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Vic McWherter, Public Interest Counsel

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

October 18, 2016

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: POST OAK CLEAN GREEN, INC.
SOAH DOCKET NO. 582-15-2498
TCEQ DOCKET NO. 2012-0905-MSW**

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in black ink, appearing to read "Garrett Arthur", written over a horizontal line.

Garrett Arthur, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

**TCEQ DOCKET NO. 2012-0905-MSW
SOAH DOCKET NO. 582-15-2498**

APPLICATION BY POST OAK	§	BEFORE THE TEXAS
CLEAN GREEN, INC. FOR NEW	§	
TYPE I MUNICIPAL SOLID	§	COMMISSION ON
WASTE LANDFILL IN	§	
GUADALUPE COUNTY	§	ENVIRONMENTAL QUALITY

**OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO PROPOSAL FOR DECISION**

TO THE MEMBERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

The Office of Public Interest Counsel (OPIC) at the Texas Commission on Environmental Quality (TCEQ) files this response to the Administrative Law Judges' (ALJ) Proposal for Decision (PFD).

Instead of making specific exceptions to the PFD, this response brief is meant to indicate OPIC's support for certain aspects of the PFD, and in one instance, to make alternative recommendations to the Commission.

I. Unplugged Oil and Gas Wells

Regarding oil and gas wells, TCEQ rule § 330.61 states:

The owner or operator shall identify the location of any and all existing or abandoned on-site crude oil or natural gas wells, or other wells associated with mineral recovery that are under the jurisdiction of the Railroad Commission of Texas. The owner or operator shall provide the executive director with written certification that these wells have been properly capped, plugged, and closed in accordance with all applicable rules and regulations of the Railroad Commission of Texas at the time of application. Producing crude oil or natural gas wells that do not affect or

hamper landfill operations may remain in their current state, if identified in the permit for the facility.¹

Currently, Special Provision 2 of the draft permit states:

Wells under the jurisdiction of the Railroad Commission of Texas (RRC) that are within the permit boundary must be plugged and abandoned. A written certification that these wells were properly capped, plugged, and closed in accordance with all applicable rules and regulations of the RRC must be approved by the executive director before physical construction may commence.²

The ALJs find that the application does not demonstrate strict compliance with § 330.61(l)(2), and OPIC agrees. Therefore, OPIC supports the recommended amendment to Special Provision 2. As recommended by the ALJs, Special Provision 2 should read as follows:

Wells under the RRC's jurisdiction that are within the permit boundary must be plugged and abandoned. The RRC's San Antonio District Office must certify that these wells were properly plugged, capped, and closed in accordance with all applicable rules and regulations of the RRC. The RRC's certification must also be approved by the ED within 30 days prior to construction.

II. Operating Hours

Regarding facility operating hours, TCEQ Rule § 330.135 states

A site operating plan must specify the waste acceptance hours and the facility operating hours when materials will be transported on or off site, and the hours when heavy equipment may operate. The waste acceptance hours of a municipal solid waste facility may be any time between the hours of 7:00 a.m. and 7:00 p.m., Monday through Friday, unless otherwise approved in the authorization for the facility. Waste acceptance hours within the 7:00 a.m. to 7:00 p.m. weekday span do not require other specific approval. Transportation of materials and heavy equipment operation must not be conducted between the hours of 9:00 p.m. to 5:00 a.m.,

¹ 30 TEX. ADMIN. CODE § 330.61(l)(2).

² ED Ex. 3 at 13.

unless otherwise approved in the authorization for the facility. Operating hours for other activities do not require specific approval.³

The ED's draft permit currently states, "The waste acceptance hours for the receipt and disposal of waste at this facility shall be 24 hours per day, seven days per week. The operating hours at this landfill, which include the use of heavy equipment, shall be 24 hours per day, seven days per week."⁴

The use and enjoyment of property is a public interest issue, and 24/7 operation of the landfill could negatively impact the use and enjoyment of property. If this permit is issued, OPIC recommends that the waste acceptance and operating hours be changed to the default hours provided in § 330.135. OPIC acknowledges that different hours may be approved. However, the ALJs find that Post Oak Clean Green (POCG or Applicant) did not present adequate evidence to support a change from the default hours specified in § 330.135. OPIC agrees. The ALJs also note that in Applicant's reply brief, it did not contest OPIC's recommendation. To be more compatible with existing land uses, particularly the nearby residences, the ALJs conclude that waste should be accepted and operations conducted during the hours specified in § 330.135 instead of the 24/7 schedule currently allowed by the draft permit. OPIC concurs.

³ 30 TEX. ADMIN. CODE § 330.135(a).

⁴ ED Ex. 3 at 4.

III. Site Operating Plan

A. Radioactive Waste

The ALJs find that the Site Operating Plan (SOP) lacks the detail required by TCEQ's rules for the screening of radioactive waste. The TCEQ rule concerning an SOP states:

A site operating plan must include provisions for site management and the site operating personnel to meet the general and site-specific requirements of this subchapter. A site operating plan must be retained during the active life of the facility and throughout the post-closure care maintenance period. A site operating plan must include the following ...

(5) procedures for the detection and prevention of the disposal of prohibited wastes, including regulated hazardous waste as defined in 40 Code of Federal Regulations (CFR) Part 261, and of polychlorinated biphenyls (PCB) wastes as defined in accordance with 40 CFR Part 761 unless authorized by the United States Environmental Protection Agency. The detection and prevention program must include the following:

(A) procedures to be used by the owner or operator to control the receipt of prohibited waste. The procedures must include the random inspections of incoming loads and must include the inspection of compactor vehicles. In addition to the random inspections, trained staff shall observe each load that is disposed at the landfill;

(B) records of all inspections;

(C) training for appropriate facility personnel responsible for inspecting or observing loads to recognize prohibited waste;

(D) notification to the executive director, and any local pollution agency with jurisdiction that has requested to be notified, of any incident involving the receipt or disposal of regulated hazardous waste or PCB waste at the landfill; and

(E) provisions for the remediation of the incident ...⁵

⁵ 30 TEX. ADMIN. CODE § 330.127.

As noted by the ALJs, the SOP does not specifically address the detection of radioactive waste, which is not necessarily detectable simply by visual observation. The ALJs conclude that POCG should be required to identify with specificity the equipment and procedures it will use to attempt to ensure that no radioactive materials are accepted at the site. OPIC agrees. We support the ALJs' recommendation that such procedures should include the use of proper equipment that can detect radioactive material and posted signs advising incoming waste disposers that: (1) disposal of radioactive waste is prohibited by law, (2) POCG uses equipment to detect unlawful radioactive waste, and (3) POCG will notify the appropriate authorities if a waste disposer is found attempting to dispose of radioactive waste.

B. Litter Collection

Regarding the control of windblown solid waste and litter, the applicable TCEQ rule states:

The working face must be maintained and operated in a manner to control windblown solid waste. Windblown material and litter must be collected and properly managed in accordance with paragraphs (1) and (2) of this section to control unhealthy, unsafe, or unsightly conditions.

(1) Windblown waste and litter at the working face must be controlled by using engineering methods or measures, including portable panels, temporary fencing, and perimeter fencing or comparable engineering controls. A site operating plan must specify the means for confining windblown waste and litter.

(2) Litter scattered throughout the site, along fences and access roads, and at the gate must be picked up once a day on the days the facility is in operation and properly managed. A site operating plan must specify the means for complying with this requirement.⁶

The ALJs find that POCG's SOP contains nothing regarding how the daily litter pick-up will be accomplished, and additional SOP provisions are necessary. OPIC agrees with the ALJs that the SOP must be modified to include the specificity required by the rule before the landfill could be permitted to operate.

IV. Alternate Liner

The ALJs find that the application has not demonstrated that maximum contaminant levels will not be exceeded at the point of compliance if an alternate liner is used. The applicable TCEQ rule states:

Alternative liner designs, which for Type I landfills must include a leachate management system, may be authorized by the executive director if the owner or operator provides a demonstration by computerized design modeling that the maximum contaminant levels detailed in § 330.331 of this title (relating to Design Criteria), Table 1 will not be exceeded at the point of compliance. At the discretion of the executive director, a field demonstration may be required to prove the practicality and performance capabilities of an alternative liner design.⁷

Given the rule requirement and the finding by the ALJs, OPIC agrees that this issue is a basis for denying the use of an alternate liner.

⁶ 30 TEX. ADMIN. CODE § 330.139.

⁷ 30 TEX. ADMIN. CODE § 330.335.

V. Bird Strikes

The ALJs find the evidence demonstrates that the landfill, as currently proposed, presents a significant bird hazard to low-flying aircraft, in violation of TCEQ rule § 330.545(d). Section 330.545(d) states, in relevant part, "Landfills disposing of putrescible waste shall not be located in areas where the attraction of birds can cause a significant bird hazard to low-flying aircraft."⁸

OPIC has previously noted our concern that the majority of the bird strike documents and their authors have not been subjected to any discovery or cross examination. However, we recognize that pilot safety is an important issue, and we must analyze the record as it currently stands. Given the evidence in the record after admission of the bird strike documents, OPIC agrees with the ALJs that the evidence shows a genuine threat of increased bird strike hazards to military pilots. If the Commission finds that the POCG landfill does not comply with § 330.545 because it is proposed to be located in an area where the attraction of birds can cause a significant bird hazard to low-flying aircraft, then the bird strike issue is a basis to deny the application.

To address their conclusion that the application cannot be granted without additional steps taken to alleviate bird strike concerns, the ALJs recommend that POCG be required to consult with the commanding officer of the Randolph Air Force Base to address potential issues the landfill would pose to the USAF training airfield. The ALJs further recommend that POCG submit a report to the ED, who will determine whether construction should commence

⁸ 30 TEX. ADMIN. CODE § 330.545(d).

and whether additional precautions should be taken. Finally, the ALJs find that construction should not begin until those concerns are adequately addressed, and the appropriate USAF personnel have given approval that construction of the landfill will no longer cause a significant hazard to low-flying aircraft.

OPIC is concerned that the ALJs have proposed a solution which may violate the doctrine of finality. Texas courts have held as a general rule that for an administrative order to be final, there must be nothing left open for future disposition.⁹ However, the Texas Supreme Court has also acknowledged that this statement is overbroad.¹⁰ The Court cites multiple cases wherein “the presence of a condition in an order does not automatically destroy its finality.”¹¹ The determinative factor appears to be whether the issuing agency must approve some further action after issuance of the order or permit.

In the *Browning-Ferris* case cited by the Texas Supreme Court, the Austin Court of Appeals found a permit to be a final order despite conditions therein.¹² The permit in that case was for a landfill in Bexar County. As a condition to the permit, the applicant was required to submit a revised completion plan to the Department of Health before certain work on the landfill

⁹ *Mahon v. Vandygriff*, 578 S.W.2d 144, 147 (Tex. Civ. App. 1979), *City of Houston v. Turner*, 355 S.W.2d 263 (Tex. Civ. App. 1962, no writ).

¹⁰ *Texas-New Mexico Power Co. v. Texas Indus. Energy Consumers*, 806 S.W.2d 230, 231 (Tex. 1991).

¹¹ *Id.* (citing *Big Three Indus. v. Railroad Comm'n*, 618 S.W.2d 543, 548 (Tex. 1981), *Browning-Ferris, Inc. v. Johnson*, 644 S.W.2d 123, 127 (Tex. App.—Austin 1982, writ ref'd n.r.e.); *Walker Creek Homeowners v. Texas Dep't of Health Resources*, 581 S.W.2d 196, 198 (Tex. Civ. App.—Austin 1979, no writ)).

¹² *Browning-Ferris, Inc. v. Johnson*, 644 S.W.2d 123, 127 (Tex. App.—Austin 1982, writ ref'd n.r.e.).

was to be done. The court held the permit was a final order, despite this condition, because the submission of the revised completion plan did not require the Department's approval.¹³

Conversely, in the *Walker Creek* case, the Austin Court of Civil Appeals held that "there is a limit on the extent to which an agency may impose conditions and still have issued a final order."¹⁴ This case involved the Texas Department of Health granting a permit to the City of Ennis to operate a landfill. The permit contained a condition that the City was required to bring forth a site access plan and have it approved by the Department. The court held the permit was not a final order as a result of this condition, reasoning that it was unclear what the plan was intended to encompass and that further action was contemplated by the agency.¹⁵

The process contemplated by the ALJs for POCG is analogous to the facts of the *Walker Creek* case. The ALJs are recommending essentially two approvals, one by the USAF and one by the ED, as conditions on the permit. Under the *Walker Creek* case, a permit which requires subsequent agency approvals after issuance is not a final order. OPIC also notes that given the USAF's position as expressed in the record documents, it is quite possible that the USAF will not give the approval required by Conclusion of Law 43. While OPIC appreciates the ALJs' efforts to propose a workable solution to the bird

¹³ *Id.* at 127.

¹⁴ *Walker Creek Homeowners v. Texas Dep't of Health Resources*, 581 S.W.2d 196, 198 (Tex.Civ.App.—Austin 1979, no writ).

¹⁵ *Id.*

strike problem, we are concerned that including a requirement for an after-the-fact further determination by the ED and ultimately an approval from the USAF would violate the doctrine of finality.


VI. Conclusion

As discussed above, OPIC supports and agrees with the ALJs' findings and conclusions regarding unplugged oil and gas wells, operating hours, radioactive waste, litter collection, and an alternate liner.

On the issue of bird strikes and airport safety, OPIC offers the following alternatives. First, the Commission could deny the application on the basis that it does not comply with TCEQ rule § 330.545 because the landfill would be located in an area where the attraction of birds can cause a significant hazard to the USAF's low-flying aircraft. Alternatively, the Commission could order a remand on the limited issue of bird strikes. The remand could provide for an initial abatement of the proceeding to allow for mediated negotiations, which hopefully would include the USAF. If such a remand occurs, OPIC would like to strongly encourage the USAF to participate in any future proceedings on the bird strike issue. At the conclusion of the abatement and mediated negotiations, SOAH could reconvene the proceeding to address the results of the negotiations and possibly include any bird strike prevention plans or agreed mitigation measures in the PFD and proposed final order.


Respectfully submitted,

Vic McWherter
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By 
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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2016, the foregoing document was filed with the TCEQ Chief Clerk, and copies were served to all parties on the attached mailing list via hand delivery, facsimile transmission, electronic mail, inter-agency mail, or by deposit in the U.S. Mail.


Garrett T. Arthur

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