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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2008 FEB -1 PM 3:51
CHIEF CLERKS OFFICE

February 1, 2008

VIA HAND DELIVERY

Ms. LaDonna Castañuela
Office of the Chief Clerk
TCEQ, MC 105
P.O. Box 13087
Austin, TX 78711-3087

RE: Docket No. 2007-1792-MSW
Zapata County San Ygnacio Landfill
Requests filed on Permit No. 783A

Please find enclosed for filing an original and eleven copies of Zapata County's Response to the Request for Hearing.

Thank you for your attention to this matter. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Hector Uribe
Counsel for Zapata County
Commissioners Court

cc: Mailing List

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2008 FEB -1 PM 3:51

CHIEF CLERKS OFFICE

TCEQ DOCKET NO. 2007-1792-MSW

APPLICATION BY ZAPATA COUNTY FOR AMENDMENT TO TCEQ MSW PERMIT NO. 783A	§ § §	BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

ZAPATA COUNTY'S RESPONSE TO THE REQUEST FOR HEARING

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

COMES NOW, the Zapata County Commissioners Court, the applicant for a permit for an amendment to its municipal solid waste permit 783A, and files this, its Response to Requests for Hearing filed by Victor Gonzalez, Jr. The County would respectfully show the following:

BACKGROUND

Zapata County's Landfill is a small Type I arid exempt municipal solid waste landfill facility, known as the San Ygnacio Landfill, and is located in Zapata County, Texas. It is used for waste generated in the County, and it is the only landfill in the County. To meet the needs of the residents of the County, additional capacity for waste disposal is needed. Thus, Zapata County has applied for an amendment to laterally expand the existing landfill its Type 1AE landfill and to include a Type IV area within the permit boundary. In this application Zapata County has not sought a vertical "expansion" to its current permit but rather a permit to match the current permitted height of its current landfill.

INTRODUCTION AND SUMMARY

The hearing request of Mr. Gonzalez should be denied. If not denied, any hearing on Zapata County's application should be strictly limited in time and scope of issues.

The Underlying Dispute: The only hearing request in this case involves an underlying property dispute. Mr. Gonzalez was the previous owner of the landfill, and, as his documents reveal, he transferred the landfill to Zapata County in 1999 by quitclaim deed with no limit on how long it could be used as a landfill. Mr. Gonzalez now claims that, since 1996, he has intended to convert his adjacent land to a housing development. Yet, when Mr. Gonzalez transferred the property to the County in 1999, he must have understood that the County would use the site as a landfill for a significant period of time and was considering constructing another landfill.

As Mr. Gonzalez knows, the County will run out of space at its landfill in the near future, and the County needs to expand the landfill or face expensive transport of the waste from the County to a commercial landfill operation out of the County. Mr. Gonzalez understands what his hearing request does in terms of delay and costs. The County, however, must proceed with its expansion.

Mr. Gonzalez claims that the deed was intended to provide him with a park for his development. It will, eventually. The County, however, must make the most

economical use of its landfill property to protect the interests of the taxpayers and other residents of the County.

The Hearing Request: Mr. Gonzalez may qualify for a hearing, but his initial comment letter of October 9, 2006 (attached) clearly did not raise any valid issues. Once the application was declared technically complete and the Executive Director issued a draft permit, Mr. Gonzalez filed a second letter on July 19, 2007. That letter did raise one issue – compliance history - that has traditionally been subject to hearings on landfill permits, but the comments were late. That is, compliance history was not a concern raised by Mr. Gonzalez's initial comment letter. Mr. Gonzalez did not, as House Bill 801 intended, provide the County or TCEQ notice of the issues early in the application process period. Thus, Mr. Gonzalez failed to provide the County with an opportunity to address his concerns early in the process, if his concerns had been valid. As the Executive Director's response to comments indicates, any issue of compliance history has been resolved.

Moreover, clearly, the many newer issues raised for the first time by Mr. Gonzalez's attorney in the November 2 hearing request are not appropriate for referral to SOAH under House Bill 801.

There should be no hearing.

The Notice Issue: There is no notice issue. While his hearing request argues for new notice, Mr. Gonzalez clearly received ample notice. He has known about the landfill for years. His comments reflect that he understood what Zapata County is

seeking in the way of an expansion to 30 acres. He says so after the second notice, even though his hearing request claims that the notice did not advise the public of such an expansion. He also clearly knew that the site was ongoing, not a new landfill.

The notice reasonably conveys the required information and apprises the public of the nature of the permitted activities, so that they may examine the specifics of the application and raise any concerns. In fact, Mr. Gonzalez has only raised the notice issue (in an untimely hearing request) because he failed to timely assert the various issues that his attorney now seeks to raise. The proper procedure, however, requires that those issues be raised early in the process, when they can be addressed by the Applicant and the Executive Director. The challenge to notice should be rejected. Mr. Gonzalez's attempt to get a second bite at the apple, when he clearly received proper notice, should be rejected.

Summary: In sum, Mr. Gonzalez's hearing request should be denied. If it is granted, Zapata County requests an expeditious hearing with issues limited to those raised by Mr. Gonzalez in his comment letter as evaluated by the Executive Director.

The parties have already met as a prelude to negotiations and recognize further discussions may save resources and time for both parties and the State. Therefore, the County would like to continue to pursue formal mediation and requests up to four weeks to proceed with negotiations.

In the interest of an expeditious and economic process, Zapata County asks for any hearings to be held in Austin, where counsel for all parties resides. Mr. Gonzalez's

address is in Helotes, Texas, and he should not be inconvenienced by a hearing in Austin.

ARGUMENT

This application was declared administratively complete on October 6, 2006. Thus, requests for a contested case hearing must be judged by the test in House Bill 801 ("HB 801"), including Section 5.556, TEX. WATER CODE, and TCEQ Chapter 55 rules. Under HB 801 and TCEQ rules, a hearing request must identify the requestor's personal justiciable interest that is affected by the proposed permit or permit amendment. The request must show 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, and list all relevant and material disputed issues of fact **that were raised during the comment period.**[1]

The Commission may grant a person's request if 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.[2]

Whether Mr. Gonzales is an "Affected Person": As an owner of land adjacent to the property proposed for expansion, Mr. Gonzalez is an "affected person."

Whether Mr. Gonzales Timely Filed Comments: Mr. Gonzalez did not provide any substantive comments or provide any basis for his concerns in his initial comments,

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[1] 30 TAC § 55.201(d)

[2] 30 TAC § 55.211(c) & 30 TAC § 55.209(e)

other than his assertion that his property interests would be adversely affected by the proposed expansion. Those comments establish his status as an affected person, but do not establish any basis for a hearing. No issues were raised that could be addressed by Zapata County or the Executive Director in the technical review period. Therefore, Mr. Gonzalez did not satisfy the requirement of timely raising issues to support a hearing request.

Whether Mr. Gonzales Timely Raised Issues Following the Second Notice to Support a Hearing Request: The Commission must determine which issues raised by an affected person in a valid hearing request should be referred to the State Office of Administrative Hearings ("SOAH") for consideration in the contested case hearing.[3]

Zapata County supports some of the Executive Director's ("ED") positions on the issues identified in his response to comments. Comments 1 (the financial loss) and 6 (interpretation of the quitclaim deed) are clearly not valid issues for consideration by the Commission in a municipal solid waste landfill proceeding.

Zapata County does not agree that the other issues identified in the Executive Director's response to comments were, in fact, actually raised by Mr. Gonzalez's second comment letter, or even intended to be raised. For example, the flying trash and odors were clearly mentioned only to support the compliance history issue. Moreover, Mr. Gonzalez raised the issue of visibility only to explain how he perceived himself to be an "affected person," not as an independent issue about proper screening.

[3] Tex. Water Code § 5.556.

Therefore, if Mr. Gonzalez's comments raised any issue, it is only the issue of wholly past compliance with TCEQ rules. And even that issue was not actually raised as a proper issue for hearing, as Mr. Gonzalez's complaint is that Zapata County has failed on several occasions in the operations of the landfill. No examples of actual problems are identified by date or other specific reference.

Moreover, any operation issues that Mr. Gonzalez has alluded to as "reflected by" TCEQ records, were resolved to the agency's satisfaction, as is noted in the End's response to comments.

Thus, Mr. Gonzalez did not raise a valid or proper issue for the hearing.

Did the TCEQ Prepare Proper Notices?: In the TCEQ application context, an applicant must provide the public with notice of its application. The notice must be of such nature as reasonably to convey the required information. *Chocolate Bayou Water Co. v. TNRCC*, 124 S.W.3d 844, 850 (Tex. App.—Austin 2003, pet. denied). The notice is intended to afford individuals who may be affected by the grant or denial of the permit a meaningful opportunity to voice their concerns and participate in the permitting process by requesting a contested-case hearing on the permit application. *Id.* Here, it is clear that the notice conveyed the required information and alerted individuals of their opportunity to participate in a contested case hearing. Indeed, the very hearing requestor complaining about the notice was afforded sufficient information to know that the Zapata County landfill was seeking an amendment to expand its landfill and that there were deadlines to comment and request a contested case hearing.

Among the information that must be included in the notice, as required by TCEQ rules, is a **"brief description** of the location and nature of the proposed activity." 30 TAC §§ 39.411, 39.419, 39.501. The notice is not intended to fully apprise potentially affected parties of the specifics of the proposed permit amendment. Those specifics are found in the application, which is made available to the public and its availability noted in the notice. *See Chocolate Bayou*, 124 S.W.3d at 851.

The notice must provide sufficient information to convey the nature of the proposed activity and the location. The notice in this case conveyed to the public that an application had been submitted and declared administratively and technically complete regarding the operation of a landfill. It provided the proper location. This notice was sufficient to advise potentially affected persons about the landfill activities, so that they could then examine the specifics of the application and determine whether they should request a hearing. In fact, the July 2007 Notice, which states that the application is for a Type I facility, likely resulted in additional scrutiny of the application by potentially affected persons, rather than less scrutiny.

If the Hearing Request is Granted, What Schedule Should be Set? Given the very limited issues raised and the fact that Mr. Gonzalez is a real estate developer with the apparent ability and desire to proceed quickly to resolve the issues, the hearing should be limited to four months, six at the very most.

Given that Mr. Gonzalez and Zapata County have had discussions and can continue to have them, no additional time for mediation is needed. Mediation can

proceed independent of any notice and hearing process, since there is only one opponent.

Finally, to make the process move as quickly as possible and to save all parties and the State resources, all aspects of the hearing should be held in Austin. Counsel for all parties work in Austin. Moreover, even Mr. Gonzalez does not reside in Zapata County. He provided his address as being in Helotes, Texas.

PRAYER

WHEREFORE, PREMESES CONSIDERED, the Zapata County Commissioners Court respectfully urges the Commission to deny the hearing requests, or, in the alternative, limit any hearing granted to 4 months and the single and limited issue of compliance history.

Respectfully Submitted,

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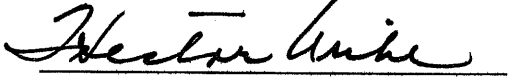

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State Bar No. 20415000

Counsel for Zapata County Commissioners Court

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October 9, 2006

Office of Chief Clerk
MC 105, TCEQ,
P.O. Box 13087
Austin, TX 78711-3087

OPA
OCT 23 2006
BY

RE: Permit no. 783A

Dear Chief Clerk,

I am in receipt of your letter announcing an application for a Municipal Solid Waste Permit amendment. I own 112 acres immediately adjacent and southeast of the proposed area. This property is currently being leased for livestock grazing, however, I have a master plan community of 62 homes, including commercial areas which are pending to be recorded in the near future once the existing land fill is officially closed.

This solid waste facility, if approved, will virtually destroy my planned community and will cause great financial loss for me and my family. The County Judge and commissioners court back in about 1996 approved the gift of the existing 10 acre landfill area but also agreed that once closed that Zapata County would create an open park out of this area. We have been waiting for the open park since this landfill began initiating closure. Furthermore, Zapata County has failed in several occassions in the operations of this landfill as reflected by your own records.

Please place me on your permanent mailing list. Also, I am requesting that this case be contested and that I be included in the group of those who contest it.

Sincerely,

Victor Gonzalez, Jr.

CERTIFICATE OF SERVICE

I certify that on the February 1, 2008, an original and eleven copies of the foregoing Zapata County's Response to the Request for Hearing was served upon the Chief Clerk of the TCEQ and a copy was served upon the parties identified below by first class mail and facsimile.

Hector Uribe

Hector Uribe

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
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