TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

February 26, 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

RE: **MCCARTY ROAD LANDFILL, Texas, LP**
TCEQ DOCKET NO. 2006-1830-MSW

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Response to Requests for Hearing the above-entitled matter.

Sincerely,

Scott A. Humphrey, Attorney
Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2006-1830-MSW

APPLICATION BY McCARTY ROAD LANDFILL TX, LP FOR AMENDMENT TO MSW PERMIT NO. 261B	§ § § §	**BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO REQUESTS FOR HEARING

TO THE MEMBERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Response to Requests for Hearing in the above-referenced matter.

I. INTRODUCTION

McCarty Road Landfill TX, LP (McCarty or Applicant) has submitted a permit application to amend its existing Type I Municipal Solid Waste Landfill Permit No. 261B. McCarty seeks a vertical expansion and continued operation of its existing landfill in Harris County, Texas. The maximum final elevation of final cover material would be 316.0 feet above mean sea level (MSL).

The solid waste to be disposed will primarily consist of municipal solid waste resulting from, or incidental to, municipal, community, commercial, institutional, recreational and industrial activities, including garbage, putrescible wastes, rubbish, ashes, brush, street cleanings, dead animals, abandoned automobiles, construction-demolition waste and yard waste. Class 1 nonhazardous industrial solid waste defined as such due to asbestos content, Class 2

nonhazardous industrial solid waste, Class 3 nonhazardous industrial solid waste, special waste (*e.g.*, solidified sludges, dead animals, empty containers, regulated and nonregulated asbestos-containing materials), and other waste as approved by the Executive Director (ED), may also be accepted. The landfill will not be authorized to accept waste materials other than those mentioned above, nor any waste streams that are expressly prohibited by Title 30 of the Texas Administrative Code (30 TAC) Chapter 330.

Over the anticipated life of the facility, authorized wastes will be accepted at an average rate of approximately 6,352 tons-per-day, which results in an estimated life of approximately 10.9 years. The site currently receives approximately 2,190,000 tons-per-year or 2,777,425 cubic yards (assuming an in-place density of 1,577 lb/cy) of solid waste (6,000 tons-per-day based on a typical 365-day operating schedule). It is assumed that the incoming waste rate will increase at the same rate as the population of Harris, Montgomery and Liberty counties and surrounding areas. The maximum annual waste acceptance rate is projected to be 2,577,625 tons-per-year or 3,268,567 cubic yards (assuming an in-place density of 1,577 lb/cy) of solid waste (7,061 tons-per-day based on a 365-day operating schedule). These projections are based on current market conditions and may vary as market conditions change.

The Applicant's landfill is located within the City of Houston in Harris County, Texas at 5757A Oates Road, approximately 7 miles northeast of downtown Houston and approximately 3.5 miles north-northeast of the intersection of Interstate Highway 610 and Interstate Highway 10. The total area within the permit boundary under the proposed permit amendment would be approximately 458.25 acres.

The permit application was received on April 6, 2004 and declared administratively

complete on April 19, 2004. The Notice of Receipt and Intent to Obtain Permit was published April 29, 2004 in the *Houston Chronicle*. The TCEQ held a public meeting on December 2, 2004 at the Shadydale Elementary School in Houston. The Notice of Application and Preliminary Decision was published on January 14, 2005 in the *Houston Chronicle*. The comment period formally closed on February 14, 2005. Subsequently, the Applicant submitted a revision to its Site Operating Plan (SOP) due to revisions to the Municipal Solid Waste Rules adopted in 2004. In response to comments from United States Representative Green, the ED extended the comment period to accept and consider public comments on the permit amendment until June 15, 2005.

In response to the notices, the TCEQ received requests for a contested case hearing from the following: Martina Cartwright, representing the Environmental and Justice Law Center, on behalf of Northeast Environmental Justice Association (NEEJA); Martina Cartwright, representing the Environmental Law and Justice Center, on behalf of Terry Downing, Nancy Crnkovic, Wallace R. Romero, Nora Fisher, Katherine & C.G. Barr, Roy & Donna McCandless, Roy & Adlea Villareal, Tonya Senegal, Earsey & Mary Ross, Mary Dorsey, Marilyn & James Henderson, Adolph Hartman, Alice C. Lux, Lena & Dan Hernandez, Maryland Whittaker, Shirley & Steven Ray Perkins, Thelmarie & Walter Tharp, Willie Thomas, Thomas & Effie Walker, Jerestene Leath, James Mukes Jr., C.L. Broussard, Vernita Johnson, Gloria & Andrew McCausland, Ollie Roberson, Cassie & James Bowie, James & Mary Gray, Micky & Gene Fish, Velma & General Washington Jr., Raul Aranda, Thomas E. Green, Ernest M. Black, Arthur & Doris Campbell and Gumesindo & Isaura Santos; and Kenneth Ramirez, representing Weingarten Realty Investors, WRI/7080 Express Lane, Inc., AN/WRI Partnership, Ltd., An/WRI

Partnership #1, Ltd. and Eagle Ind., L.P. (collectively as Weingarten). OPIC recommends granting all of the hearing requests and referring this matter to the State Office of Administrative Hearings (SOAH).

II. REQUIREMENTS OF APPLICABLE LAW

Under the applicable statutory and regulatory requirements, a person requesting a hearing must file the request in writing with the chief clerk no later than 30 days after the Chief Clerk's transmittal of the Executive Director's response to comments. 30 TAC § 5.201(c). The request must also substantially comply with the following: give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; identify the requestor's personal justiciable interest affected by the application showing why the requestor is an "affected person" who may be adversely affected by the proposed facility or activity in a manner not common to members of the general public; request a contested case hearing; list all relevant and material disputed issues of fact that were raised during the comment period that are the basis of the hearing request; and provide any other information specified in the public notice of application. 30 TAC § 55.201(d).

Under 30 TAC § 55.203(a), 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." This justiciable interest does not include an interest common to the general public. 30 TAC § 55.203(c) also provides relevant factors that will be considered in determining whether a person is affected. These factors include:

(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, safety, and 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.

The Commission shall grant an affected person's timely filed hearing request if: (1) the request is made pursuant to a right to hearing authorized by law; and (2) the request raises disputed issues of fact that were raised during the comment period and that are relevant and material to the commission's decision on the application. 30 TAC § 55.211(c).

Accordingly, pursuant to 30 TAC § 55.209(e), responses to hearing requests must specifically address:

(1) whether the requestor is an affected person;
(2) which issues raised in the hearing request are disputed;
(3) whether the dispute involves questions of fact or law;
(4) whether the issues were raised during the public comment period;
(5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commentator in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's Response to Comment;
(6) whether the issues are relevant and material to the decision on the application; and
(7) a maximum expected duration for the contested case hearing.

III. DISCUSSION

A. Determination of Affected Person Status

1. The Environmental Justice Center

Martina Cartwright, representing the Environmental Justice Center (Center) submitted two requests for a contested case hearing. The first is on behalf of NEEJA, an association comprised of local residents and business interests located nearby the existing site. The

association's focus is to advance community environmental justice concerns to ensure the health and safety of the predominately minority and low-income residents of Northeast Houston. NEEJA identifies members Joseph and Guadalupe Pinzon as well as Lawrence and Bernice Cranford, all of whom live within one mile or less of the existing site. The second request is on behalf of several individuals, each of whom reside or own property within two miles of the existing site.

The request on behalf of the individuals encompasses all of the concerns included in NEEJA's hearing request and contains additional concerns not addressed by the association. OPIC will address the two hearing requests separately.

a. NEEJA

NEEJA raises the following concerns regarding the vertical expansion: significant increase of storm water run-off from the site; potential vector infestation (*e.g.*, rodents, mosquitoes) from a substantial increase (an estimated 400,000 tpy) in waste expected to be received by the facility over the next decade; exacerbation of existing groundwater contamination caused by the facility; increase in odors from the facility; continued and increased migration of landfill gasses from the footprint of the landfill; increase in truck traffic to the site; and potential for slope failure. Based on these concerns, NEEJA contends that the Applicant will not be able to meet the statutory and regulatory requirements set out in 30 TAC Chapter 330.

A group or association may request a contested case hearing only if it meets all of the requirements set out in 30 TAC § 55.205: (1) one or more of the members would otherwise have standing to request a hearing in their own right; (2) the interests the association seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief

requested requires the participation of the individual members in the case.

NEEJA has identified the Pinzons and Cranfords as members who, by virtue of their proximity to the site, would be personally affected by the proposed vertical expansion. The association's concerns include environmental issues and health issues related to environmental matters. In order for NEEJA to address these matters, it would not be necessary for either the Pinzons or the Cranfords to participate in the hearing.

NEEJA raises several issues including storm water run-off, vector infestation, groundwater contamination and potential increases in odors and air emissions. The interests claimed are protected by the law under which the application will be considered. A reasonable relationship exists between the interests claimed and the activity regulated. There is a likely impact of the regulated activity on the health, safety and use of the members' property as well as on the use of impacted natural resources by the members. Therefore, OPIC recommends finding that NEEJA is an affected person entitled to a contested case hearing.

b. Individuals

The Center's hearing request on behalf of the several individuals includes all of the issues raised by NEEJA plus the following: increased potential for windblown debris from traffic to the site; increased potential for windblown debris from landfill, including windblown debris from the slope of the landfill during stormy weather; adverse health impacts on the local community (*e.g.*, increase in cancer, respiratory illness, allergies); loss of natural trees and impairment of the growth and development of animals due to increased groundwater contamination and storm water run-off; impairment of the health, growth and development of native and domestic animals due to the attraction and infestation of avian, mammalian and reptilian animal vectors; increased

risk of flooding as a result of diminishing trees and vegetation growth and development; and increased contamination of nearby standing waters contaminated by past leaching of chemical residue.

The individuals listed in this hearing request have personal justiciable interests that are not common to the general public. Their concerns regarding the risks to their health and safety, as well as the risks to their property, are reasonably related to the proposed activity. The Center's representation of the close proximity of their homes to the facility also increases the likely impact that the proposed facility may have on their health and the use and enjoyment of their land. This proposed permit amendment and other TCEQ rules specifically address the interests that these individuals are trying to protect. Therefore, OPIC recommends that the commission find that the individuals listed in this hearing request are affected persons entitled to a contested case hearing.

2. Weingarten

Weingarten states it owns property immediately adjacent (directly west and south) of McCarty. The property is currently being used as a thriving business park containing approximately 2.5 million square feet of space where people conduct daily business operations. The affected area includes over 128,000 square feet of consumer food storage and distribution and another approximate 1,000,000 square feet of finished consumer goods and distribution.

The viability of these business interests is tied directly to the condition of the land and the water resources located around the property. There is a direct link between Weingarten's property holdings and potential impacts of the expansion sought in this permit amendment application. Weingarten raises the following issues: (1) whether McCarty maintains sufficient training, documentation and notification procedures to be certain prohibited wastes are excluded;

(2) whether McCarty maintains sufficient gas monitoring and remediation plans to protect Weingarten from explosive or other gasses; (3) whether leachate or gas condensate will be correctly managed in a way that protects Weingarten; (4) whether the landfill expansion will worsen existing groundwater contamination problems and negatively impact Weingarten's property, business and health/safety issues; (5) whether the closure and post-closure care plans will adequately protect Weingarten after the landfill has closed; (6) whether the cost estimates and financial assurance are sufficient to protect Weingarten during closure and post-closure; (7) whether Weingarten maintains sufficient training, documentation and notification procedures to protect Weingarten regarding any special waste McCarty might accept; (8) whether the functions and minimum qualifications for each category of key personnel to be employed at McCarty will be sufficient to protect Weingarten Realty; (9) whether the procedures for the protection and prevention of the disposal of prohibited wastes, including regulated hazardous wastes, PCBs and others will be sufficient to protect Weingarten Realty; (10) whether McCarty will maintain protections against fire in the expanded or existing area sufficient to protect Weingarten Realty; (11) whether the working face of the expanded or existing area will be maintained and operated to control windblown solid waste in a manner sufficient to protect Weingarten; (12) whether the hauling of waste through the neighboring streets and the unloading of waste once received at McCarty will be sufficient to protect Weingarten; (13) whether McCarty's operations might violate any applicable requirement of the Federal Clean Air Act or Texas Clean Air Act; (14) whether operation of McCarty will result in destruction or adverse modification of the critical habitat of endangered or threatened species or cause or contribute to the taking of any endangered or threatened species; (15) whether McCarty will maintain its landfill cover in a manner that

sufficiently protects Weingarten Realty; (16) whether McCarty's operations will cause, suffer, allow or permit the collection, storage, transportation, processing or disposal of municipal solid waste in such a manner as to cause a discharge or imminent threat or discharge of municipal solid waste into or adjacent to the waters in the state without obtaining specific authorization for such discharge from the commission, the creation of a maintenance or nuisance or the endangerment of human health and welfare or the environment; and (17) whether McCarty's compliance history warrants issuance of the amendment.

Given Weingarten's close proximity to the facility, it is an affected person with interests not common to the members of the general public. Weingarten has raised several issues (including potential groundwater contamination, possible nuisance conditions and endangerment of human health and the environment and compliance history among others) that are protected by the law under which the application will be considered. A reasonable relationship exists between the interests claimed and the activity regulated. There is a likely impact of the regulated activity on the use of Weingarten's property. Therefore, OPIC recommends finding that Weingarten is an affected person entitled to a contested case hearing.

B. <u>Issues Raised in the Hearing Requests</u>

The Protestants raised the following disputed issues in their hearing request:

1. whether there are risks of contamination of groundwater (all);
2. whether the monitoring and control of harmful gasses is adequate (all);
3. whether there is a risk of vectors infestation due to an increase in expected waste (residents and NEEJA);
4. whether the slope stability analysis was adequate (residents and NEEJA);

5. whether there will be a significant increase in storm water run-off from the site (all);

6. whether there will be a nuisance odor condition (all);

7. whether there will be an increase in air emissions (all);

8. whether there will be potential for windblown debris (residents);

9. whether there will be adverse health impacts (residents);

10. whether closure and post-closure care plans are adequately protective (Weingarten);

11. whether training, documentation and notification procedures are adequate (Weingarten);

12. whether the facility will maintain adequate protection against fire (Weingarten);

13. whether there are adequately protective measures regarding hauling (Weingarten);

14. whether the landfill cover will be maintained in an adequately protective manner (Weingarten); and

15. whether the Applicant's compliance history is adequate (Weingarten).

1. <u>Issues Disputed</u>

There is no agreement of the parties on these issues. With respect to groundwater contamination, the ED states the Applicant has initiated corrective measures to address the presence of contaminated groundwater in order to comply with 30 TAC §§ 330.235-238. Concerning harmful gasses, the ED replies that the current permit requires the landfill to implement gas monitoring and remediation procedures for the exceedence of the regulatory limit for detected landfill gas concentrations. Regarding vector infestations, the ED responds that under § 330.151, the site operator must take the appropriate steps to prevent and control onsite populations of disease vectors using proper compaction and daily cover procedures, as well as the uses of other approved methods when needed. With respect to slope stability, the ED states

there are no specific rules or guidance as to how to perform this analysis; however, the ED has concluded that the proposed interim and final cover slopes are stable with a safety factor of 1.63 under the conditions analyzed. Concerning storm water run-off and flooding, the ED replies that eight detention ponds will control surface discharge, and the contaminated water generated onsite will be collected and transported offsite for treatment at properly authorized treatment facilities. Regarding nuisance odors, the ED responds that the Municipal Solid Waste Rules require the Applicant to operate the landfill in such a way that it does not create a nuisance and specifically to minimize odors, vectors, windblown litter and waste through use of proper daily cover and compaction procedures. With respect to air emissions, the ED states that while this is not an air quality permit, which is outside the scope of this review, the Applicant is required under the SOP to maintain landfill haul roads and access roads in a reasonably dust-free condition by periodic spraying from a water truck. Concerning windblown debris, the ED replies that the SOP requires the daily cleanup of spilled solid waste materials along all access roads within a distance of two miles in either direction from both site entrances. Regarding adverse health impacts, the ED responds that if the proposed landfill is constructed and operated as shown in the application and as required by the regulations, human health and the environment should be protected. With respect to closure and post-closure care plan, the ED states that after technical review of the application, the Applicant was found to have satisfactorily addressed 30 TAC §§ 330.250-256 (related to Final Closure Plan and Post-Closure Care Plan). Concerning training, documentation and notification procedures, the ED replies that Section 6 of Part IV of the SOP addresses this issue and meets the requirements of 30 TAC § 330.117(c). Regarding fire protection, the ED responds that the amendment application has a section that contains requirements for facility fire

protection training and fire protection standards, and that portion of the application is adequate to address the requirements of 30 TAC § 330.114(6). With respect to hauling, the ED states that the TCEQ does not have jurisdiction regarding issues of traffic but that the Texas Department of Transportation was consulted and concluded that the highways in the area are adequately designed to accommodate the additional traffic. Concerning the landfill cover, the ED replies that the terms and conditions of this permit, specifically as they relate to the liners on place at this facility, are adequately protective of human health and the environment. Finally, regarding compliance history, the ED reviewed the Applicant's compliance history in accordance with the standards set out in 30 TAC Chapter 60 and found that the site has a rating of .51 and a classification of average.

2. Issues of Fact

All of the above-referenced disputes are issues of fact. Because these are issues of fact, rather than issues of law or policy, these issues are appropriate for referral to hearing. See 30 TAC § 55.211(b)(3)(A)(B).

3. Issues Raised During the Comment Period

The Protestants' requests for hearing is based on issues that were raised in comments received during the comment period. These comments have not been withdrawn. At this time, there is no agreement between the parties regarding the Protestants' issues.

4. Relevant and Material Issues

Except for the issue regarding hauling and transportation, Protestants' requests raise issues which are relevant and material to the commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) & 55.211(c)(2)(A). Protestants' requests are based on concerns including,

but not limited to, the following: storm water run-off and groundwater contamination; exposure to windblown waste, foul odors, and disease vectors; and adequacy of record keeping and the SOP. These concerns are relevant and material to the commission's decision on the application because they are addressed by the substantive law governing this application within the jurisdiction of the TCEQ and may be addressed in a hearing on the pending application. The factual issues raised by Protestants relate directly to whether the applicant will met the requirements of applicable substantive law.

5. Issues Recommended for Referral to Hearing

Based on the discussion above and the Commission requirements of 30 TAC §§50.115(b), 55.211(b)(3)(A)(i), the OPIC recommends that the Commission refer the following disputed issues to the State Office of Administrative Hearings for a contested case hearing:

1. whether there are risks of contamination of groundwater;
2. whether the monitoring and control of harmful gasses is adequate;
3. whether there is a risk of vectors infestation due to an increase in expected waste;
4. whether the slope stability analysis was adequate;
5. whether there will be a significant increase in storm water run-off from the site;
6. whether there will be a nuisance odor condition
7. whether there will be an increase in air emissions;
8. whether there will be potential for windblown debris;
9. whether there will be adverse health impacts;
10. whether closure and post-closure care plans are adequately protective;

11. whether training, documentation and notification procedures are adequate;

12. whether the facility will maintain adequate protection against fire;

13. whether the landfill cover will be maintained in an adequately protective manner; and

14. whether the Applicant's compliance history is adequate.

C. Recommended Expected Duration of Hearing

Section 55.115(d) of the TCEQ's rules requires the Commission to specify the maximum expected duration of the hearing in its order when referring a matter to the State Office of Administrative Hearings. The rules specify that the Commission must state the duration of the hearing from the preliminary hearing to the Administrative Law Judge's issuance of the Proposal for Decision ("PFD"). To assist the Commission, the PIC estimates that the maximum expected duration of a hearing on this matter would be nine months from the date of the preliminary hearing until the PFD is issued.

IV. CONCLUSION

For these reasons, the OPIC recommends that the Commission grant the all three requests for a contested case hearing and refer the above-reference issues to SOAH with a maximum expected duration for hearing of nine months.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By _____
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CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2007 the original and eleven copies of the Office of the Public Interest Counsel's Response to Requests for Hearing were filed with the Chief Clerk and a copy was served by facsimile, interoffice mail or U.S. Mail to the persons on the attached mailing list.

_____
Scott A. Humphrey

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