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via E-Filing and U.S. Mail

Ms. La Donna Castañuela
Texas Commission on Environmental Quality
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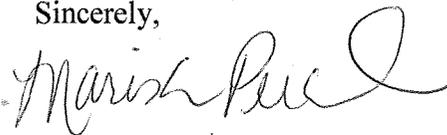
Re: **SOAH Docket No. 582-09-5727; TCEQ Docket No. 2009-0290-MWD; In the
Matter of the Petition to Revoke TPDES Permit No. WQ0014555002.**

Dear Ms. Castañuela:

Petitioners Suzanne O'Neal and Judith Spencer file the enclosed **Reply to Exceptions to
the Proposal for Decision** in the above-referenced matter.

Please contact me if you have any questions or concerns.

Sincerely,



Marisa Perales

Cc: Certificate of Service

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

PETITION TO REVOKE § BEFORE THE STATE OFFICE
TPDES PERMIT NO. §
WQ0014555002 § OF
ISSUED TO §
FAR HILLS UTILITY DISTRICT § ADMINISTRATIVE HEARINGS

PETITIONERS' REPLY TO EXCEPTIONS TO PROPOSAL FOR DECISION

TO THE HONORABLE COMMISSIONERS OF TCEQ:

Petitioners Suzanne O'Neal and Judith Spencer (collectively, "Petitioners") submit this Reply to Exceptions to the Honorable Administrative Law Judge Henry D. Card's Proposal for Decision and Proposed Order. By this Reply, Petitioners address the Exceptions submitted by Far Hills Utility District. For support, Petitioners offer the following:

ARGUMENT

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? and

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?

In its Exceptions, Far Hills argues that the written representations in its application for a discharge permit are not dispositive of these two issues. But the application is the

means—the only, formal means—by which applicants represent relevant facts to TCEQ staff for their review. The application process provides the vehicle by which applicants demonstrate how they have complied with applicable regulations. This application is what is made available to the public for their scrutiny. And ultimately, applicants are held accountable for the representations made in the application—by defending those representations in a contested case hearing, should a hearing be granted, and by complying with those application representations, should a permit be granted.

Far Hills avoided a contested case hearing by virtue of their misrepresentations. Had a contested case hearing been granted regarding Far Hills' application, the true facts regarding the ownership issue and the configuration of the property would have been unveiled. It would likely have become apparent that Far Hills did not possess the requisite ownership interest in the property to obtain a permit. And Far Hills would have been forced to correct the problem in order to get its permit. That the inaccuracy in Far Hills' application was discovered after the permit was issued, rather than before, should not alter the consequences for this misrepresentation.

Far Hills claims that by telling one, unnamed TCEQ staff person the true circumstances regarding the ownership and configuration of the property, it has fully disclosed all relevant facts. If this argument were accepted by TCEQ, it would result in bad policy and possibly, denial of due process. No longer would an applicant need to worry about accurately representing facts in its application, so long as it informed someone—anyone—at TCEQ that the representations in the application were not true. Applicants would effectively be allowed to represent one set of facts to the public, via

their application and notice, and another set of facts to certain TCEQ staff. This goes against the purposes of providing a streamlined application process and the purposes of providing the public with notice of the application and a copy of the application.

Furthermore, it creates an unworkable process for TCEQ staff. As the facts of this case illustrate, not every staff member in the water quality section works on every application for a discharge permit. There is no guarantee that the persons responsible for reviewing the application possess all of the accurate, relevant facts regarding the application. Thus, to simply inform one person that the application includes discrepancies is simply not sufficient and it is not equivalent to “full disclosure” of all relevant facts during the permitting process.

In addition to the general policy implications, the specific facts of this case add further support for an affirmative finding to Issues No. 1 and 2. Far Hills had previously applied for a discharge permit, which was ultimately denied following a contested case hearing. Thus, Mr. Hardin was familiar with at least some of the water quality permitting staff that had previously reviewed Far Hills’ first application. In particular, Ms. June Ella Martinez reminded Mr. Hardin that she had worked on the first application.¹ Yet, he never informed Ms. Martinez or conferred with her about the ownership issue.

Also, when exchanging communications with Ms. McClarron regarding the list of adjacent landowners, Mr. Hardin could have explained to Ms. McClarron that the reason Ms. O’Neal and Ms. Spencer were initially included on the adjacent landowners’ list is because the property had not yet been divided into two tracts as reflected in the

¹ Ex. FH-13, Attachment 1.

application and that even if it were already divided, the only thing separating Ms. O'Neal's property from the site is a road. Instead of ensuring that Ms. McClarron was familiar with the true circumstances surrounding the configuration of the property, however, Mr. Hardin instead chose to capitalize on Ms. McClarron's uninformed instruction to remove Ms. O'Neal and Ms. Spencer from the landowners map and list, knowing that they would not be provided notice of the application.

It is also worth noting that although Mr. Hardin testified that he informed a TCEQ staff person that Far Hills was not the true owner of the property and that this person instructed him that Far Hills could nevertheless reflect that it is the owner of the property on the application, there is no evidence that this staff person also told Mr. Hardin that it was ok to reflect that the property consisted of only five acres when it remained an undivided ten acres. Nor is there evidence that Mr. Hardin ever informed a staff person that the actual configuration of the property was such that Ms. O'Neal and Ms. Spencer were still adjacent landowners.

These facts reflect that Mr. Hardin, a professional engineer, took advantage of a convenient situation when he was told that Far Hills could represent that it was the owner of the property. Once he heard this instruction, he never revisited the subject—not to clarify to Ms. McClarron that the property had not yet been sub-divided nor to any other person reviewing the application. This was a violation of the clear and express language of the application and the rules—requirements that Mr. Hardin was quite familiar with.

Finally, Far Hills argues that Petitioners failed to offer any evidence to contradict the substance of Mr. Hardin's testimony regarding his conversation with TCEQ staff. This is inaccurate. Both Petitioners and the Executive Director presented evidence that called into question whether this conversation took place as Mr. Hardin described it. Petitioners presented the testimony of Mr. Earl, who used to work at TCEQ. He testified that during his employment at TCEQ (then, TNRCC), it was understood that TCEQ staff did not provide legal advice to applicants.² Moreover, he testified that TCEQ staff would never encourage an applicant to include false information in an application.³ Ms. Martinez's testimony buttressed Mr. Earl's.⁴

Under the circumstances, and without the name of the person to whom Mr. Hardin spoke, there is no better evidence available to rebut Mr. Hardin's assertions. Indeed, it is ironic that Far Hills, on the one hand, failed to provide the name of the TCEQ person that Mr. Hardin claims he spoke to and, on the other hand, complains that Petitioners failed to contradict the substance of Mr. Hardin's testimony regarding the conversation. This is precisely why applicants should not be allowed claim reliance on a conversation with a TCEQ staff person as an excuse for failing to provide accurate information on an application. There is simply no way to verify whether Mr. Hardin's recollection of events is accurate.

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

² Tr. p. 52, ll. 1-3.

³ Tr. p. 52, ll. 12-23.

⁴ See Tr. p. 249, ll.2-7; p. 250, ll. 1-13; p. 251, ll. 1-9.

Petitioners will not repeat the arguments set forth in its exceptions, but write only to address Far Hills' argument that this issue should be answered in the negative because Petitioners failed to offer evidence about which newspaper has the greatest circulation in Montgomery County. Petitioners' burden in this proceeding was only to show that the Montgomery County News was not the newspaper with the largest circulation. Far Hills admitted that the Montgomery County News was not the newspaper with the largest circulation.⁵ This alone supports an affirmative answer to this issue.

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?*

Here, again, Far Hills presents an argument that, if adopted, would certainly result in bad precedent, in that it would allow applicants to claim ignorance of the rules. Far Hills argues that the evidence demonstrates that the District believed publication of the NORI in the Montgomery County News would satisfy the TCEQ's rules. To the contrary, the evidence reveals that Far Hills conveniently failed to familiarize itself with TCEQ's requirements, although it had many opportunities to do so.

By definition, only one newspaper can be considered the newspaper of "greatest circulation." At one time, Far Hills assumed that the newspaper that satisfied this definition was the Conroe Courier, because it published notice of its first application for a discharge permit in that newspaper. Mr. Lackey testified that the District decided against publishing in this newspaper again because of the bad publicity the newspaper provided; apparently, TCEQ's requirements were not a factor in his decision. Moreover,

⁵ See Ex. P-25.

Mr. Lackey testified that circulation of the Montgomery County News was limited. And finally, a simple reading of the form affidavit and TCEQ's instructions would have alerted Far Hills to the requirements for published notice. That they chose to ignore those requirements and failed to inquire about Montgomery County News' circulation is not a valid excuse.

Issue No. 6: *Whether Far Hills' Permit WQ0014555002 should be revoked or suspended?*

Finally, Far Hills seeks to postpone the revocation of its permit until temporary orders are issued so as to avoid adverse consequences. But these adverse consequences are the result of Far Hills' own conduct. Far Hills was aware of the petition to revoke when it chose to commence construction of its facility. And yet, it chose to proceed with the construction and operation of the facility in order to enable Broussard-Christie, L.P. to proceed with its development plans. It did so at its own peril. And this willful and intentional conduct is not a valid excuse or defense to a petition to revoke a permit.

Failure to provide notice is a jurisdictional defect. *See Railroad Comm'n v. Red Arrow Freight Lines*, 167 S.W.2d 249 (Tex. Civ. App.—Austin 1942, writ ref'd n.r.e.). Jurisdictional defects are significant. *See id.* (holding that omission of statutorily required notice and hearing renders order void). As the facts of this case demonstrate, the District's misrepresentations deprived the Petitioners of (1) notice of the District's application, (2) the opportunity to review and comment on the District's application, and (3) the opportunity to participate in a contested case hearing regarding the application. *See Martinez v. Texas State Bd. of Med. Exam'rs*, 476 S.W.2d 400 (Tex. Civ. App.—San

Antonio 1972, writ ref'd n. r. e.) (holding that one must look to the presence or absence of notice and hearing to determine whether due process of law has been met by administrative agency).

The substantial compliance doctrine does not lessen the significance of the District's misrepresentations. As an initial matter, the cases cited by the District are not relevant here. Those cases involved the Open Meetings Act.⁶

Moreover, unlike here, in those cases where the appellate court found substantial compliance with the applicable notice provisions, there was no allegation that an affected person failed to receive the required notice or was denied an opportunity to participate in an open meeting. Here, the failure to provide proper notice resulted in the denial of Petitioners' opportunity to participate in a hearing; substantial compliance cannot rectify the situation.

Finally, the District has not made a substantial attempt to correct the violations. At the time that the District submitted its application and obtained a permit, it did not own the property on which the facility was proposed to be located; yet, its application failed to reflect this fact. This resulted in improper notice. Similarly, the District misrepresented which newspaper was appropriate for published notice. In other words, the District's violation was in misrepresenting facts; not in failing to purchase the property.

⁶ *River Rd. Neighborhood Ass'n v South Tex. Sports*, 720 S.W.2d 551 (Tex. App.—San Antonio 1986, writ dismissed) (holding that governmental body failed to substantially comply with required notice under Open Meetings Act and declaring governmental body's attempt to enter into lease agreement void); *Santos v. Guerra*, 570 S.W.2d 437 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.) (holding that governmental body substantially complied with notice requirements under Open Meetings Act where affected person was alerted and participated in hearing); *Stelzer v. Huddleston*, 526 S.W.2d 710 (Tex. Civ. App.—Tyler 1975, writ dismissed) (holding that school district substantially complied with 72-hour notice provisions under the Open Meetings Act because large segment of population was informed of meeting by news media more than 72 hours before meeting).

To cure these misrepresentations, the District should have attempted to provide accurate information in time to provide proper notice to all affected persons. This the District failed to do. Instead, the District purchased the property—after it received its permit—and now contends that its misrepresentations are cured because they *now* reflect reality. This is not an attempt to correct its violations. In fact, the District had to purchase the property in order to construct and operate its permitted facility.

Finally, the District makes an equitable argument, alleging that if its permit were to be revoked, there is no alternative for treating and discharging its wastewater. But this is not a factor to be considered under the revocation rules. Moreover, hauling wastewater to another facility is always an option, albeit an expensive one. That the District may be forced to temporarily haul its wastewater to another facility does not excuse it from misrepresenting facts in its application and failing to provide proper notice.

Again, to postpone the revocation of this permit would set a bad precedent. For one, it presumes that the temporary orders will be issued and that Far Hills will eventually be granted a discharge permit. Indeed, Far Hills appears to argue that it *must* be granted a discharge permit in order to avoid the expense of hauling its wastewater. But history calls this assumption into question, as Far Hills has been denied a permit once before. And the mere fact that it has already built the facility and begun operating it does not entitle Far Hills to a permit if it fails to comply with TCEQ's regulations. Were it otherwise, then, any applicant could construct a facility, begin operating it, then apply for a permit after the fact and argue that it must be granted at least temporary authorization to operate in order to avoid the expense of having to haul the wastewater. This is bad policy.

In addition, Far Hills attempts to avoid any repercussions for its failure to comply with the rules. Far Hills should experience at least some consequence for its actions. A temporary authorization to continue operating its facility, without interruption, would allow Far Hills to get away with misrepresenting facts and failure to provide notice, without any repercussions. This again is bad policy.

CONCLUSION

In sum, Petitioners agree with the ALJ's ultimate conclusion, but disagree with some of the findings. In addition, Petitioners disagree with the recommendation that the Commissioners abate the revocation of the permit until it considers the application for temporary orders.

Respectfully submitted,

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By:



Marisa Perales

CERTIFICATE OF SERVICE

By my signature below, I certify that on this 22nd day of July, 2010, a true and correct copy of the foregoing document was served on the following party representatives by hand-delivery, facsimile transmission and/or U.S. Mail.



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