

Bryan W. Shaw, Ph.D., P.E., *Chairman*
Toby Baker, *Commissioner*
Zak Covar, *Commissioner*
Richard A. Hyde, P.E., *Executive Director*



Vic McWherter, Public Interest Counsel

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

March 23, 2015

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: **UNIMIN CORPORATION**
TCEQ DOCKET NO. 2015-0201-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,



Rudy Calderon, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2015-0201-IWD

**IN THE MATTER
OF THE APPLICATION OF
UNIMIN CORPORATION,
PERMIT
WQ0001401000**

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**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

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

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Response to Request for Hearing in the above-referenced matter and respectfully shows the following.

I. INTRODUCTION

A. Background of Facility

UNIMIN Corporation (Applicant) has applied to the TCEQ for a Major Amendment with renewal to TPDES Permit No. WQ0001401000 (EPA I.D. No. TX0001830), which currently authorizes the discharge of mine seepage and storm-water at a daily average flow not to exceed 500,000 gallons per day per outfall via Outfalls 001, 002, and 003. In addition to the existing authorizations, the Major Amendment application seeks to authorize the discharge of process-generated wastewater at Outfalls 001 and 002; an additional settling/clarification impoundment (Pond 10); and an additional Outfall (004) to discharge process-generated wastewater and storm water on an intermittent and flow variable basis from newly created Pond 10. The Applicant seeks the authorization for the discharge via Outfall 004 as an emergency option to protect the facility in situations such as mechanical or pumping failures or improbable extreme rainfall events.

The facility, a sand mining and processing operation, is located at 1788 County Road 308 approximately 0.75 miles north of the intersection of County Road 308 and U.S. Highway 67 in the northeast corner of Somervell County in Cleburne, Texas 76033. Process generated wastewater is routed to a series of tailings ponds for settling and water clarification to allow suspended particles of sand and clay to settle. The settling pond circuit is used to maximize recycling and retaining of plant water so discharge is kept to a minimum. The discharge route for all the outfalls ends in the Brazos River below Lake Granbury in Segment No. 1204 of the Brazos River Basin. However, via Outfalls 002 and 003, the discharge route is first to unnamed tributaries, then to Georges Creek, via Outfall 004, first to an emergency spillway, then to Georges Creek, and via Outfall 001, first to Georges Creek. The unclassified receiving waters for the unnamed tributaries and emergency spillway have minimal aquatic life use and limited aquatic life use for Georges Creek. The designated uses for Segment No. 1204 are high aquatic life use, and primary contact recreation.

In accordance with 30 TAC § 307.5 of the Texas Surface Water Quality Standards (TSWQS) and the *Procedures to Implement the TSWQS* (June 2010), an antidegradation review of the receiving waters was performed. The Tier 1 antidegradation review preliminarily determined that no impairment of existing water quality uses would result from this permitting action, as the TCEQ expects the proposed permit to maintain the numerical and narrative criteria protecting the existing uses. Additionally, because the Tier 1 review preliminarily determined that the stream reach assessed does not contain water bodies with exceptional, high, or intermediate aquatic life uses, the TCEQ did not perform a Tier 2 antidegradation review. However, the TCEQ expects no significant degradation of water quality in water bodies with

exceptional, high, or intermediate aquatic life uses downstream of the discharge, as the TCEQ expects the proposed permit to protect and maintain the existing uses.

B. Procedural Background

TCEQ received this application on October 30, 2013. On January 29, 2014, the Executive Director of the TCEQ (ED) declared the application administratively complete. The Applicant published the Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) in Somervell County, Texas on February 26, 2014, in English in the *Glen Rose Reporter*. The ED completed the technical review of the application, and prepared a draft permit. The Applicant published the Notice of Application and Preliminary Decision for a Water Quality Permit (NAPD) on September 25, 2014, in English and on July 24, 2014 in Spanish in the *Glen Rose Reporter*, and on July 31, 2014 in Spanish in the *La Prensa Comunidad*. The public comment period ended on October 27, 2014. On December 29, 2014, the ED filed its Response to Comments (RTC). The ED issued its final decision on December 30, 2014. The deadline to request a contested case hearing was January 29, 2015.

TCEQ received timely comments and a request for a contested case hearing from O.R. Jordan (Protestant). OPIC recommends denying this hearing request.

II. APPLICABLE LAW

This application was declared administratively complete on January 29, 2014. Because the application was declared administratively complete after September 1, 1999, a person may request a contested case hearing on the application pursuant to the requirements of House Bill 801, Act of May 30, 1999, 76th Leg., R.S.

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.¹

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."² This justiciable interest does not include an interest common to the general public.³ Governmental entities with authority under state law over issues contemplated by the application may be considered affected persons.⁴ Relevant factors 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 and safety of the person, and on the 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.⁵

¹ 30 TEX. ADMIN. CODE (TAC) Ch. 55.201(d).

² 30 TAC Ch. 55.203(a).

³ Id.

⁴ 30 TAC Ch. 55.203(b).

⁵ 30 TAC Ch. 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.⁶

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 of 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.⁷

III. DISCUSSION

A. Determination of Affected Person Status

O.R. Jordan filed timely comments and a request for a contested case hearing. The Protestant states that he owns property located at 4503 Wildwood Circle, Granbury, Texas 76049. According to a map furnished to OPIC by the ED, Protestant's property is located on Lake Granbury and is more than 5 miles upstream from the facility. In the hearing request, the Protestant raises issues related to the water rights of the Applicant and the City of Cleburne to use water flowing downstream from Lake Granbury and about the impact on lake front property values based on the decreased water levels in Lake Granbury.

The Protestant has raised issues that are not within the jurisdiction of the TCEQ in the context of these proceedings, and which cannot be considered in evaluating whether to grant the

⁶ 30 TAC Ch. 55.211(c).

⁷ 30 TAC Ch. 55.209(e).

major amendment requested by the Applicant. The TCEQ's jurisdiction in a wastewater permit application is limited to the issues set out in Chapter 26 of the Texas Water Code. Chapter 26 does not provide the TCEQ with the authority to consider the sale or availability of surface water or ground water in evaluating an application for a water quality permit, nor does it grant the TCEQ the jurisdiction to address or consider property values or the marketability of adjacent property in its determination of whether or not to issue a water quality permit. Therefore, OPIC finds that O.R. Jordon has not shown that he is an affected person for purposes of this application.

B. Issues Raised in the Hearing Request

The following issues have been raised in the hearing request:

1. Whether the water rights of the Applicant has been considered in the evaluation of the major amendment application; and
2. Whether the proposed major amendment will have an impact on property values along Lake Granbury.

C. Issues Raised in the Comment Period

All of the issues raised in the hearing request were raised in the comment period and have not been withdrawn.⁸

D. Disputed Issues

There is no agreement between the hearing requesters and the ED on the issues raised in the hearing requests.

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.⁹ All of the issues presented are issues of fact.

⁸ 30 TAC Chapters 55.201(c) & (d)(4), 55.211(c)(2)(A).

F. Relevant and Material Issues

The hearing request does not raise issues relevant and material to the Commission's decision under the requirements of 30 TAC Chapters 55.201(d)(4) and 55.211(c)(2)(A). 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.¹⁰ Relevant and material issues are those governed by the substantive law under which this permit is to be issued.¹¹

G. Issues Recommended for Referral

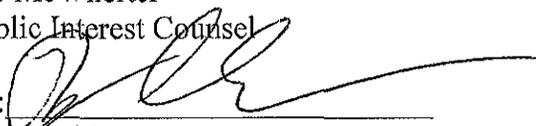
OPIC recommends that no issues be referred to SOAH for a contested case hearing.

IV. CONCLUSION

OPIC recommends denying the hearing request of O.R. Jordan for the reasons stated above.

Respectfully submitted,

Vic McWherter
Public Interest Counsel

By: 
Rudy Calderon
Assistant Public Interest Counsel
State Bar No. 24047209
P.O. Box 13087, MC 103
Austin, Texas 78711-3087
Office: (512) 239-3144
Fax: (512) 239-6377

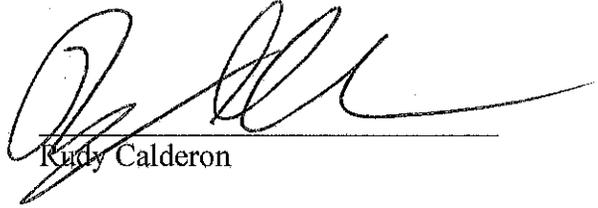
⁹ 30 TAC Ch. 55.211(c)(2)(A).

¹⁰ Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-51 (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").

¹¹ Id.

CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2015, the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Request for Hearing was 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, electronic mail, or by deposit in the U.S. Mail.



Rudy Calderon

**MAILING LIST
UNIMIN CORPORATION
TCEQ DOCKET NO. 2015-0201-IWD**

FOR THE APPLICANT:

Jim Bonsall
Unimin Corporation
1788 County Road 308
Cleburne, Texas 76033-9409
Tel: 254/897-4408 Fax: 254/897-2107

Alex J. Hebel
Unimin Corporation
4000 Baker Road
Ottawa, Illinois 61350-9500
Tel: 815/431-2241 Fax: 815/434-3828

FOR THE EXECUTIVE DIRECTOR:

Michael Parr, Staff Attorney
TCEQ Environmental Law Division
MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-0600 Fax: 512/239-0606

Monica Vallin Baiz, Technical Staff
TCEQ Water Quality Division, MC- 148
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-5784 Fax: 512/239-4430

Brian Christian, Director
TCEQ Environmental Assistance
Division, MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4000 Fax: 512/239-4430

FOR ALTERNATIVE DISPUTE
RESOLUTION:

Kyle Lucas
TCEQ Alternative Dispute Resolution,
MC-222
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4010 Fax: 512/239-4015

FOR THE CHIEF CLERK:

Bridget Bohac
Texas Commission On Environmental
Quality
Office Of Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-3300 Fax: 512/239-3311

REQUESTER:

O. R. Jordan
4503 Wildwood Circle
Granbury, Texas 76049-5824

