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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 3:36
CHIEF CLERKS OFFICE

Re: **INTERSTATE SOUTHWEST, LTD.**
TCEQ DOCKET NO. 2007-1144-IWD

Dear Ms. Castañuela:

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

Sincerely,

A handwritten signature in cursive script that reads "Eli Martinez".

Eli Martinez, Attorney
Public Interest Counsel

cc: Mailing List

Enclosure

2008 JAN -4 PM 3: 36

TCEQ DOCKET NO. 2007-1144-IWD
CHIEF CLERKS OFFICE

IN THE MATTER OF THE	§	BEFORE THE
APPLICATION BY	§	
INTERSTATE SOUTHWEST, LTD	§	TEXAS COMMISSION ON
FOR TPDES PERMIT NO.	§	
WQ0004073000	§	ENVIRONMENTAL QUALITY

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

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 Response to Hearing Requests in the above-referenced matter.

I. INTRODUCTION

Interstate Southwest, Ltd. (Applicant) operates an iron and steel forge facility. The facility uses steel ingots to manufacture oil field equipment, aircraft landing gears, parts for construction equipment, automotive defense industries, and heavy equipment. Wastewater is produced from boiler blow-down, cooling waters, wash-down waters, and process wastewaters. Several cooling streams are generated from the steel forging process. The Applicant uses a closed-loop cooling system to keep the induction heaters from becoming too hot. The closed-loop cooling system is only drained to the wastewater system in the event of power failure or emergency. Two wastewater ponds collect site storm water and the various wastewater streams from the wastewater generating processes at the site. The ponds allow retention and equalization of the wastewater streams before discharge from Outfall 001.

The Applicant has applied for a major amendment to authorize the additional discharge of process wastewaters to the discharge from iron and steel forging operations via Outfall 001. The current permit authorizes the disposal of once through cooling water, boiler blow-down, wash-down water and storm water at a daily average flow not to exceed 500,000 gallons per day via Outfall 001.

The effluent is discharged to an unnamed tributary of Sandy Creek; thence to Sandy Creek; thence to Grassy Creek; thence to Brazos River Below Navasota River in Segment No. 1202 of the Brazos River Basin. The unclassified receiving waters have no significant aquatic life use for the unnamed tributary of Sandy Creek and limited aquatic use for Sandy Creek. The designated uses for Segment No. 1202 are contact recreation, high aquatic life use, and public water supply. The draft permit authorizes the discharge of treated process wastewaters, once through cooling water, boiling blow-down, wash-down water, and storm water at a daily average dry weather flow not to exceed 500,000 gallons per day (MGD) via Outfall 001.

The facility is located adjacent to the west side of the Texas and New Orleans Rail Road, with an entrance roadway off State Highway 508 and Farm-to-Market Road 379, and approximately three miles south of the City of Navasota, Grimes County, Texas.

The application for a major permit amendment was received on August 16, 2005 and declared administratively complete on October 6, 2005. The Notice of Receipt and Intent to Obtain a Water Quality Permit was published on October 19, 2005 in the *Navasota Examiner*, in Grimes County. The Executive Director completed the technical review of the application on December 31, 2005, and prepared a draft permit. The Notice of Application and Preliminary Decision was published on March 15, 2006 in the *Navasota Examiner* in Grimes County. A

public meeting was held in Navasota on March 27, 2007. The public comment period for this application closed at the end of the public meeting. The public comment period ended on March 27, 2007, and the Executive Director's Decision and Response to Comments was mailed by the Chief Clerk on June 8, 2007. The TCEQ received one timely filed hearing request in this application from Benjamin F. Swank. As discussed more fully below, OPIC recommends granting Mr. Swank's request.

II. REQUIREMENTS OF APPLICABLE LAW

This application was declared administratively complete after September 1, 1999, and is subject to the requirements of Texas Water Code § 5.556 added by Acts 1999, 76th Leg., ch 1350 (commonly known as "House Bill 801"). Under the applicable statutory and regulatory requirements, a hearing request must 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 TEXAS ADMINISTRATIVE CODE (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 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.

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 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.

III. DISCUSSION

A. Determination of Affected Person Status

The Office of the Chief Clerk received a timely filed request for a contested case hearing on the issuance of Applicant's permit amendment from Benjamin F. Swank III (Swank) that included relevant contact information and raised disputed issues outlining why Mr. Swank believed he would be adversely affected by the proposed activity in a manner not common to members of the general public.

Swank's request articulates numerous concerns about Applicant's ability to operate this facility and the impact of the proposed permit on Swank's property, water supply, and business interests. Firstly, Requestor Swank alleges that Applicant's original permit has been roundly abused, as demonstrated—in part—by two “spills” on or near February 9, 2005 that severely interfered with Mr. Swank's use and enjoyment of his land and significantly endangered or affected his vegetation, drinking water, and cattle health. Furthermore, because part of Swank's land is leased for cattle operations, the February 2005 incident had a financial impact on Mr. Swank and his lessee. The Executive Director's Response to Comments verifies at least one discharge of 1,200 gallons of oil on February 9, 2005, for which the Applicant was issued two Notice of Violations (NOV)¹.

Swank further alleges that Applicant was irresponsibly silent about the incidents, and claims his attempts to contact Applicant were met with circumlocutory evasiveness. To further his point, Requestor Swank refers to the delayed posting of the Application in the Navasota

¹ Applicant's Compliance History report covering the period from March 02, 1999 to May 17, 2005 included in Applicant's file does not speak to the February incident(s), but the Notice of Violations presumably were merely too recent to have been reflected in the Compliance History report, given the Executive Director's acknowledgement of the February 9, 2005 discharge.

Public Library and perceived confusion by Applicant over their duty to comply with this requirement².

Swank expresses concern over potential degradation of the appearance of his land and Sandy Creek. Swank also contends the integrity of the water in both Sandy Creek and the Brazos River will be compromised, and that concomitant health and safety issues may result from the ensuing contamination. Lastly, Mr. Swank is concerned for potential land devaluation resulting from increased activity by Applicant outlined in the permit amendment.

Swank's request expresses concerns regarding the Applicant's conscientious compliance; the health and safety of his household, vegetation, and cattle; his ability to comply with the terms of leasing contracts; the use, enjoyment, and appearance of his property; and the integrity of nearby waters. These are interests protected by the law under which the application will be considered and, because of his proximity to the Applicant's plant and discharge route, there is a reasonable relationship between the interests claimed and the activity regulated³. Therefore, OPIC recommends that the commission find Mr. Swank to be an affected person in accordance with 30 TAC § 55.203 and that his hearing request be granted.

B. Issues Raised in the Hearing Request

Compliance History

Swank raises the concern that Applicant has a history of failing to comply with permit terms and amendment of the current permit portends bigger accidents with higher rates of contamination.

Use and Enjoyment of Property

² See 30 TAC §39.405(g), requiring, *inter alia*, availability of the application for review and copying in a public place in the county in which the facility is located.

³ See 30 TAC §55.203(b)(3)

Swank raises the concern that the use and enjoyment of his property has been impacted in the past by Applicant's activities, and such interference will continue under the terms of the amended permit.

Appearance of Property

Swank raises the concern that Applicant's activities will adversely affect the appearance of his property.

Devaluation of Property

Swank raises the concern that his property will be devaluated due to the foregoing concerns.

Health of Cattle and Vegetation

Swank raises the concern that Applicant's activities under the amended permit will harm the vegetation and livestock on his property.

Business Interests

Swank raises the concern that contamination of his land by the Applicant's activities will interfere with his leasing contract(s) and ability to utilize the property for cattle operations.

Contamination of Water

Swank raises the concern that Applicant's activities under the amended permit will result in contamination of Sandy Creek and the Brazos River.

C. Issues raised in Comment Period

All of the issues raised in the hearing request were raised in the comment period and have not been withdrawn. 30 TAC §§55.201(c) & (d)(4), 55.211(c)(2)(A).

D. Disputed Issues

There is no agreement between Requestor Swank and the Applicant or Executive Director on the issues raised in the hearing request. While the Executive Director's Response to Comments acknowledges the spill on February 9, 2005, there is no substantive agreement with Requestor that Applicant has exhibited continuing negligence that will pose the dangers Requestor enumerates in his hearing request⁴. Similarly, the changes made to the draft permit, which include "Spill Prevention and Response Measures⁵," do not fully address Mr. Swank's concerns regarding Applicant's negligence or incompetence. OPIC therefore finds that there is no agreement on this issue, albeit one or more events concerning the Applicant's incident history have been stipulated.

E. Issues of Fact

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements. *See* 30 TAC §55.211(b)(3)(A) and (B). The issues concerning the Applicant's compliance history, Requestor's use and enjoyment of property, property appearance and value, health of Requestor's cattle and vegetation, actual interference with Requestor's business and contracting opportunities, and effect of Applicant's activity on water quality are all issues of fact.

F. Relevant and Material Issues

⁴ See letter from Benjamin Swank dated January 23, 2006 stating, *inter alia*, "surely one would not allow (Applicant) to even extend their abilities to 'dump more waste' when they have abused their initial permit.

⁵ See "Changes Made to the Draft Permit in Response to Comment" section in Executive Director's Response to Public Comment filing.

The hearing request raises issues relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). Relevant and material issues are those that are governed by the substantive law under which this permit is to be issued.⁶ In order to refer an issue to the State Office of Administrative Hearings (SOAH), the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit.⁷

The issue raised by the Requestor concerning the Applicant's compliance history is material and relevant to the Commission's permitting decisions governed by the substantive law under which this permit is to be issued⁸. Further, potential affects of the permitted activity on the use of Swank's property⁹; health of Requestor's cattle and vegetation¹⁰; and appearance of property—inasmuch as the permit would allow oil, grease, or related residue to produce a visible film of oil or globules of grease to coat the banks of the watercourse¹¹—are material and relevant issues. Additionally, Mr. Swank's ability to maintain his cattle operation and avoid liability for Applicant's injury to the interests of his lessee, who has a separate cattle business, are protected economic interests addressed by the substantive law¹² and therefore appropriate for referral to the State Office of Administrative Hearings.

⁶ See 30 TAC §55.209(e)(6)

⁷ 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 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.”)

⁸ 30 TAC § 60.1 (a)(1)(A); Water Code §26.0281

⁹ 30 TAC § 55.203(c)(4).

¹⁰ See Water Code §26.003.

¹¹ 30 TAC §307.4 (b)(7)

¹² 30 TAC § 55.201(d)

Pursuant to Texas Water Code sections 26.027(a) and 26.003, the Commission may issue permits for wastewater discharges based upon the draft permit's effectiveness in maintaining the water quality of the state. Therefore, the issue raised by Mr. Swank concerning the permitted activity's affect on water quality is also relevant and material to the Commission's duty to maintain water quality in its permitting decisions, and therefore appropriate for referral to State Office of Administrative Hearings.

Conversely, OPIC agrees with the Executive Director's opinion that Requestor's remaining concern over property devaluation falls outside of the scope of TCEQ jurisdiction to maintain and protect water quality of the state, as implicitly authorized by the Texas Water Code Chapter 26. Potential effects on private property values are not addressed by the substantive law governing this application and therefore cannot be considered relevant and material to the Commission's decision. OPIC therefore finds that this issue is inappropriate for referral to the State Office of Administrative Hearings.

G. Issues Recommended for Referral

OPIC recommends that the following disputed issues of fact be referred to the State Office of Administrative Hearings for a contested case hearing:

- 1) Does the Applicant's compliance history warrant denial of the permit amendment?
- 2) Will the permitted activity interfere with Swank's use of his property?
- 3) Will the permitted activity endanger the health of cattle and vegetation on Swank's property?
- 4) Will the permitted activity diminish the attractiveness of Swank's property, vis-à-vis visible pollution along the banks of the watercourse?
- 5) Will the permitted activity interfere with Swank's economic interests because of its adverse impact to his cattle operation or leasing contracts?
- 6) Does the permit protect Sandy Creek and the Brazos River from contamination?

H. Maximum Expected Duration of Hearing

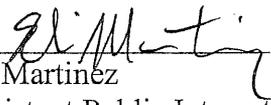
Commission Rule 30 TEX. ADMIN. CODE § 55.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. To assist the Commission in stating a date by which the judge is expected to issue a proposal for decision, and as required by 30 TEX. ADMIN. CODE §55.209(d)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be nine months from the first date of the preliminary hearing until the proposal for decision is issued.

IV. CONCLUSION

OPIC recommends referring the matter to SOAH for an evidentiary hearing on the issues recommended above. OPIC further recommends a hearing duration 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 January 4, 2008 the original and eleven true and correct copies of the Office of the Public Counsel's Response to Request 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.


Eli Martinez

MAILING LIST
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TCEQ DOCKET NO. 2007-1144-IWD

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