

April 3, 2009

**VIA HAND DELIVERY**

Ms. LaDonna Castañuela, Chief Clerk  
Texas Commission on Environmental Quality  
12100 Park 35 Circle  
Building F, 1st Floor  
Austin, Texas 78753

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2009 APR -3 PM 1:15  
CHIEF CLERKS OFFICE

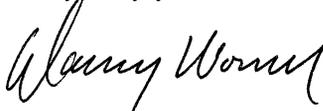
Re: Lerin Hills, Ltd.'s Reply to Exceptions to the Proposal for Decision  
Application by Lerin Hills, Ltd. for TPDES Permit No. WQ0014712001  
SOAH Docket No. 582-08-0690; TCEQ Docket No. 2007-1178-MWD

Dear Ms. Castañuela:

Enclosed for filing please find an original and seven copies of Lerin Hills, Ltd.'s Reply to Exceptions to the 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

2009 APR -3 PM 1:15

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

**LERIN HILLS, LTD.'S REPLY TO  
EXCEPTIONS TO THE 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 Reply to Exceptions to the Administrative Law Judge's ("ALJ's") Proposal for Decision ("PFD") in this case, and would respectfully show the following:

**I. INTRODUCTION**

Applicant generally agrees with the Executive Director's ("ED's") exceptions to the PFD which request that either the ALJ amend the PFD to support approval of the Application and issuance of the Draft Permit or the Commission reject the PFD and adopt a revised Order approving the Application and issuance of the Draft Permit. Applicant disagrees with Protestant's, Rick Wood's ("Protestant" or "Mr. Wood"), exceptions to the PFD, as more fully described below.

**II. LERIN HILLS AGREES  
IN PRINCIPLE WITH THE ED'S EXCEPTIONS**

Although the Applicant very much agrees in principle with the ED's Exceptions to the PFD, Lerin Hills differs in one minor respect with the ED's Exceptions to Finding of Fact No. 40.<sup>1</sup> The ED's statement that the ALJ's Finding of Fact No. 40 – "The record in this case

<sup>1</sup> ED's Exceptions at 19.

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" – is "a factual statement"<sup>2</sup> may imply that it is an *accurate* factual statement, while Lerin Hills believes that it is not. For the reasons explained in Lerin Hills' Exceptions, Part IV.B.4, Lerin Hills contends that Dr. Miertschin's modeling of the effects of the discharges from its Wastewater Treatment Plant upon phosphorus concentrations in the stream does constitute an estimate of the amounts of phosphorus that would be biologically available in this stream system over time.<sup>3</sup>

### III. THE ALJ DID NOT ERR IN FINDINGS ON GROUNDWATER PROTECTION

In her PFD, the ALJ correctly determined that the Applicant met its burden of proof as to groundwater protection.<sup>4</sup> In his exceptions, Protestant rehashes much of the same arguments he made in his Closing Arguments and his Responsive Closing Argument.<sup>5</sup>

Protestant again complains that Lerin Hills did not demonstrate that the proposed discharge would maintain aquifer protection use as it applies to Upper Cibolo Creek. The ALJ found that the Applicant did and based her determination on several factors which indicate that potential contamination of the Edwards Aquifer by the proposed discharge is unlikely:

- (1) The discharge site is at least 14 miles from the Edwards Aquifer Recharge Zone;
- (2) The effluent limits in the Draft Permit for CBOD<sub>5</sub>, TSS, ammonia nitrogen, and phosphorus are equal to or more stringent than those required in Chapter 213 (the Edwards Aquifer Protection Rules) for dischargers located only up to five miles upstream from the Edwards Aquifer Recharge Zone; and

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<sup>2</sup> *Id.*

<sup>3</sup> See explanation in Lerin Hills' Exceptions at 23-25.

<sup>4</sup> PFD at 49.

<sup>5</sup> See Closing Arguments of Rick Wood and Responsive Closing Argument of Rick Wood.

- (3) The proposed discharge, assuming maximum flow and assuming that all of it reached Upper Cibolo Creek, represents only a minute fraction of the mean annual recharge volume to the Edwards Aquifer over the length of Cibolo Creek, and the recharge from Cibolo Creek only represents a small percent of the total recharge to the Edwards Aquifer.<sup>6</sup>

With regard to the large distance between the discharge site and the Edwards Aquifer Recharge Zone, Protestant ignores the fact that there are several impoundments along the discharge route that will act to sequester contaminants. Such sequestering can take the form of burial by sedimentation, uptake by aquatic vegetation, and sorption.<sup>7</sup>

Protestant also tries to argue that reliance on the effluent standards found in the Edwards Aquifer Rules at Chapter 213 is unjustified. Such argument is hopeless. These rules were promulgated for the very purpose of protecting the Edwards Aquifer. Further, the Lerin Hills proposed discharge effluent limits are more strict than those required under the Chapter 213 rules for facilities discharging just zero to five miles upstream from the Recharge Zone. In fact, according to the Edwards Aquifer rules at § 213.6(c), such discharges are required to have a phosphorus limit of 1.0 mg/L, which is twice as high as the phosphorus limitation for the proposed Lerin Hills discharge that would be located over 14 miles upstream from the closest point of the Recharge Zone. The Commission rules should be afforded substantial deference, especially as it relates to the purpose for which such rules were promulgated. Consequently, Protestant's argument on this issue fails.

Another important factor in demonstrating that the proposed discharge will maintain aquifer protection use of the Upper Cibolo Creek is that there is undisputed evidence, including

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<sup>6</sup> PFD at 48.

<sup>7</sup> See Tr. at 201, 214-215 (Price), Tr. at 339 (Lee).

modeling evidence, which showed that contaminant concentrations from the proposed discharge would reach background levels by the time such constituents left the Hahnfeld Pond,<sup>8</sup> which is approximately four and one-half miles upstream from the confluence of Frederick Creek and the Upper Cibolo Creek and is more than 10½ miles from the Edwards Aquifer Recharge Zone.<sup>9</sup> Thus, based on this testimony and modeling, there is virtually no likelihood that such constituents will have any effect whatsoever on the Edwards Aquifer.

Protestant also alleges that the ALJ erred based on the novel argument that the Tier 2 antidegradation review is required to be applied to evaluate the impacts, if any, of the proposed discharge on Upper Cibolo Creek for purposes of aquifer protection. In effect, Protestant argues that the no greater than *de minimis* impact analysis must be made on water quality of the Edwards Aquifer as a result of the proposed discharge's effects on Upper Cibolo Creek.

The ALJ correctly determined that Tier 2 analysis of any effects on Upper Cibolo Creek relating to aquifer protection is not required under the rules.<sup>10</sup> According to § 307.5(b)(2), Tier 2 analysis applies to waters that exceed fishable/swimmable quality, and fishable/swimmable waters are defined as "waters which have quality sufficient to support propagation of indigenous fish, shellfish, and wildlife and recreation in and on the water." Thus, the focus in Tier 2 review is to prevent degradation of fishable/swimmable quality waters. Further, the Implementation Procedures specify that antidegradation review under Tier 2 ensures that where water quality exceeds the normal range of fishable/swimmable criteria, such water quality (i.e., fishable/swimmable water) will be maintained.<sup>11</sup> In addition, the Implementation Procedures

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<sup>8</sup> See Applicant's Exceptions at 34-35; Tr. at 683-684 (Miertschin); Exhibit LH-2E (Miertschin Modeling).

<sup>9</sup> Compare Airey Prefiled, Exhibit ED-1 at 16:19-17:2; Kier Prefiled, Exhibit LH-3 at 10:1-2; Saldaña Prefiled, Exhibit ED-16 at 9:13-17, 11:7-16; and Slade Prefiled, Exhibit RW-3 at 8:1-12; with Exhibit LH-2E (Miertschin Modeling).

<sup>10</sup> PFD at fn. 178.

<sup>11</sup> Implementation Procedures at 30.

specify that Tier 2 generally applies to water bodies that have existing, designated, or presumed uses of contact recreation and intermediate, high, or exceptional aquatic life waters. Nowhere in the rules or Implementation Procedures does it specify or even intimate that Tier 2 review must be conducted on the impact to the water quality of an underlying or, in this case, a remote aquifer. Obviously, Tier 2 review of surface waters will have added benefits in addition to assuring nondegradation of fishable/ swimmable quality waters, and one of those benefits would be aquifer protection. Nevertheless, neither TCEQ rules nor policy require such review on actual impact on aquifer water quality.

Protestant cites preamble language from the Texas Register associated with promulgation of the Edwards Aquifers rules to support his theory. Nevertheless, those rules make it clear that aquifer protection use only applies to areas located in the contributing, recharge or transition zones of the Edwards Aquifer.<sup>12</sup> TCEQ rules define both the recharge zone and the contributing zone of the Edwards Aquifer.<sup>13</sup> Moreover, Upper Cibolo Creek after the confluence of Frederick Creek is upstream of the boundary of the defined contributing zone<sup>14</sup> and, therefore, is not subject to those rules.

In criticizing the ALJ's findings that the aquifer protection use of Upper Cibolo Creek will be protected by the vast amount of dilution that will occur to Lerin Hills' effluent before (and after) any of it reaches the Edwards Aquifer, Protestant makes a blatantly incorrect assertion regarding applicable law in saying "Dilution is simply not a valid basis for finding a permit in compliance with applicable water quality standards." This is simply, flatly wrong. Dilution is prohibited as a means of attainment of the nationwide *technology-based* effluent limitations promulgated by EPA under the authority of Sections 301 and 304 of the federal Clean Water

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<sup>12</sup> 30 T.A.C. § 307.10, Appendix A, fn. 3 to Table of Designated Segments in the San Antonio River Basin.

<sup>13</sup> 30 T.A.C. §§ 213.3(27), 213.22(2).

<sup>14</sup> Compare Exhibit LH-20 (Miertschin Map) with 30 T.A.C. § 213.22(2) Definition of "Contributing Zone."

Act, 33 U.S.C. §§ 1311 and 1314.<sup>15</sup> However, dilution *is* a well recognized, legally proper means for a discharger to meet water quality standards governed by Section 303 of the Clean Water Act,<sup>16</sup> both through combination of waste streams prior to determination of compliance with end-of-the-pipe *water quality-based* effluent limitations ("WQBELs") and through use of in-stream "mixing zones" in setting the WQBELs.<sup>17</sup> The impression to the contrary that Protestant attempts to convey is either misinformed or disingenuous.

In his exceptions, Protestant also complains that the ALJ erred by determining that specific design features of the proposed Lerin Hills Wastewater Treatment Plant ("the Plant") are required in order to demonstrate that the proposed site, when evaluated in light of the proposed design, construction, or operational features, minimizes possible contamination of surface water and ground water. The ALJ properly balanced the site selection provision of 30 T.A.C. § 309.12 with 30 T.A.C. § 217.6(a) regarding design phase plans and specifications, which are not required until after a facility's wastewater permit is approved. Section 309.12 of the Commission's rules require evaluation of the proposed site in light of conceptual design construction or operational features of the proposed Facility. Specific aspects of the design of the Facility, such as details of pressurized pipe that would transport treated effluent to the discharge point, assumptions regarding the BOD strength, determination of peak capacity for Facility elements, and further excess storage capacity in each phase of operation are, as the ALJ determined, properly addressed in the design phase and are addressed by the ED in his review of the plans and specifications under Chapter 217 regarding the design criteria for domestic

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<sup>15</sup> See 40 C.F.R. Part 25 Subpart A, Parts 407-71 (federal rules implementing Sections 301 and 304 by setting nationwide effluent limitations and pretreatment standards). This is the context in which the Fifth Circuit, in *Texas Municipal Power Agency v. EPA*, 836 F.2d 1482, 1488 (5th Cir., 1988), made the general statement which Protestant cites for support.

<sup>16</sup> 33 U.S.C. § 1313.

<sup>17</sup> See 40 C.F.R. § 122.44(d)(ii); 30 T.A.C. § 307.8(b); Implementation Procedures at 39-49; EPA Water Quality Handbook Ch. 5 § 5.1; *American Wildlands v. Browner*, 260 F.3d 1192, 1195, 1198 (10th Cir. 2001); *Marathon Oil Co. v. EPA*, 830 F.2d 1346, 1349 (5th Cir. 1987).

wastewater systems. Furthermore, the ALJ was correct in determining that such detailed design features of the proposed Facility are outside the scope of issues referred by the Commission.

#### **IV. PROTESTANT'S SUGGESTED ADDITIONAL CONCLUSIONS WOULD COMPOUND THE ALJ'S ERRORS OF LAW**

Protestant Rick Wood urges the ALJ to bolster her three Conclusions of Law relating to Surface Water Quality<sup>18</sup> with five more, two of which are extracted from her PFD<sup>19</sup> and three of which are simply manufactured by the Protestant.<sup>20</sup> In doing so, Protestant is effectively worsening the ALJ's misinterpretation and misapplication of the law.

By rejecting the ALJ's erroneous "Findings" that Tier 2 antidegradation analysis requires *quantitative estimates* of the amounts of phosphorus that will be biologically available over time and of the amounts of any resulting algal and plant growth,<sup>21</sup> the Commission will have removed the underpinnings of her erroneous Conclusion of Law that the evidence failed to support a conclusion that the Commission's antidegradation rule would be satisfied.<sup>22</sup> Upon doing so, the Commission certainly will not want to adopt additional conclusions supportive only of that existing erroneous Conclusion of Law.<sup>23</sup>

#### **V. CONCLUSIONS**

For the reasons described above, Protestant's exceptions to the PFD should be rejected. Further, Applicant respectfully requests, as it did in its exceptions to the PFD, that the Honorable

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<sup>18</sup> PFD, Proposed Conclusions of Law Nos. 5-7.

<sup>19</sup> Protestant's proposed Conclusions of Law 8 and 9, Protestant's Exceptions at 10-11.

<sup>20</sup> Protestant's proposed Conclusions of Law 7, 10, and 11, Protestant's Exceptions at 10-11.

<sup>21</sup> See ALJ's proposed Findings of Fact Nos. 40 and 43, PFD Proposed Order at 7.

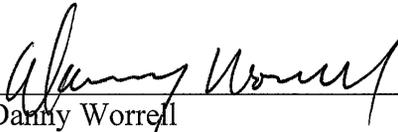
<sup>22</sup> See ALJ's proposed Conclusion of Law No. 7, PFD Proposed Order at 11-12.

<sup>23</sup> Moreover, these additional Conclusions of Law suggested by Protestant are themselves full of errors. The federal antidegradation regulation is not interpreted by EPA to contain an "absolute prohibition" on lowering water quality of fishable/swimmable waters (Protestant's proposed Conclusion of Law No. 7). See 63 Fed. Reg. 36,783 (July 7, 1998). Some of the examples provided by the Implementation Procedures of where degradation is unlikely and likely to occur *do* indicate that impact on existing uses is relevant to Tier 2 antidegradation analysis (Protestant's proposed Conclusion of Law No. 10). See Implementation Procedures at 32-34. Nothing on page 32 of the Implementation Procedures recognizes the relevance to Tier 2 antidegradation analysis of receiving water assimilative capacity in the case of pollutants for which there are no numerical water quality standards (Protestant's proposed Conclusion of Law No. 11).

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,

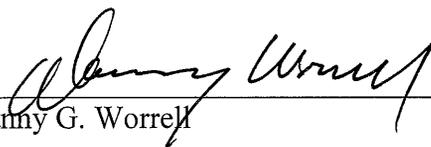
BROWN MCCARROLL, L.L.P.  
111 Congress Avenue, Suite 1400  
Austin, Texas 78701-4043  
(512) 479-1151 – Telephone  
(512) 479-1101 – Facsimile

By   
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Danny Worrell  
State Bar No. 22002000  
Jackson Battle  
State Bar No. 01918200

**CERTIFICATE OF SERVICE**

I hereby certify that on the 3<sup>rd</sup> day of April, 2009, a copy of Lerin Hills, Ltd.'s Reply to Exceptions to the Proposal for Decision was served on the following parties of record in this case via facsimile, certified mail, or hand delivery.

<p><u>FOR THE STATE OFFICE OF ADMINISTRATIVE HEARINGS:</u></p> <p>The Honorable Shannon Kilgore Administrative Law Judge State Office of Administrative Hearings 300 West 15th Street, Suite 502 Austin, Texas 78701 (512) 475-4993 - Telephone (512) 475-4994 - Facsimile</p> <p><u>FOR THE PROTESTANT:</u></p> <p>David Frederick, Attorney Eric Allmon, Attorney Lowerre &amp; Frederick 707 Rio Grande, Suite 200 Austin, Texas 78701 (512) 469-6000 - Telephone (512) 482-9346 - Facsimile</p> <p><u>FOR THE PUBLIC INTEREST COUNSEL:</u></p> <p>Amy Swanholm, Attorney Garrett Arthur, Attorney Texas Commission on Environmental Quality Public Interest Counsel, MC-103 12100 Park 35 Circle Building F, 4th Floor Austin, Texas 78753 (512) 239-5757 - Telephone (512) 239-6377 - Facsimile</p>	<p><u>FOR THE EXECUTIVE DIRECTOR:</u></p> <p>Kathy Humphreys, Staff Attorney Timothy J. Reidy, Staff Attorney Texas Commission on Environmental Quality Environmental Law Division, MC-173 12100 Park 35 Circle Building A, 3rd Floor Austin, Texas 78753 (512) 239-3417 - Telephone (512) 239-0606 - Facsimile</p> <p><u>FOR THE CHIEF CLERK:</u></p> <p>LaDonna Castañuela Texas Commission on Environmental Quality Office of Chief Clerk, MC-105 12100 Park 35 Circle Building F, 1st Floor (Room 1101) Austin, Texas 78753 (512) 239-3300 - Telephone (512) 239-3311 - Facsimile</p> <p>CHIEF CLERKS OFFICE 2009 APR - 3 PM 1:15 TEXAS COMMISSION ON ENVIRONMENTAL QUALITY</p>
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Danny G. Worrell