate for the Commission to make its judgment, and adopt findings of fact and conclusions of law, based on a cold record without first obtaining findings of fact and conclusions of law from the ALJ that was actually present for the presentation of evidence.

Thus, should the commission determine to overrule the ALJ's findings on the wetlands and regionalization issues, Protestant prays that the Commission remand the matter to SOAH for the ALJ to develop findings of fact and conclusions of law on each of the other issues raised in the case as designated in the ALJ's outline for closing arguments. To minimize the burden on the parties and to preserve the record, this remand would be for the development of findings of fact and conclusions of law only, without the opportunity for the admission of any additional evidence on those issues or the need for any additional briefing from the parties.

VI. Conclusion

For the reasons stated above, Capps respectfully prays that Applicant's Motion to Reopen the Record be DENIED.

Respectfully Submitted,

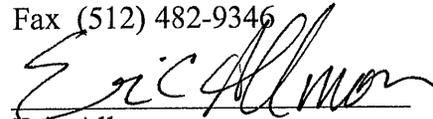
LOWERRE & FREDERICK

44 East Ave, Suite 100

Austin, TX 78701

Tel. (512) 469-6000

Fax (512) 482-9346



Eric Allmon

State Bar No. 24031819

Certificate of Service

I, Eric Allmon, hereby state that a true and correct copy of the foregoing **Protestant Capps Concerned Citizen's Response to Applicant Far Hill's Motion to Reopen the Record** has been sent on this day, the 8th day of June, 2007, by U.S. first-class mail and/or facsimile transmission to those listed below.



Eric Allmon

For the Applicant:

Stephen C. Dickman
Kelly, Hart & Hallman
301 Congress Ave., Ste. 2000
Austin, Texas 78701-2944
(512) 495-6413
(512) 495-6401 (fax)

For Ralph and Marcia Sandall:

Ralph and Marcia Sandall
10213 South Valley Drive
Willis, Texas 77318
(936) 856-7651
(936) 856-8008 (fax)

For the Public Interest Counsel:

Christina Mann
Office of the Public Interest Counsel
Texas Commission on Environmental
Quality
MC-103
P.O. Box 13087
Austin, Texas 78711
(512) 239-6363
(512) 239-6377 (fax)

For SOAH:

The Honorable Carol Wood, ALJ
State Office of Administrative Hearings
P.O. Box 13025
Austin, Texas 78711-3025
(512) 475-4994 (fax)

For the San Jacinto River Authority:

W. B. Kellum
San Jacinto River Authority
P.O. Box 329
Conroe, Texas 77305
(936) 588-7111
(936) 588-1114 (fax)

For the TCEQ Chief Clerk:

LaDonna Castanuela
Chief Clerk, TCEQ, MC-105
P.O. Box 13087
Austin, Texas 78711-3087
(512) 239-3311 (fax)

Courtesy Copy For the Executive Director:

John Williams
TCEQ, MC-175
P.O. Box 13087
Austin, Texas 78711
(512) 239-0600
(512) 239-3434 (fax)

Exhibit A: April 11, 2007 Brief of TCEQ in
Tan Terra Environmental Services, Inc., vs. Texas
Commission on Environmental Quality,
Cause No. D-1-GN-06-002425
in the 345th Judicial District of Travis County, Texas

NO. D-1-GN-06-002425

TAN TERRA ENVIRONMENTAL SERVICES

V.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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IN THE DISTRICT COURT

TRAVIS COUNTY, TEXAS

345TH JUDICIAL DISTRICT

Filed in The District Court of Travis County, Texas

APR 11 2007
At Amalia Rodriguez-Mendoza, Clerk

DEFENDANT TEXAS COMMISSION ON ENVIRONMENTAL QUALITY'S BRIEF IN RESPONSE TO PLAINTIFF'S MOTION REGARDING ADDITIONAL EVIDENCE

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant, the Texas Commission on Environmental Quality (TCEQ), through the Office of the Attorney General of Texas, submits this Brief in Response to Plaintiff's Motion Regarding Additional Evidence.

I. Factual Background

This is an appeal of a TCEQ order denying the application of Tan Terra Environmental Services, Inc. (Tan Terra) for a permit to construct and operate a municipal solid waste landfill. Before the TCEQ issued its order, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH) conducted a contested case hearing and issued a proposal for decision (PFD), recommending that the application be denied.

Tan Terra filed this lawsuit June 30, 2006. The TCEQ filed the administrative record September 21, 2006. Tan Terra then waited to file its Motion Regarding Additional Evidence until the lawsuit had been pending for more than seven months.

II. Legal Background

Judicial review of this agency decision is under the substantial evidence standard, and the scope of review is confined to the administrative record.¹ However, under APA § 2001.175(e), a reviewing court may go outside the administrative record and itself “receive evidence of procedural irregularities alleged to have occurred before the agency that are not reflected in the record.” Under a different provision, APA § 2001.175(c), a court may remand a case for the agency to take additional evidence, if the movant proves there were good reasons for its failure to present the evidence while the agency had jurisdiction, and further proves that the evidence is material. Tan Terra invokes both APA provisions.

III. Argument

Tan Terra invokes APA § 2001.175(e) and, in the alternative, § 2001.175(c). The Court should deny relief under both provisions.

A. Tan Terra is not helped by APA § 2001.175(e), which concerns procedural irregularities not reflected in the record.

The APA prohibits certain *ex parte* contacts between TCEQ commissioners and others.² Tan Terra asks to present two pieces of evidence directly to this Court, claiming they demonstrate “*ex parte* communications and improper pressure on TCEQ by members of the

1. APA §§ 2001.174, -.175. This is part of the Texas Administrative Procedure Act (APA). Hereinafter, citations to the APA will be in the form “APA § 2001.____.”

2. APA § 2001.061(barring *ex parte* communications except on notice and opportunity to participate).

Texas Legislature.”³ The evidence Tan Terra proposes to present are a May 12, 2006, letter⁴ from Senator Eddie Lucio, Jr. and an April 12, 2006, letter from Representative Juan M. Escobar. Both letters are addressed to Kathleen White, Chairman of the TCEQ, and one is also addressed to TCEQ Commissioner Larry Soward. Tan Terra’s request is peculiar, and should be denied, because the two letters already are included in the administrative record transmitted to the Court (with a copy of the record index sent to counsel for Tan Terra) on September 21, 2006. The Lucio letter is record item 162a, and the Escobar letter is item 162. In keeping with typical practice, the letters were read into the hearing record by legislative staff at the April 12, 2006, agenda meeting where the Commissioners considered Tan Terra’s application (and where Tan Terra’s attorney was present⁵). A tape of the agenda meeting is in the record, so the letters are in the record in oral form as well as written.⁶ Because the evidence is already in the record,⁷ plaintiff will be able to rely on it to make any argument

3. Plaintiff’s Motion Regarding Additional Evidence, p. 3.

4. The month on this letter is almost certainly a typographical error on the part of Sen. Lucio’s office. It was read into the TCEQ record *April* 12, 2006, so it could not have been written in *May*.

5. Tan Terra’s attorney had notice of the agenda meeting, was present, participated, and did not object to presentation of the letters. A.R. Vol. 8, Item 159 (notice of April 12, 2006, agenda meeting); Vol. 16, Item 5 (tape of April 12, 2006, agenda).

6. A.R. Vol. 16, Item 5 (tape of April, 12, 2006, agenda).

7. The administrative record is typically a broader and more case-specific compilation than Plaintiff contends. *See, e.g.*, 30 Tex. Admin. Code § 80.118 (the administrative record sent to SOAH includes any agency document determined by the executive director necessary to reflect administrative and technical review of an application).

over which the Court has jurisdiction.⁸ APA § 2001.175(e) concerns matters “not reflected in the record” and does not authorize a reviewing court to re-admit matters already in the record.

Tan Terra also proposes to present to this Court an affidavit of Hector H. Mendieta. It, too, could not concern a procedural irregularity *not reflected in the record*.⁹ The Mendieta affidavit (along with the ruling Tan Terra seeks to undermine with it) is in the administrative record.¹⁰ APA § 2001.175(e) does not authorize its re-admission into evidence in this lawsuit.

There is another reason the affidavit should not be admitted. As to it and two other pieces of evidence plaintiff wants to introduce—a map and a 2006 Federal Emergency Management Agency (FEMA) publication¹¹ — the plaintiff has not made a relevant

8. The TCEQ observes that the argument Tan Terra wants to make concerning the Escobar letter is beyond the Court’s jurisdiction. Plaintiff did not complain about the Escobar letter as an improper *ex parte* contact either in the Original Petition or its motion for rehearing. A court may not grant relief not supported by the pleadings. *See, e.g., Cunningham v. Parkdale Bank*, 660 S.W.2d 810 (Tex. 1983); *Stewart A. Feldman & Assoc. v. Indus. Photographic Supply, Inc.*, No. 14-01-00249-CV, 2002 WL 31042586 (Tex.App.—Houston [14th Dist.] Sept. 12, 2002, no pet.)(not designated for publication)(plaintiff may not sustain favorable judgment on claim not pleaded). A claim of procedural irregularity known at the time must have been raised in the motion for rehearing or the alleged error is not preserved. *Hammack v. Publ. Util. Comm’n*, 131 S.W.3d 713, 732 (Tex. App.—Austin 2004, pet. denied).

9. APA § 2001.175(e).

10. The affidavit was used by an *amicus* to make the same legal argument Tan Terra intends to make, i.e. that the scavenging rule was not intended to cover scavenging by birds. A.R. Vol. 8, Item 169 (Brief of Amicus Curiae of the Lone Star Chapter of the Solid Waste Association of North America, filed with the TCEQ May 26, 2006). At best, the affidavit is weak legislative history.

11. It is difficult to comprehend how the FEMA publication would be helpful to the point Tan Terra wishes to make. On page 4, it shows that the index is just an element of a flood map. *See* Exhibit 4 to Plaintiff’s Motion Regarding Additional Evidence.

allegation of *procedural irregularity* within the meaning of APA § 2001.175(e). Tan Terra offers these materials supposedly to show a so-called “dramatic departure from clear regulatory standards”¹² and writes as though such a departure would amount to a “procedural irregularity.” But unlike complaints about such things as bribe-taking or certain prohibited *ex parte* contacts, an allegation about departure from standards does not complain of a procedural irregularity.¹³ It is an allegation of mere error (e.g., violating a statutory provision, employing unlawful procedure, or acting in excess of the agency’s authority, within the meaning of APA § 2001.174), one for which an agency order may be reversed if the error is proven and shown to prejudice substantial rights of the plaintiff.¹⁴

For the reasons stated, the Court should not admit any of the proffered evidence under the authority of APA § 2001.175(e).

B. Tan Terra is not helped by APA § 2001.175(c).

Tan Terra argues, in the alternative, that the Court should remand this matter and direct the TCEQ to take the items into evidence. Tan Terra relies on APA § 2001.175(c), which provides:

12. Plaintiff’s Motion Regarding Additional Evidence, p. 4.

13. See, e.g., *City of Stephenville v. Tex. Parks & Wildlife Dep’t*, 940 S.W.2d 667 (Tex. App.—Austin 1996, writ denied)(trading vote on a permitting matter for reappointment to commissioner position discussed as procedural irregularity); *Clopton v. Mountain Peak Water Supply Co.*, No. 03-97-00383-CV, 1998 WL 873014 (Tex. App.—Austin Dec. 17, 1998, no pet.)(discussing *ex parte* contacts as APA § 2001.175(e) procedural irregularity); and *Young Chevrolet, Inc. v. Tex. Motor Vehicle Comm’n*, 974 S.W.2d 906, 914 (Tex. App.—Austin 1998, pet. denied)(describing prohibited *ex parte* communications as APA § 2001.175(e) procedural irregularity).

14. APA § 2001.174.

A party may apply to the court to present additional evidence. If the court is satisfied that the additional evidence is *material* and there were *good reasons* for the failure to present it in the proceeding before the state agency, the court may order that the additional evidence be taken before the agency on conditions determined by the court.

(Emphasis added.) The section, thus, requires the moving party to show that any additional evidence is material and there were good reasons for that party's failing to present it.

1. Three of the proffered items already were presented.

The section makes no provision for remanding a case for a party to present evidence, such as the two letters and the affidavit, that already were presented to the agency and are part of the administrative record.

2. All the evidence fails the good reasons test.

Moreover, a movant fails the "good reasons" test if the evidence could have been adduced at the time of the proceeding.¹⁵ Tan Terra's argument necessarily fails the good reasons prong as to the letters and affidavit because they could have been (and, in fact, were) presented to the TCEQ. The other proffered documents¹⁶ also could have been presented to

15. *San Diego Indep. Sch. Dist. v. Cent. Educ. Agency*, 704 S.W.2d 912, 914-15 (Tex. App.—Austin 1986, writ ref'd n.r.e.) (affirming district court finding that there was no reason the evidence could not have been discovered and presented at the agency proceeding), *Buttes Res. Co. v. R.R. Comm'n*, 732 S.W.2d 675, 681 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.) (affirming district court's refusal to remand for presentation of additional evidence, writing that one possible trial court no-remand rationale—that proffered well log information had been available, because it had existed at the time of the agency proceeding—was supportable).

16. Tan Terra claims the documents show that (1) TCEQ previously accepted "a FEMA Flood Insurance Rate Map index as sufficient to demonstrate that another landfill site is not in a 100-year floodplain"; and (2) a map index is a map.

the ALJ at the SOAH hearing,¹⁷ to the TCEQ Commissioners as part of plaintiff's presentation on April 12, 2006, and with Tan Terra's motion for rehearing. The issue to which they relate was hotly debated in the course of the contested case hearing: Tan Terra claimed that the requirement to show that the landfill site was not in a 100 year floodplain could be met by offering a FEMA floodplain map index, but a protestant argued it was necessary to introduce an actual map.¹⁸

3. All the evidence fails the materiality test.

With respect to § 2001.175(c)'s materiality criterion,¹⁹ not many Texas appellate decisions touch upon it. A representative case is *Smith Motor Sales, Inc. v. Texas Motor Vehicle Commission*,²⁰ which concerned appeal of a grant of a motor vehicle dealer license to Gunn Chevrolet. Protestants against the application raised a license eligibility issue for the first time in district court, and sought remand to the agency for the taking of additional evidence. They theorized that Gunn had lacked license eligibility because of not having been a "person," meaning an existing corporation, when it filed its application. The district court ruled that there was no requirement for an applicant to be a person, but that even if the

17. For example, once the issue was raised, Tan Terra could have called Mr. Mendieta as a rebuttal witness. See 30 Tex. Admin. Code § 80.117(b), which provides, "In all cases, the applicant shall be allowed a rebuttal."

18. See, e.g., A.R. Vol. 6, Item 140, page 39-42 (PFD; ALJ discussion of floodplain issue).

19. This subsection's statutory predecessor was Tex. Rev. Civ. Stats. Ann. art. 6252-13a, § 19(d)(2) (Vernon Supp. 1993).

20. 809 S.W.2d 268, 270 (Tex. App.—Austin 1991, writ denied).

requirement existed, the proffered evidence failed to establish that Gunn was *not* a person. “Under these circumstances, *the proffered evidence could not have affected the commission’s decision*. Therefore, the district court did not abuse its discretion in denying the request for remand.”²¹

Another materiality case is *Texas Oil & Gas Corp. v. Railroad Commission*,²² in which the Austin Court of Civil Appeals held that a movant passed the materiality test, because seismic data it proffered to the district court could have caused the agency to reach a conclusion contrary to its previous conclusion.²³ (The district court’s refusal to remand, however, was upheld, because the movant failed the “good reasons” test.)

Almost all of the § 2001.175(c) cases located by the undersigned have resulted in no remand.²⁴

21. *Id.* (Emphasis added.)

22. 575 S.W.2d 348 (Tex. Civ. App.—Austin 1978, no writ).

23. *Id.* at 352 .

24. See *Tex. Oil & Gas Corp. v. R.R. Comm’n*, 575 S.W.2d 348 (Tex. Civ. App.—Austin 1978, no writ), *San Diego Indep. Sch. Dist. v. Cent. Educ. Agency*, 704 S.W.2d 912 (Tex. App.—Austin 1986, writ ref’d n.r.e.), *Buttes Res. Co. v. R.R. Comm’n*, 732 S.W.2d 675 (Tex. App.—Houston [14th Dist.] 1987, writ ref’d n.r.e.), *Smith Motor Sales, Inc. v. Tex. Motor Vehicle Comm’n*, 809 S.W.2d 268 (Tex. App.—Austin 1991, writ denied), *Gulf States Utils. Co. v. Coal. of Cities for Affordable Util. Rates*, 883 S.W.2d 739 (Tex. App.—Austin 1994), *rev’d on other grounds*, 974 S.W.2d 887 (Tex. 1997), *Ringer v. Tex. State Bd. of Med. Exam’rs*, No. 03-99-00021-CV, 1999 WL 996767 (Tex. App.—Austin Nov. 4, 1999, pet. denied), *City of Port Arthur v. Sw. Bell Tel. Co.*, 13 S.W.3d 841 (Tex. App.—Austin 2000, no pet.), *In re Tex. Bd. Of Chiropractic Exam’rs*, No. 05-04-01061-CV, 2004 WL 2087178 (Tex. App.—Dallas Sep. 20, 2004, no pet.), *Bexar Metro. Water Dist. v. Tex. Comm’n on Env’tl. Quality*, 185 S.W.3d 546 (Tex. App.—Austin 2006, pet. denied).

But see *Indep. Sav. & Loan Ass’n v. Gonzales County Sav. & Loan Ass’n*, 568 S.W.2d 463 (Tex. Civ. App.—Austin 1978, writ ref’d n.r.e.), *Pub. Util. Comm’n v. Houston Lighting and Power Co.*, 715 S.W.2d 98 (Tex. App.—Austin 1986), *aff’d in part & rev’d in part on other grounds*, 748 S.W.2d 439 (Tex. 1987).

The TCEQ urges that based on the caselaw, statutory language, and policy considerations, this Court should view all of Tan Terra's proffered documents as not material. The § 2001.175(c) materiality requirement should be understood as involving a high hurdle — something well beyond mere relevance. A state agency (like a court) must be able to close the record of a case even to relevant evidence proffered by a party who opposed the outcome. If this were not the rule, final decisions could be long delayed. As the Austin Court of Appeals wrote in a slightly different context, "Absent . . . agency discretion [to close the record], the almost inevitable gap between agency hearing and order would allow the continued introduction of evidence of new circumstances such that an evidentiary hearing might never be concluded."²⁵ The same concept applies to the inevitable gap between the agency order and final judicial review. Thus, a proffer should usually be rejected even if the proffered evidence is relevant.

To meet the § 2001.175(c) materiality standard, evidence should be sufficient to enable the reviewing court to conclude that it could have affected the agency's order²⁶ — that

25. Tan Terra's contingent request for the Court to order the Commission to admit into evidence updated information on the "status of mineral operations," is an example of the sort of continuous updating of the record that generally should not be ordered by a reviewing court. *See City of San Antonio v. Tex. Dep't of Health*, 738 S.W.2d 52, 54 (Tex. App.—Austin 1987, writ denied)(whether to reopen an administrative record is generally left to the sound discretion of the agency; absent such discretion, repeated reopening of record might mean evidentiary hearing will never be concluded). *See also Buttes Res. Co.*, 732 S.W.2d at 680, where the court of appeals affirmed the Railroad Commission's ratification of a hearing officer's reliance on an evidentiary record that had closed some weeks before the Commission order, even though the relevant statute required the agency to make a certain determination "as of the date of its order." The appellate panel wrote, "Evidence cannot be continuously updated to be absolutely current at the date the Commission issues its order."

26. *Smith Motor Sales, Inc.*, 809 S.W.2d at 270.

it tended to show, in other words, that the agency reached the wrong decision and should have reached a contrary conclusion.²⁷ The court should require a definite showing by the movant and should not assume that the proffered evidence could affect the agency's decision.²⁸

These standards promote finality of agency decisions and discourage parties from prolonging administrative and judicial proceedings by proffering new evidence.²⁹

IV. Conclusion

Both the taking of additional evidence in district court concerning procedural irregularities not reflected in the record, and remand for the taking by the TCEQ of additional evidence, would be improper here. The Court should deny Tan Terra relief under the APA § 2001.175(e) aspect of its motion because the materials offered already are in the record or do not concern a genuine allegation of procedural irregularity within the meaning of the section. Furthermore, no relief should be afforded under APA § 2001.175(c) because three of Tan Terra's items already were presented to the agency and the others fail the good reason

27. *Cf. Buttes Res. Co.*, 732 S.W.2d at 681 (discussing testimony, presented to the trial court, to the effect that proffered data did not indicate that the Railroad Commission had made a wrong estimate of productive acreage); *cf. also Smith Motor Sales, Inc.* 809 S.W.2d at 270 (evidence failed to establish that applicant was not a "person").

28. *Cf. Smith Motor Sales, Inc.*, 809 S.W.2d at 270 (evidence did not establish the conclusion movant wanted and therefore it "could not have affected the commission's decision").

29. Recognition that § 2001.175(c)'s "good reasons" requirement also sets a high bar would encourage parties to develop their best evidence and present it to the agency, rather than waiting for the agency decision, then presenting the evidence in court and insisting on remand. *See Tex. Oil & Gas Corp.*, 575 S.W.2d at 352 (court declined to remand for presentation of additional evidence to the agency, when the evidence had existed when the administrative proceeding was under way but had been withheld by a party for tactical reasons).

and materiality tests for remanding to the TCEQ for taking additional evidence. Accordingly, for the various reasons stated in this response and its conclusion, the motion should be denied.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

JEFF L. ROSE
Deputy Attorney General for Litigation

KAREN W. KORNEILL
Assistant Attorney General
Chief, Natural Resources Division


NANCY ELIZABETH OLINGER
Assistant Attorney General
State Bar No. 15254230


CYNTHIA WOELK
Assistant Attorney General
State Bar No. 21836525

Natural Resources Division
P. O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Tel: (512) 463-2012
Fax: (512) 320-0052

ATTORNEYS FOR TEXAS
COMMISSION ON
ENVIRONMENTAL QUALITY

CERTIFICATE OF SERVICE

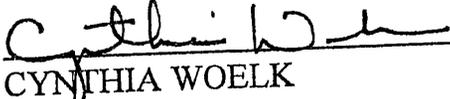
I certify that a true and correct copy of the foregoing Original Answer of Defendant Texas Commission on Environmental Quality has been sent by method indicated, to those persons listed below, this 11th day of April, 2007:

Brent W. Ryan (via fax to 512 327-6566)
McElroy, Sullivan & Miller, LLP
P.O. Box 12127
Austin, TX 78711

Richard W. Lowerre & Marisa Perales (via fax to 512 482-9346)
Lowerre & Kelly
44 East Ave., Suite 101
Austin, Texas 78701

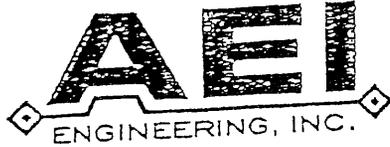
Enrique Valdivia (via fax to 210 212-3772)
Texas Rio Grande Legal Aid, Inc.
1111 North Main Ave.
San Antonio, TX 78212

Helen Currie Foster & John B. McFarland (via fax to 512 480-5888)
Graves, Dougherty, Hearon & Moody
P.O. Box 98
Austin, TX 78767



CYNTHIA WOELK

Exhibit B: Exhibit 1 to Exhibit P-5,
Letter from MCUD #2 Engineer to Far Hills Engineer,
September 17, 2004



September 17, 2004

Langford Engineering, Inc.
1080 West Sam Houston Parkway North
Suite 200
Houston, Texas 77042-5014
Attention: Mr. James E. King, P.E.

Re: Far Hills Utility District
Application For Discharge Permit
LEI Job No. 233-013.101

Dear Mr. King:

You have requested a response to the enclosed questionnaire regarding the ability of Montgomery County Utility District No. 2 to provide wastewater capacity to Far Hills Utility District. This request was for a proposed Phase I facility in the amount of 250,000 gallons per day. In response to this request, we offer the following comments for your consideration:

"Does the Montgomery County Utility District 2 have sufficient capacity to accept the volume of wastewater described above?"

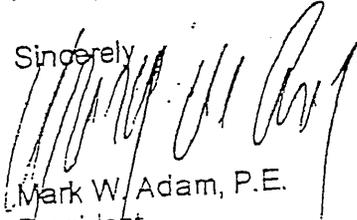
No, the existing Montgomery County Utility District No. 2 facility is currently permitted for an average daily flow of 250,000 gallons per day.

"Would the Montgomery County Utility District 2 be agreeable to expanding its facility (if necessary) in order to accept the volume of wastewater described above?"

Yes. However, Montgomery County Utility District 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.

Should there be any questions regarding this response, please contact Mr. Mark W. Adam, P.E. at 281/350-7027 or Mr. Dick Yale at 713/653-7314

Sincerely,


Mark W. Adam, P.E.
President

Attachment

Exhibit C: Form regarding MCUD#2, submitted in the
Far Hills Application

FAX TRANSMISSION

LANGFORD ENGINEERING, INC.
1080 WEST SAM HOUSTON PARKWAY NORTH, SUITE 200
HOUSTON, TEXAS 77043-5014
(713) 461-3530
FAX: (713) 932-7505

To: AEI Engineering, Inc. Date: 23 Jun 04
Fax #: 281-350-7035 Pages: (1), including this cover sheet.
From: James E. King, P.E.
Subject: Far Hills Wastewater Facility – Application for Discharge Permit
LEI Job No. 233-013-101

COMMENTS:

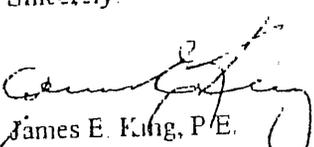
In accordance with the requirements of the TCEQ, this questionnaire is being sent to all Utility Districts within three miles of the proposed Far Hills Utility District wastewater treatment facility to determine the feasibility of regionalizing the area's wastewater collection, treatment and disposal. The proposed Phase I facility will treat 250,000 gallons per day.

Please answer the following questions at your earliest convenience and return via fax.

- YES NO Does the Montgomery County Utility District 2 have sufficient capacity to accept the volume of wastewater described above?
- YES NO Would the Montgomery County Utility District 2 be agreeable to expanding its facility (if necessary) in order to accept the volume of wastewater described above?

Thank you in advance for your prompt assistance in this matter. If you have questions or require additional information, please contact this office.

Sincerely,


James E. King, P.E.

A00146