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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

July 28, 2008

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2008 JUL 28 PM 1:48
CHIEF CLERKS OFFICE

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: **US OIL RECOVERY, LP**
TCEQ DOCKET NO. 2006-2246-MSW

Dear Ms. Castañuela:

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

Sincerely,

Vic McWherter

Vic McWherter, Senior Attorney
Public Interest Counsel

cc: Mailing List

Enclosure

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2008 JUL 28 PM 1:48

CHIEF CLERKS OFFICE

TCEQ DOCKET NO. 2006-2246-MSW

IN THE MATTER OF THE	§	**BEFORE THE**
APPLICATION OF U.S. OIL	§	**TEXAS COMMISSION ON**
RECOVERY, L.P.	§	**ENVIRONMENTAL QUALITY**
FOR MSW PERMIT NO. 2336	§	

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

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

I. INTRODUCTION

U.S. Oil Recovery ("U.S. Oil" or "Applicant") has applied for a Type V municipal solid waste processing permit for its facility located at 400 N. Richey Street, Pasadena, Harris County, Texas The facility would be authorized to process up to 200,000 gallons per day of grease trap, grit trap, and septage waste and authorized to operate Monday through Sunday between the hours of 7:00 a.m. to 7:00 p.m.

TCEQ received the U.S. Oil application on May 11, 2005, and the Executive Director ("ED") declared the application administratively complete on June 9, 2005. The applicant published a Notice of Receipt of Application and Intent to Obtain a Municipal Solid Waste Permit on June 22, 2005 in the *Houston Chronicle*; a Notice of Public Meeting and Application for a Municipal Solid Waste Permit on May 18, 2006 in the *Houston Chronicle*; and a Notice of Application and Preliminary Decision on January 24 and 25, 2007 in the *Houston Chronicle.* A public meeting was held on June 6, 2006 and the public comment period ended on February 24, 2007. The Chief Clerk mailed the ED's Response to Comment on February 6, 2008.

TCEQ received timely requests for reconsideration and hearing requests from Harris County Public Health & Environmental Services ("HCPHES") on March 6, 2008 and from Downstream Environmental, LLC ("Downstream") on February 27, 2008. Liquid Environmental Solutions ("LES") filed a timely request for reconsideration on March 7, 2008.

Based on the information submitted in the request and a review of the information available in the Chief Clerk's file on this application, OPIC recommends granting the request for reconsideration filed by LES and remanding the application to the Executive Director for further processing. OPIC recommends denial of the remaining requests for reconsideration. In the event the Commission denies all requests for reconsideration, OPIC would recommend granting the hearing requests of HCPHES and denying the hearing request of Downstream.

II. REQUESTS FOR RECONSIDERATION

A. Applicable Law

A person may file a request for reconsideration no later than 30 days after the chief clerk's transmittal of the executive director's decision and response to comments.[1] Any person may file a request for reconsideration of the ED's decision.[2] A request for reconsideration must state the reasons why the decision should be reconsidered.[3] Responses to requests for reconsideration should address the issues raised in the request.[4]

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[1] Texas Water Code §5.556; 30 TAC § 55.201(a) and (e).
[2] 30 TAC §55.201(e).
[3] *Id.*
[4] 30 TAC §55.209(f).

B. Discussion

1. Request for Reconsideration filed by LES

LES asserts that the application is not technically complete because U.S. Oil cannot demonstrate how it will dispose of its wastewater. LES relies on the requirement of 30 TAC §330.59(d)(2) that an applicant must provide written documentation that all processed waste leaving the site can be adequately handled for treatment by other facilities. This regulatory requirement is also recognized in the Response to Comment, Response 17 at page 18. The Executive Director's decision that the proposed permit meets the requirements of applicable law relied on the applicant's relationship with the City of Pasadena and the arrangements between the City of Pasadena and the applicant for disposal of the facility's wastewater. Indeed, "the Executive director determined that the discharge agreement with the city of Pasadena included with the permit application satisfies the requirement for documentation that processed waste leaving the site can be adequately handled for treatment by other facilities." (RTC at page 19.)

However, according to LES, subsequent to this January 31, 2008 statement of the ED's determination, the City of Pasadena gave notice of the termination of its wastewater contract with U.S. Oil. LES further asserts that the Gulf Coast Waste Authority has terminated its wastewater disposal service agreement with U.S. Oil. LES concludes that U.S. Oil now has no wastewater treatment option available and, therefore, the application fails to show that all technical and regulatory requirements have been met. This argument is compelling. OPIC agrees with LES that in the absence of an agreement between the applicant and the City of Pasadena, the ED's prior determination that 30 TAC §330.59(d) (2) is satisfied has no current basis in fact. As expressed in the RTC at

pages 18 and 19, the ED's decision with respect to the technical completeness of the application and its satisfaction of this regulation was clearly made in reliance on the existence of an enforceable wastewater disposal agreement with the City of Pasadena. If that agreement no longer exists, the application is not technically complete. Therefore, OPIC supports granting LES' request for reconsideration so that the application may be remanded to the ED for further processing in light of these changed circumstances.

2. Request for Reconsideration filed by HCPHES

The request for reconsideration submitted by HCPHES includes water quality issues, permit inadequacies and enforceability issues, and containment and monitoring methods discussed below.[5] OPIC cannot support these issues as the basis for a request for reconsideration. An evidentiary record would be necessary for this office to make a recommendation to the Commission as to whether the permit should be denied based on these issues. As discussed below, in the event no request for reconsideration is granted, OPIC is recommending a hearing to develop such a record.

HCPHES also argues that U.S. Oil's compliance history warrants granting of its request for reconsideration.[6] OPIC shares the County's concerns about the history of this applicant, particularly the concerns expressed about the seemingly egregious violations relating to the facility's denial of entry to agency investigators. One may question whether these violations are indicative of an average performer within the everyday understanding of the word "average;" nevertheless, the formula set forth in the agency's chapter 60 rules used to classify compliance histories has yielded a score for

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[5] Harris County's Request for Hearing and Request for Reconsideration 1, 5-6.
[6] *Id.*, at 2-3.

this applicant which results in classifying it as a "average" performer.[7] If this were not the case and the classification history formula had yielded a classification of "poor performer," the Commission could grant this request for reconsideration on the basis of compliance history and deny the permit, without the necessity of a hearing. Commission rule 30 TAC §60.3(B) authorizes the Commission to deny the applications of "poor performers." *See* Texas Water Code §5.754(e)(1) (the commission by rule shall provide for the use of compliance history classifications in commission decisions regarding the issuance, renewal, amendment, modification, denial, suspension, or revocation of a permit); 30 TAC §60.3(B)(i)(if the site is classified as a poor performer, the agency may deny an application for a solid waste management permit).

In a case such as this, however, when the agency's formula does not yield a classification of "poor performer," the Commission may deny a permit on compliance history grounds, but only following a hearing. *See* Texas Water Code §5.754(i) (after an opportunity for a hearing, commission may deny a permit application if the regulated entity's compliance history is unacceptable based on violations constituting a recurring pattern of conduct that demonstrates a consistent disregard for the regulatory process). Therefore, while OPIC cannot recommend granting HCPHES's request for reconsideration, if this application is referred to the State Office of Administrative Hearings (SOAH), OPIC is recommending referral of the compliance history issue.

HCPHES also argues that U.S. Oil's application is incomplete, illegible, and provided improper notice.[8] The ED's Response to Comments disputes this contention and states that the application is legible and meets TCEQ requirements; the ED extended

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[7] ED's Response to Public Comment 1, 13.
[8] Harris County, *supra* note 5, at 4-6.

the comment period so that the public could review the corrected copy of the application at the Pasadena Public Library.[9] While OPIC cannot recommend granting the request for reconsideration on these grounds, if this application is referred to SOAH, OPIC is recommending that the issue of notice be referred to hearing.

3. Request for Reconsideration filed by Downstream

OPIC cannot recommend the granting of Downstream's request for reconsideration. In its request for reconsideration, Downstream raises issues of application plagiarism; application deficiencies in setting forth the details of applicant's proposed processes and disposal methods and the facility's proximity to floodplains; estimates of the closure bond; and U.S. Oil's environmental record.[10] Downstream also asserts that the amended application's FEMA report was not stamped by an engineer and thus is incomplete.[11] However, the ED found the amended application to be properly sealed. While OPIC cannot recommend grating this request for reconsideration, if this application is referred to SOAH, OPIC is recommending that certain of these issues be referred to hearing for further development of an evidentiary record.

III. HEARING REQUESTS

A. Applicable Law

As the application was declared administratively complete after September 1, 1999, a person may request a contested case hearing on the application pursuant to the requirements of Texas Water Code Section 5.556. Under the applicable statutory and regulatory requirements, a hearing request must substantially comply with the following:

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[9] ED, *supra* note 7, at 4-24.
[10] Downstream's Request for a Contested Case Hearing and Reconsideration 1, at 4-5.
[11] *Id.*, at 5.

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 the application.[12]

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."[13] This justiciable interest does not include an interest common to the general public.[14] Relevant factors that will be considered in determining whether a person is affected 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.[15]

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[12] 30 TEXAS ADMIN. CODE ("TAC") § 55.201(d).
[13] 30 TAC § 55.203(a).
[14] *Id.*
[15] 30 TAC § 55.203(c).

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.[16]

Accordingly, 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 commenter 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.[17]

B. Affected Person Analysis

The Chief Clerk received timely hearing requests on this application from HCPHES and Downstream.

Harris County inspects municipal solid waste facilities for compliance with state rules and retains enforcement authority over permitted facilities;[18] and, therefore, is a local governmental entity with statutory authority over issues relevant to the application.[19] HCPHES raises concerns regarding U.S. Oil's compliance history, possible surface water quality issues, permit inadequacies and enforceability issues, and the sufficiency of public notice. These are issues protected under Texas Health & Safety

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[16] 30 TAC § 55.211(c).
[17] 30 TAC § 55.209(e).
[18] Tex. Health and Safety Code § 361.032(b); Texas Water Code § 7.351.
[19] 30 TAC § 55.203(a) 30 TAC §§ 55.203(b), 55.203(c)(6)..

Code Chapter 361 and 30 TAC Chapter 330 which regulate solid waste disposal facilities. Particularly in light of the applicant's history of violations, there is a reasonable relationship between the interests claimed and the activity regulated. For these reasons, HCPHES is an affected person.

Downstream has not demonstrated that it has a personal justiciable interest in this application. Downstream's request does not show that it is located near the facility nor otherwise demonstrate how applicant's proposed activities would likely impact any protected interest unique to the requester. The hearing request states that U.S. Oil plagiarized a prior application filed by Downstream's application to the State. However, this allegation does not relate to any issue that would be adjudicated in a contested case hearing on this application. Downstream's interest as a business competitor is not protected under the law governing this application and does not support a finding that Downstream is an affected person. For this reason, OPIC must recommend denial of Downstream's request for hearing.

C. Issues Analysis

HCPHES raises the following issues:

1. Does the applicant's compliance history warrant denial or modification of the proposed permit?

2. Will there be adequate containment at the facility's waste loading and unloading areas sufficient to comply with applicable regulations?

3. Does the application contain adequate and accurate information about the location of floodplains?

4. Does the proposed design and operation of the facility adequately protect surface water quality?

5. Does the permit provide for adequate odor control?

6. Does the permit adequately address the necessary experience, training and licensing of anyone holding the position of facility supervisor?

7. Does the application's Fault Map adequately identify and locate faults?

8. Does the permit adequately specify the municipal solid wastes which are authorized for disposal?

9. Does the permit contain adequate waste screening and acceptance procedures?

10. Was a complete, accurate and legible copy of the application made available to the public for the duration of the public comment period?

All of these issues were raised during the comment period, as evidenced by the fact that each of the listed issues was addressed in the Response to Comments. All of the issues listed above are disputed issues of fact, rather than issues of law or policy. In its March 6, 2008 hearing request, HCPSE identifies specific issues addressed in specific Responses to Comments which HCPSE disputes. Therefore, the issues raised in HCPSE's hearing request are disputed issues of fact that were timely raised during the comment period.

Each of these issues is also relevant and material to the application, addressed in the draft permit, and addressed by the substantive law governing this type of MSW application.[20] Texas Water Code §5.754(i) requires the Commission to consider

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[20] *See Anderson v. Liberty Lobby , Inc.*, 477 U.S. 242, 248-251(1986) (in discussing the standards applicable to reviewing motions for summary judgment the Court stated "[a]s to materiality, the substantive

compliance history when considering a permit application. Containment issues at the waste loading areas are addressed by 30 TAC §§301.34(6) and 330.55(b)(7)(B).[21] The adequacy of floodplain information in the application relates directly to the requirements of 30 TAC §330.53(b)(12). The protection of surface water is addressed by 30 TAC §330.55(b)(1). Odor control is required by 30 TAC §330.59(b)(5)-(6). The eligibility requirements of the facility supervisor relate to the evidence of competency requirements of 30 TAC §330.52(b)(9)(C). Issues regarding the legibility and adequacy of the Fault Map are addressed by 30 TAC §330.51(f)(1). The proper identification and description of waste streams accepted at a facility are regulated by 30 TAC §330.59. Issues concerning waste acceptance and screening relate to the requirements of 30 TAC §330.114(5)(A). The issue concerning the availability and legibility of the application are relevant in light of the requirements of 30 TAC §330.51(f)(1) and 30 TAC §39.405(g). For these reasons, the foregoing issues are relevant and material to the Commission's decision on this application.

D. **Issues Recommended for Referral to Hearing**

If the Commission denies all requests for reconsideration but grants the hearing request of HCPHES, OPIC would recommend that the Commission refer the following disputed issues of fact to the State Office of Administrative Hearings ("SOAH"):

1. Does the applicant's compliance history warrant denial or modification of the proposed permit?

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law will identify which facts are material. ... it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs.")

[21] Pursuant to 30 TAC §330.1(a), this application is governed by the MSW rules in effect prior to March 26, 2006. Therefore, the substantive rules cited in this analysis of relevant and material issues are the rules in effect prior to March 27, 2006.

2. Will there be adequate containment at the facility's waste loading and unloading areas sufficient to comply with applicable regulations?

3. Does the application contain adequate and accurate information about the location of floodplains?

4. Does the proposed design and operation of the facility adequately protect surface water quality?

5. Does the permit provide for adequate odor control?

6. Does the permit adequately address the necessary experience, training and licensing of anyone holding the position of facility supervisor?

7. Does the application's Fault Map adequately identify and locate faults?

8. Does the permit adequately specify the municipal solid wastes which are authorized for disposal?

9. Does the permit contain adequate waste screening and acceptance procedures?

10. Was a complete, accurate and legible copy of the application made available to the public for the duration of the public comment period?

E. Maximum Expected Duration of Hearing

Commission rule 30 TAC §50.115(d) requires that any commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall proceed longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. In assisting the Commission to state a date by which the judge is expected to issue a proposal for decision, and as required by 30 TAC §55.209(e)(7), the OPIC estimates that the

maximum expected duration of a hearing on this application would be one year from the first date of the preliminary hearing until the proposal for decision is issued.

IV. CONCLUSION

For the reasons set forth above, OPIC respectfully recommends that the Commission grant the request for reconsideration filed by LES. OPIC recommends the denial of the remaining requests for reconsideration. In the event that no request for reconsideration is granted, OPIC recommends denying Downstream's hearing request and granting HCPHES's hearing request on the issues set forth above.

Respectfully submitted,
Blas Coy
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CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2008 the original and eleven true and correct copies of the Office of Public Interest Counsel's Response to Requests for Reconsideration and Requests for Hearing 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.

Vic McWherter

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