

Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*
Mark R. Vickery, P.G., *Executive Director*



TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2009 APR -3 PM 4:20

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY CHIEF CLERKS OFFICE

Protecting Texas by Reducing and Preventing Pollution

April 3, 2009

LaDonna Castañuela
Texas Commission on Environmental Quality
Attention: Docket Clerk, MC 105
P.O. Box 13087
Austin, Texas 78711-3087

Re: **Executive Director's Replies to Rick Wood's 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:

Please find enclosed the original and seven, true and correct copies of the Executive Director's Replies to Rick Wood's Exceptions to the Proposal for Decision in the above referenced matter.

For further questions or inquiries, I can be contacted at (512) 239-3417.

Sincerely,


Kathy J. Humphreys
Staff Attorney
Environmental Law Division

Enclosure

cc: Mailing List

Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*
Mark R. Vickery, P.G., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

April 3, 2009

The Honorable Shannon Kilgore
Administrative Law Judge
State Office of Administrative Hearings
P.O. Box 13025
Austin, Texas 78711-3025

Re: **Executive Director's Replies to Rick Wood's 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

To the Honorable Judge Kilgore:

Please find enclosed a copy of the Executive Director's Replies to Rick Wood's Exceptions to the Proposal for Decision in the above referenced matter.

For further questions or inquiries, I can be contacted at (512) 239-3417.

Sincerely,

A handwritten signature in cursive script, appearing to read "Kathy J. Humphreys".

Kathy J. Humphreys
Staff Attorney
Environmental Law Division

Enclosure

cc: Mailing List

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

2009 APR -3 PM 4: 20

APPLICATION BY
LERIN HILLS, LTD
FOR TPDES PERMIT
NO. WQ0014712001

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BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

CHIEF CLERKS OFFICE

**EXECUTIVE DIRECTOR'S REPLIES TO RICK WOOD'S EXCEPTIONS TO THE
PROPOSAL FOR DECISION**

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

The Executive Director of the Texas Commission on Environmental Quality (TCEQ) submits the following reply (Reply) to Rick Wood's exceptions (Exceptions) to the Proposal for Decision (PFD) relating to the application by Lerin Hills, Ltd. (the Applicant) for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014712001 (the Application) in Kendall County, Texas.

I. THE PERMIT WILL BE PROTECTIVE OF GROUNDWATER

A. Executive Director's Antidegradation Review of Groundwater

Rick Wood argues that the record does not support the ALJ's conclusion that a Tier 1 review for groundwater was not performed. Mr. Wood is incorrect. As Mr. Schaefer testified, he assigned contact recreation and high aquatic life use to impounded Deep Hollow Creek and Frederick Creek.¹ Mr. Schaefer performed a Tier 1 review and concluded that the existing water quality uses would not be impaired by the Lerin Hills discharge.² Mr. Schaefer also performed a Tier 2 antidegradation review and determined that the addition of an effluent limit of 0.5 mg/L

¹ ED-9, Page 6, Lines 1-4.

² ED-9, Page 9, Lines 18-21.

for Total Phosphorus would help preclude degradation of impounded Deep Hollow Creek or Frederick Creek.³

Mr. Wood also argued that the Executive Director did not properly consider aquifer protection in his Tier I evaluation of the Lerin Hills application. A specific Tier 1 finding that aquifer protection use will be maintained is only applicable for discharges over the Edwards Aquifer recharge zone, contributing zone or transition zone.⁴ Ms. Mary Ann Airey testified that the proposed discharge location is more than 13 miles from the Edwards Aquifer recharge zone and more than ten miles upstream of the contributing zone.⁵ The proposed discharge is to the north/north-west of the recharge zone; therefore, the proposed discharge is not on, nor even near, the transition zone.⁶ Because the proposed discharge is not on the recharge, contributing or transition zone, aquifer protection use was not a use considered in the Executive Director's Tier 1 review.

B. Protection of Groundwater

The permit as drafted will be protective of groundwater. The Texas Water Code states that it is the goal of the groundwater policy to protect the existing quality of groundwater from degradation "consistent with the protection of the public health and welfare, the propagation and protection of terrestrial and aquatic life, the protection of the environment, the operation of

³ ED-12.

⁴ 30 TAC § 307.7(b)(2)(A)(ii) (2009) (Tex. Comm'n on Env. Quality, Tex. Surface Water Quality Standards).

⁵ ED-1, Page 16, Lines 19-23; Page 17, Lines 1-2.

⁶ 30 TEX. ADMIN CODE § 213.3(36) (2009) (Tex. Comm'n on Env. Quality, Tex. Surface Water Quality Standards) The Edwards Aquifer transition zone is defined as "[t]hat area where geologic formations crop out in proximity to and south and southeast of the recharge zone and where faults, fractures, and other geologic features present a possible avenue for recharge of surface water to the Edwards Aquifer, including portions of the Del Rio Clay, Buda Limestone, Eagle Ford Group, Austin Chalk, Pecan Gap Chalk, and Anacacho Limestone."

existing industries, and the maintenance and enhancement of the long-term economic health of the state.”⁷ However, the “goal of nondegradation does not mean zero-contaminant discharge.”⁸

The Executive Director carefully evaluated the juxtaposing circumstances outlined in the statute during his evaluation of this application, and as a result imposed very stringent effluent limits. The imposition of strict effluent limits ensures that existing uses are maintained and groundwater is not impaired. TCEQ and its predecessor agencies have had specific rules for the Edwards Aquifer for approximately 38 years.⁹ In 1996, the Commission adopted rules requiring effluent limits for discharges upstream of the Edwards Aquifer recharge zone.¹⁰ The Commission has not amended 30 TAC § 213.6(c) since it was initially adopted, even though other subsections of Chapter 213 have been amended, including section 213.6 which was amended in 1999.¹¹ Moreover, as Mary Ann Airey testified, the proposed discharge location is more than 13 miles from the Edwards Aquifer recharge zone, yet the effluent limits are more stringent than would be required for discharges less than five miles from the recharge zone.¹²

C. Design and Operation of the Wastewater Treatment Plant (WWTP)

The Executive Director does not require applicants to provide the final design of a WWTP before the permit is issued, and as noted by the ALJ, the plant design requirement is beyond the scope of issues referred to SOAH by the Commission. The Commission referred the question of whether the proposed facility would comply with the siting requirements in 30 TAC

⁷ TEX. WATER CODE § 26.401(b)(Vernon Ann. 2009).

⁸ *Id.*

⁹ 23 Tex.Reg. 10399 (1998) (to be codified as an amendment to 30 TEX. ADMIN CODE §§ 213.3-.10) (Tex. Nat. Resource Conservation Comm’n).

¹⁰ 21 Tex. Reg. 6562 (1996) *adopted* 21 TexReg 12125 (1996) (codified at 30 TEX. ADMIN CODE §§ 213.1-.14).

¹¹ 23 TexReg 10477 (1999) (to be codified as an amendment to 30 TEX. ADMIN CODE §§ 213.3-.10) (Tex. Nat. Resource Conservation Comm’n).

¹² ED-1; Page 17, Lines 6-18; Page 18, Unnumbered Table).

§ 309.12 to SOAH for consideration during the contested case hearing.¹³ The TCEQ is prohibited from issuing a permit for a new facility unless it finds that the proposed site, when evaluated in light of the *proposed* design, construction or operational features, minimizes possible contamination of surface water and groundwater (emphasis added).¹⁴ As part of his review, the Executive Director determined that the design of the proposed WWTP meets all applicable TCEQ rules and regulations.¹⁵ Moreover, according to TCEQ's rules, "[a]n owner is not required to submit collection system or treatment facility plans and specifications for approval prior to the commission issuing the facility's wastewater permit."¹⁶

Nothing in the rule indicates that the applicant must submit the final design in the application, and requiring the applicant to do so would be nonsensical and wasteful. As part of the application process, applicants provide the effluent limits they propose,¹⁷ a description of the proposed treatment process,¹⁸ and a flow diagram.¹⁹ The Executive Director often imposes different (typically more stringent) effluent limits, which may require the applicant to use a different treatment process.

In this case, Lerin Hills proposed effluent limits of 5 mg/l Carbonaceous Biochemical Oxygen Demand (5-day)(BOD₅); 10 mg/l Total Suspended Solids (TSS); and 1 mg/l Ammonia Nitrogen (NH₃-N).²⁰ After performing his review, the Executive Director recommended an effluent set that included an additional effluent limit of 0.5 mg/l Total Phosphorus, a more

¹³ Interim Order, Provision (5)(D).

¹⁴ 30 Tex. Admin. Code § 309.12 (2009) (Tex. Comm'n on Env. Quality, Domestic Wastewater Effluent Limitation and Siting).

¹⁵ ED-1, Page 7, Lines 16-18.

¹⁶ 30 TAC § 217.6(a).

¹⁷ Application, Domestic Technical Report 1.1, Page 6.

¹⁸ Application, Domestic Technical Report 1.1, Attachment 6.

¹⁹ Application, Domestic Technical Report 1.1, Attachment 7.

²⁰ LH-1B, Domestic Technical Report 1.1, Page 6.

stringent limit of 5 mg/l TSS and monitoring requirements for Nitrate-nitrogen and Total Nitrogen.²¹ At the hearing, Mr. Teague Harris, the engineer for Lerin Hills, testified that the treatment process proposed in the application had to be modified to include chemical addition facility to precipitate phosphorus because of the Total Phosphorus limit the Executive Director imposed in the draft permit as a result of the antidredging review.²²

The Lerin Hills draft permit requires that before construction begins Lerin Hills must submit a summary submittal letter and, if requested by the Executive Director, Lerin Hills must submit plans, specifications and a final engineering design report.²³

II. ADDITIONAL CONCLUSIONS OF LAW ARE NOT NECESSARY

Rick Wood urges the ALJ incorporate five additional Conclusions of Law in her PFD. The Executive Director believes that any of the additional Conclusions are unnecessary, incomplete, and erroneous given the record. In addition, the Executive Director specifically excepts to Rick Wood's proposed Conclusions 9, 10 and 11.

Rick Wood's proposed conclusion 9 is incomplete. While Mr. Woods is correct that according to 30 TAC § 307.5(c)(2)(B) "[t]he highest water quality sustained since November 28, 1958 (in accordance with EPA Standards Regulation 40 CFR [Part] 131) defines baseline conditions for determinations of degradation," but he neglects to include the clarifying information from the *Implementation Procedures* which provide "[b]aseline conditions are estimated from existing conditions, as indicated by the latest edition of the Texas Surface Water Quality Inventory or other available information, unless there is information indicating that

²¹ ED-8, Pages 2, 2b.

²² LH-1, Page 5, lines 14-18.

²³ EH-8, Page 23, Item 7. (Item 7 references 30 TAC 317.1, Chapter 317 was repealed in August 2008, therefore if the draft permit is issued the Chapter 317 reference will be updated to 217.)

degradation in ambient water quality has occurred in the receiving waters since November 28, 1975.”²⁴ Accordingly, Rick Wood’s proposed conclusion 9 should not be incorporated in the PFD.

Rick Wood’s proposed conclusion 10 is confusing at best, at worst it is a misstatement of the law.²⁵ A Tier 1 review ensures that existing water quality uses are not impaired by increases in pollution loading;²⁶ a Tier 2 review ensures that where water quality exceeds the normal range of fishable/swimable criteria, such water quality will be maintained unless lowering it is necessary for important economic or social development.²⁷ Accordingly, Rick Wood’s proposed conclusion 10 should not be incorporated into the PFD.

Rick Wood’s proposed conclusion 11 is simply wrong.²⁸ According to the page 32 of the *Implementation Procedures* (ED-11), “[f]or constituents that have *numerical criteria* in the water quality standards, the following equation may be used to estimate changes in assimilative capacity (emphasis added).” Moreover the paragraph following the equation acknowledges that a change in assimilative capacity is a screening procedure. Accordingly, Rick Wood’s proposed conclusion 11 should not be incorporated in the PFD.

III. CONCLUSION

The Executive Director concludes that Lerin Hills, Ltd. has satisfied all applicable statutory and regulatory requirements in its application for Texas Pollutant Discharge Elimination System

²⁴ ED-11, Page 31.

²⁵ Rick Wood’s proposed conclusion 10 is “[n]either State regulation nor the TCEQ’s surface water quality Implementation Procedures indicate that impact on existing uses is relevant to the Tier 2 antidegradation analysis. (Tier 1 antidegradation analysis seeks to ensure that existing uses are protected. 30 TAC § 307.5(b)(1).”

²⁶ ED-11, Page 24.

²⁷ ED-11, Page 30.

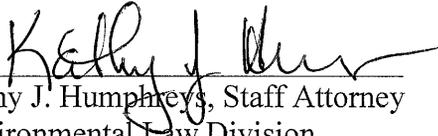
²⁸ Rick Wood’s proposed conclusion is “[t]he Implementation Procedures, themselves, page 32, recognize the relevance to Tier 2 antidegradation analysis of receiving water assimilative capacity, even in the case of pollutants for which there are no numerical water quality standards.”

(TPDES) Permit No. WQ0014712001, and that Draft TPDES Permit No. WQ0014712001 meets all applicable statutory and regulatory requirements and can be issued without any additional provisions.

Respectfully submitted,
Texas Commission on Environmental Quality

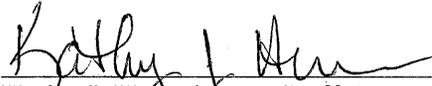
Mark R. Vickery, P.G.
Executive Director

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By 
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REPRESENTING THE EXECUTIVE
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QUALITY

CERTIFICATE OF SERVICE

I certify that on April 3, 2009, a copy of the foregoing Executive Director's Replies to Rick Wood's Exceptions to the PFD was filed with the Office of the Chief Clerk and sent by first class, agency mail and/or facsimile to the persons listed in the attached mailing list:



Kathy J. Humphreys, Staff Attorney
Environmental Law Division

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CHIEF CLERKS OFFICE

MAILING LIST
For
LERIN HILLS, LTD.
SOAH DOCKET NO. 582-08-0690
TCEQ DOCKET NO. 2007-1178-MWD
PERMIT NO. WQ0014712001

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