

March 24, 2009

VIA HAND DELIVERY

Ms. LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
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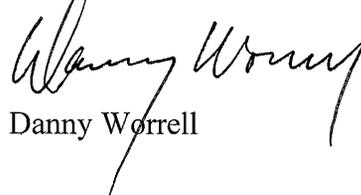
Re: Lerin Hills, Ltd.'s Exceptions to the
Administrative Law Judge's Proposal for Decision
Application by Lerin Hills, Ltd. for TPDES Permit No. WQ0014712001
SOAH Docket No. 582-08-0690; TCEQ Docket No. 2007-1178-MWD

Dear Ms. Castañuela:

Enclosed for filing please find an original and seven copies of Lerin Hills, Ltd.'s Exceptions to the Administrative Law Judge's Proposal for Decision in the above-referenced case.

Thank you for your assistance on this matter, and if you have any questions, please do not hesitate to contact me.

Very truly yours,



Danny Worrell

Enclosures

cc: Service List

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SOAH DOCKET NO. 582-08-0690
TCEQ DOCKET NO. 2007-1178-MWD

IN RE: APPLICATION OF
LERIN HILLS, LTD. FOR
TPDES PERMIT NO.
WQ0014712001

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BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

CHIEF CLERKS OFFICE

2009 MAR 24 PM 3:47

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

**LERIN HILLS, LTD.'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S PROPOSAL FOR DECISION**

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ADMINISTRATIVE LAW JUDGE'S PROPOSAL FOR DECISION**

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

COMES NOW Lerin Hills, Ltd. ("Lerin Hills" or the "Applicant"), and files this its Exceptions to the Administrative Law Judge's ("ALJ's") Proposal for Decision ("PFD") in this case, and would respectfully show the following:

I. INTRODUCTION

This case involves a draft permit ("the Draft Permit") to discharge treated effluent from the proposed Lerin Hills Wastewater Treatment Plant ("Wastewater Treatment Plant" or "the Plant") that would serve the Lerin Hills Development, a planned 1,475 single-family housing development four miles west of Boerne, in Kendall County, Texas. To date, significant resources have been spent on this development project, in addition to those used in an attempt to obtain the Permit that is the subject of this proceeding.¹ The current GBRA water supply contract for the proposed Development expires on or about June 30, 2009, if Lerin Hills does not obtain a discharge permit by then.² Consequently, if this Application is denied, the entire

¹ Such development activities include: acquisition of property, preparation of a development master plan and plat, clearing brush, constructing over four miles of roads, designing the water distribution and wastewater collection system, obtaining authority for and operation of a municipal utility district, and securing and maintaining a surface water supply from the Guadalupe Blanco River Authority ("GBRA").

² Protestant is backed by a competing development, Tapatio Springs, which is paying Protestant's legal bills in this proceeding. Tr. at 271 (Wood). Tapatio Springs' apparent goal is to prevent the Lerin Hills Development from going forward or to delay its progress as much as possible. In another case, Tapatio Springs has appealed a

investment in this project will likely be lost. In these very challenging economic times, care should be taken not to jeopardize or inhibit thoughtful, well-planned projects, such as the Lerin Hills Development, that can provide jobs and economic livelihoods for many Texans.

In addition, approval of this PFD will jeopardize the Commission's discharge permitting program, especially as it applies to municipal wastewater discharges. The new standard proposed by the ALJ in her PFD would make it very difficult for municipal wastewater applicants to obtain a permit and would very likely have a chilling effect on future proposed developments, like the proposed Lerin Hills Development.

Lerin Hills excepts to three portions of the ALJ's PFD. First, Applicant excepts to the ALJ's finding that Protestant, William "Rick" Wood ("Mr. Wood" or "Protestant") is an "affected person" with respect to Lerin Hills' Texas Pollutant Discharge Elimination System ("TPDES") Permit Application ("the Application"), which is the basis of this proceeding, and that Protestant has standing in this case. Protestant is not an affected person and should never have been granted standing in this case. Second, Applicant excepts to the ALJ's determination that it did not meet its evidentiary burden to establish that the proposed discharge would meet the antidegradation standard of the Texas Surface Water Quality Standards ("TSWQS") with respect to portions of the proposed discharge route. Applicant met its burden of proof by a significant margin with the manifest weight of credible expert testimony supporting a finding that the proposed discharge meets the Commission's antidegradation standard. In route to her decision, the ALJ has misinterpreted the Commission's antidegradation standard and recommended a new

Commission Order that created the Lerin Hills Municipal Utility District ("MUD"). *See Tapatio Springs Service Company, et al. v. Texas Commission on Environmental Quality*, Cause No. D-1-GN-06-004717 (Dist. Ct. of Travis County, 345th Judicial Dist. of Texas).

"quantitative" evidentiary requirement for a wholly qualitative regulatory standard. Third, Applicant excepts to the ALJ's allocation of transcript costs. Since Protestant misrepresented facts to the Commission in his hearing request and should not be considered an affected person, he should bear the entire cost of transcription services.

Finally, in the alternative, Lerin Hills proposes additional, more stringent proposed Permit conditions that would essentially make the proposed discharge intermittent and alleviate any potential water quality concerns the ALJ's PFD could possibly raise.

II. STANDARD OF REVIEW

The Commission may reject the ALJ's PFD and proposed Order and approve its own order, but the Commission's Order must be based on the record made before the ALJ, and the Commission must explain the basis of its Order.³ Further, the Commission may change a Finding of Fact or Conclusion of Law made by the ALJ or vacate or modify a proposed Order issued by the ALJ if it determines: (1) that the ALJ did not properly apply or interpret applicable law, agency rules, written policies, or prior administrative decisions or (2) that a technical error in a Finding of Fact should be changed.⁴ If the Commission makes such a change, it is required to state in writing the specific reason and legal basis for such changes.⁵ In addition, the ALJ has the regulatory authority to amend the PFD in response to exceptions, replies, or briefs filed by the Parties.⁶

³ TEX. GOV'T CODE § 2003.047(m).

⁴ TEX. GOV'T CODE §2001.058(e)(3).

⁵ *Id.*

⁶ 30 TEX. ADMIN. CODE ("T.A.C.") § 80.259.

III. THE ALJ ERRED IN HOLDING THAT PROTESTANT HAS STANDING

A. Protestant is not an affected person under applicable law, rules, policy, and Commission precedent.

1. Applicable Law.

An application for a TPDES permit may be referred to the State Office of Administrative Hearings ("SOAH") for a contested case hearing at the request of an "affected person," or on direct referral by the Commission at the request of the applicant or the Executive Director.⁷ The Water Code specifies that "The Commission may not grant a request for a contested case hearing unless the Commission determines that the request was filed by an affected person as defined by Section 5.115."⁸

An affected person is defined as: "a person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing. An interest common to members of the general public does not qualify as a personal justiciable interest."⁹

⁷ See TEX. WATER CODE §§ 5.556, 5.557; 30 T.A.C. §§ 55.201, 55.210, 55.211(c).

⁸ TEX. WATER CODE § 5.556(c).

⁹ See TEX. WATER CODE § 5.115. The Commission also considers the following factors in determining affected person status:

- (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 T.A.C. § 55.203.

2. Background.

The Commission referred Lerin Hills' Application to SOAH for a contested case hearing solely on the basis of a hearing request by Protestant. No other individuals were found to be affected persons by the Commission, and neither the Executive Director nor Applicant requested a direct referral.¹⁰ In his July 26, 2007, hearing request letter, counsel for Mr. Wood stated that Mr. Wood was one of a group of "landowners within 1 mile downstream of the application site and may suffer adverse impacts from the application discharges."¹¹

In testimony at the preliminary hearing, however, Mr. Wood admitted that he was not a downstream landowner and did not even own property on the watercourse (i.e., Deep Hollow Creek) into which the proposed discharge is to take place.¹² Upon further questioning, Mr. Wood testified that he has access to land along the watercourse, but that that land is in fact owned by Mr. Wood's wife's family, the Hahnfelds.¹³ Mr. Wood testified that he does not have *any* legal interest in the Hahnfeld property.¹⁴ Moreover, the evidence shows, and the ALJ acknowledged, that the Hahnfeld property is more than one mile from the proposed discharge.¹⁵ Mr. Wood tried to bolster his connection to the Hahnfeld property by testifying that there are no fences between his land and that of the Hahnfelds, and that he is allowed to use the Hahnfeld

¹⁰ See TCEQ, *An Interim Order Concerning the Application by Lerin Hills, Ltd. for TPDES Permit No. WQ0014712001*, TCEQ Docket No. 2007-1178-MWD (Oct. 26, 2007).

¹¹ See Letter from Eric Allmon to LaDonna Castañuela, Re: Comments and Request for Contested Case Hearing on proposed TPDES Permit No. WQ0014712001, by Lerin Hills Ltd. (Jul. 26, 2007).

¹² See Transcript of Proceedings Before SOAH, Prehearing Conference (Jan. 8, 2008) (hereinafter, "Preliminary Hearing Tr.") at 43-44.

¹³ See *id.* at 20-21, 27.

¹⁴ See *id.* at 50.

¹⁵ See Preliminary Hearing Tr. at 44-45; ALJ's Order No. 2 Denying Motions for Reconsideration and to Certify Question at 3 (hereinafter "ALJ's Order No. 2").

land and to access the creek and pond for recreational purposes and utilize wells on the Hahnfeld property.¹⁶

Mr. Wood testified regarding his concern for potential harm to the Hahnfelds' property, as a basis for his affected person status.¹⁷ He also testified that he and his children fished and swam in the Hahnfeld pond and had used a well on the Hahnfeld property for drinking water.¹⁸ But, no evidence was put forth by Mr. Wood to show that he had been authorized by the Hahnfelds to represent their interests before the Commission and at the hearing. No reason was given as to why the Hahnfelds did not request a contested case hearing on their own behalf.

Despite this evidence, at the conclusion of the preliminary hearing, the ALJ issued an order designating Mr. Wood as a party to the proceeding.¹⁹ Applicant filed a motion for reconsideration and, in the alternative, a motion to certify question to the Commission regarding Mr. Wood's alleged affected person status,²⁰ both of which were denied.²¹ The ALJ's determination that Mr. Wood was an affected person was primarily based on the Hahnfelds' alleged permission for him to use their property and his recreational and environmental interests in the Hahnfeld Pond.²² The ALJ essentially determined that because Mr. Wood had permission and easy access to the Hahnfeld property, his "interests" (i.e., his recreational and environmental interests) were not common to the general public.²³ Further, she determined that Mr. Wood's privilege (i.e., permission) to use the Hahnfeld property was sufficient to satisfy the requirement

¹⁶ Preliminary Hearing Tr. at 20, 31, 38-39.

¹⁷ *See id.* at 19-20.

¹⁸ *See id.* at 31, 38-39.

¹⁹ *See* ALJ's Order No. 1 Memorializing Preliminary Hearing.

²⁰ *See* Applicant's Motion for Reconsideration of Mr. Rick Wood's Standing and in the Alternative, to Certify Question to the Texas Commission on Environmental Quality.

²¹ *See* ALJ's Order No. 2.

²² *Id.*

²³ *Id.*

under the law that his recreational or environmental interest be "related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing."²⁴

Based on recent Commission precedent, however, it is clear that the evidence regarding Mr. Wood's relationship to this proceeding does not establish that he is an "affected person" for purposes of this case and, therefore, that Mr. Wood should be denied standing.

3. Commission precedent – City of Castroville case.

In its February 25, 2009, Agenda meeting, the Commission heard arguments and voted to approve the PFD in TCEQ Docket No. 2008-0559-MWD, Application of the City of Castroville for Amendment to Texas Land Application Permit No. WQ0010952-001, which was sought by the City to authorize treated wastewater effluent discharge from a wastewater treatment facility to an unnamed natural drainage swale, thence to the Medina River in Segment No. 1903 of the San Antonio River Basin. The facts of that case are very similar to the facts of the instant case. A protestant, Mr. Kunze, filed a hearing request, asserting that he was a downstream landowner within one mile of the proposed discharge point. The Commission referred the issue of whether Mr. Kunze was in fact an affected person to SOAH for a hearing.

At hearing, it was discovered that Mr. Kunze was not a downstream landowner within one mile of the proposed discharge; instead, his wife was determined to be the landowner and neither he nor his wife lived on the property in question.²⁵ Mr. Kunze's wife had inherited the land and owned it as her sole separate property, meaning that under Texas law Mr. Kunze had no legal interest in the property.²⁶ Further, Mr. Kunze had not shown that he had the authority to

²⁴ *Id.* (The ALJ determined that there was no requirement under the law that Mr. Wood's privilege be a *legal* privilege, such as might be evidenced by a lease or easement.); TEX. WATER CODE § 5.115.

²⁵ See ALJ's PFD in In the Matter of the Application of the of the City of Castroville for Amendment to Texas Land Application Permit No. WQ0010952-001 (hereinafter "*City of Castroville PFD*").

²⁶ *Id.*

represent his wife's interests in the proceeding.²⁷ Mr. Kunze testified that he had permission to use his wife's property and an obligation to care (i.e. caretaker of the property) for it.²⁸ He also testified that he swam and fished on the river at his wife's property and that he was concerned that his health and his enjoyment of the river would be harmed or curtailed by the proposed wastewater discharges.²⁹ In addition, Mr. Kunze testified that his son lived on the property and there was a shallow well near the river on the property.³⁰ Based on these facts, the ALJ found that Mr. Kunze had no justiciable interest related to a legal right, duty, privilege, power or economic interest in regard to the property, and he concluded that Mr. Kunze was not an affected person in that case.³¹

At the Commissioners' Agenda meeting at which the ALJ's PFD was considered, there was much discussion regarding whether a general recreational interest in a waterbody was enough to make one an affected person under TCEQ rules. Absent any evidence of authorization from Mr. Kunze's wife to represent her property interests, the Commissioners adopted the PFD denying Mr. Kunze's affected person status.³²

4. **Discussion/Analysis.**

a. **Protestant has no actual ownership interest sufficient to confer standing.**

Mr. Wood's hearing request was misleading and contained misrepresentations of the facts regarding his alleged downstream property ownership for the purpose of obtaining a contested

²⁷ *Id.*

²⁸ Protestant's Exceptions to the ALJ's Proposal for Decision, In the Matter of the Application of the City of Castroville for Amendment to TLAP No. WQ0010952-001, at 2-3.

²⁹ *Id.* at p. 3.

³⁰ *City of Castroville* PFD at 3.

³¹ *Id.*

³² See TCEQ Order Concerning the Application by the City of Castroville for Amendment to TPDES Permit No. WQ0010952001, TCEQ Docket No. 2008-0559-MWD, SOAH Docket No. 582-08-4359, issued March 3, 2009.

case hearing from the Commission. This was a clear abuse of the contested case hearing administrative process. In fact, the only land owned by Mr. Wood in the vicinity is a 12-acre tract that is located adjacent to the 138-acre Hahnfeld tract. The tract of land owned by Mr. Wood is not adjacent to any watercourse, and the residence on Mr. Wood's land is located more than 2,800 feet from the site of the proposed Wastewater Treatment Plant and more than 2,400 feet from the site of the proposed discharge, a distance of more than 30 times the buffer zone of 150 feet required under TCEQ rules at 30 T.A.C. § 309.13.³³ Thus, as the ALJ apparently agreed,³⁴ Mr. Wood's actual ownership of property in the area should not be a basis for determining that he is an affected person for purposes of this proceeding.

b. Protestant's situation mirrors the *City of Castroville* case.

With the lack of a legal interest in real property on the proposed discharge watercourse, Mr. Wood's situation is virtually the same as that of Mr. Kunze's in the *City of Castroville* case. In his contested case hearing request, Mr. Wood, like Mr. Kunze, represented that he was a downstream landowner within one mile. The Commission granted him affected person status and referred the permit application to SOAH for a contested case hearing, based solely on that representation. It was later learned that Mr. Wood, like Mr. Kunze, did not own or have any legal interest in land adjacent to the creek that was downstream of the proposed discharge point,

³³ See Preliminary Hearing Tr. at 47-48; ALJ's Order No. 2 at 2.

³⁴ See ALJ's Order No. 2. In footnote number 6 of the ALJ's Order No. 2, she indicates that Mr. Wood asserts that there is ambiguity in the Lerin Hills Application regarding the location of the proposed discharge point. Such assertion is clearly wrong. The proposed discharge point was located by specifically plotted latitudinal and longitudinal coordinates in the Application and is clearly labeled in maps that are part of the Application. See Exhibit LH-1B (Lerin Hills Permit Application). Further, the Draft Permit explicitly incorporates the Application by reference at page 9, paragraph 10. See Exhibit LH-1C (Draft Permit). Thus, the location of the proposed discharge point was not at all ambiguous. Protestant tries to create ambiguity on this issue by using the introductory paragraph of the Draft Permit, which describes the location of the proposed Wastewater Treatment Plant, to claim that that language implies that the discharge would be from the Plant location. Even a cursory review of the Application and Draft Permit would clarify that the discharge point is proposed to be located approximately 900 feet north and west from the location of the Plant site to an unnamed dry creek and thence to an unnamed dry creek running south under State Highway 46, and thence to Deep Hollow Creek. See Exhibit LH-1C (Draft Permit) at 6.

and, like Mr. Kunze, he did not live on the land in question. Further, in Mr. Wood's case, ownership of the land in question was even more attenuated than that of Mr. Kunze, because in Mr. Wood's case, the land was owned, not by his wife, but by his in-laws. Mr. Wood had his in-laws' permission to use the land and to use the creek and pond on the land for general recreational purposes, such as fishing and swimming, and, similarly, Mr. Kunze had his wife's permission to use her land in a similar manner.

Based on these facts, Commission rules, and recent Commission precedent in the *City of Castroville* case, Mr. Wood, like Mr. Kunze, should be denied standing. The cases are essentially indistinguishable. Like Mr. Kunze, Mr. Wood has no legal right, duty, privilege, or power affected by this permit application nor does he have an economic interest affected by it. General recreational or environmental interests without any additional legal interest is not sufficient to confer affected person status. As the ALJ found in the *City of Castroville* case, and the Commissioners recognized in their deliberations relating to that case, such legal interest, in addition to personal justiciable interests, such as recreational or environmental interests, are required to satisfy the requirements for affected person status, as defined under the Water Code and the TCEQ rules.

B. The ALJ erred in determining that Protestant did not need a legal interest to confer affected person status and, therefore, standing for this case.

Determining affected person status under Texas Water Code Section 5.115(a) is properly regarded as a two step-analysis. In this case, the ALJ did not have the guidance provided on this issue by the Commission's determination in the *City of Castroville* case at the time,³⁵ but she recognized in Order No. 2 that the affected person inquiry is a two-step process. Nevertheless,

³⁵ Had she certified the question to the Commission, however, as requested by the Applicant after the Preliminary Hearing, the Commission's interpretation of this issue could have been confirmed.

she incorrectly characterized the nature of the second step of the analysis, as discussed in further detail below.³⁶

In step one of the affected person analysis, the Commission must determine whether a person has a personal justiciable interest in the subject matter of the application.³⁷ This justiciable interest must be personal, in that it cannot be an interest that is common to members of the general public.³⁸ Case law suggests that this interest may be economic, recreational, or environmental.³⁹

In step two of the analysis, the Commission must determine whether the interest (if determined to exist in step one) is related to a "legal right, duty, privilege, power, or economic interest affected by the administrative hearing."⁴⁰ Generally, based on the Code Construction Act and the rules of grammar and common usage, the Third Court of Appeals has held that an adjective that precedes several nouns in a series in a statute should be interpreted as modifying each of the nouns in the series.⁴¹ In other words, the adjective "legal" would be read as modifying each of the nouns following it in the series—"right," "duty," "privilege," "power," and "economic interest."⁴² Without citing to any case law or other authority, the ALJ in this case rejected this reading of the statute in Order No. 2, stating that "[i]f 'legal' modifies all the words

³⁶ See ALJ's Order No. 2 at 4.

³⁷ See TEX. WATER CODE § 5.115(a).

³⁸ See *id.*

³⁹ See *Texas Rivers Protection Association v. Texas Natural Resource Conservation Commission*, 910 S.W.2d 147, 152-53 (Tex. App.—Austin 1995, writ denied) (citing *City of Bells v. Greater Texoma Util. Auth.*, 790 S.W.2d 6, 11 (Tex. App.—Dallas 1990, writ denied)).

⁴⁰ TEX. WATER CODE § 5.115(a).

⁴¹ See TEX. GOV'T CODE § 311.011(a); see, e.g., *Consol. Reinforcement v. Carothers Exec. Homes, Ltd.*, 271 S.W.3d 887, 892 (Tex. App.—Austin 2008, no pet.) ("The dissent contends that 'negligent' only modifies 'act' in the phrase in the statute 'negligent act, error, or omission' by rewording the phrase 'error, omission, or negligent act.' We, however, are to read 'words and phrases' in context and construe them 'according to the rules of grammar and common usage.' A straightforward reading leads to the conclusion that the adjective 'negligent' modifies the three nouns 'act,' 'error,' and 'omission' that are connected by the conjunction 'or.'" (internal citations omitted)).

⁴² See *id.*

in the series, it must modify 'economic interest,'" and asserting that "the phrase 'legal economic interest' makes no sense."⁴³ Recent case law from the Third Court of Appeals, however, supports the interpretation that "legal" modifies all of the nouns following it, including "economic interest."⁴⁴

Despite this, if the Commission determines that the phrase "legal economic interest" cannot possibly be what the legislature intended, then the legislative history of § 5.115(a) may allow for an alternate reading. In construing a potentially ambiguous statute, the Code Construction Act allows a court to consider the "circumstances under which the statute was enacted" and the statute's "legislative history."⁴⁵ The legislature added the current subsection (a) of § 5.115, which defines affected person, to the Water Code in 1995.⁴⁶ The bill, as filed, stated that affected person means a person who has a personal justiciable interest related to "a legal right, duty, or privilege."⁴⁷ The bill was later amended in the Texas Senate, and the engrossed version, which passed out of the Senate to the House, added the term "power" to the end of the series, to read "a legal, right, duty, privilege, or power."⁴⁸ The terminology of the series did not change in the version of the bill referred to House Committee, debated by the members, and passed out of the Texas House.⁴⁹

⁴³ See ALJ's Order No. 2 at 4-5.

⁴⁴ See *Consol. Reinforcement*, 271 S.W.3d at 892.

⁴⁵ See TEX. GOV'T CODE § 311.023, subsections (2) and (3).

⁴⁶ See Tex. S.B. 1546, 74th Leg., R.S. (1995) (introduced version as originally filed in the Senate), attached to these Exceptions in Exhibit 1.

⁴⁷ See *id.* at 1.

⁴⁸ See Tex. S.B. 1546, 74th Leg., R.S. (1995) (engrossed version as passed out of the Senate), attached to these Exceptions in Exhibit 1.

⁴⁹ See Tex. S.B. 1546, 74th Leg., R.S. (1995) (House Committee Report version as passed out of the House Committee and accompanying amendments as adopted on the House Floor), attached to these Exceptions in Exhibit 1.

Even though bills containing the above terminology in identical form passed out of both chambers of the legislature, the two versions contained another difference that had to be reconciled in a Conference Committee. It was not until the last possible minute, in Conference Committee, that the term "economic interest" was tacked onto the end of the series.⁵⁰ In light of the circumstances surrounding the bill's legislative history, it is clear that the addition of the term "economic interest" to the series was an afterthought. The Section-By-Section Analysis ("Analysis") comparing the final Senate, House, and Conference Committee versions of the bill, demonstrates, however, that the legislature intended the adjective "legal" to modify each of the nouns that were in the series in the bill as originally passed out of each house (i.e., "right, duty, privilege, or power"), but did not intend "legal" to modify the term "economic interest."⁵¹ The Analysis describes the Senate Engrossment version of the bill as providing that an affected person "is a person with a personal justiciable interest related to a legal right, duty, privilege, or power."⁵² In a side-by-side comparison, the Analysis then describes the Conference Committee Report version of the bill as the same as the Senate version of the bill "but [it] provides that a person with a personal justiciable interest related to an economic interest may also be an affected person."⁵³ Consequently, it is clear that the legislature intended the adjective "legal" to modify each of the nouns in the series, except "economic interest."

Thus, the law is also clear that a personal justiciable interest must be related to a legal interest or an economic interest. Accordingly, the ALJ erred by granting standing to Protestant, who lacks a legal interest or an economic interest that is affected by this proceeding.

⁵⁰ See Tex. S.B. 1546, 74th Leg., R.S. (1995) (Conference Committee Report version, passed by both the Senate and House and signed by the Governor), attached to these Exceptions in Exhibit 1.

⁵¹ See Conference Committee Report, Section-By-Section Analysis, Tex. S.B. 1546, 74th Leg., R.S. (1995), attached to these Exceptions in Exhibit 1.

⁵² See *id.*

⁵³ See *id.*

C. Proposed Findings of Fact and Conclusion of Law relating to standing.

When it was discovered at the preliminary hearing that Mr. Wood had no legal interest in the Hahnfeld property, the ALJ should have found that he was not an affected person and remanded the Application to the Commission.⁵⁴ In the alternative, the ALJ should have certified questions regarding Protestant's affected person status to the Commission.⁵⁵ Either way, the ALJ erred by finding Mr. Wood to be an affected person and by proceeding with the contested case hearing. Applicant respectfully requests that the Commission reject the ALJ's PFD in its entirety and refer the permit application back to the Executive Director for approval.⁵⁶ To assist in accomplishing this task, Lerin Hills respectfully proposes the following Findings of Fact and Conclusion of Law for the Commission's consideration:

Findings of Fact

- (1) In a July 26, 2006, letter to the Commission requesting a contested case hearing, Mr. Wood represented that he was one of a group of landowners within one mile downstream of the Application site.
- (2) Mr. Wood owns no real property along the discharge route.
- (3) Mr. Wood owns property adjacent to his in-laws' property, referred to as the Hahnfeld property, which is situated along the discharge route but more than one mile downstream from the discharge point.

⁵⁴ See 30 T.A.C. §§ 55.211(e) (the grant of a hearing request is an interlocutory decision that is not binding on the designation of parties by the ALJ under Sec. 80.109), 80.109 (authorizing ALJ to designate parties based on Sec. 55.203 standards); see also 30 T.A.C. § 80.101 ("At the request of the applicant, the judge shall remand an application to the executive director if all timely hearing requests have been withdrawn or denied").

⁵⁵ See 30 T.A.C. § 80.131 (interlocutory appeals and certified questions).

⁵⁶ See TEX. WATER CODE §§ 5.122 (Delegation of Uncontested Matters to the Executive Director), 5.556(c) ("The commission may not grant a request for a contested case hearing unless the commission determines that the request was filed by an affected person as defined by Section 5.115").

- (4) Mr. Wood neither resides on the Hahnfeld property nor has any legal interest in that property.
- (5) Mr. Wood is not authorized to act on behalf of the Hahnfelds' in regard to Applicant's Application.
- (6) The Hahnfelds did not request a hearing on the Applicant's Application.

Conclusion of Law

- (1) Based on Findings of Fact numbers 1 through 6, William "Rick" Wood is not an affected person within the meaning of 30 T.A.C. § 55.203.

**IV. THE ALJ DID NOT PROPERLY INTERPRET
AND APPLY TCEQ RULES INTENDED TO PROTECT
SURFACE WATER QUALITY AND USES AGAINST DEGRADATION.**

- A. This failure on the part of the ALJ is manifest in the fundamental misinterpretation and misapplication of TCEQ's antidegradation rule, 30 T.A.C. § 307.5, that she made in her Conclusion of Law #7, as premised upon the errors that she made in her Findings of Fact #40, #43, and #45.**

The determinative Conclusion of Law adverse to Lerin Hills is #7: "The evidence fails to support a conclusion that, as to nutrients and their effects on surface water quality, the Draft Permit and proposed discharge would satisfy the requirements of the Commission's antidegradation rule in connection with the waters of Deep Hollow Creek, Frederick Creek, and Cibolo Creek."

The underlying basis for this Conclusion of Law is Finding of Fact #45: "Lerin Hills has failed to show that there would not be a greater-than[*sic*]-*de minimis* degradation of the waters of Deep Hollow Creek, Frederick Creek, and Upper Cibolo Creek as a result of the proposed discharge." This is a finding of "ultimate fact" that courts typically treat as a "mixed finding of

law and fact" that embodies a policy decision by the agency.⁵⁷ As such, the Commission should not be constrained in exercising its judgment differently than did the ALJ.

The specific grounds for the ultimate Finding of Fact #45 are contained in Findings of Fact #40 and #43:

40. The record in this case includes no attempt to estimate *quantitatively* the amounts of phosphorus that will be biologically available in the stream system over time as the discharge continues. (Emphasis added.)

* * *

43. The record in this case includes no attempt to estimate *quantitatively* the amounts of algal and plant growth that may result from the increased nutrient loading from the proposed discharge. (Emphasis added.)

The proposition governing the ALJ's findings on these two factual issues is her creation of a requirement for "quantitative" estimates of (1) the amounts of phosphorus that will be biologically available "over time" and (2) the amounts of algal and other plant growth that may result (also, by implication, over time) from the nutrient loading from the discharge.

Because, at bottom, the only expressed reason for the ALJ's recommended denial of Lerin Hills' Application is her belief that the Commission's antidegradation policy embodied in 30 T.A.C. § 307.5 requires "quantitative" evidence of both the amount of nutrients biologically available over time and the amount of resulting algal and plant growth, this creation of a requirement for quantitative evidence has become the lynchpin of the case.

The ALJ's determinative Conclusion of Law #45 and Findings of Fact #40, #43, and #45 are wrong for several reasons.

⁵⁷ *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n. 19 (1982); *Universal Minerals v. C.A. Hughes & Co.*, 669 F.2d 98, 102 (3d Cir. 1981); *Perry Homes v. Cull*, 258 S.W.3d 580, 598 n. 102 (Tex. 2008).

1. **Requiring quantitative evidence in order to meet a purely qualitative standard ("lowering of water quality by more than a *de minimis* extent") (A) effectively imposes a new standard not imposed by the legislature or TCEQ and (B) constitutes "adjudicative rulemaking" without prior notice to Lerin Hills or other affected applicants.**

In her PFD, the ALJ elaborated somewhat upon her belief that Lerin Hills' evidence was deficient for failing to include quantitative estimates of the amounts of phosphorus that will be biologically available over time and of the amounts of algal and other plant growth resulting from the discharge:

Third, although Dr. Miertschin and Mr. Price believe that much of the nutrients added to the stream system over time will be biologically unavailable, they have not *quantified* how much. Nor have they tried to *quantify* how much biomass might result from the increased nutrients. They did no modeling of nutrient loading over time. They did not, as Dr. Miertschin apparently has done in the past, try to correlate phosphorus concentrations with chlorophyll A, an indicator of algal and plant biomass. They offered no *specific data* to support their opinions about loading over time and resulting biomass. (Emphasis added.)⁵⁸

Thus, the ALJ leaves no doubt that she was not satisfied by the opinions of Lerin Hills' and the Executive Director's highly qualified expert witnesses that there would be no more than *de minimis* lowering of water quality in the receiving stream, now or in the future, as clarified by their explanations of what would constitute more than *de minimis* lowering of water quality, and as supported by the reasons for their opinions that they explained at length.⁵⁹

Over and above this expert testimony based on the experts' steady state modeling and qualitative evaluation of the future effects of Lerin Hills' discharge, the ALJ clearly has demanded some sort of modeling of the effects of nutrient loading over time or some preapplication site-specific study over a substantial period of time of the actual effects of

⁵⁸ PFD at 33-34.

⁵⁹ See Exhibits LH-2 at 20, LH-12 at 2-3, LH-4 at 11-13, ED-9 at 11-14; Tr. at 105-111, 201-02, 214-16, 219-20, 551-52, 578; and discussion in Part A.4 of this Brief.

discharges such as Lerin Hills' on this or a similar stream. No such requirement of *quantitative* estimates of effects in order to meet the strictly *qualitative* standard of the rule has been imposed by the Commission.

The only TCEQ rule setting antidegradation policy and procedures is 30 T.A.C. § 307.5. In Section 307.5, there is only one sentence that enunciates the Commission's policy for "Tier 2" determination of whether or not degradation of fishable/swimmable waters will occur: "Degradation is defined as a lowering of water quality by more than a *de minimis* extent, but not to the extent that an existing use is impaired."⁶⁰ The determinative issue, therefore, in the Commission's decision on a wastewater discharge application is whether the water quality of fishable/swimmable water will be lowered by more than a *de minimis* extent.

Neither in its rules nor in its *Procedures to Implement the Texas Surface Water Quality Standards* ("Implementation Procedures") has the Commission quantified the "*de minimis*" evaluation. Although the TCEQ has established an "initial screening procedure," with a screening level of consumption of less than 10% of the assimilative capacity of receiving waters, for constituents that have numerical criteria, this quantitative initial screening standard is expressly stated to be inapplicable to constituents, like phosphorus, nitrogen, and other nutrients, that do not have numerical criteria in the state water quality standards.⁶¹

The only guidance provided by the Implementation Procedures for evaluation of whether a discharge of nutrients will cause a lowering of water quality by more than a *de minimis* extent (and, therefore, constitute degradation) is in its "Examples Where Degradation Is Unlikely to

⁶⁰ 30 T.A.C. § 307.5(b)(2).

⁶¹ Implementation Procedures at 31-32. The Implementation Procedures also expressly exclude DO and pH from the procedures for screening of loading increases of 10% or more of assimilative capacity. Implementation Procedures at 32.

Occur": "Increased loading of total phosphorus, nitrate, or total nitrogen – if it can be reasonably demonstrated that detrimental increases to the growth of algae or aquatic vegetation will not occur."⁶² Clearly, in using only the qualitative terms "reasonably demonstrated" and "detrimental increases," the TCEQ has opted to maintain a purely qualitative evaluation of whether nutrients to be discharged by an applicant will likely cause degradation of water quality. The Commission obviously has chosen not to specify any numerical presumptive limit for nutrients as it did in the case of increased loadings of TSS, DO, and bioaccumulative toxic pollutants.⁶³

Without the TCEQ having chosen to set any quantitative evidentiary standard, even presumptive, for what would constitute a *de minimis* lowering of water quality by nutrient discharges, the ALJ has ventured beyond the scope of the applicable TCEQ rule and guidance by requiring quantitative estimates of the amounts of phosphorus biologically available over time and of the amounts of resulting algal and other plant growth. If the TCEQ were to want to depart from the qualitative assessment approach for evaluation of nutrient discharges historically used and embodied in its rules and procedures, it would go through rulemaking procedures. Only by doing so could it provide the prior notice and opportunity to comment on any proposed quantitative standards that would fully inform the regulated community, other stakeholders, and the Executive Director, and that would enable the Commission to fully consider what, if any, quantitative determinations were appropriate.

By proposing that the Commission impose a requirement of "quantitative estimates" of the effects of nutrient discharges over time, the ALJ is effectively engaging in "rulemaking by

⁶² Implementation Procedures at 33, ¶7.

⁶³ See the first, fourth, and eighth "Examples Where Degradation Is Unlikely to Occur" in the Implementation Procedures at 33.

adjudication."⁶⁴ Such a disfavored approach to law and policy making not only imposes upon an applicant a requirement that it could not have anticipated in preparing its application and going into the hearing, it also denies all other potential applicants for wastewater discharge permits and other affected persons and entities, such as Texas municipalities, the opportunity to participate in a critical policy making process. For these reasons the Commission should reject the invitation to adjudicative rulemaking embodied in the ALJ's proposed Findings of Fact #40, #43, and #45 and in her proposed Conclusion of Law #7.

2. **The ALJ's erroneous findings and conclusions are based on her misinterpretation of the Tier 2 review standard contained in the TCEQ rule to effectively allow no adverse effect on water quality uses, however minimal, even though the rule expressly contemplates that some slight impact on water quality uses is acceptable – if de minimis.**

In water quality regulatory parlance, "impairment" is a term of art that is equated with causing or contributing to violation of a state water quality standard.⁶⁵ A state's water quality standards are expressed in terms of the use or uses to be made of a water body and the criteria necessary to protect such uses.⁶⁶ "Impairment," therefore, equals prevention of a state-determined use of a water body by causing nonattainment of the corresponding water quality criteria, whether numeric or narrative, whether general or site-specific. In the instant case, impairment would mean causing Deep Hollow Creek, Frederick Creek, or Upper Cibolo Creek to no longer meet the numeric and/or narrative criteria for high aquatic life and contact recreation

⁶⁴ *Rodriguez v. Service Lloyds Ins. Co.*, 997 S.W.2d 248, 255 (Tex. 1999).

⁶⁵ See 30 T.A.C. § 307.5(c)(2)(A) and explanations of 303(d) impairment listings in *2008 Texas 303(d) List* p. 1; *2008 Texas Index of Water Quality Impairments* p. 1, and *Executive Summary of 2008 Texas Water Quality Inventory and 303(d) List*, all available together on the TCEQ website.

⁶⁶ 30 T.A.C. § 307.3(a)(52) (definition of "Standards"); 40 C.F.R. § 130.3; See also explanation of "Determining Water Quality Uses and Criteria" in TCEQ's Implementation Procedures, pp. 3-7.

and, in the case of the Cibolo, protection of public water supply and the Edwards Aquifer. In other words, Tier 1 review is to ensure that there will be no "impairment" of water quality uses.⁶⁷

Tier 2 review, on the other hand, contemplates that *de minimis* lowering of water quality is acceptable.⁶⁸ This clearly means that some noticeable or measurable change in water chemistry, whether in concentrations or amounts of constituents (for example, phosphorus), or in the case of nutrients, in the amounts or types of algae or other plant growth, is permissible – so long as any impact on water quality of any such change is *de minimis*. To Lerin Hills, this means that the *de minimis* line is the point at which there is a "detriment" to a determined use or aesthetic quality, even though the detriment does not rise to the extent of an *impairment* of that use or aesthetic quality.⁶⁹

By making the statement that the ALJ criticized on page 34 of her PFD, Lerin Hills did not intend to "conflate Tier 1 analysis with Tier 2 analysis." This is because Lerin Hills does not confuse "detriment" with "impairment" as the ALJ apparently thought that it did. Rather, Lerin Hills is concerned that it is the ALJ who believes that any effect whatsoever, however "trifling," to a designated or determined use of a water body – such as for high aquatic life or contact recreation ("fishable/swimmable") – would constitute degradation. Indeed, a statement that she makes on page 32 of her PFD indicates that she interprets Tier 2 review to prohibit any negative

⁶⁷ 30 T.A.C. § 307.5(b)(1).

⁶⁸ 30 T.A.C. § 307.5(b)(2).

⁶⁹ This use of the term "detriment" is consistent with the TCEQ's use of the term "detrimental" in the seventh of its "Examples of Where Degradation is Unlikely to Occur," in illustrating an absence of degradation as when "it can be reasonably demonstrated that *detrimental increases* to the growth of algae or aquatic vegetation will not occur." (Emphasis added.) Implementation Procedures at 33.

effect whatsoever on the uses of a water body, however minimal that effect might be.⁷⁰ It is the ALJ, not the Applicant or the ED, who has misinterpreted the Tier 2 review standard.

3. **The ALJ effectively elevates the burden of persuasion beyond the applicable "preponderance of the evidence" standard.**

Section 80.17(a) of the TCEQ rules states that the burden of proof in a contested case is on the moving party, in this case the Applicant, to persuade the Commission "by a preponderance of the evidence" that it has satisfied the required elements of its case, in this case all requirements to obtain a wastewater discharge permit.⁷¹ In order to satisfy the preponderance of the evidence burden, the Applicant has only to present evidence from which the decisionmaker can find that it is "more likely than not" that each of the elements necessary to obtain a permit exists.⁷²

In the case of the Tier 2 "antidegradation" element of Lerin Hills' case, this means that the Commission must find, after weighing all of the evidence introduced at the hearing, only that it is more likely than not that, on balance, no lowering of water quality by more than a *de minimis* extent will result from Lerin Hills' discharge under the limitations imposed by the Draft Permit.

Several statements that the ALJ has made in her PFD seem to indicate that she imposed a burden upon Lerin Hills to persuade her by more than a preponderance of the evidence that no degradation will occur to Deep Hollow Creek and downstream segments. She emphasizes that

⁷⁰ Indeed, the statement that the ALJ makes in her PFD at 32 – "The difficulty here is that Tier 2 antidegradation protection is extremely stringent: it prohibits *any* greater-than[*sic*]-*de minimis* degradation in water quality, even if the degradation has no effect on the uses of the water body" – indicates that she could find degradation to occur without any effect whatsoever on a designated water quality use.

⁷¹ 30 T.A.C. § 80.17(a).

⁷² *Southwestern Bell Telephone Co. v. Garza*, 164 S.W.3d 607, 621, 622 (Tex. 2004); *In re Doe*, 19 S.W.3d 278, 289 (Tex. 2000).

"Tier 2 antidegradation protection is *extremely stringent*" (emphasis added)⁷³ even while she recognizes that it is "vague."⁷⁴ She states that the Applicant and the ED have the "difficulty" of "trying to *ensure* that Tier 2's stringent, yet vague, standard is met" (emphasis added).⁷⁵ She states that the task facing Lerin Hills is "challenging" and that Lerin Hills' burden of proof on the antidegradation issue is "substantial."⁷⁶

Lerin Hills suggests that, consciously or not, the ALJ imposed a burden of persuasion on Lerin Hills that was greater than the applicable "more likely than not" preponderance of the evidence standard and that, therefore, the Commission should carefully review the entire record for itself, exercising its own judgment *de novo*, rather than accord any deference to the ALJ's findings, at least insofar as the antidegradation issues go.

4. **Lerin Hills and the Executive Director provided a clear preponderance of the qualified evidence, in the form of expert testimony, that there would be not more than *de minimis* impact on the water quality of the receiving stream over time.**

This was done not only in the form of their expert opinions and their explanations of the bases of those opinions, but also in Dr. Miertschin's explanation that, contrary to the ALJ's apparent understanding, his modeling of the effects of the phosphorus *did* take historical stream conditions, including any releases from sediment, into account.

Even if the ALJ were justified in wanting to hear some expert testimony estimating "quantitatively" the amount of phosphorus that will be biologically available in the stream system over time as the discharge continues,⁷⁷ she heard it. Apparently, she just did not understand it. Although in her PFD she indicates that evidence of "modeling of nutrient loading

⁷³ PFD at 32.

⁷⁴ PFD at 36.

⁷⁵ PFD at 36.

⁷⁶ *Id.*

⁷⁷ Proposed Finding of Fact #40; PFD at 33.

over time" would have satisfied her,⁷⁸ she failed to recognize that the modeling of phosphorus loading to the stream that Dr. Miertschin performed and described *did* depict the phosphorus concentrations that would be produced in a succession of downstream elements of the receiving waters over time and at any future point in time, from maximum allowable effluent discharges under a "steady state" of low flow, high temperature conditions⁷⁹ that would (however unrealistically) represent constant and worst case conditions highly productive of algal and plant growth,⁸⁰ and certainly constitute conditions far more conducive to phosphorus buildup and algal growth than what actually occurs in periodically deluged, then dry, hill country streams during all seasons and weather conditions.⁸¹

Dr. Miertschin did testify, albeit succinctly, that his modeling of the results of Lerin Hills' maximum allowable phosphorus discharges did represent worst case conditions at any future point in time, even ten years down the road, because it incorporated the empirical studies of actual real-life phosphorus dynamics in such hill country streams.⁸² On the assumption that his brief responses to questions on cross-examination did not adequately get the point across, when Dr. Miertschin submitted his written rebuttal testimony,⁸³ he explained how the kinetic rate of 0.1 per day that he used to represent phosphorus "decay" in his modeling was based on actual data from studies of similar hill country streams⁸⁴ and took into consideration the effects over time of all of the ongoing processes in such a stream:

Q: What does the kinetic rate represent in your phosphorus modeling exercise?

⁷⁸ PFD at 33.

⁷⁹ Tr. at 136-38.

⁸⁰ Tr. at 140-42; Exhibit LH-12, p. 3:7-12.

⁸¹ Tr. at 207:7-202:15; 410:13-411:1.

⁸² Tr. at 101:4-13; 110:21-111:1; 111:8-13; 112:7-10.

⁸³ Exhibit LH-12.

⁸⁴ Exhibit LH-12 at 2:6-14.

A: I utilized a kinetic rate of 0.1 per day in the phosphorus modeling using the NCM [i.e., non-conservative material] subroutine. This rate is a net rate of phosphorus removal from the water column, and it is based upon actual water quality data collected in several streams in central Texas. These streams have ongoing processes of sedimentation, biological uptake, resuspension, and whatever other processes occur. I could have also used a separate NCM settling rate for the phosphorus, but I did not choose to do so, since that process is also represented in my overall net kinetic rate.⁸⁵

The modeling that Dr. Miertschin performed and reported, therefore, did depict "quantitatively" the phosphorus concentrations that would result "over time" in the stream system under worst case conditions of maximum allowable discharges and high temperature and low flow. Why this did not satisfy the ALJ is unknown. Perhaps the point could have been explained at greater length had the Protestant chosen to explore the matter, but he did not, probably for tactical reasons, and the ALJ herself did not indicate, until now, any misunderstanding of Dr. Miertschin's explanation. Therefore, the "specific data" that Dr. Miertschin's modeling furnished amply supported, without contradiction, his opinion regarding phosphorus loading to the stream over time, as well as regarding any resulting plant and algal growth.

Based upon his modeling, as well as upon his observations of Deep Hollow Creek, his knowledge of the overall stream system, and his years of experience with the effects of nutrients on central Texas streams, Dr. Miertschin explained why he was confident that, given the stringent limits in the Lerin Hills Draft Permit, particularly the 0.5 mg/L phosphorus limit, there would be no lowering of water quality in the receiving stream by more than a *de minimis* amount: there is already a large standing crop of aquatic macrophytes and algae in the Deep Hollow Creek impoundments that will continue to consume the nutrients deposited into them,

⁸⁵ Exhibit LH-12 at 3:16-23 (explanation provided).

including those from Lerin Hills' discharge; the phosphorus taken up by these plants will become part of the bottom sediment when the plants die and not be released to be available to other plants; therefore, there will be no "buildup" of available phosphorus in the ponds, and there will be no perceptible changes in the ponds or stream system.⁸⁶ Ten years down the road, if the Lerin Hills Plant is operated under the terms of the Draft Permit, the stream system, including its impoundments, "will look just like it does today."⁸⁷

Paul Price, Lerin Hills' aquatic life expert, testified that the proposed discharge would not cause any significant change in the algae and other plant assemblage in flowing or impounded portions of Deep Hollow Creek.⁸⁸ At the hearing, he further testified that much of the phosphorus discharge would not become biologically available over time because it would be sequestered in sediments or chemically combined with calcium.⁸⁹ Mr. Price's conclusion was that any additional plant growth that might occur in the SCS and Hahnfeld Ponds over time would be so slight as to not likely be noticeable.⁹⁰

Peter Schaefer, the Executive Director's water quality expert, testified that, with the stringent 0.5 mg/L limit on phosphorus in Lerin Hills' effluent there will be only a *de minimis* – i.e., "less than noticeable" – decrease in water quality in Deep Hollow Creek, specifically as to any change related to increased algae growth.⁹¹ At the hearing, Mr. Schaefer explained that, even if the discharge were to cause some noticeable increase in algae or macrophytic plant growth in one of the impounded parts of the creek, a noticeable increase in algae or other plant

⁸⁶ Exhibit LH-2 at 20; Tr. at 105-110.

⁸⁷ Tr. at 111:8-13.

⁸⁸ Exhibit LH-4 at 11-13.

⁸⁹ Tr. at 201-02, 214-15.

⁹⁰ Tr. at 216, 219-20.

⁹¹ Exhibit ED-9 at 11-14.

growth is not to be equated with a noticeable decrease in the fishable/swimmable quality of the water, of which there would be none.⁹²

As in the case of Lerin Hills' experts' testimony, the ED's water quality expert, Peter Schaefer, clearly was relating his evaluation of stream conditions resulting "over time" from Lerin Hills' permitted discharge. As with Dr. Miertschin's and Mr. Price's testimony, Mr. Schaefer's opinion regarding the absence of any degradation due to Lerin Hills' phosphorus and nitrogen discharges was based on the ED Staff's experience with permitted discharges into other hill country streams.⁹³

All of this testimony by Lerin Hills' and the ED's imminently qualified experts constituted an extensive amount of evidence that the very limited amount of phosphorus discharged by Lerin Hills' proposed Wastewater Treatment Plant would cause no increase in algal or other plant growth in the receiving stream that would lower its water quality by more than a *de minimis* amount. Without an equal weight of qualified evidence to the contrary, the decisionmaker could only find by a "preponderance of the evidence" that Lerin Hills had met its burden of persuasion that its permitted discharge would cause no degradation of water quality.

5. There was essentially no countervailing testimony from any Protestant witness with any qualification to express an expert opinion on the subject.

Neither the experience nor the credentials of the Applicant's nor the ED's witnesses were challenged. Indeed, such an effort would have been pointless. Dr. Miertschin is one of the preeminent water quality experts in the State of Texas. Dr. Miertschin has been a water quality scientist for over 35 years with a significant amount of water quality modeling and permitting

⁹² Tr. at 551-52, 578.

⁹³ Tr. at 582, 591.

experience, including issues associated with antidegradation review.⁹⁴ Mr. Paul Price is an aquatic biologist, also with over 35 years of experience, including numerous assessments of impacts of a wide variety of activities on aquatic plants and animals.⁹⁵ In addition, the ED's expert, Peter Schaefer, is an aquatic biologist with over 12 years experience in this field and has both an undergraduate degree and a Masters Degree in aquatic biology. In addition, Mr. Schaefer had the additional benefit of the collective experience of the TCEQ Water Quality Permitting Staff which he had access to and sought input from in making his determination.⁹⁶ Both the Applicant's and the ED's experts providing testimony regarding the proposed discharge meeting the Commission's antidegradation standard have the qualifications, knowledge, and experience to provide these expert opinions.

In contrast, Protestant offered Dr. Roger Lee. Dr. Lee has no wastewater discharge permitting experience in Texas, nor, for that matter, does he have any wastewater discharge permitting experience anywhere.⁹⁷ Further, he has no wastewater discharge degradation analysis experience.⁹⁸ Moreover, he is not a biologist nor an expert in aquatic biology.⁹⁹ Furthermore, there is no testimony that he even visited the area where the proposed discharge is to take place. Dr. Lee has no QUAL-TX or LA-QUAL modeling experience nor any surface water quality modeling experience, and he is not a surface water modeling expert.¹⁰⁰ Finally, he is only

⁹⁴ See Exhibit LH-2A (Miertschin Resume).

⁹⁵ See Exhibit LH-4A (Price Resume).

⁹⁶ Tr. at 581-82 (Schaefer).

⁹⁷ Tr. at 278-279.

⁹⁸ Tr. at 325.

⁹⁹ Tr. at 299.

¹⁰⁰ Tr. at 278-284.

moderately familiar with the Texas Surface Water Quality Standards and is not familiar with the TSWQ narrative standards.¹⁰¹

With respect to modeling, Dr. Lee relied on a colleague, Mr. George Krallis, to review the water quality modeling in this case.¹⁰² Mr. Krallis lives and works in Pennsylvania and has no prior experience working with or interpreting the results of QUAL-TX or LA-QUAL modeling.¹⁰³ Mr. Krallis is not an expert with QUAL-TX or LA-QUAL modeling, and before this case, Mr. Krallis had not performed or reviewed *any* water quality discharge modeling done for a discharge in Texas.¹⁰⁴ Further, Mr. Krallis has never done any wastewater discharge permitting in Texas.¹⁰⁵ Nevertheless, Mr. Krallis and Dr. Lee criticized the modeling conducted by the ED and Dr. Miertschin because the phosphorus or algal routines under the model were not utilized.¹⁰⁶ Their credibility on this issue, however, was completely undermined when Dr. Lee admitted that they were not aware that phosphorus and algal routines under the QUAL-TX or LA-QUAL model were not used, because quality assurance/quality control studies had not been conducted to assure the accuracy of such results.¹⁰⁷ Dr. Lee testified at the hearing that he would not even use such modeling subroutines.¹⁰⁸

Dr. Lee was also assisted by another colleague, Ms. Lee Read, whose specialty is in permits and due diligence.¹⁰⁹ She reviewed the Application and determined that it "appears

¹⁰¹ Tr. at 279.

¹⁰² Tr. at 279.

¹⁰³ Tr. at 280.

¹⁰⁴ Tr. at 280, 289.

¹⁰⁵ Tr. at 280.

¹⁰⁶ Tr. at 286-287.

¹⁰⁷ Tr. at 289, 301-302.

¹⁰⁸ Tr. at 301-302.

¹⁰⁹ Tr. at 280-281.

complete and comprehensive in nature."¹¹⁰ Consequently, the only Protestant witness who appeared to have any experience to provide relevant expert testimony in this proceeding found that the Application was complete and comprehensive.

On the ultimate issue of antidegradation, Dr. Lee admitted that he had no experience in determining the amount of loading that could lead to algal or other plant growth that might affect DO levels or the narrative water quality standards, which necessarily include water quality uses and the antidegradation standard itself.¹¹¹ He also admitted that he has no permitting or biological experience that would give him expertise to render an antidegradation opinion.¹¹² Moreover, he admitted repeatedly that he does not have the experience or expertise to render an expert opinion on whether there would be more than a *de minimis* degradation of water quality as a result of this proposed discharge, since he did not do "the work out there."¹¹³ Dr. Lee's "opinion" in this case was well outside his area of expertise and was, in effect, no more than lay witness testimony. Accordingly, it should not be afforded the weight of expert testimony such as provided by Dr. Miertschin, Mr. Price, and Mr. Schaefer. Consequently, all of the qualified expert testimony on this subject supports the position that the proposed discharge will not degrade water quality by more than a *de minimis* amount.

¹¹⁰ Tr. at 282.

¹¹¹ Tr. at 325.

¹¹² Tr. at 300.

¹¹³ Tr. at 304, 325, 346. To the extent that Dr. Lee has any experience on this issue, it was as a result of his involvement in a single U.S. Geological Survey Study on light attenuation on Lake Houston as a result of the inflow of nitrate and phosphate. *See* Exhibit RW-2A (Lee Resume); Tr. at 343-44. Although he admitted that he does not have expertise in plant life or aquatic plant growth, from this one study he testified that he was "comfortable in rendering somewhat of a qualitative opinion." Tr. at 344. Dr. Lee did not, however, testify that he was providing expert opinion testimony or that he was "comfortable" providing expert testimony in this case, because he could not. He does not have the training or experience to provide such testimony in this case, whether he did "the work out there" or not.

6. **The ALJ's imposition of such a high hurdle of "quantitative evidence" of future effects would severely jeopardize wastewater discharge permitting in Texas during critical economic conditions.**

If Dr. Miertschin's modeling and all of Lerin Hills' and the ED's expert testimony in this case is not sufficient to satisfy the ALJ's demand for "quantitative evidence" of the absence of degradation, it is dauntingly difficult to know what will be sufficient. Entrepreneurs will not be inclined to risk investments in residential or commercial developments dependent on wastewater discharge permits without knowing what kind of modeling of future water quality effects would be adequate to satisfy an ALJ and, ultimately, the Commission. No developer and, indeed, few, if any, municipalities would be apt to invest years in very expensive empirical studies without any predictability as to how many years the study would have to span and what would be sufficiently reliable and positive results.

These are dire times for the economy, in Texas as elsewhere. The State and the welfare of its citizens cannot afford to have important development projects, with the vital employment opportunities that they bring, frustrated by such idealistic holdings as this. The Applicant in this case did everything reasonably feasible to present highly qualified expert testimony, which all of the ED's experts concurred, that the limited discharges allowed by its Draft Permit would not cause any degradation of the receiving waters. To require more than this would be to erect barriers that are not embodied in the Commission's rules and that are not compatible with the Commission's duty to temper environmental protection with economic feasibility.¹¹⁴

¹¹⁴ TEXAS WATER CODE § 26.003.

B. The ALJ erred by making no fact finding or conclusion of law that Lerin Hills satisfied Tier 1 of TCEQ's antidegradation policy by demonstrating that it would meet the narrative standards for Deep Hollow Creek, Frederick Creek, and Cibolo Creek.

In Finding of Fact #30 (as essentially echoed in Conclusion of Law #5), the ALJ finds only that, under the terms of the Draft Permit, the Commission's *numerical* standards would be met for "all segments of the receiving stream."

In Finding of Fact #31 (and repeated in Conclusion of Law #6), the ALJ finds only that the Draft Permit would ensure that the *narrative* standards would be met for the "immediate receiving stream, the unnamed tributary."

She makes no finding regarding Lerin Hills' demonstration that it would meet the *narrative* standards applicable to Deep Hollow Creek, Frederick Creek, and Cibolo Creek.

The import of this conspicuous gap in the ALJ's Findings of Fact is evident in the language that she has used in her Conclusion of Law #7:

7. The evidence fails to support a conclusion that, as to nutrients and their effects on surface water quality, the draft permit and proposed discharge would satisfy the requirements of the Commission's antidegradation rule in connection with the waters of Deep Hollow Creek, Frederick Creek, and Cibolo Creek. 30 TEX. ADMIN. CODE. § 307.5.

By choosing to conclude that the evidence does not demonstrate that the Draft Permit and proposed discharge would satisfy the "antidegradation rule" for these segments downstream of the unnamed tributary immediately receiving the discharge, rather than limiting her proposed Conclusion of Law to failure to show that there would be greater-than-*de minimis* degradation of these segments (Tier 2), the ALJ leaves it open to the inference that she did not believe that Lerin Hills proved even that its discharge would not cause a violation of existing narrative water

quality standards (Tier 1) for Deep Hollow Creek, Frederick Creek, and Cibolo Creek. That this was the ALJ's intent is evidence upon reading footnote 168 to her PFD:

Further, given the lack of evidence about nutrient loading over time and the resulting quantity of biomass, the ALJ cannot find with confidence that the narrative standards for aesthetics and nutrients/excessive aquatic vegetation would be protected by the draft permit. 30 TEX. ADMIN. CODE § 307.4(d) and (e).¹¹⁵

It is evident, therefore, that the ALJ has impliedly found that Lerin Hills' Application failed Tier 1 of antidegradation review for the same reasons that she found it to fail Tier 2 – her opinion that there had to be *quantitative* evidence of the amount of phosphorus that will be biologically available in the stream over time and the resulting algal and plant growth, and that such quantitative evidence was missing. Therefore, the ALJ's failure to find that Lerin Hills demonstrated that, under the terms of the Draft Permit, the water quality standards, both narrative and numerical, will be maintained for all segments of the receiving stream is erroneous for the same six reasons discussed above in Part II.A of this Brief.

C. On the way to making these erroneous determinative findings and conclusions, the ALJ makes several fundamental misstatements in her PFD.

1. The ALJ was wrong to say that the circumstances of the proposed Lerin Hills' discharge do not match any of the examples of "degradation unlikely" provided by the TCEQ in its Implementation Procedures.

One of the "Examples Where Degradation Is Unlikely to Occur" provided by the TCEQ in its Implementation Procedures is as follows:

Increased loading of total phosphorus, nitrate, or total nitrogen – if it can be reasonably demonstrated that detrimental increases to the growth of algae or aquatic vegetation will not occur.¹¹⁶

¹¹⁵ PFD at 34, n. 168.

¹¹⁶ Implementation Procedures, Exhibit ED-11 at 33, ¶7.

The ALJ rejects this example as guidance for her decision by simply saying, "as discussed above, the ALJ has determined that Lerin Hills failed to make such a showing."¹¹⁷ The "discussion above" to which the ALJ refers is her discussion of her belief that Lerin Hills failed to present "quantitative estimates" of the amounts of phosphorus biologically available over time and the resulting algal growth. Viewed from other than this skewed perspective, it is clear, for the reasons presented above in Part IV.A.4 of this Brief, that Lerin Hills, through its expert testimony, did "reasonably demonstrate that detrimental increases to the growth of algae or aquatic vegetation will not occur." Therefore, the facts relevant to Lerin Hills' discharge should be found to precisely match this "degradation unlikely" example.

2. **Any concern for degradation of the waters of Upper Cibolo Creek should have been eliminated by the undisputed testimony that all concentrations of constituents of concern will be back to background levels before any discharged wastewater exits Hahnfeld Pond.**

It is especially astonishing that the ALJ included Upper Cibolo Creek, seven miles downstream of the proposed discharge point, in her finding that Lerin Hills had failed to show that there would not be greater-than-*de minimis* degradation of the downstream waters.¹¹⁸ There was undisputed testimony that all constituents of concern – DO, phosphorus, nitrogen, and bacteria – would be back to background before any wastewater even reached Frederick Creek, much less the Upper Cibolo.¹¹⁹

As stated by the ALJ, the determining reason that she included the Upper Cibolo in her negative findings was because for it, like for the farther upstream segments, Lerin Hills did not satisfy her demands for "quantitative estimates" of nutrient loading over time and resulting

¹¹⁷ PFD at 36.

¹¹⁸ Finding of Fact #45; Conclusion of Law #7; PFD at 36-37.

¹¹⁹ Exhibit LH-2E; Tr. at 683-84.

biomass.¹²⁰ Therefore, her findings and conclusions regarding the Cibolo are erroneous for all of the same reasons discussed above in Parts IV.A and B.

3. **The ALJ failed to recognize that the opinion of Lerin Hills' expert in aquatic biology, Paul Price, remained solidly that Lerin Hills' discharge would cause no noticeable increase in algae or other plant growth in the impounded portions of Deep Hollow Creek after he became aware of the levels of phosphorus concentrations in those ponds that Dr. Miertschin's modeling indicated would result from Lerin Hills' discharge.**

The ALJ seemed to dismiss Mr. Price's expert testimony that, and his explanation why, no noticeable or significant increase in algae or other plant growth would occur in the SCS and Hahnfeld Ponds over time due to the limited nutrients discharged by Lerin Hills, because she considered his opinion to have been "undermined" by his testimony that he was not aware, when he prepared his prefiled testimony, that Dr. Miertschin's modeling showed concentrations of phosphorus in the SCS Pond as high as 0.28 mg/L.¹²¹ The ALJ, however, seemed to disregard the fact that, in his testimony at the hearing, Mr. Price's opinion on this subject did not change after he learned of the phosphorus concentrations in these ponds predicted by Dr. Miertschin's modeling. If anything, Mr. Price's fully informed testimony at the hearing was even less qualified than in his prefiled testimony, progressing from "[t]he basic composition of the plant assemblage will not change significantly"¹²² to "no noticeable change."¹²³ It should also be noted that the opinion of the only other aquatic biologist to testify in the case, Peter Schaefer for the Executive Director, concurred with Mr. Price's – that there would be no significant, that is "noticeable," degradation of water quality caused by Lerin Hills' discharge.¹²⁴

¹²⁰ PFD at 37.

¹²¹ PFD at 34; Tr. at 199-200.

¹²² Exhibit LH-4 at 12.

¹²³ Tr. at 208, 213-20.

¹²⁴ Exhibit ED-9 at 14:1-3, 11:6-13; Tr. at 552, 591.

4. The ALJ has exaggerated the effects of Lerin Hills' discharge upon the phosphorus concentrations in the downstream impounded portions of Deep Hollow Creek shown by Dr. Miertschin's modeling by comparing the concentrations that he modeled as resulting from Lerin Hills' discharge with the concentrations that he measured in the impoundments, rather than with the background concentrations that he used in his modeling.

Even though the ALJ has acknowledged, in footnote 166 of her PFD, that she recognizes the difference between the modeled and measured "background" phosphorus concentrations in the receiving stream, she has persisted, both in the text of her PFD, pp. 31-32, and in her Findings of Fact, numbered 36-38, in emphasizing the differences between the concentrations of phosphorus that Dr. Miertschin's modeling showed would occur in the SCS and Hahnfeld Ponds as a result of Lerin Hills' discharge¹²⁵ and the concentrations that he found in the samples that he took from these impoundments on a cool early March day.¹²⁶

As Dr. Miertschin explained at the hearing, he chose to use an assumed background receiving stream concentration of .05 mg/L of phosphorus when he performed his modeling, rather than the below detection limit of .02 mg/L phosphorus that was measured in his samples from Blanch Pond and Hahnfeld Pond or the .035 mg/L phosphorus that was measured in the SCS Pond sample, because he was modeling results under high temperature, low flow conditions, whereas these were not the conditions under which the samples were taken.¹²⁷

The phosphorus "decay" model that Dr. Miertschin ran produced the results that would occur when Lerin Hills' maximum allowable effluent discharge entered a stream with a background phosphorus concentration of .05 mg/L, not when it entered a stream with less than half that level of phosphorus concentration. Therefore, it was illogical for the ALJ to have

¹²⁵ Under worst-case conditions of high temperature, low flow, and maximum allowable effluent discharge.

¹²⁶ See Exhibit LH-2F, Laboratory Results, March 6, 2008.

¹²⁷ Tr. at 99.

focused on comparisons between Dr. Miertschin's measured and modeled phosphorus concentrations when she made her Findings of Fact Nos. 36-38. Accordingly, these findings should be stricken, and they should be disregarded by the Commission in reaching its determinative Conclusions of Law.

D. Proposed Findings of Fact and Conclusions of Law relating to Lerin Hills' satisfaction of Texas Surface Water Quality Standards and the Commission's Antidegradation Rule.

For all of the reasons discussed in Parts IV.A, B, and C above, Lerin Hills respectfully requests that the Commission strike Findings of Fact numbered 30 – 46 and Conclusions of Law numbered 5 – 7 from the ALJ's proposed Order and replace them with the following:

Findings of Fact

30. The draft permit would ensure that the Commission's numerical and narrative standards applicable to all segments of the receiving stream would be met.
31. The greater weight and degree of qualified and credible testimony and documentary evidence in the record demonstrates that there would be no more than a *de minimis* lowering of water quality in any segment of the receiving stream as a result of the proposed discharge.

Conclusions of Law

5. The draft permit and proposed Lerin Hills discharge would satisfy the requirements of the Commission's numerical and narrative stream standards applicable to all segments of the receiving stream. 30 T.A.C. § 307.4.
6. The preponderance of the evidence supports a conclusion that, as to nutrients and their effects on surface water quality, the draft permit and proposed discharge would satisfy the requirements of the Commission's antidegradation rule in

connection with the waters of the unnamed immediate receiving stream, Deep Hollow Creek, Frederick Creek, and Cibolo Creek. 30 T.A.C. § 307.5.

If the Commission wishes to make more detailed Findings of Fact and Conclusions of Law in its Order, Lerin Hills requests the Commission to adopt the "Water Quality Findings" numbered 46 – 73 and the "Water Quality Conclusions" numbered 15 – 18 in the Proposed Findings of Fact and Conclusions of Law that Lerin Hills submitted with its Reply to Closing Arguments in this case.

**V. THE ALJ ERRED IN HER RECOMMENDATION
ON ALLOCATION OF TRANSCRIPTION COSTS.**

In assessing transcription costs, Commission rules require consideration of the following factors:

- (1) the Party who requested the transcription;
- (2) the financial ability of the party to pay the costs;
- (3) the extent to which the party participated in the hearing;
- (4) the relative benefits to the various parties of having a transcript;
- (5) the budgetary constraints of the state or federal administrative agency participating in the proceeding;
- (6) in rate proceedings the extent to which the expense of the rate proceeding is included in the utility's allowable expenses; and
- (7) any other factor which is relative to a just and reasonable assessment of the costs.¹²⁸

¹²⁸ 30 T.A.C. § 80.23(d).

As the ALJ pointed out in her PFD, both the Applicant and Mr. Wood participated in the hearing and benefited from having a transcript. Moreover, she was correct in noting that Lerin Hills is a business partnership and Mr. Wood is a private individual. Nevertheless, the evidence demonstrates that Mr. Wood's legal expenses are being paid by a competing Kendall County development, known as Tapatio Springs.¹²⁹ Mr. Wood would not specify how much of his legal expenses are being paid for by Tapatio Springs, so it is reasonable to assume that most, if not all, of his expenses are being covered by Tapatio Springs.

Furthermore, an additional significant factor that is relevant to a just and reasonable assessment of the transcription costs is Mr. Wood's standing in this case.¹³⁰ Mr. Wood is neither a downstream landowner, as he represented to the Commission in his hearing request, nor should he be considered an affected person justifying his standing for a contested case hearing. Thus, if the Commission finds that Mr. Wood is not an affected person in this case, he should be fully responsible for all transcription costs for both the hearing on the merits and the preliminary hearing. Applicant believes that equity requires no less.

VI. ALTERNATIVE PERMIT CONDITIONS

As noted above, Lerin Hills strongly urges that the Commission find that Protestant is not an "affected person" in this case and lacks standing for a contested case hearing in this proceeding. Moreover, Applicant strongly urges the Commission to find that the Applicant met its burden of proof on the Commission's antidegradation standard and that the ALJ improperly applied Commission rules and policy in this case as they relate to the Commission's antidegradation standard. Nevertheless, if the Commission were to find that the Protestant does

¹²⁹ Tr. at 271 (Wood Testimony).

¹³⁰ Lerin Hills did not raise the standing issue in relationship to transcription costs in its Closing Arguments, since the ALJ had already overruled its Motion to Reconsider Protestant's Standing.

have standing in this case, and if the Commission were to find that the ALJ's PFD raises potential water quality concerns, such concerns should vanish with recognition that Lerin Hills proposes Permit conditions here that would ensure that the proposed discharge is, in effect, intermittent. As testimony at the contested case hearing indicated, Applicant seeks a Commission Chapter 210 permit, which would authorize reuse of treated effluent that would otherwise be discharged pursuant to the proposed TPDES Permit at issue in this proceeding. As more fully discussed below, Lerin Hills proposes that the TPDES Permit sought in this case be issued with conditions that require the Permittee to obtain a Chapter 210 permit and to limit discharges under the TPDES Permit to those periods when irrigation under the 210 permit is not effective because of saturated or frozen ground conditions and when effluent storage capacity is full.

A. Chapter 210 Permit.

Chapter 210 of the Commission's rules, entitled "Use of Reclaimed Water," authorizes the use of reclaimed water after the wastewater has been treated in accordance with an applicant's wastewater discharge permit and the discharge permit provides for an alternative means of disposal during times when there is no demand for the use of the reclaimed water.¹³¹ Thus, before Lerin hills could operate under a Chapter 210 authorization, it would be required to obtain a TPDES permit, which is the subject of this proceeding, in order to provide an alternative means of disposal for those times when treated effluent cannot be used. At the hearing, Applicant's representative, Abel Godines, testified that Lerin Hills planned to obtain a Chapter 210 permit and the treated effluent would be used to maintain green spaces at the Lerin

¹³¹ 30 T.A.C. § 210.1.

Hills Development and to be available for people to use to irrigate their residential properties.¹³² Further, there is testimony on the record that Lerin Hills filed a Chapter 210 permit application and received draft authorization.¹³³ Mr. Godines went on to testify that Lerin Hills considered the treated effluent a scarce resource, and planned to use all of the treated effluent, which would otherwise be discharged, to maintain green spaces and residential yards at the Lerin Hills Development.¹³⁴

Additional evidence regarding the Chapter 210 permit sought by Lerin Hills was excluded at the hearing on the merits, because the ALJ determined that such evidence was not relevant to the issues referred by the Commission.¹³⁵ Nevertheless, with the ALJ's focus in her PFD on quantitative evidence for nutrient loading and potential biomass increases over time, consideration of Applicant's use of a Chapter 210 permit to limit discharges becomes very relevant. For the Commissioners' convenience, the narrative portion of the Lerin Hills Chapter 210 permit application and the draft authorization is attached to these Exceptions in Exhibit 2 for your review. As noted in the application at page 2, Lerin Hills proposes to use the reclaimed water (i.e., treated effluent from the proposed Lerin Hills Wastewater Treatment Plant) for irrigating along public roadways, open space areas (including parks, vegetative buffer strips, and habitat areas), and lawn and landscape areas of single-family lots or commercial tracts. The reclaimed water would be distributed to residential and commercial tracts through a purple pipe system that would be owned and maintained by the Lerin Hills Municipal Utility District.

¹³² Tr. at 243:15-19, 249:5-11, 250:9-21.

¹³³ Tr. at 706:25-707:12.

¹³⁴ *See id.*

¹³⁵ *See* Tr. at 704:6-705:18.

B. Proposed Permit conditions.

As noted above, Lerin Hills is agreeable to placing conditions in the Permit that, in conjunction with the Chapter 210 authorization it seeks, would limit discharges under the TPDES Permit for those periods of time when irrigation under the Chapter 210 permit cannot be conducted, because the ground is too saturated as a result of extended periods of rain or is frozen and the proposed effluent storage capacity is full. In effect, Lerin Hills has already agreed to similar terms, without inclusion of effluent storage capacity, in settlement agreements with the only two landowners along the proposed discharge route within one mile downstream of the proposed discharge point. These settlement agreements were made with those downstream landowners in an attempt to avoid a potential contested case hearing. Those settlement agreements are attached to these Exceptions in Exhibit 3 for the Commissioners' consideration and review.

As specifically set out below, Lerin Hills proposes that the Permit contain conditions which would require that the Permittee obtain a Chapter 210 authorization prior to discharge under the TPDES Permit and would require the Permittee to use its best efforts to beneficially reuse its treated effluent in accordance with its Chapter 210 authorization before such effluent is discharged. Further, the Permittee will only discharge pursuant to its TPDES Permit when irrigation is not possible as a result of saturated or frozen ground conditions and treated effluent storage capacity is full. Finally, Lerin Hills would commit under the Permit to construct and maintain storage capacity for its treated effluent, and the volume of such storage capacity would be constructed parallel with the completion of the phases of the proposed Wastewater Treatment Plant. Accordingly, the specific Permit conditions, as alternatively proposed, are as follows:

- (1) Prior to any discharge authorized by this Permit, Permittee shall obtain a Chapter 210 authorization for use of effluent treated in accordance with the terms of this Permit.
- (2) Permittee shall use its best efforts to beneficially reuse treated effluent generated under this Permit in accordance with its Chapter 210 authorization prior to such treated effluent being discharged.
- (3) Permittee is authorized to discharge treated effluent under this Permit only in situations where beneficial reuse under its Chapter 210 authorization cannot successfully be accomplished as a result of saturated or frozen ground conditions and its treated effluent storage units are at capacity.
- (4) Permittee shall construct and maintain storage capacity for effluent treated in accordance with the terms of this Permit, which storage capacity shall be installed in stages with completion of the phases of the Wastewater Treatment Plant, specifically as follows:
 - a. During the Interim Phase I stage of Plant development (the period from the 180,000 gallons/day treatment capacity to completion of the Plant with 360,000 gallons/day treatment capacity) three (3) days of storage capacity will be available for storage of treated effluent;
 - b. During the Interim Phase II stage of Plant development (the period from completion of the Plant with 360,000 gallons/day treatment capacity up to completion of the Plant with approximately 500,000

gallons/day treatment capacity) three (3) days of storage capacity will be available for storage of treated effluent; and

- c. In Phase III of Plant development (the completion of the Plant with approximately 500,000 gallons/day treatment capacity until such time, if ever, as the Plant is further expanded) three (3) days of storage capacity will be available for storage of treated effluent.

In conjunction with these proposed additional permit conditions, Lerin Hills proposes the following Finding of Fact and Conclusion of Law to be included in the Commission's proposed Order issuing this Permit:

Finding of Fact:

1. Applicant plans to obtain a Chapter 210 in order to beneficially reuse treated effluent and plans to utilize the entire treated effluent capacity from the proposed Wastewater Treatment Plant for irrigation of green spaces and residential tracts, and such beneficial reuse will reduce the volume of discharges over time under this TPDES permit.

Conclusion of Law:

1. Lerin Hills' Chapter 210 authorization for reuse of treated effluent reducing the volume of discharges under the Permit over time further assures that the Permit meets the Commission's antidegradation rule. 30 T.A.C. § 307.5.

C. Alternative proposed conditions do not constitute a major amendment.

The proposed additional Permit conditions will "improve or maintain the permitted quality or method of disposal of waste" and will not "relax a standard or criterion which may

result in a potential deterioration of quality of water in the State."¹³⁶ In fact, additional permit conditions would make the Permit more stringent and protective of water quality of the State. Consequently, such proposed changes to the Permit would not constitute a major amendment to either the Draft Permit or to the Application in this case.¹³⁷

VII. CONCLUSIONS

Lerin Hills has expended significant resources, over \$35 million, on this development project, associated with such activities as acquisition of land, preparation of a development master plan and plat, clearing brush, constructing over four miles of roads, designing a water distribution and wastewater collection system, getting authority for and operation of a municipal utility district, securing surface water supply, and attempting to obtain the discharge permit, which is the subject of this proceeding. Further, the water supply contract for the proposed Development expires on or about June 30, 2009, if Lerin Hills is not able to obtain this discharge permit by then. Consequently, if the Commission upholds this PFD and the Application is denied, the entire investment in this project will likely be lost. In these difficult economic times, the State should be very careful not to jeopardize thoughtful, well-planned developments, like the Lerin Hills Development, that can provide jobs and economic livelihoods for many. Approval of this PFD could very likely have a chilling effect on future such projects and, ultimately, have far reaching detrimental economic effects on the entire State.

The Commission should also be very mindful of the impact approval of this PFD may have on the coherence and vitality of its TPDES permitting program, especially as it relates to municipal discharge permitting. Adoption of the requirements embodied in this PFD would

¹³⁶ 30 T.A.C. § 305.62(c).

¹³⁷ See 30 T.A.C. § 281.23 and 30 T.A.C. § 305.62.

make it nearly impossible for any applicant to obtain a permit for municipal wastewater discharges. In addition, approval of this PFD would be inconsistent with the Commission's prior precedent on standing for contested case hearings and contrary to the definition of affected person under the statute. Such a decision would likely result in future, fact-specific inconsistent standing decisions, since precedent would be established that the "bright line" threshold requirement of a legal interest is not required.

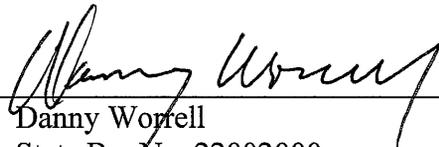
Moreover, and fundamentally, Lerin Hills has met its burden of proof with an overwhelming weight of evidence demonstrating that the proposed discharge meets the Commission's antidegradation standard. Protestant provided no credible countervailing evidence to the contrary. Furthermore, by this PFD, the ALJ imposes a new quantitative test to satisfy the purely qualitative antidegradation standard, thus "moving the goalpost" for the Applicant in this case, as well as for the ED. This new ALJ-made standard was without notice to the Applicant and in violation of Lerin Hills' due process rights. In addition, the ALJ bases her opinion on a misinterpretation of the Commission's antidegradation standard itself, which she erroneously believes prohibits any detrimental effects on uses.

Finally, the Commission should not even be having to consider the PFD in this case, because Protestant is not an affected person and should never have been granted standing in the first place.

Accordingly, Applicant respectfully requests that the Honorable Commissioners vote to reject the PFD, find that Protestant is not an affected person and does not have standing in this case, find that Applicant has met its burden of proof establishing that the proposed discharge will meet the Commission antidegradation standard, and issue an Order approving the Application and issuing the Draft Permit. In the alternative, if the Commissioners believe that the PFD raises legitimate water quality concerns, which Applicant believes it does not, Lerin Hills respectfully requests the Commissioners to issue the Draft Permit with the additional conditions that it has proposed.

Respectfully submitted,

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By 

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of March, 2009, a copy of Lerin Hills, Ltd.'s Exceptions to the Administrative Law Judge's Proposal for Decision was served on the following parties of record in this case via facsimile, certified mail, or hand delivery.

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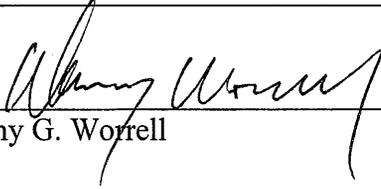
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Danny G. Worrell

EXHIBIT 1

S.B. 1546
Introduced Version of Bill
as Originally Filed in the Senate

By *[Signature]*

S.B. No. 1546

A BILL TO BE ENTITLED

1

AN ACT

2 relating to persons affected by matters in hearings before the
3 Texas Natural Resource Conservation Commission.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

5 SECTION 1. Section 5.115, Water Code, is amended to read as
6 follows:

7 Sec. 5.115. PERSONS AFFECTED IN COMMISSION HEARINGS; NOTICE
8 OF APPLICATION. (a) For the purpose of an administrative hearing
9 held by or for the commission, including a contested case,
10 "affected person" or "person affected" or "person who may be
11 affected" means a person who has a personal justiciable interest
12 related to a legal right, duty, or privilege affected by the
13 administrative hearing other than an interest common to members of
14 the general public. The commission is not required to hold a
15 hearing if the commission determines that the basis of a person's
16 request for a hearing as an affected person is not reasonable. The

1 commission may adopt rules necessary to carry out this subsection.

2 (b) [(a)] At the time an application for a permit or license
3 under this code is filed with the executive director and is
4 administratively complete, the commission shall give notice of the
5 application to any person who may be affected by the granting of
6 the permit or license.

7 (c) [(b)] At the time an application for any formal action by
8 the commission that will affect lands dedicated to the permanent
9 school fund is filed with the executive director or the commission
10 and is administratively complete, the commission shall give notice
11 of the application to the School Land Board. Notice shall be
12 delivered by certified mail, return receipt requested, addressed to
13 the deputy commissioner of the asset management division of the
14 General Land Office. Delivery is not complete until the return
15 receipt is signed by the deputy commissioner of the asset
16 management division of the General Land Office and returned to the
17 commission.

18 (d) [(c)] The commission shall adopt rules for the notice
19 required by this section.

20 (e) [(d)] The notice must state:

21 (1) the identifying number given the application by the
22 commission;

1 (2) the type of permit or license sought under the
2 application;

3 (3) the name and address of the applicant;

4 (4) the date on which the application was submitted; and

5 (5) a brief summary of the information included in the permit
6 application.

7 (f) [(e)] The notice to the School Land Board under this section
8 shall additionally:

9 (1) state the location of the permanent school fund land to
10 be affected; and

11 (2) describe any foreseeable impact or effect of the
12 commission's action on permanent school fund land.

13 (g) [(f)] A formal action or ruling by the commission on an
14 application affecting permanent school fund land that is made
15 without the notice required by this section is voidable by the
16 School Land Board as to any permanent school fund lands affected by
17 the action or ruling.

18 SECTION 2. This Act takes effect September 1, 1995.

19 SECTION 3. The importance of this legislation and the crowded
20 condition of the calendars in both houses create an emergency and
21 an imperative public necessity that the constitutional rule
22 requiring bills to be read on three several days in each house be

1 suspended, and this rule is hereby suspended.

S.B. 1546
Engrossed Version of the Bill
as Passed Out of the Senate

April 27 1995 Engrossed

Dorothy Shaw
Engrossing Clerk

I certify that this document is a true
and correct copy of the engrossed Senate
measure as it was received from the Senate
and referred to the Committee on

Natural Resources

Cynthia Subardt

Chief Clerk of the House

By: Bivins
(Counts)

S.B. No. 1546

A BILL TO BE ENTITLED

AN ACT

1 relating to persons affected by matters in hearings before the
2 Texas Natural Resource Conservation Commission.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

4 SECTION 1. Section 5.115, Water Code, is amended to read as
5 follows:

6 Sec. 5.115. PERSONS AFFECTED IN COMMISSION HEARINGS; NOTICE
7 OF APPLICATION. (a) For the purpose of an administrative hearing
8 held by or for the commission involving a contested case, "affected
9 person," or "person affected," or "person who may be affected"
10 means a person who has a personal justiciable interest related to a
11 legal right, duty, privilege, or power affected by the
12 administrative hearing. An interest common to members of the
13 general public does not qualify as a personal justiciable interest.
14 The commission is not required to hold a hearing if the commission
15 determines that the basis of a person's request for a hearing as an
16 affected person is not reasonable or is not supported by competent
17 evidence. The commission shall adopt rules specifying factors
18 which must be considered in determining whether a person is an
19 affected person in any contested case arising under the air, waste,
20 or water programs within the commission's jurisdiction and whether
21 an affected association is entitled to standing in contested case
22 hearings.

23 (b) At the time an application for a permit or license under

1 this code is filed with the executive director and is
2 administratively complete, the commission shall give notice of the
3 application to any person who may be affected by the granting of
4 the permit or license.

5 (c) [(b)] At the time an application for any formal action
6 by the commission that will affect lands dedicated to the permanent
7 school fund is filed with the executive director or the commission
8 and is administratively complete, the commission shall give notice
9 of the application to the School Land Board. Notice shall be
10 delivered by certified mail, return receipt requested, addressed to
11 the deputy commissioner of the asset management division of the
12 General Land Office. Delivery is not complete until the return
13 receipt is signed by the deputy commissioner of the asset
14 management division of the General Land Office and returned to the
15 commission.

16 (d) [(c)] The commission shall adopt rules for the notice
17 required by this section.

18 (e) [(d)] The notice must state:

19 (1) the identifying number given the application by
20 the commission;

21 (2) the type of permit or license sought under the
22 application;

23 (3) the name and address of the applicant;

24 (4) the date on which the application was submitted;

25 and

1 (5) a brief summary of the information included in the
2 permit application.

3 (f) [~~fe~~] The notice to the School Land Board under this
4 section shall additionally:

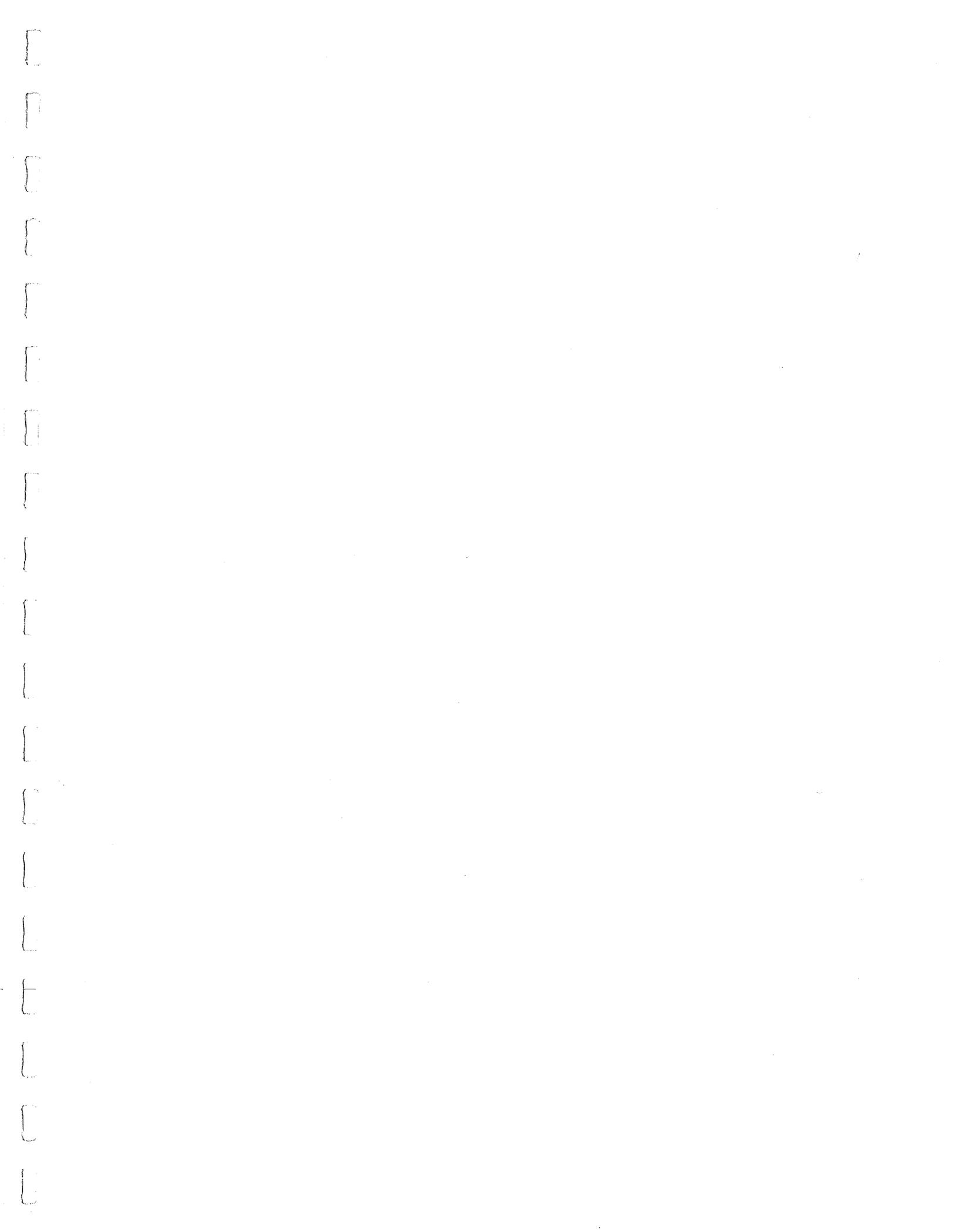
5 (1) state the location of the permanent school fund
6 land to be affected; and

7 (2) describe any foreseeable impact or effect of the
8 commission's action on permanent school fund land.

9 (g) [~~gf~~] A formal action or ruling by the commission on an
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17 emergency and an imperative public necessity that the
18 constitutional rule requiring bills to be read on three several
19 days in each house be suspended, and this rule is hereby suspended.



S.B. 1546
House Committee Report Version
of the Bill as Passed Out of House Committee
and Accompanying Amendments as Adopted
on the House Floor

HOUSE COMMITTEE REPORT

1st Printing

By: Bivins
(Counts)

S.B. No. 1546

A BILL TO BE ENTITLED

AN ACT

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11 legal right, duty, privilege, or power affected by the
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17 emergency and an imperative public necessity that the
18 constitutional rule requiring bills to be read on three several
19 days in each house be suspended, and this rule is hereby suspended.



FLOOR AMENDMENT NO. 1

BY Harris

Amend S.B. No. 1546 (House Committee Report) on page 1, lines 12 and 13, by striking "An interest common to members of the general public does not qualify as a personal justiciable interest.".

ADOPTED

MAY 19 1995

Cynthia Gerhardt
Chief Clerk
House of Representatives



005385

3rd READING

Amendment No. 1

By: HARRIS

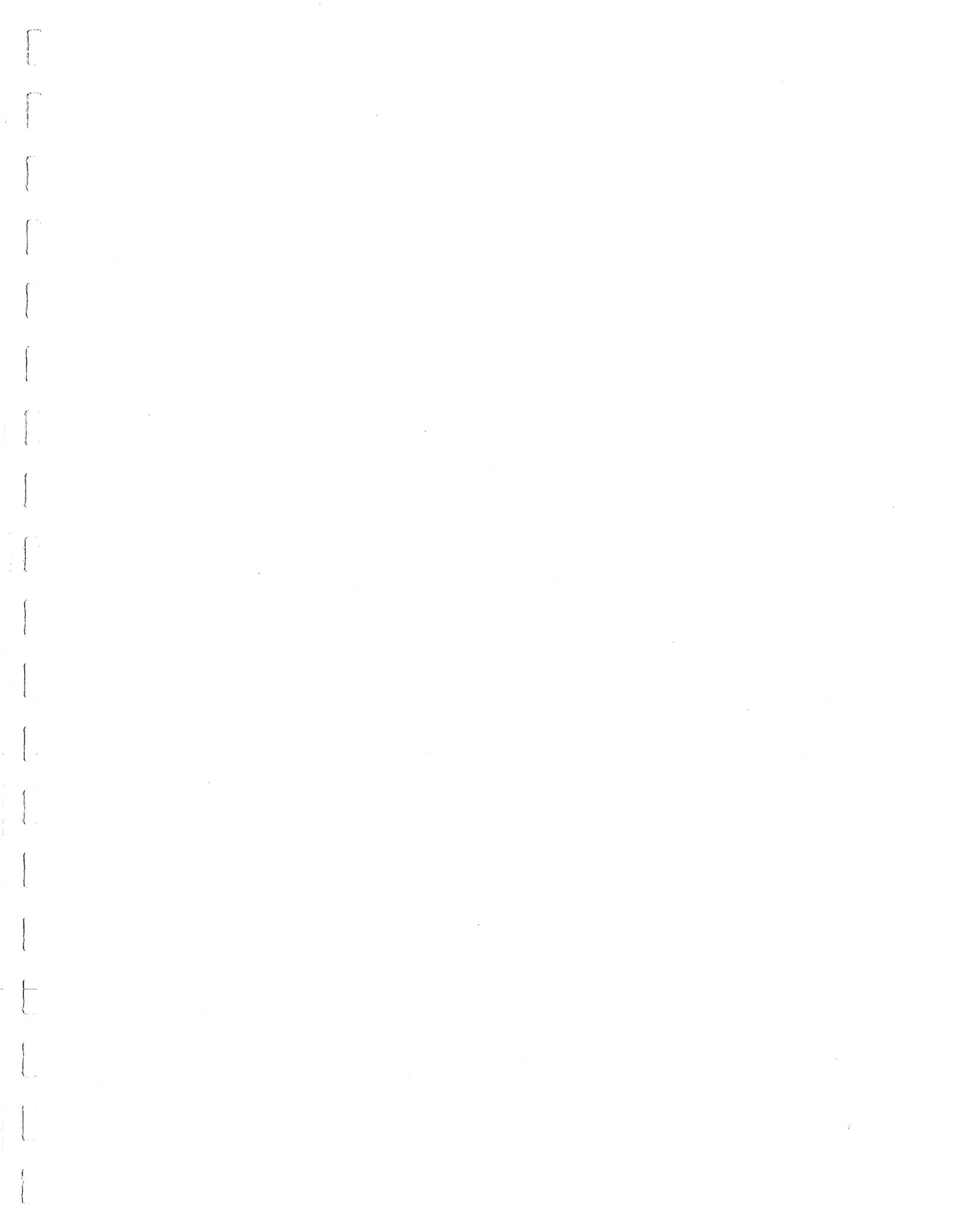
Amend SB 1546. *ON Third Reading AS follows.*

On page 1 line 12 after "hearing." add "Such right, duty, privilege, or power may be a present or future justiciable interest. An interest which can be shown to be only common to members of the general public does not qualify as a personal justiciable interest."

ADOPTED

MAY 24 1995

Cynthia Gerhardt
Chief Clerk
House of Representatives



S.B. 1546
Conference Committee Report Version
of the Bill Passed by Both the Senate and House
and Signed by the Governor

CONFERENCE COMMITTEE REPORT

S.B. No. 1546

A BILL TO BE ENTITLED

1

AN ACT

2

relating to persons affected by matters in hearings before the
3 Texas Natural Resource Conservation Commission.

4

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

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"person who may be affected" means a person who has a personal

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justiciable interest related to a legal right, duty, privilege,

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24

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25

(b) At the time an application for a permit or license

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under this code is filed with the executive director and is

2.

Conference Report
5-29-95

1 administratively complete, the commission shall give notice of
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3 granting of the permit or license.

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24 and ²/₃

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26 the permit application.

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CONFERENCE COMMITTEE REPORT FORM

Austin, Texas

May 27, 1995

Date

Honorable Bob Bullock
President of the Senate

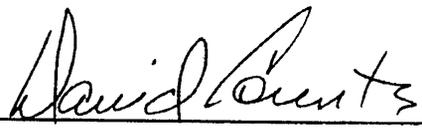
Honorable James E. "Pete" Laney
Speaker of the House of Representatives

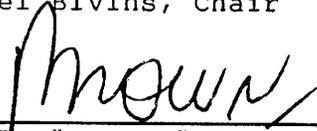
ADOPTED
MAY 29 1995

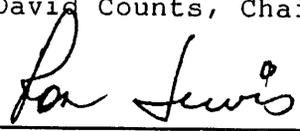
Sirs:

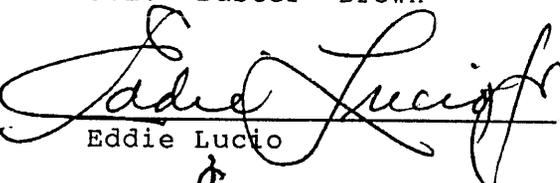
We, Your Conference Committee, appointed to adjust the differences between the Senate and the House of Representatives on Senate Bill 1546 have met and had the same under consideration, and beg to report it back with the recommendation that it do pass in the form and text hereto attached.

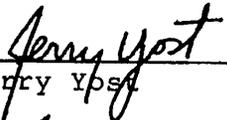

Teel Bivins, Chair

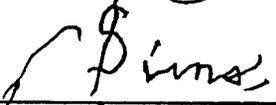

David Counts, Chair

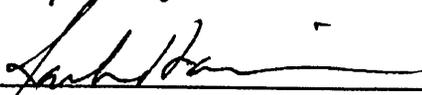

J.E. "Buster" Brown


Ron Lewis

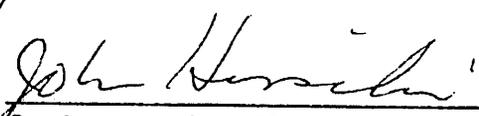

Eddie Lucio


Jerry Yost


Bill Sims


Jack Harris


On the part of the Senate
Ken Armbrister


On the part of the House
John Hirschi

Note to Conference Committee Clerk:

Please type the names of the members of the Conference Committee under the lines provided for signature. Those members desiring to sign the report should sign each of the six copies. Attach a copy of the Conference Committee Report and a Section by Section side by side comparison to each of the six reporting forms. The original and two copies are filed in house of origin of the bill, and three copies in the other house.

MAY 27 1995 *Filed with the Secretary of the Senate*



S.B. 1546
Conference Committee Report,
Section-by-Section Analysis

SENATE BILL 1546
CONFERENCE COMMITTEE REPORT
SECTION-BY-SECTION ANALYSIS

SENATE ENGROSSMENT	HOUSE SUBSTITUTE	CONFERENCE COMMITTEE REPORT
<p>SECTION 1. Amends Section 5.115, Water Code as follows:</p> <p>(a) Provides that an affected person, for the purpose of an administrative hearing at the Texas Natural Resource Conservation Commission, is a person with a personal justiciable interest related to a legal right, duty, privilege, or power affected by the administrative hearing.</p> <p>Provides that an interest common to members of the general public does not qualify as a personal justiciable interest.</p> <p>Provides that the commission does not have to hold a hearing if a request for a hearing is unreasonable or not supported by competent evidence. Requires the commission to adopt rules to specify factors for determining whether a person is an affected person in a contested case hearing.</p> <p>(b)-(g) No substantive changes. Renumbered to conform.</p>	<p>SECTION 1. Amends Section 5.115, Water Code as follows:</p> <p>(a) Substantively the same, except provides that a right, duty, privilege, or power may be a present or future justiciable interest.</p> <p>(b)-(g) Same.</p>	<p>SECTION 1. Amends Section 5.115, Water Code as follows:</p> <p>(a) Same as Senate version, but provides that a person with a personal justiciable interest related to an economic interest also may be an affected person.</p> <p>(b)-(g) Same.</p>
<p>SECTION 2. Provides for an effective date of 9/1/95.</p>	<p>SECTION 2. Same.</p>	<p>SECTION 2. Same.</p>
<p>SECTION 3. Emergency Clause.</p>	<p>SECTION 3. Same.</p>	<p>SECTION 3. Same.</p>

S.B. 1546
Legislative Actions Summary Timeline

Texas Legislature Online History

Bill: SB 1546 **Legislative Session:** 74(R)

Last Action: 06/16/1995 E Effective on 9/1/95

Caption Version: Enrolled

Caption Text: Relating to persons affected by matters in hearings before the Texas Natural Resource Conservation Commission.

Author: Bivins

Sponsor: Counts

Subjects: Water--General (I0885)
NATURAL RESOURCE CONSERVATION COMMISSION, TEXAS (V0172)

Senate Committee: Natural Resources

Status: Out of committee

Vote: Ayes=9 Nays=0 Present Not Voting=0 Absent=2

House Committee: Natural Resources

Status: Out of committee

Vote: Ayes=7 Nays=0 Present Not Voting=0 Absent=2

Senate Conferees: Appointed (05/26/1995) Bivins (Chair) | Armbrister | Brown | Lucio | Sims

House Conferees: Appointed (05/26/1995) Counts (Chair) | Harris, Jack | Hirschi | Lewis, Ron | Yost

Actions: (descending date order)

Description	Comment	Date ▼	Time	Journal Page
E Effective on 9/1/95		06/16/1995		
E Signed by the Governor		06/16/1995		4099
E Sent to the Governor		05/30/1995		4082
H Signed in the House		05/29/1995		4714
S Signed in the Senate		05/29/1995		4078
S Reported enrolled		05/29/1995		
H Senate adopts conf. comm. report-reported		05/29/1995		4712
S Nonrecord vote recorded in Journal		05/29/1995		4069
S Senate adopts conference committee report		05/29/1995		4069
S House adopts conf. comm. report-reported		05/28/1995		3737
H Nonrecord vote recorded in Journal		05/28/1995		4565
H House adopts conference committee report		05/28/1995		4565
S Conference committee report filed		05/27/1995		4004

H Conf. Comm. Report printed and distributed		05/27/1995 05:54 PM	
S House appoints conferees-reported		05/27/1995	3503
S House grants request for conf comm-reported		05/27/1995	3503
H House appoints conferees		05/26/1995	4292
H House grants request for conference committee		05/26/1995	4292
H Senate appoints conferees-reported		05/26/1995	4123
H Senate requests conference committee-reported		05/26/1995	4123
H Senate refuses to concur-reported		05/26/1995	4123
S Senate appoints conferees		05/26/1995	3358
S Senate requests conference committee		05/26/1995	3357
S Senate refuses to concur		05/26/1995	3357
S House amendment(s) laid before the Senate		05/26/1995	3357
S House passage as amended reported		05/25/1995	2944
H Nonrecord vote recorded in Journal		05/24/1995	3481
H Passed as amended		05/24/1995	3481
H Amended	1-Harris	05/24/1995	3480
H Read 3rd time		05/24/1995	3480
H Nonrecord vote recorded in Journal		05/19/1995	3074
H Passed to 3rd reading as amended		05/19/1995	3074
H Amendment tabled	2-Hirschi	05/19/1995	3074
H Amended	1-Harris	05/19/1995	3073
H Read 2nd time		05/19/1995	3073
H Placed on General State Calendar		05/18/1995	
H Considered in Calendars		05/16/1995	
H Committee report sent to Calendars		05/05/1995	
H Committee report printed and distributed		05/04/1995 07:24 PM	
H Reported favorably w/o amendment(s)		05/02/1995	1949
H Considered in formal meeting		05/02/1995	
H Referred to Natural Resources		04/28/1995	1554
H Read first time		04/28/1995	1554
H Received from the Senate		04/27/1995	1522
S Reported engrossed		04/27/1995	
S Nonrecord vote recorded in Journal		04/27/1995	1409
S Passed		04/27/1995	1409
S Read 3rd time		04/27/1995	1409
S Record vote		04/27/1995	1409
S Rules suspended		04/27/1995	1409
S Read 2nd time & passed to engrossment		04/27/1995	1409
S Rules suspended		04/27/1995	1409
S Placed on intent calendar		04/27/1995	
S Placed on Reg. Order of Business Calendar		04/12/1995	
S Recommended for local & uncontested calendar		04/11/1995	
S Reported favorably as substituted		04/11/1995	1045
S Testimony taken in committee		04/11/1995	
S Considered in public hearing		04/11/1995	
S Scheduled for public hearing on		04/11/1995	

S No action taken in committee	04/06/1995	
S Scheduled for public hearing on	04/06/1995	
S No action taken in committee	04/04/1995	
S Scheduled for public hearing on	04/04/1995	
S Referred to Natural Resources	03/21/1995	661
S Read first time	03/21/1995	661
S Filed	03/13/1995	
S Received by the Secretary of the Senate	03/13/1995	

EXHIBIT 2

May 31, 2007

Mr. Louis Herrin, III, P.E.
Technical Support/Wastewater Permitting Section
Texas Commission on Environmental Quality
12,100 Park Circle, Bldg. F
P.O. Box 13087
Austin, Texas 78711-3087

Reference: Application to TCEQ for Chapter 210 Reclaimed Water Use Authorization
Lerin Hills, Ltd., Kendall County, Texas, PATE Job No. 1576-002-01

Dear Mr. Herrin:

On behalf of Lerin Hills, Ltd., we respectfully submit this Application and supplemental information in support of Lerin Hills, Ltd.'s request for an authorization to use reclaimed water under Chapter 210 of the Texas Administrative Code.

BACKGROUND

Lerin Hills, Ltd. is the developer of the Lerin Hills Development located on approximately 866 acres (the "Tract") in Kendall County, Texas. The Tract is located north of and adjacent to State Highway 46 approximately 3 miles south of Interstate Highway 10. The Tract is not located within the corporate or extraterritorial jurisdiction of any municipality. Please see the attached Vicinity Map (**Exhibit No. 1**).

The proposed Lerin Hills Development will consist of 1,475 single-family lots, an elementary school site, and some commercial acreage located along SH 46.

The Lerin Hills Municipal Utility District ("District"), which was created by the TCEQ on November 20, 2006, will provide and maintain water distribution and supply, and wastewater collection and treatment to the Lerin Hills Development. The District boundary is the same as the boundary of the Lerin Hills Development.

Treated surface water will be purchased from the Guadalupe-Blanco River Authority for the district's water supply. Water storage and re-pumping facilities will be constructed within the District.

Wastewater treatment will be provided by a proposed wastewater treatment plant located onsite as shown on Exhibit No. 1. Lerin Hills, Ltd. applied to the TCEQ for a TPDES wastewater discharge permit on May 3, 2006. The TCEQ staff has prepared a draft permit as of August 24, 2006 (**Exhibit No. 3**) and is currently preparing responses to comments received from the public. Lerin Hills, Ltd. intends to transfer the TPDES permit, after it is issued by the TCEQ, to the District.

Lerin Hills, Ltd. wishes to obtain authorization to use reclaimed water within the Lerin Hills Development, and also wishes to obtain authorization to reuse water outside of the Lerin Hills Development if such an opportunity should arise in the future. Lerin Hills understands that the Authorization for Use of Reclaimed Water will not be issued until the TPDES permit is issued. Lerin Hills, Ltd. intends to transfer the proposed Authorization to Use Reclaimed Water to the District after it is issued.

THE INTENDED USE OF THE RECLAIMED WATER, INCLUDING QUANTITY, QUALITY, ORIGIN, AND LOCATION AND PURPOSE OF INTENDED USE

Intended Uses and Locations

Lerin Hills, Ltd. proposes to use the reclaimed water for landscape and open space irrigation in various locations. These locations, all within the Lerin Hills Development, would be as follows:

1. Landscape irrigation along public roadways. The irrigation systems would be owned and maintained by the District.
2. Landscape irrigation of open space areas, including parks, vegetative buffer strips, habitat areas, etc., not located on any private single family lots or commercial tract. These areas would be owned and maintained by the District or the developer.
3. Landscape irrigation of lawn and landscape areas located on single-family lots or on commercial tracts. Reclaimed water would be distributed to these individual property owners through a purple pipe system owned and maintained by the District. The irrigation system on each residential lot or commercial tract would be owned and maintained by the respective individual property owner, subject to the rules and regulations of the District.

The potential locations for use of reclaimed water within the Lerin Hills Development are shown as shaded either in yellow (the single-family lots) or green (parks, open space and commercial tracts) on **Exhibit No. 2**. Exhibit No. 2 uses an aerial photograph as a background onto which the District boundary (also the Lerin Hills Development boundary) and development landplan are overlaid. Reclaimed water will not necessarily be irrigated on all of these areas.

In addition, the District wishes to obtain authorization to sell reclaimed water, if an opportunity should arise in the future, to one or more property owners outside of the Lerin Hills Development for the purpose of landscape or open space irrigation.

There are 1,475 proposed single-family lots with the Lerin Hills Development which we have computed to contain approximately 325 acres, an average area of 0.2203 acres per lot. Assuming that approximately 60% of each lot will be irrigated, we estimate that as much as 195 acres could be irrigated

with reclaimed water. A purple pipe reclaimed water distribution system may not be extended to every lot within the Lerin Hills Development.

There are approximately 240 acres of land, including future parks, roadway esplanades, open space, and commercial property, which have the potential to be irrigated within the Lerin Hills Development, as shown on Exhibit No. 23.

Thus, there are approximately 435 acres of land which have the potential of being irrigated with the reclaimed water. If in the future at full development build-out, the Lerin Hills MUD Wastewater Treatment Plant produces the maximum average daily flow allowed under the proposed TCEQ permit, and the reclaimed water was irrigated at an application rate of 0.064 gallons/square foot/day (reference TCEQ's Chapter 285.90), then a total of 179.4 acres would need to be irrigated. This amount of 179.4 acres is much less than the approximately 435 acres of available land area for irrigation.

Therefore, the Lerin Hills Development has sufficient land available to use all of the reclaimed water within its boundaries. Lerin Hills recognizes that treated wastewater meeting the strict standards of the proposed permit may, from time to time, need to be discharged during times of intense rainfall or extended wet weather.

Purpose of Intended Use

Lerin Hills, Ltd. wishes to use reclaimed water in order to conserve the use of treated surface water, and for the beneficial impact to the vegetation within the development.

Origin of Reclaimed Water

The origin of the reclaimed water will be the treated effluent from the proposed Lerin Hills MUD Wastewater Treatment Plant. This facility will treat domestic wastewater from the Lerin Hills Development.

Quantity of Reclaimed Water

Lerin Hills, Ltd. has applied for a TPDES permit to discharge up to 500,000 gallons per day average daily flow. The draft permit has three phases of 180,000 GPD, 360,000 GPD, and 500,000 GPD. The design average daily flow per living units equivalent (or equivalent single-family connection) is 300 GPD. Actual flows may be less due to the effect of water conserving plumbing fixtures.

Lerin Hills Ltd. intends to use all of the average daily flow within the Lerin Hills Development. During periods of wet weather, when less irrigation is required, then some portion of the treated flow would be discharged.

Quality of the Reclaimed Water

The proposed landscape irrigation will be in areas of public contact and in areas of limited public contact. All reclaimed water will be treated to a Type 1 quality, as defined by Chapter 210.

The draft permit prepared by the TCEQ staff requires one of the highest treatment levels of any municipal permit in the State of Texas, as summarized below:

<u>Parameter Quality</u>	<u>Proposed Lerin Hills Permit Effluent Limitations 30-Day Average</u>	<u>Chapter 210 Type 1 Reclaimed Water 30-Day Average</u>
CBOD5	5 mg/l	5 mg/l
TSS	10 mg/l	not applicable
NH3-N	1.0 mg/l	not applicable
TOTAL P	0.5 mg/l	not applicable
CHLORINE	1.0 MG/L Minimum	not applicable
FECAL COLIFORM	not applicable	20 Colonies/100 ml*
TURBIDIY	not applicable	3 NTU

* Monthly Daily Averages
** 30 day geometric mean

To achieve this level of treatment, the Lerin Hills MUD WWTP will consist of a complete mix biological activated sludge process with sufficient aeration to achieve biological nitrification. Chemical precipitation of phosphorus will be provided, and the activated sludge process will be followed by sand filtration and then by hypochlorite (bleach) disinfection. The chlorine disinfection will provide a residual to maintain the bacterial water quality within the reclaimed water purple pipe distribution system, and allow operator to obtain rapid chlorine residual measurements. These processes will produce tertiary effluent that meets the Type 1 quality requirements for reclaimed water use under Chapter 210.

A CLEAR INDICATION OF THE MEANS FOR COMPLIANCE WITH CHAPTER 210, INCLUDING DOCUMENTATION THAT A USER WILL BE APPRISED OF THEIR RESPONSIBILITIES UNDER THIS CHAPTER AS A PART OF THE WATER SUPPLY CONTRACT OR OTHER BINDING AGREEMENT

The owner of the reclaimed water will be the District, once the TPDES permit is issued and transferred by Lerin Hills, Ltd. to the District. The proposed users will fall into one of the following categories:

1. The District itself will be the user for irrigation on certain open space and park areas that may be conveyed by the developer to the District. The District will also irrigate the wastewater treatment plant site itself.

2. Lerin Hills, Ltd., the developer, will be the user for certain open spaces, park areas, and street esplanades prior to conveyance to the District. The developer may irrigate open space areas that it owns which will subsequently be developed into single-family lots.
3. Private property owners whose property is located within the District and are water customers of the District. These private property owners will predominately be single-family home owners and some commercial property owners. All of these private property owners will be customers of the District and subject to the District's rules and regulations.
4. As previously stated, Lerin Hills, Ltd. desires authorization to sell reclaimed water by contract to one or more users located outside of the Lerin Hills Development for the purpose of landscape irrigation in case such an opportunity should arise in the future. There are no specific plans to sell water at this time.

For certain areas within the District, the District will be the producer, provider and user. As such, the District will be responsible for all operations, maintenance, testing and reporting under the proposed Chapter 210 Authorization for those uses.

All other users, identified in numbers 2 through 4 above, will be required to sign a Customer Service Agreement with the District, in which the District will be the producer and provider. The users will contractually agree to fulfill their obligations under Chapter 210 and will be provided with, and required to acknowledge receiving a copy of the Chapter 210. A copy of the Draft Customer Service Agreement for Use of Reclaimed Water is included as **Exhibit No. 4**.

In addition, the District's Rate Order will also contain rules and operating procedures concerning the proper use of reclaimed water within the District. The District has the governmental authority to enforce those rules.

EVIDENCE IN A WATER SUPPLY CONTRACT OR OTHER BINDING AGREEMENT OF THE PROVIDER'S AUTHORITY TO TERMINATE RECLAIMED WATER USE THAT IS NONCOMPLIANT WITH CHAPTER 210

The Draft Customer Service Agreement for Use of Reclaimed Water provided as Exhibit No. 4 includes Section III G which states the following:

"If Customer fails to comply with the terms of the Service Agreement, the District shall have the option to terminate service until Customer is in compliance. The District also reserves the right to terminate service in accordance with the terms and conditions set forth in the District's Rate Order, as may be amended from time to time."

Mr. Louis. Herrin III, P.E
Lerin Hills Application for Use of Reclaimed Water
May 31, 2007
Page 6 of 6

AN OPERATION AND MAINTENANCE PLAN THAT IS REQUIRED UNDER RATE ORDER OR IS TO BE A PART OF THE WATER SUPPLY CONTRACT OR OTHER BINDING AGREEMENT

The District will include in its Rate Order and its Customer Service Agreements the requirements for all reclaimed water users to operate and maintain their systems in accordance with the requirements of Chapter 210 as they apply to users. At a minimum, the Rate Order and Customer Service Agreement provisions will address the following:

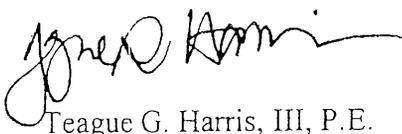
1. A labeling and separation plan for the prevention of cross connections between reclaimed water distribution lines and potable water lines;
2. The measures that will prevent unauthorized access to reclaimed water facilities (e.g., secured valves);
3. Procedures for monitoring reclaimed water transfers and use;
4. Steps the user must utilize to minimize the risk of inadvertent human exposure;
5. Schedules for routine maintenance;
6. A plan for carrying out provider employee training and safety relating to reclaimed water treatment, distribution, and management; and
7. A contingency plan for remedy of system failures, unauthorized discharges, or upsets.

A SEPARATE WATER RIGHTS AUTHORIZATION FROM THE COMMISSION IF REQUIRED

A separate water rights authorization from the TCEQ will not be required. The water supply will be purchased from the Guadalupe-Blanco River Authority, and a copy of the interim contract is provided as Exhibit No. 5.

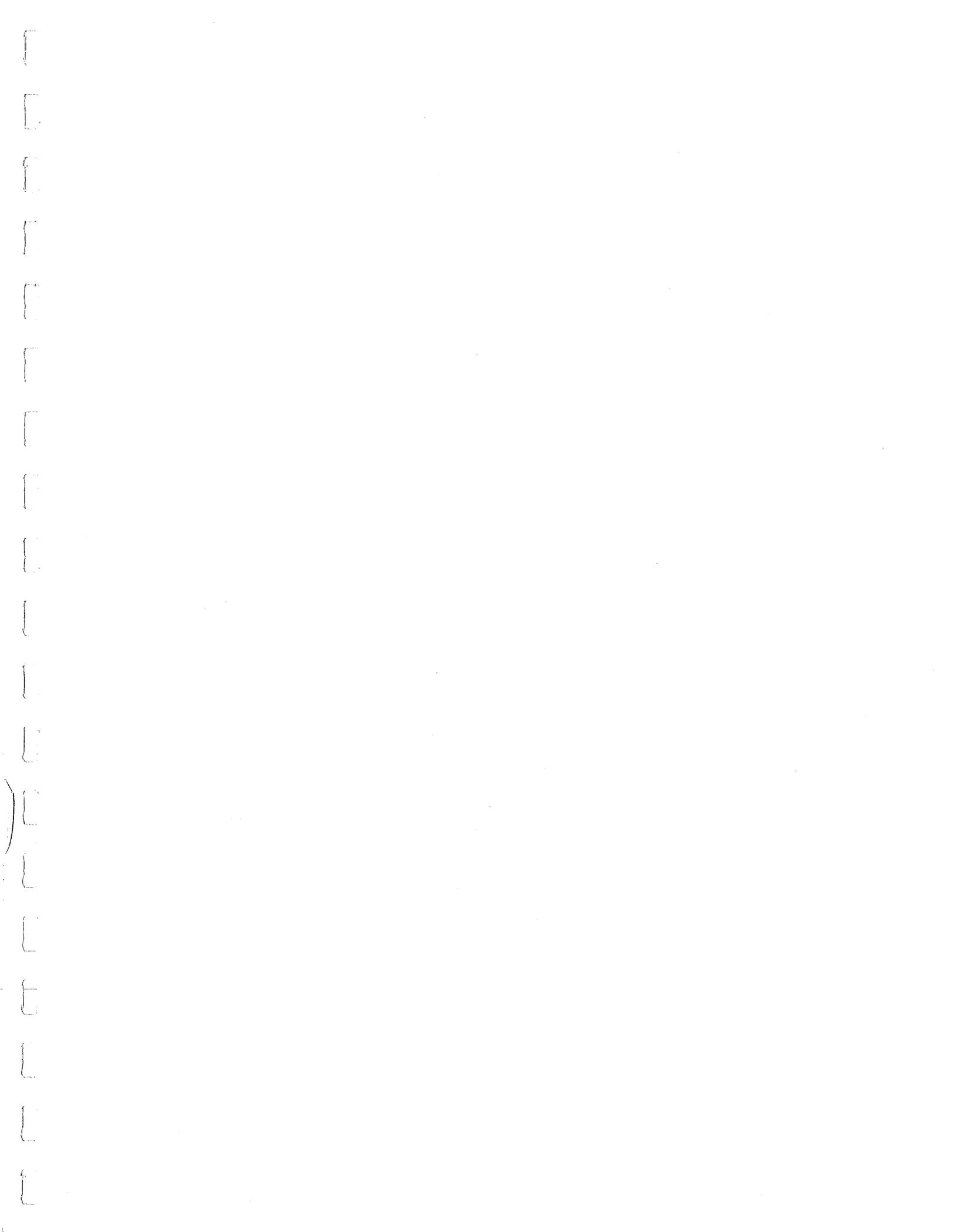
Very Truly Yours,

PATE ENGINEERS, INC.



Teague G. Harris, III, P.E.
Senior Vice President

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Authorization No. R-14712-001

AUTHORIZATION FOR RECLAIMED WATER

Producer: Lerin Hills Municipal Utility District
4820 Bacon Road
San Antonio, Texas 78249

Provider: Lerin Hills, Ltd.
4820 Bacon Road
San Antonio, Texas 78249

Users: Any user authorized by the Lerin Hills, Ltd. as a distributor of the reclaimed water.

Location: The Lerin Hills Municipal Utility District (Lerin Hills MUD) wastewater treatment plant is located approximately 4.1 miles west of Interstate Highway 10, as measured along State Highway 46, and then approximately 200 feet due west from that point on State Highway 46 in Kendall County, Texas.

Authorization: Type I and Type II reclaimed water from the Lerin Hills MUD's Wastewater Treatment Plant (TPDES Permit No. WQ0014712-001), to be used as defined in 30 TAC Ch. 210 in the area delineated in Attachment A.

This authorization contains the conditions that apply for the uses of the reclaimed water. The approval of a reclaimed water use project under 30 TAC Chapter 210 does not affect any existing water rights. If applicable, a reclaimed water use authorization in no way affects the need of a producer, provider, and/or user to obtain a separate water right authorization from the commission.

Issued Date:

For the Commission

Limitations: The authorization is subject to the following requirements:

I. General Requirements

- (a) No wastewater treatment plant operator (producer) shall transfer reclaimed water to a user without first notifying the commission.
- (b) Reuse of untreated wastewater is prohibited.
- (c) Food crops that may be consumed raw by humans shall not be spray irrigated. Food crops including orchard crops that will be substantially processed prior to human consumption may be spray irrigated. Other types of irrigation that avoid contact of reclaimed water with edible portions of food crops are acceptable.
- (d) There shall be no nuisance conditions resulting from the distribution, the use, and/or storage of reclaimed water.
- (e) Reclaimed water shall not be used in a way that degrades groundwater quality to a degree adversely affecting its actual or potential uses.
- (f) Reclaimed water stored in ponds must be prevented from discharging into waters in the state, except for discharges directly resulting from rainfall events, in accordance with a permit issued by the commission, or as authorized under the Lerin Hills MUD's Wastewater Treatment Plant (TPDES Permit No. WQ001471E001). All other discharges are unauthorized. If an unauthorized overflow of a holding pond occurs causing discharge into or adjacent to waters in the state, the user or provider, as appropriate, shall report any noncompliance. A written submission of such information shall be provided to the TCEQ Region 12 office and to the TCEQ Central Office, Enforcement Division (MC-149), within five (5) working days after becoming aware of the overflow. The written submission shall contain a description of the noncompliance and its cause; the potential danger to human health or safety, or the environment; the period of noncompliance, including exact dates and times; if the noncompliance has not been corrected, the anticipated time it is expected to continue; and, steps taken or planned to reduce, eliminate, and prevent recurrence of the noncompliance, and to mitigate its adverse effects.
- (g) Unless otherwise provided in this authorization, there shall be no off-site discharge, either airborne or surface runoff, of reclaimed water from the user's property except to a wastewater treatment system or wastewater treatment collection system unless the reclaimed water user applies for and obtains a permit from the commission that authorizes discharge of the water.
- (h) All new reclaimed water piping shall be separated from potable water piping when trenched by a distance of at least nine feet. All new exposed piping, hose bibs and faucets shall be painted purple and designed to prevent connection to a standard water hose. All piping shall be stenciled with a warning reading "NON-POTABLE WATER."
- (i) The design of any new distribution systems which will convey reclaimed water to a user shall

require the approval of the executive director. Materials shall be submitted to the executive director for approval in accordance with the Texas Engineering Practice Act (Article 3271a, Vernon's Annotated Texas Statutes). The plans and specifications for any new distribution systems constructed pursuant to this authorization must be approved pursuant to state law, and failure to secure approval before commencing construction of such works or making a transfer of reclaimed water therefrom is a violation of this authorization, and each day of a transfer is an additional violation until approval has been secured.

- (j) Nothing in this authorization modifies any requirements of the Texas Department of Health found in 30 Tex. Admin. Code Chapter 290.
- (k) A major change from a prior notification for use of reclaimed water must be approved by the executive director before it can be implemented. A major change includes:
 - (1) a change in the boundary of the approved service area not including the conversion of individual lots within a subdivision to reclaimed water use;
 - (2) the addition of a new producer;
 - (3) a major change in the intended use, such as conversion from irrigation of a golf course to residential irrigation, or
 - (4) a change from either Type I or Type II use to the other.
- (l) The reclaimed water producer and user shall maintain on the sites a current operation and maintenance plan. The operation and maintenance plan shall contain the following, as a minimum:
 - (1) a copy of the signed contract between the user and producer;
 - (2) a labeling and separation plan for the prevention of cross connections between reclaimed water distribution lines and potable water lines;
 - (3) the measures that will be implemented to prevent unauthorized access to reclaimed water facilities (e.g., secured valves);
 - (4) procedures for monitoring reclaimed water;
 - (5) a plan for how reclaimed water use will be scheduled to minimize the risk of inadvertent human exposure;
 - (6) schedules for routine maintenance;
 - (7) a plan for worker training and safety; and
 - (8) contingency plan for system failure or upsets.

- (m) One of the following requirements must be met by the user or provider, for any area where reclaimed water is stored or where there are hose bibs or faucets:
- (1) Signs having a minimum size of eight inches by eight inches shall be posted at all storage areas and on all hose bibs and faucets reading, in both English and Spanish, "Reclaimed Water, Do Not Drink" or similar warning.
 - (2) The area shall be secured to prevent access by the public.
- (n) Where a reclaimed water line parallels a sewer line, the reclaimed water line shall be constructed in accordance with subsection (p) or (q) of this section. The horizontal separation distance shall be three feet (outside to outside) with the reclaimed water line at the level of or above the sewer line. Reclaimed water lines that parallel sewer lines may be placed in the same benched trench. Where a reclaimed water line crosses a sewer line, the requirement of 30 Tex. Admin Code §290.44(e)(5)(B), *Location of Water Lines*, shall be followed with the reclaimed water line substituted for the water line.
- (o) Reclaimed water lines that transport reclaimed water under pressure shall be sized according to acceptable engineering practices for the needs of the reclaimed water users. The provider shall prevent high velocity scouring and maintain adequate fluid velocity to prevent the deposition of solids in the lines. Pipe specified for reclaimed water force mains shall have an expected life of at least as long as that of the associated installation and shall be suitable for the reclaimed water being pumped and operating pressure to which it will be subjected. All pipes shall be identified in the technical specifications with appropriate American Society for Testing and Materials, American National Standard Institute, or American Water Works Association (AWWA) standard numbers for both quality control (dimensions, tolerance, and installation such as bedding or backfill). All pipes and fittings shall have a minimum working pressure rating of 150 pounds per square inch. Final plans and specifications shall describe required pressure testing for all installed reclaimed water force mains. Minimum test pressure shall be 1.5 times the maximum design pressure. Allowable leakage rates shall be determined as described in 30 TAC Chapter 317 relating to *Pressure Sewer Systems* or its successor.
- (p) Gravity flow reclaimed water lines shall meet the requirements of 30 TAC Chapter 317, *The Design of Sewerage Systems* or its successor. The provider shall prevent high velocity scouring and maintain adequate fluid velocity to prevent the deposition of solids in the lines.
- (q) All exposed piping and piping within a building shall be either purple pipe or painted purple. All buried piping installed after February 12, 1997 shall be one of the following: manufactured in purple, painted purple, taped with purple metallic tape, or bagged in purple. All exposed piping must be stenciled in white with a warning reading "NON-POTABLE WATER." All exposed or buried reclaimed water piping constructed at a wastewater treatment facility is exempt from the color-coding requirement of this section.
- (r) When applicable, in accordance with 30 TAC Chapter 317, *Design Criteria for Sewerage Systems* or its successor, the design of the distribution systems that will convey reclaimed

water to a user shall be submitted to the executive director and must receive an approval before the distribution system may be constructed. The design of the distribution systems must meet the criteria of 30 TAC Chapter 317, *Design Criteria for Sewerage Systems* or its successor. When a municipality is the plan review authority for certain sewer systems that transport primarily domestic waste, in lieu of the commission, design submittal will not be subject to submittal to the commission and instead must be approved by the municipality.

- (s) All ground level and elevated storage tanks shall be designed, installed, and constructed in accordance with current AWWA standards with reference to materials to be used and construction practices to be followed, except for health-based standards strictly related to potable water storage and contact practices, where appropriately less restrictive standards may be applied.
- (t) If effluent is to be used for irrigation within the Edwards Aquifer recharge zone, plans and specifications for the disposal system must be submitted to the executive director for review and approval prior to construction of the facility in accordance with 30 TAC Chapter 213, *Edwards Aquifer*.

II. Storage Requirements for Reclaimed Water Outside the Edwards Aquifer Recharge Zone

- (a) Any holding pond designed to contain Type I or Type II effluent shall have a lining with a permeability of no more than 1×10^{-4} cm/sec and conform to the following requirements:
 - (1) The ponds shall be designed and constructed to prevent groundwater contamination;
 - (2) Soils used for pond lining shall be free from foreign material such as paper, brush, mess, and large rocks; and
 - (3) All soil liners must be a compacted material, at least 24 inches thick, compacted in lifts no greater than 6 inches thick and compacted to 95% of Standard Proctor Density. In situ clay soils meeting the soils liner requirements shall be excavated and re-compacted a minimum of 6 inches below planned grade to assure a uniformly compacted finished surface.
 - (4) Soil liners must meet the following particle size gradation and Atterburg limits:
 - (A) 30% or more passing a number 200 mesh sieve; and
 - (B) a liquid limit of 30% or greater; and a plasticity index of 15 or greater and have a permeability less than or equal to 1×10^{-4} cm/sec;
 - (5) Synthetic membrane linings shall have a minimum thickness of 40 mils with a leak detection system. In situ liners at least 24 inches thick meeting a permeability less than or equal to 1×10^{-4} cm/sec are acceptable alternatives;

- (6) Certification by a Texas License Professional Engineer shall be furnished that the pond lining meets the appropriate criteria prior to utilization of the facilities;
- (7) Soil embankment walls shall have a top width of at least five feet. The interior and exterior slopes of soil embankment walls shall be no steeper than one foot vertical to three feet horizontal unless alternate methods of slope stabilization are utilized. All soil embankment walls shall be protected by a vegetative cover or other stabilizing material to prevent erosion. Erosion stops and water seals shall be installed on all piping penetrating the embankments;
- (8) An alternative method of pond lining which provides equivalent or better water quality protection than provided under this section may be utilized with the prior approval of the executive director and
 - (b) Reclaimed water may be stored in leak-proof fabricated tanks.
 - (c) Subsequent holding ponds utilized for the receipt and storage of reclaimed water of a quality that could cause or causes a violation of a surface water quality standard or impairment of groundwater for its actual or intended use will be also subject to the storage requirements of this section.

III. Specific Uses and Quality Standards for Reclaimed Water

Numerical parameter limits pertaining to specific reclaimed water use categories are contained in this section. These limits apply to reclaimed water before discharge to initial holding ponds or a reclaimed water distribution system. It shall be the responsibility of the reclaimed water producer to establish that the reclaimed water meets the quality limits at the sample point for the intended use in accordance with the monitoring requirements identified in Section IV, *Sampling and Analysis*.

- (a) Type I Reclaimed Water Use. Type I use is where the public will likely come in contact with the reclaimed water. The irrigation of public areas is allowed by this authorization.
- (b) The following conditions apply to this type use of reclaimed water. At a minimum, the reclaimed water producer shall only transfer reclaimed water of the following quality as described for Type I reclaimed water use, reclaimed water on a 30-day average shall have a quality of:

CBOD ₅	5 mg/l
Turbidity	3 NTU
Fecal Coliform	20 CFU/100 ml*
Fecal Coliform (not to exceed)	75 CFU/100 ml**

* geometric mean
** single grab sample

- (c) Type II Reclaimed Water Use. The Type II use is where the public will not come in contact with the reclaimed water. The following uses are allowed by this authorization:

dust suppression and soil compaction,
golf course irrigation,
landscape irrigation where public access is restricted, and
maintenance of off-channel water impoundments.

(d) The following conditions apply to this type of use of reclaimed water. At a minimum, the reclaimed water producer shall only transfer reclaimed water of the following quality as described for Type II reclaimed water use; reclaimed water on a 30-day average shall have a quality of:

CBOD ₅	15 mg/l
Fecal Coliform	200 CFU/100 ml
Fecal Coliform (not to exceed)	800 CFU/100 ml
* <i>geometric mean</i>	
** <i>single grab sample</i>	

IV. Sampling and Analysis

The reclaimed water producer shall sample the reclaimed water prior to distribution to user to assure that the water quality is in accord with the intended contracted use. Analytical methods shall be in accord with those specified in 30 TAC Chapter 3.6, *Monitoring and Reporting*. The minimum sampling and analysis frequency for Type I reclaimed water is twice per week, and for Type II reclaimed water is once per week.

The monitoring shall be done after the final treatment unit. These records shall be maintained on a monthly basis and be available at the plant site for inspection by authorized representatives of the Commission for at least five years.

V. Record Keeping and Reporting

- (a) The reclaimed water provider and user shall maintain records on site for a period of at least five years.
 - (1) Records to be maintained by the provider include:
 - (A) copies of notifications made to the commission concerning reclaimed water projects.
 - (B) as applicable, copies of contracts made with each reclaimed water user (this requirement does not include reclaimed water users at residences that have separate distribution lines for potable water).
 - (C) records of volume of water delivered to each reclaimed water user per delivery (this requirement does not apply to reclaimed water users at

residences that have separate distribution lines for potable water).

- (D) reclaimed water quality analyses.
- (2) The reclaimed water producer shall report to the commission on a monthly basis the following information on forms furnished by the executive director. Such reports are due to the commission by the 20th day of the month following the reporting period.
 - (A) volume of reclaimed water delivered to providers and
 - (B) quality of reclaimed water delivered to a user or provider reported as a monthly average for each quality criteria except those listed as "not to exceed" that shall be reported as individual analyses.
- (b) The provider shall provide written notice to the Water Quality Application Team (MC 148) and the Region 11 Office of the commission at least thirty (30) days prior to transfer. Monitoring requirements contained in this authorization are suspended from the effective date of the authorization until the reclaim water is transferred.

VI. Transfer of Reclaimed Water

Reclaimed water transferred from a provider to a user shall be done on a demand only basis. This means that the reclaimed water user may refuse delivery of such water at any time. All reclaimed water transferred to a user must be of at least the treatment quality specified in Section IV, *Sampling and Analysis*. Transfer shall be accomplished via pipes or tank trucks.

VII. General Prohibitions

Storage facilities for retaining reclaimed water prior to use shall not be located within the floodway and shall be protected from the 100-year flood.

VIII. Restrictions

This authorization does not convey any property right and does not grant any exclusive privilege.

IX. Responsibilities and Contracts

- (a) The producer of reclaimed water will not be liable for misapplication of reclaimed water by users, except as provided in this section. Both the reclaimed water provider and user have, but are not limited to, the following responsibilities:
 - (1) The reclaimed water producer shall:

- (A) transfer reclaimed water of at least the minimum quality required by this chapter at the point of delivery to the user for the specified use;
 - (B) sample and analyze the reclaimed water and report such analyses in accordance with Section IV, *Sampling and Analysis*, and Section V, *Record Keeping and Reporting*; and
 - (C) notify the executive director in writing within five (5) days after obtaining knowledge of reclaimed water use not authorized by the executive director's reclaimed water use approval.
- (2) The reclaimed water provider shall
- (A) assure construction of reclaimed water distribution lines/systems in accordance with 30 TAC Chapter 017, *Design of Sewerage Systems*, and in accordance with approved plans and specifications;
 - (B) transfer reclaimed water of at least the minimum quality required by this chapter at the point of delivery to the user for the specified use;
 - (C) notify the executive director in writing within five (5) days after obtaining knowledge of reclaimed water use not authorized by the executive director's reclaimed water use approval; and
 - (D) not be found in violation of this chapter for the misuse of the reclaimed water by the user if transfer of such water is shut off promptly upon knowledge of misuse regardless of contract provisions.
- (3) The reclaimed water user shall
- (A) use the reclaimed water in accordance with this authorization; and
 - (B) maintain and provide records as required by Section II, *Record Keeping and Reporting*.

X. Enforcement

If the producer, provider and/or user fail to comply with the terms of this authorization, the executive director may take enforcement action provided by the Texas Water Code, §§26.019 and 26.136.

XI. Standard Provisions

- (a) This authorization is granted in accordance with the rules and orders of the commission and

the laws of the state of Texas.

- (b) Acceptance of this authorization constitutes an acknowledgment and agreement that the provider and user will comply with all the terms, provisions, conditions, limitations and restrictions embodied in this authorization and with the rules and other orders of the commission and the laws of the state of Texas. Agreement is a condition precedent to the granting of this authorization.

DRAFT

Attachment A

Need map of service area to complete this attachment.





Authorization No. R-14712-001

AUTHORIZATION FOR RECLAIMED WATER

Producer: Lerin Hills Municipal Utility District
4820 Bacon Road
San Antonio, Texas 78249

Provider: Lerin Hills, Ltd.
4820 Bacon Road
San Antonio, Texas 78249

Users: Any user authorized by the Lerin Hills, Ltd. as a distributor of the reclaimed water.

Location: The Lerin Hills Municipal Utility District (Lerin Hills MUD) wastewater treatment plant is located approximately 4.1 miles west of Interstate Highway 10, as measured along State Highway 46, and then approximately 200 feet due west from that point on State Highway 46 in Kendall County, Texas.

Authorization: Type I and Type II reclaimed water from the Lerin Hills MUD's Wastewater Treatment Plant (SPDES Permit No. WQ0014712001), to be used as defined in 30 TAC Ch. 210 in the area delineated in Attachment A.

This authorization contains the conditions that apply for the uses of the reclaimed water. The approval of a reclaimed water use project under 30 TAC Chapter 210 does not affect any existing water rights. If applicable, a reclaimed water use authorization in no way affects the need of a producer, provider, and/or user to obtain a separate water right authorization from the commission.

Issued Date:

For the Commission

Limitations: The authorization is subject to the following requirements:

I. General Requirements

- (a) No wastewater treatment plant operator (producer) shall transfer reclaimed water to a user without first notifying the commission.
- (b) Reuse of untreated wastewater is prohibited.
- (c) Food crops that may be consumed raw by humans shall not be spray irrigated. Food crops including orchard crops that will be substantially processed prior to human consumption may be spray irrigated. Other types of irrigation that avoid contact of reclaimed water with edible portions of food crops are acceptable.
- (d) There shall be no nuisance conditions resulting from the distribution, the use, and/or storage of reclaimed water.
- (e) Reclaimed water shall not be used in a way that degrades groundwater quality to a degree adversely affecting its actual or potential uses.
- (f) Reclaimed water stored in ponds must be prevented from discharging into waters in the state, except for discharges directly resulting from rainfall events, in accordance with a permit issued by the commission, or as authorized under the Lerin Hills MUD's Wastewater Treatment Plant (TPDES Permit No. WQ001472001). All other discharges are unauthorized. If an unauthorized overflow of a holding pond occurs causing discharge into or adjacent to waters in the state, the user or provider, as appropriate, shall report any noncompliance. A written submission of such information shall be provided to the TCEQ Region 3 office and to the TCEQ Central Office, Enforcement Division (MC-149), within five (5) working days after becoming aware of the overflow. The written submission shall contain a description of the noncompliance and its cause; the potential danger to human health or safety, or the environment; the period of noncompliance, including exact dates and times; if the noncompliance has not been corrected, the anticipated time it is expected to continue; and, steps taken or planned to reduce, eliminate, and prevent recurrence of the noncompliance, and to mitigate its adverse effects.

Unless otherwise provided in this authorization, there shall be no off-site discharge, either airborne or surface runoff, of reclaimed water from the user's property except to a wastewater treatment system or wastewater treatment collection system unless the reclaimed water user applies for and obtains a permit from the commission that authorizes discharge of the water.
- (g)
- (h) All new reclaimed water piping shall be separated from potable water piping when trenched by a distance of at least nine feet. All new exposed piping, hose bibs and faucets shall be painted purple and designed to prevent connection to a standard water hose. All piping shall be stenciled with a warning reading "NON-POTABLE WATER."
- (i) The design of any new distribution systems which will convey reclaimed water to a user shall

require the approval of the executive director. Materials shall be submitted to the executive director for approval in accordance with the Texas Engineering Practice Act (Article 3271a, Vernon's Annotated Texas Statutes). The plans and specifications for any new distribution systems constructed pursuant to this authorization must be approved pursuant to state law, and failure to secure approval before commencing construction of such works or making a transfer of reclaimed water therefrom is a violation of this authorization, and each day of a transfer is an additional violation until approval has been secured.

- (j) Nothing in this authorization modifies any requirements of the Texas Department of Health found in 30 Tex. Admin. Code Chapter 290.
- (k) A major change from a prior notification for use of reclaimed water must be approved by the executive director before it can be implemented. A major change includes:
 - (1) a change in the boundary of the approved service area not including the conversion of individual lots within a subdivision to reclaimed water use;
 - (2) the addition of a new producer;
 - (3) a major change in the intended use, such as conversion from irrigation of a golf course to residential irrigation; or
 - (4) a change from either Type I or Type II use to the other.
- (l) The reclaimed water producer and user shall maintain on the sites a current operation and maintenance plan. The operation and maintenance plan shall contain the following, as a minimum:
 - (1) a copy of the signed contract between the user and producer;
 - (2) a labeling and separation plan for the prevention of cross connections between reclaimed water distribution lines and potable water lines;
 - (3) the measures that will be implemented to prevent unauthorized access to reclaimed water facilities (e.g., secured valves);
 - (4) procedures for monitoring reclaimed water;
 - (5) a plan for how reclaimed water use will be scheduled to minimize the risk of inadvertent human exposure;
 - (6) schedules for routine maintenance;
 - (7) a plan for worker training and safety; and
 - (8) contingency plan for system failure or upsets.

- (m) One of the following requirements must be met by the user or provider, for any area where reclaimed water is stored or where there are hose bibs or faucets:
- (1) Signs having a minimum size of eight inches by eight inches shall be posted at all storage areas and on all hose bibs and faucets reading, in both English and Spanish, "Reclaimed Water, Do Not Drink" or similar warning.
 - (2) The area shall be secured to prevent access by the public.
- (n) Where a reclaimed water line parallels a sewer line, the reclaimed water line shall be constructed in accordance with subsection (p) or (q) of this section. The horizontal separation distance shall be three feet (outside to outside) with the reclaimed water line at the level of or above the sewer line. Reclaimed water lines that parallel sewer lines may be placed in the same benched trench. Where a reclaimed water line crosses a sewer line, the requirement of 30 Tex. Admin Code §290.44(e)(5)(B), *Location of Water Lines*, shall be followed with the reclaimed water line substituted for the water line.
- (o) Reclaimed water lines that transport reclaimed water under pressure shall be sized according to acceptable engineering practice for the needs of the reclaimed water users. The provider shall prevent high velocity scouring and maintain adequate fluid velocity to prevent the deposition of solids in the lines. Pipe specified for reclaimed water force mains shall have an expected life of at least as long as that of the associated lift station and shall be suitable for the reclaimed water being pumped and operating pressure to which it will be subjected. All pipes shall be identified in the technical specifications with appropriate American Society for Testing and Materials, American National Standard Institute, or American Water Works Association (AWWA) standard numbers for both quality control (dimensions, tolerance, and installation such as bedding or backfill). All pipes and fittings shall have a minimum working pressure range of 150 pounds per square inch. Final plans and specifications shall describe required pressure testing for all installed reclaimed water force mains. Minimum test pressure shall be 1.5 times the maximum design pressure. Allowable leakage rates shall be determined as described in 30 TAC Chapter 317 relating to *Pressure Sewer Systems* or its successor.
- (p) Gravity flow reclaimed water lines shall meet the requirements of 30 TAC Chapter 317, *The Design of Sewerage Systems* or its successor. The provider shall prevent high velocity scouring and maintain adequate fluid velocity to prevent the deposition of solids in the lines.
- (q) All exposed piping and piping within a building shall be either purple pipe or painted purple. All buried piping installed after February 12, 1997 shall be one of the following: manufactured in purple, painted purple, taped with purple metallic tape, or bagged in purple. All exposed piping must be stenciled in white with a warning reading "NON-POTABLE WATER." All exposed or buried reclaimed water piping constructed at a wastewater treatment facility is exempt from the color-coding requirement of this section.
- (r) When applicable, in accordance with 30 TAC Chapter 317, *Design Criteria for Sewerage Systems* or its successor, the design of the distribution systems that will convey reclaimed

water to a user shall be submitted to the executive director and must receive an approval before the distribution system may be constructed. The design of the distribution systems must meet the criteria of 30 TAC Chapter 317, *Design Criteria for Sewerage Systems* or its successor. When a municipality is the plan review authority for certain sewer systems that transport primarily domestic waste, in lieu of the commission, design submittal will not be subject to submittal to the commission and instead must be approved by the municipality.

- (s) All ground level and elevated storage tanks shall be designed, installed, and constructed in accordance with current AWWA standards with reference to materials to be used and construction practices to be followed, except for health-based standards strictly related to potable water storage and contact practices, where appropriately less restrictive standards may be applied.
- (t) If effluent is to be used for irrigation within the Edwards Aquifer recharge zone, plans and specifications for the disposal system must be submitted to the executive director for review and approval prior to construction of the facility in accordance with 30 TAC Chapter 213, *Edwards Aquifer*.

II. Storage Requirements for Reclaimed Water Outside the Edwards Aquifer Recharge Zone

- (a) Any holding pond designed to contain Type I or Type II effluent shall have a lining with a permeability of no more than 1×10^{-4} cm/sec and conform to the following requirements:
 - (1) The ponds shall be designed and constructed to prevent groundwater contamination;
 - (2) Soils used for pond lining shall be free from foreign material such as paper, brush, trees, and large rocks; and
 - (3) All soil liners must be of compacted material, at least 24 inches thick, compacted in lifts no greater than 6 inches thick and compacted to 95% of Standard Proctor Density. In situ clay soils meeting the soils liner requirements shall be excavated and re compacted a minimum of 6 inches below planned grade to assure a uniformly compacted finished surface.
 - (4) Soil liners must meet the following particle size gradation and Atterburg limits:
 - (A) 30% or more passing a number 200 mesh sieve; and
 - (B) a liquid limit of 30% or greater; and a plasticity index of 15 or greater and have a permeability less than or equal to 1×10^{-4} cm/sec;
 - (5) Synthetic membrane linings shall have a minimum thickness of 40 mils with a leak detection system. In situ liners at least 24 inches thick meeting a permeability less than or equal to 1×10^{-4} cm/sec are acceptable alternatives;

- (6) Certification by a Texas License Professional Engineer shall be furnished that the pond lining meets the appropriate criteria prior to utilization of the facilities;
- (7) Soil embankment walls shall have a top width of at least five feet. The interior and exterior slopes of soil embankment walls shall be no steeper than one foot vertical to three feet horizontal unless alternate methods of slope stabilization are utilized. All soil embankment walls shall be protected by a vegetative cover or other stabilizing material to prevent erosion. Erosion stops and water seals shall be installed on all piping penetrating the embankments;
- (8) An alternative method of pond lining which provides equivalent or better water quality protection than provided under this section may be utilized with the prior approval of the executive director and
 - (b) Reclaimed water may be stored in leak-proof fabricated tanks.
 - (c) Subsequent holding ponds utilized for the receipt and storage of reclaimed water of a quality that could cause or causes a violation of a surface water quality standard or impairment of groundwater for its actual or intended use will be also subject to the storage requirements of this section.

III. Specific Uses and Quality Standards for Reclaimed Water

Numerical parameter limits pertaining to specific reclaimed water use categories are contained in this section. These limits apply to reclaimed water before discharge to initial holding ponds or a reclaimed water distribution system. It shall be the responsibility of the reclaimed water producer to establish that the reclaimed water meets the quality limits at the sample point for the intended use in accordance with the monitoring equipment identified in Section IV, *Sampling and Analysis*.

- (a) Type I Reclaimed Water Use. Type I use is where the public will likely come in contact with the reclaimed water. The irrigation of public areas is allowed by this authorization.
- (b) The following conditions apply to this type use of reclaimed water. At a minimum, the reclaimed water producer shall only transfer reclaimed water of the following quality as described for Type I reclaimed water use, reclaimed water on a 30-day average shall have a quality of:

CBOD ₅	5 mg/l
Turbidity	3 NTU
Fecal Coliform	20 CFU/100 ml*
Fecal Coliform (not to exceed)	75 CFU/100 ml**

* geometric mean

** single grab sample

- (c) Type II Reclaimed Water Use. The Type II use is where the public will not come in contact with the reclaimed water. The following uses are allowed by this authorization:

dust suppression and soil compaction,
golf course irrigation,
landscape irrigation where public access is restricted, and
maintenance of off-channel water impoundments.

- (d) The following conditions apply to this type of use of reclaimed water. At a minimum, the reclaimed water producer shall only transfer reclaimed water of the following quality as described for Type II reclaimed water use; reclaimed water on a 30-day average shall have a quality of:

CBOD ₅	15 mg/l
Fecal Coliform	200 CFU/100 ml
Fecal Coliform (not to exceed)	800 CFU/100 ml
* <i>geometric mean</i>	
** <i>single grab sample</i>	

IV. Sampling and Analysis

The reclaimed water producer shall sample the reclaimed water prior to distribution to user to assure that the water quality is in accord with the intended contracted use. Analytical methods shall be in accord with those specified in 30 TAC Chapter 3, *Monitoring and Reporting*. The minimum sampling and analysis frequency for Type I reclaimed water is twice per week, and for Type II reclaimed water is once per week.

The monitoring shall be done after the final treatment unit. These records shall be maintained on a monthly basis and be available at the plant site for inspection by authorized representatives of the Commission for at least five years.

V. Record Keeping and Reporting

- (a) The reclaimed water provider and user shall maintain records on site for a period of at least five years.
- (1) Records to be maintained by the provider include:
- (A) copies of notifications made to the commission concerning reclaimed water projects.
- (B) as applicable, copies of contracts made with each reclaimed water user (this requirement does not include reclaimed water users at residences that have separate distribution lines for potable water).
- (C) records of volume of water delivered to each reclaimed water user per delivery (this requirement does not apply to reclaimed water users at

residences that have separate distribution lines for potable water).

- (D) reclaimed water quality analyses.
- (2) The reclaimed water producer shall report to the commission on a monthly basis the following information on forms furnished by the executive director. Such reports are due to the commission by the 20th day of the month following the reporting period.
 - (A) volume of reclaimed water delivered to provider and
 - (B) quality of reclaimed water delivered to a user or provider reported as a monthly average for each quality criteria except those listed as "not to exceed" that shall be reported as individual analyses.
- (b) The provider shall provide written notice to the Water Quality Application Team (MC 148) and the Region 11 Office of the commission at least thirty (30) days prior to transfer. Monitoring requirements contained in this authorization are suspended from the effective date of the authorization until the reclaim water is transferred.

VI. Transfer of Reclaimed Water

Reclaimed water transferred from a provider to a user shall be done on a demand only basis. This means that the reclaimed water user may refuse delivery of such water at any time. All reclaimed water transferred to a user must be of at least the treatment quality specified in Section IV, *Sampling and Analysis*. Transfer shall be accomplished via pipes or tank trucks.

VII. General Prohibitions

Storage facilities for retaining reclaimed water prior to use shall not be located within the floodway and shall be protected from the 100-year flood.

VIII. Restrictions

This authorization does not convey any property right and does not grant any exclusive privilege.

IX. Responsibilities and Contracts

- (a) The producer of reclaimed water will not be liable for misapplication of reclaimed water by users, except as provided in this section. Both the reclaimed water provider and user have, but are not limited to, the following responsibilities:
 - (1) The reclaimed water producer shall:

- (A) transfer reclaimed water of at least the minimum quality required by this chapter at the point of delivery to the user for the specified use;
 - (B) sample and analyze the reclaimed water and report such analyses in accordance with Section IV, *Sampling and Analysis*, and Section V, *Record Keeping and Reporting*; and
 - (C) notify the executive director in writing within five (5) days after obtaining knowledge of reclaimed water use not authorized by the executive director's reclaimed water use approval.
- (2) The reclaimed water provider shall:
- (A) assure construction of reclaimed water distribution lines/systems in accordance with 30 TAC Chapter 917, *Design of Sewerage Systems*, and in accordance with approved plans and specifications;
 - (B) transfer reclaimed water of at least the minimum quality required by this chapter at the point of delivery to the user for the specified use;
 - (C) notify the executive director in writing within five (5) days after obtaining knowledge of reclaimed water use not authorized by the executive director's reclaimed water use approval; and
 - (D) not be found in violation of this chapter for the misuse of the reclaimed water by the user if transfer of such water is shut off promptly upon knowledge of misuse regardless of contract provisions.
- (3) The reclaimed water user shall:
- (A) use the reclaimed water in accordance with this authorization; and
 - (B) maintain and provide records as required by Section II, *Record Keeping and Reporting*.

X. Enforcement

If the producer, provider and/or user fail to comply with the terms of this authorization, the executive director may take enforcement action provided by the Texas Water Code, §§26.019 and 26.136.

XI. Standard Provisions

- (a) This authorization is granted in accordance with the rules and orders of the commission and

the laws of the state of Texas.

- (b) Acceptance of this authorization constitutes an acknowledgment and agreement that the provider and user will comply with all the terms, provisions, conditions, limitations and restrictions embodied in this authorization and with the rules and other orders of the commission and the laws of the state of Texas. Agreement is a condition precedent to the granting of this authorization.

DRAFT

Attachment A

Need map of service area to complete this attachment.

LEAD

EXHIBIT 3

AGREEMENT

This is an agreement ("Agreement") by and between Lerin Hills, LTD. ("Lerin"), and Edgar W. Blanch, Jr. ("Blanch"), entered into on the date set forth below.

Previously, Lerin filed an application to the Texas Commission on Environmental Quality ("TCEQ") for a waste discharge Permit which is No. WQ0014712001 ("Permit") in order to construct the Lerin Hills Wastewater Treatment Plant ("Plant") to serve development within the Lerin Hills MUD; and

Lerin proposes to transfer the permit to the Lerin Hills MUD once such permit is issued by the TCEQ; and

Blanch has filed a protest to the Permit and has asked the TCEQ to refer the Permit application to the State Office of Administrative Hearings ("SOAH") for a contested case hearing. Blanch then withdrew that protest and request to refer the Permit to SOAH; however, Blanch now claims to have filed another request for a contested hearing on the Permit and referral to SOAH. Lerin has objected to that second filing and contests the validity of the request and referral to SOAH. Lerin and Branch now sign this Agreement to resolve the differences between them related to the Permit application and hereby agree to the following terms:

1. Use of Reclaimed Water

Lerin agrees to use to use all of the treated effluent from the proposed Plant for purposes of landscape and open space irrigation in accordance with its Chapter 210 Authorization (see below) such that there will be no discharge from the Lerin Hills development into the unnamed tributary which traverses Blanch's property and thence into Deep Hollow Creek and thence into the Soil Conservation Service impoundment, except during those times which a discharge of treated effluent is necessary due to intense rainfall or saturated ground conditions. Lerin agrees to construct, maintain, and operate sufficient irrigation systems within open space areas owned and/or maintained by Lerin, or the Lerin Hills MUD, to achieve the reuse objective stated above to offset any shortfall of the collective irrigation usage by the private single family lot owners within the Lerin Hills development. Blanch agrees that from time to time, due to intense rainfall or saturated ground conditions, there will be treated effluent discharged from the Plant into the unnamed tributary which traverses Blanch's property and thence into Deep Hollow Creek and thence into the Soil Conservation Service impoundment.

2. Submittal of TCEQ Chapter 210 Use of Reclaimed Water Authorization

Lerin has prepared and submitted an application to the TCEQ to obtain an authorization for the Use of Reclaimed Water (meaning the treated effluent of the proposed wastewater treatment plant), and agrees to respond to the TCEQ comments as required to satisfy all application requirements. The reclaimed water quality will meet the standards for Type I water as defined in 30 T.A.C. Chapter 210, which is sufficient for irrigation in areas of public contact. Lerin agrees that it will construct and operate reclaimed water distribution and irrigation systems in accordance with TCEQ's Chapter 210. Lerin proposes to transfer the Chapter 210 Authorization to the Lerin Hills MUD once issued by the TCEQ

3. Location of Landscape and Open Space Irrigation.

Lerin currently intends to use all of the reclaimed water within the Lerin Hills development, but reserves the right to deliver reclaimed water to another landowner for use in compliance with Lerin's Chapter 210 Authorization.

4. Withdrawal of Blanch's Comments and Requests for Contested Case Hearing.

Upon execution of this agreement, Blanch will immediately file a letter with the office of the Chief Clerk of the TCEQ with a copy to Lerin formally notifying the TCEQ that Blanch withdraws all of his comments concerning the Permit application and all of his requests for a contested hearing. Blanch agrees that he will not take any further action or make any further statement(s) to protest or oppose Lerin's Permit application. Blanch recognizes that TCEQ's issuance of the Permit must occur before the issuance of the Chapter 210 Use of Reclaimed Water Authorization.

5. Sanctions

As material consideration for the agreement of Blanch to withdraw his request for a contested case hearing and to withdraw all of his comments regarding Lerin's Permit, Lerin agrees to pay Blanch as liquidated damages, ipso facto, an amount equal to any monetary damages assessed by the TCEQ against Lerin for violations of its Permit.

6. Agreement

The parties agree that this Agreement represents the entire Agreement of the parties related to the subject matter, namely the Permit, and this Agreement are supported by good, valuable and sufficient consideration, the receipt of which is acknowledged by Lerin and Blanch.

7. Notice of Future Permit Amendment

Lerin agrees to provide Blanch prior notice by first class U.S. mail if Lerin seeks to amend the Permit.

8. No Admission

In this Agreement, neither party admits the validity of the position that the other party has taken regarding the protest filed by Blanch or the application for the Permit filed by Lerin. However, the parties agree that Lerin will continue to pursue approval and issuance by the TCEQ of the application for the Permit to allow the development of Lerin Hills to proceed subject to the terms above.

9. Heirs, Successors, and Assignees

This Agreement is nonseverable and binding on all heirs, successors, and assignees of the Parties.

9. Heirs, Successors, and Assignees

This Agreement is nonseverable and binding on all heirs, successors, and assignees of the Parties.

10. Right to Sue

The parties agree that this Agreement does not contain a covenant not to sue.

SIGNED this 3rd day of October, 2007

Edgar W. Blanch, Jr.
Edgar W. Blanch, Jr.

SIGNED this 2nd day of October, 2007

LERIN HILLS, LTD.

J. Abel Godines
By: Lerin Development Company, L.L.C.
Its: General Partner, J. Abel Godines, President

LERIN HILLS, LTD.

W. Jay Harpole
By: Lerin Development Company, L.L.C.
Its: General Partner, W. Jay Harpole, Vice President

THE STATE OF TEXAS §

COUNTY OF KENDALL §

Before me the undersigned, a Notary Public, on this day personally appeared EDGAR W. BLANCH, JR. known to me, to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 3rd day of October, 2007.

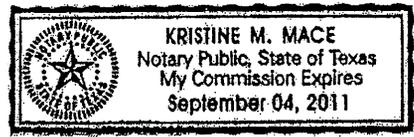


Mary Margaret C. Clamp
Notary Public, State of Texas

THE STATE OF TEXAS §
 §
COUNTY OF BEXAR §

Before me the undersigned, a Notary Public, on this day personally appeared J. ABEL GODINES known to me, to be the person and officer whose name is subscribed to the foregoing instrument and acknowledged to me that the same was the act of LERIN HILLS, LTD (LERIN DEVELOPMENT COMPANY, L.L.C.) a Texas limited liability company, and the he has executed the same as the act of such company for the purposes and consideration therein expressed, and in the capacity therein stated.

Given under my hand and seal of office this 2nd day of October, 2007

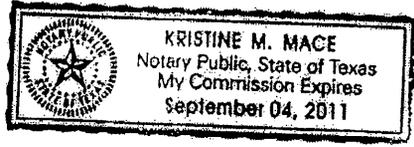


Kristine M. Mace
Notary Public, State of Texas

THE STATE OF TEXAS §
 §
COUNTY OF BEXAR §

Before me the undersigned, a Notary Public, on this day personally appeared W. JAY HARPOLE known to me, to be the person and officer whose name is subscribed to the foregoing instrument and acknowledged to me that the same was the act of LERIN HILLS, LTD (LERIN DEVELOPMENT COMPANY, L.L.C.) a Texas limited liability company, and the he has executed the same as the act of such company for the purposes and consideration therein expressed, and in the capacity therein stated.

Given under my hand and seal of office this 2nd day of October, 2007



Kristine M. Mace
Notary Public, State of Texas

MWD
53346

2007-11-78-MWD

Robert W. Webster
335 State Highway 46 W
Boerne, Texas 78006-8113

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2007 AUG 23 PM 2:27

CHIEF CLERKS OFFICE

August 20, 2007

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

VIA FAX: (512) 239-3311

WHR OPA
AUG 23 2007

Re: Application of Lerin Hills, Ltd. for TPDES Permit No. BY ~~DM~~
WQ0014712001 ("Application")

Dear Ms. Castanuela:

I the undersigned, do herewith WITHDRAW my request for a contested hearing of the captioned Permit and all of our comments concerning said Permit.

Sincerely,



Robert W. Webster

RWW/sr

cc: Teague G. Harris, P.E.
Senior Vice President
Pate Engineers
13333 Northwest Fwy., Suite 300
Houston, Texas 77040
Via fax: (713)462-1631

Richard Kammerman, Esq.
Richard Kammerman, P.C.
7200 North Mopac, Suite 150
Austin, Texas 78731
Via fax: (512) 233-2763

MWD

COPY

AGREEMENT

This is an agreement ("Agreement") by and between Lerin Hills, LTD. ("Lerin"), and Robert W. Webster ("Webster"), entered into on the date set forth below.

Previously, Lerin filed an application to the Texas Commission on Environmental Quality ("TCEQ") for a waste discharge permit which is No. WQ0014712001 ("Permit"); and

Webster has filed a protest to the Permit and has asked the TCEQ to refer the Permit application to the State Office of Administrative Hearings ("SOAH") for a contested case hearing.

Webster and Lerin have now resolved the differences between them related to the Permit application and hereby agree to the following terms:

1. Use of Reclaimed Water

Lerin agrees to use its best efforts to use all of the treated effluent from the proposed Lerin Hills Wastewater Treatment Plant for purposes of landscape and open space irrigation such that there will be, on most days, no discharge from the Lerin Hills development into Deep Hollow Creek and the lake on Webster's property. Lerin agrees to construct, maintain, and operate sufficient irrigation systems within open space areas owned and/or maintained by Lerin, or the Lerin Hills MUD, to achieve the reuse objective stated above to offset any shortfall of the collective irrigation usage by the private single family lot owners within the Lerin Hills development. Webster agrees that from time to time, due to intense rainfall or saturated ground conditions, there will be a treated effluent discharged from the Plant to Deep Hollow Creek and the lake on Webster's property. Lerin agrees that any such discharge would meet the requirements of its TCEQ Permit. Lerin agrees that it will not seek a Permit amendment or Renewal or seek to obtain authorization from TCEQ to commence construction of additional treatment and/or collection facilities without prior notification to Webster.

2. Submittal of TCEQ Chapter 210 Use of Reclaimed Water Authorization

Lerin agrees that it will prepare and submit an application to the TCEQ to obtain an authorization for the Use of Reclaimed Water (meaning the treated effluent of the Plant), and respond to the TCEQ comments as required to satisfy all application requirements. The reclaimed water quality will meet the standards for Type 1 water as defined in 30 T.A.C. Chapter 210, which is sufficient for irrigation in areas of public contact. Lerin agrees that it will construct and operate reclaimed water distribution and irrigation systems in accordance with TCEQ's Chapter 210.

3. Location of Landscape and Open Space Irrigation

Lerin currently intends to use all of the reclaimed water within the Lerin Hills development, but reserves the right to deliver reclaimed water to another landowner for use in compliance with Lerin's Chapter 210 Authorization.

4. Withdrawal of Protest and Comments

Upon receipt of confirmation from the TCEQ staff that Lerin's application for a Chapter 210 Use of Reclaimed Water Authorization has been reviewed and found ready for approval, Webster will

send a letter to the TCEQ formally notifying the TCEQ that he withdraws his request for a contested hearing of the Permit and withdraws all his comments concerning the Permit. Webster agrees that after receipt of such confirmation, he will not take any action or make any statement to protest or oppose Lerin's Permit application. Webster recognizes that TCEQ's issuance of the Permit must occur before the issuance of the Use of Reclaimed Water Authorization.

5. SANCTIONS

As material consideration of the Agreement of Webster to withdraw his request for a contested case hearing, Lerin agrees to pay Webster as liquidated monetary damages, ipso facto, an amount equal to any monetary damages assessed by TCEQ against Lerin for violations of its Permit.

6. RIGHT TO SUE

Lerin Agrees that this Agreement does not contain any covenant for Webster not to sue and does not constitute a waiver of any personal or property rights of Webster.

7. Agreement

The parties agree that this Agreement represents the entire Agreement of the parties related to the subject matter, namely the Permit, and this Agreement is supported by good, valuable and sufficient consideration, the receipt of which is acknowledged by Lerin and Webster.

8. No Admission

In this Agreement, neither party admits the validity of the position that the other party has taken regarding the protest filed by Webster or the application for the Permit filed by Lerin. However, the parties agree that Lerin will continue to pursue approval and issuance by the TCEQ of the application for the Permit to allow the development of Lerin Hills to proceed subject to the terms above.

9. Heirs and Assignees

This Agreement is binding on all heirs, successors, and assignees of the Parties.

SIGNED this 17th day of August, 2007.

LERIN HILLS, LTD.

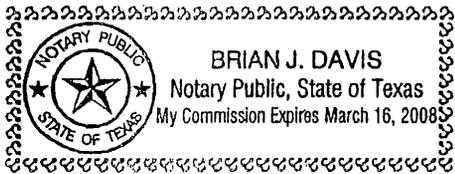
J. Abel Godines
By: Lerin Development Company, L.L.C.
Its: General Partner, Abel Godines, President

By: [Signature]
Robert W. Webster

THE STATE OF TEXAS §
 §
COUNTY OF Bexar §

Before me, the undersigned, a Notary Public, on this day personally appeared ABEL GODINES known to me, to be the person and officer whose name is subscribed to the foregoing instrument and acknowledged to me that the same was the act of LERIN HILLS, LTD (LERIN DEVELOPMENT COMPANY, L.L.C.) a Texas limited liability company, and that he has executed the same as the act of such company for the purposes and consideration therein expressed, and in the capacity therein stated.

Given under my hand and seal of office, this 17th day of August, 2007.

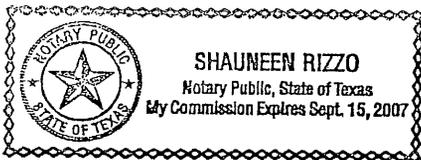


Brian J. Davis
Notary Public, State of Texas

THE STATE OF TEXAS §
 §
COUNTY OF KENDALL §

Before me, a Notary Public, on this day personally appeared ROBERT W. WEBSTER known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 31st day of August, 2007.



Shauneen Rizzo
Notary Public, State of Texas