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Blas J. Coy, Jr., *Public Interest Counsel*

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

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2009 APR -3 PM 2:47
CHIEF CLERKS OFFICE

RE: **LERIN HILLS, LTD.**
SOAH DOCKET NO. 582-08-0690
TCEQ DOCKET NO. 2007-1178-MWD

Dear Judge Kilgore:

Enclosed for filing is the Public Interest Counsel's Exceptions to the Administrative Law Judge's Proposal for Decision in the above-entitled matter.

Sincerely,


Amy Swanholm, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 • P.O. BOX 13087 • AUSTIN, TEXAS 78711-3087 • 512-239-6363

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TCEQ DOCKET NO. 2007-1178-MWD

2009 APR -3 PM 2: 47

LERIN HILLS, LTD.
TPDES PERMIT NO.
WQ1104712001
KENDALL COUNTY

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BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL
QUALITY
CHIEF CLERKS OFFICE

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S REPLY TO LERIN HILLS
LTD.'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S PROPOSAL
FOR DECISION**

To the Members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (TCEQ or the "Commission") submits this reply to *Lerin Hills, Ltd's Exceptions to the Administrative Law Judge's Proposal for Decision*. OPIC did not file exceptions to the Honorable Judge Kilgore's *Proposal for Decision and Order Concerning the Application by Lerin Hills Ltd., for TPDES Permit No. WQ0014712001* (PFD) because the Administrative Law Judge (ALJ) correctly applied the law and soundly supported her conclusions with facts within the record. OPIC files this brief only for the limited purpose of responding to Lerin Hills Ltd's (Lerin Hills or Applicant) argument in Section III of its brief, regarding administrative standing.

I. INTRODUCTION

Lerin Hills, Ltd. ("Lerin Hills" or "Applicant") applied to the TCEQ for a new permit to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 500,000 gallons per day. The proposed location for the Lerin Hills wastewater treatment plant is approximately 4.1 miles west of Interstate Highway 10, as measured along State Highway 46, and then approximately 200 feet west from that point on State Highway 46 in Kendall County. The treated effluent will be discharged to an unnamed tributary; then to the headwaters of an impoundment on Deep Hollow Creek;

then to Deep Hollow Creek; then to Frederick Creek; then to the Upper Cibolo Creek in Segment No. 1908 of the San Antonio River Basin. According to the Executive Director's (ED) technical summary, the unnamed tributary is unclassified receiving water with no significant aquatic life uses. The impoundment on Deep Hollow Creek and Deep Hollow Creek have high aquatic life uses, and the designated uses for Segment No. 1908 are high aquatic life uses, public water supply, aquifer protection, and contact recreation.

The agency received Lerin Hills' application on May 3, 2006. On October 26, 2007, the Commission issued an Interim Order naming Rick Wood an affected person, denying two other hearing requests, and referring seven issues to the State Office of Administrative Hearings (SOAH) for a contested case hearing.¹

On January 8, 2008, the ALJ held a preliminary hearing on the matter. During the hearing, she took testimony from witnesses seeking party status and determined that Rick Wood (Wood or Protestant) was an affected person. Four other requests for party status were denied. On February 1, 2008, Lerin Hills filed a motion to reconsider whether Rick Wood was an affected person. In the alternative, Lerin Hills requested the ALJ send certified questions to the Commission.

In *Order No. 2*, signed February 26, 2008, Judge Kilgore re-visited the evidence and considered parties' arguments on this matter. She denied Lerin Hills' motions and reaffirmed Rick Woods as an affected person for the purposes of the contested case hearing. She also denied Lerin Hills' motion to certify a question to the Commission. On November 18, 2008, SOAH held a hearing on the merits.

¹ Issues referred were;

1. Whether the proposed discharge will be in compliance with regulations that are intended to protect groundwater and surface water;
2. Whether the effluent limitations in the draft permit are protective of water quality and the designated uses of the receiving waters;
3. Whether the permit would authorize the Applicant to discharge the appropriate amount of wastewater based on the service area projections;
4. Whether the proposed facility would comply with the siting requirements of 30 TAC § 309.12;
5. Whether the facility will meet the rule requirements intended to reduce nuisance odor conditions;
6. Whether the Applicant's compliance history is such that the permit should not be issued;
7. Whether Other Requirements No. 1 (p. 23) and Operational Requirements No. 4 (p. 10) of the draft permit with regard to the plant operator and safety requirements are sufficient to ensure compliant plant operations.

II. APPLICABLE LAW CONCERNING ADMINISTRATIVE STANDING

Administrative standing for TCEQ contested cases is, by statute and rule, dependent upon, *inter alia*, a showing that the request for a contested case hearing was submitted by an “affected person.” TEX. WATER CODE § 5.556(c) (2004). The statutory definition of “affected person” is “a person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing” that is not “an interest common to members of the general public.” TEX. WATER CODE § 5.115(a). The statute then directs the commission to specify factors to be considered in the determination of an affected person based on the program in which the contested case arises.

The commission’s rules provide that all factors shall be considered, including such relevant factors as:

- (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.²

In a hearing request, a requestor does not need to show that they will ultimately prevail on the merits, but must show that they will “potentially suffer harm or have a justiciable interest that will be affected.”³ A hearing requestor need only raise specific concerns about the possible negative impacts the permitted entity could have on the

² 30 TAC § 55.203(c).

³ *United Copper Industries, Inc. v. Grissom*, 17 S.W.3d 797, 803 (Tex. App. – Austin 2000), citing *Heat Energy Advanced Technology, Inc. v. West Dallas Coalition for Environmental Justice*, 962 S.W.2d 288 (Tex. App. – Austin 1998).

requestor's stated interest to show that she is more likely than other members of the general public to be adversely affected.⁴

Administrative standing encompasses a broad group of protestants because the right to appear in an administrative proceeding is construed more liberally than standing for judicial review.⁵ Texas courts have held that injury to recreational interests may be sufficient to confer judicial review standing,⁶ if the interest is not common to members of the general public.⁷ As administrative standing is broader than standing to seek judicial review, and courts have found that recreational interests suffice to confer judicial review standing, recreational use interests must also satisfy administrative standing requirements.

Although courts distinguish standing to participate in an administrative hearing from standing to seek judicial review of agency action,⁸ courts have also held that the "affected person" standing test used by TCEQ is synonymous to the APA judicial review test of "aggrieved person."⁹ The *Texas Rivers* court held that injury to recreational interests suffices to confer standing to seek judicial review.¹⁰ *Texas Rivers* involved an individual appellant who claimed injury to aesthetic and recreational interests in a river and owned property fronting part of the Guadalupe River affected by a water diversion permit.¹¹ The court also granted organizational standing to the Texas Rivers Protection

⁴ *Id.* at 803.

⁵ *Railroad Comm'n of Texas v. Ennis Transp. Co.*, 695 S.W.2d 706, 710; *Texas Industrial Traffic League*, 628 S.W.2d 187, 196; *Fort Bend County v. Texas Parks & Wildlife Comm'n*, 818 S.W.2d 898, 899.

⁶ *Housing Authority of the City of Harlingen v. State*, 539 S.W.2d 911, 913-914 citing *Ass'n of Data Processing Service Org. v. Camp*, 397 U.S. 150; *City of Bells v. Greater Texoma Utility Authority*, 790 S.W.2d 6, 11.

⁷ *Hunt v. Bass*, 664 S.W.2d 323, 324.

⁸ *Stone v. Texas Liquor Control Board*, 417 S.W.2d 385, 386; *Hooks v. Texas Dep't of Water Res.*, 602 S.W.2d 389, 391, *rev'd on other grounds*, 611 S.W.2d 417; *Texas Industrial Traffic League v. Railroad Comm'n of Texas*, 628 S.W.2d 187, 197.

⁹ *Texas Rivers Protection Ass'n v. TNRCC*, 910 S.W.2d 147, 151; *Hooks v. Texas Dep't of Water Resources*, 611 S.W.2d 417 (Tex.1981) (harmonizing, specifically, the judicial review provisions of the Water Code with the judicial review provisions of the APA, rather than interpreting the Water Code's administrative standing test in conjunction with the APA judicial review standard) citing *City of San Antonio v. Texas Water Comm'n*, 407 S.W.2d 752, 765 (Tex.1966).

¹⁰ *Id.* at 151-152.

Association after a member testified that he conducted canoeing trips on the affected part of the river and that the proposed discharge would harm his business opportunities.¹²

Federal case law establishes that recreational uses are justiciable interests not common to the general public when supported by affidavits showing specific facts that the party would be directly affected.¹³ In *Laidlaw*, Plaintiffs affidavits stating they fished, camped, walked, birdwatched, picnicked, swam, or canoed as far as 40 miles downstream from the discharge point fulfilled the “injury in fact” test.¹⁴ In *Sierra Club*, the Court determined that a recreational interest plaintiff only need allege that they use the affected area and the aesthetic and recreational value of the area will be lessened by the proposed activity.¹⁵

III. THE ALJ’S DECISION ON STANDING WAS CORRECT

This issue has already been considered twice by the ALJ, and in both instances, she concluded that Rick Wood is an affected person. OPIC asks that the Commissioners review Judge Kilgore’s *Order No. 2* in its entirety, as it explains the evidence before her when she was evaluating whether Rick Wood should gain party status and her reasoning for finding that Rick Wood is an affected person.

A. Facts relied upon by Judge Kilgore.

Order No. 2 describes Rick Wood as living on “property that directly abuts the property”¹⁶ where the wastewater treatment plant would have been built. It also states

¹¹ *Id.*

¹² *Id.*

¹³ *Friends of the Earth (FOE) v. Laidlaw Env’tl Services*, 528 U.S. 167, 180-184; *Sierra Club v. Morton*, 405 U.S. 727, 735.

¹⁴ 528 U.S. 167, 181-183.

¹⁵ 405 U.S. 727, 735.

¹⁶ Attachment 1 containing *Order No. 2*, page 2.

that his home is about 2,800 feet from the site of the proposed plant.¹⁷ His land is adjacent to land owned by his father-in-law. Rick Wood testified that his family uses the entire combined acreage. The creek where the proposed discharge would flow into does not flow adjacent to or through Mr. Wood's deeded property. But, it does pass through the larger family acreage owned by Wood's father-in-law and there is no barrier to distinguish between these two pieces of property.¹⁸ The creek is also connected to a pond where Wood and his family swim and fish. The pond, in addition to a water well used by the family, is within a mile of the discharge point as shown on application maps.¹⁹

B. Judge Kilgore correctly applied the law.

First, an affected person is "one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application."²⁰ When analyzing whether Wood was an affected person, Judge Kilgore first stated that an affected person's interest, under 30 TAC § 55.203 can be economic, recreational, or environmental, citing *Texas Rivers Protection Ass'n v. TNRCC*, 910 S.W. 2d 147, 151-152 (Tex App.- Austin 1995, Writ Denied).²¹ Because Wood testified that he and his children regularly use the pond on the family acreage, he has recreational and environmental interests. In addition, Judge Kilgore mentioned that the dispute over the location of the discharge point strengthened Wood's argument but was not necessary to his status as an affected person. Lerin Hills does not dispute that Wood has shown he has a personal justiciable interest.

¹⁷ *Id.* at 2.

¹⁸ *Id.* at 3.

¹⁹ Lerin Hills argues in its *Exceptions* that there was no inconsistency regarding the location of the discharge point, but this was not clear prior to the contested case hearing. *Order No. 2* states, "Lerin Hills does not directly address Mr. Wood's contention that the discharge points on the map and in the prose description are different." *Order No. 2*, p. 3.

²⁰ Texas Water Code (TWC) § 5.115(a); 30 TAC § 55.203(a). Note that OPIC uses the two tiered structure presented in TWC § 5.115(a) rather than the multilevel analysis often conducted by OPIC in response to hearing requests. The two tiered organizational structure was used by Judge Kilgore in *Order No. 2* and not disputed by Lerin Hills in its *Exceptions*. Therefore OPIC adheres to this two-tiered structural analysis for ease of comparison.

²¹ *Order No. 2*, at 4.

Second, that interest must be related to a legal right, duty, privilege, power, or economic interest.²² Judge Kilgore found that Wood's use of his family's property is a privilege, under TWC § 5.115(a). *Order No 2* states;

His [Wood's] wife's family permits him and his children to use the property, and to use the stream itself and the nearby well; they are not trespassers, but enjoy special permission to make use of the resources.

Therefore, she concluded that Wood is an affected person and allowed him to participate as a party to contested case hearing.

In the Applicant's *Exceptions*, it argues that Wood did not show he was an affected person because it believes the applicable language means Wood must show his privilege is also a *legal* privilege. Judge Kilgore specifically rejected this argument in *Order No. 2*, stating;

If "legal" modifies all the words in the series, it must modify "economic interest." However, the phrase "legal economic interest" makes no sense. Moreover, as Mr. Wood points out, Texas case law tends toward liberal construction of laws providing for the right of participation in administrative cases. In light of this tradition, it makes even less sense to adopt Lerin Hill's syntactically awkward interpretation of the rule.²³

Furthermore, Judge Kilgore found that, considering the factors listed in 30 TAC § 55.203(c), Wood showed he was affected. He provided evidence showing there was a reasonable relationship between his interests and the proposed discharge by showing that he used the receiving waters.²⁴ He also showed that the regulated activity would have a likely impact upon his use of natural resources²⁵ because Wood testified that algae blooms can create water quality problems in the pond his family uses, and that these blooms interfere with his family's use of the pond for swimming and fishing.²⁶ The ALJ

²² TWC § 5.115(a); 30 TAC § 55.29.

²³ *Order No. 2* at 4-5.

²⁴ 30 TAC § 55.203(c)(3).

²⁵ 30 TAC § 55.203(c)(4).

²⁶ *Order No. 2* at 5.

ultimately ended up recommending denial of the permit based partially on nutrient issues, the presence of which can lead to algae blooms.

C. Legislative history.

Applicant's reference to a case²⁷ interpreting the Code Construction Act²⁸ actually confirms Judge Kilgore's common sense interpretation of TWC § 5.115. There, the court stated that it should read words and phrases in context and construe them according to the rules of grammar and common usage. A "straightforward reading" of the disputed language led the court to conclude that the adjective "negligent" modified the words "act," "error" and "omission," instead of just "act." Applicant believes this case stands for the proposition 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."²⁹ This is incorrect.

First, the word "legal" is not an adjective describing the term "right," but a part of the two-word term, "legal right."³⁰

Second, in *Carothers*, the court focused on reading the words in context, and according to the rules of grammar. It also gave the statute a "straightforward reading." Using these tenants, the court concluded that *in that specific situation*, that's what made sense.

In this situation, common sense dictates that "legal" only applies to "right." This interpretation makes sense in the context of the statute. It conforms to the common usage of the term "legal right," and the nonexistent usage of the term "legal economic interest." And as Judge Kilgore notes, to read the language otherwise would be "syntactically awkward."³¹

²⁷ *Applicant's Exceptions* at 11, citing *Consol. Reinforcement v. Carothers Exec. Homes, Ltd.*, 271 S.W.3d 887, 892 (Tex App.-Austin 2008, no pet.).

²⁸ Texas Government Code (TGC) § 311.011(a) "Words and phrases shall be read in context and construed according to the rules of grammar and common usage."

²⁹ *Applicant's Exceptions* at 11.

³⁰ See Black's Law Dictionary 8th Edition, by Bryan A. Garner, defining "legal right" as, among other things, "a right created or recognized by law." There are no entries for the terms "legal right" "legal duty," "legal privilege," "legal power" or "legal economic interest."

³¹ *Order No. 2* at 4-5.

The Applicant also argues that “legal” should modify every term except for “economic interest” and that this is what the legislature intended by adding the term “economic interest” at the last moment. There is no evidence within the legislative history of why this term was inserted. Applicant cites to no testimony confirming its assertion that “legal” modifies “right,” “duty,” “privilege,” and “power.” The legislative history only shows definitively that “legal” does not modify “economic interest.”³²

When the Legislature enacts statutes, it is presumed that “public interest is favored over any private interest.”³³ It is also presumed that “the entire statute is intended to be effective.”³⁴ Further, legislative history is only one element that a court may consider among other matters when it construes the meaning of a statute³⁵ and in this situation, Judge Kilgore gave it the proper weight and consideration.

IV. ORDER NO. 2 IS CONSISTANT WITH PRIOR COMMISSION DECISIONS

The Commission has previously considered whether to grant contested case hearings to requestors based on their stated recreational interests in the impacted natural resource.³⁶ In *Eastman*, Mr. Keith Weaver asked for a contested case hearing based on the impacts of the proposed discharge on the Sabine River and, thereby, on his interest in fishing on the river. Mr. Weaver also expressed concern about the impact of air pollutants and odors from the waste water treatment facility on his property, his family and his home. He owned land near the facility, although the interest he claimed was not that of a nearby landowner, but a recreational user of the Sabine River. Despite

³² *Applicant's Exceptions* at 13, citing Tex S.B. 1546 74th Leg., R.S. (1995).

³³ TGC § 311.021(5).

³⁴ TGC § 311.021(2).

³⁵ TGC § 311.023(3).

³⁶ See *Application of Eastman Chemical Company for an Industrial Waste Discharge Permit*, TNRCC Dkt. No. 97-1058-IWD (Permit No. 00471, Commission Order Issued January 21, 1998); *Application of Dos Republicas Resources Company, Inc., for an Industrial Waste Discharge Permit*, TNRCC Dkt. No. 94-0446-IWD (Permit No. 03511, Commission Order Issued November 29, 1994).

recommendations by the ED and OPIC to the contrary, the Commissioners denied the hearing request. The Commissioners' denial of Eastman's recreational use hearing request was overturned in District Court.³⁷ The Travis County District Court stated:

“the TNRCC erred in determining that Mr. Weaver's hearing request did not present an adequate basis for a hearing. The request for hearing adequately alleged that Mr. Weaver is an affected person and adequately alleged a reasonable basis for a hearing. Further, given the facts alleged, TNRCC could not determine that the request did not meet the requirements of TEX. WATER CODE § 5.115 without providing Mr. Weaver an opportunity to present his evidence.”³⁸

In *Dos Republicas*, the Commission granted a hearing request based on the impacts of proposed discharges on waters used for recreational purposes.³⁹ The hearing requestor also owned property in the vicinity of the proposed facility.

Unlike the protestant in the *City of Castroville*, Wood himself owns property near the proposed facility. Although he accesses the waterway through his father-in-law's property, he owns land next to his father-in-law's property, very close to the proposed facility. These two properties are not divided by any fencing. Wood and his family also use a well that is located within a mile from the proposed facility location, and within a mile of the proposed discharge point ascertainable from application maps. Therefore, Judge Kilgore's decision that Wood is an affected person is not in conflict with the Commission's recent decision in the *City of Castroville*.

V. PROPERTY OWNERSHIP IS IMMATERIAL TO RECREATIONAL INTEREST

Even if Wood had not stated that he owns property in the area, his interest and the interests of his children in recreating in the pond downstream from the proposed

³⁷ *Application of Eastman Chemical Company for an Industrial Waste Discharge Permit*, TNRCC Dkt. No. 97-1058-IWD (Permit No. 00471, Commission Order Issued January 21, 1998).

³⁸ *Weaver v. TNRCC*, No. 98-04623, slip op. at 1 (Dist.Ct. – Travis, May 5, 1999).

³⁹ *Application of Dos Republicas Resources Company, Inc., for an Industrial Waste Discharge Permit*, TNRCC Dkt. No. 94-0446-IWD (Permit No. 03511, Commission Order Issued November 29, 1994).

discharge point are enough to establish that Wood has a personal justiceable interest.⁴⁰ Property ownership in the area is not a requirement for a finding that a protestant possesses a recreational interest, although it is one way in which a protestant may show that her recreational interest is “related to a legal right, duty, privilege, power, or economic interest affected by the application.”⁴¹

Federal cases have allowed standing for recreational use interests without an additional showing that the requestor or plaintiff also owned property nearby.⁴² Further, administrative standing is often interpreted to be more permissive, or broad, than judicial standing.⁴³ And there is no requirement, in Texas case law or in TCEQ statutes and regulations, that a hearing requestor claiming a recreational interest must also own property in the area. Logically, individuals who live close to a natural resource are more likely to recreate there. It also makes sense that nearby property owners possess a “legal right, duty, privilege, power, or economic interest that could be impacted.”⁴⁴ Yet an individual who travels across Texas to, for example, fish for a certain type of fish in a waterway known to carry trophy sized specimens of that fish, may possess just as strong an interest as the individual from down the street who frequently walks their dog along the same waterway or swims there with their children.

In this case, though, it is immaterial whether a property interest is required or not required for an individual asserting a recreational interest to be found “affected.” Wood has shown he owns property near the facility and discharge route, his family owns property bisected by the discharge route, and he has unfettered access to his family’s land and the potentially impacted waterway. He has also shown that he and his family swim and fish in the potentially impacted waterway and use a well less than a mile from the proposed facility and discharge point.

⁴⁰ This is the first step in the two-step analysis under TWC § 5.115(a) and 30 TAC § 55.203(a).

⁴¹ This is the second step in the two-step analysis under TWC § 5.115(a) and 30 TAC § 55.203(a).

⁴² *Friends of the Earth (FOE) v. Laidlaw Env'tl Services*, 528 U.S. 167, 180-184; *Sierra Club v. Morton*, 405 U.S. 727, 735.

⁴³ *Railroad Comm'n of Texas v. Ennis Transp. Co.*, 695 S.W.2d 706, 710; *Texas Industrial Traffic League*, 628 S.W.2d 187, 196; *Fort Bend County v. Texas Parks & Wildlife Comm'n*, 818 S.W.2d 898, 899.

⁴⁴ TWC § 5.115(a); 30 TAC § 55.203(a).

V. CONCLUSION

OPIC agrees with and supports Judge Kilgore's *Proposal for Decision and Order Concerning the Application by Lerin Hills Ltd., for TPDES Permit No. WQ0014712001*. She correctly applied the law and soundly supported her conclusions with facts within the record. Furthermore, her decision in *Order No. 2* was correct and should be adopted along with the rest of the PFD.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By:


Amy Swanholm

Assistant Public Interest Counsel

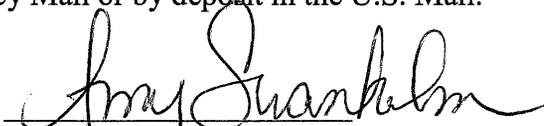
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CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2009, the original and seven true and correct copies of the Office of the Public Interest Counsel's *Reply to Lerin Hills, Ltd's Exceptions to the Administrative Law Judge's Proposal for Decision* were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.


Amy Swanholm
Assistant Public Interest Counsel

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2009 APR -3 PM 2:47
CHIEF CLERKS OFFICE

Attachment 1

Order No. 2
Denying Motions for Reconsideration
and to Certify Questions

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

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

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**BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS**

**ORDER NO. 2
DENYING MOTIONS FOR RECONSIDERATION AND TO CERTIFY QUESTION**

I. Introduction

Lerin Hills, Ltd., (Lerin Hills) applied to the Texas Commission on Environmental Quality (TCEQ or the Commission) for a wastewater permit for a new treatment facility to be built in Kendall County. On October 26, 2007, the Commission issued an Interim Order naming Rick Wood as an affected person, denying two other hearing requests, and ordering that the case be referred to the State Office of Administrative Hearings (SOAH) for a hearing on a specified list of issues. On January 8, 2008, the undersigned SOAH administrative law judge (ALJ) convened a preliminary hearing in this case. At the preliminary hearing, the ALJ took testimony from witnesses in support of applications for party status and determined that Rick Wood is an affected person entitled to be a party to this contested case proceeding. The ALJ denied four other applications for party status, and established a schedule for the hearing process.

On February 1, 2008, Lerin Hills filed 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. On February 15, 2008, Mr. Wood filed a response to Lerin Hill's motion, and Lerin Hills, in turn, filed a reply on February 19, 2008.

After re-visiting the evidence and considering the arguments of the parties, the ALJ concludes that Lerin Hills' motions should be denied.

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II. The Governing Rule

The Commission's rule at 30 TEX. ADMIN. CODE § 55.203, which governs questions of party status, reads as follows:

(a) For any application, an affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest.

(b) Governmental entities, including local governments and public agencies, with authority under state law over issues raised by the application may be considered affected persons.

(c) In determining whether a person is an affected person, all factors shall be considered, including, but not limited to, the following:

- (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.

III. The Evidence

Mr. Wood lives on property that directly abuts the property on which the proposed wastewater treatment plant will be built.¹ His home is approximately 2,800 feet from the site of the proposed plant and about 2,400 feet from the discharge point as identified by map in the application.

¹ Mr. Wood's testimony is at Tr. at 17-51.

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Mr. Wood holds title to approximately 12 acres of land. His land is adjacent to, and not separated by fencing from, about 150 acres owned by his father-in-law. Mr. Wood testified that his family uses the entire combined acreage.

The discharge from the plant, according to the application, would flow into an intermittent stream that, in turn, flows into Deep Hollow Creek. This creek does not pass adjacent to or through Mr. Wood's deeded property. The creek does pass directly through the larger family acreage owned by Mr. Wood's father-in-law. That property has a pond in the creek that Mr. Wood and his children use for fishing and swimming. Further, there is a well on the family property, near to the pond, that Mr. Wood and his family use. There is also a well on Mr. Wood's property. The pond and well on the family property are within a mile – as the crow flies – from the plant and discharge sites, and are slightly more than a stream-mile from the discharge point as shown on maps in the application.

According to Mr. Wood, there is a disparity between the location of the discharge point as identified by map in the application, on the one hand, and the discharge point as identified in prose description in the application, on the other hand. The discharge point as described, says Mr. Wood, is actually about only 100 feet from his property, and "it's debatable whether the discharge crosses my deeded property before it gets into Deep Hollow Creek."² Lerin Hills asserts in argument that there is no ambiguity about the location of the discharge point and suggests that Mr. Wood was confusing it with another, different proposed discharge location in the petition for the creation of the Lerin Hills Municipal Utility District.³ However, Lerin Hills does not directly address Mr. Wood's contention that the discharge points on the map and in the prose description are different.

² Tr. at 21.

³ 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 at 7-8.

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IV. Analysis of Party Status Question

The ALJ agrees with Lerin Hills that the more clear-cut case for party status in a wastewater discharge hearing involves a downstream riparian landowner. However, the record amply shows that Mr. Wood's circumstances bring him within the ambit of § 55.203.⁴

First, the rule requires that an affected person have an interest that might be affected. Case law makes clear that the interest can be economic, recreational, or environmental.⁵ Mr. Wood, who testified that he and his children make regular use of the pond on the family acreage, has recreational and environmental interests at stake here.⁶

Second, the interest must be related to a legal right, duty, privilege, power, or economic interest. Mr. Wood's use of his family's property is a privilege. His wife's family permits him and his children to use the property, and to use the stream itself and the nearby well; they are not trespassers, but enjoy special permission to make use of the resources.

Lerin Hills argues that, to fall within the rule, Mr. Wood must show that his privilege is a legal privilege – that when the rule says an affected person is “one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application,” the word “legal” modifies “privilege.” The ALJ disagrees with Lerin Hills' reading. If “legal” modifies all the words in the series, it must modify “economic interest.” However, the

⁴ The ALJ independently determines, based on sworn testimony in the record, that Mr. Wood is an affected person. Therefore, there is no need for the ALJ to consider Lerin Hills' assertions that the Commission, in finding he was an affected person, relied on his allegedly misleading assertions about the location of his property. Even if the ALJ had no authority to make such an independent determination, the ALJ believes any potentially misleading assertions by Mr. Wood (if indeed there were any) are not material to a determination of his status as affected person.

⁵ Texas Rivers Protection Ass'n v. Texas Natural Resource Conservation Commission, 910 S.W.2d 147, 151-152 (Tex. App.—Austin 1995, writ denied).

⁶ Mr. Wood's assertion that the Lerin Hills application is ambiguous with respect to the location of the discharge point – thereby possibly meaning that the discharge would flow much closer to his property – somewhat strengthens, but is not necessary to, his status as an affected person.

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phrase "legal economic interest" makes no sense. Moreover, as Mr. Wood points out, Texas case law tends toward liberal construction of laws providing for the right of participation in administrative cases. In light of this tradition, it makes even less sense to adopt Lerin Hill's syntactically awkward interpretation of rule 55.203(a).

Next, the interest cannot be common to members of the general public. Mr. Wood certainly meets this requirement; he and his children enjoy a portion of the receiving stream that is not open to the public. That Mr. Wood himself owns property not separated by any physical barrier from the larger family tract makes his interest stronger and more unique. He is not an occasional guest from a remote place, but is an adjacent landowner who routinely uses the resource in question.

Finally, subsection (c) of the rule provides a list of factors to be considered in determining who is an affected person under the rule. They speak of the relationship between the interest claimed and the activity regulated. There is no question that Mr. Wood's use of the receiving stream into which Lerin Hills' discharge would flow establishes such a connection. Another factor is the likely impact of the regulated activity on use of the impacted natural resource by the person. Mr. Wood testified that algae blooms in upstream impoundments and in his family pond can create water quality problems that could interfere with the use of his family's pond for swimming and fishing.

Lerin Hills incorrectly states that "a legal interest, such as title to or lease of real property, is required for standing in TCEQ cases."⁷ Lerin Hills cites to several cases to support this assertion, but none of the cases cited states that a person must have a property interest or be a riparian

⁷ 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 at 12.

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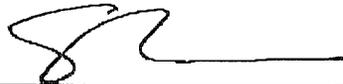
landowner to be an affected person.⁸ Rule 55.203 itself does not require title to or lease of real property directly on the receiving stream.

Mr. Wood has established that he is an "affected person" for purposes of this hearing process. Lerin Hills' motion for reconsideration is denied.

V. Motion to Certify Question

Lerin Hills requests the ALJ to certify to the Commission the question whether someone like Mr. Wood, who is not a riparian landowner, can be an affected person under Rule 55.203. Lerin Hills argues that granting Mr. Wood affected party status "has the potential to significantly broaden the scope of that term, as defined under TCEQ rules and related precedent."⁹ As discussed above, the ALJ is unpersuaded that there exists any indication, in the language of the rule itself or in case law, that such ownership (or lease) of property is necessary. There is no need to seek guidance from the Commission. Lerin Hills' motion to certify a question to the Commission is denied.

SIGNED February 26, 2008.



SHANNON KILGORE
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

⁸ The very first case is an air quality case that discusses where the person affected "lives" but makes no mention whatsoever of any interest in real property. *United Copper Indus. V. Grissom*, 17 S.W.3d 797 (Tex. App.—Austin 2000). The other two cases involve water issues but neither establishes a rule that a riparian interest is necessary to meet the requirements of status as an affected person. In another case cited to by Lerin Hills, a woman who had once held title to property that had since been deeded to her children was determined not to be an affected party. However, there is nothing in the decision suggesting that the record included facts about her use and enjoyment of her relatives' property, and such facts are central to Mr. Wood's status as an affected person. *Elizondo v. Texas Natural Resource Conservation Comm'n*, 974 S.W.2d 928 (Tex. App.—Austin 1998).

⁹ 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 at 17.

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