

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

December 23, 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: Genan, Inc.
Tire Registration No. 6200673

Dear Ms. Castañuela:

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

Sincerely,

A handwritten signature in cursive script that reads "Eli Martínez".

Eli Martínez, Attorney
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. 2010-1886-MIS

**IN THE MATTER OF THE MOTION § BEFORE THE TEXAS
TO OVERTURN THE EXECUTIVE §
DIRECTOR'S DECISION REGARDING § COMMISSION ON
THE SCRAP TIRE PERMIT ISSUED TO §
GENAN, INC. REGISTRATION NO. 6200673 § ENVIRONMENTAL QUALITY**

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

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

The Office of Public Interest Counsel (OPIC) of the Texas Commission on
Environmental Quality (TCEQ or the Commission) responds to the above-captioned Motion to
Overturn as follows:

I. INTRODUCTION

Genan, Inc. (Genan or Applicant) submitted an application to register as a Scrap Tire
Storage and Processing Facility and Transporter to the TCEQ DFW Region Office in late 2009.
By letter dated February 26, 2010 Waste Section Manager Samuel L. Barrett notified Genan that
that its application was determined incomplete and was being returned for 60 days to allow
Genan to cure several deficiencies. In response to requests by Genan, the TCEQ DFW Region
Office granted an extension of the original response time frame on April 29, 2010, and a second
extension was granted on June 29, 2010. The TCEQ DFW Region Office reviewed Applicant's
updated materials and issued an approval for Registration Number 6200673 on October 28,
2010, authorizing Genan to transport, process, and store whole used or scrap tires and tire pieces.

On November 22, 2010, Marisa Perales, on behalf of Citizens for Responsible Recycling
(CRR or Movant), filed a motion to overturn the executive director's approval of Genan's

application, contending that notice had not been properly provided and that Genan's application contained several fatal deficiencies, including insufficient information regarding the proposed site and surrounding area, noncompliance with technical various requirements, inadequacies in the Site Operating Plan, and failure to provide information required by 30 TAC §328.63.

OPIC has reviewed the application materials and determined that Movant has raised credible issues of fact and law relating to proper notice, and recommends that the Commission remand the application to the Executive Director, require Genan to renote its application, supply a complete and updated application with the TCEQ and Harris County Judge Ed Emmett, and provide for a comment period. Such a remand would serve the Commission's interest in maintaining the integrity of permitting procedures and ensuring public participation in Commission decisions.

II. PROCEDURAL ISSUES

Title 30, Texas Administrative Code (TAC), Chapter 50, Subchapter G, addresses authority delegated to the ED and specifies applications in which the ED may take action on behalf of the Commission. Where an application has not been formally contested, or is ineligible for formal challenge, Subchapter G contains a provision allowing the applicant, public interest counsel or other person the opportunity to file a motion to overturn the ED's action on an application or water quality management plan.¹ A motion to overturn must be filed within 23 days after notice of approval of the application has been mailed² unless general counsel, by written order, extends the period of time for filing motions.³

¹ 30 TAC §50.139.

² 30 TAC §50.139(b).

³ 30 TAC §50.139(e).

The TCEQ mailed Genan's approval letter on October 28, 2010. Because the 23 day deadline fell on November 20, 2010—a Saturday—CRR's motion filing on November 22, 2010 was timely.⁴ OPIC therefore finds that the Movant has the right to seek Commission review of the executive director's issuance of this registration, in addition to any rights of judicial review.

III. DISCUSSION

a. Notice

Genan originally published notice of its application on November 19, 26, and December 3, 2009 in the *North Channel Sentinel*. The notice indicated that the registration documents had been filed “with County Judge Ed Emmett...where they may be viewed by the public.” However, after reviewing the application and notice documents, the TCEQ DFW Region Office sent a Notice of Deficiency (NOD) to Genan on February 26, 2010 and returned its application, allowing 60 days for Genan to “submit an application that is complete.”

The “Summary of Application Deficiencies” section of the February 26, 2010 NOD indicates that TCEQ Scrap Tire Management Registration Program Staff met with representatives of Genan at the DFW Region Office on February 10, 2010, at which time staff informed Applicant that additional documentation was required to meet registration requirements. At this time staff also received information from “Genan, Inc. representatives indicat(ing) that new notices would be published in the Sunday edition of the *Houston Chronicle*.” Genan did in fact republish notice on February 14, 21, and 28, 2010 in the *Houston Chronicle*.

⁴ See 30 TAC §1.7 (stating that, 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).

As CRR's motion emphasizes, however, the February notices referred to an application that had been returned to the Commission. Therefore, Genan's application did not technically exist at the time that it was supposed to have been made available for viewing by the public. Any materials that may have remained at the County Judge's office consisted of an incomplete or inaccurate application. As indicated *supra*, Genan requested two extensions of the original response time frame on April 29, 2010 and June 29, 2010, and the final "revised original application" was not received by the TCEQ Regional Office until August 9, 2010—over five months after the last notice had been published.

CRR contends that the application that is now on file with the TCEQ is a "substantially different application than the one that was initially noticed," and the revised application should have been renoticed "so that the public had an opportunity to review all of the information and determine if and how they may be affected." OPIC agrees. A cursory review of the current application on file contains a Shredder layout map, Site Operating Plan, Fire Plan, and Cost Closure Plan signed July 7, 2010; a property owner's affidavit witnessed April 22, 2010; a Letter of Credit with an issuance date of August 6, 2010; and a Detention Pond Study that was received by the DFW Region 4 Office on October 14, 2010. Providing notice of an application that will remain incomplete for several months afterward does not allow affected persons to review a complete record and identify whether any potential interests could be negatively impacted. In this particular instance, some of the missing information relates to essential elements of Scrap Tire Storage and Processing Facility and Transporter registration requirements listed in 30 TAC Chapter 328, Subchapter F. OPIC therefore recommends that the Commission remand Genan's

application to the Executive Director with directions for Applicant to file and notice a complete application with the TCEQ and Harris County Judge Ed Emmett.

b. Maps

CRR contends that the location map included in Genan's application does not indicate that it is a USGS map, does not contain a 1/2"=1 mile scale, is not dated, and does not contain a north arrow; the topographic map does not represent all roads within 1 mile of the property, does not contain a north arrow, and does not indicate that it is a USGS map; the landowner's map does not clearly reflect the proposed site, is not dated, and does not list every property within a 500-foot radius; and the property ownership affidavit does not contain a legal description of the site. Provident, Engineers, in an October 8, 2010 response to CRR's contentions, indicates that the Harris County Right-of-Way map used by Genan was supplied by TxDOT and is the most current map of the areas where the property is located; the topographic map is a USGS quad map; the landowner's map was the most current Harris County Appraisal District map at the time of the filing of the application; and the legal description of the site property is provided in Attachment 12 of the Application. OPIC has reviewed this information and cannot conclude that the Executive Director erred in finding that Genan's Application satisfies TCEQ rules and requirements relating to CRR's objections listed in this section.

c. Plans

CRR contends that the Site Layout Plan does not clearly show the location of the gatehouse or the shredder, the locations of personnel assembly points and evacuation routes, and does not contain information about insurance. After reviewing Attachment 32 of Genan's

application, OPIC concludes that all required information under the TCEQ Rules is included in the Site Layout Plan, including the locations of the gate and shredder.

CRR contends that the drainage plan does not show how runoff will be directed to the pond and raises the concern that the detention pond will not have adequate capacity for both runoff and firewater. OPIC has reviewed the Detention Pond Study prepared by Provident Engineers, Inc. and submitted in Genan's application and finds that the ED did not err in determining that Applicant had met TCEQ rules relating to drainage and flood control. The detention pond is designed to detain runoff water from a 100-year storm event, is sealed by a certified engineer, and has been approved by Harris County Flood Control District as evidenced in Attachment 29 of the application.

CRR contends that the Executive Director erred in granting Genan's registration because the Fire Control Plan does not include roles to be played by on-site personnel, locations of duty stations, and lacks information on procedures. However, the Harris County Fire Marshall has reviewed Applicant's Fire Plan and found that the site plan "appears to adequately address fire and life safety hazards for the Scrap Tire/Storage site," and that "the presented details show(ed) full compliance with design requirements for Harris County Fire Marshall's Office" as indicated in Attachment 15. OPIC cannot find that the Executive Director erred in finding that Genan's Fire Control Plan complied with TCEQ rules and requirements.

a. Contentions that Lack Particularity

CRR also contends that the cost estimate for closure is "inadequate and warrants further investigation," that the Site Operating Plan is "too general," that "several state and local permits and approvals are still missing from the application," and that the shredder layout drawing lacks

“basic information,” and that the information about end use market for the processed product is “very general and amounts to nothing more than an advertising brochure.” OPIC cannot determine from these contentions that the Executive Director erred in finding that Genan’s application complied with TCEQ rules and requirements, because these contentions are too general to serve as a basis for overturning the Executive Director’s decision.

Furthermore, assuming *arguendo* that the end use information contained in the application is legally insufficient, a TCEQ memo filed by Ms. Hackathorn on October 27, 2010 indicates that confidential commercial business end use market information was submitted by Genan to meet agency requirements and that the regulated entity had “submitted adequate information demonstrating compliance with scrap tire facility registration requirements pursuant to 30 TAC §328.63(c)(4)(E).”

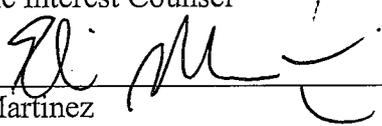
V. CONCLUSION

Movant has raised credible issues of fact and law relating to proper notice, and recommends that the Commission remand the application to the Executive Director, require Genan to renote its application, supply a complete and updated application with the TCEQ and

Harris County Judge Ed Emmett, and provide for a comment period. Such a remand would serve the Commission's interest in maintaining the integrity of permitting procedures and ensuring public participation in Commission decisions.

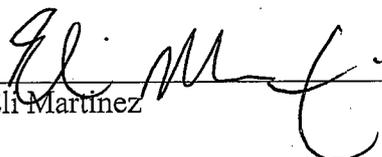
Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By 
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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 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 or by deposit in the U.S. Mail.


Eli Martinez

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