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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

May 11, 2007

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

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2007 MAY 11 PM 4: 27
CHIEF CLERKS OFFICE

**RE: GEM SEAL OF TEXAS, INC. V. CITY OF AUSTIN
TCEQ DOCKET NO. 2006-0056-MIS**

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Brief in Response to Gem Seal's Petition for Review in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Christina Mann" followed by a smaller signature that appears to be "bpjler".

Christina Mann, Attorney
Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2006-0056-MIS

IN THE MATTER OF
THE PETITION FILED
BY GEM SEAL OF
TEXAS, INC FOR
REVIEW OF CITY OF
AUSTIN ORDINANCE
NO. 20051117-070

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BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL
QUALITY

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S
BRIEF IN RESPONSE TO GEM SEAL INC'S PETITION FOR REVIEW**

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

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas
Commission on Environmental Quality (the Commission or TCEQ) and files this brief in
the above-referenced matter.

I. PROCEDURAL BACKGROUND

On November 17, 2005, City of Austin Mayor Will Wynn signed Ordinance No.
20051117-070, relating to the use of coal tar pavement products (the Ordinance). The
Ordinance became effective January 1, 2006.¹ Texas Water Code § 26.177(d) and 30
T.A.C. § 86.51- 86.59 provide authority and mechanism for an affected person to appeal
an action of a city (such as the Ordinance) related to water pollution control and
abatement outside the corporate limits of the city. Gem Seal, Inc. (Gem Seal) filed a
Petition for Review of the Ordinance on January 17, 2006 (the Petition). Gem Seal
appealed the Ordinance within 60 days of the enactment of the Ordinance, as required by
Water Code § 26.177(d) and 30 T.A.C. § 86.54. The City of Austin filed an Answer on

¹ See City of Austin Ordinance No. 20051117-070, and 20051201-016 (an ordinance amending the
original ordinance to correct a topographical error)

February 6, 2006, within 20 days of the filing of the Petition as allowed by 30 T.A.C. § 86.56.

The matter has been set for Commission consideration at the June 27, 2007 public meeting by the General Counsel through a letter dated April 27, 2007.

II. DISCUSSION

The Petition complies with the requirements of 30 T.A.C. § 86.55

Gem Seal identifies itself as the party seeking Commission review and the City of Austin as the City whose action is being appealed.² 30 T.A.C. § 86.55 (1) and (2). Gem Seal also identifies the Ordinance it is appealing (and attaches the Ordinance) and details when the City of Austin (the City) enacted the Ordinance.³ 30 T.A.C. § 86.55 (3) and (4). Gem Seal provides a list of known persons, in addition to Gem Seal, likely to be adversely affected by the Ordinance, and the Ordinance itself describes the area in which these persons would be affected.⁴ 30 T.A.C. § 86.55 (5). Gem Seal provides a concise summary of facts and arguments and asks for relief from the Commission by overturning the Ordinance in its entirety. 30 T.A.C. § 86.55 (6) and (7). Therefore, it is appropriate for the Commission to consider the Petition. 30 T.A.C. § 86.57

The Petition does not raise facts or legal arguments which warrant modification of the Ordinance

The Ordinance prohibits use of coal tar pavement products within the City's planning jurisdiction, with certain exceptions. The Ordinance itself does not specify the purpose of the coal tar ban. Nevertheless, in their respective filings, both Gem Seal and

² See Petition for Review of City of Austin Ordinance No. 20051117-070 filed by Gem Seal, Inc. January 17, 2006., Page 1

³ *Id.* at 2. OPIC notes that the City of Austin has objected to jurisdiction based upon whether the correct version of the Ordinance had been attached to the original filing. OPIC finds that this requirement has subsequently been met and that no unfair surprise has resulted for any party.

⁴ *Id.* at 4.

the City acknowledge that the purpose of the Ordinance is to address polycyclic aromatic hydrocarbons (PAHs), which have been found to be present in waterways with Austin. The central dispute between these parties is whether or not the Ordinance is a valid, reasonable, efficient and/or effective method to address this concern. However, Gem Seal also argues there is not much of a concern because a 2003 Commission report found that the levels present “do not pose an imminent human health risk” and that the extent of PAH contamination is actually “relatively limited.”⁵ Gem Seal also identifies other sources of PAHs but states that the City found that the PAHs in Barton Creek were primarily attributable to coal tar-based sealants.

Gem Seal requests that the Commission find the Ordinance to be arbitrary, inefficient, unreasonable and/or ineffective because the City did not establish:

- 1) that the PAHs were attributable in any significant degree to coal tar-based sealants;
- 2) whether the PAHs were substantially attributable to other sources;
- 3) whether there exist less restrictive means to effectuate the goals of the Ordinance;
- 4) whether there are alternate risks associated with the ban;
- 5) whether the PAHs levels were serious enough, representing an “imminent risk to human health or life.”

The City responds to Gem Seal’s concern that the City acted without sufficient scientific information by concisely detailing the City’s evaluation of PAH data. The City further dismisses Gem Seal’s implied contention that the PAHs found must present some sort of imminent threat to human health. The City states that it considered other alternatives and found them impractical. The City also found that the harm associated with continued use of coal tar-based sealants outweighed risks resulting from a ban.

The language in Texas Water Code § 26.177(d) provides the Commission with a limited scope of review of the City’s Ordinance. The only considerations are “whether

⁵ *Id* at 3

the action or program is invalid, arbitrary, unreasonable, inefficient, or ineffective in its attempt to control water quality.” The statute requires that the Commission give deference to the City and places a limited burden on the City to demonstrate its reasoning for enactment of the Ordinance. Gem Seal does not provide any argument or fact that suggests that the Ordinance will have no positive effect on water quality. Rather, Gem Seal argues that the levels of PAHs are not of *imminent* concern to human health, or could be addressed in another way. Gem Seal further complains that other sources of PAHs are not also regulated.

OPIC cannot find that the City is under an obligation to wait until PAHs are of imminent concern to human health. OPIC agrees with the City that it has the authority to regulate for protection of the local aquatic communities. Likewise, the City has no burden to demonstrate that it is regulating all sources of PAHs. The City is first regulating what it considers to be the largest source of PAHs. This does not preclude future additional regulation of other sources of PAHs. As an entity with authority to regulate pollutants within its planning jurisdiction, the City has ample discretion to choose which method it finds to be most cost effective and efficient in removing a source of PAHs from the watershed.

The Petition does not warrant referral to the State Office of Administrative Hearings (SOAH)

The Commission may refer the appeal to SOAH for hearing prior to Commission decision 30 T.A.C. § 86.57. OPIC does not find that there is an issue of fact which would be appropriate for referral to SOAH. The studies related to the PAH contamination in Austin’s water referred to by the parties have already been concluded. From the filings available, OPIC notes that the City has identified its concerns related to PAH

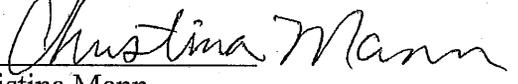
contamination, and the basic premise that PAHs are found in coal tar-based sealants and in the waterways running through the City is unchallenged by Gem Seal. If this premise were not established, then a fact finding by SOAH would be appropriate. The only questions remaining are legal or policy questions, and are therefore appropriate for the Commission to answer, particularly with the amount of discretion afforded the City by Texas Water Code § 26.177. OPIC further expects and encourages the parties to provide copies of the completed studies referenced in their respective filings as attachments to the reply brief.

III. CONCLUSION

OPIC recommends the Commission issue an order affirming the City of Austin's Ordinance relating to the use of coal tar pavement products. OPIC does not find that Gem Seal has raised an issue of fact appropriate for referral to SOAH. In addition, OPIC finds that the City acted well within its discretion to protect water quality and Gem Seal has not presented any evidence or argument that would allow the Commission to overturn the Ordinance.

Respectfully submitted,

Blas Coy, Jr.
Public Interest Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2007 the original and eleven true and correct copies of the Office of the Public Counsel's Brief in Response to Gem Seal Inc.'s Petition 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.


Christina Mann, Assistant Public Interest Counsel

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TCEQ DOCKET NO. 2006-0056-MIS

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