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## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

October 5, 2012

Bridget Bohac, Chief Clerk  
Texas Commission on Environmental Quality  
Office of the Chief Clerk (MC-105)  
P.O. Box 13087  
Austin, Texas 78711-3087

**RE: CITY OF LEVELLAND  
TCEQ DOCKET NO. 2011-1424-MSW**

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in black ink that reads "Eli Martinez".

Eli Martinez, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

**TCEQ DOCKET NO. 2011-1424-MSW**

**IN THE MATTER OF THE  
APPLICATION OF CITY OF  
LEVELLAND FOR MUNICIPAL  
SOLID WASTE PERMIT  
NO. 2369**

**BEFORE THE TEXAS  
COMMISSION ON  
ENVIRONMENTAL QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO  
REQUESTS FOR HEARING**

To the Honorable Members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Response to Requests for Hearing in the above-referenced matter and respectfully shows the following.

**I. Introduction**

**A. Background of Facility**

The City of Levelland, 1709 Avenue H, Levelland, Texas 79336, has applied to the TCEQ for an MSW permit to authorize the construction and operation of a new Type I & IV Arid Exempt MSW landfill in Hockley County, Texas. The facility is proposed to be located on Bobwhite Road, 2.5 miles east of U.S. 385 and 0.5 miles south of FM 1585 in Hockley County, Texas. The total permitted area would include 171.5 acres of land located on a property of 177.02 acres, of which approximately 90 acres would be used for waste disposal. The final elevation of the waste fill and final cover material will be 3,535 feet above mean sea level for the Type I disposal area, and 3,507.4 feet above mean sea level for the Type IV disposal area. The site would be authorized to accept municipal solid waste resulting from, or incidental to, municipal, community, commercial, institutional, and recreational activities. This includes garbage, putrescible wastes, rubbish, ashes, brush, street cleanings, dead animals, abandoned automobiles, construction-demolition waste, yard waste, special

waste, and other waste as approved by the Executive Director. Waste acceptance would be limited to a maximum rate of approximately 14,600 tons per year, approximately 20 tons per day of Type I waste and 20 tons per day of Type IV waste, based on a sum of the previous four quarters of waste acceptance.

## **B. Procedural Background**

TCEQ received this application on July 8, 2010. On August 19, 2010, the Executive Director (ED) declared the application administratively complete. The Notice of Receipt of Application and Intent to Obtain a Permit (NORI) was published on September 5, 2012 in the *Levelland & Hockley County News-Press*. The ED completed the technical review of the application on January 10, 2011, and prepared a draft permit. The ED published the Notice of Application and Preliminary Decision on February 6 and 13, 2011 in the *Levelland & Hockley County News-Press*. A Notice of Public Meeting was published in the *Levelland & Hockley County News-Press* on April 20, April 27, and May 4, 2011 and a public meeting was held on May 10, 2011, at the Levelland Middle School auditorium, located at 1401 East Ellis Street, Levelland, Texas 79336.

The first comment period for this Application ended on May 10, 2011. The Applicant submitted an amendment to the technically complete application on February 13, 2012. The Executive Director received the amended application on February 21, 2012. The Applicant published the Second Notice of Application and Preliminary Decision on April 29, 2012, in the *Levelland & Hockley County News-Press*. The second comment period ended on May 29, 2012. On July 26, 2012 the ED filed his decision and Response to Public Comment, which the Office of Chief Clerk mailed on July 31, 2012. The deadline to request reconsideration of the executive director's decision or a contested case hearing was August 30, 2012.

TCEQ received requests for reconsideration from Harold Paulk and Markwest Power Tex LLC, and requests for a contested case hearing from Eddie Blair, Kathy Blair, Emmitt Burelsmith, and Shirley Burelsmith. OPIC recommends denying the requests for reconsideration and granting the hearing requests submitted by Eddie Blair, Kathy Blair, Emmitt Burelsmith, and Shirley Burelsmith.

## **II. Requests for Reconsideration**

### **A. Applicable Law**

A person may file a request for reconsideration no later than 30 days after the chief clerk's transmittal of the executive director's decision and response to comments.<sup>1</sup> Any person may file a request for reconsideration of the ED's decision.<sup>2</sup> A request for reconsideration must state the reasons why the decision the decision should be reconsidered.<sup>3</sup> Responses to requests for reconsideration should address the issues raised in the request.<sup>4</sup>

### **B. Discussion**

Harold Paulk submitted a request for reconsideration on behalf of Markwest Power Tex LLC (Markwest) on August 2, 2011 and April 20, 2012. Mr. Paulk also submitted a request for reconsideration in his personal capacity on August 2, 2012. The requests articulated common concerns regarding potential impacts of the proposed facility. The first concern relates to potential impacts on groundwater, particularly during a period of recent drought. The second concern relates to potential damage to a high pressure gas line owned by Markwest under the proposed entryway of the facility.

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<sup>1</sup> Texas Water Code §5.5556; 30 TAC §55.201(a) & (e).

<sup>2</sup> 30 TAC §55.201(e).

<sup>3</sup> *Id.*

<sup>4</sup> 30 TAC §55.209(f).

OPIC empathizes with the concerns articulated in the requests related to potential negative impacts on groundwater and the potential for safety issues at the facility, and recognizes that these concerns are within the jurisdiction of the commission to address in the context of these proceedings. An evidentiary record, however, would be necessary for OPIC to make a recommendation to the commission as to whether the permit should be denied based on these concerns. Without such a record, a recommendation for denial of the permit would be based on speculation and without the benefit of scientific inquiry and analysis. OPIC therefore recommends that the requests for reconsideration of the executive director's recommendation be denied.

### **III. Hearing Requests**

#### **C. Applicable Law**

The ED declared this application administratively complete on August 19, 2010. Because the application was declared administratively complete after September 1, 1999, a person may request a contested case hearing on the application pursuant to the requirements of House Bill 801, Act of May 30, 1999, 76th Leg., R.S., § 5 (codified at TEX. WATER CODE (TWC) § 5.556).

Under the applicable statutory and regulatory requirements, a hearing request must substantially comply with the following: give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; identify the requestor's personal justiciable interest affected by the application showing why the requestor is an "affected person" who may be adversely affected by the proposed facility or activity in a manner not common to members of the general public; request a contested case hearing; list all relevant and material disputed issues of fact that were raised during the comment period that are the basis of the hearing request;

and provide any other information specified in the public notice of the application.

30 TEX. ADMIN. CODE (TAC) § 55.201(d).

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.”

30 TAC § 55.203(a). This justiciable interest does not include an interest common to the general public. 30 TAC § 55.203(a). Governmental entities with authority under state law over issues contemplated by the application may be considered affected persons.

30 TAC § 55.203(b). Relevant factors considered in determining whether a person is affected include:

- (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;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

30 TAC § 55.203(c).

The Commission shall grant an affected person’s timely filed hearing request if:

(1) the request is made pursuant to a right to hearing authorized by law; and (2) the request raises disputed issues of fact that were raised during the comment period and that are relevant and material to the Commission’s decision on the application. 30 TAC § 55.211(c).

Accordingly, responses 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 by filing a withdrawal letter with the Chief Clerk prior to the filing of the Executive Director's Response to Comment;
- (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.

30 TAC § 55.209(e).

#### **IV. Discussion**

##### **D. Determination of Affected Person Status**

###### **a. Eddie and Kathy Blair**

The TCEQ received hearing requests from Eddie and Kathy Blair submitted on March 3, 2011 and August 29, 2012. The requests included relevant contact information and raised disputed issues outlining why the requestors believed they would be adversely affected by the proposed activity in a manner not common to members of the general public.

Mr. and Mrs. Blair are concerned about potential safety issues related to the high pressure gas line located under the proposed entryway of the facility; potential water contamination, including groundwater, surface water, and water wells; and oversight and inspection of site construction. These are interests protected by the law under which the application will be considered.<sup>5</sup>

The Information Resources Division of the TCEQ produced a map indicating the residence of the Blairs is located less than one mile from the proposed facility, which

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<sup>5</sup> 30 TAC § 55.203(c)(1).

demonstrates there is a reasonable relationship between the interests claimed and the activity regulated.<sup>6</sup> Therefore, OPIC finds that Mr. and Mrs. Blair are affected persons in accordance with 30 TAC § 55.203, and recommends that their hearing request be granted.

**b. Emmitt and Shirley Burelsmith**

The TCEQ received hearing requests from Emmitt and Shirley Burelsmith on March 3, 2011 and August 30, 2012. The requests included relevant contact information and raised disputed issues outlining why the requestors believed they would be adversely affected by the proposed activity in a manner not common to members of the general public.

Mr. and Mrs. Burelsmith are concerned about potential safety issues related to the high pressure gas line located under the proposed entryway of the facility; potential negative impacts on property values; crops; wildlife; wildlife habitat; air; water, including drinking and surface water; soil erosion; a potential dust nuisance and damage to roads created by trucks; and the sufficiency of test wells. Other than the issues related to property values, these are interests protected by the law under which the application will be considered.<sup>7</sup>

The Information Resources Division of the TCEQ produced a map indicating the residence of the Burelsmiths is located less than one mile from the proposed facility, which demonstrates there is a reasonable relationship between the interests claimed and the activity regulated.<sup>8</sup> Therefore, OPIC finds that Mr. and Mrs. Burelsmith are

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<sup>6</sup> See 30 TAC §55.203(b)(3)

<sup>7</sup> 30 TAC § 55.203(c)(1).

<sup>8</sup> See 30 TAC §55.203(b)(3)

affected persons in accordance with 30 TAC § 55.203, and recommends that their hearing request be granted.

#### **E. Issues Raised in the Hearing Request**

The following issues have been raised in the hearing requests:

- (1) Does the proposed permit adequately address the high pressure gas line easement located under the facility entryway?
- (2) Will the proposed operations adequately protect local surface and ground water resources?
- (3) Will the proposed operations negatively impact wildlife?
- (4) Will the proposed operations negatively impact offsite vegetation, including crops?
- (5) Will construction of the facility receive proper oversight and inspection?
- (6) Does the proposed permit contain sufficient monitoring requirements?
- (7) Will the proposed operations create a dust nuisance?
- (8) Will the proposed operations result in offsite soil erosion?
- (9) Will the proposed operations negatively impact air quality?
- (10) Will the proposed operations negatively impact roads?
- (11) Will the proposed operations negatively impact property values?

#### **F. Issues Raised in the Comment Period**

All of the issues raised in the hearing request were raised in the comment period and have not been withdrawn. 30 TAC §§ 55.201(c) and (d)(4), 55.211(c)(2)(A).

#### **G. Disputed Issues**

There is no agreement between the hearing requesters and the ED on the issues raised in the hearing requests.

#### **H. Issues of Fact**

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable

requirements. 30 TAC § 55.211(c)(2)(A). All of the issues presented are issues of fact appropriate for referral to SOAH.

## **I. Relevant and Material Issues**

The hearing requests raise issues relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). In order to refer an issue to SOAH, the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–51 (1986) (in discussing the standards applicable to reviewing motions for summary judgment the Court stated “[a]s to materiality, the substantive law will identify which facts are material . . . it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs”). Relevant and material issues are those governed by the substantive law under which this permit is to be issued. 477 U.S. at 248–51.

The requestors' concerns regarding compliance with pipeline easements,<sup>9</sup> test well requirements,<sup>10</sup> potential negative impacts to wildlife and vegetation, oversight and inspection,<sup>11</sup> monitoring requirements, soil erosion,<sup>12</sup> dust nuisance,<sup>13</sup> air quality,<sup>14</sup> and the sufficiency of the site access roads to accommodate expected traffic<sup>15</sup> are all relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A).

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<sup>9</sup> 30 TAC §330.141(a)

<sup>10</sup> 30 TAC§330.63(e)(4)

<sup>11</sup> 30 TAC §330.73

<sup>12</sup> 30 TAC §330.305(d)

<sup>13</sup> 30 TAC §330.153(b)

<sup>14</sup> 30 TAC §330.63(b)(2)(C)

<sup>15</sup> 30 TAC §§330.61(i) & 330.153(c)

The proposed permit also must comply with 30 TAC §§ 305.122(c), 307.1 and 309.10, which prohibit injury to private property and invasion of property rights and require minimization of exposure to nuisance conditions. Furthermore, Applicant is required to control and abate nuisance odor under 30 TAC §§ 307.4(b)(1) and 309.13(e). TCEQ is responsible for the protection of water quality under Chapter 26 of the TWC and 30 TAC Chapters 305, 307 and 309. The Texas Surface Water Quality Standards in 30 TAC Chapter 307 require the proposed permit “maintain the quality of water in the state consistent with public health and enjoyment.” 30 TAC § 307.1.

However, the requestors’ concerns related to property values are not addressed by the substantive law governing this application and therefore cannot be considered relevant and material to the Commission’s decision. OPIC therefore finds that the issue of property value is not appropriate for referral to the State Office of Administrative Hearings.

#### **J. Issues Recommended for Referral**

OPIC recommends that the following disputed issues of fact be referred to SOAH for a contested case hearing:

- (1) Does the proposed permit adequately address the high pressure gas line easement located under the facility entryway?
- (2) Will the proposed operations adequately protect local surface and ground water resources?
- (3) Will the proposed operations negatively impact wildlife?
- (4) Will the proposed operations negatively impact offsite vegetation, including crops?
- (5) Will construction of the facility receive proper oversight and inspection?
- (6) Does the proposed permit contain sufficient monitoring requirements?
- (7) Will the proposed operations create a dust nuisance?
- (8) Will the proposed operations result in offsite soil erosion?
- (9) Will the proposed operations negatively impact air quality?
- (10) Will the proposed operations negatively impact roads?

#### **K. Maximum Expected Duration of Hearing**

Commission Rule 30 TAC § 50.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. To assist the Commission in stating a date by which the judge is expected to issue a proposal for decision, and as required by 30 TAC § 55.209(d)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be nine months from the first date of the preliminary hearing until the proposal for decision is issued.

#### **V. Conclusion**

OPIC recommends denying the request for reconsideration submitted by Harold Paulk and granting the hearing requests from Eddie Blair, Kathy Blair, Emmitt Burelsmith, and Shirley Burelsmith on the issues referenced in Section III.G above. OPIC further recommends a hearing duration of nine months.

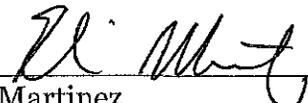
Respectfully submitted,

Blas J. Coy, Jr.  
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### **CERTIFICATE OF SERVICE**

I hereby certify that on October 5, 2012 the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Requests for Hearing was filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.

  
Eli Martinez

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TCEQ DOCKET NO. 2011-1424-MSW**

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