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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2010 JUL 22 PM 4:37

CHIEF CLERKS OFFICE

July 22, 2010

Via Hand-Delivery

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

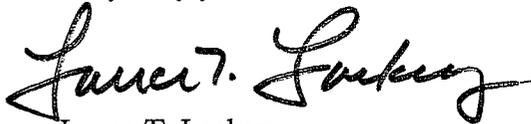
RE: SOAH Docket No. 582-09-5727, TCEQ Docket No. 2009-0290-MWD; *In the Matter of the Petition to Revoke TPDES Permit No. WQ0014555002*; State Office of Administrative Hearings

Dear Ms. Castañuela:

Please find enclosed an original and seven (7) copies of Far Hills Utility District's Reply to Petitioners' Exceptions to Proposal for Decision. 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*

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CHIEF CLERKS OFFICE

July 22, 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 Reply to Petitioners' Exceptions to Proposal for Decision 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)

SOAH DOCKET NO. 582-09-5727

TCEQ DOCKET NO. 2009-0290-MWD 2010 JUN 22 PM 4:37

PETITION TO REVOKE
TPDES PERMIT NO. WQ0014555002

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CHIEF CLERKS OFFICE
BEFORE THE

ISSUED TO
FAR HILLS UTILITY DISTRICT

STATE OFFICE OF
ADMINISTRATIVE HEARINGS

FAR HILLS UTILITY DISTRICT'S REPLY TO
PETITIONERS' EXCEPTIONS TO PROPOSAL FOR DECISION

TO THE HONORABLE COMMISSIONERS OF THE TCEQ:

Pursuant to 30 TAC §80.257, Far Hills Utility District (the "District") submits this Reply to the Exceptions to Proposal for Decision filed by Petitioners Suzanne O'Neal and Judith Spencer (collectively, "Petitioners").

ARGUMENT

I. Finding of Fact 22: Far Hills' Believed Completion Date for Property Purchase

Petitioners first argue, without support, that Finding of Fact 22 is irrelevant and should be omitted.¹ However, two of the six issues the Commission referred for hearing (Issues No. 4 & 5) specifically inquire about the District's "knowledge" and "intent." Contrary to Petitioners' suggestion, those issues cannot be resolved by simply reviewing the District's written application and the notice-related documents.² In determining what the District "knew" and "intended," the

¹ Finding of Fact 22: "Far Hills Board and its engineer, Mr. Hardin, believed the purchase of the 5.34 acres would be completed before the Commission completed its review of the application and certainly before the permit was issued."

² If that were the case, the Commission could have decided the issues itself and would not have needed to refer them for hearing.

ALJ properly considered all the facts and circumstances surrounding the District's application. Finding of Fact 22 explains why the District did it what it did, and it is precisely the sort of finding that the ALJ was asked to make in this proceeding. As such, Finding of Fact 22 is highly relevant to the Commission's resolution of the "knowledge" and "intent" issues and such finding should not be omitted.

Next, Petitioners argue that Finding of Fact 22 is contrary to the evidence and should be revised to reflect that that District did not intend to purchase the property until *after* the permit was issued. In support of this argument, Petitioners cite to pre-filed testimony from the Vice-President of the District's Board of Directors (William A. Lackey) in which he explains the District's reasons for not waiting to file its permit application until after it had purchased the property from Broussard-Christie, L.P.³ In the cited testimony, Mr. Lackey also references his understanding that the District needed a wastewater permit in order to get the TCEQ's approval on a "change of use" for the bond funds the District intended to use to purchase the property.

Petitioners' suggestion that this testimony proves the District "never intended to purchase the property before the application review was completed or before the permit was issued" goes too far. In another portion of his pre-filed testimony, Mr. Lackey unequivocally states that the District had every intention of purchasing the property from Broussard-Christie, L.P. "as soon as possible."⁴ In addition, the District's engineer (Timothy B. Hardin) testified at length at the Hearing on the Merits ("HOM") that both he and the District expected that the District would

³ Exhibit FH-1 at p.11, lines 3-19

⁴ Exhibit FH-1 at p. 10, lines 14-17

complete its purchase of the property *before* the TCEQ issued a permit.⁵ Finding of Fact 22 is relevant, supported by the evidence, and should remain in its current form.

II. Findings of Fact 23 & 24: Mr. Hardin's Conversation with TCEQ Staff Regarding Ownership and Configuration of the Property

Petitioners contend that Findings of Fact 23 & 24 should be omitted because the evidence supporting those findings -- Mr. Hardin's testimony regarding his conversation with the TCEQ staff member about the "true" ownership and configuration of the property -- is inadmissible hearsay.⁶ It is important to note that Petitioners made the exact same hearsay objection to Mr. Hardin's testimony prior to the Hearing on the Merits and that objection was properly overruled by the ALJ. Mr. Hardin's testimony is not hearsay because it contains statements that have legal significance independent of their truth (i.e., operative facts). In addition, Mr. Hardin's testimony was not offered for the truth of the matter asserted. Rather, it was offered to show the effect Mr. Hardin's conversation with the TCEQ staff member had on his preparation of the District's application. Furthermore, even if Mr. Hardin's testimony did contain hearsay, it was admissible under the "state of mind exception" to the hearsay rule.⁷ The testimony conveys Mr. Hardin's state of mind at the time he prepared the District's application and Mr. Hardin's state of mind is expressly relevant to the "knowledge" and "intent" issues referred by the Commission (Issues No. 4 & 5).

⁵ HOM Transcript at p. 166, lines 8-23

⁶ Finding of Fact 23: "Mr. Hardin called the Commission and explained to a staff member that Far Hills had an agreement to purchase the land on which the plant was to be built."

Finding of Fact 24: "The staff member, whose name Mr. Hardin did not remember, told him Far Hills should identify itself as the owner."

⁷ TEX. R. EVID. 803(3)

Petitioners also except to Findings of Fact 23 & 24 as being against the great weight and preponderance of the evidence. However, Petitioners failed to offer any evidence to refute the substance of Mr. Hardin's testimony regarding his conversation with the TCEQ staff member. Instead, Petitioners now cite to testimony from their expert witness (Sasha Earl) and two of the Executive Director's witnesses (Adrienne McClarron and June Ella Martinez) in arguing that Mr. Hardin's reliance upon the verbal advice given to him by the TCEQ staff member was "unreasonable" and deserves little, if any, weight.

A complete review of Mr. Earl's testimony, however, actually reveals that Mr. Hardin's reliance upon the TCEQ staff member's verbal advice was indeed reasonable. Mr. Earl (who has prepared a number of wastewater permit applications himself) stated in his prefiled testimony that he too has contacted TCEQ staff on various occasions with questions regarding the appropriate information to be submitted with a permit application or the proper interpretation of TCEQ rules.⁸ Under cross examination at the HOM, Mr. Earl admitted that on the occasions he contacted TCEQ staff with questions, he relied upon the information he received.⁹ Thus, it is reasonable to conclude, as the ALJ did, that but for Mr. Hardin's conversation with the TCEQ staff member, the District would not have identified itself as the "owner" of the property in its written application.¹⁰

Similarly, Petitioners reliance upon testimony from the two TCEQ staff members is misplaced. In the testimony cited by Petitioners, both of the TCEQ staff members testified that

⁸ Exhibit P-1 at p. 17, lines 12-21

⁹ HOM Transcript at p. 21, line 9 – p. 24, line 4; p. 58, line 3 – p. 59, line 5

¹⁰ PFD at p. 10

they would never orally advise an applicant that a misrepresentation of facts was acceptable. However, it is important to note that Mr. Hardin did not contact the TCEQ staff member seeking authority to “misrepresent facts” or obtain an “exception” to the TCEQ’s application requirements. Rather, Mr. Hardin contacted the TCEQ seeking advice on: (1) who should be identified in the District’s application as the “owner” of the property in light of the District’s verbal agreement to purchase the property, and (2) whether Broussard-Christie, L.P. needed to be included as a co-permittee on the District’s application.¹¹ Consequently, the testimony cited by Petitioners is misleading and does not discredit Mr. Hardin’s testimony. Findings of Fact 23 & 24 are supported by a preponderance of the evidence and should not be omitted.

III. Findings of Fact 50 & 51: Alternative Service by MCUD2 & Excessive Costs of Pumping and Hauling to Remote Site

Petitioners also contend that Findings of Fact 50 & 51 are irrelevant and should be deleted.¹² However, any decision regarding the possible suspension or revocation of the District’s permit must necessarily involve a thorough evaluation of the potential consequences of such a decision. Contrary to Petitioners’ argument, Issue No. 6 cannot be resolved by merely looking to the relevant TAC provision that governs permit revocation¹³ and determining if one of the “good cause” factors listed therein exists. Rather, the Commission should consider the totality of the circumstances in resolving Issue No. 6 and Findings of Fact 50 & 51 are material to that inquiry. It is also important to note that Petitioners made no attempt to refute or discredit

¹¹ Exhibit FH-

¹² Finding of Fact 50: “Montgomery County Utility District No. 2 (MCUD #2), which had formerly provided service ‘has expressed concerns’ about accommodating Far Hills’ wastewater because MCUD #2’s plant is over its capacity.”

Finding of Fact 51: “It would be expensive to pump and haul Far Hills’ waste to a remote location.”

¹³ 30 TAC §305.66(a)

the evidence that supports Findings of Fact 50 & 51. The ALJ's findings regarding MCUD2's inability to accept and treat the District's wastewater and the expensive cost of pumping and hauling the District's wastewater to a remote location are relevant to the ultimate issue of revocation and they should not be deleted from the proposed Order.

IV. Finding of Fact 56: Far Hills' Failure to Disclose Information Was Not Done "Knowingly" or "Intentionally"

In Finding of Fact 56, the ALJ concludes that the District's failure to disclose fully all relevant facts regarding ownership and configuration of the property was not done intentionally or knowingly. In his PFD, the ALJ explained that this finding was based upon "a lack of credible evidence" showing ill intent on the part of the District.¹⁴ Indeed, the evidence is quite clear that the District's sole intent was to truthfully and accurately inform the TCEQ who would be the ultimate owner of the property where the District's treatment plant would be located and how such property would be configured.¹⁵ If the District had any ill intent to deceive the TCEQ about the "true" ownership and configuration of the property, Mr. Hardin would have never contacted the TCEQ staff member to discuss the District's verbal agreement with Mr. Broussard to purchase the property and inquire about who should be identified as the property "owner" in the District's application under the circumstances.

Despite the District's lack of subjective intent to deceive, Petitioners contend that Finding of Fact 56 is improper because the District was clearly aware that the information it provided, or failed to provide, to the TCEQ regarding ownership and configuration of the property was

¹⁴ PFD at p. 13

¹⁵ Exhibit FH-1 at p. 12, line 7-21; Exhibit FH-10 at p. 8, line 1-8; HOM Transcript at p. 168, line 24 – p. 169, line 12; p. 177, line 24 – p. 178, line 3

factually incorrect. However, it must be remembered that the representations regarding ownership and configuration of the property in the District's application were made only after the District's engineer consulted a TCEQ staff member regarding the appropriate course of action under the circumstances. Based upon that consultation, Mr. Hardin and the District believed that representing the District to be the "owner" of the property was lawful, sanctioned, and entirely appropriate. This belief, even if mistaken, was objectively reasonable and sufficiently negates any culpability (knowledge or intent) on the part of the District.¹⁶ Furthermore, the concept of punishing the District for an act committed in reliance upon information provided by a staff member of the very agency charged with interpretation and execution of the statutes and regulations at issue in this case runs entirely contrary to the principles of fundamental fairness and equity.

For these reasons, Finding of Fact 56 is proper and should not be revised.

V. Ordering Provision 2: Abatement of Revocation Pending Resolution of the District's Temporary Order

Not surprisingly, Petitioners except to the ALJ's recommendation that revocation of the District's permit be abated until the Commission resolves the District's pending Application for a Temporary Order. According to Petitioners, the ALJ's recommendation provides the District with an "out" that places the District's financial interests above the integrity of the permitting process and Petitioners' private property interests. Petitioners even go so far as to claim that the District's Application for a Temporary Order is "entirely an issue of money, not public safety."¹⁷

¹⁶ See TEX. PEN. CODE §8.02(a); see also *Giddings v. State*, 83 S.W. 694, 694 (Tex. Crim. App. 1904) ("if an accused does anything that would be otherwise criminal under a mistake of fact, believing the fact to exist and that he had a right to act under it, it would not be criminal.")

¹⁷ Petitioners' Exceptions at p. 9

Contrary to Petitioners' argument, the public safety concerns raised in the District's Application for a Temporary Order are both real and significant. In addition, the evidence regarding the adverse consequences to be suffered by the general public of a potential suspension or revocation of the District's permit is undisputed. The District cannot afford the excessive costs of pumping and hauling its wastewater to a remote location, and MCUD2 does not currently have the permitted capacity available to treat and discharge the District's wastewater. At this time, there simply is no feasible alternative to the District treating and discharging its wastewater in accordance with the terms of the permit.

This being the situation, the ALJ's recommendation for an abatement of this proceeding until the Commission has had an opportunity to fully consider and resolve the District's pending Application for a Temporary Order strikes an appropriate balance of all competing interests. In fact, it is abundantly clear from the PFD that ALJ Card did his very best to be mindful of the Commission's own Mission Statement¹⁸ in making his recommendation for an abatement.¹⁹

The ALJ's recommendation to postpone revocation of the District's permit until the Commission has resolved the District's Application for a Temporary Order is supported by the evidence and should be followed.

VI. Assessment of Transcript Costs

Petitioners' insistence that the Commission's final Order contain a provision assessing all transcript costs against the District is misplaced. As noted in the PFD, Petitioners did not file a

¹⁸ The TCEQ's Mission Statement provides, "The Texas Commission on Environmental Quality strives to protect our State's human and natural resources consistent with sustainable economic development. Our goal is clean air, clean water, *and the safe management of waste.*" (emphasis added)

¹⁹ According to ALJ Card, "To shut down the treatment plant without making provision for alternative service would be a drastic and unwise step."

motion to assess transcript costs and the parties were not afforded an opportunity to present evidence on this issue.²⁰ Thus, an assessment of any transcription costs against the District without it being given an opportunity to present evidence on the issue would be premature and in violation of 30 TAC §80.23(d)(3).

Furthermore, an Order assessing *all* transcript costs against the District would be improper under the factors set forth in 30 TAC §80.23(d)(1). The District did not request that the contested case hearing be recorded, Petitioners and the District equally participated in the hearing, Petitioners and the District equally benefitted from having a transcript of the hearing, and the District has expended just as much time and resources (if not more) on this proceeding as Petitioners have.

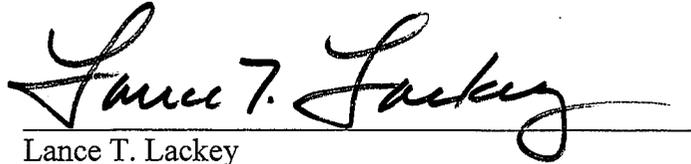
CONCLUSION

In summary, all of Petitioners' Exceptions to the Proposal for Decision lack merit and should be ignored. Findings of Fact 22-24, 26, 32, 50-51, 56, and Ordering Provision No. 2 are supported by a preponderance of the evidence and they should be included (as currently written) in the Commission's final Order.

²⁰ PFD at pp. 16-17, *see also* Finding of Fact 59

Respectfully submitted,

BARRETT & SMITH, PLLC

A handwritten signature in black ink that reads "Lance T. Lackey". The signature is written in a cursive style and is positioned above a horizontal line.

Lance T. Lackey

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FAR HILLS UTILITY DISTRICT**

CERTIFICATE OF SERVICE

By my signature below, I certify that on the 22nd day of July, 2010, a true and correct copy of the foregoing document was served upon the following persons via the methods indicated below:

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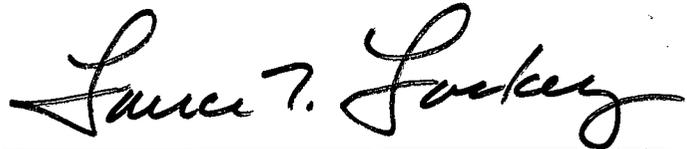
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