

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

June 21, 2010

Les Trobman, General Counsel  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin Texas 78711-3087

**Re: SOAH Docket No. 582-09-5727; TCEQ Docket No.2009-0290-MWD; Petition to Revoke TCEQ Water Quality Permit No. WQ0014555002 issued to Far Hills Utility District**

Dear Mr. Trobman:

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 documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than July 12, 2010. Any replies to exceptions or briefs must be filed in the same manner no later than July 22, 2010.

This matter has been designated **TCEQ Docket No. 2009-0290-MWD; SOAH Docket No. 582-09-5727**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www10.tceq.state.tx.us/epic/efilings/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in black ink, appearing to read "H. D. Card".

Henry D. Card  
Administrative Law Judge

HDC/lh  
Enclosures  
cc: Mailing List

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**AGENCY:** Environmental Quality, Texas Commission on (TCEQ)

**STYLE/CASE:** FAR HILLS UTILITY DISTRICT

**SOAH DOCKET NUMBER:** 582-09-5727

**REFERRING AGENCY CASE:** 2009-0290-MWD

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**STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

**ADMINISTRATIVE LAW JUDGE**

**ALJ HENRY D. CARD**

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FAR HILLS UTILITY DISTRICT

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FAR HILLS UTILITY DISTRICT

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xc: Docket Clerk, State Office of Administrative Hearings

**SOAH DOCKET NO. 582-09-5727  
TCEQ DOCKET NO. 2009-0290-MWD**

<b>PETITION TO REVOKE</b>	<b>§</b>	<b>BEFORE THE STATE OFFICE</b>
	<b>§</b>	
<b>TCEQ WATER QUALITY PERMIT</b>	<b>§</b>	
	<b>§</b>	<b>OF</b>
<b>NO. WQ0014555002 ISSUED TO</b>	<b>§</b>	
	<b>§</b>	
<b>FAR HILLS UTILITY DISTRICT</b>	<b>§</b>	<b>ADMINISTRATIVE HEARINGS</b>

**PROPOSAL FOR DECISION**

Suzanne O’Neal and Judith Spencer (Petitioners) seek revocation of the Texas Pollutant Discharge Elimination System (TPDES) permit issued to Far Hills Utility District (Far Hills), based on misstatements in the application and flaws in the notice published of that application. The Administrative Law Judge (ALJ) concludes that the permit should be revoked. However, because of the potential impact on customers served by the permitted wastewater plant, the ALJ further recommends that revocation of the permit be postponed at least until the Texas Commission on Environmental Quality (TCEQ or the Commission) has ruled on Far Hills’ application for a temporary permit to allow it to continue to discharge treated wastewater, which is pending before the Commission. The ALJ also recommends that Far Hills be ordered to file a new application for a permanent permit with accurate information, remedying the notice violations.

**I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY**

The Commission has jurisdiction over this matter pursuant to its enabling statutes and 30 TEX. ADMIN. CODE (TAC) § 305.66. The State Office of Administrative Hearings (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 ANN. Chapter 2003. Pursuant to 30 TAC § 80.17(a), Petitioners have the burden of proof in this proceeding.

Far Hills, which is located in Montgomery County, Texas, originally filed a request for a discharge permit on August 31, 2004. The application was protested and referred to SOAH. After a contested case hearing, the SOAH ALJ recommended denial of the permit. The Commission considered the Proposal for Decision (PFD) on August 22, 2007, and denied the permit in an Order issued September 7, 2007. The Commission denied the permit because the proposed plant would have been located in wetlands and therefore did not meet the requirements of 30 TAC § 309.13.

On April 11, 2007, after the PFD but before the Commission's Order, Far Hills filed a new application for a TPDES permit. Although the Applicant was the same, the proposed permit was for a different location. The Executive Director declared that application administratively complete on June 15, 2007. Notice of Receipt of Application and Intent to Obtain a Water Quality Permit (NORI) was published June 27, 2007, in the *Montgomery County News* and in Spanish on June 29, 2007 in *El Sol*. The Executive Director declared the application technically complete on July 26, 2007, whereupon the Notice of Application and Preliminary Decision (NAPD) was published in the same periodicals. No comments were received. The uncontested permit was posted to the Executive Director's uncontested agenda and granted on November 11, 2007. That permit, No. WQ0014555002, is the subject of this petition.

Petitioners submitted their petition to revoke the permit on March 3, 2009.<sup>1</sup> The Commission considered the petition at its June 26, 2009, agenda, granted the requested hearing, and referred the matter to SOAH in an Interim Order dated July 2, 2009.

Notice of the hearing was mailed on September 14 and September 23, 2009. The preliminary hearing, at which jurisdiction was determined, party status granted, and a procedural schedule established, was held on October 29, 2009.

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<sup>1</sup> Everett Simmons originally was a named Petitioner also, but did not appear for the preliminary hearing and was not granted party status.

On October 9, 2009, Far Hills filed its Notice of Forthcoming Application for Temporary Order to Discharge Treated Effluent into State Waters in the Event That TPDES Permit No. WQ0014555002 Is Suspended or Revoked, and Request for Direct Referral to SOAH. In that pleading, Far Hills informed the Commission that it planned to file the referenced application so it could continue to operate while a revised application was being considered, if this permit were revoked or suspended. Far Hills filed the actual application for a temporary order on November 2, 2010. That application is being processed at the Commission after having been reviewed by the United States Environmental Protection Agency.<sup>2</sup>

Petitioners filed a motion for summary disposition regarding this petition to revoke the permit on December 22, 2009. That motion was denied.

After an agreed continuance, the hearing was held February 22, 2010. Petitioners, Far Hills, the Executive Director, and the Office of Public Interest Counsel (OPIC) participated in the hearing, which was adjourned the same day. The record closed April 22, 2010, with the filing of the parties' replies to closing arguments.

## II. REFERRED ISSUES

In its Interim Order, the Commission referred the following issues to SOAH for a contested case hearing:

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?
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?

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<sup>2</sup> See Far Hills' and the Executive Director's Responses to Order No. 8, filed June 14, 2010.

3. In relation to Permit WQ0014555002, has Far Hills misrepresented any relevant facts regarding the appropriate newspaper for publication of notice?
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?
5. If Far Hills failed to disclose fully all relevant facts regarding ownership and configuration of the property was this act done intentionally or knowingly pursuant to Texas Water Code §7.149? and
6. Whether Far Hills' Permit WQ0014555002 should be revoked or suspended.

### III. EVIDENCE AND ARGUMENTS

In its application for this permit, Far Hills stated that it owned the 5.34 acre tract of land on which the plant was to be located. In fact, it did not. That land was part of a then-undivided ten-acre tract owned by Broussard-Christie, L.P., a real estate development company.<sup>3</sup>

Tim Hardin, who is the primary engineer for Far Hills and who prepared the application, testified Far Hills had a verbal agreement with Rod Broussard of Broussard-Christie, L.P. to purchase the 5.34 acres. Mr. Hardin stated he and Far Hills' Board believed that purchase would be completed before the Commission completed its review of the application and certainly before the permit was issued. According to Mr. Hardin, he called the Commission and spoke with a staff member, who told him Far Hills should identify itself as the owner. Mr. Hardin could not remember the name of the staff member with whom he spoke.<sup>4</sup> None of the staff members who testified remembered that conversation with Mr. Hardin, although they did not deny it might have occurred.

William Lackey, Vice-President of the Far Hills Board of Directors, testified the Board believed its verbal agreement with Broussard-Christie was enforceable. As it turned out, however, Broussard-Christie declined to honor that agreement and instead required Far Hills to purchase the

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<sup>3</sup> Petitioners Ex. 1 and 12-16.

<sup>4</sup> Far Hills Ex. 10.

entire ten-acre tract in 2008. In November 2009, long after the permit was issued, Far Hills sold the additional acreage to James Hartman, who owns the operating company for the treatment plant. Far Hills now owns 4.887 acres of the tract, which it uses for its treatment plant.<sup>5</sup> Both Mr. Hardin and Mr. Lackey testified that Far Hills did not intend to deceive the Commission regarding the ownership of the property, but were trying to reflect the expected future ownership.

Both Ms. O'Neal and Ms. Spencer own property adjacent to the ten-acre tract. In its original list and map of affected landowners, Far Hills included them. Their properties are not adjacent to the approximately five-acre site identified in the application, however. Therefore, both were excluded from the final list and map, and did not receive notice of the application. Both testified they first learned of the project when construction began.

Both Mr. Lackey and Mr. Hardin testified that Far Hills did not intentionally inappropriately exclude Petitioners, or anyone else, from the mailed notice. Instead, Petitioners were excluded, after consultation with the Commission's Staff, because they were not adjacent to the plant site as it was depicted in the application and therefore not considered to be affected persons. Far Hills sent mailed notice to 114 landowners, but Petitioners were not on that list.<sup>6</sup>

In addition to mailed notice, the application process requires two rounds of published notice. Although the requirements are similar, they are not identical. The first, the NORI, requires publication of notice in the newspaper of largest circulation in the county in which the facility is to be located. The second, the NAPD, requires publication of notice in a newspaper regularly published or circulated within the county. Both requirements are set out in the instructions provided applicants by the TCEQ.<sup>7</sup>

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<sup>5</sup> Far Hills Exs. 1 and 8; Tr. at 107-108.

<sup>6</sup> ED Ex. 9.

<sup>7</sup> See Executive Director's Closing Argument at 10. That argument outlines the path of regulations that govern the notice requirements. Because those requirements are undisputed, the ALJ does not discuss the intricacies of those regulations in this PFD. The notice requirements are also slightly different for facilities located within municipalities, which this one is not.

For its first application, which ultimately was denied, Far Hills published both the NORI and the NAPD in the *Conroe Courier*, which is a daily newspaper published in Conroe, Texas, the county seat of Montgomery County. For its second application, which led to this permit, Far Hills published both the NORI and the NAPD in the *Montgomery County News*, a free weekly newspaper.

According to Mr. Lackey, Far Hills did not want to publish again in the *Conroe Courier*, because it had run stories critical of the first application. Based on discussions with its engineer and attorney, the Far Hills Board believed the *Montgomery County News* was an acceptable option under the rules. Publishing the notices in the *Montgomery County News* was also cheaper than in the *Courier*. Mr. Lackey stated the Board thought the *Montgomery County News* would be a good choice also because it ran stories of local interest. Far Hills now admits that the *Montgomery County News* is not the newspaper of largest circulation in Montgomery County, but Mr. Lackey testified the Board thought at the time it satisfied the Commission's requirements.<sup>8</sup>

The publisher's affidavit originally submitted for the NORI by the *Montgomery County News* stated it was "of general circulation" in Montgomery County. The Commission Staff rejected that affidavit and advised Far Hills the affidavit needed to be on TCEQ's form. The *Montgomery County News* then completed a form attesting it was "a newspaper of largest circulation in Montgomery County," which Far Hills submitted to the Commission.<sup>9</sup>

Mr. Lackey testified that Far Hills provides water service to approximately 408 residential connections and sewer service to approximately 372 residential connections. He stated there was no practical alternative for sewer service. Mr. Lackey had contacted Montgomery County Utility District No. 2 (MCUD #2), which had formerly provided service, about reinstating service if this permit were revoked. He testified that MCUD #2 "has expressed concerns" about accommodating

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<sup>8</sup> In response to the Motion for Summary Judgment, Far Hills presented evidence that the *Houston Chronicle*, rather than either the *Conroe Courier* or the *Montgomery County News*, is actually the newspaper of largest circulation in Montgomery County. If Far Hills is required to file a new application, that matter should be resolved. See Far Hills' Reply to Closing Arguments at 5.

<sup>9</sup> ED Exs. 14 and 17-19.

Far Hill's wastewater because MCUD #2's plant is over its capacity.<sup>10</sup> Mr. Lackey estimated the cost of pumping and hauling Far Hills' waste to a remote location to be at least \$160,000 per month, although he did not identify the source of that estimate.<sup>11</sup>

Petitioners presented the testimonies of professional engineer Sasha Earl, Ms. O'Neal, and Ms. Spencer. Mr. Earl, who formerly worked at the Commission,<sup>12</sup> testified Far Hills had inaccurately portrayed itself in its application as owning the plant site, improperly excluded Ms. O'Neal and Ms. Spencer from the mailed notice, and improperly published the NORI. He testified that, during his employment at the Commission, he had never seen a situation in which an applicant had not owned the land on which a facility was to be constructed. He stated, however, that the Commission had a policy that allowed applicants to show a 99-year lease contract for the land or for the applicant and the landowner to apply as co-permittees.<sup>13</sup> Far Hills did not take either of those alternatives. Mr. Earl also stated that he would not have relied on unwritten advice from a TCEQ staff member in filling out the ownership portion of the application, and would also consider the identity of that person to be important.<sup>14</sup>

Ms. O'Neal testified that she owned land adjacent to the wastewater plant. Construction began on the plant in the fall of 2008. Ms. O'Neal stated she never received mailed notice or saw any published notice. She stated further that when it rains, water from the site flows onto her property.

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<sup>10</sup> MCUD #2 and Far Hills had an agreement that Far Hills would be off MCUD #2's system by October 29, 2009. Far Hill's connection to MCUD #2 is valved off. Far Hills Ex. 1 at 18; Tr. at 143-44.

<sup>11</sup> Far Hills Ex. 1 at 18-19; Tr. at 142-43.

<sup>12</sup> Mr. Earl worked at the Commission when it was known as the Texas Natural Resource Conservation Commission (TNRCC).

<sup>13</sup> Mr. Hardin testified that one reason he called the Commission about the ownership issue was that Far Hills preferred not to include Broussard-Christie as a co-permittee unless it were necessary. Tr. at 167-69.

<sup>14</sup> Petitioners Ex. 1; Tr. at 20-22, 54-55.

Ms. Spencer also testified that she owns property adjacent to the plant site, that she never received any mailed notice or saw any written notice, and that construction began in the fall of 2008. Neither Ms. O'Neal nor Ms. Spencer is a customer of Far Hills.<sup>15</sup>

The Executive Director presented the testimonies of TCEQ employees Adrienne C. McClarron, June Ella Martinez, and Charlene R. Smith. Ms. McClarron was the administrative reviewer for Far Hills' application. She stated Far Hills was notified of certain deficiencies in its application, which it corrected, after which she deemed it administratively complete. She testified that the Staff relies on applicants to submit accurate and complete applications and that the Staff does not independently verify land ownership. Ms. McClarron also testified that the application allows an applicant to submit a copy of an executed option to purchase agreement to show it will have ownership once the permit is approved.<sup>16</sup>

Ms. Martinez was the technical reviewer for the application. She stated she determined the application to be technically complete after requiring some additional information. She testified she relied on the administrative review to determine whether ownership requirements were met.<sup>17</sup>

Ms. Smith is the Notice Team Leader at TCEQ. She described the two different kinds of notice—the NORI and the NAPD. She explained that she had informed Far Hills of the inadequacy of the original NORI affidavit and required the filing of the new one. Ms. Smith stated that TCEQ does not verify the circulation claims of the affidavits, but relies on the applicants to do so.<sup>18</sup>

Ms. McClarron, Ms. Martinez, and Ms. Smith all testified that they would have required Far Hills to remedy the situation, or would have notified TCEQ's Legal Division, if they had known of the inaccuracies in the land ownership description and notice.

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<sup>15</sup> Petitioners Exs. 21 and 24.

<sup>16</sup> ED Exs. 1 and 4; Tr. at 223.

<sup>17</sup> ED Ex. 11; Tr. at 246-47.

<sup>18</sup> ED Ex. 14; Tr. at 255.

In their closing arguments, the Petitioners and OPIC contended that (1) Far Hills failed to disclose all relevant facts regarding the ownership and configuration of the property, (2) Far Hills failed to disclose all relevant facts, misrepresented facts, and made false and misleading statements with respect to mailed notice, (3) Far Hills misrepresented relevant facts regarding the appropriate newspaper for publication of notice, (4) Far Hills published notice in the wrong newspaper intentionally or knowingly, (5) Far Hills failed to disclose all relevant facts regarding ownership and configuration of the property intentionally or knowingly, and (6) Far Hills' Permit WQ0014555002 should be revoked.

The Executive Director agreed with the Petitioners' and OPIC's answers to the first five questions. He also agreed that the permit should be revoked; however, he argued that the Commission should contemporaneously grant the pending application for a temporary order to authorize temporary discharges, in order to prevent unauthorized discharges of treated domestic wastewater. The Executive Director further recommended that Far Hills be required to file a new application for a permit for the existing facility, and provide and publish notice in accordance with the Commission's rules, as well as provide written notice to Ms. O'Neal and Ms. Spencer, even if their property is no longer adjacent to the site.

Far Hills argued that all the questions referred by the Commission should be answered in the negative. It contended that Mr. Hardin informed the Commission orally of the property-ownership situation and was given the go-ahead to file the application with Far Hills listed as the property owner, which was what Far Hills intended. Far Hills further argued that it did not fail to fully disclose facts related to mailed notice, because the mailed notice was derived from the property description. Far Hills stated it was not aware at the time of publication that the *Montgomery County News* was not the paper of largest circulation in Montgomery County, although Far Hills has subsequently admitted that it is not. According to Far Hills, it relied on the representations of the *Montgomery County News* to that effect. Even if the Commission finds against it on those issues, Far Hills denied intentionally or knowingly misrepresenting either the ownership of the property or the proper newspaper for publication of notice. Finally, Far Hills argued that its permit should not be

revoked—first, because of its answers to the issues above; second, because of the adverse consequences to the public and the unavailability of feasible alternatives for treatment of the wastewater; and third, because the violations, if any, were not significant and because it has made a substantial attempt to correct them.

#### IV. ALJ'S ANALYSIS

##### A. Referred Issues

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 finds Far Hills failed during the application process to disclose fully all relevant facts regarding its ownership and configuration of the property.

As is discussed more fully below, the ALJ finds Mr. Hardin spoke with a TCEQ Staff member about the ownership situation of the Far Hills plant site, and that the representations in the application were based on that conversation. However, Mr. Hardin did not inform the Staff that the agreement was unenforceable, because the Board and he were unaware of that fact. Far Hills did not inform the Commission, before the permit was approved, that the sale of the property had not actually occurred as it had anticipated. Even now the property ownership is slightly different from that portrayed in the application. The ALJ agrees with Petitioners that the correct information regarding the ownership of the land was not set forth in the application itself, regardless of what oral advice Far Hills received.

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?*

Far Hills' inaccurate description of the land ownership led to an inaccurate determination of who was entitled to receive mailed notice. The ALJ finds Far Hills failed to fully disclose all relevant fact, misrepresented relevant facts, and made false or misleading statements with respect to mailed notice.

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

Far Hills represented that the *Montgomery County News*, in which it published the NORI, was the newspaper of largest circulation in Montgomery County. It is not. Far Hills' attempt to shift the blame for that inaccuracy is discussed below, but the ALJ finds that it did misrepresent that fact.

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?*

Mr. Lackey testified that Far Hills believed the *Montgomery County News* was an appropriate newspaper for publication of the NORI and did not deliberately publish in the wrong newspaper. Under the circumstances, however, the ALJ finds it hard to believe that Far Hills thought the *Montgomery County News* was the newspaper of largest circulation in Montgomery County. Far Hills had filed a previous application for a wastewater permit. It published the NORI for that application in the *Conroe Courier*. Presumably it believed that the *Conroe Courier* was the newspaper of largest circulation in Montgomery County.

Mr. Lackey stated that Far Hills chose to publish notice of this application instead in the *Montgomery County News*, because it was cheaper and because the *Conroe Courier* had run negative articles about the previous application. Neither Mr. Lackey nor Mr. Hardin testified that Far Hills had determined that the *Montgomery County News* was actually the newspaper of largest circulation in Montgomery County. Although the *Montgomery County News* eventually, on its second attempt, filed an affidavit that it was "a newspaper of largest circulation" in Montgomery County, that

affidavit was filed after the fact. There was no testimony to indicate that Far Hills relied on the representations from the *Montgomery County News* in reaching its publication decision.

The ALJ does not reach a finding on whether Far Hills intended to hide its application from the public by publishing in the *Montgomery County News*. He does find, however, that Far Hills ignored the explicit requirements for the NORI by publishing in a newspaper that it knew was not the newspaper of largest circulation in Montgomery County. Therefore, the ALJ finds Far Hills intentionally or knowingly published notice in the wrong newspaper.

In their petition, Petitioners requested TCEQ institute an enforcement action under TEX. WATER CODE ANN. § 7.149. That section makes it a criminal offense for a person to intentionally or knowingly make a false material statement, representation, or certification in certain applications, notices, record, report, plan, or other documents. The Commission included consideration of that section in its referral on this issue.

As the Executive Director pointed out, however, although the Commission has the general authority to enforce provisions of the Water Code, neither the Commission nor SOAH has criminal jurisdiction. Moreover, the standard of proof in a criminal proceeding is different from that in this administrative proceeding. The Executive Director also pointed out that any criminal prosecution for an offense under this section would be barred by the statute of limitations.<sup>19</sup> Therefore, although the ALJ finds Far Hills intentionally or knowingly published the NORI in the wrong newspaper, he does not reach any conclusion regarding whether that act was in violation of Texas Water Code §7.149.<sup>20</sup>

5. *If Far Hills failed to disclose fully all relevant facts regarding ownership and configuration of the property was this act done intentionally or knowingly pursuant to Texas Water Code §7.149?*

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<sup>19</sup> Executive Director's Closing Argument at 2-3.

<sup>20</sup> The Commission has the authority to request the Executive Director to institute an enforcement proceeding if it so desires.

Mr. Lackey testified Far Hills had an oral agreement with Broussard-Christie to purchase approximately five acres of the ten-acre tract for the wastewater plant site. Surprisingly, at least to the ALJ, the Far Hills Board did not realize that oral agreement was unenforceable. The ALJ finds it plausible that the Board communicated to Mr. Hardin that it had an agreement to purchase the property, that Mr. Hardin communicated that fact to a TCEQ Staff member in asking how to fill out the application, and that the Staff member told him to show Far Hills as the owner, not realizing that there was no written option to purchase and that the agreement could not be enforced. Broussard-Christie did not sell the ten-acre tract to Far Hills until after the permit had been issued.

Far Hills did have some motive to misrepresent the ownership of the property, because Ms. O'Neal and Ms. Spencer were adjacent to the ten-acre tract. Yet Far Hills included both Petitioners in the original landowner list and later removed them. Although it is possible that Far Hills intentionally misrepresented the ownership of the property as a means of excluding Petitioners from notice, the ALJ finds it equally possible that the misrepresentation was a serious blunder caused by miscommunication and ignorance of the unenforceability of Far Hill's oral agreement with Broussard-Christie. In the absence of credible evidence to show intent, the ALJ finds Far Hills' failure to disclose fully the relevant facts regarding ownership of the property was not done intentionally or knowingly.

6. *Whether Far Hills' Permit WQ0014555002 should be revoked or suspended.*

The commission's authority to revoke Far Hills' permit is set out in 30 TAC § 305.66, which states, in pertinent part:

- (a) A permit or other order of the commission does not become a vested right and may be suspended or revoked for good cause at any time by order of the commission after opportunity for a public hearing is given. Good cause includes, but is not limited to, the following: . . . .
  - (4) the permittee's failure in the application or hearing process to disclose fully all relevant facts, or the permittee's misrepresentation of relevant facts at any time; . . .

- (10) such other cause sufficient to warrant termination or suspension of the authorization.
- (f) The commission may deny, suspend for not more than 90 days, or revoke an original or renewal permit if the commission finds after notice and hearing, that:
  - (1) the permit holder has a record of environmental violations in the preceding five years at the permitted site;
  - (2) the applicant has a record of environmental violations in the preceding five years at any site owned, operated, or controlled by the applicant;
  - (3) the permit holder or applicant made a false or misleading statement in connection with an original or renewal application, either in the formal application or in any other written instrument relating to the application submitted to the commission, its officers, or its employees; . . .
- (g) Before denying, suspending, or revoking a permit under this section, the commission must find:
  - (1) that a violation or violations are significant and that the permit holder or applicant has not a made a substantial attempt to correct the violations; . . .

Far Hills contends that its violations, if any, were not significant and that it has made a substantial effort to correct them. Far Hills cites its post-permit purchase of the property and subsequent sale of a portion of that property. Far Hills also points out that it provided notice to 114 other landowners and argues that it substantially complied with the published notice requirements by publishing in the *Montgomery County News*.

In his closing argument, the Executive Director contended that the “significant” language of 30 TAC § 305.66(g)(1) refers to environmental violations, not to false or misleading statements.<sup>21</sup> Petitioners agreed with the Executive Director’s interpretation. OPIC assumed the standard applied

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<sup>21</sup> Executive Director’s Closing Argument at 3-5.

to such statements and did not otherwise address it. Far Hills, of course, disagreed with that analysis. The Executive Director, Petitioners, and OPIC all contended that the violations were significant, in any event, and that Far Hills has not made a significant attempt to correct them.

The ALJ does not address that legal dispute in this Proposal for Decision because he agrees that the violations were significant. The misinformation about the property ownership and configuration misled the Staff about an essential element of the project and led to the problems with mailed notice. Proper notice itself is fundamental to any administrative proceeding. Because Petitioners did not receive notice, they were not able to participate in the permitting proceeding, which was uncontested. The mailing of notice to other individuals did not cure the harm to Petitioners. The post-permit sale of a portion of the ten-acre tract does not rectify that basic flaw in the permitting process.<sup>22</sup> When the permit was issued, Far Hills did not own the site and Petitioners were adjacent landowners who should have been, but were not, notified of the application. Far Hills has not made a substantial effort to correct those fundamental violations; the only way to correct them is for affected persons to receive proper notice.

The Executive Director also disputes the existence of a substantial compliance standard for notice. Again, the ALJ does not address that legal question, because he finds that publication of notice in the *Montgomery County News* did not substantially comply with the NORI publication requirement.

The ALJ finds that Permit No. WQ0014555002 should be revoked because of the significant misleading statement in the application regarding ownership and configuration of the property and notice to the public. As noted by Far Hills and the Executive Director, however, the wastewater plant is providing sewer service to approximately 372 residential connections. Far Hills demonstrated that no alternative service is available, at least at this time. MCUD #2's plant is over capacity. Even if Mr. Lackey's \$160,000 per month estimate is not correct, it would certainly be expensive to pump and haul the Far Hills wastewater to a remote location. Nothing in the record

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<sup>22</sup> The ALJ notes that the configuration of the property is not identical to that described in the application.

shows that the affected residential customers played any role in the problems with the permit application or that they have received notice that the permit might be revoked. To shut down the wastewater treatment plant without making provision for alternative service would be a drastic and unwise step. Although OPIC suggested the plant could continue to provide service, even with its permit revoked, in violation of TCEQ regulations, the ALJ does not believe the Commission should encourage that course of action.

Far Hills' Application for Temporary Order to Discharge Treated Effluent into State Waters in the Event That TPDES Permit No. WQ0014555002 Is Suspended or Revoked is not before SOAH and was not the subject of this hearing. Therefore, the ALJ declines to recommend that the Commission grant that application. He does recommend, however, that revocation of Permit No. WQ0014555002 be abated until the Commission has ruled on that application.

The Executive Director recommended that, in the Temporary Order, Far Hills be required to file a new permit application, to comply with all relevant application and notice provisions in filing and processing that application, and to provide notice to Petitioners, even though they are no longer adjacent to the property. Although the ALJ agrees with those recommendations, he does not include them in the Proposed Order in this case because they would be issues in the Temporary Order proceeding.

## **B. Transcript Costs**

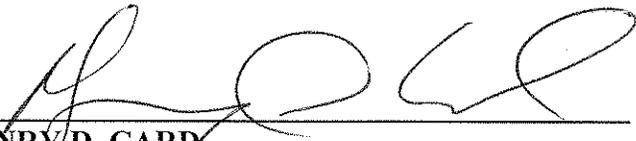
The Executive Director, in his closing argument, requested that transcript costs not be assessed against him, pursuant to 30 TAC § 80.23(d)(2). That subsection provides, "The commission will not assess reporting or transcription costs to statutory parties who are precluded by law from appealing any ruling, decision, or other act of the commission."

Subsection (d)(3) of that rule states:

In any proceeding where the assessment of reporting or transcription costs is an issue, the judge shall provide the parties an opportunity to present evidence and argument on the issue. A judge shall include in the proposal for decision a recommendation for the assessment of costs.

The issue of transcription costs was not raised until the Executive Director's closing argument. Therefore, the parties did not have the opportunity to present evidence on the issue. Pursuant to 30 TAC § 80.23(d)(1), the Commission may assess those costs to one or more of the parties based on certain factors. Because no motion was filed and no opportunity for evidence presented, the ALJ makes no finding or recommendation on the allocation of reporting and transcription costs.

**SIGNED June 21, 2010.**



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**HENRY D. CARD**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**An ORDER Regarding Petition to Revoke TCEQ Water Quality Permit No. WQ0014555002 Issued to Far Hills Utility District; TCEQ Docket No. 2009-0290-MWD and SOAH Docket No. 582-09-5727**

On \_\_\_\_\_, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Petition to Revoke TCEQ Water Quality Permit No. WQ0014555002 Issued to Far Hills Utility District. A Proposal for Decision (PFD) was presented by Henry D. Card, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a hearing concerning the Petitioner on February 22, 2010, in Austin, Texas.

**FINDINGS OF FACT**

1. Far Hills Utility District (Far Hills), which is located in Montgomery County, Texas, originally filed a request for a Texas Pollutant Discharge Elimination System (TPDES) permit with the Commission on August 31, 2004.
2. The August 31, 2004, application was protested and referred to SOAH. After a contested case hearing, the SOAH ALJ recommended denial of the permit. The Commission considered the Proposal for Decision (PFD) on August 22, 2007, and denied the permit in an Order issued September 7, 2007.
3. The Commission denied the permit because the proposed plant would have been located in wetlands and therefore did not meet the requirements of 30 TAC § 309.13.

4. On April 11, 2007, after the PFD but before the Commission's Order, Far Hills filed a new application for a TPDES permit. Although the Applicant was the same, the proposed permit was for a different location.
5. The Executive Director declared the April 11, 2007, application administratively complete on June 15, 2007.
6. Notice of Receipt of Application and Intent to Obtain a Water Quality Permit (NORI) was published June 27, 2007, in the *Montgomery County News* and in Spanish on June 29, 2007 in *El Sol*.
7. The Executive Director declared the application technically complete on July 26, 2007, whereupon the Notice of Application and Preliminary Decision (NAPD) was published in the same periodicals.
8. No comments were received regarding the NAPD.
9. The uncontested permit, No.WQ0014555002, was posted to the Executive Director's uncontested agenda and granted to Far Hills on November 11, 2007.
10. Suzanne O'Neal and Judith Spencer (Petitioners) submitted their petition to revoke Permit No.WQ0014555002.
11. The Commission considered the petition to revoke at its June 26, 2009, agenda, granted the requested hearing, and referred the matter to SOAH in an Interim Order dated July 2, 2009.
12. Notice of the hearing was mailed on September 14 and September 23, 2009.
13. The notice contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.

14. The preliminary hearing, at which jurisdiction was determined, party status granted, and a procedural schedule established, was held on October 29, 2009.
15. On October 9, 2009, Far Hills filed its Notice of Forthcoming Application for Temporary Order to Discharge Treated Effluent into State Waters in the Event That TPDES Permit No. WQ0014555002 Is Suspended or Revoked, and Request for Direct Referral to SOAH. In that pleading, Far Hills informed the Commission that it planned to file the referenced application so it could continue to operate while a revised application was being considered, if this permit were revoked or suspended.
16. Far Hills filed the actual application for a temporary order on November 2, 2010. That application is being processed at the Commission after having been reviewed by the United States Environmental Protection Agency.
17. After an agreed continuance, the hearing was held February 22, 2010. Petitioners, Far Hills, the Executive Director, and the Office of Public Interest Counsel (OPIC) participated in the hearing, which was adjourned the same day. The record closed April 22, 2010, with the filing of the parties' replies to closing arguments.
18. In its Interim Order, the Commission referred the following issues to SOAH for a contested case hearing:
  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?
  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?

3. In relation to Permit WQ0014555002, has Far Hills misrepresented any relevant facts regarding the appropriate newspaper for publication of notice?
  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?
  5. If Far Hills failed to disclose fully all relevant facts regarding ownership and configuration of the property was this act done intentionally or knowingly pursuant to Texas Water Code §7.149? and
  6. Whether Far Hills' Permit WQ0014555002 should be revoked or suspended.
19. In its application for Permit No. WQ0014555002, Far Hills stated that it owned the 5.34 acre tract of land on which the plant was to be located.
  20. Far Hills did not own the 5.34-acre tract of land on which the plant was to be located. That land was part of a then-undivided ten-acre tract owned by Broussard-Christie, L.P., a real estate development company.
  21. Far Hills had a verbal agreement with Rod Broussard of Broussard-Christie, L.P. to purchase the 5.34 acres.
  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.
  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.
  24. The staff member, whose name Mr. Hardin did not remember, told him Far Hills should identify itself as the owner.

25. Mr. Hardin did not tell the staff member that Far Hills' verbal agreement to purchase the land was unenforceable.
26. Broussard-Christie declined to honor its verbal agreement with Far Hills and instead required Far Hills to purchase the entire ten-acre tract in 2008.
27. Far Hills did not inform the Commission, before the permit was approved, that the sale of the property had not actually occurred as it had anticipated.
28. In November 2009, long after the permit was issued, Far Hills sold the additional acreage to James Hartman, who owns the operating company for the treatment plant.
29. Far Hills now owns 4.887 acres of the tract, which it uses for its treatment plant.
30. Both Ms. O'Neal and Ms. Spencer own property adjacent to the ten-acre tract.
31. In its original list and map of affected landowners, Far Hills included Ms. O'Neal and Ms. Spencer.
32. Ms. O'Neal's and Ms. Spencer's properties are not adjacent to the approximately five-acre site identified in the application.
33. Both Petitioners were excluded from the final list and map, and did not receive notice of the application.
34. Far Hills' inaccurate description of the land ownership led to an inaccurate determination of who was entitled to receive mailed notice.
35. Both Petitioners learned of the project when construction began.
36. Neither Ms. O'Neal nor Ms. Spencer is a customer of Far Hills.
37. In addition to mailed notice, the application process requires two rounds of published notice. Although the requirements are similar, they are not identical.
38. The first published notice, the NORI, requires publication of notice in the newspaper of largest circulation in the county in which the facility is to be located.

39. The second published notice, the NAPD, requires publication of notice in a newspaper regularly published or circulated within the county.
40. Both publication requirements are set out in the instructions provided applicants by the TCEQ.
41. For its first application, which ultimately was denied, Far Hills published both the NORI and the NAPD in the *Conroe Courier*, which is a daily newspaper published in Conroe, Texas, the county seat of Montgomery County.
42. For its second application, which led to this permit, Far Hills published both the NORI and the NAPD in the *Montgomery County News*, a free weekly newspaper.
43. Far Hills did not want to publish again in the *Conroe Courier*, because it had run stories critical of the first application, and because publication in the *Montgomery County News* was cheaper.
44. The *Montgomery County News* is not the newspaper of largest circulation in Montgomery County.
45. The publisher's affidavit originally submitted for the NORI by the *Montgomery County News* stated it was "of general circulation" in Montgomery County. The Commission Staff rejected that affidavit and advised Far Hills the affidavit needed to be on TCEQ's form.
46. The *Montgomery County News* then completed a form attesting it was "a newspaper of largest circulation in Montgomery County," which Far Hills submitted to the Commission.
47. In reaching its publication decision, Far Hills did not rely on the representations of the *Montgomery County News* that it was "a newspaper of largest circulation" in Montgomery County.

48. Far Hills provides water service to approximately 408 residential connections and sewer service to approximately 372 residential connections.
49. Far Hills' residential customers did not play any role in the problems with the permit application and have not received notice that the permit might be revoked.
50. Montgomery County Utility District No. 2 (MCUD #2), which had formerly provided service 'has expressed concerns' about accommodating Far Hill's wastewater because MCUD #2's plant is over its capacity.
51. It would be expensive to pump and haul Far Hills' waste to a remote location.
52. In relation to Permit WQ0014555002, Far Hills failed during the application and/or hearing process to disclose fully all relevant facts regarding its ownership and configuration of the property. (*Referred Issue No. 1*).
53. Far Hills failed to fully disclose all relevant facts, misrepresent any relevant facts or make any false or misleading statements with respect to mailed notice. (*Referred Issue No. 2*).
54. In relation to Permit WQ0014555002, Far Hills misrepresented relevant facts regarding the appropriate newspaper for publication of notice. (*Referred Issue No. 3*).
55. Far Hills intentionally or knowingly published the NORI in the wrong newspaper. (*Referred Issue No. 4*).
56. Far Hills' failure to disclose fully all relevant facts regarding ownership and configuration of the property was not done intentionally or knowingly. (*Referred Issue No. 5*).
57. Far Hills' misrepresentations regarding ownership and configuration of the land, mailed notice, and published notice were significant.
58. Far Hills has not made a substantial effort to correct its violations.

59. The issue of transcription costs was not raised until the Executive Director's closing argument. Therefore, the parties did not have the opportunity to present evidence on the issue.

### **CONCLUSIONS OF LAW**

1. The Commission has jurisdiction over this matter pursuant to its enabling statutes and 30 TEX. ADMIN. CODE (TAC) § 305.66.
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 ANN. Chapter 2003.
3. Pursuant to 30 TAC § 80.17(a), Petitioners have the burden of proof in this proceeding.
4. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
5. Far Hills' Permit No. WQ0014555002 should be revoked, pursuant to 30 TAC § 305.66. (*Referred Issue No. 6*).
6. Far Hills' Application for Temporary Order to Discharge Treated Effluent into State Waters in the Event That TPDES Permit No. WQ0014555002 Is Suspended or Revoked was not before SOAH and was not the subject of the hearing in this case.
7. Revocation of Far Hills' Permit No. WQ0014555002 should be abated until the Commission has ruled on the application for a temporary order.

### **ORDERING PROVISIONS**

**NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:**

1. TPDES Permit No. WQ0014555002, issued to Far Hills Utility District, shall be revoked subject to the provisions of this Order.
2. Revocation of TPDES Permit No. WQ0014555002 is abated pending resolution by the Commission of Far Hills Utility District's Application for Temporary Order to Discharge Treated Effluent into State Waters in the Event That TPDES Permit No. WQ0014555002 Is Suspended or Revoked.
3. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
4. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and Texas Government Code §2001.144.
5. As required by Texas Water Code § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to Respondent.
6. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

**ISSUED:**

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

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**Bryan W. Shaw, Ph D., Chairman**  
**For the Commission**