

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

<b>PETITION TO REVOKE</b>	<b>§</b>	<b>BEFORE THE TEXAS</b>
<b>TPDES PERMIT NO.</b>	<b>§</b>	
<b>WQ0014555002</b>	<b>§</b>	<b>COMMISSION ON</b>
<b>ISSUED TO</b>	<b>§</b>	
<b>FAR HILLS UTILITY DISTRICT</b>	<b>§</b>	<b>ENVIRONMENTAL QUALITY</b>

**PETITIONERS' EXCEPTIONS TO PROPOSAL FOR DECISION**

**TO THE HONORABLE COMMISSIONERS OF TCEQ:**

Petitioners Suzanne O'Neal and Judith Spencer (collectively, "Petitioners") submit these Exceptions to the Honorable Administrative Law Judge Henry D. Card's Proposal for Decision and Proposed Order, dated June 21, 2010. In short, Petitioners agree with Judge Card's ultimate recommendation that Petitioners' Petition to Revoke be granted and that Far Hills Utility District's (the "District" or "Far Hills") TPDES Permit No. WQ0014555002 be revoked. And Petitioners agree with most of Judge Card's Findings of Fact and Conclusions of Law, supporting his ultimate recommendation. Petitioners, however, disagree with the Judge's findings and conclusions regarding Referred Issue No. 5. Petitioners urge that this issue should have been answered in the affirmative. Petitioners also disagree with the Judge's recommendation that the permit not be revoked until the Commission makes a final decision on the application for temporary orders. For support, Petitioners offer the following:

## **I. INTRODUCTION**

The proposal for decision presents more than an adequate basis to revoke Far Hills Utility District's TPDES permit. In some instances, the proposed order includes irrelevant findings, however, that should not be included. Certain other findings go against the great weight of the evidence in the hearing.

Additionally, it is important to realize that the issuance of the temporary order recommended by the Administrative Law Judge is not permitted by TCEQ rules, is unjustified, and would have only limited effect.

Finally, given that Far Hills' failure to adhere to TCEQ rules necessitated the immediate hearing, it is appropriate that 100% of the transcript costs of the hearing be assessed against Far Hills.

## **II. ARGUMENT**

### **A. Finding of Fact 22: Far Hills' Believed Completion Date for Property Purchase**

Petitioners except to Finding of Fact 22 because it is not relevant and because it does not convey the complete story.<sup>1</sup> Although Mr. Hardin testified that he thought Far Hills would purchase the 5.34 acres before the TCEQ completed its review of the application and before the permit was issued, this was contradicted by other testimony from the District. For instance, Mr. Lackey testified that his understanding of the TCEQ's requirements is that the District could not purchase the property until a change of use of the bond revenue was approved, and the change of use could not be approved until a

---

<sup>1</sup> 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.

discharge permit was issued. Ex. FH-1 (Lackey prefiled testimony), p. 11, ll. 6-19. So, at least according to Mr. Lackey, the District never intended to purchase the property before the application review was completed or before the permit was issued. At the very least, this reflects contradictory evidence regarding the District's intent when submitting its application with the misrepresentation that the District owned the property. This Finding of Fact should be omitted or revised to reflect that the District did not intend to purchase the property until *after* the permit was issued.

B. Findings of Fact 23 & 24: Mr. Hardin's Alleged Conversations with TCEQ Staff

Petitioners also except to Findings of Fact 23 and 24.<sup>2</sup> These Findings are not supported by relevant and reliable evidence; in fact, they go against the great weight and preponderance of the evidence. The only evidence offered in support of these findings was testimony by Mr. Hardin. But his testimony should be given little, if any, weight. First, the testimony is hearsay. Assuming for the sake of argument that his testimony regarding the statements by an unnamed TCEQ staff person were admissible, that testimony was discredited when compared to the testimony offered by Mr. Earl and two of the TCEQ Executive Director witnesses, Ms McClarron and Ms. Martinez.

Mr. Earl testified that when he was employed at TCEQ, the agency policy would not have allowed him, or any other staff member, to advise an applicant that it was permissible to circumvent the rules or misrepresent facts on an application. Exhibit P-1

---

<sup>2</sup> 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.

(Earl Prefiled Testimony), p. 17, ll. 5–11. He further testified that had he been faced with a similar situation as Mr. Hardin, wherein he was relying on the advice of a staff person, he would have sought to obtain something in writing and he would have verified that the individual possessed the authority to allow such an exception to the rules. Tr. p. 55, ll.2 – 24.

TCEQ's witnesses confirmed Mr. Earl's recollection of TCEQ policy. For instance, Ms. McClarron testified that she may have been the person with whom Mr. Hardin spoke about the true configuration and ownership of the property; she simply could not recall one way or the other. But she explained that even if Mr. Hardin had spoken to her about the true ownership and configuration of the property, she would not have advised Mr. Hardin, or anyone else, to misrepresent those facts under any circumstances. Tr. p. 238, l. 25; p. 239, ll. 1-16.

Similarly, Ms. Martinez testified that she never verbally allows for any sort of exception to the regulatory requirements; nor does she ever provide any sort of legal advice to applicants. Tr. p. 249, ll. 2-7; *see also* p. 250, ll. 1-13; p. 251, ll. 1-9 (Ms. Martinez generally testifying that she would not advise an applicant to misrepresent facts in application and that were she aware that an application included misrepresentations, she would refer it to her supervisor).

This testimony discredits Mr. Hardin's testimony. Indeed, the testimony demonstrates that it was unreasonable for Mr. Hardin, a professional engineer with experience in preparing TPDES permit applications, to rely on verbal advice from a TCEQ staff person that contradicts the plain language of the rules and the application

instructions. The great weight of the evidence presented supports a finding that Mr. Hardin had no reasonable basis for his decision to misrepresent the facts regarding the ownership and configuration of the property, and thus, Findings of Fact 23 and 24 should be deleted.

Moreover, that Mr. Hardin may have spoken to someone at TCEQ and conveyed the actual facts to that person is of little relevance here. Had Mr. Hardin conveyed the accurate facts to a staff person who was actually reviewing the application, such as Ms. Martinez (the same person who reviewed Far Hills' first application), perhaps it would have been relevant. Likewise, had Mr. Hardin followed up and informed the staffers assigned to the District's application what he had been previously told, that might have been relevant. But simply asserting that he told *someone*—someone who answered the telephone when he called TCEQ—that the District did not own the property but planned to purchase it eventually is of little value whatsoever. It adds nothing to the issues presented here.

### C. Finding of Fact 26: Post-Issuance Transaction with Broussard-Christi

Petitioners except to Finding of Fact 26 because it is irrelevant.<sup>3</sup> Whatever occurred after Far Hills misrepresented the facts in its application bears no relevance to the issues presented. At the time the application was submitted, Far Hills did not own the property and the property consisted of 10 acres, not five acres. Yet Far Hills misrepresented these facts. A permit was issued based on these misrepresentations.

---

<sup>3</sup> Finding of Fact 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.

Broussard-Christie was not a co-applicant. And nowhere in the application is there any indication that Broussard-Christie and Far Hills had a purchase contract for the property. In fact, Broussard-Christie appears nowhere in the permit application. That Broussard-Christie failed to honor an agreement with Far Hills bears no relevance to the permit application process. And it bears no relevance to the fact that Far Hills misrepresented facts in its application and never corrected those misrepresentations throughout the permitting process.

D. Finding of Fact 32: Adjacency of Petioners' Properties to Represented Five Acre "Site"

Petitioners except to Finding of Fact 32 because it is inconsistent with TCEQ policy. The only land separating Ms. O'Neal's property from the five-acre site depicted in the application is a roadway. Tr. p. 116, ll. 1-3; p. 121, ll. 14-22; p. 136, ll. 11-12. Ms. McClarron testified that generally if the only thing separating two pieces of property is a roadway, then, the properties are considered adjacent. Ex. ED-1, p. 8, ll. 17-22; p. 9, ll. 1-5; Tr. p. 229, ll. 15-25; p. 230, ll. 1-7.

So, had Far Hills accurately depicted the use for the 30-foot sliver of land that separates its five-acre tract from Ms. O'Neal's as a roadway, the two properties would still be considered adjacent for purposes of providing notice. *See* Tr. p. 242, ll. 15-20. Considering this adjacency, TCEQ policy does not support Finding of Fact 32.

E. Findings of Fact Nos. 50 & 51: Alternate Service by MCUD # 2 or Pumping & Hauling

Petitioners except to Findings of Fact 50 and 51 because they are irrelevant to the issues referred in this case.<sup>4</sup> Montgomery County Utility District No. 2 (MCUD #2) did not provide any representatives or witnesses in this case. The only testimony about its “concerns” came from Far Hills’ witness. In any event, this has no relevance to this revocation proceeding. Nor is the cost of pumping and hauling the wastewater to another location relevant to this revocation proceeding.

F. Finding of Fact No 56: Knowing Nature of Far Hills’ Failure to Disclose Information Regarding Property

Petitioners except to Finding of Fact 56 because the great weight of the evidence supports a contrary finding: Far Hills’ failure to disclose fully all relevant facts regarding ownership and configuration of the property was done intentionally and knowingly. All of the evidence, including the testimony offered by Mr. Lackey and Mr. Hardin, demonstrates that both knew that the information that Far Hills included in its application was untrue. That Mr. Hardin told someone at TCEQ (although it is not clear whom) that Far Hills did not own the property demonstrates that he misrepresented the facts in the application knowingly and intentionally. The misrepresentations were not an accident. They were not a mistake. Nor were they a result of mere negligence. Although Mr.

---

<sup>4</sup> Finding of Fact 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. FINDING OF FACT 51: It would be expensive to pump and haul Far Hills’ waste to a remote location.

Hardin claims to have obtained the permission of a staff person to misrepresent the facts in the application, this, at best, supports a sort of affirmative defense to his intentional acts. But it does not change the fact that he acted with knowledge and intent in misrepresenting facts.

The strategic configuration of the property also supports a finding of intentional and knowing conduct. Far Hills did not simply split the ten-acre tract into two tracts. Rather, the tract was configured in such a way that a sliver of property—a roadway—separated Ms. O’Neal’s property from the property that Far Hills would ultimately acquire. This demonstrates that once Far Hills determined that it need not represent the property as a single, 10-acre tract in the application, it decided to configure the property in such a way as to avoid having to provide notice to adjacent landowners who were not customers of the District. Accordingly, Finding of Fact should be revised to reflect that the District indeed knowingly and intentionally misrepresented facts in the application about the ownership and configuration of the property.

### **III. TEMPORARY ORDER**

Petitioners except to Ordering Provision No. 2. Far Hills’ application, regarding the issuance of a temporary order.

#### **A. Far Hills’ Actions Warrant Revocation**

The ALJ attempts to provide Far Hills’ with an “out,” whereby its failure to accurately disclose information to the Commission during the permitting process has little real consequence. The ALJ anticipates the issuance of a temporary order prior to

permit revocation, so that the facility may continue to operate as it goes through the motions of obtaining a new permit.

Far Hills' application for a temporary order is not presented in this proceeding. The Commission has already allowed Far Hills to ignore Petitioners' private property rights for 20 months. The consequence of revoking the permit without issuance of a temporary order is an unambiguous requirement that Far Hills pay to either pump and haul its wastewater, or pay Montgomery County Utility District No. 2 to accept its wastewater for treatment. **This is entirely an issue of money, not public safety.** The Commission should not place the financial interest of Far Hills, which is fully to blame for its current predicament, above the integrity of the permitting process and the protection of private property rights.

#### B. The Order Does Not Authorize a Discharge

The ALJ seems to imply that issuance of the temporary order would allow Far Hills to continue operating its facility. It is important to recognize that this is not the case. Nothing in the proposed temporary order authorizes a discharge from the Far Hills facility. By its own terms, the order states that, "The discharge under the proposed order is a violation of Texas Water Code § 26.121(d)."<sup>5</sup> As the EPA stated in its review of the order, "the Temporary Order if approved does not authorize a discharge from the Far Hills Utility District facility under the TPDES program or the Clean Water Act (CWA)."<sup>6</sup> Even if the order is issued, Far Hills will still be subject to an enforcement action for the

---

<sup>5</sup> Draft Temporary Order, Conclusion of Law No. 5.

<sup>6</sup> June 11, 2010 letter to Robert Martinez, Director, TCEQ Environmental Law Division from Claudia Hosch, Associate Director Water Quality Protection Division, EPA Region 6.

discharges associated with its facility by either the EPA or an affected citizen by way of a citizen's suit under the Clean Water Act. Any implication that issuance of the contemplated temporary order would authorize Far Hills to continue the operation of its wastewater treatment facility is false, and Petitioners object to any such implication in the ALJ's proposal for decision or proposed order.

#### **IV. TRANSCRIPT COSTS**

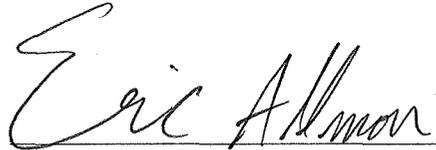
Petitioners maintain that a finding of fact, conclusion of law, and ordering provision assessing all transcript costs against Far Hills should be included in the Commission's final order. Petitioners have already expended significant resources in this proceeding—a proceeding that could have been avoided had they been provided proper notice when the permit application was first submitted. Petitioners first learned of the proposed treatment plant when it commenced construction in the Fall of 2008, and have been forced to spend time and resources over the past approximately 20 months simply to protect their private property rights which should have been recognized by Far Hills during the application process in 2007.

#### **V. 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,

LOWERRE, FREDERICK, PERALES,  
ALLMON & ROCKWELL  
707 Rio Grande, Suite 200  
Austin, Texas 78701  
Phone: (512) 469-6000  
Facsimile: (512) 482-9346

By:   
Eric Allmon

## CERTIFICATE OF SERVICE

By my signature below, I certify that on this 12th 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.



Eric Allmon

For the Administrative Law Judge:

ALJ Henry D. Card  
State Office of Administrative Hearings  
PO Box 13025  
Austin, TX 78711-3025

For the Chief Clerk:

Ms. LaDonna Castañuela  
Texas Commission on Environmental Quality  
Office of the Chief Clerk, MC-105  
P.O. Box 13087  
Austin, Texas 78711-3087

For Far Hills Utility District:

Lance T. Lackey  
Matthew B. Kutac  
Andrew Barrett  
Capitol Tower  
206 East 9th Street, Suite 1750  
Austin, Texas 78701

For the Executive Director:

John E. Williams  
Daniel Ingersoll  
Texas Commission on Environmental Quality  
Environmental Law Division MC-173  
P.O. Box 13087  
Austin, TX 78711-3087

For the Office of Public Interest Counsel:

Amy Swanholm  
Texas Commission on Environmental Quality  
Office of Public Interest Counsel- MC- 103  
P.O. Box 13087  
Austin, Texas 78711-3087