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2008 FEB 19 AM 8:23

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

February 15, 2008

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Texas Commission on Environmental
Quality
Mail Code 100
PO Box 13087
Austin, Texas 78711-2087

Commissioner Larry R. Soward
Texas Commission on Environmental
Quality
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PO Box 13087
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Commissioner Brian W. Shaw, Ph.D.
Texas Commission on Environmental
Quality
Mail Code 100
PO Box 13087
Austin, Texas 78711-2087

Regarding: In Re: Travis County District Court's "Order on Motion to Reconsider Order to Remand to Agency to Consider Material New Evidence" in the matter of Consideration of a Petition from Lerin Hills Development Company LLC for the Creation of Lerin Hills Municipal Utility District; TCEQ Docket No. 2006-0969-DIS

Response of Tapatio Springs Service Co., Lee Roy and Joan Hahnfeld and Edgar Blanch

Dear Chairman and Commissioners:

The Executive Director has reviewed facts surrounding the remand from the district court. He recommends you reverse the Commission's November 20, 2006, decision to deny a contested case hearing to Tapatio Springs, Lee Roy and Joan Hahnfeld and Edgar Blanch.

The Office of Public Interest Counsel has made the same recommendation.

By its amicus brief, the Cow Creek Groundwater Conservation District, the district with jurisdiction over the groundwater that is at issue, here, has urged the same recommendation.

That recommendation, of course, has been urged all along by Tapatio Springs, the Hahsfelds and Mr. Blanch.

Only Lerin Hills opposes this recommendation.

Initially, of course, it is clear that Lerin Hills also seeks to limit the range of considerations you may weigh in reaching your decision. Lerin Hills lays out some conclusory (i.e., not cited to authority) "law" regarding the purpose of § 2001.175(c), Gov't Code. It does not address at all the inherent power of a court to remand administrative agency decisions for further review. See, some of the background law on this in the footnote, below.¹ Then, it reads the Judge's December 4th Order ("the matter be remanded to the Texas Commission on Environmental Quality to allow the Plaintiffs to resent additional evidence . . . with respect to the use of groundwater and Plaintiffs' status as "affected persons") to exclude your authority to consider anything other than "use of groundwater" factors. That simply is not what the order says. It says you may consider not only groundwater issues, but also whether the Plaintiffs are "affected persons." Everything related to the affected person status (or otherwise) of the plaintiffs is in your court.

¹ *First Sav. & Loan Ass'n v. Lewis*, 512 S.W.2d 62, 64-65 (Tex. Civ. App. 1974), writ ref'd, n.r.e., summarized this power:

It has been broadly stated by this Court that the practice of remanding causes to administrative agencies is always sustained when authorized by statute, and frequently when it is not so authorized. *Gerst v. Jefferson County Savings and Loan Association*, 390 S.W. 2d 318 (Tex. Civ. App. 1965, writ ref'd n.r.e.). The uses of remand are many, and it is common, at least in other jurisdictions, for the reviewing court to remand the cause to the agency with instructions to take additional evidence, to consider evidence which the agency has failed to consider, or to reconsider the evidence and revise its findings, or to make proper findings, if the agency's original order had not included proper findings of fact, or to correct technical deficiencies. 2 Cooper, *State Administrative Law*, § 9(B), p. 773 (1965).

* * *

The jurisdiction to review the orders of the Commissioner is vested in the district court of Travis County, a court with equitable powers. And though the district court must act within the bounds of the statute, it may draw upon its general equity powers and adjust its relief to the exigencies of the case in accordance with equitable principles governing judicial action. *Ford Motor Company v. National Labor Rel. Bd.*, 305 U.S. 364, 83 L. Ed. 221, 59 S. Ct. 301 (1939) and Jaffe, *Judicial Control of Administrative Action*, Chap. 19, p. 709 (1965).

* * *

The allowance of remand under the circumstances of this case, we believe, will ultimately result in a speedier disposition of administrative appeals, and in the more efficient use of the judiciary's time.

Lerin Hills also attempts to improve its position before you with affidavits interpreting or explaining or avoiding earlier statements made by its agents. The schedule set out by the Commission's General Counsel December 14, 2007, did not allow time for discovery of the details supporting or undermining these post-hoc "clarifications" of what has been said. In fact, if you will inquire of the General Counsel, I believe you will discover that a remand discovery period sought by me, counsel for the Plaintiffs, was rejected immediately before December 14th as inappropriate. Under these circumstances, you should not consider the 2008 affidavits of Lerin Hills's agents. It is exactly for unearthing and pinning down facts that the referral to SOAH/contested case process exists; let SOAH sort out the facts after everyone has had a full opportunity to help develop them.

Tapatio Springs, the Hahsfelds and Mr. Blanch pray you concur with the ED, OPIC and the groundwater district and grant them (Tapatio Springs, et al.) a contested hearing on the MUD's formation.

Sincerely,


David Frederick

xc:

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From: David Frederick

Date: February 15, 2008

DOCUMENTS	NUMBER OF PAGES (not including cover pg.)
Rick Wood's Reply to Lerin Hills MUD's Response to Requestors' Initial Pleading on Remand	4

COMMENTS:

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