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## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

February 9, 2015

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

**RE: LERIN HILLS MUNICIPAL UTILITY DISTRICT  
TCEQ DOCKET NO. 2014-1706-MWD**

Dear Ms. Bohac:

Enclosed for filing is the Office of Public Interest Counsel's Response to Requests for Hearing in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Isabel Segarra Treviño".

Isabel G. Segarra Treviño, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

**TCEQ DOCKET NO. 2014-1706-MWD**

**IN THE MATTER OF THE  
APPLICATION BY LERIN HILLS  
MUNICIPAL UTILITY DISTRICT  
FOR A RENEWAL OF TCEQ  
PERMIT  
NO. WQ0014712001**

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**BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE  
TO REQUESTS FOR HEARING**

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Response to Requests for Hearing in the above-referenced matter and respectfully recommends denying the contested case hearing requests.

**I. INTRODUCTION**

**A. Background of Facility**

Lerin Hills Municipal Utility District (Lerin Hills or Applicant) has applied to renew its existing Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014712001. While the existing permit was issued on August 28, 2009, the Lerin Hills Municipal Utility District Wastewater Treatment Facility (Facility) has not been constructed. The Facility will be located on the north side of State Highway 46, approximately 4.1 miles west of Interstate Highway 10, as measured along State Highway 46, northeast of Deep Hollow Drive in Kendall County, Texas 78006.

The Facility will treat effluent using an activated sludge process operated in a complete mix variation of single-staged nitrification. During the Interim I phase, the daily average flow is

not to exceed 55,000 gallons. At this point, the Facility will include a lift station, a bar screen, an aeration basin, a final clarifier, a sludge digester, a tertiary filter, a chlorine contact chamber, and a dechlorination chamber. During the Interim II phase, the daily average flow is not to exceed 110,000 gallons. At this point, the Facility will include a lift station, a bar screen, two aeration basins, a final clarifier, two sludge digesters, a tertiary filter, a chlorine contact chamber, and a dechlorination chamber. During the Final phase, the daily average flow is not to exceed 490,000 gallons. The Final phase will include a lift station, a bar screen, an aeration basin, a final clarifier, two sludge digesters, a tertiary filter, a chlorine contact chamber, and a dechlorination chamber.

Sludge generated by the Facility will be hauled by a registered transporter to Texas Organic Recovery Composting Facility (Permit No. 42016) to be digested, dewatered, and disposed. The draft permit also authorizes the disposal of sludge at a TCEQ authorized land application site or co-disposal landfill.

Treated effluent generated by the Facility will be discharged to an unnamed tributary; then to the headwaters of an impoundment on Deep Hollow Creek; then to Frederick Creek (Soil Conservation Service (SCS) Site 4 Reservoir); then to Deep Hollow Creek; then to Frederick Creek; then to Upper Cibolo Creek in Segment No. 1908 of the San Antonio River Basin. The unclassified receiving water uses are minimal aquatic life for the unnamed tributary and high aquatic life for SCS Site 4 Reservoir and Deep Hollow Creek. The designated uses for Segment No. 1908 are high aquatic life, public water supply, aquifer protection, and primary contact recreation.

## **B. Procedural Background**

The TCEQ received Lerin Hills' application on November 11, 2013 and the TCEQ Executive Director (ED) declared the application administratively complete on April 11, 2014. The TCEQ prepared a Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) and Lerin Hills published it in English and in Spanish on April 29, 2014 in *The Boerne Star* newspaper in Kendall County. The ED's staff completed the technical review of Lerin Hills' application on June 19, 2014, and prepared a draft permit. The TCEQ prepared a Notice of Application and Preliminary Decision for Water Quality Permit (NAPD) and Lerin Hills published it in English and in Spanish on July 11, 2014 in *The Boerne Star* newspaper in Kendall County. Alternate language publication was required for this permit application. The public comment period ended on August 11, 2014.

The Chief Clerk mailed the Executive Director's Decision and Response to Public Comment on October 9, 2014 and the deadline to file requests for a contested case hearing was Thursday, November 13, 2014.

The TCEQ Chief Clerk's office received two timely requests for a contested case hearing from Robert Webster and William Rick Wood. As discussed below, OPIC recommends denying the hearing requests because there is no right to a contested case hearing on this permit renewal.

## **II. APPLICABLE LAW**

As an initial matter, the Commission must determine whether a right to hearing exists under the provisions of Texas Water Code (TWC) § 26.028(d). Upon reviewing these statutory provisions, OPIC concludes that the Commission may issue this permit without holding a public hearing. According to the information reviewed by OPIC, Lerin Hills' renewal application satisfies each of the requirements of § 26.028(d). The application seeks to renew a permit

governed by Chapter 26 of the Water Code. This application does not propose to increase the amount of effluent authorized to be discharged, nor does it change the pattern or place of discharge. The ED's Technical Summary dated June 11, 2014 states that effluent limitations and monitoring requirements in the draft permit remain the same as those contained in the existing permit, with the exception of minor revisions to bring the permit into compliance with recent Standard Permit updates. Therefore, the renewed permit can be expected to maintain the quality of waste authorized to be discharged. All notices were given properly and the ED's Response to Public Comment was filed with the Chief Clerk's Office and mailed to all commenters. The Applicant's compliance history raises no issue regarding its ability to comply with the terms of its renewed permit. For these reasons, OPIC concludes that there is no right to contested case hearing on Lerin Hills' application for renewal of its permit. However, if the Commission concludes that there is a right to a hearing, OPIC recommends granting Robert Webster and William Rick Wood's hearing requests.

A person may request the TCEQ reconsider the ED's decision on an application or hold a contested case hearing on an application pursuant to the requirements of House Bill 801, Act of May 30, 1999, 76th Leg., R.S., § 5 (codified at TWC § 5.556). The requirements of House Bill 801 only apply to applications declared administratively complete on or after September 1, 1999. The TCEQ declared Lerin Hills' application administratively complete on April 11, 2014; therefore, Lerin Hills' application is subject to the procedural requirements of House Bill 801.

The rules of the TCEQ require that a person seeking a hearing must substantially comply with the following: (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who filed the request, (2) identify the requestor's personal justiciable interest affected by the application, including a written statement describing the requestor's

location or distance in relation to the proposed facility or activity, and, how or why the requestor believes he or she will be 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 comment period and that are the basis of the hearing request, and (5) provide any other information specified in the public notice of the application. 30 TEX. ADMIN. CODE (TAC) § 55.201(d).

Only affected persons are granted contested case hearings. TWC § 5.556(c). 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.” 30 TAC § 55.203(a). This justiciable interest does not include an interest common to the general public. *Id.* Relevant factors considered in determining whether a person is affected include:

- (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.

30 TAC § 55.203(c).

The Commission shall grant an affected person’s timely filed contested case hearing request if the request: (1) raises disputed issues of fact that were raised during the comment period and that are relevant and material to the Commission’s decision on the application, (2) is timely filed with the Chief Clerk, (3) is made pursuant to a right to hearing authorized by law,

and (4) complies with the request for reconsideration and contested case hearing requirements.

30 TAC § 55.211(c). 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 of 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.

30 TAC § 55.209(e).

### **III. DISCUSSION**

Robert Webster and William Rick Wood filed timely requests for a contested case hearing on November 13, 2014 for Lerin Hills' renewal of Permit No. WQ0014712001. Both requests substantially comply with the procedural requirements of 30 TAC § 55.201.

#### **A. Determination of Affected Person Status**

The hearing requests lists Mr. Webster's address at 325 State Highway 46 W., Boerne, Texas 78006 and Mr. Wood's address at 306 Highway 46 W., Boerne, Texas 78006. The ED's map shows the Facility is adjacent to Mr. Webster's property along Mr. Webster's west boundary and contains a significant portion of the discharge route flows through his property. Mr. Wood's property is adjacent to Mr. Webster's property along Mr. Wood's south boundary and contains the continuation of the discharge route that flows through his property.

For a hearing requestor to be an affected person, the request must be based on an interest that is protected under the law governing the permit application. 30 TAC § 55.203(a). The TCEQ administers waste water discharge permit applications pursuant to its authority under

TWC § 26.027(a). Both hearing requests list numerous issues. From OPIC's review of the requests, these issues can be grouped into two categories: (1) issues that are beyond the scope of TCEQ's jurisdiction, issues that are vague, and issues that are irrelevant, and (2) issues that are relevant and material to this application and protected under the law governing the application.

**1. Issues that are beyond the scope of the TCEQ's jurisdiction, issues that are vague, and issues that are irrelevant.**

Mr. Webster is concerned about the impact of the discharge on the people he represents through the Cow Creek Groundwater Conservation District, Precinct 1. Mr. Webster does not specify what interests will be impacted by the discharge; therefore, this issue is too vague for the Commissioners to consider. Mr. Wood is concerned that contamination of a well on his property and nuisance odors from the Facility will diminish the value of his property. Property value is not an interest protected by the TPDES program. Mr. Webster is concerned about dam structure and the safety of downstream residents. Dam structure is irrelevant on this water quality application.

Mr. Webster and Mr. Wood are concerned that the applicant has not justified the discharge in the face of alternatives, including: land application, discharging into a lake owned by Lerin Hills, re-selling treated effluent to a local golf course, and regionalizing with the Kendall West Utility Company. The TCEQ's review of the application is limited to the facts contained in the application. The TCEQ does not have authority to change the manner of disposal of the treated effluent – the TCEQ can only grant or deny permits. Lastly, Mr. Webster and Mr. Wood both mention that the Proposal for Decision issued by the State Office of Administrative Hearings on the original permit application recommended denial of the permit. Further, that the Commission set aside the recommendation and ultimately granted the permit. The administrative law judge's opinion on the original permit application is irrelevant to the pending permit renewal application.

**2. Issues that are relevant and material to this application and protected under the law governing the application.**

The scope of the issues raised by a hearing request must present an interest that is protected under the law governing the permit application. Here, the wastewater discharge permit process protects water quality. The TWC prohibits the discharge of waste or pollutants into, or adjacent to, a water in the state without authorization from the Commission. TWC § 26.121. Mr. Webster and Mr. Wood are concerned that the discharges will contaminate wells on their property. Well water contamination caused by discharges is a water quality issue that shares a reasonable relationship with the TWC's general pollution prohibition. Further, this concern speaks to the likely impact of the regulated activity on the public's health and safety. Mr. Wood is concerned that the impact of the discharges on contact recreation activities has not been studied, and, that recreation on a lake on his property will be affected. This interest relates to the impact the Facility may have on the use of a natural resource. Mr. Wood is concerned that nuisance odors from the facility will affect his enjoyment of his property. Waste water treatment facilities must abate or control nuisance odors pursuant 30 TAC § 309.13(e). Therefore, Mr. Wood's concern is an interest protected by the application process.

Mr. Webster is concerned that the current drought was not considered and that receiving streams will contribute to pollution because of drought conditions. This interest shares a reasonable relationship with the TWC's general pollution prohibition. Mr. Webster is concerned that the discharge is near Hester's Lake on Cibolo Creek, a significant recharge feature of the Edwards Aquifer. Mr. Wood is similarly concerned that the discharge could reach groundwater contained in the Karst geology of the Trinity Aquifer. Aquifer protection, like well water protection, relate to water quality protection, an interest protected by the TWC. Mr. Webster is concerned that additional nutrient loading of the receiving streams has not been studied.

Similarly, Mr. Wood is concerned that diminished water quality and phosphate loading will cause algae blooms, lower dissolved oxygen levels, and kill fish. These issues relate to water quality directly and are protected by the TWC.

While OPIC recommends denying the hearing requests because no right to a hearing exists for this permit application, OPIC finds that Mr. Webster and Mr. Wood are affected persons based on the factors in 30 TAC § 203(c). In the event the Commission finds that there is a right to a hearing, OPIC provides further analysis below concerning the issues raised in the requests.

**B. Issues Raised in the Hearing Request**

Mr. Webster and Mr. Wood's hearing requests raise the following issues:

1. Whether the people Mr. Webster represents through the Cow Creek Groundwater Conservation District, Precinct 1 will be impacted.
2. Whether well contamination will diminish Mr. Wood's property value.
3. Whether dam structure will compromise the safety of downstream residents.
4. Whether a discharge permit is justified against the alternatives, including: land application, discharging into a lake owned by Lerin Hills, re-selling treated effluent to a local golf course, and regionalizing with the Kendall West Utility Company.
5. Whether the Proposal for Decision issued by an Administrative Law Judge during the original permit proceedings should be considered.
6. Whether discharges will contaminate groundwater wells on Mr. Webster and Mr. Wood's property.
7. Whether discharges will impact recreation on Mr. Wood's lake.
8. Whether nuisance odors will affect Mr. Wood's enjoyment of his property.
9. Whether drought conditions will cause receiving streams to pollute.
10. Whether contaminated effluent could reach the Edwards and Trinity Aquifers.

11. Whether nutrient and phosphate loading will cause algae blooms, lower dissolved oxygen, and cause fish to die.

**C. Issues Raised in the Comment Period**

Mr. Webster and Mr. Wood's issues were raised in the comment period and have not been withdrawn. 30 TAC §§ 55.201(c) & (d)(4), 55.211(c)(2)(A).

**D. Disputed Issues**

There is no agreement between the Mr. Webster, Mr. Wood, and the ED on the issues raised in the hearing request.

**E. Issues of Fact**

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements. 30 TAC § 55.211(c)(2)(A). The issues raised by Mr. Webster and Mr. Wood are issues of fact and could be addressed by an evidentiary hearing.

**F. Relevant and Material Issues**

The issues discussed in § III.A.2 above, and listed in § III.B.6–11, relating to water quality and the TPDES application process, are relevant and material. All other issues raised by Mr. Weber and Mr. Wood are not relevant and material and could not be addressed by the TCEQ.

**G. Issues Recommended for Referral**

OPIC recommends that the issues listed in § III.B.6–11 be referred to the SOAH for a contested case hearing.

**H. Maximum Expected Duration of Hearing**

Commission Rule 30 TAC § 80.6(b)(5) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing. To assist the Commission

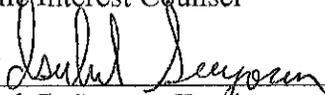
in stating a date by which the judge is expected to issue a proposal for decision, and as required by 30 TAC § 55.209(e)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be six months from the first date of the preliminary hearing until the proposal for decision is issued.

#### IV. CONCLUSION

OPIC recommends denying the hearing requests of Mr. Webster and Mr. because there is no right to a hearing on this permit renewal. If the Commission disagrees and finds there is a right to a hearing on this matter, OPIC recommends granting the requests of Mr. Webster and Mr. Wood and referring the issues listed in § III.B.6–11 to SOAH for a contested case hearing.

Respectfully submitted,

Vic McWherter  
Public Interest Counsel

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 9, 2015 the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Request for Hearing was filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.

  
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Isabel G. Segarra Treviño

**MAILING LIST**  
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**TCEQ DOCKET NO. 2014-1706-MWD**

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