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CHIEF CLERKS OFFICE

July 2, 2007

**VIA HAND DELIVERY**

LaDonna Castañuela, Chief Clerk  
TCEQ, MC-105  
P.O. Box 13087  
Austin, Texas 78711-3087

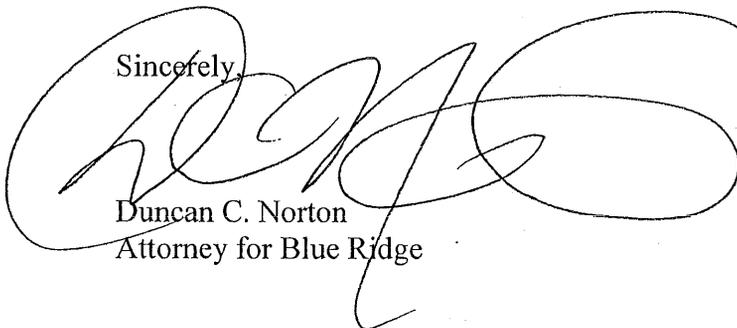
RE: TCEQ Docket No. 2007-0614-MSW  
TCEQ MSW Permit No. 1505A  
Application of Blue Ridge Landfill, TX; L.P.

Dear Ms. Castañuela:

Enclosed please find an original and eleven copies of *Applicant's Response to Requests for Hearing* to be filed in the above-reference matter.

Thank you for your attention to this matter. Should you have any questions, please do not hesitate to contact me.

Sincerely,



Duncan C. Norton  
Attorney for Blue Ridge

DCN/rmy  
1635/04/ltr070702

cc: Mailing List

**TCEQ DOCKET NO. 2007-0614-MSW**

**IN RE THE APPLICATION OF § BEFORE THE**  
**BLUE RIDGE LANDFILL, TX, L.P. § TEXAS COMMISSION ON**  
**NO. MSW-1505A § ENVIRONMENTAL QUALITY**

JUL -2 PM 4: 56

CLERK'S OFFICE

**APPLICANT'S RESPONSE TO REQUESTS FOR HEARING**

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

COMES NOW Blue Ridge Landfill, TX, L.P. ("Blue Ridge"), applicant for a permit amendment, Permit No. MSW-1505A, for the expansion of a Type I municipal solid waste (MSW) facility in Fort Bend County, Texas, and submits this its Response to Requests for Hearing pursuant to the rules of the Texas Commission on Environmental Quality (the "TCEQ" or the "Commission"), 30 TEX ADMIN CODE § 55.209(d), and shows the following:

**I.  
BACKGROUND**

The Blue Ridge Landfill is a Type I municipal solid waste landfill located at 2200 FM 521 in Fort Bend County, Texas. The landfill was permitted by the Texas Department of Health in 1985 and has, since 1993, served the solid waste disposal needs of Fort Bend, Brazoria, Galveston, and Harris Counties, consistent with the Houston-Galveston Area Council's Solid Waste Management Plan for the H-GAC Region. In order to continue to provide solid waste management and disposal services, Blue Ridge has applied for an expansion to create additional waste disposal capacity so that it can continue to serve the needs of these areas.

Public meetings regarding the proposed expansion were held on July 6, 2006 and December 7, 2006. After administrative and technical review, the Executive Director ("E.D.")

issued his Preliminary Decision and Draft Permit on October 13, 2006. As described in the Notice of Setting for the Commission Agenda dated June 15, 2007, the Office of the Chief Clerk has forwarded ten letters requesting a hearing, and four letters requesting reconsideration.

## **II. LEGAL BASIS AND ORGANIZATION OF RESPONSE**

Section 55.211(c)(2) of the TCEQ rules provides that a request for a contested case hearing shall be granted if the request is made by an affected person and "(A) raises disputed issues of fact that were raised during the comment period, that were not withdrawn by the commenter... and that are relevant and material to the commission's decision on the application; (B) is timely filed with the chief clerk; (C) is pursuant to a right to hearing authorized by law; and (D) complies with the requirements of §55.201 regarding timing and contents of hearing requests.

Section 55.209(e) of the TCEQ rules provides that "[r]esponses to hearing requests must specifically address: (1) whether the requestor is an affected person; (2) which issues raised in the hearing request are disputed; (3) whether the dispute involves questions of fact or of law; (4) whether the issues were raised during the public comment period; (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing...; (6) whether the issues are relevant and material to the decision on the application; and (7) a maximum expected duration for the contested case hearing." Basically, responses to hearing requests are required to address most of the elements that must be in a hearing request for it to be referred to SOAH.

This response is organized to correspond to these requirements. Section III discusses whether each hearing requestor is an affected person. Section IV discusses whether each issue is appropriate for referral, including a quick reference table, which will hopefully assist the

Commissioners and staff in synthesizing the twenty-seven (27) issues raised by the hearing requestors. Section V discusses each issue not recommended for referral in more detail relative to the applicable requirements. Section VI discusses the maximum expected duration of the hearing and Section VII contains a request for time for mediation. Section VIII discusses the requests for reconsideration, and finally, Section IX contains Blue Ridge's Prayer, including a list of all issues that it analyzed as appropriate for referral, in terminology appropriate for referral, considering the relevant TCEQ regulatory language.

**III.**  
**IS THE REQUESTOR AN AFFECTED PERSON?**  
**(§55.209(e)(1))**

Section 55.203(a) of the TCEQ rules provides that “an affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest.” In determining whether an individual is an affected person, the TCEQ rules require consideration of “all factors...including, but not limited to, the following: (1) whether the interest claimed is one protected by the law under which the application will be considered; (2) distance restrictions or other limitations imposed by law on the affected interest; (3) whether a reasonable relationship exists between the interest claimed and the activity regulated; (4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person; [and] (5) likely impact of the regulated activity on use of the impacted natural resource by the person....”<sup>1</sup>

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<sup>1</sup> §55.203(c).

A governmental entity may be an affected person if it has authority under state law over issues raised by the application,<sup>2</sup> considering "their statutory authority over or interest in the issues relevant to the application."<sup>3</sup>

A group or association may request a contested case hearing only if it meets all three of the following requirements: 1) one or more of its members would otherwise have standing to request a hearing; 2) the interests that the group seeks to protect are germane to the organization's purpose; and 3) neither the claim asserted nor the relief requested requires the participation of the individual members.<sup>4</sup>

Table 1 lists the hearing requestors, and states whether each is an affected person/entity with a brief summary of the reasoning for the conclusion. Following the table is a more detailed narrative explanation regarding the affected person status of each hearing requestor.

**Table 1 – Affected Person Consideration**

| (ABBREV. IN TABLE 2) |      | HEARING REQUESTOR                        | AFFECTED PERSON?  |
|----------------------|------|--|---|
| 1                    | C    | CABRLE                                   | Yes. Meets associational requirements.  |
| 2                    | RC   | Rodrigo Carreon                          | Yes. Property located approximately 1.5 miles from Blue Ridge. Member of CABRLE so should be aligned. |
| 3                    | BC   | Brian Childs                             | No. Property located more than 2 miles from Blue Ridge.   |
| 4                    | AC   | Arthur Crumpton, Jr.                     | No. Property located more than 2 miles from Blue Ridge.   |
| 5                    | AE   | Ada Edwards, Houston City Council Member | No. Does not request to be a party. Does not claim a personal justiciable interest.                   |
| 6a                   | KTRK | KTRK                                     | Yes. Adjacent landowner.  |
| 6b                   | KRIV | KRIV                                     | No. Interest claimed is not protected. Property located beyond 2 miles.                               |
| 6c                   | KHOU | KHOU                                     | No. Interest claimed is not protected. Property located beyond 2 miles.                               |
| 7                    | M    | Darryl Mayo                              | No. Interest going to general public.   |

<sup>2</sup> §55.203(b).

<sup>3</sup> §55.203(c)(6).

<sup>4</sup> §55.205(a).

|    |    |                                  |   |
|----|----|----------------------------------|---|
| 8  | DO | Dora Olivo, State Representative | No. Does not request to be party. Does not claim a personal justiciable interest. |
| 9  | AP | Anita Prinz                      | Yes. Member of CABRLE so should be aligned.                                       |
| 10 | GT | Green Trees                      | No. Not an identifiable individual and does not establish associational standing. |

### 1 - CABRLE

Based upon statements in its hearing request, Citizens Against Blue Ridge Landfill Expansion ("CABRLE") appears to meet the requirements for associational standing (§55.205(a)). Its request was submitted on April 13, 2007, which is within the hearing request period. Blue Ridge reserves the right to object to CABRLE'S associational standing, based on additional information it may obtain during discovery.

### 2 - RODRIGO CARREON

Mr. Carreon submitted several hearing request letters prior to the hearing request deadline. He has indicated that he resides within "5 blocks" of Blue Ridge. Mr. Carreon also is identified in the CABRLE hearing request as a member located at "1122 Avenue C, Fresno, Texas, 77545 . . . less than 1.5 miles southwest of the landfill." GPS mapping of Mr. Carreon's address relative to Blue Ridge locates his home approximately 1.5 miles from the proposed expanded permit boundary. Though 1.5 miles stretches the limits of what can reasonable be considered potentially affected, Blue Ridge has no objection to Mr. Carreon being deemed an affected person and granted party status in this matter. However, because CABRLE has identified Mr. Carreon as a member of its association, Blue Ridge respectfully requests that Mr. Carreon be aligned with CABRLE if both CABRLE and Mr. Carreon are granted party status.

### 3 - BRIAN CHILDS

Mr. Childs submitted a timely hearing request and indicated he and his family "live within 10 miles of the proposed landfill." His address, 11712 Sterling Brook, Pearland, Texas

77584 more precisely identifies his property as being between 2 and 2.5 miles east of the proposed and current Blue Ridge permit boundary. At this distance, Blue Ridge believes that his interests are "common to members of the general public" and therefore do not qualify as a "personal justiciable interest," neither has he shown there is any "likely impact of the regulated activity on the health and safety" of his family or the use of his property as required by 30 TAC § 55.209(e)(1). Blue Ridge, therefore recommends that Mr. Childs has not qualified as an affected person and should not be granted party status.

4 - ARTHUR CRUMPTON, JR.

Mr. Crumpton filed a timely hearing request (and a Request for Reconsideration) in which he identifies himself as a resident of Shadow Creek, which is a community "within one mile of Blue Ridge Landfill." His address, as provided in his hearing request, is 2017 Mountain Creek Street, Pearland, Texas 77584. This address is beyond 2 miles from the nearest existing and proposed amended permit boundary. At this distance Blue Ridge believes that his interests are "common to members of the general public" and therefore do not qualify as a "personal justiciable interest." As such, he has not shown there is any "likely impact of the regulated activity on the health and safety of his family or the use of his property" as required by 30 TAC § 55.209(e)(1). Blue Ridge, therefore recommends that Mr. Crumpton has not qualified as an affected person and should not be granted party status.

5 - ADA EDWARDS  
HOUSTON CITY COUNCIL MEMBER

Blue Ridge appreciates the concerns that Councilmember Edwards expressed on behalf of her constituents and intends to continue cooperating with her to address those concerns. However, Blue Ridge also believes this letter does not comply with TCEQ requirements for

hearing requests and therefore should not be granted as such. Councilmember Edwards' letter, submitted during the public comment period on City of Houston letterhead, identifies various constituent groups and lists concerns that she and those groups have with the landfill. The letter requests that "(i)f these matters cannot be resolved at the public meetings then a contested case hearing should be held." Blue Ridge submits that this letter does not meet the requirements of Sections 55.203(a), 55.209, or 55.211(c). It has not been raised by an affected person, in that Councilmember Edwards does not identify herself or any individual as a person who resides within close proximity to Blue Ridge or is affected in a way different from that of the general public, nor does she ask to be named as a party.

Since Blue Ridge is not disputing that the requirements for a contested case hearing have been met and that most of her stated concerns should be referred as relevant issues, Blue Ridge believes that Councilmember Edwards will likely be satisfied that her recommendation has been upheld.

6 - KTRK TELEVISION, INC., FOX TELEVISION STATIONS, INC. (KRIV)  
AND KHOU-TV L.P.

*KTRK*: Blue Ridge has no objection to KTRK Television, Inc. ("KTRK"), as an adjacent property owner, being considered an affected person. In fact, Blue Ridge purchased a small tract of adjacent land from KTRK in 2006. That purchase included a full disclosure by Blue Ridge of its intent to expand its landfill.<sup>5</sup> Following that transaction, in 2007, KTRK surprisingly chose to use another tract that it owned within one mile of Blue Ridge as the site for installation of its new Doppler radar. This fact shows that KTRK's claims of lack of notice are

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<sup>5</sup> The sales contract with KTRK in that land acquisition included an agreement by KTRK not to oppose the Blue Ridge Landfill expansion.

hollow and its complaints of possible interference, if true, are self-inflicted. Nonetheless, KTRK by virtue of its proximate property ownership, has met the "affected person" standard.

*KRIV and KHOU-TV*: Fox Television Stations, Inc. (KRIV) and KHOU-TV, L.P. ("KHOU") are identified in the same request as "adversely affected" by virtue of their operating additional Doppler weather radars within "2 to 3" and "3 miles" of Blue Ridge, respectively. Though all are represented by Lowerre and Frederick, Attorneys at Law, and filed as one combined hearing request, they are not identified as a "group" nor have they requested "associational standing." In addition, the that collectively they are members of a group or that the interest that the group seeks to protect are germane to the organization's purpose, or that the claim asserted and the relief requested does not require the participation of one of the "members."

Blue Ridge strongly objects to KRIV and KHOU being identified as affected persons and granted party status. The interest claimed by them (possible interference with weather forecasting by their Doppler radars) is not "one protected by the law under which the application is being considered."<sup>6</sup>

The KHOU and KRIV Doppler weather radar related concern which they attempt to characterize as "public safety" and "public welfare" issues ostensibly because they fear the height of the landfill may block their radar's view of weather activity, tens, and possibly even hundreds, of miles away is not within the ambit of TCEQ's MSW jurisdiction. Plainly stated, the interest claimed (weather forecasting) is not "protected by the law under which the application will be considered," nor does "a reasonable relationship exist" between (the interest) claimed and the activity regulated, as required by 55.203(c).

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<sup>6</sup> §55.203(c)(1).

KTRK, KHOU and KRIV also have not provided any law or regulation showing “distance restrictions or other limitations imposed by law on the affected interest they claim (weather-forecasting) as required by that regulation.

TCEQ has been given no statutory responsibility to assure that a privately-owned T.V. station's ability to forecast weather is not interfered with. KTRK, KHOU and KRIV have not cited, and cannot cite, any statute or regulation applicable to MSW permitting which identifies weather-forecasting as a public safety, health, and welfare concern to be considered. Specific siting limitations exist in TCEQ MSW regulations regarding Public Use Airports, Seismic Impact Zones, Fault areas and Wetlands and unstable areas (30 T.A.C. Sections 330.300- .305). There are no such specific regulations regarding weather radars. Without such rules in place, this claimed “interest” cannot be referred as a relevant and material issue, except as one of many components of land use compatibility, as further discussed below.

TCEQ public health and safety responsibility is limited to protecting the public and the environment from contamination of the air, water, and soil or land by human activities which have the potential to contaminate that environment. To claim weather forecasting as a public health, safety and welfare issue to be protected in permitting of an MSW landfill, is analogous to claiming that TCEQ could limit the stack-height of a new power plant or the height of a catalytic cracking unit or tank at a refinery in TEX. HEALTH AND SAFETY CODE Chapter 382 air permitting matters, if it might interfere with a weather radar's ability to forecast weather. The same would be true for a wastewater treatment plant or a petro-chemical facility's permitting pursuant to Chapter 26 of the Texas Water Code. Clearly such claims would not qualify a T.V. station for party status in those contexts. Nor should they in this MSW application.

That leaves only land use compatibility (TX. HEALTH AND SAFETY CODE §361.069 and 30 TAC §330.53(b)(8)) as an interest which might qualify KHOU or KRIV for party status as an affected person. However, both of these entities identify their properties (the Doppler towers) as being 2 or more miles from the Blue Ridge permit boundary. At this remote distance, there is not even a requirement to identify land uses for consideration of compatibility with a landfill for permitting purposes. There are numerous requirements to identify and consider land uses with 500 feet (i.e. water wells, structures and inhabitable buildings), and many others within one mile (residences, schools, churches, day-care facilities, cemeteries, etc...). The only items identified in TCEQ regulations as land use considerations beyond one mile are zoning (2 miles), growth trends (5 miles) and airports (6 miles). There is no regulatory or statutory foundation for consideration of the existence of weather radars more than 2 miles from the proposed permit boundary. For these reasons, KHOU and KRIV should not be considered affected persons and their requests for party status should be denied. KTRK, however, does qualify by virtue of its ownership of property adjacent to Blue Ridge.

#### 7 - DARRYL MAYO

Mr. Mayo submitted a timely hearing request and indicated he lives within one mile of Blue Ridge. His home address, 2119 Auburn Shores Drive, Pearland, Texas 77584, appears to be just over 1.5 miles from the existing and proposed Blue Ridge Permit boundary. Because Mr. Mayo is located more than 1.5 miles from the facility, he has not shown that he has a personal justifiable interest and should not be granted affected person status.

#### 8 - STATE REPRESENTATIVE DORA OLIVO

Blue Ridge appreciates the concerns that Representative Olivo has on behalf of her constituents and desires to resolve those issues through continued cooperation with her.

However, for the reasons discussed below, Blue Ridge also believes her letters do not comply with TCEQ requirements for hearing requests and therefore should not be granted as such. Since Blue Ridge is not disputing whether other hearing requests should be granted and Representative Olivo did not specify any specific issues for referral, Blue Ridge believes that Representative Olivo will likely be satisfied that her recommendation has been upheld.

Representative Olivo filed letters during the comment period which addressed concerns and issues she has on behalf of her constituents. These letters did not request a contested case hearing. She then filed a letter, dated May 10, 2007 wherein she states "I am writing on behalf of my constituents" and "urging the Texas Commission on Environmental Quality to grant *their* request for the contested case hearing" (emphasis added). It does not appear that Representative Olivo is seeking party status, but is only requesting that the case be referred. Additionally, this letter was filed more than 2 weeks after the deadline for filing hearing requests. This letter does not comply with Section 55.211(c) and therefore cannot represent a valid hearing request by an affected person.

#### 9 - ANITA PRINZ

Blue Ridge has no objection to Ms. Prinz being identified as an affected person. Based on her submissions, she is landowner of the property within 1.5 miles of the current and proposed permit boundary and timely filed a hearing request. Blue Ridge does not object to her being granted party status. In her earlier comments filed on February 18, 2007, Ms. Prinz identifies herself as being a member of CABRLE, therefore, Blue Ridge respectfully requests that she be aligned with that association.

10 - GREEN TREES

This letter, received by TCEQ on July 28, 2006 and signed "Green Trees," appears, based on handwriting and syntax similarities, to have been written by Mr. Rodrigo Carreon. An address on FM 521 in Arcola, TX 77583 is included, which seems to be approximately 2 to 3 miles from Blue Ridge. If, in fact, Green Trees is an individual, Blue Ridge objects to the granting of this hearing request unless a Reply is filed by Mr./Ms. Green Trees, confirming that he/she is in fact a person residing at an address which can be identified as within 1.5 miles of Blue Ridge.

If Green Trees is not an individual, this request should be denied, since it does not establish that Green Trees meets the requirements for associational standing in § 55.205(a). Green Trees has not shown that it is a bona fide organization, that it has one or more members that would have standing to request a hearing in their own right, that it has interests that are germane to the organization's purpose, or that neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

**IV.  
WHAT ISSUES ARE APPROPRIATE FOR REFERRAL?  
(§55.209(e)(2-6))**

In the HB 801 process applicable to this application, once the consideration of affectedness has occurred and eligible parties identified, the Commission is then charged with determining which issues raised by an affected person in a valid hearing request should be referred to the State Office of Administrative Hearings ("SOAH") for consideration in the contested case hearing.<sup>7</sup>

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<sup>7</sup> TEX. WATER CODE §5.556

The following table is intended to provide a quick reference for the reader as to what issues should and should not be referred. Column 1 numbers each issue, and Column 2 briefly describes each issue requested. For efficiency, similarly worded issues filed by different requestors, or even the same requestor, were combined. Column 3 provides an abbreviation identifying each affected person that raised a particular issue (these abbreviations can be found in Table 1). Column 4 addresses whether the issue was raised during the public comment period as required by §55.209(e)(4). Column 5 addresses whether the issue raised is a disputed issue of fact as required by §55.209(e)(2) - (3). Column 6 addresses whether the issue is relevant and material to the decision on the application as required by §55.209(e)(6). Column 7 shows which applicable rules and/or statutes are implicated by the issue. No hearing requests were found to be based on issues raised solely in a public comment withdrawn by the commenter in writing (§55.209(e)(5)), so no column was needed. Where an issue fails to meet any one of these criteria and is therefore not appropriate for referral, an explanation is provided in Section V.

**Table 2**  
**Issues Considerations**  
**Blue Ridge Landfill, TX, LP Proposed MSW Permit No. 1505A**

|   | ISSUE   | RAISED BY AFFECTED PERSON? | RAISED IN COMMENT? | DISPUTED FACT? | RELEVANT/MATERIAL? | RULES                            | REFER? |
|---|---|----------------------------|--------------------|----------------|--------------------|----------------------------------|--------|
| 1 | Land Use (includes all land use components, ie. growth trends, screening, height, identification of wells, springs, houses, churches . . .) | √ (C, KTRK, AP)            | √                  | √              | √                  | 330.53(a), 53(b)(8), 54(4)       | Yes    |
| 2 | Traffic/Transportation  | √ (C, AP)                  | √                  | √              | √                  | 330.53(b)(9)                     | Yes    |
| 3 | Compliance with Missouri City agreement   | √ (C)                      | √                  | √              | No                 |                                  | No     |
| 4 | Nuisance (includes odor, blowing trash, dust)   | √ (C, KTRK, AP)            | √                  | √              | √                  | 330.5(a)(2), 124(a), 127(b), 128 | Yes    |

| ISSUE |  | RAISED BY AFFECTED PERSON?     | RAISED IN COMMENT? | DISPUTED FACT? | RELEVANT/MATERIAL? | RULES  | REFER? |
|-------|--|--------------------------------|--------------------|----------------|--------------------|--|--------|
| 5     | Noise  | √ (C)                          | √                  | √              | No                 |  | No     |
| 6     | Vectors  | √ (C)                          | √                  | √              | √                  | 330.126, 133(a)  | Yes    |
| 7     | Groundwater Contamination (includes leachate system, geology, hydrology) | √ (C, RC, AP, TV)              | √                  | √              | √                  | 330.51(a), 55(a)(5), 56(d), 56(e), 56(f), 56(j), 56(k), 153(d), 200-206, 230-242 | Yes    |
| 8     | Compliance History   | √ (C, KTRK, AP)                | √                  | √              | √                  | Tex. Health & Safety Code Ch 361   | Yes    |
| 9     | Drainage   | √ (C, KTRK, AP)                | √                  | √              | √                  | 330.55(b)(5), 55(b)(2), 55(b)(3), 55(b)(4), 56(f)(4)(A)                          | Yes    |
| 10    | Flood Plain Analysis   | √ (C, AP)                      | √                  | √              | √                  | 330.55(b)(7), 56(f)(4)(B), 301, 408(1)   | Yes    |
| 11    | Surface Water Contamination  | √ (RC, KTRK, AP)               | √                  | √              | √                  | 330.53(b)(11), 55(b)(5)(E), 55(b)(6), 56(f), 153(a), 59(b)(3), 139, 409(1)       | Yes    |
| 12    | Notice Deficiency  | √ (KTRK)                       | √                  | √              | No                 |  | No     |
| 13    | Public Safety, Health, Welfare   | √ (KTRK, AP)                   | √                  | No             | No                 |  | No     |
| 14    | Effect on Doppler Radar  | √ (KTRK)                       | √                  | √              | No                 |  | No     |
| 15    | Protection of Natural Resources  | √ (KTRK)                       | √                  | No             | No                 |  | No     |
| 16    | Air Pollution  | √ (RC, AP)                     | √                  | √              | No                 |  | No     |
| 17    | L/F Design & Operations, if they affect KTRK's property                  | √ (KTRK)                       | √                  | No             | √                  |  | No     |
| 18    | Location Restrictions<br>- faults<br>- wetlands                          | √ (KTRK, AP)                   | √                  | √              | √                  | 330.41(b), 300-305   | Yes    |
| 19    | Property Value   | √                              | √                  | √              | No                 |  | No     |
| 20    | Compatibility with COG plan  | √ (AP)                         | √                  | √              | √                  | 330.50(c)(3)(D)  | Yes    |
| 21    | Endangered Species   | √ (AP)                         | √                  | √              | √                  | 330.51(b)(8), 53(b)(13), 55(b)(9), 129, 302(2)(C)                                | Yes    |
| 22    | Identification of site specific issues requiring special considerations  | √ (AP)                         | √                  | No             | √                  |  | No     |
| 23    | Complete application   | √ (AP)                         | √                  | No             | √                  |  | No     |
| 24    | General Health Concerns  | No (Only raised by BC, AC, AE) | √                  | No             | No                 |  | No     |
| 25    | General Environmental Concerns   | No (Only raised by AC, AE)     | √                  | No             | No                 |  | No     |

|    | ISSUE                 | RAISED BY AFFECTED PERSON?      | RAISED IN COMMENT? | DISPUTED FACT? | RELEVANT/MATERIAL? | RULES | REFER? |
|----|-----------------------|---------------------------------|--------------------|----------------|--------------------|-------|--------|
| 26 | Toxic Waste           | No (Only raised by AE)          | No                 | No             | √                  |       | No     |
| 27 | Post Closure Care     | No (Only raised by AE-nonparty) | √                  | √              | √                  |       | No     |
| 28 | Environmental Justice | No (Not raised in HR)           | √                  | √              | √                  |       | No     |

**V.  
DISCUSSION OF ISSUES NOT ELIGIBLE FOR REFERRAL**

Below is a discussion of those requested issues that Blue Ridge submits are not appropriate for referral to SOAH. There are several reasons why an issue may have been deemed inappropriate for referral. Section 50.115(c) states that the “commission *may not* refer an issue to SOAH for a contested case hearing unless the commission determines that the issue: (1) involves a disputed question of fact; (2) was raised during the public comment period; and (3) is relevant and material to the decision on the application.” (emphasis added). Additionally, issues must be raised in a timely request by a person who qualifies for party status as an affected person.<sup>8</sup>

The TCEQ has historically assessed the relevancy of an issue by considering whether that issue could form the basis of a necessary finding of fact and conclusion of law, and therefore whether or not the permit should be issued. If the issue is extraneous to that decision, it is not relevant or material to the decision on the application and should not be referred. Simply put, the Commission should ask whether an applicant's failure to sustain its burden of proof on an issue

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<sup>8</sup> §55.211(b)(3)(A).

could result in denial of the application. If so, then the issue is relevant. If not, then the issue is not relevant. Since the Commission may not base a decision on factors not specifically enumerated by applicable statutes, rules, or regulations in making a decision on the application, such issues are not relevant and material.<sup>9</sup>

**A. Compliance with Missouri City Agreement (No. 3)**

Whether the application complies with terms in a third-party agreement between Blue Ridge and Missouri City is not relevant and material to the decision on the application. Blue Ridge is confident that the application does comply with this agreement, however, the agreement was created outside of the TCEQ's approval process, and is therefore not relevant to it. If Missouri City believes that Blue Ridge is in violation of the agreement, Missouri City can pursue appropriate remedies in civil court. CABRLE, who raised this issue, is not party to the agreement, and has no standing to argue the proper construction of the agreement. Further, TCEQ has no jurisdiction to interpret or enforce this or any other contractual agreement unless it is expressly made a provision in a permit. If this issue were to be referred, CABRLE might advocate an interpretation of the agreement that conflicts with the intent of the parties to the agreement. Any such finding by the ALJ or Commission would be irrelevant to the TCEQ's decision on this application.

**B. Noise (No. 5)**

Issues regarding noise are not relevant and material to the decision on the application. There are no noise regulations in the TCEQ rules relevant to this application. Note that the agency has promulgated rules against excessive noise for Transfer Stations/Registrations,<sup>10</sup> but

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<sup>9</sup> *Starr County v. Starr Indus. Servs., Inc.*, 584 S.W.2d 352, 356 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.).

<sup>10</sup> See §330.59(b)(7), 330.65(e)(8), 330.71(f)(8), and 330.73(e)(8).

has not promulgated any similar rules for landfills. In addition, noise is not included in the definition of nuisance as that term is defined in the rules relevant to this application.<sup>11</sup>

**C. Alleged Deficiency of Notice (No. 12)**

KTRK's allegation that it did not receive notice of the application is not relevant and material to the decision on the application. Since KTRK clearly received actual notice prior to the end of the hearing request period (as evidenced by its timely hearing request) and Blue Ridge has not objected to any of its requested issues based solely upon its failure to be based on a comment, KTRK is not harmed by any alleged lack of notice. Blue Ridge is confident that all appropriate notice has been provided, and acknowledges that notice exhibits will be reviewed by the ALJ as a threshold consideration at the preliminary hearing, however it should not be listed as a referred issue on which the merits of the application can be decided.

**D. Public Safety, Health, and Welfare (No. 13)**

Blue Ridge firmly believes that the referral of general issues, such as the "public health, safety, or welfare," effectively serves to convert a limited referral of issues into a direct referral of the entire application – undermining the purpose and intent of HB 801, as codified in Section 5.556 of the Texas Water Code. Such issues do not specify a disputed question of fact, but rather evoke policy considerations which form the foundation of the specific statutes and rules of the TCEQ. They are, therefore, not appropriate for referral to SOAH. TCEQ rule, Section 55.211(b)(3)(A) states that the factual issues to be referred to SOAH by the Commission must be "specific." By employing such vague statements, no specific facts are placed in dispute. Instead, if referred, virtually any requirement found within the Commission's MSW regulations or even beyond those regulations could then be raised in the SOAH hearing, in direct contravention of

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<sup>11</sup> See §330.2 (defining nuisance in terms of pollution, contamination of groundwater or surface water, vectors, and odors, but not including noise).

the letter and intent of the HB 801 process. Such a broad referral effectively negates the issue-narrowing process mandated by the legislature when it enacted that bill in 1999.

Bringing such broad and vague "issues" into the contested case process can even potentially expand the scope of the hearing beyond the rubric of TCEQ regulations and mutate a contested case hearing into a "toxic tort" trial on such matters as the medical causation of a broad range of unspecified current or future medical conditions that a party might allege.

The stated "policy and purpose" of the Texas Solid Waste Disposal Act (SWDA) is "to safeguard the health, welfare, and physical property of the people and the environment by controlling the management of solid waste ...".<sup>12</sup> In order to fulfill this policy and effect this purpose, the Texas Legislature has passed statutory requirements and directed the Commission to promulgate specific rules and standards pertaining to the management and control of solid waste and MSW facilities.<sup>13</sup> The Commission has, in turn, promulgated its comprehensive regulatory framework governing the disposal of solid waste in furtherance of that "policy". The very premise of the State's MSW framework, then, is that an MSW applicant who prepares, submits and then adequately demonstrates that its application meets or exceeds the agency's standards has proposed a facility that, by definition "safeguard[s] the health, welfare, and physical property of the people and the environment."<sup>14</sup> Requiring an applicant to carry the burden of proof on "public safety, health and welfare" as an issue independent of, and potentially beyond, the TCEQ statutory and regulatory standards exceeds the Commission's authority and cannot form the basis for denial of the permit. As such, it is inappropriate for referral as an independent disputed issue of fact "relevant and material to the Commission's ultimate decision." More directly stated, the Commission would commit legal error if it were to deny this, or any application, because there

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<sup>12</sup> TEX. HEALTH & SAFETY CODE ANN. §361.002

<sup>13</sup> Id. at §361.024.

<sup>14</sup> Id. at §361.002.

was a finding that the applicant would not protect public safety, health and welfare even though it proved compliance with all the specific, applicable regulations which were appropriately referred pursuant to the HB 801 process. For this reason, it is improper to refer such a policy issue for consideration in a contested case hearing. The policy is met, as a matter of law, when the applicant proves it meets the standard for the "specific"<sup>15</sup> disputed fact issues which have been referred.

Blue Ridge realizes that similar arguments were made recently by McCarty Road Landfill, TX, L.P. in its response to hearing requests regarding a similarly broad issue, and were rejected by the Commission, which referred a similar issue (framed and referred by the Commission as "whether the proposed expansion will negatively impact the health of the requestors and their families"). Blue Ridge is hopeful it has refined its discussion such that the Commission better understands the potential problems that such a broadly phrased, subjective issue can open in a contested case setting. For these reasons, Blue Ridge strongly urges that this policy statement not be transformed into a "specific" and independent disputed issue of fact.

**E. Effect on Doppler Radar (No. 14)**

KTRK's allegation that the landfill would affect the operation of its Doppler radar is not relevant to the issue of public safety, health, and welfare. As KTRK admits in its hearing request, "[t]he construction of the landfills [sic] could even require Requesters to abandon the locations for the Doppler radar or make other changes at great costs to the Requesters."<sup>16</sup> Thus, it is clear that it is not the public safety health or welfare that is KTRK's interest, nor even weather forecasting that is at issue, but rather it is the financial interest KTRK has in consciously choosing to locate its tower near Blue Ridge, even after it was aware of Blue Ridge's planned

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<sup>15</sup> §55.211(b)(3)(A)(i).

<sup>16</sup> Hearing request of KTRK, April 13, 2007, at 2.

choosing to locate its tower near Blue Ridge, even after it was aware of Blue Ridge's planned expansion and after it had agreed to not oppose that expansion. Blue Ridge acknowledges that KTRK is an adjacent land owner and its land use may be considered as one component of the broader land use compatibility issue, however, it is not a separate issue.<sup>17</sup> Since Blue Ridge is acknowledging that land use compatibility should be referred, no independent referral of radar is appropriate.

**F. Protection of Natural Resources (No. 15)**

KTRK seeks referral of "protection of...the natural resources."<sup>18</sup> This issue is not relevant and material to the decision on the application. There are no rules or standards which are relevant to this issue, nor is there any independent requirement to protect "natural resources," and no standards to determine whether the application is protective of natural resources or which natural resources are to be protected. As such, this issue is not appropriate for referral. For additional discussion, please see the discussion of "public safety, health, and welfare" at (No. 4) above herein.

**G. Air Pollution (No. 16)**

Air issues at the landfill are regulated under a separate, standard air permit (Standard Permit Registration No. 81004 and General Operating Permit No. O-01472). Because there is a separate process for evaluation of air emissions from landfills, the issue is not relevant and material to this application and it should not be referred to SOAH.

Blue Ridge notes that a similar issue was requested in the Hearing Requests for McCarty Road Landfill, TX, L.P., but was not referred by the Commission. For the same reason, this issue should not be referred in this hearing.

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<sup>17</sup> For additional discussion of radar interests being inappropriate for referral, please see the Affected Person discussion in III(6) above, herein.

<sup>18</sup> Hearing request of KTRK, April 13, 2007, at 5.

**H. Landfill Design and Operations, if they affect KTRK's property (No. 17)**

This issue is not "specific," but is instead overbroad, general, and vague. In requesting that "the issues of design and operations should be referred if they could affect KTRK's property," KTRK does not allege any identifiable design or operation within the TCEQ's jurisdiction that may actually affect their property. Blue Ridge has not objected to several issues raised by KTRK that might affect their property (i.e., drainage patterns, surface water protection, and groundwater protection). However, the referral of this issue as stated, would not provide Blue Ridge with any identifiable standard or criteria on which to present the evidence required to meet its burden of proof. See similar discussions above herein regarding public health, safety and welfare, and protection of natural resources.

**I. Property Values (No. 19)**

Property values are not relevant and material to the decision on this application. As noted in the Executive Director's Response to Comments (comment 1), and in the Executive Director's response to comments in previous matters,<sup>19</sup> the TCEQ has acknowledged that it has no authority to consider property values when reviewing MSW permit applications. The Commission has supported this position by not referring property value issues when they have been requested.<sup>20</sup>

**J. Identification of site specific issues requiring special considerations (No. 22)**

This issue does not raise a disputed question of fact. In this issue, Ms. Prinz does not allege any site specific issue that requires special consideration. Therefore, there is no issue of fact raised by this issue.

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<sup>19</sup> See Tex. Comm'n on Enviro. Quality, *Executive Director's Response to Public Comments Concerning Application by Panama Road Landfill, TX, LP, MSW Permit No. 2296*, p. 8 (Nov. 1, 2002); Tex. Nat. Res. Conservation Comm'n, *Executive Director's Response to Public Comments Concerning Application by City of Shamrock MSW Permit No. 2281*, Docket No. 2001-0702-MSW pp. 13-14 (May 11, 2001); Tex. Nat. Res. Conservation Comm'n, *Executive Director's Response to Hearing Requests, Hereford MSW Permit No. MSW 2289*, Docket No. 2002-0653-MSW p. 12 (June 3, 2002).

<sup>20</sup> Id.

**K. Completeness of Application (No. 23)**

This issue does not raise a disputed question of fact. In this issue, Ms. Prinz does not allege any specific information that is missing from the application (Blue Ridge did not object to referral of the specific issue that she raised – whether the application identified all springs, wells, homes, churches, etc. – as part of a general land use issue). However, referral of so broad an issue could effectively convert what should be a limited referral into a direct referral by opening the entire application to the hearing, in contravention of HB 801 and TCEQ's procedural rules, as previously discussed.

**L. General Health Concerns (No. 24)**

This issue was not raised by an affected person, so should not be referred. Unspecific health concerns (i.e., not specific to groundwater, air pollution, or Doppler radar concerns and addressed above) were raised only by Mr. Brian Childs, Mr. Arthur Crumpton, Jr. and Councilmember Ada Edwards. These three hearing requestors are not affected persons for the reasons described in Section III.

Even if raised by an affected person, this issue would not be appropriated for referral, for the same reasons that the "public safety, health, and welfare issue" should not be referred.

**M. General Environmental Concerns (No. 25)**

This issue was not raised by an affected person, so should not be referred. Nonspecific environmental concerns (i.e., not specific to groundwater or air pollution concerns and addressed above) were raised only by Mr. Arthur Crumpton, Jr., and Councilmember Ada Edwards. These two hearing requestors are not affected persons for the reasons described in Section III.

Even if raised by an affected person, this issue would not be appropriated for referral, for the same reasons that the "public safety, health, and welfare issue" should not be referred.

**N. Toxic Waste (No. 26)**

This issue was only raised by Councilmember Edwards, who is not an affected person for the reasons described in Section III, so should not be referred. Even if raised by an affected person, this issue would not be appropriated for referral, since it does not raise a disputed issue of fact. From the issue as framed in the hearing request, it is not possible to determine what fact the request is intended to dispute, or what her concerns were intended to be with respect to toxic waste. For these reasons, this issue should not be referred.

Finally, Blue Ridge was not able to find a comment raised during the comment period which corresponds to the Hearing Request issue.<sup>21</sup>

**O. Post Closure Care (No. 27)**

This issue was only raised by Councilmember Edwards, who is not an affected person for the reasons described in Section III. According to § 55.211(c), "a request for a contested case hearing should be granted if the request is ... (2) made by an affected person" if the request: (A) raised disputed issues of fact that were raised during the comment period ...". An issue raised solely by a person who has been defined not an affected person (such as Councilmember Edwards) does not meet these requirements. As such, this issue should not be referred.

**P. Environmental Justice (No. 28)**

This issue was not raised in any timely filed hearing request, much less by an affected person, and so is not appropriate for referral.

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<sup>21</sup> See, e.g. E.D.'s Comment 20 (Special Waste's) which refers to concerns about medical waste and asbestos, but not "toxic waste".

**VI.**  
**DURATION OF HEARING**  
**(§55.209(e)(7))**

Responses to hearing requests must address the maximum expected duration of the hearing from the first day of the preliminary hearing to the issuance of the proposal for decision. Blue Ridge suggests that, given the number of parties and number and complexity of issues, nine (9) months is an appropriate schedule.

**VII.**  
**MEDIATION**

Blue Ridge also respectfully requests that six (6) weeks be allowed for mediation between the parties, to be conducted by TCEQ mediators, prior to referral to the State Office of Administrative Hearings.

**VIII.**  
**REQUESTS FOR RECONSIDERATION**

In addition to requests for hearings, requests for reconsideration were received from Chris Calvin, Arthur Crumpton, Jr., Sheba Muharib, and Martin Rosetta. Blue Ridge respectfully requests denial of these requests for reconsideration in light of its recommendation for mediation and Commission's referral for a contested case hearing.

**IX.**  
**PRAYER**

WHEREFORE, PREMISES CONSIDERED, Blue Ridge does not object to a finding that CABRLE, Rodrigo Carreon, KTRK, and Anita Prinz, are affected persons. Blue Ridge respectfully requests that the Commission find that KHOU TV, L.P., KRIV, Brian Childs, Arthur Crumpton, Jr., City Councilmember Ada Edwards, Darryl Mayo, Green Trees, and Representative Dora Olivo are not affected persons.

Blue Ridge further respectfully requests that the issues listed in Table 3 below be referred to the State Office of Administrative Hearings for consideration in the contested case hearing. Blue Ridge respectfully requests that all issues to be referred be stated in terms that conform to the requirements set out in the MSW regulations so that the parties, SOAH, and ultimately the Commissioners can properly focus on the regulatory standards that must be met. The most effective way to ensure that the application is considered against the requirements of the rules is to state the issues, to the extent possible, in the language of the rules.

Blue Ridge respectfully requests that a duration of nine (9) months be allowed for the hearing, and that six weeks be allowed for mediation between the parties prior to referral to the State Office of Administrative Hearings.

Blue Ridge also respectfully requests that the Commission deny all requests for reconsideration.

Finally, if any of the hearing requestors write to the TCEQ and inform the TCEQ that they are not going to pursue their hearing request prior to the time at which the Commission meets to refer the issues, Blue Ridge requests that any issues raised solely by those hearing requestors not be referred to SOAH.

**Table 3 – Issues for Referral**

| ISSUE |   |
|-------|---|
| 1     | Whether the Blue Ridge proposed landfill expansion is compatible with surrounding land uses as required by §330.53(B)(8) and other relevant statutes and regulations.   |
| 2     | Whether the applicant's anticipated traffic impacts meet the requirements of §330.53(b)(9) and other relevant statutes and regulations.   |
| 3     | Whether the expansion will cause, suffer, allow, or permit the disposal of municipal solid waste or the use or operation of a solid waste facility to dispose of solid waste in such a manner that causes the creation and maintenance of a nuisance, as that term is defined in §330.2, in accordance with §330.5(a)(2) and other relevant statutes and regulations. |
| 4     | Whether the applicant provides for control of vectors as required by §330.126 and other relevant statutes and regulations.  |

| ISSUE |   |
|-------|---|
| 5     | Whether the proposed landfill expansion is adequately protective of groundwater as required by §§330.56(d-f, j-k), §§330.200-206, §§330.230-242 and other relevant statutes and regulations.  |
| 6     | Whether the Applicant's compliance history has been correctly considered in accordance with the requirements of §60.3(A) and other relevant statutes and regulations.   |
| 7     | Whether the existing drainage patterns have not been significantly altered as required by §330.56(f)(4)(A)(iv), Regulatory Guidance Document RG-417 (2002) <sup>22</sup> and other relevant statutes and regulations, and whether surface water drainage will be managed as required by §§330.55(b)(2-5) and other relevant statutes and regulations. |
| 8     | Whether the applicant's proposed expansion permits solid waste disposal operations in a floodway in violation of §330.56(f)(4)(B) and other relevant statutes and regulations.  |
| 9     | Whether the proposed expansion is adequately protective of surface water as required by §330.55(b)(1) and other relevant statutes and regulations.  |
| 10    | Whether the proposed expansion meets the location restrictions as required by §§330.300-305 and other relevant statutes and regulations.  |
| 11    | Whether the expansion complies with the Houston-Galveston Area Council of Governments' Solid Waste Management Plan For the H-GAC Region.  |
| 12    | Whether the applicant has considered the impact upon endangered or threatened species as required by §330.53(B)(13)(B) and other relevant statutes and regulations, and whether the site was designed to protect endangered species as required by §330.55(b)(9) and other relevant statutes and regulations.   |

Respectfully submitted,

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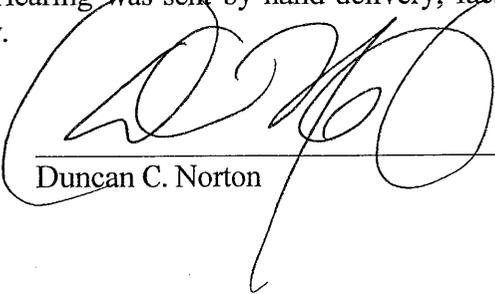
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**ATTORNEYS FOR BLUE RIDGE LANDFILL, TX, LP**

<sup>22</sup> Applicable only for "permit applications that were administratively complete before March 27, 2006."

**CERTIFICATE OF SERVICE**

I hereby certify that on this the 2<sup>nd</sup> day of July, 2007, a true and correct copy of the foregoing Applicants' Response to Requests for Hearing was sent by hand-delivery, facsimile or U.S. Certified Mail to the mailing list set out below.



\_\_\_\_\_  
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