



RAILROAD COMMISSION OF TEXAS

HEARINGS DIVISION

March 22, 2017

Oil & Gas Docket No. 04-0290190

The Application of J. Moss Investments Pursuant to Statewide Rule 8 for a Permit to Maintain and Operate a Commercial Landtreatment Facility, the J. Moss Landtreatment Facility, Permit Nos. LT-0168 and P010932, Zapata County, Texas.

PROPOSAL FOR DECISION

APPEARANCES:

FOR APPLICANT:

Jay Stewart, Attorney
Wesley McGuffey, Attorney
Mark McCoury, Vice-President
J. Rodney King, Director of Corporate Accounts
Tracey O'Shay, Geoscientist
Kerry Pollard, Petroleum Engineer

APPLICANT:

J. Moss Investments
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FOR PROTESTANT:

David Frederick, Attorney
Craig Kissock, Consultant
Carlos Trevino, Jr., Waterworks Manager
Hector Uribe, former State Senator

REPRESENTING:

Zapata County
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FOR THE RAILROAD COMMISSION:

Kathy Keils, Attorney

REPRESENTING:

Oil & Gas Division, RRC

PROCEDURAL HISTORY

APPLICATION FILED:

June 30, 2014

NOTICE OF HEARING:

July 15, 2014

HEARD BY:

Paul Dubois - Technical Examiner
Marshall Enquist - Administrative Law Judge

HEARING DATE :

December 2 & 3, 2015; June 15, 2016

TRANSCRIPT RECEIVED:

December 8, 2015; June 28, 2016

PFD CIRCULATION DATE:

March 22, 2017

STATEMENT OF THE CASE

J. Moss Investments ("JMI") seeks renewal of a permit for its commercial landtreatment facility (Permit No. LT-0168) with an associated drilling-fluid disposal pit (Pit No. P010932). The renewed permit would allow the J. Moss Landtreatment Facility ("the Facility") to receive, store, handle, treat and dispose of non-hazardous oil and gas wastes, including oil-based drilling fluids and associated cuttings, tank bottoms, and contaminated soil. The Draft Permit (Attachment I) allows the Facility to receive both water-based drilling muds and associated cuttings, as well as oil-based liquids and solids. The Facility is located on 82.5 acres immediately north of State Highway 16 in Zapata County, Texas. JMI was represented at the hearing by Attorneys Jay Stewart and Wesley McGuffey.

Commission Staff has produced a Draft Permit for the Facility, including the Renewal of Permit No. LT-0168 and approval of new Pit Permit P010932. The Draft Permit was based on information from several sources, including JMI's application dated May 18, 1994 (which became effective August 9, 1994), its amendment request received November 15, 1995, its renewal request dated May 6, 1996, its renewal request dated June 24, 1996, its amendment requests dated July 12, 1996 and October 1, 1996, its renewal request dated June 27, 2011 and information received to date.

The Draft Permit was prepared in 2014 and would have been approved as administratively complete but for protests received from Lauro Gutierrez, Espuela Land and Cattle Company, L-Bar-L Cattle Company, and Zapata County. By letter dated December 1, 2015, Attorney Tim George withdrew the protests of Lauro Gutierrez, Espuela Land and Cattle Company and L-Bar-L Cattle Company. The remaining protestant is Zapata County ("Zapata County" or "ZC" or "the County"), represented by Attorney David Frederick.

The hearing in this docket was called to order at 9:00 A.M. on December 2, 2015, and lasted until late in the day on December 3, 2015. On the first day, JMI challenged the standing of the County to appear in protest of the JMI application. Both JMI and the County presented evidence on the issue of standing and the ruling on the matter was carried forward to this PFD.

Near the end of the second day, Mr. Frederick, for the County, offered numerous exhibits into evidence without a sponsor and no explanation of the significance of the exhibits. Mr. Stewart examined the exhibits and stated that he had no problem with some of the exhibits, but that others were incomplete. The parties and the ALJ agreed to a plan by which Mr. Stewart and Mr. Frederick would work together to supplement the exhibits to satisfy any objections related to completeness, thereby allowing the exhibits to be admitted into the record of the hearing.

After the hearing was recessed, the ALJ considered the deficiencies inherent in this compromise related to unsponsored exhibits, and, by letter dated February 24, 2016, directed the parties to find a mutually agreeable hearing date that would provide Mr. Frederick an opportunity to offer the exhibits through his expert witness and provide Mr. Stewart an opportunity to cross-examine the sponsoring witness. The third day of hearing was called to order on June 15, 2016.

ZAPATA COUNTY'S STANDING

At the beginning of the first day of hearing, JMI, through its Counsel, Attorney Jay Stewart, challenged the standing of Zapata County to protest the JMI application. In addition, JMI noted that the County had failed to file a Notice of Intent to Appear in Protest. Immediately after the reading of the Appearance Slips and the swearing of witnesses, Mr. Stewart comprehensively asserted the standing issue.

Q. ALJ (Enquist) Do we have any preliminary issues before we get started?

A. JMI (Stewart) I will, Judge. I'm going to challenge the party status of Zapata County. I don't believe they are a person affected pursuant to Rule 8. They do not receive notice, only municipalities would receive notice if in the event this facility was within the territorial jurisdiction of the municipality; it is not.

So Rule 8 does not mandate notice certainly to Zapata County. They are arguably a person, according to Rule 8, but a person must show that they are an affected person to appear as a party. Definition of an affected person, person who is or who, as a result of the activity sought to be permitted, has suffered or may suffer actual injury or economic damage other than as a member of the general public.

In light of House Bill 40, which certainly removed any type of jurisdiction from anyone other than the State and reaffirmed that - - that any type of ordinance or other measure, which the statute says is preempted by the State. I don't see Zapata County has an interest that is negatively affected to qualify it as a person affected.

Groundwater is owned by the surface owners, which is not Zapata County. Sheet flow is owned by the State. The test for Rule 8 is surface and subsurface waters. So I don't have any understanding of how Zapata County would be qualified as an affected person in this matter. And we move to strike them as - - if they're requesting party status.

Certainly, as we do in these hearings all the time, Mr. Uribe and Mr. Frederick certainly can make public comment, but I certainly would object to inclusion of them as a party in this matter.

Q. ALJ Okay.

A. JMI Oh - - excuse me - - last thing, they did not file a notice of appearance as required by Commission rule. We did not see that. We checked Docket Services yesterday.

And so, again, that's another strike for being allowed as a party. Certainly do not oppose to them making public comment, but I will strike them as - - request to strike them as a party.¹

Under questioning by the ALJ, Attorney David Frederick affirmed that he represented Zapata County, and that his representation had been secured through the Commission's Court of that county.² At this point, the ALJ stated:

Q. ALJ Okay. I'm not going to rule on that [i.e., the Motion to Strike] at this moment. I don't have all the facts. I haven't had time to digest this file. So I'm going to rule on that motion regarding standing in the PFD, and we'll proceed.

A. JMI Well, Judge, if - - two qualifications. One, the notice of the hearing is because they protested that they're an affected party. Is that meaning that you'll allow Mr. Frederick to cross-examine and put on witnesses?

Q. ALJ I will allow Mr. Frederick to participate in the hearing. And as I said, you'll get a ruling in the PFD.

A. JMI Okay.³

JMI then made an opening statement regarding their request for renewal of their landtreatment facility permit. Zapata County followed with an opening statement, and then spoke more directly to the standing issue.

A. Frederick Let me address - - just so you will have more confidence that you have made the correct decision to defer ruling - - the three points that were raised in the objection to standing, just so you'll know why the county does indeed have standing.
We protested this. You will see the record does reflect we protested as early as 2011. We were intimately involved in the negotiations over the many resettings of this case that your docket sheet will reflect, I believe.
Any indication to the effect that we have not been participating, or that our opposition has, in some respects, caught the Applicant

¹ Transcript, Vol. 1, p. 9, lines 12-25; p. 10, lines 1-25; p. 11, lines 1-5.

² Transcript, Vol. 1, p. 11, lines 8-19.

³ Transcript, Vol. 1, p. 12, lines 15-22.

flat-footed, I don't think you will find reflected in the documents that it was - - to which the Railroad Commission has been privy. As to whether the county would be a party or could be a party, because, as Mr. Stewart commented, it's not a municipality, so, therefore it doesn't have to get notices under the Railroad Commission rule.

The truth of the matter is, that actually, Zapata County is one of - - it might be the only county in Texas that, by special legislation, is treated as a Class A general-law municipality. So I've got the statutory cite for that, which I'll give you in briefing.

But just know that there's a statute out there that treats Zapata County differently from, to my knowledge, any other county in the state. But, certainly, it treats Zapata County as a Class A municipality.

Zapata County runs the waterworks system for - - I want to say for the entire county. I don't know that that's absolutely true. I know that Zapata County Waterworks supplies water both to customers, directly retail, and also wholesalers for resale to - - for example, everybody along SH16. [Vol. 1, p. 16, lines 14-25; p. 17, lines 1-25.]

...

I don't think that the - - anybody can really claim surprise or have a very good defense for being unprepared for a hearing, if that - - if that's even the allegation. But, certainly, under Railroad Commission rules, protestants are treated differently from intervenors. Intervenors are required to file notices of appearance five days ahead of hearing, but protestants are not, under the rules, at least. [Vol. 1, p. 18, lines 12-19.]

...

As recently as last Saturday, this site was discharging - - without any sort of permits to discharge that we have been able to determine, and, certainly, no authorization from the Railroad Commission - - wastewaters from the site. And we've got eyewitness testimony. We've got exhibits you know.

Our view is, the county's view is, and primarily because of its wastewater - - I'm sorry - - its wastewater - - its freshwater supply responsibilities, not exclusively, but primarily because the county has these freshwater supply responsibilities, the county view is that if an applicant is going to be authorized by the State to undertake and conduct this sort of potentially harmful waste disposal activity, that Applicant, that permittee, has to be serious about complying with Railroad Commission rules. [Vol. 1, p. 20, lines 3-18.]

...

So, really, - - you know, our case in the end is just these people haven't abided by their permit in the past. If the rules mean anything, there needs to be - that needs to be brought to an end.⁴

[Vol 1, p. 21, lines 2-5]

Ms. Keils, representing Commission staff, stated that Staff is an interested party and wants to hear the evidence presented. She also stated that "...as of now, Staff agrees with the current - - with the Draft Permit and all its attachments andappendices."⁵

Before calling his first witness, Mr. Stewart re-stated some of his objections to the standing of Zapata County to protest his client's application case.

A. JMI

First of all, the notice of hearing requires that if you're going to attend - - if you're going attend a hearing to protest - - and we've worked on this at the agency over the last five, six years - - that we make this a mandatory filing. It was not filed. And merely being on a Service List as a protestant does not, in any form or fashion, meet the standard of the person affected standard as required by Rule 8. [Vol. 1, p. 23, lines 1-9]

...

The fact of the matter is that if they're pulling water from Falcon Reservoir, they're going to have to show how this facility actually impacts Falcon Reservoir. There is a factual determination. [Vol 1, p. 23, lines 17-20.]

...

Clearly, under House Bill 40, this - - the county has no jurisdiction over this facility. It has been reaffirmed as of the 2015 Legislature that they don't just appear to advise the Commission. It's not their job.

So I will reiterate, based on those comments, my objection and that you have to actually show with true evidence that you're a person affected. And I know you'll take that under consideration, but I wanted you to hear that from me because I've dealt with this issue for many, many years at many, many hearings. [Vol. 1, p. 24, lines 13-23.]

Q. ALJ

Well, clearly, the County doesn't have jurisdiction over your facility; the Commission does. I understand that. But any protestant can come to the Commission and protest. And, yes, they do have to show they're an affected party.

⁴ Transcript, Vol. 1, p. 16, lines 14-25; p. 17, lines 1-25; p. 18, lines 12-19; p. 20, lines 3-18; p. 21, lines 2-5.

⁵ Transcript, Vol. 1, p. 22, lines 13-17.

And once again, I'll say it again, the Examiners may not know how they're affected parties, if indeed they are, until we hear more facts. So it's very common at the beginning of one of these cases for one party to challenge another party's standing, but we prefer to hear as much evidence as possible before we make that decision.

So if you would please go forward, I would appreciate it.⁶

Mr. Stewart proceeded to call his first witness and present testimony. Part way through the morning, Mr. Frederick asked to interrupt Mr. Stewart's presentation and take a Zapata County witness, Mr. Hector Uribe, out of turn so that he might be released.

Mr. Uribe was a member of the Texas House from 1978 through 1981, and then elected to the Texas Senate in a special election in 1981, serving until 1990.⁷ Mr. Uribe testified that, in his capacity as legislative consultant to Zapata County, and in conjunction with Representative Guillen, House Bill 722 was drafted in 2003, culminating in Local Gov't Code §81.033. The bill provided that counties along the border with no incorporated municipalities and with a population less than 7,500 would be entitled to exercise the powers of a Type A municipality.⁸ The Bill was a legislative response to the growing problem that Zapata County, and other counties, had with colonias that did not provide basic water or wastewater services.⁹ Zapata County met the requirements of this legislation, and passed a referendum approving this form of government. The county has also been concerned with the quality of water in the Rio Grande River as it backs up behind Falcon Dam.¹⁰

A. Uribe We've - - the county of Zapata, through its Commissioner's Court, has adopted a master plan that will ultimately shift the economy of this very poor county away from gas and hydrocarbon development to ecotourism. So it's extremely important that our water resources be kept as clean as possible.¹¹

Under further direct, Mr. Uribe further indicated that concerns about colonias were not the

⁶ Transcript, Vol. 1, p. 23, lines 1-9 and 17-20; p. 24, lines 13-25; p. 25, lines 1-15.

⁷ Transcript, Vol. 1, p. 81, line 25; p. 82, lines 1-2.

⁸ Transcript, Vol. 1, p. 82, lines 13-24.

⁹ Transcript, Vol. 1, p. 83, lines 19-23.

¹⁰ Transcript, Vol. 1, p. 84, lines 9-22.

¹¹ Transcript, Vol. 1, p. 85, lines 19-25.

exclusive concerns resulting in the grant of municipal authority.

A. Uribe Those were the primary reasons, but also the quality of the water and the possibility that it might be tainted or contaminated by - - by oil waste.¹²

According to Mr. Uribe, Zapata County received zoning powers in 2007 in the 80th Legislative Session, because zoning had not been included in the original grant of powers. ¹³

Upon cross-examination by Mr. Stewart, Mr. Uribe stated that he did not claim Zapata County was an incorporated city, town or village, only that it has Type A municipal powers. ¹⁴ Mr. Uribe also stated that Zapata County had not adopted any ordinance regarding oil and gas waste operations. ¹⁵ Regarding actual injury or economic damage other than as a member of the general public, Mr. Uribe stated, " But I can't give you any specifics about the quality of the water and the problems we had with the Texas Commission on Environmental Quality, but we had some that had to be addressed. Now, we're not claiming at this juncture a direct connection." ¹⁶

On the second day of hearing, at the beginning of Zapata County's case, the ALJ requested that Mr. Frederick reiterate, in as succinct a manner as possible, the basis for the County's assertion of standing to protest the instant case. ¹⁷ Mr. Frederick stated there was a three-prong reason why Zapata County had standing . ¹⁸

Stating the first prong supporting Zapata County's standing, Mr. Frederick repeated his belief that "We've been Protestants from the beginning, and that would make us a party." ¹⁹ Mr. Frederick then stated his No. 2 prong supporting standing:

A. Frederick Well, then, No. 2, we would have standing because the county

¹² Transcript, Vol. 1, p. 86, lines 15-17.

¹³ Transcript, Vol. 1, p. 87, lines 4-10.

¹⁴ Transcript, Vol. 1, p. 89, lines 2-5.

¹⁵ Transcript, Vol. 1, p. 89, lines 17-18.

¹⁶ Transcript, Vol. 1, p. 97, lines 12-17.

¹⁷ Transcript, Vol. 2, p. 311, lines 16-21.

¹⁸ Transcript, Vol. 2, p. 313, lines 11-13.

¹⁹ Transcript, Vol. 2, p. 314, lines 6-7.

itself has property and incurs expenses that are put at greater risk, pieces of property that are put at greater risk and expenses incurred that would be increased. And neither those properties nor expenses are shared by the public at large. So the county has - - and that particular - - that is particularly related to the water treatment facility that is downgradient from the J. Moss - - which is owned by the county and that water treatment facility, freshwater treatment facility, is downgradient from the J. Moss site.

Q. ALJ And exactly where is that? I mean, you mentioned county properties and now you're - -

A. Frederick Okay - -

Q. ALJ - - specifically giving me the water treatment facility. I don't know where it is, how far away it is.

A. Frederick It is - - I don't think any of us knows exactly how far away it is. My most honest, best estimate for you is in the neighborhood of 18 to 20 miles. It is south along - - in that most recent exhibit you've just seen, it's on the Falcon Reservoir - - oh, It's on the Rio Grande - -

Q. ALJ Okay.

A. Frederick - - on Falcon Reservoir where Falcon Reservoir has been backed up. I mean, I think it's - - I've got a witness here who runs that facility and can tell us how he describes it, but my view of it would be that it's on Falcon Reservoir.²⁰

Mr. Frederick followed this with a discussion on the path of run-off from the vicinity of the JMI site to Veleño Creek, which runs into Falcon Reservoir, not far from the location of the Zapata County water treatment plant, and offered Zapata County Exhibit 38 (Attachment II) to document the spatial relationship between the JMI facility and the Zapata County Waterworks.²¹

Q. ALJ So let's get back on track here.

A. Frederick Which is to say - - explain why I guess we would have standing?

²⁰ Transcript, Vol. 2, p. 314, lines 9-25; p. 315, lines 1-18.

²¹ Transcript, Vol. 2, pp. 316 -318.

Q. ALJ Well, no. Let's go back. Again, I want you to - - your first prong covered several areas of ground. So let's - - you said you've got three prongs, so let's go one, two three.

A. Frederick Okay, My one, two, three would be - - we just discussed No. 1.

Q. ALJ Well, I'm asking you to start with it again.

A. Frederick Okay. So No. 1 would be that the county, as an entity, is an affected party. So we would have a justiciable interest both at the agency level and on appeal. And that would be because it has a waterworks, which we just discussed where it is.

Q. ALJ Is that still in No. 1 or are we in No. 2 - -

A. Frederick Still No. 1, No. 1. We're at No. 1. Contaminants from the JMI site, at least in our theory of the science here, could migrate to where the waterworks intake is. We have some evidence about a - - certain types of meteorological events during which that site had problems. And our view is were those meteorological events to reoccur, then some of these contaminants would make it to that intake structure, thereby affecting the property of the county in a way that not everybody else's property in the county or in the state or however long you want to define "public interest" to be - - the public would be affected and increased costs of operation - - slightly, but increased costs of operation at the water intake structure. Okay. So that's one thing.

Another reason is that the county, as we discussed and as Mr. Uribe - - so reason No. 2 is, as Mr. Uribe explained, the county has the authority that Class A municipalities have. Okay? So House Bill 40 from the last legislative session very much circumscribed - - not to use even more harsh terms - - the authorities of local government to become involved at all with oil and gas operations. But Class A municipalities do have, as all municipalities have certain police powers, certain protection of health and safety powers that we granted to our government. And those have not all been eradicated as to facilities associated with oil and gas. ²²

...

²² Transcript, Vol. 2, p. 318, lines 11-25; p. 319, lines 1-25; p. 320, lines 1-7.

Three, there is a theory of law in Texas that is unsettled, but it is - it has been asserted before and it sometimes prevails - - that governmental units stand in a *parens patriae* relationship to their citizenry... ²³

If we were just down to the only grounds we have for standing we have is that third, that we get to stand in the shoes of our citizens, that would be the third ground we would take. So those are the three reasons I think we have standing. ²⁴

In December of 2015, Mr. Frederick filed a document titled "Comment of Zapata County Regarding Standing". The main purpose of this document was to reiterate Zapata's County's three main claims to standing and emphasize the second of the three. Mr. Frederick wrote that Zapata County

"... (1) ...unlike the public at large, has property that could be affected by the escape of contaminants from the JMI site; (2) ...is a governmental entity with some special rights, rights not held by the general public, that could be affected by the terms of the permit, if any, issued to JMI, and, (3) it, because it is a governmental entity with jurisdiction over the territory that is Zapata County, unlike the public at large, may represent citizens living in Zapata County in a *parens patriae* role to the ends of advocating for both minimizing contaminant escapes from the JMI site and establishing enforceable terms in the permit, if any, issued to JMI." Comment of Zapata County Regarding Standing, page 1, December 21, 2015.

EXAMINERS' OPINION ON THE STANDING OF ZAPATA COUNTY

When challenged on its standing to appear at the Commission in protest of the JMI application, Zapata County offered several arguments that it believed established its standing. Each of those arguments is here considered in turn. In the Examiners' opinion, Zapata County does not have standing in the present hearing.

Commission Statewide Rule 8 describes the entities entitled to notice of an application for a landtreatment pit permit:

The applicant shall give notice of the permit application to the surface owners of the tract upon which the pit will be located or upon which the disposal will take place. When the tract upon which the pit will be located or upon which the disposal will take place lies within the corporate limits of an incorporated city, town, or village, the applicant shall also give notice to the city clerk or other appropriate official.

²³ Transcript, Vol. 2, p. 321, lines 8-12.

²⁴ Transcript, Vol. 2, p. 321, lines 18-22.

Statewide Rule 8(d)(6)(C) [16 Tex. Admin Code §3.8(d)(6)(C)]. An entity described as entitled to notice pursuant to the provisions of a Statewide Rule is often, but not always, considered an affected party by definition. Such an entity might still be subject to a challenge to their status as an affected party. Statewide Rule 8 also defines “Affected person” as:

Person who, as a result of the activity sought to be permitted, has suffered or may suffer actual injury or economic damage other than as a member of the general public.

Statewide Rule 8(a)(22) [16 Tex Admin. Code 3.8(a)(22)]

In order to demonstrate that it has standing to appear in protest of the instant hearing, Zapata County must show that it was either entitled to notice in this docket pursuant to Statewide Rule 8(d)(6)(C), or that it is an “affected person” pursuant to Statewide Rule 8(a)(22).

1. Standing Based on Grant of Municipal Powers to Zapata County

Zapata County, through Hector Uribe, argued that the Texas Legislature granted it, in 2003, the powers of a Type A Municipality and zoning authority in 2007, as codified in Local Gov’t Code §81.033 (see Attachment III) . This Section applied to the commissioner’s court of a county that had a population of more than 5,000, was located within 100 miles of an international boundary, and contained no incorporated territory of a municipality.

Local Gov’t Code 81.033(c) provides that “For an election under this section, the ballot shall be prepared to permit voting for or against the proposition: “Granting (name of county) County the authority to enact ordinances in the same manner as a general-law municipality.” According to the testimony of Mr. Uribe, this election was held, and the Commissioner’s Court acquired the powers of a municipality. “So the voters got a chance to vote and adopted a form of government as a result of the legislature enactment, very similar to unitary government. Unitary government is a concept of consolidated - - consolidating governmental entities.”²⁵

The gist of this argument appears to be that Zapata County, as a result of the powers granted under Local Gov’t Code §81.033, falls under the notice requirements of Statewide Rule 8(d)(6)(C), which states:

The applicant shall give notice of the permit application to the surface owners of the tract upon which the pit will be located or upon which the disposal will take place. When the tract upon which the pit will be located or upon which the disposal will take place lies within the corporate limits of an incorporated city, town, or village, the applicant shall also give notice to the city clerk or other appropriate official.

In the opinion of the Examiners, the statements that Zapata County acquired the powers of a Type

²⁵ Transcript, Vol. 1, p. 83, lines 6-11.

A municipality pursuant to Local Gov't Code §81.033 are overbroad in that Zapata County did not acquire all the powers of a Type A municipality. Section 81.033 includes several restrictions on the authority granted, including a prohibition on the Commissioner's Court exercising zoning authority under Local Gov't Code Chapter 211 or developing a Municipal Comprehensive Plan under Chapter 213.

In response to cross-examination by JMI, asking if Mr. Uribe was testifying that Zapata County was an incorporated city, town or village, Mr. Uribe responded "I'm not saying that. What I'm saying is that it has Type A municipal powers."²⁶

Q. JMI Well, I'm going to get to that, sir. But I just want to kind of understand your testimony, that Zapata County still is Zapata County.

A. Uribe It is.

Q. JMI It's not Zapata City? There is a city there, isn't there?

A. Uribe No. There is no municipality, no incorporated community there.

Q. JMI Is Zapata a town?

A. Uribe It is a township, an unincorporated township.

Q. JMI Okay. And do you know that this facility is not within the township of Zapata?

A. Uribe Well, the legislature didn't give authority to any township. In fact, it gave authority because there was no township.²⁷

Under further cross-examination regarding any ordinance passed by the County regarding oil and gas operations, Mr. Uribe responded "We have not adopted an ordinance as of this moment."²⁸

Zapata County has not represented that it is the surface owner of the tract the JMI facility is located on. The record evidence indicates the surface owner is Jose Luis Bustamante.²⁹ Cross-examination reveals that the disposal tract does not lie within the corporate limits of an incorporated city,

²⁶ Transcript, Vol. 1, p. 89, lines 2-5

²⁷ Transcript, Vol. 1, p. 92, lines 7-22.

²⁸ Transcript, Vol. 1, p. 89, lines 14-18.

²⁹ JMI Exhibit #1.

town, or village. Zapata County has not shown that it was entitled to notice pursuant to Statewide Rule 8(d)(6)(C) [16 Tex. Admin Code 3.8(d)(6)(C)] as either the surface owner of the tract the Facility is located on, or as an incorporated city, town or village. The Examiners find that, while Zapata County may have been granted some of the powers of a municipality, it has failed to demonstrate a basis upon which a limited grant of municipal powers confers upon it standing to appear in the present hearing.

2. Standing Based on County Ownership of the Zapata County Waterworks

Counsel for Zapata County argued that the county's ownership of the Zapata County Waterworks gives it standing to appear at the hearing. Mr. Frederick argued:

A. Frederick Contaminants from the JMI site, at least in our theory of the science here, could migrate to where the waterworks intake is. We have some evidence about a - - certain types of meteorological events during which that site had problems. And our view is were those meteorological events to reoccur, then some of those contaminants would make it to that intake structure, thereby affecting the property of the county in a way that not everybody else's property in the county or in the state or however long you want to define "public interest" to be - - the public would be affected and increased costs of operation - - slightly, but increased costs of operation at the water intake structure.³⁰

The record evidence is that the JMI Facility lies near the head of Veleño Creek, which flows about 18 to 20 creek miles³¹ south to Falcon Reservoir, near the intake for the Zapata County Waterworks. The water treatment facility is managed by Mr. Carlos Trevino, Jr., Utilities Director for Wastewater and Water for Zapata County. Mr. Trevino was presented as a witness by Zapata County.

Mr. Trevino testified as to the location of the Zapata County Waterworks (Attachment II) on Falcon Reservoir. The waterworks has an intake that reaches about 150 feet out into the lake with three intake motors that bring in water.

Q. Frederick Now, if there were increased pollutant loads after (at the) intake structure, would that have any financial impact at all on the operation of the waterworks - - of the waterworks?

A. Trevino Depending on the contaminants, the plant would have to go - - undergo increased chemical usage to take care of pollutants. Normally organic compounds are taken care of by the treatment -

³⁰ Transcript, Vol. 2, p. 319, lines 6-19.

³¹ Transcript, Vol. 2 p. 435, Lines 10-11.

- water treatment process. Some are not able to be treated, like inorganics, like heavy metals, copper, lead, zinc, selenium, et cetera, any other heavy metals like that, they would have to be - - they go through the plant, but they're really not treated. So we try to meet the TCEQ maximum contaminant levels that we go by, and we do that by monitoring - - our monthly monitoring reports.
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Mr. Trevino then testified as to the problems experienced by the water works in times of heavy rainfall.

Q. Frederick Okay. Well, not to dwell on the shortcomings of the plant, but I want to go back to what I believe you told me was a 2010 error. Am I correct that back in 2010 there were some operational problems out at the plant?

A. Trevino Due to a flood that we had there.

Q. Frederick Okay. That's the part I want to talk to you about. First place, what was the - - what was the nature of the operational problems you had?

A. Trevino Well, during that time, of course, turbidity was a big problem, so we had to deal with that. And, you know, a lot of debris in the river that grows and brought all kinds of contaminated material, trees, brush, animals, dead animals, you name it.

Q. Frederick Did the - - I forgot - - Velando (phonetic) Creek, is that the name of the creek?

A. Trevino Veleño.

Q. Frederick Veleño. Did Veleño Creek flood in those days?

A. Trevino Oh, yes.

Q. Frederick Did at least some of your contaminant problem - - did you ever see contamination coming down Veleño Creek?

A. Trevino No, we don't see it. We just, you know, get some - - when we do our monthly operating reports, we know that our levels are higher

³² Transcript, Vol. 2, p. 436, lines 24-25, p. 437, lines 1-13.

through the numbers, and so we adjust accordingly.

Q. Frederick Okay. And I take it from what you've said that you do attribute at least some of your 2010 operating problem - - experience to the fact of flooding conditions that existed in your watershed?

A. Trevino Yes sir, along with all the other water plants along the line.

Q. Frederick You say "along the line", that's back up the Rio Grande?

A. Trevino Right. As far back as even McAllen - - as far back as McAllen to Laredo, and all - - there's some small plants in between.³³

Under cross-examination, Mr. Trevino stated that the Zapata County Waterworks takes water samples at the plant intake, and at sampling sites spread along the area of the town, but does not sample Veleño Creek or its tributaries.³⁴ Zapata County has not conducted an analysis of the dilutive impact on contaminants entering the lake, and no analysis of historical oil and gas operations in the area and how that may have impacted the lake.³⁵

Zapata County did not offer any evidence that the JMI Facility is currently impacting the water quality of Falcon Reservoir, or that it has ever impacted the water quality of Falcon Reservoir. Zapata County has no baseline analysis from which the possible impact of the JMI Facility on Falcon Reservoir or the waterworks can be judged. The Aerial Photo offered by Zapata County of the pathway of flood waters from the JMI Facility to Falcon Reservoir (Attachment II) is dotted with numerous bright spots. These are well pads in the area, indicating the area has undergone intensive oil and gas development. Zapata County did not explain how, in times of heavy rainfall, runoff from these oil and gas pad sites could be distinguished from any possible runoff from the JMI site.

The Draft Permit for the JMI Facility requires that JMI maintain two feet of freeboard between the top of the berms enclosing the cells and the top of fluid within those cells.³⁶ JMI's expert witness testified that a 12 inch rain would be more than a 100-year rainfall event.³⁷ Zapata County's expert witness, Fred Kissock, testified that a 24-hour 25-year rainfall event would deposit 7.84 inches of rain.

A. Kissock I - - rather than even trying to interpolate, I took the figures out of

³³ Transcript, Vol. 2, p. 438, lines 7-25, p. 439, lines 1-18.

³⁴ Transcript, Vol. 2, p. 444, lines 5-13.

³⁵ Transcript, Vol. 2, p. 444, lines 24-25, p. 445, lines 1-6.

³⁶ Draft Permit Condition Section V, Part D.

³⁷ Transcript, Vol. 2, p. 214, lines 11-12.

TxDOT Manual TP 40, which lists the 24-hour 25-year as 7.84 and the 50-year 24-hour is 9.29.³⁸

In the Examiners' opinion, Zapata County offers little more than speculation that its water treatment plant might be impacted by runoff from the JMI Facility, assuming a breach in one of the JMI containment cells during a time of high rainfall. The County cannot quantify the possible impact, or even demonstrate that any impact would be measurable or attributable to a particular site admittedly 18 to 20 miles upstream on a single creek. Zapata County would have the Commission focus on the speculative impact to its water treatment facility from one oil and gas landtreatment facility in the watershed of Veleño Creek, to the exclusion of all other oil and gas activity within the watershed of Veleño Creek. In a broader sense, during a time of high rainfall, any adverse impact on the Zapata County Waterworks could just as easily be attributed to point-source or non-point-source contaminant loading from anywhere in the much greater watershed of the Rio Grande River upstream of Falcon Dam, with sources from Texas or Mexico, or both. In that broader sense, considering the water treatment facilities up and down the Rio Grande, an injury to the Zapata County Waterworks would be an injury or damage suffered as a member of the general public.

Zapata County is unable to demonstrate that it has suffered or will suffer actual injury or economic damage to its water treatment plant due to the JMI Facility. Absent such a showing, Zapata County cannot demonstrate that ownership of the Zapata County Waterworks entitles it to affected party status and standing in the present hearing.

3. Zapata County and the Power to Inspect the JMI Facility Under Texas Water Code §26.173(a).

As another basis for standing, Zapata County asserts it has power to inspect the JMI Facility pursuant to Texas Water Code §26.173(a), and power to refer its findings to the Commission for enforcement pursuant to Section 26.173(b).³⁹

Texas Water Code §26.173 states,

(a) A local government has the same power as the commission has under Section 26.014 of this code to enter public and private property within its territorial jurisdiction to make inspections and investigations of conditions relating to water quality. The local government in exercising this power is subject to the same provisions and restrictions as the commission.

(b) When requested by the executive director, the result of any inspection or investigation made by the local government shall be transmitted to the commission for its consideration.

³⁸ Transcript, Vol. 2, p. 385, lines 19-21.

³⁹ "Comment of Zapata County Regarding Standing", page 2, filed December 21, 2016.

Texas Water Code §26.001(18) defines “local government” as “...an incorporated city, a county, a river authority, or a water district.....”. Zapata County clearly fits under the description of a local government.

Texas Water Code §26.001(2) defines “Commission” as “...the Texas Natural Resource Conservation Commission.”, which is the agency currently known as the Texas Commission on Environmental Quality. The statute does not refer to the Texas Railroad Commission. Zapata County’s citation of a section of the Texas Water Code that does not even apply to the Texas Railroad Commission does not support the standing of Zapata County in the present case.

Zapata County cites *Jackson County Vacuum Truck Service v. Lavaca-Navidad River Authority*, 701 S.W.2d 12 (Tex. App. - Corpus Christi 1985, writ refused) as authority for the proposition that the County may enter property within its jurisdiction “...to inspect and investigate for conditions related to ground or surface water quality.” Comment of Zapata County Regarding Standing, filed December 21, 2015. The actual holding in the case is not as broad as Zapata County implies. The holding in that case states “We hold that local governments and the Department of Water Resources have the authority to enter and inspect public and private lands, even those known to be used for oil and gas activities. It is within their jurisdiction to investigate for possible water pollution from other than oil and gas sources.” (emphasis added) *Id*, at 14-15.

Zapata County does not explain how limited authority to enter property to inspect for water pollution from “...other than oil and gas sources” translates into standing to appear in a Texas Railroad Commission hearing in protest of a land treatment facility renewal application. It is the Examiners opinion that the quoted sections of the Texas Water Code do not confer standing on Zapata County to appear in the present hearing.

4. Zapata County’s Standing Under the Doctrine of *parens patriae*.

As another basis for standing, Zapata County invokes the doctrine of *parens patriae*.⁴⁰ “Under the *parens patriae* doctrine, a state in its sovereign capacity may, in a proper case, maintain a suit on behalf of its citizens for the protection of their rights.” *Tuma v. Kerr County*, 336 S.W.3d 277, 281-282 (Tex. App. - San Antonio 2010, n.w.h.) The doctrine has limited applicability. “This doctrine, however, does not apply to counties, whose power is derivative and not sovereign.” *Id*, at 282.

The Examiners find no support for the proposition that Zapata County may represent its citizens before the Texas Railroad Commission under the doctrine of *parens patriae*, and no support for the assertion that the doctrine provides Zapata County with standing to appear before the Commission in the present docket.

⁴⁰ Literally “Parent of the Country”. See *Farmers Group v. Lubin*, 222 S.W.3d 417 (Tex. 2007).

5. Zapata County's Standing Based On the Appearance of Its Name On the Service List

Zapata County first argued that it was a party to the hearing because it had protested as early as 2011, and had been involved in the several re-settings of the hearing date in this docket. The argument here appears to be that Zapata County's inclusion on the Service List is sufficient to establish standing. The Examiners disagree.

The file contains a July 29, 2011 letter from Mr. Frederick notifying the Commission that he represents Zapata County and formally protests J. Moss Investment's application to renew and amend Permit No. LT-0168. In the letter, Mr. Frederick notes the county is concerned about "...the facility's ability to generate odors and negatively impact water quality and the aesthetic values of the County's citizens." Mr. Frederick and Zapata County, in the person of the Honorable Joseph Rathmell, County Judge, have been on the hearing Service List since that time.

Commission hearings are commonly protested. The protests received may be a very few or in the tens or even hundreds. Docket Services has no process to determine which protest, out of many received, involves a protestant that actually has standing to appear at a hearing. As each protest is received, the apparent protestant is placed on the Service List for that docket. Being placed on a Service List for a docketed hearing does not confer standing in that hearing.

Standing is normally determined at the actual hearing or in a preliminary hearing called for the purpose of establishing standing. In this docket, Zapata County's standing was immediately challenged at hearing, on the basis that Zapata County is not an "affected person". Statewide Rule 8(a)(22) defines an "affected person" as a "Person who, as a result of the activity sought to be permitted, has suffered or may suffer actual injury or economic damage other than as a member of the general public." Reliance on the fact that the names of Zapata County Judge Joseph Rathmell, Hector Uribe and David Frederick appear on the Service List of the Notice of Hearing is not an answer to a challenge to "affected party" status. Such reliance is not responsive to the requirement that an entity on a Service List demonstrate that it, as a result of the activity sought to be permitted, has suffered or may suffer actual injury or economic damage other than as a member of the general public. Zapata County thus fails to establish standing.

The Hearing

Zapata County was allowed to participate fully in the instant hearing, subject to a ruling on standing to be stated in the PFD. Zapata County cross-examined the JMI witnesses and offered its own witnesses and evidence. Over the course of three days of hearing, Zapata County had the opportunity to establish a credible basis for standing in this hearing.

Examiners' Recommendation

The Examiners find that Zapata County has not demonstrated that it is a party entitled to Notice of Hearing in the present docket or that it is an affected party with standing to appear in protest of this application. Accordingly, the Examiners recommend that the Commission enter an Order finding that

Zapata County does not have standing to protest this docket, that the hearing is uncontested, and that the docket should be referred to Technical Permitting for administrative approval.

Based on the record in this docket, the Examiners recommend adoption of the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. At least 10 days notice of this hearing was given to all parties entitled to Notice of Hearing.
2. J. Moss Investments ("JMI") has applied to renew the permit for its commercial landtreatment facility (Permit No. LT-0168) and amend the permit with the addition of an associated drilling-fluid disposal pit (Pit No. P010932). The renewed permit would allow the J. Moss Landtreatment Facility to receive, store, handle, treat and dispose of non-hazardous oil and gas wastes, including oil-based drilling fluids and associated cuttings, tank bottoms, and contaminated soil. The landtreatment facility is located on 82.5 acres immediately north of State Highway 16 in Zapata County, Texas.
3. Zapata County appeared at the hearing in protest of the JMI application to renew and amend its landtreatment facility permit.
4. J. Moss Investments challenged the standing of Zapata County to protest its application on the basis that Zapata County was not an affected person as defined in Statewide Rule 8.
5. Statewide Rule 8(d)(6)(C) defines the entities entitled to notice of application for a landtreatment facility. The Rule states "The applicant shall give notice of the permit application to the surface owners of the tract upon which the pit will be located or upon which the disposal will take place. When the tract upon which the pit will be located or upon which the disposal will take place lies within the corporate limits of an incorporated city, town, or village, the applicant shall also give notice to the city clerk or other appropriate official."
6. Statewide Rule 8(a)(22) defines "Affected person" as "Person who, as a result of the activity sought to be permitted, has suffered or may suffer actual injury or economic damage other than as a member of the general public."
7. Zapata County argued it had standing in this docket because:
 - a. Pursuant to Local Gov't Code §81.033, the Zapata County Commissioner's Court has been granted the powers of a Type A municipality.
 - b. Zapata County is the owner of the Zapata County Waterworks and contaminants from the JMI Landtreatment Facility, could, under specific conditions, flow downgradient to the Zapata County Waterworks (located on the bank of Falcon Reservoir, which is

created by the impoundment of the Rio Grande River), thereby resulting in the expenditure of additional funds in properly treating the lake water before sale to customers.

- c. Zapata County has the authority to inspect the JMI Landtreatment Facility pursuant to Texas Water Code §26.173(a) and refer their findings to the Texas Railroad Commission.
 - d. Zapata County may represent its citizens under the doctrine of *parens patriae*.
 - e. Zapata County protested this application in 2011, and its name has been on the Service List for this hearing since that time, which Zapata County asserts gives it standing.
8. The Zapata County Commissioners Court did not receive all the powers of a Type A municipality under Texas Gov't Code §81.033, and no incorporated municipality has been formed within the boundaries of Zapata County.
- a. Zapata County is not the surface owner of the JMI Landtreatment Facility tract.
 - b. Zapata County is not a municipality. There is no incorporated city, town or village within Zapata County.
 - c. Zapata County does not fall within the notice requirements of Statewide Rule 8(d)(6)(C).
9. Zapata County asserts it has standing to appear in protest of the JMI Landtreatment Facility as the owner of the Zapata County Waterworks, which might incur additional costs of water treatment if contaminants flow downstream from the JMI Facility to the Waterworks in Veleño Creek.
- a. The JMI Landtreatment Facility is located approximately 18 to 20 creek miles from the Zapata County Waterworks.
 - b. Zapata County did not specify the contaminants it believed might result in additional costs of water treatment.
 - c. Zapata County did not present any baseline demonstrating the contaminants and contaminant levels that the waterworks was required to treat for on a regular basis.
 - d. The map offered by Zapata County to demonstrate the location of the JMI Facility in relation to the Zapata County Waterworks indicates the area is dotted with numerous oil and gas drilling locations, which in turn indicates the area has been developed for oil and gas recovery.

- e. Zapata County did not offer an explanation of how run-off from well pad locations could be differentiated from any run-off from the JMI Landtreatment Facility.
 - f. Zapata County presented testimony that a flood in 2010 created problems for the Zapata County Waterworks, due to turbidity and debris washed into the river, such as trees, brush, and dead animals. This problem was not unique to the Zapata County Waterworks, but was a problem shared by all water treatment plants along the Rio Grande River.
 - g. Zapata County did not explain how it could attribute any actual injury or economic damage to its waterworks, now or in the future, specifically to the JMI Landtreatment Facility, as opposed to actual injury or economic damage suffered from all aspects of oil and gas development in the watershed of the Rio Grande River, from either the Texas or Mexico side, or both.
10. Zapata County asserted that it had standing to appear in protest of the JMI Landtreatment Facility because it had the power to inspect the JMI Landtreatment Facility pursuant to Texas Water Code §26.173(a) and report its findings to the Texas Railroad Commission.
- a. Texas Water Code §26.173(a) defines “commission” as the Texas Natural Resource Conservation Commission, currently known as the Texas Commission on Environmental Quality (“TCEQ”).
 - b. Texas Water Code §26.173(a) does not apply to the Texas Railroad Commission.
 - c. Texas Water Code §26.173(a) does not provide any basis for the standing of Zapata County in the present hearing.
11. Zapata County asserts it has standing to appear in the present hearing to represent its citizens under the doctrine of *parens patriae*.
- a. The doctrine of *parens patriae* applies to the states in their capacity as sovereign entities.
 - b. The doctrine of *parens patriae* does not apply to counties. The power of counties is derivative from the state and the counties are not sovereign.
12. Zapata County asserts it has standing to appear in the present hearing due to the fact it protested the application in 2011 and has been on the Service List since that time.
- a. The Docket Services office of the Texas Railroad Commission receives protests to applications constantly, and has no mechanism for determining if a protestant is an affected party or not. All protestants are placed on the Service List of the docket as a matter of course.

- b. At hearing, applicants often challenge the standing of protestants on the basis that they were not entitled to notice of the hearing, or cannot show that they are affected parties under the applicable rule.
- c. JMI challenged the standing of Zapata County to appear as a protestant in the present hearing. Zapata County did not establish that it, as a result of the activity sought to be permitted, has suffered or may suffer actual injury or economic damage other than as a member of the general public.

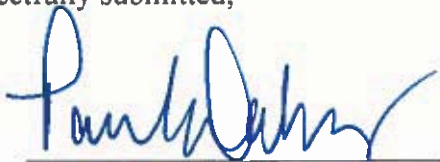
CONCLUSIONS OF LAW

- 1. Proper notice of hearing was timely given to all persons legally entitled to notice.
- 2. All things have occurred to give the Commission jurisdiction to decide this matter.
- 3. Zapata County was not entitled to notice of the application of JMI Landtreatment Facility for renewal and amendment of its permit, and did not show that it was an affected party entitled to appear in protest of the present application pursuant to Statewide Rule 8(a)(22).

RECOMMENDATION

The ALJ and Technical Examiner recommend that Zapata County be dismissed from this docket, the docket be deemed unprotested, and the docket be remanded to Technical Permitting for further administrative processing.

Respectfully submitted,



Paul Dubois
Technical Examiner



Marshall Enquist
ALJ