

Barrett
Smith
— PLLC —
ATTORNEYS AT LAW

Capitol Tower, 206 East 9th Street, Suite 1750, Austin, TX 78701
Phone: 512.600.3800 Fax: 512.600.3899
www.barrettsmithlaw.com

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2010 JUL 12 PM 4:43
CHIEF CLERKS OFFICE

July 12, 2010

Via Facsimile

The Honorable Henry D. Card
Administrative Law Judge
State Office of Administrative Hearings
PO Box 13025
Austin, Texas 78711-3025

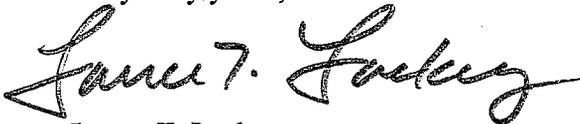
RE: SOAH Docket No. 582-09-5727, TCEQ Docket No. 2009-0290-MWD; *In the Matter of the Petition to Revoke TPDES Permit No. WQ0014555002*; State Office of Administrative Hearings

Dear Judge Card:

Please find enclosed Far Hills Utility District's Exceptions to Proposal for Decision and Proposed Order with respect to the above-referenced case.

Should you have any questions, please contact me.

Very truly yours,



Lance T. Lackey

Direct Dial: 512.600.3804

Email: llackey@barrettsmithlaw.com

cc: All counsel of record (via Email)
 TCEQ Chief Clerk (via Facsimile)

Barrett
Smith
— PLLC —
ATTORNEYS AT LAW

Capitol Tower, 206 East 9th Street, Suite 1750, Austin, TX 78701
Phone: 512.600.3800 Fax: 512.600.3899
www.barrettsmithlaw.com

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2010 JUL 12 PM 4:43

CHIEF CLERKS OFFICE

July 12, 2010

Via Hand-Delivery

LaDonna Castañuela
Chief Clerk, MC 105
Texas Commission on Environmental Quality
PO Box 13087
Austin, Texas 78711-3087

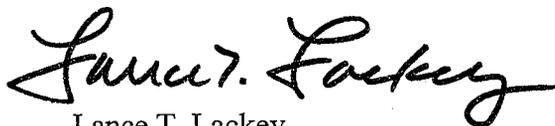
RE: SOAH Docket No. 582-09-5727, TCEQ Docket No. 2009-0290-MWD; *In the Matter of the Petition to Revoke TPDES Permit No. WQ0014555002*; State Office of Administrative Hearings

Dear Ms. Castañuela:

Please find enclosed an original and seven (7) copies of Far Hills Utility District's Exceptions to Proposal for Decision and Proposed Order. Please file this document among the papers of the above-referenced matter.

Should you have any questions, please feel free to contact me.

Very truly yours,



Lance T. Lackey

Direct Dial: 512.600.3804

Email: llackey@barrettsmithlaw.com

cc: All counsel of record
Hon. Henry D. Card, *Administrative Law Judge*

SOAH DOCKET NO. 582-09-5727
TCEQ DOCKET NO. 2009-0290-MWD 2010 JUL 12 PM 4:46

PETITION TO REVOKE
TPDES PERMIT NO. WQ0014555002

ISSUED TO
FAR HILLS UTILITY DISTRICT

§
§
§
§
§

BEFORE THE CLERKS OFFICE

STATE OFFICE OF

ADMINISTRATIVE HEARINGS

**FAR HILLS UTILITY DISTRICT'S EXCEPTIONS
TO PROPOSAL FOR DECISION AND PROPOSED ORDER**

Pursuant to 30 TEX. ADMIN. CODE §80.257, Far Hills Utility District (the "District") files the following Exceptions to the Proposal for Decision ("PFD") and Proposed Order issued by Administrative Law Judge Henry D. Card ("ALJ"). Although the District excepts to a number of the ALJ's conclusions, the District strongly concurs with the ALJ's recommendation that any potential suspension or revocation of the District's permit be postponed until the Commission has resolved the District's pending Application for a Temporary Order.

I. ISSUE NO. 1

In relation to Permit WQ0014555002, has Far Hills failed during the application and/or hearing process to disclose fully all relevant facts regarding its ownership and configuration of the property?

The ALJ resolved Issue No. 1 in the affirmative. In doing so, he relied primarily upon the representation in the District's application that it owned the proposed site for its wastewater treatment plant when it did not yet own that property.¹ However, the District's representation of property ownership in its written application is not dispositive of this issue. When that evidence

¹ PFD at p. 10.

is viewed in its proper context and combined with all of the other evidence relevant to this issue, it is clear that Issue No. 1 should have been resolved in the negative.

The site of the District's proposed treatment plant was approximately 5 acres of a 10 acre tract of property located on the east side of Cude Cemetery Rd. in Montgomery County.² When the District submitted its application to the TCEQ, it had a verbal agreement with Rod Broussard of Broussard-Christie, L.P. to purchase that property.³ The District believed that its purchase of the property would be completed before the TCEQ completed its review of the District's application, and certainly before a permit would be issued.⁴ Furthermore, the District had every intention of completing its purchase of the property as soon as possible.⁵

Given the circumstances, the District's engineer, Timothy B. Hardin, contacted the TCEQ to inquire about who should be identified in the District's application as the "owner" of the plant site.⁶ Specifically, Mr. Hardin had a telephone conversation with a staff member of the Water Quality Permitting Section of the TCEQ in which Mr. Hardin informed that individual that the property was currently owned by Broussard-Christie, L.P. and that the District had a verbal agreement to purchase the property.⁷ Mr. Hardin also inquired about whether identifying Broussard-Christie, L.P. as a co-permittee would be necessary under the circumstances.⁸ The

² Exhibit P-12; Exhibit FH-1 at p. 9, line 18 – p. 10, line 2

³ Exhibit FH-1 at p. 10, lines 9-12, Exhibit FH-10 at p. 6, lines 8-13; HOM Transcript at p. 106, line 11 – p. 107, line 22

⁴ Exhibit FH- 10 at p. 6, lines 16-19; HOM Transcript at p. 166, lines 8-23

⁵ Exhibit FH-1 a p. 10, lines 14-17

⁶ Exhibit FH-10 at p. 6, lines 21-23; HOM Transcript at p. 167, line 3 – p. 169, line 12

⁷ Exhibit FH-10 at p. 6, line 8 – p. 7, line 7

⁸ HOM Transcript at p. 167, line 3 – p. 169, line 12

TCEQ staff member informed Mr. Hardin that because the District would be the ultimate owner of the property, the proper course of action was to simply identify the District as the property “owner” in the application form.⁹

Mr. Hardin relied upon the information provided to him by the TCEQ staff member and prepared the District’s application and supporting materials accordingly. But for Mr. Hardin’s conversation with the TCEQ staff member, the District would not have identified itself as the “owner” of the property and prepared its application in the manner that it did. It is also important to note that Petitioners failed to offer any evidence to contradict the substance of Mr. Hardin’s testimony regarding his conversation with the TCEQ staff member about the property ownership issue.

The bottom line is that the District, through Mr. Hardin, did tell the TCEQ about the “true” ownership and configuration of the property prior to submitting its application. In light of the information Mr. Hardin conveyed to the TCEQ staff member, it simply cannot be concluded that the District “failed during the application and/or hearing process to disclose fully all relevant facts regarding its ownership and configuration of the property.” Although the PFD acknowledges and ultimately accepts Mr. Hardin’s testimony regarding his conversation with the TCEQ staff member, the ALJ failed to give that testimony the weight it deserves and properly resolve Issue No. 1 in the negative.

The District respectfully excepts to the ALJ’s affirmative resolution of Issue No. 1 and proposed Finding of Fact No. 52.

⁹ Exhibit FH-10 at p. 6, line 8 – p. 7, line 7

II. ISSUE NO. 2

Did Far Hills fail to fully disclose all relevant facts, misrepresent any relevant facts, or make any false or misleading statements with respect to mailed notice?

The record reveals that Mr. Hardin prepared the District's map and list of adjacent landowners that was used by the TCEQ to provide mailed notice with the understanding that the property should be configured to show how it would legally exist once the District's agreement to purchase the approximately 5 acres was complete.¹⁰ Consequently, the first and second issues referred by the Commission are inextricably intertwined, and Mr. Hardin's conversation with the TCEQ staff member regarding the "true" ownership and configuration of the property also supports a negative finding on this issue. As previously discussed, the ALJ failed to give Mr. Hardin's testimony the weight it deserves and his affirmative resolution of this issue is contrary to the evidence.

Furthermore, the only reason Petitioners were removed from the District's original map and list of adjacent landowners was because of a discussion Mr. Hardin had with Adrienne McClarron of the TCEQ regarding certain deficiencies she identified on the District's original landowner map and list.¹¹ If the discussion between Mr. Hardin and Ms. McClarron had not occurred, Petitioners would not have been removed from the map and list of adjacent landowners and they would have received mailed notice of the District's application. When Mr. Hardin had his discussion with Ms. McClarron about the necessary revisions to the Districts' map and list of adjacent landowners, he was under the assumption that she was already aware of the "true"

¹⁰ Exhibit FH-10 at p. 6, line 8 – p. 7, line 7

¹¹ Exhibit FH-10 at p. 10, line 20 – p. 11, line 10; HOM Transcript at p. 184, line 8 – p. 185, line 1

ownership and configuration of the subject property (because Mr. Hardin had conveyed this information in his previous conversation with the TCEQ staff member).¹²

For these reasons, the District excepts to the ALJ's affirmative resolution of Issue No. 2 and proposed Finding of Fact Nos. 34 & 53.

III. ISSUE NO. 3:

In relation to Permit WQ0014555002, has Far Hills misrepresented any relevant facts regarding the appropriate newspaper for publication of notice?

The ALJ's affirmative finding on this issue is not supported by any admissible evidence. Indeed, Petitioners failed to offer any evidence about which newspaper had the greatest circulation in Montgomery County (i.e., the appropriate newspaper for the District's publication of the Notice of Receipt of Application and Intent to Obtain a Water Quality Permit ("NORI")) in June 2007 (when the District published the NORI). In the absence of any evidence conclusively establishing which newspaper was the appropriate paper for the District's publication of the NORI, it simply cannot be said that the District made a misrepresentation regarding same. Moreover, there is absolutely no evidence to support a finding that the District knew the *Montgomery County News* was not the newspaper of largest circulation in Montgomery County when it caused the NORI to be published in that newspaper.

Accordingly, the District respectfully excepts to the ALJ's affirmative finding on Issue No. 3 and proposed Finding of Fact Nos. 44, 47 & 54.

¹² HOM Transcript at p. 179, line 21 – p. 180, line 2

IV. ISSUE NO. 4

If Far Hills did publish notice in the wrong newspaper was this act done intentionally or knowingly pursuant to Texas Water Code §7.149?

As previously discussed, the record fails to establish that the District knew (at the time) that the *Montgomery County News* was not the appropriate paper for publication of the NORI according to the TCEQ's rules (i.e., that the *Montgomery County News* was not the newspaper of "largest circulation"). To the contrary, the evidence is quite clear that the District believed publication of the NORI in the *Montgomery County News* would satisfy the TCEQ's rules.¹³

In addition, the ALJ's conclusion that the District *should have known* that the *Montgomery County News* was not the newspaper of largest circulation because the District had previously used the *Conroe Courier* to publish the NORI for its first permit application is misplaced. The Vice-President of the District's Board of Directors (William Lackey) testified that, based upon information provided to the District by its attorney and engineer, the District actually believed that both the *Montgomery County News* and the *Conroe Courier* were permissible options for publication of the NORI under the TCEQ's rules.¹⁴ Thus, if the District published the NORI in the wrong newspaper, it certainly was not done "intentionally" or "knowingly."

The District respectfully excepts to the ALJ's affirmative finding on Issue No. 4 and proposed Finding of Fact No. 55.

¹³ Exhibit FH-1 at p. 17, lines 4-10; HOM Transcript at p. 121, line 23 – p. 123, line 11

¹⁴ HOM Transcript at p. 121, line 23 – p. 123, line 23

V. ISSUE NO. 6

Whether Far Hills' Permit WQ0014555002 should be revoked or suspended?

The substantial adverse consequences of suspending or revoking the District's permit outweigh any harm that might have been caused by the misrepresentations and/or notice deficiencies alleged by Petitioners. The District currently has no feasible alternatives to treating and discharging its wastewater in accordance with the terms of the permit.¹⁵ Furthermore, the District cannot reconnect to Montgomery County Utility District No. 2 ("MCUD2") because MCUD2 does not have the available permitted capacity to accommodate the District's wastewater.¹⁶ In addition, pumping and hauling the District's wastewater to a remote plant for treatment would be extremely costly, and the District and its residents simply do not have the financial means to pay for those costs.¹⁷ Thus, there is nowhere for the District's wastewater to go if the permit is suspended or revoked, and this could create a major health and safety issue for the residents of the District and the general public. In light of these substantial adverse consequences, the ALJ should have exercised the discretion afforded him under 30 TAC §305.66(a) and concluded that the District's permit should not be revoked.

Moreover, even if one or more of the "good cause" factors for suspension or revocation were established, the District's "violations" were not "significant" and the District made a "substantial attempt to correct such violations."¹⁸ The District's subsequent purchase of the

¹⁵ Exhibit FH-1 at p. 18, line 16 – p. 19, line 4

¹⁶ Exhibit FH-1 at p. 18, line 16 – p. 19, line 4; HOM Transcript at p. 144, lines 4-21

¹⁷ Exhibit FH-1 at p. 18, line 16 – p. 19, line 4

¹⁸ 30 TAC §305.66(g)

property from Broussard-Christie, L.P. in November 2008¹⁹ effectively negates the “significance” of the District’s alleged misrepresentations regarding property ownership in the application. Moreover, the District’s subsequent purchase of the property effectively “cured” any alleged misrepresentations regarding the ownership and configuration of the property in the District’s application materials. At this time, the District owns the same piece of property it proposed for its wastewater treatment plant site during the application process, and that property is configured in almost the exact same manner it was represented to the TCEQ in the District’s application.²⁰

Similarly, even if omitting Petitioners from the District’s revised map and list of adjacent landowners resulted in deficient mailed notice, it can hardly be said that this deficiency was “significant” given that approximately 114 other landowners received mailed notice on at least two occasions and had ample opportunity to contest the District’s permit application.²¹ Further, even if the District did publish the NORI in the wrong newspaper, the Commission should be mindful that Texas Courts routinely apply a “substantial compliance rule” to evaluate whether a party has complied with the mandatory notice provisions of a statute or regulation.²² The rationale of the “substantial compliance rule” is that while the notice provisions in a statute may be mandatory, they are essentially procedural and rigid adherence to a procedural mandate will not be required if it is clear that a substantial compliance provides realistic fulfillment of the

¹⁹ Exhibit FH-1 at p. 13, line 2 – p. 14, line 10; Exhibit FH-5; Exhibit FH-6

²⁰ Exhibit FH-8; Exhibit FH-1 at p. 13, line 2 – p. 14, line 10

²¹ Exhibit P-15; Exhibit P-17; Exhibit P-18

²² See e.g., *River Rd. Neighborhood Assoc. v. South Texas Sports*, 720 S.W.2d 551 (Tex. App.—San Antonio 1986, writ dismissed); *Santos v. Guerra*, 570 S.W.2d 437 (Tex.Civ.App.-San Antonio 1978, writ refused n.r.e.); *Stelzer v. Huddleston*, 526 S.W.2d 710 (Tex.Civ.App-Tyler 1975, writ dismissed);

purpose for which the mandate was incorporated into the statute.²³ In this case, the District's publication of the NORI in the *Montgomery County News* constitutes substantial compliance with the TCEQ's publication requirements.

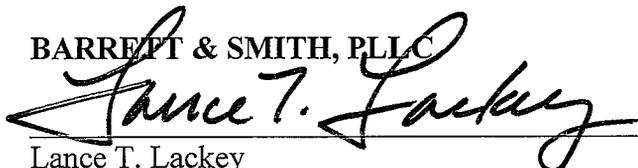
Based on the foregoing, the District respectfully excepts to the ALJ's affirmative finding on Issue No. 6, proposed Finding of Fact Nos. 57 & 58, and proposed Conclusion of Law No. 5.

CONCLUSION

In summary, the District respectfully excepts to the ALJ's affirmative findings on Issue Nos. 1, 2, 3, 4 and 6. The District also excepts to proposed Finding of Fact Nos. 34, 44, 47, & 52-55 and proposed Conclusion of Law No. 5. However, the District strongly concurs with the ALJ's recommendation that any potential suspension or revocation of the District's permit be postponed until the Commission has resolved the District's pending Application for a Temporary Order.

Respectfully submitted,

BARRETT & SMITH, PLLC



Lance T. Lackey
State Bar No. 00798312
Andrew N. Barrett
State Bar No. 0180900
Matthew B. Kutac
State Bar No. 24050899
206 East 9th Street, Suite 1750
Austin, Texas 78701
(512) 600-3800 – Telephone
(512) 600-3899 – Facsimile

**ATTORNEYS FOR
FAR HILLS UTILITY DISTRICT**

²³ See *Stelzer*, 526 S.W.2d at 712-13.

CERTIFICATE OF SERVICE

By my signature below, I certify that on the 12th day of July, 2010, a true and correct copy of the foregoing document was served upon the following counsel of record via the methods indicated below:

Via Email

Marisa Perales
Lowerre, Frederick, Perales, Allmon & Rockwell
707 Rio Grande, Suite 200
Austin, Texas 78701
marisa@lf-lawfirm.com
Attorneys for Petitioners
Suzanne O'Neal & Judith Spencer

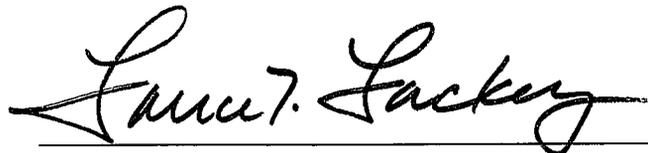
Via Email

John E. Williams
Daniel Ingersoll
Texas Commission on Environmental Quality
Environmental Law Division, MC-173
P.O. Box 13087
Austin, Texas 78711-3087
johwilli@tceq.state.tx.us
dingerso@tceq.state.tx.us
Attorney for the TCEQ Executive Director

Via Email

Amy Swanholm
Texas Commission on Environmental Quality
Office of Public Interest Counsel, MC-103
P.O. Box 13087
Austin, Texas 78711-3807
aswanhol@tceq.state.tx.us
Assistant Public Interest Counsel

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2010 JUL 12 PM 4:46
CHIEF CLERKS OFFICE



Lance T. Lackey