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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

December 19, 2008

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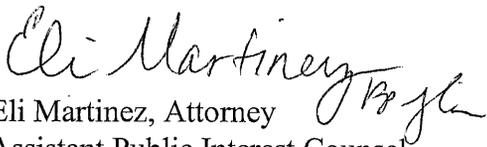
TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2008 DEC 19 PM 2:52
CHIEF CLERKS OFFICE

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

Dear Ms. Castañuela:

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

Sincerely,


Eli Martinez, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

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TCEQ DOCKET NO. 2007-1792-MSW

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**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**
CLERKS OFFICE

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

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. 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.

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 March 27, 2008, a Revised Notice of Application and Preliminary Decision for a Municipal

Solid Waste Permit was published in both English and Spanish in *The Zapata County News*. On April 28, 2008, the public comment period ended. The Executive Director's Decision and Response to Comments was submitted to the Chief Clerk on September 27, 2007 and mailed October 4, 2007. An amended Response to Comments was submitted to the Chief Clerk on June 19, 2008 and mailed by the Chief Clerk on June 26, 2008. Eight requests for a contested case hearing were received by the Commission. As discussed more fully below, OPIC recommends granting each hearing request.

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, 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 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 eight timely-filed hearing requests on this application. Seven of the requests were submitted using a common letter.¹ The eighth request was written by attorney Monica Jacobs on behalf of Victor Gonzalez, Jr. Each of the requests included relevant contact information and raised disputed issues outlining why the requestor believed they would be adversely affected by the proposed activity in a manner not common to members of the general public.

The seven requestors raise the concerns that the proposed permit will have negative impacts on human health and the environment. More specifically, the requestors are concerned with the control of disease vectors, site access and traffic concerns, accidental inclusion of prohibited wastes, gas monitoring, landfill cover, fire, water quality and water runoff, compliance history, debris and windblown litter, odor impacts, and insufficient visual screening mechanisms. Aside from the issue of traffic concerns, these are interests protected by the law under which the application will be considered.² Each of the seven requestors also state that they reside within two miles of the facility.

Given the extent of the permitted expansion—from 10 acres to a total of 30 acres resulting in a total disposal capacity of approximately 422,000 cubic yards—OPIC finds that a reasonable relationship exists between the interests claimed and the activity regulated.³

¹ The seven requests were received from: Paul and Aminta Yeasley; Jorge and Maria Valdez; Orlando and Erika Villarreal; San Juanita Rocha; Gerardo Paredes; Brenda Jaicyzoski; and Luis Lozano.

² 30 TAC § 55.203(c)(1).

³ See 30 TAC §55.203(b)(3)

Therefore, OPIC finds that each of the seven requestors are affected persons in accordance with 30 TAC § 55.203, and recommends that their hearing requests be granted.

The eighth request, submitted on behalf of Victor Gonzalez, Jr., echoes the concerns in the letter discussed above. Additionally, Mr. Gonzalez raises the concerns that leachate and gas condensate, closure and post-closure plans, financial assurance, and personnel qualifications issues warrant denial of the permit. In a previous hearing request dated July 19, 2007, Mr. Gonzalez also raised the concern that the community he plans to develop could not be realized if the permitted expansion occurred. This issue of concern has not been withdrawn in the current request. Aside from Mr. Gonzalez's concerns regarding this business interest and potential traffic resulting from facility operations, Mr. Gonzalez's remaining interests are protected by the law under which the application will be considered.⁴

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. Gonzalez as an adjacent property owner on the map included in their application.⁵ Because of his proximity to the Applicant's facility, there is a reasonable relationship between the interests claimed and the activity regulated.⁶ 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

Control of Disease Vectors

All requestors raise the concern that Applicant measures intended to control disease vectors will be insufficient.

⁴ 30 TAC § 55.203(c)(1).

⁵ See Zapata County Application and attached map dated March 18, 2008.

⁶ See 30 TAC §55.203(b)(3)

Site Access and Traffic Concerns

All requestors raise the concern that site access and traffic concerns, including road dust, have not been sufficiently addressed by Applicant.

Special and Prohibited Wastes

All requestors raise the concern that special and prohibited wastes will not be properly handled by the facility.

Gas Monitoring

All requestors raise the concern that Applicant's gas monitoring and remediation plans are insufficient.

Landfill Cover

All requestors raise the concern that Applicant will not maintain landfill cover in a protective manner.

Fire

All requestors raise the concern that Applicant will not be able to protect against fire in the expanded area.

Water Quality and Water Runoff

All requestors raise the concern that Applicant will not be able to operate the facility in such a way as to protect the surrounding environment from runoff or prevent contamination of groundwater resources.

Compliance History

All requestors raise the concern that Applicant's compliance history demonstrates the inability to operate the facility according to permitted terms.

Migration of Landfill Debris and Windblown Litter

All requestors raise the concern that Applicant will not be able to protect against migration of landfill debris and windblown litter.

Odor Impacts

All requestors raise the concern that Applicant's facility will result in an odor nuisance.

Insufficient Visual Screening of Waste Material

All requestors raise the concern that Applicant will not be able to properly screen waste materials from view.

Leachate and Gas Condensate

Mr. Gonzalez raises the concern that Applicant will not be able to properly control leachate and gas condensate.

Closure and Post-Closure Plans

Mr. Gonzalez raises the concern that Applicant's closure and post-closure plans, including financial assurance, do not adequately protect human health and the environment.

Qualified Personnel

Mr. Gonzalez raises the concern that Applicant will not be able to maintain minimally-qualified key personnel.

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.

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 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.⁷ In order to refer an issue to the State

⁷ See 30 TAC §55.209(e)(6)

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.⁸

The requestors' concerns regarding disease vectors,⁹ site access,¹⁰ road dust,¹¹ special and prohibited wastes,¹² gas monitoring,¹³ landfill cover,¹⁴ fire,¹⁵ water quality and runoff,¹⁶ compliance history,¹⁷ migration of landfill debris and windblown litter,¹⁸ odor nuisance,¹⁹ visual screening of waste material,²⁰ leachate and gas condensate,²¹ closure and post-closure plans,²² and retention of qualified personnel²³ are all relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). These issues are addressed by the substantive law governing this application, are within the jurisdiction of the

⁸ 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.")

⁹ 30 TAC §330.151 requires the site operator to control on-site populations of disease vectors using compaction and daily cover procedures.

¹⁰ 30 TAC §330.61(i) requires applicant to include data on the availability and adequacy of roads.

¹¹ 30 TAC §330.153(b) prohibits creation of a nuisance to surrounding areas from dust resulting from on-site and other access roadways.

¹² 30 TAC §335.127(5) requires that the applicant design procedures for the detection and prevention of the disposal of prohibited wastes.

¹³ 30 TAC §330.159 requires that gases must be monitored in accordance with a landfill gas management plan.

¹⁴ 30 TAC §165 requires application of daily, intermediate and final cover.

¹⁵ 30 TAC §330.129 requires that the owner or operator of the landfill maintain a source of earthen material in such a manner that it is available at all times to extinguish any fires.

¹⁶ 30 TAC §330.303 requires construction, operation, and maintenance of a facility in such a way as to manage runoff and runoff during the peak discharge from at least a 25 year storm.

¹⁷ 30 TAC § 60.1 (a)(1)(A)

¹⁸ 30 TAC §330.139 requires control of windblown solid waste and collection of windblown material and litter to control unhealthy, unsafe, or unsightly conditions.

¹⁹ 30 TAC § 330.15(a)(2) requires operation of the facility in a way to prevent the occurrence of nuisance odor conditions.

²⁰ 30 TAC §330.175 requires visual screening of waste.

²¹ 30 TAC §330.177 outline the requirements for leachate and gas condensate recirculation at Type I landfills.

²² 30 TAC §330.457(e) requires that an approved closure plan must be established describing the steps necessary to close all MSW landfill units at any point during the active life at the unit.

²³ 30 TAC §330.133(b) requires that staff observe each load of material disposed of at the landfill and be properly trained.

TCEQ, and can be addressed in a hearing on the pending application.²⁴ Therefore, OPIC finds these issues are appropriate for referral to the State Office of Administrative Hearings.

Mr. Gonzalez initially raised 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. 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) Will the Applicant appropriately control for disease vectors?
- 2) Are appropriate roads to the Applicant's facility available and adequate, and will they present a dust nuisance?
- 3) Will special and prohibited wastes be effectively screened by the Applicant's facility?
- 4) Will the Applicant appropriately comply with applicable gas monitoring requirements?
- 5) Will Applicant maintain landfill cover in a manner protective of human health and the environment?
- 6) Will Applicant have the ability to appropriately manage fires over the expanded permitted area?
- 7) Will Applicant appropriately protect the surrounding environment from runoff and prevent contamination of groundwater resources?

²⁴ 30 TAC Section 55.201(d)(4); and, 55.211(c)(2)(A)

- 8) Does the Applicant's compliance history demonstrate the inability to comply with the terms of its permit and abide by applicable rules?
- 9) Will Applicant appropriately protect against migration of landfill debris and windblown litter?
- 10) Will the permitted activity cause an odor nuisance?
- 11) Will Applicant appropriately screen waste materials from view?
- 12) Will the Applicant appropriately control leachate and gas condensate?
- 13) Do Applicant's closure and post-closure plans, including financial assurance, adequately protect human health and the environment?
- 14) Will Applicant maintain minimally-qualified key personnel to run the expanded facility?

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 one year from the first date of the preliminary hearing until the proposal for decision is issued.

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IV. CONCLUSION

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OPIC recommends referring the matter to SOAH for an evidentiary hearing on the issues recommended above. OPIC further recommends a hearing duration of one year.

Respectfully submitted,

Blas J. Coy, Jr.
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By 
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CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2008 the original and seven true and correct copies of the Office of the Public Counsel's Response to Hearing Requests 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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