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## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

January 30, 2009

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  
2009 JAN 30 PM 4:01  
CHIEF CLERKS OFFICE

Re: **DARLING INTERNATIONAL, INC.**  
**TCEQ DOCKET NO. 2008-1446-MSW**

Dear Ms. Castañuela:

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

Sincerely,

A handwritten signature in cursive script that reads "Amy Swanholm".

Amy Swanholm, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

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TCEQ DOCKET NO. 2008-1446-MSW

2009 JAN 30 PM 4:01

IN THE MATTER OF  
THE APPLICATION OF  
DARLING  
INTERNATIONAL INC.  
FOR MSW PERMIT NO.  
2353

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BEFORE THE TEXAS  
CHIEF CLERKS OFFICE  
COMMISSION ON  
ENVIRONMENTAL  
QUALITY

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

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) with a Response to  
Requests for Hearing in the above-referenced matter.

**I. INTRODUCTION**

**A. Background of Facility**

Darling International, Inc. (Darling) has applied to the Texas Commission on  
Environmental Quality (TCEQ) for a new permit, Permit No. 2353, to operate a grease  
trap waste processing facility. The facility will be located at 3701 Schalker Street, 850  
feet south of Cavalcade Street, in Houston, Harris County, Texas. The facility would be  
located on approximately 0.77 acres, within a larger tract of land where Darling currently  
has offices and a rendering plant. The proposed facility would be authorized to accept,  
store and process grease trap waste associated with municipal, community, commercial,  
institutional, recreational and industrial activities.

## **B. Procedural Background**

TCEQ received this application on March 9, 2007. On April 30, 2007, the Executive Director (ED) declared the application administratively complete. The Notice of Receipt and Intent to Obtain Water Quality Permit (NORI) was published in *The Houston Chronicle* on June 7, 2007. It was also published in *The Houston Chronicle/dba La Voz De Houston* a Spanish-speaking publication generally circulated in Harris County, Texas, on June 6, 2007. The Notice of Application and Preliminary Decision (NAPD) was published in *The Houston Chronicle* on May 8, 2008, in Harris County, Texas. It was also published in *The Houston Chronicle/dba La Voz De Houston* on May 7, 2008. The public comment period ended on June 9, 2008 and the Chief Clerk mailed the ED's Response to Comments on August 7, 2008. The deadline to request a contested case hearing was September 8, 2008.

TCEQ received one comment letter from Downstream Environmental (Downstream) on May 19, 2007, before the close of the comment period. TCEQ also received one letter containing a request for reconsideration and request for a contested case hearing from Downstream, on September 5, 2008, before the close of the hearing request period. Based on Downstream's timely hearing request, OPIC recommends referring this application to SOAH for a contested case hearing.

## **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.<sup>1</sup> Any person may file a request for reconsideration of the ED's decision.<sup>2</sup> A request for reconsideration must state the reasons why the decision should be reconsidered.<sup>3</sup> Responses to requests for reconsideration should address the issues raised in the request.<sup>4</sup>

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<sup>1</sup> Texas Water Code (TWC) §5.556; 30 TAC § 55.201(a) and (e).

<sup>2</sup> 30 TAC § 55.201(e).

<sup>3</sup> *Id.*

**B. Request for Reconsideration filed by Downstream Environmental**

In a letter dated September 5, 2008, Downstream Environmental lists five reasons why its request for reconsideration should be granted. First, it states that Darling has a terrible compliance history with the City of Houston's Health Department, especially concerning odors. Second, it argues that the application does not meet the requirements of 30 TAC § 330.65(c)(4)(a). Third, it argues that Darling has not complied with its wastewater discharge agreements, leading to voluntary closure in the past. Fourth, it argues that Darling's closure bond estimate is insufficient. Fifth, Downstream restates its assertion that Darling has a history of noncompliance and nuisance odor issues.

OPIC cannot support these issues as the basis for the Commission granting 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. Therefore, OPIC recommends denying the request for reconsideration.

**III. ANALYSIS OF REQUESTS FOR CONTESTED CASE HEARINGS**

**A. Applicable Law**

This application was declared administratively complete after September 1, 1999, and is subject to the requirements of Texas Water Code (TWC) § 5.556 added by Acts 1999, 76<sup>th</sup> Leg., ch 1350 (commonly known as "House Bill 801"). Under the applicable statute<sup>4</sup> 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

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<sup>4</sup> 30 TAC § 55.209(f).

the public notice of application. 30 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, 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.

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.

**B. Determination of Affected Party Status**

The Office of the Chief Clerk received a timely request for a contested case hearing from Mary Wimbish on behalf of Downstream Environmental on September 5, 2008.

In its request Downstream Environmental states that it operates a facility located on the West side of Houston, Texas, about 20 miles from the proposed facility which is on the East side of the city. While Downstream does not expressly say what type of facility it operates, it contends that both it and the applicant serve the same customer base.<sup>5</sup> Downstream goes on to state that its economic interests will be impacted if the proposed facility is permitted. Downstream contends that the ED is not applying the requirements of the agency equally to similar applications. Specifically, Downstream states that when it applied for a similar authorization, the ED refused to grant an exemption from the 50 foot buffer zone requirement and denied the permit application. Downstream notes that, similar to Downstream's application eight years ago, the Applicant can not meet the 50 foot buffer zone requirement on one side of its facility. Nevertheless, the ED granted the Applicant the exemption and recommends granting the permit.

Downstream expresses concern regarding Darling's compliance history with the City of Houston's Health Department, specifically in regard to odors. Downstream also argues that the application does not meet the requirements of 30 TAC § 330.65(c)(4)(a).<sup>6</sup> Third, it argues that Darling has not complied with its wastewater discharge agreements, leading to voluntary closure in the past. Fourth, Downstream argues that Darling's closure bond estimate is insufficient. Fifth, Downstream restates its assertion that Darling has a history of noncompliance and nuisance odor issues.

Downstream argues that its interest is distinguishable from other waste industries in the area because Downstream previously attempted to gain a similar permit to operate as the proposed facility, but was ultimately denied. Downstream claims they are further

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<sup>5</sup> A review of TCEQ records show that Downstream Environmental is authorized to operate a Type V facility in the City of Houston.

<sup>6</sup> OPIC notes that 30 TAC § 330.65 does not contain the subsection which Ms. Wimbish cites, regarding this issue.

affected because two other permits have been granted with waivers to the 50 foot buffer zone rule, while Downstream's permit application was denied because it did not meet this same rule, raising the concern that the ED is not applying the same standards to all applications before the TCEQ.

Therefore, OPIC concludes Downstream has expressed interests not common to members of the general public. Downstream states it is a competitor with Darling, and will serve the same client base.<sup>7</sup> OPIC finds that Downstream's unique economic interest in ensuring that direct business competitors are held to similar regulatory standards constitutes a personal justiciable interest.<sup>8</sup> OPIC also finds a reasonable relationship between the interests claimed and the impact of the proposed permit on those interests and recommends the Commission find Downstream an affected party.

### **C. Issues Raised in the Hearing Requests**

In its hearing request, Downstream questions whether Darling's compliance history warrants granting the permit. It also expresses concern that the proposed facility will cause nuisance odors. In the past, Downstream claims, Darling has operated a grease and grit processing facility at the same site, but Downstream claims it was shut down by the City of Houston. Further, Downstream argues that Darling will not have a 50 foot buffer zone around the proposed facility. Downstream also argues that the proposed permit is silent on how the waste will be processed, and therefore does not meet the requirements of 30 TAC § 330.65(c)(4)(a).<sup>9</sup> Finally, Downstream questions whether Darling's closure bond estimates are sufficient.

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<sup>7</sup> See *Texas Disposal Systems Landfill, Inc., v. TCEQ*, 259 S.W. 3d 361, 363 (Tx. App. 2008). There, a protestant to a landfill permit modification was found to have no justiciable interest where the protestant's landfill was 200 miles away, and the interest alleged was unfair competition from an un-permitted future facility that might open near the protestant's facility. However the court implies that a protestant who was a direct business competitor "with a sufficient interest of its own" would have a justiciable interest.

<sup>8</sup> OPIC distinguishes this hearing request from Downstream's hearing request and request for reconsideration filed in *U.S. Oil Recovery L.P.*, TCEQ Docket No. 2006-2246-MSW. There, the only issue raised by Downstream was plagiarism, which OPIC concluded was not a protected economic interest under 30 TAC § 55.203(a). Further, OPIC concluded that preventing and punishing plagiarism is an interest common to the general public, and therefore not a personal justiciable interest. 30 TAC § 55.203(c).

<sup>9</sup> OPIC notes that 30 TAC § 330.65 does not contain the subsection which Ms. Wimbish cites, regarding this issue.

**D. Issues raised in Comment Period**

Downstream submitted a comment letter on May 19, 2008. In the comment letter, Downstream states that there is no 50 foot buffer zone surrounding the facility, and that Downstream tried to get a permit on the same site several years earlier, but was denied because there was not 50 foot buffer. Downstream also states there have been numerous complaints about odors from the facility, documented by the City of Houston.

Downstream's letter requesting a hearing raises issues beyond the scope of those raised during the comment period. Downstream may only raise those issues which were brought up during the comment period. Therefore Downstream may not raise the issue of whether Darling's bond closure estimates are sufficient. Downstream also may not raise the issue of whether the application contains sufficient information of how the waste will be processed.<sup>10</sup> All other issues raised by Downstream in its hearing request relate to the issue of odor or the 50 foot buffer requirement.

**E. Disputed Issues**

There is no agreement between Downstream and Darling or the ED on the issues raised in Downstream's hearing request.

**F. 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. All of the issues raised are issues of fact. *See* 30 TAC §55.211(b)(3)(A) and (B).

**G. Relevant and Material Issues**

Hearing requests may raise issues relevant and material to the Commission's decision under 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). In order to refer an issue to SOAH, the Commission must find that the issue is relevant and material to the

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<sup>10</sup> *Id.*

Commission's decision to issue or deny this permit.<sup>11</sup> Relevant and material issues are those governed by the substantive law under which this permit is to be issued.<sup>12</sup>

Downstream raises concerns that the proposed facility will cause nuisance odors. Related to this issue, Downstream states that Darling's record with the City of Houston and compliance history regarding nuisance warrants denial of the permit application. This issue is relevant and material because 30 TAC §330.15(a)(2) prohibits the proposed facility from creating or maintaining nuisance conditions. Furthermore, the proposed facility must be designed to "prevent nuisance odors from leaving the boundary of the facility."<sup>13</sup> The proposed facility must also employ certain measures for controlling odor.<sup>14</sup> Therefore Downstream's question of whether the proposed facility can adequately control nuisance odors is relevant and material.

Downstream also questions whether the proposed permit complies with TCEQ buffer zone requirements. 30 TAC §330.543(b)(1) requires a municipal solid waste facility to maintain a minimum 50-foot buffer zone between the facility and the property line.<sup>15</sup> The rule, however, provides the ED with authority to "consider alternatives to buffer zone requirements for permitted and registered storage and processing municipal solid waste facilities."<sup>16</sup> Therefore, whether the proposed facility will comply with buffer zone requirements is a relevant and material issue.

#### **H. Issues Recommended for Referral**

OPIC recommends the Commission refer the following disputed issues of fact to the State Office of Administrative Hearings for a contested case hearing:

1. Will the proposed facility cause nuisance odors?

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<sup>11</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>12</sup> *Id.*

<sup>13</sup> 30 TAC § 330.245(d).

<sup>14</sup> 30 TAC § 330.245(f).

<sup>15</sup> 30 TAC § 330.543(b)(1).

<sup>16</sup> *Id.*

2. Will the proposed facility comply with buffer zone requirements for municipal solid waste facilities?

**I. Maximum Expected Duration of Hearing**

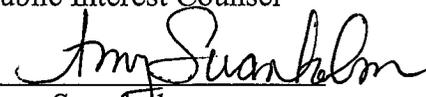
Commission Rule 30 TEX. ADMIN. CODE § 55.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer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

**III. CONCLUSION**

OPIC recommends the Commission grant the hearing request of Downstream Environmental Inc. and refer the above-referenced issues to the State Office of Administrative Hearings.

Respectfully submitted,

Blas J. Coy, Jr.  
Public Interest Counsel

By:   
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**CERTIFICATE OF SERVICE**

I hereby certify that on January 30, 2009 the original and seven true and correct copies of the Office of the Public Interest Counsel's Response to 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.

  
Amy Swanholm

CHIEF CLERKS OFFICE

2009 JAN 30 PM 4: 01

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QUALITY

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**TCEQ DOCKET NO. 2008-1446-MSW**

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