

TCEQ DOCKET NO. 2006-0969-DIS

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APPLICATION FOR THE  
CREATION OF LERIN HILLS  
MUNICIPAL UTILITY DISTRICT

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BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

CHIEF CLERKS OFFICE

**EXECUTIVE DIRECTOR'S RESPONSE TO  
REQUESTORS' INITIAL PLEADING ON REMAND**

**TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY:**

**I. Introduction**

The Executive Director of the Texas Commission on Environmental Quality ("TCEQ" or "Commission") files this Response to Requestors' Initial Pleading on Remand regarding an application filed by Lerin Development Company, LLC, for the creation of Lerin Hills Municipal Utility District ("District").

The District contains 866.53 acres of land and is located approximately four miles west-southwest of downtown Boerne, Texas, and approximately 31 miles northwest of the San Antonio Central Business District, in Kendall County, Texas. Access to the District is provided by State Highway 46, on the south side and Johns Road, on the north side. The District is not within the corporate limits or the extraterritorial jurisdiction of any city, town, or village. The District provides water, wastewater, and drainage services within its boundaries.

**II. Procedural History**

Lerin Development Company, LLC (Applicant) filed an application for the creation of the District on February 16, 2006. It was declared administratively complete on February 24, 2006. The Applicant published the Notice of District Petition in the *Comfort News* on April 27, 2006 and May 4, 2006. The period to request a contested case hearing ended June 5, 2006. Seven persons requested a contested case hearing: Cow Creek Groundwater Conservation District,<sup>1</sup> Tapatio Springs Service Company, RLC Designs, Inc., William Wood, Lee Roy and Joan Hahnfeld, Edgar W. Blanch, and Kendall County Commissioner's Court.<sup>2</sup> On November 16, 2006, the Commission considered the hearing requests at an open meeting. The Commission denied all hearing requests.

<sup>1</sup> At the original agenda considering these hearing requests, the Executive Director argued that although the Cow Creek Groundwater Conservation District filed a letter with the Office of the Chief Clerk, the letter did not actually request a contested case hearing.

<sup>2</sup> The Kendall County Commissioner's Court withdrew its hearing request prior to consideration.

Tapatio Springs Service Company (Tapatio Springs), Lee Roy and Joan Hahnfeld (the Hahnfelds), and Edgar W. Blanch (Blanch), Requestors, appealed the Commission's denial of their hearing requests to the Travis County District Court. The Requestors presented the Court with new evidence not available to the Commission at its November 16, 2006 agenda. Finding that the evidence is material and was not available at the time of the Commission's decision, by order dated October 29, 2007, Judge Jeanne Meurer remanded the case to the Commission to allow Plaintiffs (Requestors) "to present additional evidence in support of Plaintiff's Original Petition for review of the creation of Lerin Hills M.U.D. with respect to the use of groundwater and Plaintiff's status as 'affected persons'." Further, in a December 4, 2007 order denying a motion to reconsider its order remanding the case, the Court stayed its proceedings for 90 days to allow the Commission time to take further action. According to this order and as provided by Texas Government Code Section (§) 2001.175(c), the Commission may change its findings and decision by reason of the additional evidence and is required to file the additional evidence and any changes, new findings, or decisions with the reviewing court.

### **III. Applicable Legal Standards**

#### **A. Standard for determining whether to grant or refuse a petition for district creation**

Under Texas Water Code (TWC) §54.021(a), the Commission shall grant the petition for creation of a municipal utility district if it finds that the petition conforms to the requirements of Section 54.015 and the project is feasible, practicable, necessary, and would be a benefit to the land proposed to be included in the proposed District.

In making the determination as to whether the project is feasible, practicable, necessary, and would be a benefit to the land proposed to be included in the district, TWC §54.021(b), requires the Commission to consider the following:

- (1) the availability of comparable service from other systems, including but not limited to water districts, municipalities, and regional authorities;
- (2) the reasonableness of projected construction costs, tax rates, and water and sewer rates; and
- (3) whether or not the district and its system and subsequent development within the district will have an unreasonable effect on the following:
  - (A) land elevation;
  - (B) subsidence;
  - (C) groundwater level within the region;
  - (D) recharge capability of a groundwater source;
  - (E) natural run-off rates and drainage;
  - (F) water quality; and
  - (G) total tax assessments on all land located within a district.

If the Commission finds that the petition for creation of the district does not conform to the requirements of TWC §54.015, the project is not feasible or practicable, is not necessary, or is not a benefit to the land in the district, TWC §54.021(d) requires the Commission to deny the petition.

**B. Standard for determining who qualifies as an “affected person”**

Title 30, Texas Administrative Code (30 TAC) §§55.103 and 55.256(a) provide that an affected person’s is one who has a personal justiciable interest that is related to a legal right, duty, privilege, power, or economic interest affected by the application belonging to the requestor and not an interest common to members of the general public. The regulations give the Commission flexibility to determine affected person status by considering any relevant factor; including the following, which are laid out in 30 TAC §55.256(c):

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

**IV. Hearing Requestors**

The following parties filed hearing requests that were denied by the Commission at its November 16, 2006 agenda, appealed the Commission’s decision to the District Court, and were granted this opportunity to present additional evidence:

- A. Tapatio Springs Service Company—a neighboring water and sewer utility.
- B. Lee Roy and Joan Hahnfeld—own property directly adjacent to the District.
- C. Edgar W. Blanch, Jr.—owns property directly adjacent to the District, which has been developed into a residential subdivision.

Four others filed hearing requests, however, they did not appeal the Commission's decision; therefore, their hearing requests are not before the Commission on remand from the District Court.

## V. Analysis of the Hearing Requests

**The Executive Director recommends that the Commission grant the hearing requests of Tapatio Springs, the Hahnfelds, and Mr. Blanch because new evidence presented after the denial of the hearing requests indicates that the requestors are affected persons, and because the hearing requests and related filings raise issues reasonably related to the factors established in Section 54.021 of the Texas Water Code.**

In determining whether a hearing request should be granted, the Commission must determine whether the requestor has raised a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. Tapatio Springs, the Hahnfelds, and Mr. Blanch have raised concerns regarding the impact of the District on groundwater availability, water quality, and run-off.

In its hearing request filed with the TCEQ Office of the Chief Clerk on May 22, 2006, Tapatio Springs questions the adequacy of the water supply described in the application. On October 23, 2006, Tapatio Springs filed an additional hearing request raising specifically the issues of protection of groundwater quality and whether the proposed facility would "adversely impact...groundwater, including drinking water." Further, in Tapatio Springs' response to the replies to its request for hearing, filed with the Chief Clerk on November 6, 2006, Tapatio Springs specifically raises the issues of groundwater availability, adequacy of the water supply, and the effect of the proposed District on groundwater supply and quality. In their initial hearing request, filed with the Chief Clerk on May 26, 2006, the Hahnfelds expressed concern about run-off from the project. In the Requestors' Initial Pleading on Remand, the Requestors reiterate their concerns regarding groundwater levels and quality and recharge and about surface water run-off associated with the District or subsequent development in the District.

Additional evidence regarding the source of the proposed District's water supply was presented to the District Court after the Commission's original denial of these hearing requests. The Requestors presented evidence that at a meeting of the Kendall County Commissioners Court on March 26, 2007, Lerin Hills, Ltd.<sup>3</sup> requested from the Commissioners "relief from the requirement to have the plat note that requires that no Kendall County groundwater be used to provide water service to the development." Further, Lerin Hills, Ltd. argued to the Commissioners Court that it should be able to access and use groundwater drawn from land that it owns, presumably by right of capture. Additionally, on March 28, 2007, the board meeting

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<sup>3</sup> The Applicant, Lerin Development, LLC is the general partner of corporation Lerin Hills, Ltd.

agenda for the District included a discussion of an engineering report presented by Lerin Hills, Ltd. recommending that the District apply for a groundwater withdrawal permit, stating that “In addition to the treated surface water that has been contracted from the GBRA, the district will require the ability to pump groundwater for several reasons.” The reasons given were that the groundwater was needed as a “backup” water supply, and that “conjunctive use” of groundwater would lower overall operating costs.

This additional information demonstrates that whether or not the District will use groundwater to supply its customers and thus, how groundwater use might affect the Requestors, are disputed issues of fact. If the District uses groundwater, Tapatio Springs, which also uses groundwater to supply its water utility customers, may be affected by a decrease in the amount or quality of groundwater available to supply its customers. As neighboring property owners and users of the groundwater, the Hahnfelds and Mr. Blanch may be affected in a similar manner. Further, the issues raised—groundwater level within the region, the recharge capability of a groundwater source, water quality, and runoff rates—are considerations required by TWC §54.021(b)(3) in the decision of whether or not to grant a petition for district creation. Thus, the Requestors have demonstrated a personal justiciable interest under 30 TAC §§55.256(c)(3), (4), and (5).

## **VI. Executive Director’s Recommendation**

Under Texas Government Code §2001.175(c), the agency may change its findings and decision by reason of additional evidence and is required to file the additional evidence and any changes, new findings, or decisions with the reviewing court. The Executive Director recommends that the Commission find Tapatio Springs Service Company, Lee Roy and Joan Hahnfeld, and Edgar W. Blanch are affected persons under 30 TAC §§55.103 and 55.256(a) and grant each of their hearing requests. The Executive Director further recommends that the Commission file these findings and decision with the Travis County District Court, as required, prior to the expiration of the 90-day stay imposed by the Court’s Order on Motion to Reconsider Order to Remand to Agency to Consider Material New Evidence, dated December 4, 2007.

Application for the Creation of Lerin Hills MUD  
TCEQ Docket No. 2006-0969-DIS  
January 31, 2008

Respectfully submitted,

TEXAS COMMISSION ON ENVIRONMENTAL  
QUALITY

Glenn Shankle, Executive Director

Robert Martinez, Director  
Environmental Law Division

By Shana L. Horton

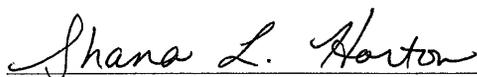
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CHIEF CLERKS OFFICE

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## CERTIFICATE OF SERVICE

I hereby certify that on this 31<sup>st</sup> day of January, 2008, the original of "Executive Director's Response Requestors' Initial Pleading on Remand" relating to the application for creation of Lerin Hills MUD was filed with the Texas Commission on Environmental Quality's Office of Chief Clerk and sent to the individuals on the mailing list below by the method indicated.



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Shana L. Horton, Staff Attorney  
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