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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

June 17, 2009

Texas Commission on Environmental Quality
12100 Park 35 Circle
Building F, 4th Floor
Austin, Texas 78711-3025

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2009 JUN 17 PM 4:01
CHIEF CLERKS OFFICE

Re: Lerin Hills Ltd.'s Revised Proposed Order
Application of Lerin Hills Ltd., for TPDES Permit No. WQ0014712001
SOAH DOCKET NO. 582-08-0690, TCEQ DOCKET NO. 2007-1178-MWD

Dear Chairman and Commissioners:

OPIC cannot agree to the form of the Applicant's proposed *Order Concerning the Application by Lerin Hills, Ltd., for TPDES Permit No. WQ0014712001* (Order). The Applicant's changes to the Administrative Law Judge's (ALJ) Conclusions of Law Nos. 6 and 7 do reflect the majority consensus of the Commission on this matter. Yet, many of the Applicant's changes to the Surface Water Quality section of the Findings of Fact go beyond what appears to be necessary to reflect the Commission's reasoning for altering the ALJ's conclusions of law.

Specifically, the Applicant unnecessarily deletes language from the ALJ's Findings of Fact Nos. 32, 36, 37, and 39. In addition the Applicant has unnecessarily deleted the ALJ's Findings of Fact Nos. 38, 40, 43, and 46. OPIC does not disagree with the form of the Applicant's changes to the ALJ's Findings of Fact Nos. 31 and 45 changes, as they appear to reflect the Commission's reasoning for overturning the ALJ's Conclusions of Law Nos. 6 and 7.

If the Commission approves the Order in the form proposed by the Applicant, without additional explanation and revision to the Applicants proposed changes to the Surface Water Quality section of the Findings of Fact, the ensuing order may conflict

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with Texas Government Code (TGC) § 2001.058(e)¹ as well as § 2003.047(m)², which apply when the Commission alters or reverses an ALJ's proposal for decision.³ Furthermore, the order may conflict with established caselaw interpreting these statutes.⁴

Therefore, OPIC cannot agree with the Applicant as to the form of its proposed Order, and asks the Commission to consider any changes, omissions or additions to the ALJ's findings of fact and conclusions of law in light of relevant caselaw, statutes, and rules.

Sincerely,



Amy Swanholm
Assistant Public Interest Counsel

cc: Service List

¹TGC § 2001.058(e) states: "A state agency may change a finding of fact or conclusion of law made by the administrative law judge, or may vacate or modify an order issued by the administrative judge, only if the agency determines:

- (1) that the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies provided under Subsection (c), or prior administrative decisions;
- (2) that a prior administrative decision on which the administrative law judge relied is incorrect or should be changed; or
- (3) that a technical error in a finding of fact should be changed.

The agency shall state in writing the specific reason and legal basis for a change made under this subsection." (emphasis added).

² TGC § 2003.047 (m) states: "Except as provided in Section 361.0832, Health and Safety Code, the commission shall consider the proposal for decision prepared by the administrative law judge, the exceptions of the parties, and the briefs and argument of the parties. *The commission may amend the proposal for decision, including any finding of fact, but any such amendment thereto and order shall be based solely on the record made before the administrative law judge. Any such amendment by the commission shall be accompanied by an explanation of the basis of the amendment.* The commission may also refer the matter back to the administrative law judge to reconsider any findings and conclusions set forth in the proposal for decision or take additional evidence or to make additional findings of fact or conclusions of law. The commission shall serve a copy of the commission's order, including its finding of facts and conclusions of law, on each party." (emphasis added).

³ The TCEQ falls within Chapter 2001's definition of "state agency" in TGC § Section 2001.003(7). Although Chapter 2003 governs TCEQ contested case hearings, 2003.047(n) states that "the provisions of Chapter 2001 shall apply to contested case hearings for the commission to the extent not inconsistent with this section." As TGC § 2001.058(e) and TGC § 2003.047(m) are not inconsistent, both statutes apply to TCEQ actions.

⁴ See, among others, *Texas State Board of Medical Examiners v. Dunn*. No. 03-03-00190-CV, 2003 WL 22721659, 3 (Tex.App. Austin, Nov. 20, 2003, no pet.) (not designated for publication) (discussing courts' deference to an agency's decision to modify or reject an ALJ's conclusions, and adjudicative vs. legislative facts); *Granek v. Texas State Bd. of Medical Examiners*, 172 S.W.3d 761, 781 (Tex.App. Austin 2005, no pet.) (an agency "is required to explain with particularity its specific reason and legal basis for each change made" to an ALJ's finding of fact or conclusion of law); *Pierce v. Texas Racing Com'n*. 212 S.W.3d 745, 755 (Tex.App. Austin 2006, pet. denied); *Jordon Paving Corp. v. Texas Dept. of Transp.*, 2009 WL 1607916, 8 (Tex.App. Austin, 2009) (discussing due process rights of parties to a contested case hearing).

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