

TCEQ DOCKET NO. 2007-1178-MWD

LERIN HILLS, LTD.  
TPDES PERMIT NO. WQ0014712001  
KENDALL COUNTY

§ BEFORE THE  
§ TEXAS COMMISSION ON  
§ ENVIRONMENTAL QUALITY

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2007 OCT - 1 PM 1:51  
CHIEF CLERKS OFFICE

OFFICE OF PUBLIC INTEREST COUNSEL'S  
RESPONSE TO HEARING REQUESTS AND MOTION FOR EXTENSION OF  
HEARING REQUEST DEADLINE

**To the Members of the Texas Commission on Environmental Quality:**

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (TCEQ or "Commission") files this response to hearing requests.

**I. Introduction**

Lerin Hills, Ltd. ("Lerin Hills" or "Applicant") has applied to the TCEQ for a new permit to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 500,000 gallons per day. The proposed location for the Lerin Hills wastewater treatment plant is approximately 4.1 miles west of Interstate Highway 10, as measured along State Highway 46, and then approximately 200 feet west from that point on State Highway 46 in Kendall County. The treated effluent will be discharged to an unnamed tributary; then to the headwaters of an impoundment on Deep Hollow Creek; then to Deep Hollow Creek; then to Frederick Creek; then to the Upper Cibolo Creek in Segment No. 1908 of the San Antonio River Basin. According to the Executive Director's (ED) technical summary, the unnamed tributary is unclassified receiving water with no significant aquatic life uses. The impoundment on Deep Hollow Creek and Deep Hollow Creek have high aquatic life uses, and the designated uses for Segment No. 1908 are high aquatic life uses, public water supply, aquifer protection, and contact recreation.

The agency received Lerin Hills' application on May 3, 2006, and the application was declared administratively complete on May 26, 2006. The first notice (Notice of Receipt of Application and Intent to Obtain Water Quality Permit) was published June 9, 2006 in the *Boerne Star and Recorder*. On September 22, 2006, the second notice (Notice of Application and Preliminary Decision for TPDES Permit for Municipal Wastewater) was published in the same newspaper. The public comment period closed October 24, 2006. The ED's Response to Comments (RTC) was filed June 21, 2007, and the hearing request period closed July 26, 2007. The ED has stated his decision that this permit application meets the requirements of applicable law.

The agency received hearing requests from the following individuals: John and Patricia Bakke, E.W. Blanch, Jr., and Robert Webster. Additionally, a joint hearing request was submitted by Eric Allmon of Lowerre & Frederick on behalf of five business entities and three individuals. The business entities are as follows: Mountainview at Tapatio, L.P.; Tapatio Springs Real Estate Holdings, L.P.; Kendall County Development Co., L.P.; Tapatio Springs Service Co.; and Kendall County Utility Co. (collectively "Tapatio"). The three individuals are Rick Wood, E.W. Blanch, Jr., and Robert Webster. Subsequently, John and Patricia Bakke, E.W. Blanch, Jr., and Robert Webster submitted individual withdrawals of their hearing requests. OPIC assumes that Mr. Blanch and Mr. Webster's individual withdrawals mean that they are no longer included in the joint hearing request filed by Eric Allmon. Rick Wood and Tapatio now remain as the only pending hearing requests. OPIC recommends that the Commission grant Rick Wood and Tapatio's hearing requests.

## **II. Motion for Extension of Hearing Request Deadline**

The hearing request deadline in this matter was July 26, 2007. The joint hearing request filed by Eric Allmon was received in the TCEQ Chief Clerk's Office after 5:00 p.m. on July 26 and was therefore date-stamped as received on July 27. For this reason, Mr. Allmon filed a motion for an extension of the hearing request deadline to 5:15 p.m. on July 26, 2007.

According to the motion, the Chief Clerk's Office received the hearing request at 5:02 p.m., July 26, and the delay in sending the hearing request was caused by technical problems with a fax machine. The motion also correctly states that under 30 TAC § 55.201(g)(2), the Commission may extend the time allowed to file a hearing request. Given the reasonable efforts made to timely file the hearing request and the Commission's authority to grant the relief sought, OPIC recommends that this motion be granted.

## **III. Applicable Law**

This application was declared administratively complete after September 1, 1999, and is therefore subject to the procedural requirements adopted pursuant to House Bill 801 (76th Leg., 1999).

Under 30 TEX. ADMIN. CODE (TAC) § 55.201(d), a hearing request must substantially comply with the following:

- (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request;
- (2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;
- (3) request a contested case hearing;

- (4) list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the executive director's responses to comments that the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy; and
- (5) provide any other information specified in the public notice of application.

Under 30 TAC § 55.203(a), an affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest. Section 55.203(c) provides relevant factors to be considered in determining whether a person is affected. These factors include:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restriction 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;
- (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.

Under 30 TAC § 55.211(c)(2), a hearing request made by an affected person shall be granted if the request:

- (A) raises disputed issues of fact that were raised during the comment period, that were not withdrawn by the commenter by filing a withdrawal letter with the chief clerk prior to the filing of the executive director's response to comment, and that are relevant and material to the commission's decision on the application;

- (B) is timely filed with the chief clerk;
- (C) is pursuant to a right to hearing authorized by law; and
- (D) complies with the requirements of § 55.201.

Accordingly, pursuant to 30 TAC § 55.209(e), responses to hearing requests must specifically address:

- (1) whether the requestor is an affected person;
- (2) which issues raised in the hearing request are disputed;
- (3) whether the dispute involves questions of fact or law;
- (4) whether the issues were raised during the public comment period;
- (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the Chief Clerk prior to the filing of the Executive Director's Response to Comment;
- (6) whether the issues are relevant and material to the decision on the application; and
- (7) a maximum expected duration for the contested case hearing.

#### **IV. Analysis**

On October 23, 2006, Patrick Lindner of Davidson & Troilo submitted a hearing request on behalf of Tapatio. As previously stated, the joint hearing request of Tapatio and Rick Wood was submitted by Eric Allmon. After conferring with Mr. Lindner and Mr. Allmon, OPIC has learned that the representation of Tapatio in this matter has passed from Mr. Lindner to Mr. Allmon.

##### **A. Affected Person**

###### **1. Rick Wood**

According to the joint hearing request, Mr. Wood is a landowner within one mile downstream of the proposed site and may suffer adverse impacts from the discharges. The joint

hearing request also states that Mr. Wood adopts the comments previously filed on behalf of Tapatio. Those previously filed comments include concerns regarding odor and impacts to the quantity and quality of groundwater and surface water. According to a map prepared by the Executive Director (Attachment 1), Mr. Wood resides approximately 3/4 of a mile from the proposed plant site and discharge point. Mr. Wood's proximity to the proposed plant combined with his concerns regarding odor and water quality provide a personal justiciable interest which is not common to members of the general public. OPIC therefore concludes that Mr. Wood qualifies as an affected person.

## **2. Tapatio**

The October 2006 hearing request states that Mountainview at Tapatio, Tapatio Springs Real Estate Holdings, and Kendall County Development Company are landowners in the area. These companies are concerned about the effect that the proposed plant and the proposed discharge of effluent will have on them and their property. They are specifically concerned about odors and impacts on the quantity and quality of groundwater and surface water. The companies state that they develop property for residential purposes within the area, and adverse environmental effects on water quality will adversely affect the people, plants, fish, and wildlife that depend upon the water. Mountainview at Tapatio, Tapatio Springs Real Estate Holdings, and Kendall County Development Company are landowners adjacent to the Lerin Hills service area boundary, with an economic interest in the condition of their land and associated natural resources. As such, OPIC finds that these three entities qualify as affected persons.

Tapatio Springs Service Co. asserts that it owns and operates a sewage treatment plant with excess capacity that is located within three miles of the proposed treatment plant, and that it has an application pending at TCEQ to merge with Kendall County Utility Co. Tapatio alleges

that the Applicant failed to make inquiry as to Tapatio's ability to provide service from this existing treatment plant. Therefore, Tapatio alleges that the Applicant has not demonstrated a need for the proposed plant or demonstrated that the permitting of this plant would further the State's interests in regionalization. Tapatio's expressed interest in regionalization is one protected under Texas Water Code § 26.028 which applies to this application. 30 TAC §55.203(c)(1). Furthermore, given that Tapatio is a utility service provider located in close proximity to the proposed plant, its particular interest in regionalization with respect to the processing of this application and the proposed permitting of this plant is an interest not common to the general public. For these reasons, OPIC finds that Tapatio Springs Service Co. and Kendall County Utility Co. are affected persons.

#### **B. Relevant and Material Issues**

Tapatio and Rick Wood dispute the following issues, which were raised during the public comment period and have not been withdrawn:

- (1) Operation of the proposed facility will harm surface and groundwater supply and quality. This issue involves the Texas Surface Water Quality Standards found in 30 TAC Chapter 307 and is therefore relevant and material to the Commission's decision on this application.
- (2) The TCEQ should have considered flooding, erosion, and siting concerns when evaluating the application. This issue concerns location standards found in 30 TAC Chapter 309 and is therefore relevant and material to the Commission's decision on this application.
- (3) Lerin Hills has not adequately demonstrated that issuance of the proposed permit is consistent with the Commission's policy of regionalization. This issue

concerns the Commission's regionalization policy as expressed in Texas Water Code §§ 26.003, 26.0282, and 26.081 and is therefore relevant and material to the Commission's decision on the application.

(4) Lerin Hills has not demonstrated that it can safely operate the proposed plant.

This issue concerns the design criteria for sewerage systems found in 30 TAC Chapter 317 and is therefore relevant and material to the Commission's decision on the application.

(5) The proposed facility will adversely impact the health and safety of humans and wildlife. This issue involves the Texas Surface Water Quality Standards found in 30 TAC Chapter 307 and is therefore relevant and material to the Commission's decision on this application.

(6) The proposed facility will disrupt the use and enjoyment of private property. This issue concerns the nuisance prevention requirements in 30 TAC § 309.13 and is therefore relevant and material to the Commission's decision on this application.

## **V. Conclusion**

For the reasons set forth above, OPIC respectfully recommends that the Commission grant the hearing requests of Rick Wood and all of the Tapatio entities.

OPIC further recommends that the following issues be referred to the State Office of Administrative Hearings for a contested case hearing:

(1) Will operation of the proposed facility harm surface and groundwater supply and quality?

(2) Did the TCEQ consider flooding, erosion, and siting concerns when evaluating the application?

- (3) Has Lerin Hills adequately demonstrated that issuance of the proposed permit is consistent with the Commission's policy of regionalization?
- (4) Has Lerin Hills demonstrated that it can safely operate the proposed plant?
- (5) Will the proposed facility adversely impact the health and safety of humans and wildlife?
- (6) Will the proposed facility disrupt the use and enjoyment of private property?

OPIC recommends a maximum duration of 9 months for the contested case hearing.

Respectfully submitted,

Blas J. Coy, Jr.  
Public Interest Counsel

By   
Garrett Arthur  
Assistant Public Interest Counsel  
State Bar No. 24006771  
P.O. Box 13087, MC 103  
Austin, Texas 78711  
phone: (512) 239-5757  
fax: (512) 239-6377

**CERTIFICATE OF SERVICE**

I hereby certify that on October 1, 2007, 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

**MAILING LIST  
LERIN HILLS, LTD.  
TCEQ DOCKET NO. 2007-1178-MWD**

FOR THE APPLICANT:

Richard Kammerman  
3139 W. Holcombe, No. 175  
Houston, Texas 78731  
Tel: (512) 343-2424  
Fax: (512) 233-2763  
Fax: (713) 669-0826

REQUESTER:

Eric Allmon  
Lowerre & Frederick  
44 East Ave., Ste. 100  
Austin, Texas 78701-4386

FOR THE EXECUTIVE DIRECTOR:

Kerrie Jo Qualtrough, Senior Attorney  
Texas Commission on Environmental Quality  
Environmental Law Division, MC-173  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-0600  
Fax: (512) 239-0606

FOR OFFICE OF PUBLIC ASSISTANCE:

Bridget Bohac, Director  
Texas Commission on Environmental Quality  
Office of Public Assistance, MC-108  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-4000  
Fax: (512) 239-4007

FOR ALTERNATIVE DISPUTE

RESOLUTION:

Kyle Lucas  
Texas Commission on Environmental Quality  
Alternative Dispute Resolution, MC-222  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-4010  
Fax: (512) 239-4015

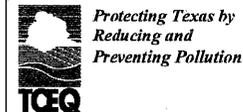
FOR THE CHIEF CLERK:

LaDonna Castañuela  
Texas Commission on Environmental Quality  
Office of Chief Clerk, MC-105  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-3300  
Fax: (512) 239-3311

# Lerin Hills, Ltd.

WQ0014712001

Map Requested by TCEQ Office of Legal Services



Texas Commission on Environmental Quality  
GIS Team (Mail Code 197)  
P.O. Box 13087  
Austin, Texas 78711-3087

September 28, 2007

0 0.125 0.25 0.5 0.75 Miles

Projection: Texas Statewide Mapping System (TSMS)

Scale 1:39,552

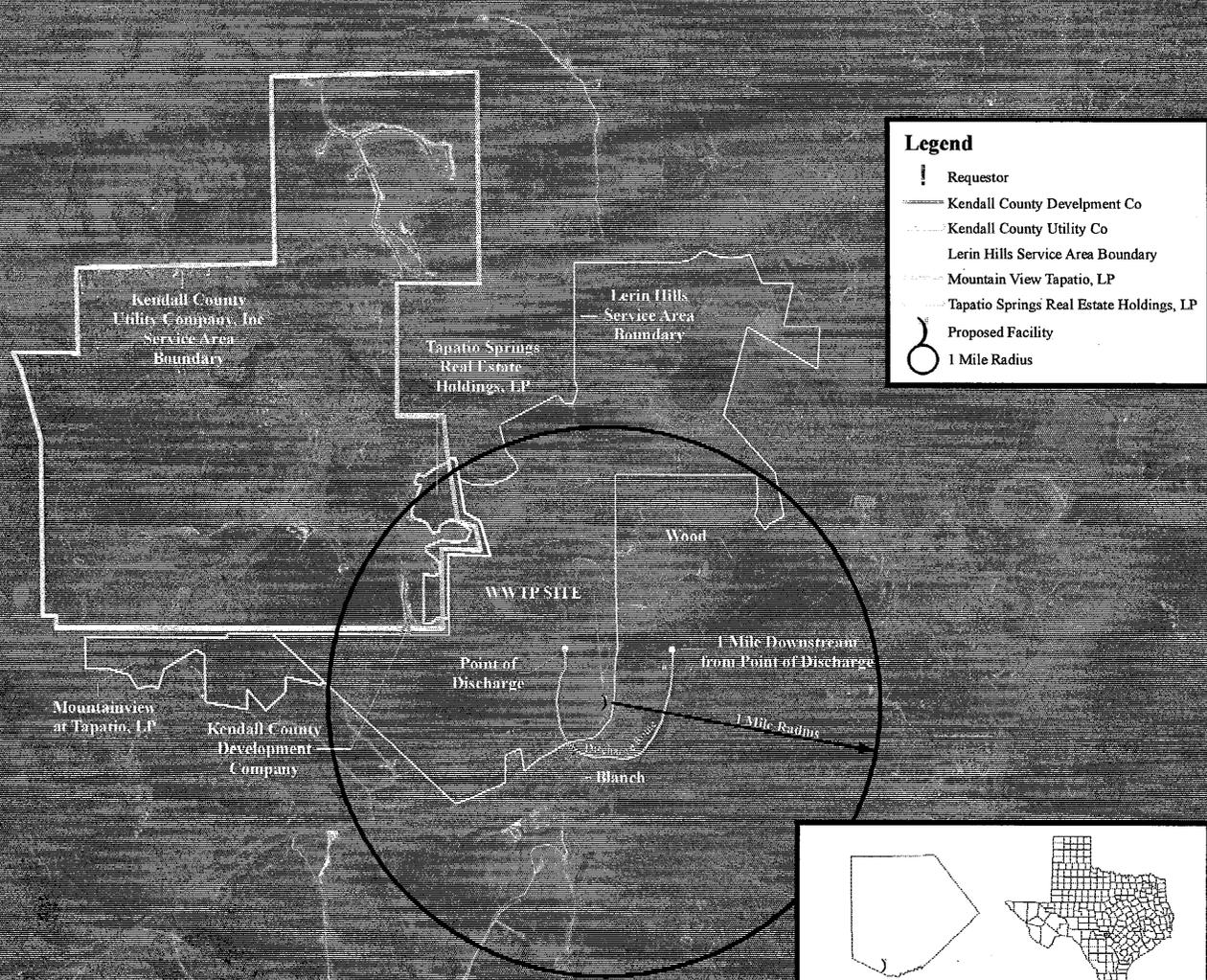
Source: The location of the facility was provided by the TCEQ Office of Legal Services (OLS). The property boundaries depicted were manually digitized and approximated (survey data not available) using paper maps provided by OLS. OLS obtained the site location information and the requestor information from the applicant. The counties are GDT 2000 Line Data (1:100,000). The background of this map is a source photograph from the 2004 U.S. Department of Agriculture Imagery Program. The imagery is one-meter Color-Infrared (CIR). The image classification number is tx029\_1-1.

This map depicts the following:

- (1) The approximate location of the facility. This is labeled "WWTP SITE."
- (2) The Lerin Hills service area boundary. This is labeled "Lerin Hills Service Area Boundary."
- (3) The Kendall County Utility Company service area boundary. This is labeled "Kendall County Utility Company, Inc Service Area Boundary."
- (4) The Tapatio Springs Real Estate Holdings property. This is labeled "Tapatio Springs Real Estate Holdings, LP."
- (5) The Kendall County Development Co. property. This is labeled "Kendall County Development Company."
- (6) Mountainview at Tapatio property. This is labeled "Mountainview at Tapatio, LP."
- (7) Circle and arrow depicting 1 mile radius. This is labeled "1 Mile Radius."
- (8) Point of discharge. This is labeled "Point of Discharge."

This map was generated by the Information Resources Division of the Texas Commission on Environmental Quality. This map was not generated by a licensed surveyor, and is intended for illustrative purposes only. No claims are made to the accuracy or completeness of the data or to its suitability for a particular use. For more information concerning this map, contact the Information Resource Division at (512) 239-0800.

M McDermott CIRF-070822067



**Legend**

- ! Requestor
- Kendall County Development Co
- Kendall County Utility Co
- Lerin Hills Service Area Boundary
- Mountain View Tapatio, LP
- Tapatio Springs Real Estate Holdings, LP
- Proposed Facility
- 1 Mile Radius

Lerin Hills, Ltd.

The facility is located in Kendall County. The red square in the first inset map represents the approximate location of the facility. The second inset map represents the location of Kendall County in the state of Texas; Kendall County is shaded in red.