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Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

March 2, 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 MAR -2 PM 2:41
CHIEF CLERKS OFFICE

Re: **SOUTH TEXAS MINING VENTURE, LLP**
TCEQ DOCKET NO. 2008-1876-UIC

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 "Amy Swanholm".

Amy Swanholm, 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. 2008-1876-UIC

2009 MAR -2 PM 2:41

IN THE MATTER OF
SOUTH TEXAS MINING
VENTURE, LLP.
PERMIT NOS. WDW418
AND WDW419.

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BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL
QUALITY
CHIEF CLERKS OFFICE

**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

South Texas Mining Venture, LLP., 400 North Shoreline Blvd., Suite 800N,
Corpus Christi, TX 78471 (South Texas) has applied for two Class I non-hazardous
underground injection well permits. The wells are proposed to be located at the La
Palangana site off of Ranch Road 3196 in Duval County, Texas. The site is
approximately six miles north of Benavides, Texas, approximately 70 miles west of
Corpus Christi, Texas, and approximately 150 miles south of San Antonio, Texas.

The proposed permit would authorize the disposal of materials generated during
in situ uranium mining operations conducted at the La Palangana mining site. Materials
include those described under Texas Health and Safety Code (THSC) § 401.003(3)(b),
including tailings or wastes from the extraction or concentration of uranium or thorium,
as well as discreet surface wastes from the uranium solution extraction process. The
permits also authorize disposal of; 1) wastes generated during closure of the well and
associated facilities, as compatible with permitted wastes, the reservoir, and well
materials; 2) lixiviant bleeding stream; 3) lab waste stream; 4) resin transfer water; 5)
filter press wash stream; 6) reverse osmosis brine stream; 7) restoration wastewater;

and 8) other associated wastes, as compatible with permitted wastes, the reservoir, and well materials. In addition to this permit, South Texas has applied for a Radioactive Materials License, a Class III injection well area permit, and a Production Area Authorization.

The application was received on September 6, 2007 and declared administratively complete on September 18, 2007. The Notice of Receipt of Application and Intent to Obtain New Underground Injection Control Permits (NORI) was published on October 3, 2007, in the *Freer Press* of Duval County. The Notice of Application and Preliminary Decision for a Non-hazardous Waste Underground Injection Control Proposed Permit Nos. WDW 418 and 419 (NAPD) was published on July 30, 2008 in *The Progress*, *The Frio-Nueces Current*, and *The Star Classifieds* in Duval County. On July 31, 2008, it was published in *The Hebronville View*, *The Falfurrias Facts*, *The Laredo Morning Times*, and *The Star Classifieds* in Duval County. The comment period ended on August 2, 2008, and the deadline to request a contested case hearing was December 4, 2008. TCEQ received two hearing requests from Emily Rogers on behalf of Duval County Conservation District (Duval) and Jim Wells County Fresh Water Supply District No. 1 (Jim Wells), on September 2, 2008 and on December 5, 2008. The first hearing request was submitted during the period to submit comments and is therefore timely, but the second hearing request was submitted one day after the deadline to request a contested case hearing, and is therefore not timely.

II. REQUESTS FOR A CONESTED CASE HEARING

A. 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, 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 Person Status

TCEQ received two hearing request from Emily Rogers on behalf of Duval County Conservation District (Duval) and Jim Wells County Fresh Water Supply District No. 1 (Jim Wells). The first request was faxed to the TCEQ on the last day to submit public comments, September 2, 2008, and a hard copy arrived at the TCEQ the next day. The second hearing request was filed on December 5, 2009, one day after the closing of the period to request a contested case hearing, December 4, 2009, and therefore is not timely. This second hearing request does not present any new information, though.

The timely hearing request states that Duval is affected because the proposed wells will have an adverse affect on Duval's water supply. The request also states that it owns five water wells within six miles of the proposed injection wells and provides potable water service throughout Duval County. In addition, the proposed injection wells are in areas that receive their water from Duval.

Jim Wells claims to be affected because the proposed wells will have an adverse affect on Jim Wells's water supply. Jim Wells has one well that serves about 600 retail water connections (servicing 1900 people). That well is located in Jim Wells County, directly east of the proposed injection wells.

Both districts raise concerns regarding future uranium contamination in their wells, which provide the sole source of water for both districts. Jim Wells states it currently has uranium in its water supply from ongoing mining in the area, and believes that this problem will be worsened by the proposed injection wells. Further, both districts contend that the applicant has not demonstrated the proposed injection wells are in the public interest or financially responsible. They further contend that the applicant has not determined if there are any other practical, economic, and feasible alternatives to the injection wells. They also believe the applicant has not shown that the proposed injection wells will be properly operated.

Based on the unique issues raised in the hearing request and both districts' authority over groundwater wells in the immediate vicinity of the proposed injection wells, OPIC recommends the Commission find Duval and Jim Wells to be "affected persons" in accordance with 30 TAC § 55.205(a).

C. Issues Raised in the Hearing Requests

Both hearing requestors question whether the proposed draft permits adequately protects the groundwater quality in Duval County. They also question whether the proposed draft permits will pollute their wells, which are drinking water sources. Jim Wells District is concerned that the proposed injection wells will exacerbate the uranium contamination they already struggle with.

Both districts question whether these injection wells are in the public interest, and whether it is financially responsible to install the injection wells. They charge that the applicant has not determined whether there are any other alternatives. Finally, they argue that the applicant has not shown that the proposed injection wells will be properly operated.

D. Issues raised in Comment Period

All of the issues raised in the hearing requests were raised in the comment period and have not been withdrawn.¹

E. Disputed Issues

There is no agreement between the Petitioners or requesters and the applicant or Executive Director on the issues raised in the hearing requests.

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. *See* 30 TAC §55.211(b)(3)(A) and (B). The issues as described above are all issues of fact.

¹ 30 TAC §§55.201(c) and (d)(4), 55.211(c)(2)(A).

G. Relevant and Material Issues

The hearing requests raise 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). In order to refer an issue to SOAH, the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit.² Relevant and material issues are those that are governed by the substantive law under which this permit is to be issued.³

Duval County and Jim Wells express concern that the proposed wells will affect groundwater quality and could pollute their sole source of drinking water. When considering whether to grant this type of permit, the TCEQ examines whether "with proper safeguards, both ground and surface freshwater can be adequately protected from pollution."⁴ TCEQ rules state that "[n]o permit or authorization by rule shall be allowed where an injection well causes or allows the movement of fluid that would result in the pollution of an underground source of drinking water." The permit "shall include terms and conditions reasonably necessary to protect fresh water from pollution."⁵ Further, 30 TAC § 331.1(a) charges the TCEQ to "prevent underground injection that may pollute fresh water." Therefore these are relevant and material issues.

Duval County and Jim Wells question whether these injection wells are in the public interest, and whether it is financially responsible to install the injection wells. Both entities also question whether there are any practical, economic and feasible alternative to the proposed disposal method. TCEQ may grant a permit if it finds that "the use or installation of the injection well is in the public interest."⁶ In evaluating the public interest, it shall consider specifics such as the applicant's compliance history and

² 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.")

³ *Id.*

⁴ Texas Water Code (TWC) § 27.051(a)(3).

⁵ 30 TAC § 331.5(a)

⁶ TWC § 27.051(a)(1).

“whether there is a practical, economic and feasible alternative to an injection well reasonably available.”⁷ Therefore these are relevant and material issues.

Jim Wells questions whether the proposed wells will increase current uranium levels in their water wells. This is a relevant and material issue because Chapter 331 requires Class I disposal wells to be designed, constructed, operated and closed in a manner that prevents underground flow of contaminants that could result in pollution of underground sources of drinking water.⁸

Duval County and Jim Wells question whether the applicant has demonstrated adequate financial responsibility. TWC §27.051(a)(4) states that the Commission may grant the applicant’s permit if there has been a satisfactory showing of financial responsibility. Furthermore, TCEQ rules lay out specifics for ensuring an applicant’s financial security to properly manage the site.⁹ Therefore this is a relevant and material issue.

Duval County and Jim Wells question whether the applicant has provided for proper operation of the proposed wells. 30 TAC § 331.63 provides specific operating requirements that the applicant must comply with. Further, the Commission shall consider proposed operating data submitted as part of the application.¹⁰ Therefore this is a relevant and material issue.

H. 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 proposed injection wells adequately protect against contamination of groundwater and underground drinking water sources?
2. Will the proposed injection wells increase uranium levels above those already present in some groundwater and underground drinking water sources?
3. Are the use and installation of the proposed injection wells in the public interest?

⁷ 30 TAC §331.121(b).

⁸ See 30 TAC § 331.4, 5, 7, 43, 44, 45, 46, 62, 63, 64, 65, 66, 68, and 121.

⁹ See 30 TAC § 331.142, 143, and 144.

¹⁰ 30 TAC § 331.121(a)(2)(G) and (J).

4. Is there is a practical, economic and feasible alternative to the applicant's proposed disposal method?
5. Has the applicant made a satisfactory showing of financial responsibility?
6. Has the applicant provided for the proper operation of the proposed injection wells?

I. Maximum Expected Duration of Hearing

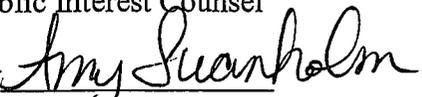
Commission Rule 30 TEX. ADMIN. CODE § 55.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer 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 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 granting the hearing requests from Duval County and Jim Wells and referring the above mentioned *Issues Recommended for Referral*. OPIC further recommends a hearing duration of nine months.

Respectfully submitted,

Blas Coy, Jr.
Public Interest Counsel

By 

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CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2009 the original and seven true and correct copies of the Office of 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,
Assistant Public Interest Counsel

TEXAS
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