

Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*



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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

October 7, 2011

Bridget Bohac, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

**RE: MAILING LIST
RIO GRANDE MINING COMPANY
TCEQ DOCKET NO. 2011-1469-IWD**

Dear Ms. Bohac:

Enclosed for filing is the Office of Public Interest Counsel's Response to Request for Hearing 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



TCEQ DOCKET NO. 2011-1469-IWD

**IN THE MATTER OF
THE APPLICATION
OF
RIO GRANDE MIING
COMPANY FOR
PERMIT NO.
0004297000**

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**BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL
QUALITY**

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

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

Rio Grande Mining Company (Rio Grande), which operates the Shafter Mine, has applied for a major amendment without renewal to amend its Texas Land Application Permit (TLAP), which authorizes the disposal of wastewater via surface and sub-surface irrigation, to a Texas Pollutant Discharge Elimination System (TPDES) discharge permit which would authorize the discharge of mine dewatering water into water in the state at a daily average flow of 360,000 gallons per day. The current TLAP permit authorizes the disposal of mine dewatering water via surface and subsurface irrigation at a daily average flow not to exceed 360,000 gallons per day. If the draft permit is issued, Rio Grande will not be authorized to dispose of mine dewatering water via surface or subsurface irrigation.

The facility is located west of U.S. Highway 67, approximately one mile west of the Shafter town site, Presidio County, Texas 79843. The effluent is

proposed to be discharged to an unnamed drainage, then to Arroyo del Muerto, then to Wilson Arroyo, then to Rio Grande Below Riverside Diversion Dam, in Segment No. 2307 of the Rio Grande Basin.

B. Procedural Background

TCEQ received the major amendment application on July 13, 2010, and declared it administratively complete on October 15, 2010. The Notice of Receipt of Application and Intent to Obtain a Water Quality Permit (NORI) was published on October 28, 2010, in English in *The Big Bend Sentinel* and in Spanish in *The Presidio International*. The Executive Director completed the technical review of the application on February 12, 2011, and prepared a draft permit. The Notice of Application and Preliminary Decision (NAPD) was published on April 14, 2011, in English in *The Big Bend Sentinel* and in Spanish in *The Presidio International*. The comment period closed May 16, 2011, and the deadline to request a contested case hearing was August 18, 2011. This application was administratively complete on or after September 1, 1999; therefore, this application is subject to the procedural requirements adopted pursuant to House Bill 801 (76th Legislature, 1999).

OPIC recommends not referring this application to the State Office of Administrative Hearings (SOAH) for a contested case hearing.

II. 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, 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 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.

A group or association may request a contested case hearing if:

- (1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;
- (2) the interests the group or association seeks to protect are germane to the organization’s purpose; and
- (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

30 TAC § 55.205(a). The ED, OPIC, or applicant may request the group or association provide an explanation of how the group or association meets these requirements. 30 TAC § 55.205(b).

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 one hearing request from Paul Hunt, a Presidio County Judge, on May 13, 2011. He states that he is concerned with the proposed discharge's impact on local water resources. He believes the dewatering process will waste large amounts of water from a poorly understood and fragile desert mountain ecosystem. He is also concerned that the aquifer system where Rio Grande will get its water is critical to the health of Shafter residents, regional wildlife, and businesses in Presidio County. He is also concerned with whether the discharge will contaminate the groundwater with arsenic.

Mr. Hunt's hearing request is unclear as to whether he is requesting a hearing as an individual or on behalf of Presidio County. He submitted his hearing request on letterhead for the Presidio County Commissioners Court, and lists his address as that of Presidio County. However he does not state on whose behalf he requests a hearing.

The hearing request does not include enough information to determine whether Paul Hunt is requesting a hearing as an individual or on behalf of Presidio County. As an individual, his hearing request does not include enough information to determine whether he has a personal justiciable interest. However, if his request is on behalf of the Presidio County, and the Presidio

County Commissioners Court has authorized him to request a hearing, then Presidio County would be affected.

As a governmental entity with authority statutory authority over or interest in the issues relevant to the application, Presidio County would have standing under 30 TAC § 55.201 (b) and (c)(6). Presidio County is charged with protecting the health and safety of the citizens living within its boundaries. The hearing request questions whether the proposed discharge would be protective of water quality in Presidio County and whether the permit would adversely impact the residents of Shafter.

If this request is on behalf of Presidio County (County), OPIC encourages the county to submit a response brief clarifying this. TCEQ procedure allows hearing requesters to file response briefs by October 24, 2011. Further, if the County Commissioners Court has passed a resolution opposing the TCEQ application, including this resolution with the response brief would help clarify the County's intentions.

Therefore OPIC finds that Paul Hunt is not affected, but may revise its recommendation based on any timely response clarifying whether this hearing request is on behalf of Presidio County.

C. Issues Raised in the Hearing Requests

OPIC finds that the hearing requester is not affected. However, should the Commission recommend that this matter be sent to the State Office of Administrative Hearings, OPIC provides the following analysis on what issues may be appropriate for the subsequent hearing. Mr. Hunt raises the following issues:

1. Whether the dewatering process would adversely impact the health of Shafter residents, regional wildlife, and local businesses.
2. Whether the dewatering process would adversely impact the desert mountain aquifer system.
3. Whether the proposed discharge would contaminate groundwater.

4. Whether the proposed discharge will impact local water resources.

D. Issues raised in Comment Period

All of the hearing requests raise issues that were also raised during the comment period.

E. Disputed Issues

There is no agreement between the hearing requestor and Rio Grande 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. All of the issues raised in timely hearing requests by affected parties 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 Commission's decision to issue or deny this permit.¹ Relevant and material issues are those governed by the substantive law under which this permit is to be issued.²

TCEQ is responsible for the protection of water quality under Chapter 26 of the TWC and 30 TAC Chapters 305, 307 and 309, as well as under specific rules related to wastewater systems found at 30 TAC Chapters 30 and 217. The Texas Surface Water Quality Standards in 30 TAC Chapter 307 require the

¹ *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.”)

² *Id.*

proposed permit “maintain the quality of water in the state consistent with public health and enjoyment.” 30 TAC § 307.1. Furthermore, the proposed permit must comply with 30 TAC § 305.122(c), 307.1 and 309.10, which prohibit injury to private property and invasion of property rights and require minimization of exposure to nuisance conditions. Therefore all of the issues listed in Section III.C, above, are relevant and material.

H. Issues Recommended for Referral

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

1. Whether the dewatering process would adversely impact the health of Shafter residents, regional wildlife, and local businesses.
2. Whether the proposed discharge would contaminate groundwater.
3. Whether the proposed discharge will impact local water resources.

III. 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.

IV. CONCLUSION

OPIC recommends the Commission find that the hearing requester is not affected, and deny the hearing request. However, as it is unclear whether Mr. Hunt is requesting a hearing as an individual or on behalf of Presidio County, OPIC may revise its recommendation, based on any timely filed information from Presidio County.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By: Amy Swanholm
Amy Swanholm
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CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2011 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
Amy Swanholm

MAILING LIST
RIO GRANDE MINING COMPANY
TCEQ DOCKET NO. 2011-1469-IWD

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REQUESTER:

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