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June 20, 2013

Ms. Bridget Bohac  
Chief Clerk  
Texas Commission on Environmental Quality  
PO Box 13087  
Mail Code 105  
Austin, Texas 78711-3087

Re: **Municipal Solid Waste Landfill Application, TCEQ Permit No. MSW-2378**  
Stop Post Oak Dump's "Hearing Request, Motion For Reconsideration Of ED's Decision, Alternative Motion For Commission To Overturn ED's Decision, & Motion For ED And/Or Commission To Take Action;" Schertz-Seguin Local Government Corporation's "Motion To Join Stop Post Oak Dump's Hearing Request, Motion For Reconsideration Of Executive Director's Decision, Alternative Motion For Commission To Overturn Executive Director's Decision & Motion For Executive Director And/Or Commission To Take Action;" and Guadalupe County Groundwater Conservation District's "Motion To Join Stop Post Oak Dump's Hearing Request, Motion For Reconsideration Of Executive Director's Decision, Alternative Motion For Commission To Overturn Executive Director's Decision & Motion For Executive Director And/Or Commission To Take Action."

Dear Ms. Bohac:

On behalf of Post Oak Clean Green, Inc. ("**Post Oak**"), the applicant for a Municipal Solid Waste Landfill Permit, TCEQ Permit No. MSW-2378, please accept this letter in response to the above-referenced motions. The first of these motions, to which the latter two entities 'joined,' was filed by counsel on behalf of an individual or group that refers to itself as "Stop Post Oak Dump" ("**SPOD**") on or about April 24, 2013. Subsequently, on or about April 29, 2013, a motion was purportedly filed by counsel for Schertz-Seguin Local Government Corporation ("**SSLGC**"), which, according to its website, is a corporation separate from the cities of Schertz and Seguin, Texas, although the SSLGC motion does not appear in the docket per the Texas Commission on Environmental Quality ("**TCEQ**") online database. The last motion, titled identically to the **SSLGC** Motion was filed on or about May 31, 2013 by counsel for the Guadalupe County Groundwater Conservation District ("**GCGCD**"), a legislatively created political subdivision formed pursuant to Chapter 36 of the Texas Water Code to regulate the spacing and production of water wells. As explained below, none of these motions is appropriate or provided for under TCEQ rules governing the processing of permit applications. While Post

Oak could simply decline to provide any response to these inappropriate “filings,” a brief response is in order so that the record is complete.

At the outset, Post Oak wishes to be clear that by submitting this response it is not validating the motion practice employed by the movants. Noticeably absent from the three current motions is any reference to TCEQ or any other rules or laws that contemplate any such motions prior to completion of the agency’s public participation process, which includes the procedures generally set forth in 30 TEX. ADMIN. CODE CHAPTERS 39, 50, and 55, entitled Public Notice; Action On Applications And Other Authorizations; and Motions For Reconsideration And Contested Case Hearings; Public Comment, respectively. This same absence afflicted *SPOD*’s first “Motion to Overturn” (“MTO”) of September 24, 2012, and was pointed out to *SPOD* in “Post Oak Clean Green’s Response to Motion to Overturn,” dated October 15, 2012. Indeed, it is ironic that the alleged basis for the relief requested here is that the TCEQ Executive Director did not follow applicable rules, while the motions themselves and the relief requested circumvent and seek to circumvent the full public participation and procedural processes of the agency. Post Oak objects to an *ad hoc* procedure being created to accommodate these motions but will participate to protect its interests and the record. In this regard, if it is decided that these motions are properly before any agency decision maker, Post Oak respectfully requests that it be notified of the consideration of the motions and given an opportunity to respond more completely.

At present, we will limit this letter to a few brief, overarching points in response to these motions. First, many of the arguments and complaints raised by the current *SPOD* motion are simply a rehash of the arguments made in *SPOD*’s first “MTO” last fall. Thus, Post Oak will emphatically restate a point made and supported in great detail in its response of last October: “Not every decision the ED makes on an application qualifies as an ‘action’ that allows a person to file a MTO to challenge that decision.” Post Oak maintains that the steps taken by the Executive Director that *SPOD* seeks to overturn are not *actions* subject to an MTO according to TCEQ rules. If they were, *SPOD* has missed its opportunity to seek judicial review of any issues that were raised in its September 24, 2012 motion by failing to timely challenge the actions of the Executive Director within the requisite time. Tex. Water Code Ann. § 5.351(b) states: “A person affected by a ruling, order, or decision of the commission must file his petition [for judicial review] within 30 days after the effective date of the ruling, order, or decision.” In other words, *SPOD* cannot challenge actions of the Executive Director that are more than 30 days old and MTOs, when proper, are overruled by operation of law after 45 days, according to 30 Tex. Admin. Code § 50.139. Thus, not only is the September 24, 2012 motion overruled, but so now is the April 24, 2013 motion more than 45 days old. Also, because the more recent *SSLGC* and *GCGCD* motions merely join the *SPOD* motion without raising any new arguments, these too are denied and their opportunity to challenge the Executive Director’s action has passed. *SPOD* should have already exhausted its administrative remedies, if these were truly ‘actions’ subject to challenge. See *West v. Texas Comm’n on Env’tl. Quality*, 260 S.W.3d 256, 263 (Tex. App.—Austin 2008, pet. denied) and *City of Austin v. Texas Comm’n on Env’tl. Quality*, 2009 Tex. App. LEXIS 9861 (Tex. App.—Austin Dec. 31, 2009).

A series of arguments by movants hinges on the wholly unfounded and preemptive claim that Post Oak and the Executive Director will try to circumvent the procedures set out in the TCEQ rules, thereby denying movants the opportunity to make public comments on the application and pursue a contested case hearing. Post Oak has and will continue to follow TCEQ procedural rules for this application process. In that regard, on June 4, 2013 Post Oak published the Notice Of Application And Preliminary Decision On Land Use Compatibility Determination For A Municipal Solid Waste Permit in the *Seguin Gazette*. This publication initiated the second public comment period in which *SPOD*, *SSLGC*, and *GCGCD* may comment, as they have previously, on the merits of the application and proposed permit. After the Executive Director considers any comments received and responds to those comments, he may stand by his preliminary decision, adjust his determination, or take any other action authorized by TCEQ rules. *See* 30 Tex. Admin. Code § 55.156. In fact, it is unquestionable that the draft permit may be changed following consideration of public comment. It is after the Executive Director's response to comment that *SPOD*'s, *SSLGC*'s, and *GCGCD*'s requests for reconsideration and a contested case hearing may be legally considered by the Commissioners. *See* 30 Tex. Admin. Code Chapter 55, Subchapter F. Of course, at that time, movants will have to make the requisite demonstration that they qualify as "affected persons," and the Commissioners will decide what issues, if any, should be referred to the State Office of Administrative Hearings. In short, the application is not ripe for any of the relief the movants request, including immediate referral for a contested case hearing, and any consideration of these motions now would be an unnecessary and wasteful exercise.

Given that the public comment and participation process is ongoing and at least some of the movants' fears expressed in their motions are addressed by Post Oak's publication of the requisite notice described above, it is possible that these motions are simply moot. If the movants are now satisfied that the remaining public participation process required by TCEQ rules will be followed, Post Oak respectfully requests that they withdraw their motions. Certainly, the movants' other misplaced assertions regarding the Executive Director's failure to adhere to rules and policies in making the preliminary determination can be addressed in the ordinary fashion through the extensive public participation process offered under TCEQ rules, and no impromptu procedures are necessary to supplement the ample opportunities movants will have to raise these issues. In fact, exploration of concerns raised by affected parties at the appropriate time in the permitting process is assured and we expect the TCEQ will ultimately issue a permit for the Post Oak facility that protects human health and the environment.

In sum, the various alternative forms of relief requested in the motions are procedurally premature according to TCEQ rules, or based on the erroneous notion that the Executive Director was *not* going to proceed under the TCEQ's public participation and hearing rules found in the above-referenced chapters. Then, too, some of the arguments are just plain wrong and do not give an accurate picture of the application or of the law. For all of these reasons, the motions should be disregarded or denied. As requested above, if the Executive Director or Commissioners elect to consider these motions, Post Oak would like the opportunity to more fully brief the issues raised. We appreciate the consideration of these matters.

Sincerely,



Glen Grunberger  
Attorney  
SBN: 08556500

cc: Mr. Zac Covar, Executive Director, TCEQ  
Mr. Les Trobman, General Counsel, TCEQ  
Mr. Blas Coy, Public Interest Counsel, TCEQ  
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Mr. Earl Lott, Municipal Solid Waste Division, TCEQ  
Mr. Rick Lowerre, Counsel for Stop Post Oak Dump  
Mr. Ron Naumann, President, Guadalupe County Groundwater Conservation District  
Mr. Mike Gershon, Counsel for Guadalupe County Groundwater Conservation District  
Mr. Dylan O. Drummond, Counsel for Schertz-Seguin Local Government Corporation  
The Honorable Judith Zaffirini, State Senator  
The Honorable Donna Campbell, State Senator  
The Honorable John Keumpel, State Representative  
The Honorable Don Keil, Mayor of Seguin  
The Honorable Larry Jones, Guadalupe County Judge  
Mr. Marvin C. Quinney, Chairman, Area Council of Governments  
Ms. Gloria Arriaga, Executive Director, Alamo Area Council of Governments  
Ms. Shelly Coleman, Guadalupe County Environmental Health Director  
Dr. Lillian Ringsdorf, Region 8 Director, Texas Department of State Health Services  
Mr. Ron Naumann, President, Guadalupe County Groundwater Conservation District  
Mr. Mike Gershon, Counsel for Guadalupe County Groundwater Conservation District  
Mr. William Jones, Board of Directors, Guadalupe County Groundwater Conservation District  
Mr. J.D. Head, Counsel for Gonzales County Groundwater Conservation District

Mr. Greg Sendelmann, Gonzales County Groundwater Conservation District

Mr. Bill West, Guadalupe-Blanco River Authority

Mr. Lou Rosenberg, Counsel for Canyon Regional Water Authority

Mr. David Davenport, Canyon Regional Water Authority

Mr. Gary Guy, San Antonio Water System

Mr. Charles Ahrens, San Antonio Water System

Mr. Ken Brooks, San Antonio Water System

Mr. Steven Siebert, San Antonio Water System

Mr. Johnnie Halliburton, Plum Creek Conservation District

Mr. Bill Klemt

Mr. Jim Watts, Stop Post Oak Dump

Mr. Mark Green, Guadalupe County Road Administrator

Mr. Greg Seidenberger, Guadalupe County Commissioner, Precinct 1

Mr. Tom Funderburg, Post Oak Clean Green, Inc.

Mr. Dale Burnett, Post Oak Clean Green, Inc.

Mr. Wade Wheatley, Cook-Joyce, Inc.