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Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 31, 2008

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

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2008 JAN 31 PM 3:04
CHIEF CLERKS OFFICE

Re: **LERIN HILLS MUNICIPAL UTILITY DISTRICT**
TCEQ DOCKET NO. 2006-0969-DIS

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Response to Requestors' Initial Pleading on Remand in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Garrett Arthur".

Garrett Arthur, Attorney
Public Interest Counsel

cc: Mailing List

Enclosure

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TCEQ DOCKET NO. 2006-0969-DIS

**PETITION BY LERIN HILLS
DEVELOPMENT COMPANY LLC
FOR CREATION OF LERIN HILLS
MUNICIPAL UTILITY DISTRICT**

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**BEFORE THE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**
CHIEF CLERKS OFFICE

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO REQUESTORS' INITIAL PLEADING ON REMAND**

To the members of the Texas Commission on Environmental Quality:

The Office of the Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (TCEQ or the "Commission") files this Response to the Requestors' Initial Pleading on Remand.

I. Background

At the November 15, 2006 Agenda meeting, the Commission considered the petition of Lerin Hills Development Company LLC ("Lerin Hills") for creation of the Lerin Hills Municipal Utility District (MUD) and associated hearing requests. On November 20, 2006, the Commission granted Lerin Hills' petition, and on December 12, 2006, hearing requestors Tapatio Springs Service Company ("Tapatio"), Lee Roy and Joan Hahnfeld, and Edgar W. Blanch, Jr. (collectively, "Requestors") filed a joint motion for rehearing. The Commission's General Counsel, on January 22, 2007, informed the parties that this motion for rehearing had been overruled by operation of law. On February 7, 2007, the Requestors appealed the Commission's denial of their hearing requests to Travis County District Court. Judge W. Jeanne Meurer, in an order signed December 4, 2007, remanded this matter to the Commission to allow Requestors to present additional evidence concerning the use of groundwater and Requestors'

status as “affected persons.” Judge Meurer’s order additionally states that the Commission may modify its findings and decision by reason of the additional evidence.

II. Applicable Law

A. Affected Persons

An “affected person” is defined as one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application.¹ An interest common to members of the general public does not qualify as a personal justiciable interest.²

To determine if someone is an affected person, 30 TAC § 55.256(c) states that all relevant factors shall be considered, including, but not limited to, the following:

- (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, safety, and use of property of the person; and
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person.

B. Requirements Applicable to a Petition for Creation of a MUD

A petition to create a MUD is subject to Chapter 54 of the Texas Water Code.³ Section 54.021 of the Code sets out certain factors which the Commission must consider in its review of a petition:

¹ 30 TEX. ADMIN. CODE § 55.256(a).

² *Id.*

³ TEX. WATER CODE §§ 54.001 *et seq.*

(a) If the commission finds that the petition conforms to the requirements of Section 54.015 and that the project is feasible and practicable and is necessary and would be a benefit to the land to be included in the district, the commission shall so find by its order and grant the petition.

(b) In determining if the project is feasible and practicable and if it is necessary and would be a benefit to the land included in the district, the commission shall consider:

(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.

(c) If the commission finds that not all of the land proposed to be included in the district will be benefited by the creation of the district, the commission shall so find and exclude all land which is not benefited from the proposed district and shall redefine the proposed district's boundaries accordingly.

(d) If the commission finds that the petition does not conform to the requirements of Section 54.015 of this code or that the project is not feasible, practicable, necessary, or a benefit to the land in the district, the commission shall so find by its order and deny the petition.

III. Analysis

A. Groundwater Use

The Commission's November 2006 Order included and incorporated as part of the Order an Interoffice Memorandum from the Executive Director's (ED) staff dated August 28, 2006 (hereafter "Memorandum"). The Memorandum states that the proposed MUD plans to purchase wholesale water service from the Guadalupe-Blanco River Authority (GBRA).⁴ The Memorandum later states that because the MUD plans to obtain its water supply from surface water, the MUD should have no effect on groundwater levels.⁵ The ED's staff also state the proposed MUD will have minimal effect on groundwater recharge.⁶ The Memorandum clearly indicates that the ED's staff believed that the MUD was proposing to use surface water exclusively, and no groundwater.

The Requestors have provided a transcript of the Commission's consideration of this matter at the November 15, 2006 Agenda meeting. Staff's belief that the MUD was not proposing groundwater use was again communicated to the Commission at this Agenda. ED staff stated that the MUD was proposing to get its water from the GBRA and therefore would not affect the groundwater.⁷ Later in response to a question from the Commission, ED staff confirmed that the MUD was not going to use groundwater.⁸

When taken in combination, the Memorandum and the Agenda discussion appear to leave no doubt that both the ED's staff and the Commission believed that the Lerin Hills MUD would not use groundwater. As stated earlier, the Memorandum, with these statements concerning groundwater, was incorporated as part of the Commission's Order.

⁴ TCEQ Interoffice Memorandum (Aug. 28, 2006) at p. 6.

⁵ *Id* at p. 9.

⁶ *Id*.

⁷ Tr. of TCEQ Agenda Meeting (Nov. 15, 2006) at p. 25, lines 19-23.

⁸ *Id* at p. 27, lines 16-18.

The Requestors' Pleading presents additional documentation that the Requestors contend provides evidence of the MUD's likely use of groundwater. This documentation includes a transcript of a March 26, 2007 Kendall County Commissioners Court meeting and a transcript of a March 28, 2007 Lerin Hills MUD meeting. At the Commissioners Court meeting, Lerin Hills sought removal of a plat note which requires that no Kendall County groundwater be used to provide water service to the Lerin Hills development.⁹ Lerin Hills contended that it wants to use groundwater for the purpose of building roads or infrastructure, but not for provision of water service to the residents.¹⁰ At the MUD board meeting, an engineering report apparently prepared for the Lerin Hills developer or the MUD was presented to the board. The engineering report recommends that the MUD apply to the Cow Creek Groundwater Conservation District for a groundwater withdraw permit, and cites two reasons that the MUD will require the ability to pump groundwater.¹¹ First, groundwater will serve as a backup water supply to fight fires and serve the health, safety, and welfare of the District's residents.¹² Second, the conjunctive use of groundwater will allow a lower overall operating cost to the residents.¹³ OPIC notes that conjunctive use is generally understood to mean the combined use of surface water and groundwater.

OPIC finds that the Requestors' additional evidence clearly shows a change on the part of Lerin Hills from representations made to and relied upon by the ED's staff and this Commission. OPIC also agrees with Judge Meurer's finding that this evidence is material and was not available to the Commission at the time of its previous decision. Therefore, OPIC recommends

⁹ Tr. of Kendall County Commissioners Court Meeting (Mar. 26, 2007) at p. 2, lines 1-21.

¹⁰ *Id* at p. 4, lines 4-7.

¹¹ Tr. of Lerin Hills Municipal Utility District Meeting (Mar. 28, 2007) at p. 41, lines 19-24.

¹² *Id* at p. 41, line 24 -- p. 42, line 7.

¹³ *Id* at p. 42, lines 8-10.

that the Requestors' affected person status now be reevaluated in light of this material new evidence.

B. Requestors' Affected Person Status

The stated purpose of Judge Meurer's remand is "to allow Plaintiffs to present additional evidence in support of Plaintiffs' Original Petition for review of the creation of Lerin Hills M.U.D. with respect to the use of groundwater and Plaintiffs' status as 'affected persons.'" OPIC will therefore limit its analysis of the Requestors' affected person status to the issue of groundwater, as raised in the Requestors' timely filed hearing requests and any replies.

Edgar W. Blanch, Jr. and Lee Roy and Joan Hahnfeld

In their hearing requests, Mr. Blanch and the Hahnfelds do not raise groundwater issues as a basis for finding that they are affected persons. For this reason, OPIC cannot find that Mr. Blanch and the Hahnfelds now qualify as affected persons.

Tapatio Springs Service Company

Tapatio's initial hearing request generally raised concerns about the MUD's water supply, and Tapatio's reply specifically raises groundwater levels as a basis for its affected person status. The reply states that groundwater use by the MUD will jeopardize the groundwater supply that Tapatio relies on for its existing customers. Tapatio also points out that the TCEQ has designated Kendall County as a priority groundwater management area, in part, because of the limited groundwater supply.

When evaluating the creation of a MUD, the Commission must consider whether the district, its system, and subsequent development within the district will have an unreasonable effect on groundwater level within the region.¹⁴ In determining whether Tapatio qualifies as an affected person, one of the factors to be considered is whether Tapatio's claimed interest is one

¹⁴ TEX. WATER CODE § 54.021(b).

protected by the law under which the petition is considered.¹⁵ We conclude that Tapatio's interest in the region's groundwater level is an interest protected by Texas Water Code Chapter 54, and therefore, a personal justiciable interest. OPIC finds that Tapatio has shown itself to be an affected person in this matter.

IV. Conclusion

In light of the additional evidence concerning the use of groundwater, OPIC recommends that the Commission find Tapatio Springs Service Company to be an affected person.

Based on OPIC's finding that the timely filed hearing requests of Edgar W. Blanch, Jr. and Lee Roy and Joan Hahnfeld did not raise concerns regarding the MUD's impact on groundwater, OPIC recommends the Commission find that Mr. Blanch and the Hahnfelds are not affected persons. Under 30 TAC § 55.255(d), these individuals may still appear at any hearing convened on this petition and request to be admitted as parties.

If the Commission finds that Tapatio is an affected person, OPIC recommends that this matter be referred to the State Office of Administrative Hearings for a contested case hearing.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By 
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¹⁵ 30 TAC § 55.256(c).

CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2008, the original and eleven true and correct copies of the foregoing document were filed with the TCEQ Chief Clerk, and copies were served to all parties listed on the attached mailing list via hand delivery, facsimile transmission, inter-agency mail, or by deposit in the U.S. Mail.



Garrett Arthur

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