

Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*



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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 4, 2008

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
2008 JAN -4 PM 3:39
CHIEF CLERKS OFFICE

**RE: CITY OF PORT ARTHUR
TCEQ DOCKET NO. 2007-0599-MSW**

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Preliminary Response to Motion to Overturn in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Vic McWherter".

Vic McWherter, Senior Attorney
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

P.O. Box 13087 • Austin, Texas 78711-3087 • 512-239-1000 • Internet address: www.tceq.state.tx.us

printed on recycled paper using soy-based ink

TCEQ DOCKET NO. 2007-0599-MSW

2008 JAN -4 PM 3: 39

MOTION TO OVERTURN THE
EXECUTIVE DIRECTOR'S
TEMPORARY AUTHORIZATION
RE: ALTERNATIVE DAILY COVER
AT THE PORT ARTHUR LANDFILL

§
§
§
§
§
§

BEFORE THE TEXAS
CHIEF CLERKS OFFICE
COMMISSION ON
ENVIRONMENTAL QUALITY

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S
PRELIMINARY RESPONSE TO MOTION TO OVERTURN**

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

The Office of Public Interest Counsel ("OPIC") of the Texas Commission on Environmental Quality ("the Commission" or "TCEQ") files this preliminary response to Texas Campaign for the Environment's Motion to Overturn the Executive Director's (ED) November 28, 2007 temporary authorization regarding alternative daily cover. This action authorized the Port Arthur landfill to use as alternative daily cover waste containing concentrations in excess of 1500 mg/kg of total petroleum hydrocarbons. For the reasons discussed below, the Office of Public Interest Counsel recommends that the Commission set this matter for further briefing and, based on information known at this time, OPIC recommends granting the motion to overturn.

I. INTRODUCTION

The City of Port Arthur holds MSW Permit 1815A which authorizes the operation of its Type I MSW landfill located in Jefferson County on State Highway 73, approximately 1.1 miles southwest of the bridge over Taylor Bayou. The permit authorizes disposal of household waste, yard waste, commercial waste, Class 2 nonhazardous industrial waste, Class 3 nonhazardous industrial waste and construction/demolition waste. (Permit 1815A Provision II B.) The City is

prohibited from disposing of Class 1 nonhazardous waste by Permit 1815A Provision II C. OPIC is unaware of any subsequent authorization allowing the City to dispose of any specific Class 1 waste at its landfill. On November 28, 2007, the executive director authorized the City to use alternative daily cover consisting of waste with concentrations of total petroleum hydrocarbons in excess of 1500 mg/kg. As it appears that the City of Port Arthur landfill could not accept this Class 1 waste for disposal, the question arises as to whether such waste may be accepted for alternative daily cover.

II. APPLICABLE LAW

The definition of Class 1 waste is set forth in the Commission's rules at 30 TAC §330.3(21) as follows: "Class 1 wastes--Any industrial solid waste or mixture of industrial solid wastes that because of its concentration, or physical or chemical characteristics is toxic, corrosive, flammable, a strong sensitizer or irritant, a generator of sudden pressure by decomposition, heat, or other means, or may pose a substantial present or potential danger to human health or the environment when improperly processed, stored, transported, or disposed of or otherwise managed, as further defined in §335.505 of this title (relating to Class 1 Waste Determination)."

In turn, 30 TAC §330.505(6) provides that a waste is a Class 1 waste if it is identified as a Class 1 waste in §335.508 relating to the Classification of Specific Industrial Solid Wastes. With respect to the particular waste at issue in this matter, 30 TAC §335.508(6) provides as follows: "Where hydrocarbons cannot be differentiated into specific petroleum substances, then such wastes with a TPH concentration of greater than 1,500 ppm shall be classified as a Class 1

waste.”¹

In order for a facility to receive authorization to dispose of Class 1 waste when its permit does not specifically authorize disposal of such waste, the permittee must make a specific written request to the executive director. 30 TAC §330.173(d). Moreover, class 1 waste containing total petroleum hydrocarbons in concentrations exceeding 1500 parts per million may only be disposed in dedicated cells that meet the requirements of §330.331(e) of this title (relating to Design Criteria).

Finally, under 30 TAC §330.165(d) (5): “Alternative daily cover must not exceed constituent limitations imposed on waste authorized to be disposed at the facility.”

III. DISCUSSION

In accordance with the applicable law set forth above, OPIC concludes that waste containing concentrations of total petroleum hydrocarbons in excess of 1500 kg/mg (or one part per million) is classified as Class 1 nonhazardous industrial waste. The City's permit does not authorize disposal of this waste; in fact, the permit expressly prohibits the disposal of Class 1 waste. Furthermore, in order for the City to be authorized to dispose of Class 1 waste containing these concentrations of hydrocarbons, the City would have to submit a detailed written request to the executive director and would also be required to have special dedicated landfill cells specifically designed for the disposal of this waste. 30 TAC §330.173(d); §330 171(b)(4). OPIC is unaware of any authorization ever issued to the City to dispose of this type of Class 1 waste.

¹ 1,500 mg/kg equals a concentration of 1,500 parts per million.

Therefore, it appears that allowing the material in question to be used as alternative daily cover would violate §330.156(d)(5)'s mandate that that alternative daily cover must not exceed constituent limitations imposed on waste authorized to be disposed at the facility.

OPIC is aware of the provisions of 30 TAC §330.156(d) (4)(B) which allow an applicant to make a demonstration to the executive director that material containing concentrations in excess of 1500 mg/kg of total petroleum hydrocarbons can be a suitable cover and that use of such material will be adequately protective of human health and the environment. Here, it appears that the City has attempted to avail itself of these provisions and make such a demonstration. The City's revised October 8, 2007 submittal states at page 5: "Newpark ADC contains a concentration of Total Petroleum Hydrocarbons (TPH) that exceed 1,500 mg/Kg as specified in 30 TAC §330.165(d)(4)(B). Therefore this TA [temporary authorization] includes a demonstration for Executive Director approval that the Newpark ADC is a suitable alternative daily cover."

Here, however, reliance on the demonstration allowed under §330.165(d)(4) disregards the existence of the unequivocal prohibition stated in §330.165(d)(5). The §330.165(d)(5) prohibition on using material as cover that is not authorized for disposal at the landfill contains no provisions allowing for an exception upon a demonstration made under §330.165(d)(4). Furthermore, §§330.165(d)(4) and (5) may be read in harmony. Giving both provisions of the rule effect, this type of class 1 waste could be used as alternative daily cover at a landfill only if the landfill is authorized to accept such waste for disposal, assuming the required demonstration is made under §330.165(d)(4). However, if the landfill is not authorized to dispose of such waste, the

unequivocal prohibition of §330.165(d)(5) would appear to disallow the use of waste containing concentrations in excess of 1500 kg/mg from being used as alternative daily cover.

IV CONCLUSION

For these reasons, OPIC respectfully requests that the Commission set the pending motion for further briefing and for consideration at a future agenda. Based on the information OPIC has received to date, OPIC has formed a preliminary conclusion that the motion should be granted. OPIC will reconsider this position if this matter is set for Commission consideration and further briefs are filed providing additional information.

Respectfully submitted,
Blas J. Coy, Jr.
Public Interest Counsel

By *Vic McWherter*
Vic McWherter, Senior Attorney
State Bar No. 00785565
Office of Public Interest Counsel
P.O. Box 13087 MC 103
Austin, Texas 78711
(512)239-6363 PHONE
(512)239-6377 FAX

CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2008 the original and eleven true and correct copies of the Office of the Public Interest Counsel's Preliminary Response to Motion to Overturn was 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.

Vic McWherter
Vic McWherter

MAILING LIST
MOTION TO OVERTURN TEMPORARY AUTHORIZATION ISSUED TO CITY OF
PORT ARTHUR LANDFILL
TCEQ DOCKET NO. 2007-0599-MWD

FOR THE CITY OF PORT ARTHUR

Mr. John A. Comeaux, P.E.
Director of Public Works
City of Port Arthur
444 Fourth Street
Port Arthur, TX 77640

FOR THE EXECUTIVE DIRECTOR:

Guy Henry, Senior Attorney
Texas Commission on Environmental Quality
Environmental Law Division, MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-0600
Fax: (512) 239-0606

FOR THE CHIEF CLERK:

LaDonna Castañuela
Texas Commission on Environmental Quality
Office of Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-3300
Fax: (512) 239-3311

FOR MOVANT TEXAS CAMPAIGN FOR
THE ENVIRONMENT

Eric Allmon
Lowerre & Frederick
44 East Ave., Ste. 100
Austin, Texas 78701-4386