

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge
November 27, 2006

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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

Derek Seal
General Counsel
Texas Commission on Environmental Quality
PO Box 13087
Austin Texas 78711-3087

Re: SOAH Docket No. 582-06-0568; TCEQ Docket No.2005-1899-MWD; In Re:
Application of Far Hills Utility District for Water Quality Permit No. Wq001455-001
in Montgomery County

Dear Mr. Seal:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the original documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than December 18, 2006. Any replies to exceptions or briefs must be filed in the same manner no later than December 28, 2006..

This matter has been designated **TCEQ Docket No.2005-1899-MWD; SOAH Docket No. 582- 06-0568.** All documents to be filed must clearly reference these assigned docket numbers. Copies of all exceptions, briefs and replies must be served promptly on the State Office of Administrative Hearings and all parties. Certification of service to the above parties and an **original and eleven copies** shall be furnished to the Chief Clerk of the Commission. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

Carol Wood

Carol Wood
Administrative Law Judge

CW/ds
Enclosures
cc: Mailing List

William P. Clements Building
Post Office Box 13025 ♦ 300 West 15th Street, Suite 502 ♦ Austin Texas 78711-3025
(512) 475-4993 Docket (512) 475-3445 Fax (512) 475-4994
<http://www.soah.state.tx.us>

**STATE OFFICE OF ADMINISTRATIVE HEARINGS
WILLIAM P. CLEMENTS BUILDING
300 West Fifteenth Street
Austin, Texas 78701
Phone (512) 475-4993
Facsimile (512) 475-4994**

SERVICE LIST

**AGENCY: TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
(TCEQ)**

STYLE/CASE: FAR HILLS UTILITY DISTRICT

SOAH DOCKET NUMBER: 582-06-0568

TCEQ DOCKET NUMBER: 2005-1899-MWD

STATE OFFICE OF ADMINISTRATIVE
HEARINGS

CAROL WOOD
ADMINISTRATIVE LAW JUDGE

PARTIES

REPRESENTATIVE/ADDRESS

COURTESY COPY

**John E. Williams
Texas Commission on Environmental Quality
MC-175
P.O. Box 13087
Austin, TX 78711-3087
Tel 512/239-0600
Fax 512/239-3434
512/239-0606**

**OFFICE OF PUBLIC INTEREST COUNSEL
OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

**Christina Mann
Office of the Public Interest Counsel
Texas Commission on Environmental Quality
MC-103
P.O. Box 13087
Austin, TX 78711-3087
Tel 512/239-6363
Fax 512/239-6377**

SAN JACINTO RIVER AUTHORITY

**W. B. Kellum
Manager
San Jacinto River Authority
P.O. Box 329
Conroe, TX 77305
Tel: 936-588-7111
Fax: 936-588-3043**

FAR HILLS UTILITY DISTRICT

Stephen C. Dickman
Attorney
Kelly, Hart & Hallman
301 Congress Ste. 2000
Austin, TX 78701-2944
Tel: 512-495-6413
Fax: 512-495-6401

CAPPS (CONCERNED CITIZENS)

Eric Allmon
Attorney
Lowerre & Frederick
44 East Avenue Ste 101
Austin, TX 78701
Tel: 512-482-9345
Fax: 512-482-9346

RALPH & MARCIA SANDALL

10213 Valley Drive South
Willis, TX 77318-6446
Tel: 936-856-7651
Fax: 936-856-8008

xc: **Docket Clerk, State Office of Administrative Hearings**
Docket Clerk, Office of the Chief Clerk, TCEQ, Fax No. (512) 239-3311

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

APPLICATION OF FAR HILLS	§	BEFORE THE STATE OFFICE
UTILITY DISTRICT FOR WATER	§	
QUALITY PERMIT NO. WQ001455-001	§	OF
IN MONTGOMERY COUNTY	§	
	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

I. INTRODUCTION

Far Hills Utility District (Applicant, Far Hills, or District) has applied to the Texas Commission on Environmental Quality (Commission or TCEQ) for a proposed new Texas Pollutant Discharge Elimination System (TPDES) permit, authorizing the discharge of treated domestic wastewater at a daily average flow not to exceed 500,000 gallons per day (gpd) from Applicant's facility to be located in Montgomery County, Texas. The treated effluent would be discharged via pipeline to Lake Conroe in Segment No. 1012 of the San Jacinto River Basin. The designated uses for Segment No. 1012 are high aquatic life uses, public water supply, and contact recreation. For reasons explained below, the Administrative Law Judge (Judge) recommends that the permit be denied.

II. PROCEDURAL HISTORY

Far Hills filed its application on August 31, 2004, and on December 2, 2004, the Commission's Executive Director (ED) made a preliminary decision that the proposed permit would meet all statutory and regulatory requirements. On November 8, 2005, Applicant requested that the matter be directly referred to the State Office of Administrative Hearings.

The preliminary hearing was held in Conroe, Texas, on January 11, 2006. After determining that proper notice had been given, the Judge designated Far Hills, represented by Stephen Dickman; the ED, represented by John Williams; the Commission's Public Interest

Counsel (PIC), represented by Christina Mann; Protestants Capps Concerned Citizens (Capps), represented by Eric Allmon, and Ralph and Marcia Sandall (Sandalls) as parties to the proceeding. Although the ED participated in the preliminary hearing, the ED later withdrew as a party after reaching an agreement with Far Hills regarding disputed provisions of the draft permit. The Judge also designated the San Jacinto River Authority (River Authority), represented by Reed Eichelberger, general manager, as a party; however, the River Authority participated mainly as an observer and did not attend the hearing on the merits.

The hearing on the merits was held in Austin, Texas, from June 26 to June 28, 2006. After the parties submitted final arguments on September 25, 2006, the record closed.

III. FACILITY DESCRIPTION AND PERMIT CONDITIONS

The proposed Far Hills facility would be an activated sludge process plant operated in the complete mix mode. Treatment units in the interim phase are proposed to include a lift station, a manual bar screen, an aeration basin, a clarifier, a sludge digester, and a chlorine contact chamber. The final phase is proposed to include the following treatment units: a lift station, a manual bar screen, two aeration basins, two clarifiers, two sludge digesters, and two chlorine contact chambers. The plant would be located north of Virginia Street at the intersection of Cude Cemetery Road and Virginia Street in Montgomery County.

The draft permit authorizes a discharge of treated domestic wastewater at an interim volume not to exceed a daily average flow of 0.25 million gallons per day (MGD) and a final volume not to exceed a daily average flow of 0.5 MGD.

The proposed effluent limitations in the interim and the final phase of the draft permit, based on a 30-day average, are the following: 10 milligrams per liter (mg/l) carbonaceous

biochemical oxygen demand (CBOD), 15 mg/l total suspended solids (TSS), 3 mg/l ammonia nitrogen, and 4.0 mg/l minimum dissolved oxygen (DO). The effluent must contain a chlorine residual of at least 1.0 mg/l and must not exceed a chlorine residual of 4.0 mg/l after a detention time of at least 20 minutes, based on peak flow.

IV. APPLICABLE LAW

TEX. WATER CODE (Water Code) § 26.003 reads in pertinent part as follows:

It is the policy of this state. . . to maintain the quality of water in the state consistent with the public health and enjoyment, the propagation and protection of terrestrial and aquatic life, and the operation of existing industries. . . *to encourage and promote the development and use of regional and areawide waste collection, treatment, and disposal systems* to serve the waste disposal needs of the citizens of the state; and to require the use of all reasonable methods to implement this policy. (Emphasis added.)

In pertinent part, Water Code § 26.0282 reads as follows:

In considering the issuance. . . of a permit to discharge waste, the commission may deny or alter the terms of conditions of the proposed permit. . . based on consideration of need, including. . . the availability of existing or proposed areawide or regional waste collection, treatment, and disposal systems not designated as such by commission order. . . .

Water Code § 11.502(1) states, in pertinent part, the following:

The definition of the term “wetlands” within the State of Texas, for the purposes of the Clean Water Act. . . and all Texas laws, rules, and regulations adopted pursuant to Chapter 2001, Government Code and interpretation and implementation of any kind whatsoever of both federal and state laws by agencies of the state. . . relating to wetlands, means an area (including a swamp, marsh, bog, prairie pothole, or similar area) having a predominance of hydric soils that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support and that under normal

circumstances supports the growth and regeneration of hydrophytic vegetation.

Commission rule, 30 TEX. ADMIN. CODE (TAC) § 309.11(10), reads as follows:

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

According to 30 TAC § 309.13(b), in applicable part:

A wastewater treatment plant unit may not be located in wetlands.

V. MAJOR ISSUES

A. **Whether issuance of the proposed permit would further the State policy for promoting regionalization, as set forth in Water Code § 26.082.**

The Judge recommends the Commission find that issuance of the proposed permit would not further the State's regionalization policy.

1. **Background**

Far Hills Utility District was created as a water control and improvement district by Commission order in 1972, and the District encompasses about 327 acres on a peninsula in the southeast quadrant of Lake Conroe in Montgomery County. It is located near the City of Willis and in the extraterritorial jurisdiction of the City of Conroe, but not within the corporate limits of any city. The District's boundaries include seven residential subdivisions for which it provides water and wastewater services.¹

¹ Ex. A-4 at 3.

Far Hills provides water service to 320 residential connections and sewer service to 302 residential connections. The District currently serves a population of approximately 591 people. Its projections of future growth indicate that it will serve a total of 1,021 connections at full build-out of the subdivisions that Far Hills serves.²

Currently, Far Hills' wastewater is being treated by Montgomery County Utility District (MCUD) No. 2 at its Seven Coves Plant. Far Hills' collection lines transport wastewater to a Far Hills sewer main located along Cude Cemetery Road. After passing through a Far Hills lift station located at Virginia Street, the wastewater is conveyed about two miles north and west to the Seven Coves Plant (Plant).³

In January 2004, MCUD No. 2 told Far Hills that the Plant and lift station needed major repairs. A few months later, MCUD No.2 advised the District that the Plant was reaching its permitted flow capacity and would have to be expanded in the very near future.⁴ The engineer of MCUD No. 2 estimated repair costs of approximately \$568,500, which did not include the cost of a plant expansion for which Far Hills' share would equal about one million dollars. MCUD No. 2 asked Far Hills to fund about 29 percent of the repair costs.⁵ The District decided it was more cost effective to terminate its agreement with MCUD No. 2 and build its own wastewater treatment plant.⁶ Far Hills' contract with MCUD No. 2 to provide wastewater service expires in 2012.⁷

² Ex. A-4 at 4.

³ Ex. A-5 at 4.

⁴ Ex. A-4 at 4-5.

⁵ Ex. A-4 at 5.

⁶ Ex. A-5 at 4.

⁷ Ex. P-5 at 7.

2. Applicant's Argument

Applicant asserts there are no entities within three miles of its proposed facility that have the ability or willingness to serve the District. TCEQ requires a permit applicant to make inquiries of other wastewater plants located within three miles of the proposed facility to determine whether they have the capacity and willingness to provide the wastewater service to meet the needs of the applicant. Far Hills notes it sent inquiries to the five existing wastewater providers within three miles and received negative responses from three of the providers,⁸ no response from Montgomery County Utility District No. 3, and a "qualified response" from MCUD No. 2.

In a letter dated September 17, 2004, MCUD No. 2 stated that currently it did not have sufficient capacity to accept the District's proposed wastewater volume of 250,000 gallons per day (gpd) and that it would have to properly evaluate the possibility of expanding its facility to accommodate the District's requested volume.⁹ Although that same letter noted that MCUD No. 2 would consider expanding its plant to accept Far Hills' request for service, Applicant argues the subsequent agreement between Far Hills and MCUD No. 2 in November 2004¹⁰ that allowed the District to withdraw from the Plant "forecloses" the possibility – that is, makes it legally impossible – for MCUD No. 2 to continue serving Far Hills beyond 2012. Additionally, Applicant contends that TCEQ does not have jurisdiction to evaluate alternatives to what an applicant has requested.

3. Capps' Argument

Capps argues that Far Hills has not established a need for its proposed facility. Capps contends that wastewater service is already being provided by an alternate service provider, that is,

⁸ Montgomery County Utility District No. 8, Lake Conroe Hills Municipal Utility District (MUD), and Point Aquarius MUD.

⁹ Ex. A-5-6.

¹⁰ The evidence shows that the agreement was executed "somewhere around" October 29, 2004. Ex. P-5 at 19.

MCUD No.2; the infrastructure is already in place to continue providing that service; and MCUD No.2, the alternate service provider, has expressed a willingness to expand its plant in the future to continue accepting Far Hills' wastewater. Citing the following testimony of Larry Folk, president of the board of MCUD No. 2, Capps asserts that Applicant has failed to demonstrate that MCUD No. 2 refused to provide service to the District after 2012:

Q. (Allmon) How long has [MCUD No. 2] provided [wastewater service to Far Hills]?

A. (Folk) I don't know exactly, but I think our – maybe our original agreement was in the early 1970s.

Q. Okay. When does that contract expire?

A. I believe the year 2012.

Q. . . . Has [MCUD No. 2] ever stated it would refuse to extend service past 2012?

A. No.¹¹

Capps also contends that, because Far Hills requested that MCUD No. 2 cease service to the District in order to facilitate its permit application, the District cannot use its agreement with MCUD No. 2 to withdraw from the Plant to demonstrate a need for service. Capps points out that only after Far Hills submitted its application for a new permit did Far Hills and MCUD No. 2 negotiate an agreement that would allow Applicant to withdraw from the Plant.

Furthermore, Capps asserts that, contrary to Applicant's argument, the Commission can evaluate alternative service providers and may deny a permit application on the basis of regionalization if alternative providers exist.

¹¹ Ex. P-5 at 7.

4. Sandalls' Argument

The Sandalls contend that Far Hills has provided conflicting information regarding the need for constructing a new wastewater treatment facility. They note that, in December 2004, Far Hills informed its residents that it had decided to build its own facility because the District would need to invest capital to expand the plant of MCUD No. 2, yet the District would have no input or control in the construction or operation of the new facility.¹² However, the Sandalls point out that Mr. Folk indicated that MCUD No. 2 had not ruled out allowing Far Hills to have representation on the board controlling the Plant.¹³ Thus, the Sandalls argue that Far Hills' application for a permit should be denied because it has provided conflicting information regarding the need for the new facility.

5. River Authority's Position

In setting forth its position, the River Authority reiterated what it had stated in a March 24, 2005, letter to TCEQ; that is, the Directors are concerned "with the continued development of small 'tin-can' treatment plants around Lake Conroe." The River Authority noted that its directors prefer "that a regional facility be developed at an appropriate location to serve the multiple existing and future developments" in the area. The River Authority also stated that it recognizes "that there are differences in costs and that there will be reluctance on the part of some who are involved to lose total control and share facilities, but the improvements in maintenance and manning of regional facilities is worth the effort."¹⁴

¹² Ex. S-1, Attachment 8 at 1.

¹³ Ex. P-5 at 15.

¹⁴ River Authority's closing argument (letter dated August 31, 2006).

6. Judge's Analysis

The Judge concurs with Capps' assertion that Far Hills has failed to establish a need for the proposed facility. Contrary to Applicant's argument, there is an entity within three miles of the proposed facility that has the ability and willingness to serve the District. The Judge notes that, at the time Far Hills filed its application for a permit on August 31, 2004, MCUD No. 2 had neither refused to serve the District nor had it and Far Hills signed an agreement that would allow the District to withdraw from the Plant's service. Furthermore, MCUD No. 2 has never stated that it would refuse to extend service to Far Hills beyond 2012, when the contract between Far Hills and MCUD No. 2 expires. Indeed, Mr. Folk, president of the MCUD board, testified that the board has "an obligation as caretakers of an agency of the state" to do whatever the Commission requires it to do.¹⁵

Furthermore, it is not legally impossible for MCUD No. 2 to continue serving Far Hills. Pursuant to Water Code § 26.003, the Commission has the authority to promote the use of regional waste treatment. With that authority, the Commission can demand that Far Hills continue to send its wastewater to the Plant for treatment and can require MCUD No. 2 to continue treating the District's wastewater. Because wastewater service for the District is already being provided by MCUD No. 2; the infrastructure is already in place to continue providing that service, and MCUD No. 2 has expressed a willingness to expand the Plant to continue accepting Far Hills' wastewater, the Judge recommends the Commission find that issuance of the proposed permit would not further the State policy of promoting regionalization and thus the permit should be denied.

B. Whether the proposed wastewater treatment plant would be located in wetlands.

The Judge recommends the Commission find that the proposed treatment plant would be partially located in wetlands.

¹⁵ Ex. P-5 at 24.

1. Applicant's Argument

Applicant argues that none of its proposed wastewater treatment units will be located in a wetlands. Far Hills contends that Nicholas Laskowski, a certified wetlands delineator, performed a jurisdictional wetlands determination in accordance with the United States Army Corps of Engineers (Corps) standards. He ascertained that, of the 4.287-acre tract, only 0.0045 acres would be classified as "adjacent headwater wetlands" and 0.0082 acres would be classified as "headwaters."¹⁶ According to Applicant, neither of these two small areas are located on or near the site where Fall Hills proposes to construct its wastewater treatment units. (*See* Attachment A, Laskowski map.)

Far Hills asserts that the wetlands delineation report prepared by Capps' expert, John Jacobs, Ph.D., "exhibits a surprising number of deficiencies and careless errors all tending to cast doubts on the reliability of his delineation of wetlands." According to Applicant, the following are the deficiencies and errors committed by Dr. Jacobs:

- a. He did not define a specific study area or determine its acreage.
- b. He failed to determine wetland acreage through surveying or using GPS instruments.
- c. Dr. Jacobs' delineation of his wetland boundary was based only on hydrologic conditions, not documented observations of hydric soils or hydrophytic vegetation.
- d. He failed to include documentation of hydric soils in his wetland delineation.

Far Hills argues that these deficiencies and errors indicate that Dr. Jacobs' wetland delineation was not performed in accordance with Corps requirements; thus, his "facile conclusion about the location of wetlands is highly suspect."

¹⁶ Ex. A-7-NL-5, Appendix F.

2. Capps' Argument

Capps asserts that Far Hills' proposed wastewater treatment units will be partially located in wetlands, as depicted by Exhibit P-2D. (See Attachment B, Jacobs' depiction of wetlands location, outlined in red.) According to Capps, Dr. Jacob testified that the most prominent indicators for the presence of wetlands in this case are vegetation, water marks, and the hydrology. He further noted that the requirement for hydric soils is also met.¹⁷

Capps contends that wetlands vegetation exists throughout the area Dr. Jacob designated as wetlands. Capps points out that, at Observation Point 2, 100 percent of the plant species Dr. Jacob observed were consistent with wetland vegetation, while 80 percent of the species present at Observation Point 3 were consistent with wetland vegetation.¹⁸ Furthermore, Capps notes that, included among the wetland vegetation observed by Dr. Jacob at Point 3, was *planera aquatica*, an obligate, meaning a plant species found 99 percent of the time within wetlands.¹⁹ Capps also asserts that, although Dr. Jacob only formally documented his observations at three locations, he walked around the remainder of the area which he designated as wetlands to confirm the presence of wetland vegetation.²⁰

Additionally, Capps argues that Mr. Laskowski observed wetland vegetation in many areas of the site. For example, at observation point Up1, 83 percent of the vegetation species he observed were OBL (obligate wetland plants), FACW (facultative wetland plants), or FAC (facultative plants).²¹ Similarly, at Point Up2, he found that 88 percent of the species met this

¹⁷ Tr. v.2 at 273.

¹⁸ Ex. P-2B, Appendix A.

¹⁹ Ex. P-2C at 14.

²⁰ Tr. v. 2 at 233.

²¹ Ex. A-7 at A00957.

criteria;²² at Point Up3, he determined that 80 percent of the species met this criteria;²³ at Point Up4, he found that 60 percent met this criteria;²⁴ and at Point UP5, he determined that 100 percent of the species met this criteria.²⁵ Mr. Laskowski concluded that these species are not associated with wetlands in this location. Yet, Capps notes that Dr. Jacob testified that, according to the Corps' 1987 *Wetlands Delineation Manual* (Manual), if 50 percent or more of the plants meet this criteria, "then you have to say it is hydrophytic vegetation."²⁶

Capps also asserts Dr. Jacob determined that wetland hydrology exists throughout the area he designated as wetlands. Capps contends that Observation Point No. 2 is the closest data point to the District's proposed treatment units;²⁷ that Dr. Jacob observed a clear watermark on a tree at this point; and that he documented his observation photographically.²⁸ Dr. Jacob testified that the water mark is a "very clear indicator that could only be derived from standing water for significant periods of time, probably weeks."²⁹ Capps asserts that the presence of a watermark on a tree is considered by the Corps to be a "primary indicator" with regards to hydrology, "which alone is adequate to demonstrate the presence of wetland hydrology when accompanied by findings of hydrophytic vegetation and hydric soils."³⁰

Furthermore, Capps argues that the landscape of the site indicates those areas where wetland hydrology exists. Capps contends that, in this case, a flat, water-gathering area covers

²² A-7 at A000959.

²³ A-7 at A000961.

²⁴ A-7 at A000963.

²⁵ A-7 at A000965.

²⁶ Tr. v. 2 at 245. *See* Ex. P-2C at 17.

²⁷ Ex. P-2B at 8.

²⁸ Ex. P-2B at 10.

²⁹ Tr. v. 2 at 236-237.

³⁰ Capps' closing argument, citing Ex. P-2C at 34.

much of the site, while more convex, water-shedding areas exist in the northeast and southeast corners of the site. And, in order to account for the changes in landscape at the site, Dr. Jacob oriented his observation points to account for both the site's flat areas and its sloped areas.³¹ By observing "the lay of the land," Dr. Jacob determined that the flat areas of the site where water tends to gather extended into those eastern areas of the site where he has depicted wetlands.³²

Capps also argues that the observation of inundation at a site is another primary indicator that an area is a wetland. Capps contends that the record includes evidence of inundation at this site, such as Mr. Laskowski's photographs of inundation in eastern areas of the site³³; photographs presented by Capps' witness, Patsy Clemons³⁴; and Applicant's own map showing the site to be normally inundated with water in a continuous swath from the western boundary to the eastern boundary.³⁵

Moreover, citing the Manual, Capps argues that drift lines are a primary indicator of wetland hydrology.³⁶ Capps notes that Dr. Jacob observed such lines at both Points 2 and 3.³⁷ Lastly, again citing the Manual, Capps asserts that drainage patterns in wetlands are a primary indicator of wetland hydrology³⁸ and Dr. Jacob observed such patterns at both Observation Points 2 and 3.³⁹

³¹ Tr. v. 2 at 234-235.

³² Tr. v. 2 at 275-277.

³³ Ex. A-7 at A00953, Photos 9 & 10.

³⁴ Exs. P-1G, P-1H, P1I.

³⁵ Ex. A-7 at A00937.

³⁶ Ex. P-2C at 32-33.

³⁷ Ex. P-2B, Appendix A, p. 1 of data forms for Observation Points 2 and 3.

³⁸ Ex. P-2C at 33-34, esp. at paragraph (6).

³⁹ Ex. P-2B, Appendix A, p.1 of data forms for Points 2 and 3.

Regarding wetland soils, Capps argues the evidence demonstrates the presence of hydric soils at the site in the area where the wastewater treatment units are proposed to be located. Capps points out that Dr. Jacob observed that the soils in the area had distinct gleyed colors, for example 5Y 3/1, which is consistent with wetland status.⁴⁰ Capps also asserts, “Applicant did not meaningfully dispute the presence of hydric soils at the site in areas designated as wetlands by Dr. Jacob.”⁴¹

As for Applicant’s criticism of Dr. Jacob’s delineation report, Capps responds that his deviations from the procedures in the Manual were minor, with no consequence for his ultimate conclusions regarding the location of wetlands at the site, that is, that there are continuous wetlands “right up to the stream.”⁴² With regard to the extent of Dr. Jacob’s study area, Capps argues that Applicant has not disputed that the area studied by Dr. Jacob included the areas where the wastewater treatment units are proposed; hence, the extent of his study area beyond those areas is irrelevant. Similarly, Capps contends that a determination of the exact acreage occupied by wetlands on the site is not necessary to determine whether treatment units are to be located within wetland areas. Also, Capps asserts that, contrary to Applicant’s argument, Dr. Jacob considered and stressed that all three factors or parameters set out in the Manual, that is, hydrophytic vegetation, hydric soils, and wetland hydrology, must be present to meet the definition of wetlands.⁴³

3. PIC’s Argument

The PIC argues that Far Hills has failed to establish by a preponderance of the evidence that its wastewater treatment units will not be located in wetlands, as required by 30 TAC

⁴⁰ Ex. P-2B at 3.

⁴¹ Capps’ closing argument at p.33.

⁴² Tr. v. 2 at 262-263.

⁴³ Tr. v. 2 at 272-273.

§ 309.13(b). According to the PIC, the record reflects ample lay discussion of the nature of the geomorphology at the site, such as Ms. Clemons' testimony concerning a series of photographs showing the area inundated for some period of time.⁴⁴ The PIC also asserts that the testimony and wetlands delineation of Dr. Jacob – an experienced wetland scientist and professional geoscientist who has developed and taught short courses on wetland delineations – is more persuasive and informative than that of Mr. Laskowski, a recently certified wetlands delineator who is not a certified soils scientist. Furthermore, the PIC argues that Far Hills has only presented evidence regarding the location of federal jurisdiction wetlands rather than proving that the proposed wastewater treatment units will not be located in wetlands. Capps, on the other hand, has provided evidence that strongly contradicts even Applicant's narrow presentation of evidence. For these reasons, the PIC argues that Far Hills has failed to demonstrate compliance with all applicable TCEQ location standards with regard to wetlands.

4. Sandalls' Argument

The Sandalls assert that Far Hills has presented misleading information regarding the site for the proposed treatment facility. They note that Far Hills sent an informational letter to the District's residents and property owners in August 2004, in which Far Hills described the site as "low and swampy and in a flood plain."⁴⁵ However, the Sandalls contend that the District's application filed that same month with TCEQ described the proposed site as "undeveloped grass land."⁴⁶

5. Judge's Analysis

The Judge recommends that the Commission find that the proposed wastewater treatment units will be partially located in wetlands. Like the PIC, the Judge finds that the testimony of

⁴⁴ Ex. P-1.

⁴⁵ Ex. S-1-6 at p. 3.

⁴⁶ Ex. A-5-4 at A00718, Item 12.

Dr. Jacob and his delineation of wetlands at the site of the proposed wastewater treatment facility, depicted in Exhibit P-2D, are more credible and persuasive than those of Mr. Laskowski. Dr. Jacob, a professor at Texas A & M University and a professional geoscientist, has extensive experience in wetlands delineation and an educational background in soil science.⁴⁷ Mr. Laskowski, on the other hand, is a recently certified wetland delineator who is not yet a licensed soil scientist.⁴⁸

According to Dr. Jacob in his wetlands delineation report, the proposed site “lies on a floodplain of an unnamed tributary to the West Fork of the San Jacinto River (Lake Conroe).” The area “is mapped as Trinity Clay, frequently flooded, and Ferris Clay, 1-5 % slopes, eroded, by Soil Survey Staff (1972).” The “area is not a mapped FEMA floodplain. . . [it] is hydrologically adjacent to the unnamed tributary and to Lake Conroe, a waters of the U.S. While not a mapped floodplain, the area is clearly frequently flooded as evidenced by common rack lines observed in the area.”⁴⁹ Dr. Jacob also testified that the east side of the subject area is connected hydrologically to the stream on the west side; thus, there are continuous wetlands right up to the stream.⁵⁰

The Judge concurs with Capps’ assertion that Dr. Jacob in his wetlands delineation report considered hydrophytic vegetation, wetland hydrology, and hydric soils in his delineation of wetlands at the proposed site. Those considerations are amply set out above under Capps’ argument. Furthermore, the Judge agrees with Capps that Dr. Jacob’s deviations from the Manual’s procedures were minor and of no consequence for his ultimate conclusions regarding the delineation of wetlands at the proposed site.

Appellant asserts that wastewater treatment units can be located in a wetlands so long as a Corps permit is obtained, and the applicable standard for determining which wetlands are subject

⁴⁷ See Ex. P-2A.

⁴⁸ See Ex. A-6-1; Tr. v. 1 at 166-167.

⁴⁹ Ex. P-2B at 2.

⁵⁰ Tr. v. 2 at 263.

to TCEQ's location standards are those used for making Corps jurisdictional determinations as administered by the Corps' Galveston District office.⁵¹ In other words, Applicant is arguing that a determination of federal "jurisdictional" wetlands definitively restricts state law and the Commission's authority to define the characteristics that make an area suitable or inappropriate for a wastewater treatment plant. The Judge disagrees.

Pursuant to Commission Rule § 309.13(b) entitled "Unsuitable Site Characteristics," a wastewater treatment plant unit may not be located in wetlands. "Wetlands" are defined in the same chapter of Commission rules at § 309.11(10) [quoted above], which, except for the inclusion of playa lakes, is the exact definition of wetlands found in 40 CFR § 122.2.⁵² And Commission Rule § 309.14(a), entitled "Prohibition of Permit Issuance," declares that the Commission may not issue a permit for a wastewater treatment plant if the facility does not meet the requirements of § 309.13.

Jurisdictional wetlands are a subset of "waters of the United States" and thus subject to Section 404 of the Clean Water Act that authorizes the Secretary of the Army to issue permits for the discharge of dredged or fill material into the waters of the United States, including wetlands.⁵³ The Corps' Manual, utilized by both Dr. Jacob and Mr. Laskowski, is intended to provide guidelines and methodology for determining whether an area is a wetland for purposes of Section 404.

The purpose of Chapter 309 of Commission rules, however, is to condition issuance of a permit for new domestic wastewater treatment facilities "on the selection of a site that minimizes possible contamination of ground and surface waters; to define the characteristics that make an area suitable or inappropriate for a wastewater treatment facility; to minimize the possibility of

⁵¹ Applicant's closing argument, p. 16.

⁵² See Ex. P-2C at 9.

⁵³ Ex. P-2C at 1 - 2.

exposing the public to nuisance conditions; and to prohibit issuance of a permit for a facility to be located in an area determined to be unsuitable or inappropriate. . . .”⁵⁴ Under its own rules, therefore, the Commission may not issue a permit for a wastewater treatment plant that will be located in wetlands – regardless whether those wetlands are determined to be jurisdictional waters of the United States.⁵⁵

C. What is the proper assessment of transcription costs pursuant to Commission rules?

By Order No. 5, the Judge required a transcript be prepared in this case because the evidentiary hearing was scheduled to last longer than one day. Applicant requests that transcription costs be divided equally between it and all Protestants. Capps argues that transcription costs remaining after deduction of all costs associated with the expediting of the transcript should be assessed 90 percent to Far Hills and 10 percent to Capps.

The Judge recommends that the Commission find that 93 percent of the total transcription costs of \$ 6,640.20 should be assessed to Far Hills and 7 percent should be assessed to Capps.

Commission rules at 30 TAC § 80.23(d) list the factors that the Commission shall consider in assessing reporting and transcription costs. The factors relevant to this case include the following:

- (A) *The party who requested the transcript.* The Judge ordered the transcript. Applicant requested that the transcript be expedited.
- (B) *The financial ability of the party to pay costs.* Applicant has substantial financial resources as a result of its significant tax base. Capps is funded by donations from

⁵⁴ 30 TAC § 309.10(b).

⁵⁵ Indeed, the Judge notes that under the federal definition of wetlands, playa lakes are not included. According to Applicant’s argument, playa lakes, not being jurisdictional wetlands, would, therefore, be suitable sites for locating wastewater treatment facilities—clearly, something that Commission rules and definition of wetlands would determine as unsuitable.

individuals and families. The Sandalls have only the financial resources of a single family.

- (C) *The extent to which the party participated in the hearing.* Far Hills argues that Protestants participated to an almost equal extent as Applicant. Capps presented five witnesses compared to Applicant's seven witnesses, and cross-examination was about equal. The Judge finds that the extent of participation by all the parties was appropriate and that none of the parties unduly burdened the transcript with frivolous arguments or unnecessary questioning of witnesses.
- (D) *The relative benefits to the various parties of having a transcript.* As the party bearing the burden of proof, Far Hills could anticipate the greatest potential benefit from an ability to cite and reassemble the information within the record, although all parties benefitted from having a transcript.
- (G) *Any other factor which is relevant to a just and reasonable assessment of costs.* The Judge does not find that any other factor should affect the assessment of transcription costs. The Judge finds that all parties had plausible, good-faith arguments for the issues they raised.

Considering all of the factors set out in the Commission's rules, the Judge finds that Applicant's financial ability, its potential benefit from having a transcript, and its expediting of the transcript weigh in favor of assessing 93 percent of the total transcription costs of \$6,640.20 to Far Hills and 7 percent to Capps.

VI. OTHER ISSUES

Capps presented arguments addressing such issues as, among others, purported errors in the ED's modeling that demonstrated that the water quality standard for dissolved oxygen would not be violated in the immediate receiving waters; alleged errors in the ED's anti-degradation review; and Far Hills purported failure to prove an adequate buffer zone for all wastewater treatment plant units. Because of the Judge's discussion and recommendations regarding the major issues, the Judge declines to address these other issues.

VII. CONCLUSION

After a review of the record and for the reasons given above, the Judge recommends that the Commission adopt the proposed Order denying Far Hills Utility District a TPDES permit.

SIGNED November 27, 2006.

**CAROL WOOD
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN ORDER

denying the application of Far Hills Utility District for proposed TPDES Permit No. WQ0014555001; Docket No. 2005-1899-MWD; SOAH Docket No. 582-06-0568

On _____, 2007, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the application of Far Hills Utility District (Applicant, Far Hills, or District) for proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014555001. The application was presented to the Commission with a proposal for decision by Carol Wood, Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH).

After considering the ALJ's proposal for decision and the evidence and arguments presented, the Commission makes the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. Far Hills filed its application for a TPDES permit on August 31, 2004, and on December 2, 2004, the Commission's Executive Director (ED) made a preliminary decision that the proposed permit would meet all statutory and regulatory requirements.
2. On November 8, 2005, Applicant requested that the matter be directly referred to SOAH.

3. On November 21, 2005, the Commission's Chief Clerk sent notice of hearing to an attached list of persons.
4. On December 7, 2005, notice of hearing was published in *The Courier*, a newspaper regularly published or generally circulated in Montgomery County, Texas.
5. A preliminary hearing regarding the application was held in Conroe, Texas, on January 11, 2006. The Judge designated the following as parties to the proceeding: Far Hills, the ED, the Commission's Public Interest Counsel, Capps Concerned Citizens (Capps), and Ralph and Marcia Sandall (Sandalls). The Judge also designated the San Jacinto River Authority (River Authority) as a party; however, the River Authority participated mainly as an observer.
6. Although the ED participated in the preliminary hearing, he later withdrew as a party after reaching an agreement with Far Hills regarding disputed provisions of the proposed permit.
7. The hearing on the merits was held in Austin, Texas, from June 26 to June 28, 2006.
8. Far Hills was created as a water control and improvement district by Commission order in 1972 and encompasses about 327 acres on a peninsula in the southeast quadrant of Lake Conroe in Montgomery County. Far Hills is located near the City of Willis and in the extraterritorial jurisdiction of the City of Conroe, but not within the corporate limits of any city. The District's boundaries include seven residential subdivisions for which it provides water and wastewater services.
9. Far Hills provides water service to 320 residential connections and sewer service to 302 residential connections. The District currently serves a population of approximately 591

people. Its projections of future growth indicate that it will serve a total of 1,021 connections at full build-out of the subdivisions that Far Hills serves.

10. Currently, Far Hills' wastewater is being treated by Montgomery County Utility District (MCUD) No. 2 at its Seven Coves Plant (Plant). Far Hills' collection lines transport wastewater to a Far Hills sewer main located along Cude Cemetery Road. After passing through a Far Hills' lift station located at Virginia Street, the wastewater is conveyed about two miles north and west to the Plant.
11. In January 2004, MCUD No. 2 told Far Hills that the Plant and lift station needed major repairs. A few months later, MCUD No. 2 advised the District that the Plant was reaching its permitted flow capacity and would have to be expanded in the very near future. The engineer of MCUD No. 2 estimated repair costs of approximately \$568,500, which did not include the cost of a plant expansion for which Far Hills' share would equal about one million dollars. MCUD No. 2 asked Far Hills to fund about 29 percent of the repair costs.
12. Far Hills decided it was more cost effective to terminate its agreement with MCUD No. 2 and build its own wastewater treatment plant.
13. Far Hills' contract with MCUD No. 2 to provide wastewater service expires in 2012.
14. The proposed Far Hills facility would be an activated sludge process plant operated in the complete mix mode and would be located north of Virginia Street at the intersection of Cude Cemetery Road and Virginia Street in Montgomery County. Treatment units in the interim phase are proposed to include a lift station, a manual bar screen, an aeration basin, a clarifier, a sludge digester, and a chlorine contact chamber. The final phase is proposed to include the following treatment units: a lift station, a manual bar screen, two aeration basins, two clarifiers, two sludge digesters, and two chlorine contact chambers.

15. The proposed permit authorizes a discharge of treated domestic wastewater at an interim volume not to exceed a daily average flow of 0.25 million gallons per day (MGD) and a final volume not to exceed a daily average flow of 0.5 MGD.
16. The proposed effluent limitations in the interim and the final phase of the proposed permit, based on a 30-day average, are the following: 10 milligrams per liter (mg/l) carbonaceous biochemical oxygen demand (CBOD), 15 mg/l total suspended solids (TSS), 3 mg/l ammonia nitrogen, and 4.0 mg/l minimum dissolved oxygen (DO). The effluent must contain a chlorine residual of at least 1.0 mg/l and must not exceed a chlorine residual of 4.0 mg/l after a detention time of at least 20 minutes, based on peak flow.
17. There is no need for Far Hills' proposed wastewater treatment facility.
 - a. There is an entity, MCUD No. 2, within three miles of Far Hills' proposed facility that has the ability and willingness to serve the District.
 - b. Wastewater service for Far Hills is already being provided by MCUD No. 2.
 - c. Much of the infrastructure is already in place to continue providing that service.
 - d. MCUD No. 2 has expressed a willingness to expand its plant to continue accepting Far Hills' wastewater.
 - e. At the time Far Hills filed its application for a permit on August 31, 2004, MCUD No. 2 had neither refused to serve the District nor had Far Hills and MCUD No. 2 signed an agreement that would allow the District to withdraw from the Plant's service.
 - c. MCUD No. 2 has never stated that it would refuse to extend service to Far Hills beyond 2012, when the contract between it and Far Hills expires.
18. Far Hills' proposed wastewater treatment plant would be partially located in wetlands.
 - a. Hydrophytic vegetation, such as *planera aquatica*, exists throughout the designated wetlands area.

- b. Wetland hydrology exists throughout the area designated as wetlands.
 - (1) There is a clear watermark on a tree at the data point closest to the District's proposed wastewater treatment units.
 - (2) Drift lines are a primary indicator of wetland hydrology, and such lines exist at two observation points within the wetlands area.
 - (3) Drainage patterns in wetlands are a primary indicator of wetland hydrology, and such patterns exist at two observation points within the wetlands area.
 - c. Hydric soils with distinct gleyed colors are present in the area where Far Hills' wastewater treatment units are proposed to be located.
19. The site of Far Hills' proposed wastewater treatment facility lies on a floodplain of an unnamed tributary to the West Fork of the San Jacinto River (Lake Conroe). The area is mapped as Trinity Clay, frequently flooded, and Ferris Clay, 1-5 % slopes, eroded, by U.S. Soil Survey Staff (1972). The area is not a mapped FEMA floodplain. It is hydrologically adjacent to the unnamed tributary and to Lake Conroe, waters of the United States. While not a mapped floodplain, the area is frequently flooded.
20. Transcription and reporting costs for the hearing in this case totaled \$ 6, 640.20. Of that total amount, Far Hills should be assessed 93 percent and Capps should be assessed 7 percent.
- a. The ALJ ordered the transcript.
 - b. Far Hills requested that the transcript be expedited, which cost \$ 2,602.40 of the total amount of transcription costs.
 - c. Applicant has substantial financial resources as a result of its significant tax base.
 - d. Capps is funded by donations from individuals and families. The Sandalls have only the financial resources of a single family.
 - e. Capps presented five witnesses compared to Applicant's seven witnesses, and cross-examination was about equal. The extent of participation by all the parties was

appropriate, and none of the parties unduly burdened the transcript with frivolous arguments or unnecessary questioning of witnesses.

- f. No other factor affects the assessment of transcription costs. All parties had plausible, good-faith arguments for the issues they raised.

II. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter, pursuant to TEX. WATER CODE (Water Code) ch. 26.
2. SOAH has jurisdiction over all matters relating to the conduct of a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ch. 2003.
3. It is the policy of the State to encourage and promote the development and use of regional and areawide waste collection, treatment, and disposal systems and to require the use of all reasonable methods to implement this policy. Water Code § 26.003.
4. In considering the issuance of a permit to discharge waste, the Commission may deny a proposed permit based on the consideration of need, including the availability of existing areawide or regional waste collection, treatment, and disposal systems. Water Code § 26.0282.
5. Based on the above findings of fact and conclusions of law, issuance of the proposed permit would not further the State policy of promoting regionalization.
6. Wetlands are those areas that are inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, playa lakes, and similar areas. 30 TEX. ADMIN. CODE (TAC) § 309.11(10).

7. A wastewater treatment plant unit may not be located in wetlands. 30 TAC § 309.13(b).
8. The Commission may not issue a permit for a wastewater treatment plant if the facility does not meet the requirements of 30 TAC § 309.13.
9. Based on the above findings of fact and conclusions of law, issuance of the proposed permit should be denied.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, THAT:

1. The application of Far Hills Utility District for a TPDES permit is DENIED.
2. Applicant shall pay 93 percent of the total transcription costs of \$6,640.20 and Capps Concerned Citizens shall pay the remainder.
3. All other motions, requests for entry of specific findings of fact or conclusions of law submitted by any party and any other request for general or specific relief not expressly granted or adopted herein are denied for want of merit.
4. The Commission's Chief Clerk shall forward a copy of this Order to all parties.
5. If any provision, sentence, clause, or phrase of this Order is for any reason held invalid, the invalidity of such shall not affect the validity of the remaining portions of the Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Kathleen Hartnett White, Chairman
For the Commission