

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

March 25, 2010

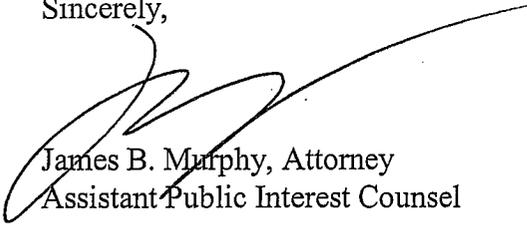
LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

RE: H. L. ZUMWALT CONSTRUCTION, INC.
TCEQ DOCKET NO. 2010-0317-EAQ

Dear Ms. Castañuela:

Enclosed for filing is the Office of Public Interest Counsel's Response to Motion to Overturn in the above-entitled matter.

Sincerely,



James B. Murphy, Attorney
Assistant Public Interest Counsel

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 P.O. BOX 13087 AUSTIN, TEXAS 78711-3087 512-239-6363

P.O. Box 13087

Austin, Texas 78711-3087

512-239-1000

Internet address: www.tceq.state.tx.us

TCEQ DOCKET NO. 2010-0317-EAQ

IN THE MATTER	§	BEFORE THE
OF THE APPLICATION OF	§	
H.L. ZUMWALT	§	
CONSTRUCTION, INC., FOR	§	
APPROVAL OF A WATER	§	TEXAS COMMISSION ON
POLLUTION ABATEMENT PLAN,	§	
EDWARDS AQUIFER	§	
PROTECTION PROGRAM	§	
IDENTIFICATION NO. 2897.00	§	ENVIRONMENTAL QUALITY

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO
MOTION TO OVERTURN**

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 Motion to Overturn concerning the Executive Director's (ED) approval of a Water Pollution Abatement Plan (WPAP) concerning H.L. Zumwalt Construction, Inc. (Applicant) in the above-referenced matter and respectfully shows the following.

I. INTRODUCTION

Westward Environmental, Inc. (Westward) submitted to the San Antonio Regional Office on November 6, 2009 a WPAP application on behalf of Applicant. The ED requested additional information from Applicant, which he received on January 6, 2010 and January 20, 2010. On February 4, 2010, the ED mailed his letter approving the WPAP. On March 1, 2010, David Frederick with the law firm of Lowerre, Frederick, Perales, Allmon & Rockwell filed a motion to overturn the ED's decision on behalf of the Ranchland Oaks Home Owners' Association (Ranchland), which includes a letter supporting the motion from Dr. Lauren Ross, Ph.D., P.E. with Glenrose Engineering, Inc. According to the motion, Ranchland Oaks

subdivision adjoins Applicant's site on its west side. Ranchland is a membership organization that has among its objectives the preservation of the natural qualities of the environment affecting their members' properties. On March 10, 2010, Westward submitted a letter arguing that Ranchland's motion is untimely filed.

Applicant's proposed commercial project is a limestone quarry with a project area of approximately 30 acres within a 113 acre property. Other activities proposed at the site include a rock crusher, stockpile areas, screens and conveyors, a scale house, and scales. The project will be located approximately 5 miles west of the FM 471 and SH 211 intersection in Medina County on the recharge zone of the Edwards Aquifer.

II. APPLICABLE LAW

A. Water Pollution Abatement Plan Requirements

Construction proposed within the Edwards Aquifer recharge zone must comply with 30 TEX. ADMIN. CODE Chapter 213. The goal of Chapter 213 "is that the existing quality of groundwater not be degraded, consistent with the protection of public health and welfare, the propagation and protection of terrestrial and aquatic life, the protection of the environment, the operation of existing industries, and the maintenance and enhancement of the long-term economic health of the state." 30 TAC § 213.1(1). In order to achieve this goal, no person may commence construction of a regulated activity, such as a limestone quarry, on the Edwards Aquifer recharge zone without a WPAP. 30 TAC § 213.5(a)–(b). *See also* 30 TAC § 213.3(28) (definition of "regulated activity").

The WPAP must include best management practices (BMP) and measures that will be used to control the discharge of pollution from regulated activities during and after construction.

30 TAC § 213.5(b)(4)(C). BMPs and measures must: (1) prevent pollution of surface water, groundwater, or storm water that originates upgradient from the site and flows across the site, (2) prevent pollution of surface water or groundwater that originates on-site or flows off the site, including pollution caused by contaminated storm water runoff from the site, (3) prevent pollutants from entering surface streams, sensitive features, or the aquifer, (4) maintain flow to naturally occurring sensitive features to the extent practicable, and (5) control the discharge of pollution after the completion of construction, including insuring that 80% of the incremental increase in the annual mass loading of total suspended solids from the site caused by the regulated activity is removed. 30 TAC § 213.5(b)(4)(C)(i)–(v) and (D)(ii). The ED may grant an exception to the BMP requirements if the requester can demonstrate equivalent water quality protection practices and measures for the aquifer. 30 TAC § 213.9(a).

B. Motion to Overturn Requirements

The applicant or a person affected may file a motion to overturn the ED's final action on an Edwards Aquifer protection plan, modification, or exception, pursuant to the requirements of 30 TAC § 50.139(a), (b), and (d)–(g). 30 TAC § 213.1(3). Under 30 TAC § 50.139, the applicant, OPIC, or other person may file with the chief clerk a motion to overturn the ED's action on an application, and wherever other agency rules refer to a "motion for reconsideration," that term should be considered interchangeable with the term "motion to overturn executive director's decision." 30 TAC § 50.139(a). A motion to overturn must be filed no later than 23 days after the date the agency mails notice of the signed permit to the applicant and persons on any required mailing list for the action. *Id.* § 50.139(a). An action by the ED is not affected by a motion to overturn unless expressly ordered by the Commission. *Id.* § 50.139(e). The

Commission or General Counsel may extend the period of time for filing motions to overturn and for taking action on the motions. *Id.* § 50.139(e).

III. DISCUSSION

A. Timeliness of Motion

Westward argues in its response letter that Ranchland untimely filed the motion two days past the 23-day time period provided in 30 TAC § 50.139(a). The ED mailed his approval letter on February 4, 2010, and Ranchland filed its motion on March, 1, 2010. According to OPIC's calculation, 23 days from February 4, 2010 is Saturday, February 27, 2010. Pursuant to Commission rule, a filing is deemed timely if received by the chief clerk's office on the Monday following a weekend or holiday:

Except as otherwise specifically provided by commission rules, in computing any period of time prescribed or allowed by commission regulation or orders or by any applicable statute, the period shall begin on the day after the act, event, or default in question and shall conclude on the last day of that designated period, unless it is a Saturday, Sunday, or legal holiday on which the office of the chief clerk is closed, in which event the period runs until the end of the next day that is neither a Saturday, Sunday, nor a legal holiday on which the office of the chief clerk is closed.

30 TAC § 1.7. In this case, Ranchland filed its motion on the next day that the office of chief clerk was open after the expiration of the 23-day time period. Accordingly, OPIC concludes the motion is timely filed.

B. Adequacy of Water Pollution Abatement Plan

Ranchland identifies several issues with the WPAP that may cause water quality degradation. First, Ranchland questions whether the berms proposed to divert storm water runoff around the rock mining operation are sufficient to protect water quality. Ranchland states that the berms were proposed without calculations of contributing area size or expected storm

runoff flow rates, making it impossible to determine if a designed runoff channel is necessary. Ranchland argues the WPAP also fails to address erosion and water quality impacts from overland flow diversion from the berms. Ranchland suggests a revegetation plan be included in the permit to assure rapid stabilization of the berms. OPIC agrees with Ranchland that Applicant should calculate expected storm runoff flow rates to determine whether a designed runoff channel is necessary and should include a revegetation plan for the berms in the WPAP.

Second, Ranchland states that the on-site mobile generator and diesel tank presents a danger of water contamination, and suggests placing the generator and tank outside the mining pit or using off-site electricity. OPIC concludes the approved WPAP is sufficient on this issue. The permanent pollution abatement measures require that Applicant store and maintain the mobile fueling truck offsite, and use a flex base pad with a one-foot berm as a secondary containment for fueling activities.

Third, Ranchland states that the standards for total suspended solids in the general permit for discharge of stormwater for dewatering operations are inadequate to protect water quality. This issue goes to the adequacy of an approved general permit, and concerns with the general permit should be raised during its renewal rather than with this WPAP. However, it does not appear the permanent pollution abatement measures in the approval letter include the requirement in 30 TAC § 213.5(b)(4)(D)(ii) to insure that 80% of the incremental increase in the annual mass loading of total suspended solids from the site caused by the regulated activity is removed. OPIC concludes the approved permanent pollution abatement measures should include this provision. In addition, OPIC agrees with Ranchland that Special Condition V in the approval letter concerning “appropriate measures” for stormwater discharges is too vague to

protect water quality, and must be more specific as to the measures to be taken during dewatering.

Fourth, Ranchland states that an independent geologic assessment should be performed to identify naturally-occurring sensitive features and the WPAP should clarify whether Applicant will seal the feature upon discovery. The rules, however, do not require an independent geologic assessment. *See* 30 TAC § 213.5(b)(3). In addition, both Standard Condition 12 of the approval letter and 30 TAC § 213.5(f)(2) require immediate cessation of all activities upon discovery of a sensitive feature, at which point Applicant develops a plan for protecting the feature, which the ED must review and approve before construction may continue. OPIC concludes that the determination of whether to seal the feature should be made on a case-by-case basis upon its discovery.

Fifth, Ranchland expresses concern about the potential for subsurface contamination from stormwater migrating through the bottom of the pit into underlying karst formations, particularly with Applicant's unstudied assertion that stormwater evaporation is more likely than subsurface contamination. OPIC agrees the WPAP inadequately addresses the potential for subsurface contamination. Applicant should be required to analyze whether evaporation is more likely than subsurface contamination.

Sixth, Ranchland states that the Spill Response Action is very general and does not provide adequate guidance. OPIC agrees that the spill response provisions are too general to provide guidance or allow for enforcement.

Seventh, Ranchland expresses concern about the lack of a site restoration plan after the mining operations cease. Standard Condition 22 of the approval letter requires that areas where construction is initiated and abandoned be returned to a condition that protects the aquifer from

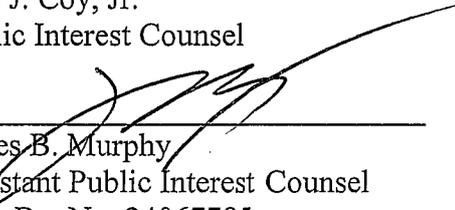
potential contamination. OPIC concludes this condition should be clarified to cover post-mining activities and should include specific measures to prevent contamination.

IV. CONCLUSION

Based on the foregoing reasons, OPIC recommends granting the Motion to Overturn.

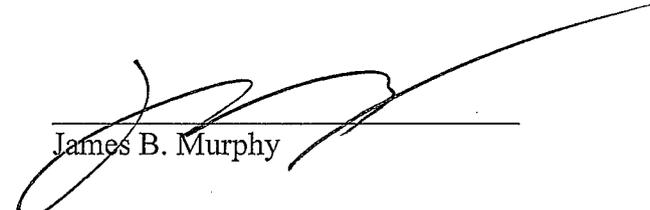
Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By: 
James B. Murphy
Assistant Public Interest Counsel
State Bar No. 24067785
P.O. Box 13087, MC 103
Austin, Texas 78711-3087
(512) 239-4014 Phone
(512) 239-6377 Fax

CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2010 the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Motion to Overturn 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, electronic mail, or by deposit in the U.S. Mail.


James B. Murphy

MAILING LIST
H. L. ZUMWALT CONSTRUCTION, INC.
TCEQ DOCKET NO. 2010-0317-EAQ

Henry Zumwalt
H. L. Zumwalt Construction, Inc.
12354 FM 1560 N
Helotes, Texas 78023
Tel: 210/695-3541 Fax: 210/695-5651

Matt Bellos
Environmental Specialist
Westward Environmental, Inc.
PO Box 2205
Boerne, Texas 78006
Tel: 830/249-8284 Fax: 830/249-0221

Charly Fritz
Edwards Aquifer Protection Program
San Antonio Regional Office MC R-13
Texas Commission on Environmental Quality
14250 Judson Rd.
San Antonio, Texas 78233-4480
Tel: 210/403-4065 Fax: 210/545-4329

David Frederick
Lowerre, Frederick, Perales, Allmon & Rockwall
707 Rio Grande, Suite 200
Austin, Texas 78701
Tel: 512/469-6000 Fax: 512/482-9346

Kathy Humphreys
Texas Commission on Environmental Quality
Environmental Law Division MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-3400 Fax: 512/239-3434

Bridget Bohac, Director
Texas Commission on Environmental Quality
Office of Public Assistance, MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4000 Fax: 512/239-4007

LaDonna Castañuela
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

