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TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
Blas J. Coy, Jr., *Public Interest Counsel*

2008 FEB -1 PM 4:10

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
*Protecting Texas by Reducing and Preventing Pollution*  
CHIEF CLERKS OFFICE

February 1, 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

Re: **ZAPATA COUNTY**  
**TCEQ DOCKET NO. 2007-1792-MSW**

Dear Ms. Castañuela:

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

Sincerely,

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

Eli Martinez, Attorney  
Assistant 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

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**TCEQ DOCKET NO. 2007-1792-MSW**

**IN THE MATTER OF THE  
APPLICATION BY ZAPATA  
COUNTY FOR MSW PERMIT  
NO. 783**

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§

**BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY**

2008 FEB -1 PM 4:10

CHIEF CLERKS OFFICE

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S  
RESPONSE TO REQUEST 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 to Hearing Request in the above-referenced matter, and would respectfully recommend referring this matter to the State Office of Administrative Hearings ("SOAH").

**I. INTRODUCTION**

Zapata County's San Ygnacio Landfill facility is located in Zapata County, Texas off an unnamed gravel road, approximately 0.4 miles northeast of U.S. Highway 83, two miles south of the City of San Ygnacio. Elevation and Coordinates of Current Permanent Benchmark: Latitude: 27° 02' 15" N, Longitude: 99° 25' 14" W, Elevation: 390 feet above mean sea level (msl). The total area within the permit boundary is approximately 30 acres. The facility consists of a site entrance with a lockable gate and an 8-foot height chain link fence along the permit boundary, a paved entrance road from State Highway 83, all-weather access roads, a gatehouse, scales, a maintenance building, an office building, soil stockpiles for waste cover, crushed stone stockpiles for access road repairs, and Type I and Type IV solid waste disposal areas. Structures for surface drainage and stormwater run-on/runoff controls include a perimeter drainage system to convey stormwater runoff around the site, berms, ditches, a detention pond, and associated drainage structures.

This facility is authorized to accept municipal solid waste resulting from, or incidental to, municipal, community, commercial, institutional, recreational and industrial activities. These wastes include garbage, putrescible wastes, rubbish, ashes, brush, street cleanings, dead animals, abandoned automobiles, construction-demolition waste, yard waste, Class 2 non-hazardous industrial solid waste, Class 3 non-hazardous industrial solid waste, and certain special wastes.

The current application, MSW Permit Amendment Application No. 783-A (application), requests an amendment to the existing permit to expand the landfill vertically and laterally. The application proposes an expanded landfill with a below-grade excavation of approximately 20-30 feet to an elevation of 380 feet above mean sea level (msl) with continuous area filling with waste, and above-grade aerial fill of approximately 10 to 25 feet, to an elevation of 420 to 435 feet above msl. The proposed lateral expansion will add 20 acres to the existing permitted boundary of 10 acres for a total of 30 acres. The expansion would result in a total disposal capacity of approximately 422,000 cubic yards. The permit amendment application was prepared and submitted in accordance with Title 30, Texas Administrative Code, Section 305.62.

On August 22, 2006, TCEQ received this application for an amendment to Municipal Solid Waste Permit No. 783. On October 6, 2006, the Executive Director declared the application administratively complete. On October 19, 2006, the Notice of Receipt of Application and Intent to Obtain a Type I Municipal Solid Waste Permit for the application was published in English in *The Zapata County News*, the newspaper of largest circulation in the county in which the facility that is the subject of the application for amendment is proposed. On November 30, 2006, the Notice of Receipt of Application and Intent to Obtain a Type I Municipal Solid Waste Permit for this application was published in Spanish in *The Zapata County News*. On May 30, 2007, the Executive Director completed the technical review of the

application and prepared a draft permit. On July 5, 2007, the Notice of Application and Preliminary Decision for a Municipal Solid Waste Permit was published both in English and in Spanish in *The Zapata County News*. On August 6, 2007, the public comment period ended. The Executive Director's Decision and Response to Comments was mailed by the Chief Clerk on October 4, 2007. Two requests for a contested case hearing were received from Victor Gonzalez. As discussed more fully below, OPIC recommends granting Mr. Gonzalez's requests.

## II. APPLICABLE LAW

This application was declared administratively complete after September 1, 1999; therefore, it is subject to the requirements of Texas Water Code section 5.556, added by Act 1999, 76<sup>th</sup> 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 the application. 30 TEXAS ADMIN. CODE ("TAC") § 55.201(d).

Under 30 TAC section 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. *Id.* 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.

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. 30 TAC § 55.211(c).

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.

30 TAC § 55.209(e).

### **III. DISCUSSION**

#### **A. Determination of Affected Person Status**

The TCEQ received two timely-filed hearing requests on this application from Victor Gonzalez, Jr. on October 9, 2006 and July 19, 2007. The requests included relevant contact information and raised disputed issues outlining why Mr. Gonzalez believed he would be adversely affected by the proposed activity in a manner not common to members of the general public.

Mr. Gonzalez initially raises the concern that the facility location will discourage potential purchasers of lots in his planned community development and result in lost sales. OPIC finds that Mr. Gonzalez's interest in the future development and sale of residential lots near the proposed facility site is not the type of economic interest that confers affected party status. Such an interest is speculative and derivative of the facility's effect on property values and future planned developments. The effect on the marketability of real property is similar to requests which have expressed concerns about decreased property values and opportunities for resale. Although Mr. Gonzalez states that his property is currently being leased out for grazing, no information was provided that demonstrates the current economic use of this property is being interfered with, or will face added harm if the permit amendment is granted.

In his request, Mr. Gonzalez raises concern about Applicant's compliance history, stating that trash, papers, and debris fly over the containment fence onto his property.<sup>1</sup> Mr. Gonzalez also complains of a persistent odor nuisance. These are interests protected by the law under which the application will be considered.<sup>2</sup>

The 10 acres on which the existing landfill sits was dedicated to the County by Mr. Gonzalez in 1999, and the remainder of his property adjoins the site. Further, Applicant lists Mr.

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<sup>1</sup> As of May 22, 2007, five Notices of Violations had been issued to Applicant, including: Failure to conduct proper compaction; Failure to apply daily cover; and Failure to collect windblown material along the fence lines and throughout the site.

<sup>2</sup> 30 TAC § 55.203(c)(1).

Gonzalez as an adjacent property owner on the map included in their application.<sup>3</sup> Because of his proximity to the Applicant's facility, we conclude that there is a reasonable relationship between the interests claimed and the activity regulated.<sup>4</sup> Therefore, OPIC finds that Mr. Gonzalez is an affected person in accordance with 30 TAC § 55.203, and recommends that his hearing request be granted.

## **B. Issues Raised in the Hearing Request**

### Compliance History

Mr. Gonzalez raises concerns that Applicant has a history of poorly operating the landfill, failing to adequately contain windblown debris, and failing to comply with permit terms. Mr. Gonzalez expresses concern that these problems will only be exacerbated if the landfill increases in size.

### Odor Nuisance

Mr. Gonzalez raises the concern that the facility presents an odor nuisance.

### Business Interests

Mr. Gonzalez raises the concern that the facility will adversely affect future development of his property.

## **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 the Applicant, the Executive Director, and the Requestor on the issues presented above.

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<sup>3</sup> See Zapata County Application and attached map dated March 18, 2008.

<sup>4</sup> See 30 TAC §55.203(b)(3)

**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, use and enjoyment of property, odor nuisance, and interference with Requestor's business opportunities are all issues of fact.

**F. Relevant and Material Issues**

Certain issues raised by the requesters are not relevant and material to the Commission's decision on the application. Relevant and material issues are those that are governed by the substantive law under which this permit is to be issued.<sup>5</sup> 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.<sup>6</sup> As discussed above, OPIC considers Mr. Gonzalez's concerns about the proposed facility's impact on the sale of lots in its residential development to be a concern regarding property values which could not be addressed in proceedings regarding this permit. OPIC therefore finds that this issue is inappropriate for referral to the State Office of Administrative Hearings.

The hearing request also 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). Requester's concerns regarding use and enjoyment of property,<sup>7</sup> compliance history,<sup>8</sup> and odor nuisance<sup>9</sup> are each

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<sup>5</sup> See 30 TAC §55.209(e)(6)

<sup>6</sup> *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.")

<sup>7</sup> 30 TAC § 55.203(c)(4)

<sup>8</sup> 30 TAC § 60.1 (a)(1)(A)

relevant and material to the commission's decision on the application. These issues are addressed by the substantive law governing this application, are within the jurisdiction of the TCEQ, and can be addressed in a hearing on the pending application.<sup>10</sup> Therefore, OPIC finds these issues raised by Mr. Gonzalez are appropriate 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 exacerbate existing problems with windblown trash on neighboring property?
- 3) Will the permitted activity cause an odor nuisance?

#### **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.

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<sup>9</sup> 30 TAC § 332.45(5) (requiring facility siting and operation to be conducted in a manner as to prevent potential nuisance odor conditions and fire hazards).

<sup>10</sup> 30 TAC Section 55.201(d)(4); and, 55.211(c)(2)(A)

#### 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.

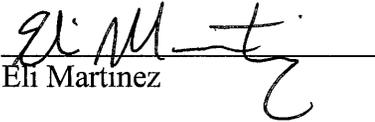
Respectfully submitted,

Blas J. Coy, Jr.  
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By   
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**CERTIFICATE OF SERVICE**

I hereby certify that on February 1, 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

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TCEQ DOCKET NO. 2007-1792-MSW**

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