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CHIEF CLERKS OFFICE

December 28, 2006

The Honorable Carol Wood, ALJ
State Office of Administrative Hearings
P.O. Box 13025
Austin, Texas 78711-3025

Via hand-delivery

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 and Honorable Judge Wood,

Enclosed please find Protestant Capps Concerned Citizens' Replies to the Applicant's Exceptions to the Proposal for Decision 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

2006 DEC 28 PM 3: 55

CHIEF CLERKS OFFICE

IN THE MATTER OF THE	§	BEFORE THE TEXAS
APPLICATION OF FAR HILLS	§	COMMISSION ON
UTILITY DISTRICT FOR PERMIT	§	ENVIRONMENTAL QUALITY
NO. WQ0014555001	§	

**CAPPS CONCERNED CITIZENS' REPLY TO EXCEPTIONS TO THE
PROPOSAL FOR DECISION**

TO THE HONORABLE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

In the case of the Application of Far Hills Utility District for Permit No. WQ0014555001, Protestant Capps Concerned Citizens (Capps) comes now, and files this, its Reply to Exceptions to the Administrative Law Judge's (ALJ) Proposal for Decision.

I. SUMMARY

Far Hills Utility District (Applicant) has failed to show a need for the facility, and has failed to show that no treatment plant units will be located in wetlands. A viable treatment alternative exists that Texas Commission on Environmental Quality (TCEQ) should consider in determining the need for the facility. Further, the ALJ has applied a definition of "wetlands" consistent with all applicable statutes and regulations in reaching her conclusion that Applicant proposes to place wastewater treatment plant units in wetlands in violation of 30 TAC § 309.13.

II. REGIONALIZATION

A. MCUD2 is Clearly a Viable Alternative Treatment Option

The permitting process is by its very nature prospective. In issuing a permit, TCEQ looks to what the results of a proposed discharge will be in the future. Likewise,

in considering the need for a facility, TCEQ must look to the availability of alternate treatment options to accommodate the future flows that a facility is proposed to accept. This is why TCEQ based its denial on regionalization grounds on the *future* capacity of an alternate service provider in the Matter of the Consideration of an Application by Lake Travis II Investments LP for Permit No. 14257-001, TCEQ Docket No. 2002-1378-MWD (*Lake Travis II*).

When asked if it was agreeable to expanding its plant to accept the flows proposed to be treated by Applicant's plant, Montgomery County Utility District No. 2 (MCUD2) answered in the affirmative, with the natural caveat that it would properly evaluate the technical aspects of this expansion prior to any final decision.¹ Until such a technical evaluation has been performed, and such an expansion is demonstrated to be technically infeasible, Applicant has not met its burden of proof to show a need for the proposed facility. It is the anticipated physical state of the MCUD2 facilities in the future that is relevant to a decision on its future availability as an alternate treatment option, not the current state of the facilities.

Nothing in Larry Folk's deposition indicates that MCUD2 would be unwilling to expand its plant to a degree that would enable it to accept the wastewater flows proposed to be treated by the new plant if asked to do so by TCEQ. Mr. Folk stated that MCUD2 has no preference that Applicant build its own plant instead of seeking expansion of the MCUD2 plant.² Further, while MCUD2 has agreed not to protest the application, MCUD2 has also taken no position in support of the application.³ While Applicant

¹ Ex. P-5, Ex. No. 1 thereto.

² Ex. A-5, p. 14, l. 9-13.

³ Ex. A-5, p. 13, l. 11-21.

claims its withdrawal from the MCUD2 plant allows MCUD2 to avoid an expansion of the MCUD2 plant, Mr. Folk did not agree.⁴

B. Applicant's Strained Interpretation of Tex. Water Code § 26.0282 Should Be Rejected

Applicant asks that the Commission adopt an interpretation of Tex. Water Code § 26.0282 that is both counter to the statute and also diametrically opposed to the prior interpretation of this statute applied by TCEQ in *Lake Travis II*. This statutory section empowers the Commission to consider the need for a facility in considering a wastewater discharge permit. The statute further empowers the commission in doing so to consider either areawide or regional systems even if they do not have that formal designation. Applicant itself has described the treatment by MCUD2 of the wastewater involved as a "regional" option.⁵ By explicitly including the provision that the Commission may consider alternate areawide or regional options even if they are "not designated as such," the Legislature was making clear that the Commission should be inclusive in its consideration of other options when considering the need for a facility.

Applicant's interpretation of the statute, requiring that a facility either be formally designated or in the process of being designated a regional facility, is directly opposed to this intent. Applicant's interpretation is further directly opposed to the prior interpretation of the statute applied by TCEQ in *Lake Travis II*, where TCEQ considered an alternate treatment option that had neither been formally designated a regional provider, nor was in the process of being designated an alternate treatment provider.

⁴ Ex. P-5, p. 23, l. 21-25.

⁵ Ex. P-5, ex. 2 thereto.

III. WETLANDS

A. Applicant Confuses a Question of Jurisdiction with a Question of Definition

Applicant's Exceptions repeatedly assert that the ALJ has applied a different definition of "wetlands" than is used by the Corps or embodied in Texas Statutes. This is not true. Neither the ALJ, Capps, nor OPIC has taken the position that a different definition of the term "wetland" should be used in the TCEQ water quality permitting context than the definitions set forth at 30 TAC § 309.11(10) and Tex. Water Code § 11.502(1).

The status of an area as a "wetland" denotes a determination that an area contains a specific type of ecology that plays a critical role in water quality. Some "wetlands" fall within the contours of the federal government's jurisdiction as interpreted by the U.S. Supreme Court, and those are "jurisdictional" wetlands. Other wetlands may not be considered jurisdictional by the United States Army Corps of Engineers (the Corps), but they nevertheless fall within the definition of "wetland." The 1987 Corps of Engineers Wetlands Delineation Manual itself recognizes this distinction:

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 additional limitation imposed on the Corps in its ability to protect wetlands is not applicable to a TCEQ determination of wetlands, since TCEQ's water quality permitting jurisdiction is derived from the definition of "water in the state" at Tex. Water Code § 26.001(5), not the federal definition of "Waters of the United States."

⁶ Ex. P-2C, p. 2.

The definition of “water” or “water in the state” found at Tex. Water Code § 26.001(5) is broader than the federal definition of “Waters of the United States,” and explicitly includes:

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 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)

In noting the breadth of this definition in the water pollution context, the Houston Court of Appeals, 14th District, has noted that:

By this broad definition the legislature has clearly sought to include *all* water found within the environment--whether impounded or free-flowing, above or beneath the surface of the ground, in or out of a watercourse, salt or fresh, or publicly or privately owned. In short, under the definition provided by the legislature, it is difficult to envision any liquid water in the environment, apart from free-falling rain drops, that is not "water in the state."⁷ (emphasis in original)

Clearly, the definition of “water in the state” underpinning the Texas regulatory scheme for the protection of water quality is broader than the definition of “Waters of the United States” upon which the Corps’ jurisdiction is grounded. Consequently, the jurisdiction of TCEQ to recognize and protect wetlands is broader than the jurisdiction of the Corps to recognize and protect wetlands.

B. Remand to SOAH for Further Evidence on Wetlands is Unjustified

Applicant has placed great weight in its argument on a document it claims has been issued by the Corps since the close of evidence in this case. The admissibility of

⁷ Watts v. State of Texas, 140 S.W.3d 860, 866 (Tex. App. – Houston [14th Dist.] 2004, pet. ref’d).

this document was extensively briefed in writing prior to the ALJ's decision not to hold the record open for its submission.

1. The Document Is Merely Cumulative of Evidence in the Record

The wetlands delineated as "jurisdictional" by Applicant are all within an area found to be wetlands by Dr. Jacob, expert for Capps. Thus, any verification of Applicant's delineation will only confirm the existence of wetlands in an area where the parties already agree wetlands exist. Such confirmation of an already agreed upon fact is not helpful to the trier of fact. As discussed above, 30 TAC § 309.13(b) applies to all wetlands, not just wetlands within the Corps' jurisdiction. The verification of Mr. Laskowski's delineation of jurisdictional wetlands, if such verification exists, will not include a Corps evaluation of all wetlands on the site, only those it considers jurisdictional for its own purposes.

Reopening the record to accept the document Applicant claims exists would require remand of the case to the State Office of Administrative Hearings (SOAH), with the opportunity for additional discovery by Protestants, additional pre-filed evidence from all parties, an additional hearing on the merits, further briefing, and another proposal for decision by the ALJ. To impose this burden on the parties and the State, simply so that Applicant may submit evidence that is cumulative of evidence already in the record, is unjustified.

2. Applicant's Late Submission of the Evidence Constitutes an Abuse of the Permitting Process

Applicant has been aware of information indicating that wetlands are present on the site since at least the end of the comment period on June 13, 2005. Yet, Applicant

performed no significant evaluation to determine the presence of wetlands at the site until April of 2006.

Despite its limited evaluation of the presence of wetlands at the site at the time, Applicant asked that the permitting process be accelerated in November of 2005 by requesting a direct referral. On March 23, 2006, Applicant was provided a copy of Dr. Jacob's report showing the extensive presence of wetlands at the site. Only at this point did Applicant begin any serious effort to address the question of whether wetlands existed at the site, with Mr. Laskowski on April 5, 2006 making the site visit which forms the basis of his report.⁸ Applicant's pre-filed evidence in the case was due on April 21, 2006.⁹ Yet, Applicant did not file its wetlands report and associated evidence until May 4, 2006, and did not disclose any materials related to this report until that date. Thus, even this evidence is only in the record because the ALJ granted applicant special permission to supplement its evidence after the applicable deadline. Applicant did not submit this report to the Corps of engineers until May 3, 2006.¹⁰ Considering that Applicant did not even *submit* its evaluation to the Corps until over a week *after* Applicant's deadline to provide its direct case, the late development of this evidence is entirely attributable to Applicant's lack of diligence in obtaining this evidence.

IV. OTHER ISSUES

Capps concurs with the exceptions filed by the Office of the Public Interest Counsel (OPIC), and has already addressed these issues in Capps' Exceptions. In addition to OPIC's reference to Anti-degradation as a state requirement, Capps will further note

⁸ Applicant Ex. A-7, p. A00957-A00970.

⁹ ALJ's Order No. 1.

¹⁰ Applicant's Ex. A-7, p. A00924, 1. 13-17.

that the implementation of an anti-degradation protection is a required element of Texas' Federal National Pollutant Discharge Elimination System (NPDES) delegation.¹¹

V. CONCLUSION AND PRAYER

For these reasons, Protestant Capps Concerned Citizens respectfully prays that the Commission adopt the Proposal for Decision submitted by the ALJ, and deny the application by Far Hills Utility District for Permit No. WQ001455001.

Respectfully submitted,

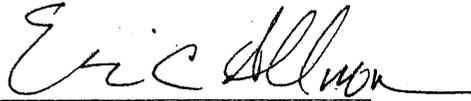


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¹¹ 40 CFR § 131.12.

Certificate of Service

I, Eric Allmon, hereby state that a true and correct copy of the foregoing **Protestant Capps Concerned Citizens' Replies to the Applicant's Exceptions to the Proposal for Decision** has been sent on this day, the 28th day of December, 2006, by U.S. first-class mail and/or facsimile transmission to those listed below.



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