

Bryan W. Shaw, Ph.D., *Chairman*
Carlos Rubinstein, *Commissioner*
Toby Baker, *Commissioner*



Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 27, 2012

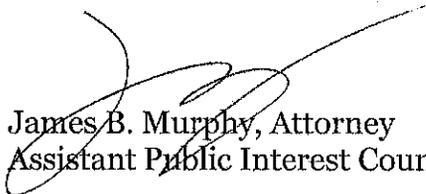
Bridget Bohac, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

**RE: AFFORDABLE DEWATERING SERVICE, LLC
TCEQ DOCKET NO. 2012-1401-MSW**

Dear Ms. Bohac:

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

Sincerely,


James B. Murphy, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2012-1401-MSW

**IN THE MATTER OF THE
APPLICATION OF AFFORDABLE
DEWATERING SERVICE, LLC
FOR PERMIT NO. 2373**

**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

Affordable Dewatering Service, LLC (Applicant) has applied to the TCEQ for a permit authorizing construction and operation of a new municipal solid waste Type V liquid waste processing facility located at 2201 S. Midkiff Road, Midland in Midland County. The draft permit authorizes acceptance, storage, and processing of grease trap waste, grit trap waste, septage, and portapotty waste on a commercial basis on approximately 1.57 acres, with a maximum daily volume of 126,000 gallons. The maximum daily volume may include grease trap waste of 36,000 gallons, grit trap waste of 10,000 gallons, septage of 60,000 gallons, and portapotty waste of 20,000 gallons.

B. Procedural Background

TCEQ received this application on April 1, 2011. On April 19, 2011, the TCEQ Executive Director (ED) declared the application administratively complete. The TCEQ

Office of Chief Clerk (OCC) mailed the Notice of Receipt of Application and Intent to Obtain a New Municipal Solid Waste Permit (NORI) on April 21, 2011. According to affidavits of publication filed May 19, 2011, Applicant published the NORI on April 28, 2011 in the *Midland Reporter Telegram*.

The ED declared the application technically complete on February 10, 2012. The OCC mailed the Notice of Application and Preliminary Decision for Municipal Solid Waste Permit (NAPD) on February 29, 2012. According to affidavits of publication filed March 22, 2012, Applicant published the NAPD on May 7, 2012 in the *Midland Reporter Telegram*. The public comment period ended on April 9, 2012. On June 7, 2012, the ED filed his decision and Response to Public Comment, which the OCC mailed on June 11, 2012. The deadline to request a contested case hearing was July 11, 2012.

TCEQ received timely comments and requests for a contested case hearing from attorney Robert Wilson on behalf of Alpha Equipment and FenceCo on April 5, 2012. OPIC recommends granting the hearing requests.

II. Applicable Law

A person may request a contested case hearing on an application declared administratively complete after September 1, 1999 pursuant to the requirements of House Bill 801, Act of May 30, 1999, 76th Legislature, Regular Session, Section 5 (codified at Title 2, Texas Water Code (TWC), Section 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. Title 30, Texas Administrative Code (TAC), Section 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).

II. Discussion

A. Determination of Affected Person Status

Robert Wilson, on behalf of Alpha Equipment and its president, Rod Prichard, timely filed a request for a contested case hearing. The request states that Alpha Equipment is located north of and adjacent to the proposed facility site, with prevailing winds blowing from the proposed facility to Alpha Equipment's location. Alpha Equipment raises concerns about odors from the proposed facility. Alpha Equipment states that its customers and employees have already experienced severe odors from the proposed site, resulting in physical illness, complaints, and adverse impacts on business. Alpha Equipment also expresses concerns about adverse effects on human health and welfare and use and enjoyment of property. In addition, Alpha Equipment states that it submitted complaints to the TCEQ about odor from the proposed site in June 2011 and those complaints are not present in the ED's compliance history review.

Based on the location of the Alpha Equipment site in relation to Applicant's proposed facility site, Alpha Equipment is an affected person under the factors in 30 TAC 55.203(c). Alpha Equipment is adjacent to the proposed facility site, listed on the land ownership maps submitted with the application under the name of Dale Waldron as numbers 5 and 16. Alpha Equipment expresses concerns about odor and compliance history that are protected by the Solid Waste Disposal Act, Title 5, Texas Health and Safety Code (THSC), Chapter 361 and the TCEQ's municipal solid waste rules at 30 TAC Chapter 330.

Robert Wilson, on behalf of FenceCo and its owner, Fred Squire, timely filed a request for a contested case hearing. The request states that FenceCo is located approximately 1,000 feet north of the proposed facility site, with prevailing winds blowing from the proposed facility to FenceCo's location. FenceCo raises concerns about odors from the proposed facility. FenceCo states that its employees have already experienced severe odors from the proposed site, resulting in physical illness, complaints, and the possibility of staffing losses. FenceCo also expresses concerns about adverse effects on its customers, business, human health and welfare, and use and enjoyment of property. In addition, FenceCo states that it submitted a complaint to the TCEQ about odor from the proposed site in June 2011 and this complaint, in addition to other complaints about Applicant's initial operations, are not present in the ED's compliance history review.

Based on the location of the FenceCo site in relation to Applicant's proposed facility site, FenceCo is an affected person under the factors in 30 TAC 55.203(c). FenceCo is approximately 1,000 feet north of the proposed facility site, listed on the land ownership maps submitted with the application under FenceCo owner Frederick E.

Squire as numbers 7 and 15. FenceCo expresses concerns about odor and compliance history that are protected by the Solid Waste Disposal Act and the TCEQ's municipal solid waste rules at 30 TAC Chapter 330.

B. Issues Raised in the Hearing Request

The following issues have been raised in the hearing requests:

- (1) Whether air emissions from the proposed facility will cause or contribute to a condition of air pollution.
- (2) Whether air emissions from the proposed facility will cause or contribute to nuisance odors.
- (3) Whether the ED properly reviewed Applicant's compliance history.
- (4) Whether the draft permit should include permit conditions or provisions to address Applicant's compliance history.

C. 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).

D. Disputed Issues

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

E. 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.

F. 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.

Texas Health and Safety Code 361.002(a) expresses the policy and purpose of the Solid Waste Disposal Act, which is to “safeguard the health, welfare, and physical property of the people and to protect the environment by controlling the management of solid waste, including accounting for hazardous waste that is generated.” TCEQ rules prohibit solid waste facilities from creating or maintaining a nuisance or endangering human health or welfare or the environment. 30 TAC 330.15(a).

Texas Health and Safety Code 361.011(d) requires the TCEQ to consider air pollution control when evaluating applications for municipal solid waste permits. The TCEQ municipal solid waste rules prohibit air emissions from causing or contributing to a condition of air pollution as defined in the Texas Clean Air Act, and provide specific measures to control odor. 30 TAC 330.245. The Texas Clean Air Act defines the term “air pollution” as “the presence in the atmosphere of one or more air contaminants or combination of air contaminants in such concentration and such duration that (A) are

or may tend to injurious to or to adversely affect human health or welfare, animal life, vegetation, or property; or (B) interfere with the normal use of enjoyment of animal life, vegetation, or property.” THSC 382.003(3). Therefore, the issues of air pollution and odor are relevant and material to the Commission’s decision on this application.

Texas Water Code 5.751 and 5.754 require the TCEQ to consider an applicant’s compliance history in decisions regarding the issuance of a permit. TCEQ rules also require evaluation of compliance history when evaluating permit applications. 30 TAC 60.3. Therefore, the issue of Applicant’s compliance history is relevant and material to the Commission’s decision on this application.

G. Issues Recommended for Referral

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

- (1) Whether air emissions from the proposed facility will cause or contribute to a condition of air pollution.
- (2) Whether air emissions from the proposed facility will cause or contribute to nuisance odors.
- (3) Whether the ED properly reviewed Applicant’s compliance history.
- (4) Whether the draft permit should include permit conditions or provisions to address Applicant’s compliance history.

H. 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.

I. Public Notice

Applicant filed an alternative language publisher’s affidavit on May 9, 2011 stating that the NORI was published in both English and Spanish language on April 28, 2011 in the *Midland Reporter Telegram*. According to the May 19, 2011 Public Notice Verification associated with the NORI, there is no Spanish-language newspaper of general circulation in the municipality and county. The March 22, 2012 Public Notice Verification associated with the NAPD states that there is a Spanish-language newspaper of general circulation in the municipality and county, but the newspaper refused to publish the notice as requested. The verification does not list the name of the newspaper that refused to publish.

OPIC performed an internet search of Spanish-language newspapers in the Midland area, and found two papers that may circulate generally in Midland and Midland County: *El Semanario* and *El Editor-Odessa*. In addition, it does not appear the *Midland Reporter Telegram* publishes a Spanish-language version, so publication in this paper did not satisfy the alternative language notice requirement. As a result, there is an open question whether Applicant met the requirement for alternative language notice.

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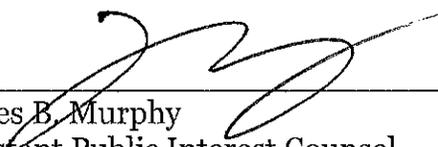
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III. Conclusion

OPIC recommends granting the hearing requests from Alpha Equipment and FenceCo on the issues referenced in Section III.G above. OPIC further recommends a hearing duration of nine months.

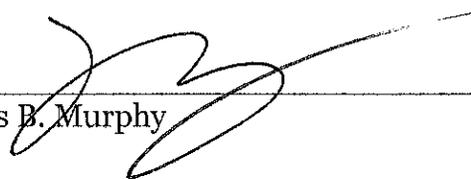
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2012, the original and seven 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.


James B. Murphy

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TCEQ DOCKET NO. 2012-1401-MSW

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