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Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

December 18, 2006

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

CHIEF CLERK'S OFFICE

DEC 18 10 21 11

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

RE: Far Hills Utility District
SOAH Docket No. 582-06-0568; TCEQ Docket No. 2005-1899-MWD

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Exceptions to the Administrative Law Judge's Proposal for Decision and Order in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Christina Mann".

Christina Mann, Attorney
Public Interest Counsel

cc: Mailing List

Enclosure

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

TEXAS
COMMISSION ON
ENVIRONMENTAL
QUALITY

2006 DEC 18 PM 2:45

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 CLERK'S OFFICE

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S PROPOSAL FOR DECISION AND ORDER**

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) and files these Exceptions to the Proposal for Decision (PFD) and Order recommended by the Administrative Law Judge (ALJ) in the above styled matter and would respectfully show the following:

OPIC is supportive of the PFD issued by ALJ Carol Wood on November 27, 2006. However, OPIC finds that in addition to the reasons discussed in the PFD¹, the application of Far Hills Utility District (Far Hills or Applicant) should be denied because Far Hills failed to demonstrate that all applicable State water quality standards will be met. Additionally, Far Hills failed to meet its burden in demonstrating compliance with all applicable antidegradation requirements.

Applicant did not demonstrate that all applicable State water quality standards will be met.

Far Hills relied heavily upon TCEQ staff determinations during the technical review of this permit application. Far Hills did not provide an expert to address any water

¹ OPIC notes that Judge Wood acknowledges other issues were raised throughout the hearing and in closing arguments, and that she declines to address these other issues, "because of the Judge's discussion and recommendations regarding the major issues..." See Page 19, Section VI of the Proposal for Decision.

quality issues, but rather relied solely upon deposition transcripts of staff witnesses to meet the Applicant's burden of proof. The record reflects that the Protestants found fault with the manner in which TCEQ found that all applicable State water quality standards would be met, with the criterion for dissolved oxygen (DO) of particular interest.

TCEQ modeler, Karen Holligan, provided testimony regarding how the effluent limitations found in the draft permit will ensure that the receiving waters meet state water quality standards through her oral deposition of April 11, 2006, which was submitted as part of Applicant's prefiled direct case. Furthermore, she appeared for cross examination testimony on June 26, 2006. CAPPs questioned Ms. Holligan's judgment to allow a .20 milligram DO per liter departure from the applicable water quality standards.² Ms. Holligan testifies that the applicable water quality standard for Lake Conroe is 5 milligrams DO per liter.³ According to Ms. Holligan's modeling run for the effluent limitations found in the current draft permit, the initial DO concentration in the first cell modeled is 4.8 milligrams per liter: an acceptable result.⁴ Ms. Holligan describes this practice of allowing a .20 departure as merely "general practice" by TCEQ with no supportive written guidance.⁵

OPIC appreciates Ms. Holligan's testimony regarding the conservative nature of the modeling.⁶ Nevertheless, OPIC cannot find that meeting a 4.8 DO limitation is an acceptable substitute for meeting a 5.0 standard when no evidence is presented regarding the technical reasons for allowing a .20 variance from the established standard.

² See cross-examination of Karen Holligan, Tr. at Page 34, lines 8-19.

³ Id at line 5.

⁴ Id. at lines 10-13.

⁵ Testimony of Karen Holligan, Tr. page 36 at line 7.

⁶ See Ms. Holligan's oral deposition, Exhibit A-2 beginning at A00356.

Additionally, when Ms. Hamilton testifies⁷ as the TCEQ aquatic scientist, she only refers to the standard of 5.0 milligrams DO per liter and never presents any water quality analysis on 4.8 milligrams. She states that she is unable to answer how 4.8 milligrams per liter complies with the State water quality standard for Lake Conroe.⁸

Therefore, OPIC cannot find that Far Hills demonstrated that all applicable State water quality standards will be met, specifically for dissolved oxygen concentrations.

Applicant did not demonstrate compliance with all applicable antidegradation requirements.

Far Hills attempts to meet its burden in demonstrating compliance with all antidegradation requirements relying solely upon TCEQ staff testimony. Ms. Hamilton conducted the antidegradation review for this permit, and testified that since the waters of Lake Conroe exceed the fishable swimmable standards, both Tier I and Tier II antidegradation reviews were required.⁹ When asked about her Tier II antidegradation review, Ms. Hamilton never identifies what she would consider a de minimus change in dissolved oxygen concentration for the receiving waters.¹⁰ Instead of analyzing the effect of the change in concentrations for dissolved oxygen from the proposed effluent, Ms. Hamilton “determined that as long as that 5 milligrams per liter criteria were met, it would protect from degradation.”¹¹

Ensuring that the standard would be met is not the same as conducting an antidegradation review. It is important to note that water quality criteria and antidegradation are distinct legal requirements. Water quality standards include

⁷ See oral deposition of Lori Hamilton of April 11, 2006 and live testimony on June 26, 2006

⁸ See oral deposition of Lori Hamilton, Ex. A-3 Page A00467-468

⁹ Testimony of Lori Hamilton, Tr. at Page 71, lines 10-11.

¹⁰ Id. at Pages 71-78.

¹¹ Tr. at Page 74, lines 15-17.

“designated uses,” defined as “those uses specified in water quality standards for each water body or segments whether or not they are being attained,”¹² and “criteria,” defined as “elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use.”¹³ Criteria alone, however, may not be sufficient to protect a designated use,¹⁴ and EPA recognizes that “[w]hen criteria are met, water quality will *generally* protect the designated use.”¹⁵

Accordingly, the United States Supreme Court has recognized that States may complement water quality criteria with a requirement that “activities also comport with designated uses...to ensure that each activity – even if not foreseen by the criteria – will be consistent with the specific uses and attributes of a particular water body.”¹⁶ The Commission’s antidegradation policy augments water quality criteria and uses by ensuring that Texas’ high-quality waters will not deteriorate to the level of water quality standards.¹⁷

TCEQ’s water quality regulations contemplate criteria evaluation and antidegradation review as distinct legal requirements. Texas has developed and adopted a statewide antidegradation policy that provides increasingly strict protection for state waters depending on the quality of the receiving water above and beyond specific water quality criteria and designated uses.¹⁸

¹² 40 C.F.R. § 131.3(f) (2006); *see also* 30 TAC § 307.3(15) (2006).

¹³ 40 C.F.R. § 131.3(b) (2006); *see also* 30 TAC § 307.3(13) (2006).

¹⁴ *PUD No. 1 of Jefferson County v. Washington Dep’t of Ecology*, 511 U.S. 700, 715 (1994).

¹⁵ 40 C.F.R. § 131.3(b) (emphasis added).

¹⁶ *PUD No. 1*, 511 U.S. 700, 717 (1994).

¹⁷ *See* Michael C. Blumm & William Warnock, *Symposium: The Clean Water Act Turns 30: Celebrating Its Past, Predicting Its Future: Roads Not Taken: EPA vs. Clean Water*, 33 *Env’tl Law* 79, 104 (2003).

¹⁸ Texas is required to develop and adopt such a policy, including implementation methods, pursuant to 40 C.F.R. section 131.12 (2006).

TCEQ implements its antidegradation policy to ensure that Texas' high-quality waters are not allowed to deteriorate to the level of water quality standards by affording those waters three "tiers" of protection.¹⁹ Tier 1 reviews, applicable to all water bodies regardless of whether that receiving water exceeds water quality goals,²⁰ requires water quality that will maintain and protect *existing* uses.²¹ The Tier 1 antidegradation policy "establishes the floor" of water quality²² and protects the environment where the existing use of a water body happens to be better than the segment's designated use.²³ TCEQ's Tier 2 portion of its antidegradation policy, applicable to waters that *exceed* fishable/swimmable quality (Lake Conroe exceeds fishable/swimmable quality), requires maintenance and protection of waters that exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water.²⁴ As opposed to the Tier 1 portion of the antidegradation policy that ensures water quality necessary to maintain existing uses, Tier 2 protects and maintains water quality levels above the Tier 1 floor. Therefore, the Commission's Tier 2 antidegradation policy requires protection of "high quality waters" so that the existing level of water quality is maintained absent economic or social development justifications.

There is nothing in the record to allow a decision-maker to determine whether degradation has or has not occurred. Ms. Hamilton did not review what the likely change

¹⁹ 30 TAC § 307.5(b).

²⁰ 30 TAC § 307.5(a) (2006); TCEQ Implementation Procedures, ED Ex. 6, page 24 (stating that "TPDES permit amendments or new permits that allow increased pollution loading are subject to review under Tier 1 of the antidegradation policy and all pollution that could cause an impairment of existing uses is included in the evaluation."); Revisions to the National Pollutant Discharge Elimination System Program and Federal Antidegradation Policy in Support of Revisions to the Water Quality Planning and Management Regulation, 64 Fed. Reg. 46058, 46063 (proposed August 23, 1999).

²¹ 30 TAC § 307.3(22) (2006) (defining "existing use" as "[a] use which is currently being support by a specific water body or which was attained on or after November 28, 1975.").

²² Water Quality Standards Regulation, 63 Fed. Reg. 36742, 36781 (proposed July 7, 1998).

²³ *Id.*; 30 TAC § 307.5(b)(1) (2006); 30 TAC § 307.3(15) (defining "designated use" as "[a] use which is assigned to specific water bodies in Appendix A or in Appendix D in §307.10 of this title.").

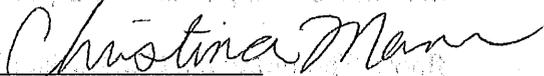
²⁴ 40 C.F.R. § 131.12(a)(2); 30 TAC § 307.5(b)(2).

in DO concentrations would be, and therefore did not analyze whether such a change would or would not constitute degradation. The Applicant did not provide any additional analysis. Therefore, OPIC cannot find that the Applicant has demonstrated compliance with all applicable antidegradation requirements.

For these reasons, OPIC respectfully recommends that the Commission adopt the ALJ's Proposal for Decision recommending denial of the permit application and further add the following findings on the issues briefed above:

- 1) Far Hills has not demonstrated that all applicable State water quality standards will be met, specifically for dissolved oxygen concentrations.
- 2) Far Hills has not demonstrated compliance with all applicable antidegradation requirements.

Respectfully submitted,
Blas Coy, Jr.
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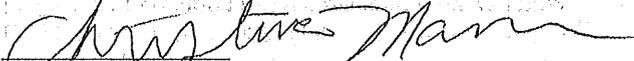
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CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2006 eleven true and correct copies of the Office of the Public Interest Counsel's Exceptions to the Proposal for Decision (PFD) and Order were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.


Christina Mann

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

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