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October 5, 2012

Ms. Bridget Bohac  
Texas Commission on Environmental Quality  
Office of the Chief Clerk, MC-105  
12100 Park 35 Circle  
Austin, TX 78753

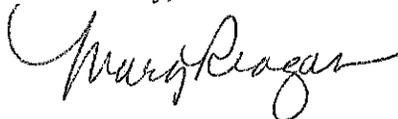
Re: Docket No. 2012-1820-IHW  
US Ecology Texas, Inc.  
Request(s) filed on Permit No. 50052

Dear Ms. Bohac:

Enclosed for filing, please find an original and 7 copies of the "Applicant's Response to Requests for Contested Case Hearing," together with Exhibits thereto.

If you have any questions, please do not hesitate to contact me.

Sincerely,



Mary Reagan

MBR/bes

Enclosures

2012 OCT -5 PM 2:43  
CHIEF CLERKS OFFICE  
TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

TCEQ Docket No. 2012-1820-IHW

IN RE THE APPLICATION OF § BEFORE THE  
US ECOLOGY TEXAS, INC § TEXAS COMMISSION ON  
PERMIT NO. 50052 § ENVIRONMENTAL QUALITY

2012 OCT -5 PM 2:44  
CHIEF CLERK'S OFFICE  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

APPLICANT'S RESPONSE TO REQUESTS FOR CONTESTED CASE HEARING

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

Pursuant to 30 Tex. Admin. Code § 55.209 (d), Applicant U.S. Ecology Texas, Inc. ("USET") files this Response to Requests for Contested Case Hearing (the "Response") concerning the renewal and amendment of Permit No. 50052 (the "Permit") and would respectfully show as follows:

**I. Introduction**

USET owns and operates a commercial hazardous and industrial solid waste facility for the storage, processing, and disposal of industrial wastes, including hazardous waste (the "Facility"). The Facility is located on a 240-acre tract on County Road 69 approximately 3.5 miles south of Robstown, Texas, in Nueces County, Texas. Also located on County Road 69 adjacent to the Facility is an active municipal landfill known as the El Centro Landfill which permitted by the TCEQ under MSW Permit No. 2267.

The Facility has been in existence serving Texas industry since 1972. Units for comprehensive waste management include a secure landfill, container storage areas, stabilization buildings with mixing tanks, and a tank farm incorporating a pretreatment system prior to deep well injection. The Permit authorizes each of these Facility components and specifies extensive requirements for their design and operation. The Permit also includes a Compliance Plan for groundwater monitoring and corrective action.

On June 5, 2009, USET submitted an application to the TCEQ for renewal and amendment of the Permit (the "Application"). Besides requesting the Permit's renewal, the Application requested routine changes to the Permit, including correcting a few minor inconsistencies in the Permit and updating various plans already required by the Permit, i.e. the Personnel Training Plan, Security Plan, Inspection Plan (including the Example Inspection Forms and Schedule), the Contingency Plan, the Waste Analysis Plan and Tables, the Construction Quality Assurance Plan, the Closure and Post-Closure Plans and the Corrective Action Program. In addition to these updates, the Application includes a new Landfill Operations Plan and proposes a unified Landfill Waste Management Area ("LWMA") for the Compliance Plan.

The Application identifies three other changes to improve the Facility. It proposes a new second Facility entrance on the at the northwest corner of the western side of the Facility. It also requests authority to increase the capacity of the Uncovered Waste Storage Area for container storage to a maximum capacity of 4,000 cubic yards.<sup>1</sup> Finally, the Application requests deletion of an operating hours restriction that lacks a basis in the TCEQ's regulations. The operating hours restriction was placed in the Permit in 1994, and USET seeks to have its renewed Permit corrected so as not to include provisions that lack a basis in applicable statute and regulations.

The public comment period on the Application closed on January 30, 2012. The TCEQ received numerous public comment and requests for contested case hearing on the Application; however, the hearing requestors/commenters focused little attention on the technical merits of

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<sup>1</sup> To address a potential point of confusion evidenced in the public comment, the reference to "Uncovered Waste Storage Area" does not refer to uncovered containers but rather, to the area at the Facility in which the containers are stored. As explained by the Executive Director in the Response to Comments ("RTC"), this term "refers to a permitted existing outdoor container storage area that is not under a roof" and does not refer to individual containers, which "are required to be covered except during sampling, processing, or consolidation of waste streams in accordance with 40 CFR 264.173 and 30 TAC § 335.152(a)(7)." *RTC, p. 13.*

the Application. Instead they focused on the operating hours restriction, the new site entrance, and various concerns and questions about the Facility. Even though the Commission may ultimately conclude that a limited number of the requestors are “affected persons,” their hearing requests should not be granted under 30 Tex. Admin. Code § 55.211(c)(2)(A) because they do not raise disputed issues of fact or present issues that are relevant and material to the Commission’s decision. Moreover, due to the absence of these factors, none of the issues raised in public comment meets the legal criteria in 30 Tex. Admin. Code § 50.115(c) for referral to the State Office of Administrative Hearings (“SOAH”); therefore, the Commission should approve the Application without a contested case hearing.

## **II. Applicable Legal Authority**

### **A. Standing to Request a Contested Case Hearing**

Before a permit is issued, amended, extended, or renewed, the Commission must provide an opportunity for a hearing to the applicant and persons affected. Tex. Health & Safety Code § 361.088 (West 2012). 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 Tex. Admin. Code § 55.203(a). An interest common to members of the general public does not qualify as a personal justiciable interest. *Id.*

The same principles governing whether a party has standing to challenge a governmental action in court also govern whether a party is an “affected person” entitled to a contested case hearing. *City of Waco v. Texas Comm’n on Env’tl Quality*, 346 S.W.3d 781, 801-802 (Tex. App.-Austin 2011, pet. denied); *Bosque River Coalition v. Texas Comm’n on Env’tl Quality*, 347 S.W.3d 366, 375 (Tex. App.-Austin 2011, pet. denied). The “irreducible constitutional minimum” of individual standing contains three elements: (1) the complaining party must have suffered an “injury in fact,” an invasion of a legally protected interest that is concrete,

particularized, and actual or imminent rather than conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant and not the independent action of a third party not before the court; and (3) it must be likely that the injury will be redressed by a favorable decision. *Bosque River Coalition*, 347 S.W.3d at 375.

Consistent with these principles, in determining whether a person is an affected person, the Commission is required to consider the following factors:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance limitations 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 Tex. Admin. Code § 55.203(c).

Groups or associations requesting a contested case hearing are subject to additional standing requirements besides those specified in 30 Tex. Admin. Code § 55.203(c). A group or association may request a contested case hearing only if the group or association meets all of the following requirements:

- (1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;
- (2) the interests of the group or association seeks to protect are germane to the organization's purpose; and
- (3) neither the claim nor the relief requested requires the participation of the individual members in the case.

*Id.* § 55.205(a).

The Commission may grant a hearing request filed by an affected person only if it meets the following requirements:

- (1) raises disputed issues of fact that were raised during the comment period, that were not withdrawn by the commenter by filing a withdrawal letter with the chief clerk prior to the filing of the executive director's response to comment, and that are relevant and material to the Commission's decision on the application;
- (2) is timely filed with the chief clerk;
- (3) is pursuant to a right to hearing authorized by law; and
- (4) complies with the requirements of 30 Tex. Admin. Code § 55.201.

*Id.* § 55.211(c)(2)(A)-(D).

Section 55.201 provides that a request for a contested case hearing by an affected person must be in writing, must be filed with the chief clerk no later than 30 days after the chief clerk mails (or otherwise transmits) the RTC, and may not be based solely on an issue that withdrawn prior the filing of the RTC. *Id.* § 55.201(a) and (c). Section 55.201 further provides that a hearing request must substantially comply with the following:

- (1) give the name, address, daytime telephone number, and where possible, fax number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number, and where possible, fax number, who shall be responsible for receiving all official communications and documents for the group;
- (2) identify the person's justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;
- (3) request a contested case hearing;

- (4) list all relevant and material disputed issues of fact that were raised during the public comment period and that are basis of the hearing request. To facilitate the Commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the Executive Director's responses to comments that the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy; and
- (5) provide any other information specified in the public notice of the application.

*Id.* § 55.201(d).

#### **B. Response to Contested Case Hearing Requests**

The executive director, the public interest counsel, and the applicant may submit written responses to hearing requests. *Id.* § 55.209(d). 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 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 RTC;
- (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.

*Id.* § 55.209(e).

#### **C. Action on Requests for Contested Case Hearing**

The Commission is required to evaluate public comment, the Executive Director's response to comments, and requests for contested case hearing and determine whether a hearing request meets the applicable requirements. *Id.* § 55.211 (b). If the Commission determines that

a hearing request meets applicable requirements, and if the request raises disputed issues of fact that were raised during the comment period (that were not withdrawn prior to the filing of the RTC) and that are relevant and material to the Commission's decision, the Commission may (1) specify the number and scope of the specific factual issues to be referred to SOAH; (2) specify the maximum duration of the hearing; and (3) direct the chief clerk to refer the issues to SOAH for a hearing. *Id.* § 55.211(b)(3)(A).

However, if the hearing request does not meet applicable requirements, the Commission may proceed to act on the application without SOAH referral. *Id.* § 55.211(b). The Commission may also act on an application without a contested case hearing if the request raises only disputed issues of law or policy. *Id.* § 55.211(b)(3)(B). 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. *Id.* § 50.115(c).

### **III. Determination of Affected Person**

#### **A. Introduction**

The number of hearing requests pending before the Commission are generally the same or so similar in their form and content that they lend themselves to group consideration, which is the approach taken by the Executive Director in the Response to Comments ("RTC"). A copy of the RTC is attached to this Response as Exhibit 1. The hearing requests filed by Kenneth and Virginia Ahlrich appear to be the template for the hearing requests filed by almost all others. Additional hearing requests were later filed in response to the deadline in the Chief Clerk's notice of the RTC. These hearing requests also generally track the form letter used by their predecessors. Thus, they raise no new issues.

As briefed in Section II of this Response, the Commission must consider certain factors in determining whether a person is an affected person. One of the required factors is distance restrictions or other limitations imposed by law on the affected interest. 30 Tex. Admin. Code § 55.203(c)(2). A review of applicable regulations provides a basis for a careful and conservative distance criteria for the Commission's review. For applications for industrial and hazardous waste permits, the chief clerk is required to mail notice of the receipt of application and intent to obtain permit to persons listed in 30 Tex. Admin. Code § 39.413. 30 Tex. Admin. Code § 39.503(c)(1). Section 39.413 requires mailed notice to the landowners named on the application map or supplemental map. These same mailed notice requirements apply to notice of hearing for an application to renew or amend an existing permit. *Id.* § 39.503(f)(3)(B). Mailed notice of hearing requirements for permit renewals and amendments are in contrast to mailed notice of hearing requirements applicable to applications for new facilities, which require mailed notice to each residential or business address within ½ mile of the facility and to each owner of real property located within ½ mile of the facility listed in the real property records of the appraisal district in which the facility is located. *Id.* § 39.503(f)(3)(A).

Instructions accompanying the Part B permit application form require permit applicant to “submit a map indicating the boundaries of all adjacent landowners and a list . . . of the names and mailing addresses of all adjacent landowners and other nearby landowners who might consider themselves affected by the activities described by this application.” Even though only “adjacent” and “other nearby” landowners are required to be identified, the application map in the Application identifies all landowners within one (1) mile of the Facility.

Hence, the use of a one-mile distance limitation is a conservative criterion in determining whether a person is an affected person in cases like this one which concern amendment and/or renewal of permits for existing facilities. This distance criterion exceeds the application

requirements which limit the landowners list to adjacent or nearby landowners. It also exceeds the ½ mile notice requirements applicable to applications for new facilities. Plainly, a one-mile radius from the Facility should mark the outer boundary of those persons potentially affected by the Application.

In determining whether a person is an affected person, the Commission is also required to consider whether the interest claimed is one protected by the law under which the application will be considered and whether a reasonable relationship exists between the interest claimed and the activity regulated. 30 Tex. Admin. Code § 55.203(c)(1) and (3). Hearing requestors largely focused on issues outside the Application's scope. This problem has decisive effect on the eligibility of issues for referral, and, therefore, is discussed in more detail in Section IV of this Response. However, the hearing requestors' failure to identify relevant and material disputed issues of fact not only precludes issue referral but also disqualifies the requestors as affected persons whose hearing requests should be granted under the criteria in 30 Tex. Admin. Code § 55.203(c)(1) and (3).

The following analysis of individual hearing requests is organized based on the requestor's distance from the Facility. These distances were determined from the addresses provided by the hearing requestors in their hearing requests. A map showing the location of each requestor is attached to this response as Exhibit 2. A key to this map identifying each requestor and the requestor's location according to the address provided in the hearing request is attached as Exhibit 3.

#### **B. Requestors within a One-Mile Radius of the Facility**

The following 11 hearing requestors are the only ones who either reside or own property within the Facility's one-mile radius: Kenneth Ahlrich, Virginia Ahlrich, Charlie B. Jones, Jr., Dewey Lawhon, Jolynn Mallett, Grace Martinez, Joe Martinez, Jr., Melton Perez, Reynaldo

Rosas, Chrissy Tamez, and Nikole Tamez. USET acknowledges, based on the information provided in their hearing requests, that these individuals reside or own property within one mile of the Facility. However, despite their potential status as “affected persons,” their hearing requests should not be granted because, as more fully discussed in Section IV of this Response, they do raise disputed issues of fact or present issues that are relevant and material to the Commission’s decision, as required by 30 Tex. Admin. Code § 55.211(c)(2)(A).

Two others claim to be within one-mile of the Facility. Russell Jungman and Morris Michalk submitted hearing requests identifying their distance from the Facility as being one mile; however, both requestors gave Bishop, Texas, as their address. The town of Bishop is more than 10 miles from the Facility. Therefore, these hearing requests raise a question as to whether the requestors have established a personal justiciable interest not common to members of the general public. Their hearing requests state that they and their employees operate farm equipment near the Facility; however, with their residence in another city, it is unclear to what degree the hearing requestors themselves work near the Facility, as opposed to their employees. In addition, because these requestors apparently rent rather than own the property farmed, the property referred to in their hearing requests could not be mapped on Exhibit 2. Therefore, these requests fail to “identify the person’s personal justiciable interest affected by the application,” as required by 30 Tex. Admin. Code § 55.201(d)(2). Accordingly, their hearing requests should be denied.

### **C. Requestors Outside the One-Mile Radius of the Facility**

The remainder of the hearing requestors provided addresses located outside the Facility’s one-mile radius. Their location between one and three miles from the Facility and the direction and distance of requestors beyond three miles from the Facility is mapped on Exhibit 2. Due to their lack of proximity to the Facility, these requestors have failed to establish that they have an

interest that is not in common with the general public; therefore, their hearing requests should be denied. In addition, even if any of these requestors is determined by the Commission to have personal standing, their hearing request should, nevertheless, be denied because, as more fully discussed in Section IV of this Response, they fail to raise or present a disputed issue of fact or present an issue that is relevant and material to the Commission's decision, as required by 30 Tex. Admin. Code § 55.211 (c)(2)(A).

The hearing request of Monica Ybarra provides an address but does not indicate "the requestor's location and distance relative to the [Facility]," as required by 30 Tex. Admin. Code § 55.201(d)(2). The address provided by Ms. Ybarra, however, is the same address as that given in the hearing request of Gavino D. Ybarra, which indicates the distance from the Facility as 1 ½ miles. When mapped on Exhibit 2, however, this location is greater than two miles from the Facility.

Several hearing requestors provide addresses at extreme distances from the Facility. These hearing requestors are: Jennifer Borrer, Rev. Dale Brynestad, Devereaux Brewer, Noe Lopez, Mara Lopez, and Wanza Treybig. All of these hearing requests should be denied, as discussed below.

In her hearing request, Jennifer Borrer states that "the distance and location of my property from the facility is within a [sic] 17 miles within the same zip code as the facility." Having the same zip code, however, is not the legal test for determining a requestor's personal justiciable interest. When the proper legal criteria are applied, Ms. Borrer has no standing to contest the Application. Her interest is no different from that of the general public which she describes in her request. Ms. Borrer's initial declaration that her interest is not in common with the general public is immediately contradicted by subsequent statements that "[c]hemicals emitted by any explosion at the plant could easily blow across all of Robstown's residents and

beyond.” This description, tying Ms. Borrer’s interest to Robstown residents generally, reveals, despite her conclusory statements otherwise, that she has no interest beyond that of the general public. Ms. Borrer has wholly failed to show that “[her] complaint affects [her] differently from other citizens,” the showing required to establish a personal justiciable interest. *See City of Waco*, 346 S.W. 3d 781, 802 (Tex. App.—Austin 2011, pet. denied). Therefore, lacking a personal justiciable interest in the Application, Ms. Borrer is not an “affected person,” and the Commission has no alternative but to deny her hearing request.

Ms. Borrer’s hearing request fails on additional grounds. The concern which she raises, the potential for gaseous emissions of chemicals from the Facility, is outside the scope of this proceeding. As noted by the Executive Director in the RTC, the Application recites that USET will obtain a separate air permit to address air emissions at the Facility. RTC, p. 20. Air permitting requirements are under the purview of the Texas Clean Air Act, Tex. Health & Safety Code Chapter 382, and are outside the scope of this proceeding. In determining whether a person is an affected person, the Commission is required to consider “whether the interest claimed is one protected by the law under which the application will be considered.” 30 Tex. Admin. Code § 55.203(c)(1). Ms. Borrer’s hearing request fails under this criterion.

The remainder of Ms. Borrer’s hearing request amounts to little more than a series of questions about the Application and the Facility, which are legally insufficient to establish a personal justiciable interest in these proceedings. The potential for harm from a permit’s issuance must be more than mere speculation. *Bosque River Coalition*, 347 S.W.3d 366, 376 (Tex. App. Austin—2011, writ denied).

The hearing request of Rev. Dale Brynestad is similar to Ms. Borrer’s in content and format and, for similar reasons, should be denied. Rev. Brynestad has a Corpus Christi address; the distance and location from the Facility given in his hearing request is seven (7) miles. Like

Ms. Borrer, Rev. Brynstad is located too far away from the Facility to be an affected person. Although claiming he would be impacted more than the general public, his reference to members of his congregation as being affected contradicts this claim. Like Ms. Borrer, he focuses on concerns about “gaseous byproducts” that are outside the scope of this proceeding. Again like Ms. Borrer’s, his hearing request ends with a series of question and speculative comments which are extraneous to the Commission’s determination whether a person is an affected person. For all of these reasons, this hearing request should be denied. It should also be noted that the Commission received this hearing request on February 1, 2012, after the close of the public comment period on January 30, 2012. Therefore, regardless of relevance, none of the issues presented in this request can be referred to SOAH for contested case hearing.

Like the previous hearing request, the hearing requests of Devereaux Brewer, Noe Lopez, and Mara Lopez provide Corpus Christi addresses. The actual distances of their location from the Facility are shown on Exhibit 2. With distances at least six miles and 8.9 miles, respectively, from the Facility, their interest in the Application is common to members of the general public; therefore, they do not meet the definition of “affected person,” which requires demonstration of a personal justiciable interest. In addition, their hearing requests rely on the form letter discussed above. Therefore, their hearing requests should also be denied because they fail to raise a disputed issue of fact or present an issue which is relevant and material to the Commission’s decision on the Application, as required by 30 Tex. Admin. Code § 55.211(c)(2)(A).

The hearing request of Wanza Treybig should be denied on the same grounds. Ms. Treybig lives in Bishop, Texas, giving her address as “ $\frac{1}{4}$  or – five miles south of the facility.” Ms. Treybig opposes the requested change in operating hours on tenuous grounds that “odors can be smelled at times” and that “animals, not just people, would be upset” with a change in operating hours. Ms. Treybig expresses concern about the drainage ditch which runs through her

property, stating that the “danger of toxins is very frightening.” The remainder of her hearing request relies on shared content with other hearing requests filed in this proceeding. These statements are insufficient to show that Ms. Treybig has a personal justiciable interest that is actual or imminent, as opposed to conjectural or hypothetical. Accordingly, her hearing request fails to satisfy the requirements of 30 Tex. Admin. Code § 55.201(d)(2) requiring an explanation of “how and why the requestor . . . will be adversely affected by the proposed facility.”

Ms. Treybig’s hearing request also fails to satisfy the criterion in 30 Tex. Admin. Code § 55.203(c)(2), requiring the Commission to consider “distance restriction or other limitations imposed by law on the affected interest.” By her own admission, Ms. Treybig is located approximately five (5) miles from the Facility. The actual mapped distance shown on Exhibit 2 is even greater at 5.7 miles.

Finally, a hearing request was filed by the Clean Economy Coalition (“CEC”). This hearing request should be denied. CEC purports to rely on the membership of Kenneth and Virginia Ahlrich to support its entitlement to associational standing under 30 Tex. Admin. § 55.205; nevertheless, CEC’s hearing request should be denied because it fails to raise a disputed issue of fact or present an issue which is relevant and material to the Commission’s decision on the Application, as required by 30 Tex. Admin. Code § 55.211(c)(2)(A) . CEC’s hearing request simply paraphrases the concerns raised by Kenneth and Virginia Ahlrich, which do not meet the legal criteria in Section 55.211(c)(2)(A) for granting a hearing request, nor meet the similar criteria for issue referral in 30 Tex. Admin. Code § 50.115(e), as explained in Section IV of this Response. .

In addition, according to information obtained from the Texas Secretary of State, CEC filed a Certificate of Termination voluntarily dissolving its domestic nonprofit corporation status on March 21, 2011. A copy of the Certificate of Termination is attached to this Response as

Exhibit 4. The hearing request was filed in the name of CEC; however, a dissolved corporation is not a legal entity. Therefore, CEC does not meet the definition of “person” in 30 Tex. Admin. Code § 3.2(25). Because CEC is not a “person,” it cannot be an “affected person” entitled to a public hearing. Therefore, CEC’s hearing request should be denied on this additional ground.

#### **IV. Issues for Referral**

After evaluating public comment, the Executive Director’s RTC, and requests for contested case hearing, the Commission may determine that a hearing request does not meet the applicable requirements and, therefore, act on the application. 30 Tex. Admin. Code §55.211(b)(2). Similarly, if the hearing request raises only disputed issues of law or policy, the Commission may make a decision on the issues and act on the application. *Id.* § 55.211(b)(3)(B). The Commission is also authorized to refer a disputed issue of fact to SOAH for a hearing; however, the Commission may not refer any 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.

30 Tex. Admin. Code § 50.115(c).

Based on the pending hearing requests, the Commission should not refer the Application to SOAH because no contested case hearing is necessary or authorized under TCEQ rules. The conditions for referral to SOAH simply have not been met. The Commission should instead act now to approve the Application.

The hearing requests filed in this case simply do not raise any disputed factual issues that are relevant and material to the Commission’s decision on the Application. Any remaining issues are disputed issues of law, on which the Commission must act without referral to SOAH.

As more fully explained below, the Commission should act on the Application by issuing the draft permit recommended by the Executive Director, with the exception that the special provision restricting the Facility's operating hours, which the Executive Director has retained in the draft permit, should be removed. A copy of the draft permit is attached to this Response as Exhibit 5.

With only a few exceptions, the hearing requests in this case are very similar in format and content, appearing to be based on a "master" hearing request that served as a template for all the others. This method was likely employed as a way to organize and involve as many people as possible to "oppose" the Application by simply adding their names to a form. The similarity of their form and content, however, means that they are similarly flawed when evaluated under applicable legal criteria. The hearing requests, including the few that were authored independently, fail to raise any issues of disputed fact that are relevant and material to the Application, as more fully set forth below. Therefore, under 30 Tex. Admin. Code § 55.211 (b)(2) and (3)(B), the Commission should act on the Application without referral to SOAH for a contested case hearing.

In general, the public comment contained in the hearing requests was organized around four basic concerns: the operating hours restriction, the new site entrance road, container storage, and authorized wastes. Except for the authorized waste concern, the others were followed by a series of bulleted items relating to that particular ground of opposition. These bulleted items do not raise new concerns. Therefore, due to their explanatory nature, they are not addressed as separate issues or concerns in this Response.

#### **A. Operating Hours Restriction.**

The hearing requestors oppose USET's request to remove the operating hours restriction in the Permit, which imposes restrictions on the use of heavy machinery and floodlights at the

Facility between the hours of 8:00 p.m. and 7:00 a.m. This issue presents a question of law, rather than a disputed issue of fact. By banning the use of heavy machinery and floodlights during these hours, the operating hours restriction purports to regulate noise and light. But the Commission does not have regulatory authority or jurisdiction to impose noise and light restrictions in permits for hazardous and industrial solid waste facilities. Applicable rules are devoid of any restrictions or limitations on operating hours at such facilities.

The operating hours restriction was first included as part of the Permit in 1994. The Application, which requests removal of this provision, effectively presents the first opportunity that Commission has had in the years since then to reconsider the provision's underlying legality. Despite its inclusion in the Permit, there is no legal authority authorizing or allowing the restriction, and thus, the restriction should no longer be included in the Permit. The Commission's hazardous waste rules in 30 Tex. Admin. Code Chapter 335, which govern operations at the Facility, do not regulate facility operating hours. The absence of such rules in Chapter 335 is in sharp contrast to rules in 30 Tex. Admin. Code Chapter 330 for municipal solid waste ("MSW") facilities which specifically provide for restrictions on facility operating hours in § 330.135 as part of the operational standards for MSW facilities.

Moreover, since the 1994 decision, the Commission has enacted policy specifically rejecting MSW-like regulation of facility operating hours at other types of disposal facilities. In 2004, the Commission adopted permitting standards for commercial non-hazardous industrial waste facilities in 30 Tex. Admin. Code Chapter 335, Subchapter T. Section 330.590 of these rules specifies operational standards applicable to such facilities by incorporating by reference many of the MSW operational standards in Chapter 330. Notably absent from this list of incorporated operational standards is § 330.135 in the MSW rules regulating Facility Operating Hours. This 2004 rule-making is a clear affirmation of Commission policy not to impose

operating hours restrictions at industrial facilities and evinces the error made by the previous Commission in imposing such restrictions on the Facility in 1994.

The Executive Director acknowledges that there is an absence of legal authority to impose operating hours restrictions at hazardous waste facilities. Specifically, the Executive Director states in the RTC that “[s]tate and federal rules do not require specific hours of operation for industrial hazardous waste treatment storage and disposal facilities.” RTC, p. 25. The Executive Director has further stated that “TCEQ jurisdiction over industrial hazardous waste management does not include regulating sound levels emanating from a facility.” *Id.*, p. 8. Therefore, “consideration of noise is outside the scope of the executive director’s review of the Application.” *Id.* Lacking the requisite authority in its regulations, the Commission should act on the Application and remove restrictions in the Permit on the Facility’s hours of operation and noise and light levels. The regulations do not support the inclusion of these restrictions in permits for hazardous and industrial solid waste facilities.

#### **B. New Site Entrance and Traffic Concerns**

The hearing requestors oppose the proposed new site entrance at the northwest corner of the western side of the Facility based on various claims of traffic congestion and noise, property accessibility and interference with enjoyment of property. In addition, CEC claims that the Ahlriches will experience increased vehicle noise and air pollution from trucks and an increased probability of traffic accidents at their residence. These claims are wholly outside the scope of this proceeding. As pointed out by the Executive Director in the RTC, “adequacy of existing ingress and egress to the facility, transportation routes, traffic congestion, risks of transporting hazardous industrial solid waste and emergency response to spills of hazardous industrial solid waste during the transport are outside the scope of the executive director’s review of the Application.” RTC, p. 7.

The Application is for renewal and amendment of an existing hazardous waste permit; therefore, it is not required to address transportation and traffic. Under the TCEQ's rules, such requirements are only applicable to permit applications for new commercial hazardous waste management facilities. Those requirements, which are set forth at 30 Tex. Admin. Code § 305.50(a)(10) and (12), apply to applications for new facilities, requiring them to contain descriptions of the major routes of travel and information demonstrating whether a burden will be imposed on public roadways, such as vehicular average gross weight and number, and identification of roadways and major highways to be used by vehicles accessing the facility. As an existing facility, the Facility is not subject to these requirements.

Regarding discharges of hazardous waste during transportation, such incidents are regulated under 30 Tex. Admin. Code § 335.93, which are applicable to transporters of hazardous waste, not facility owners and operators. In sum, none of the grounds raised by the hearing requestors in support of their opposition to the proposed site entrance is relevant or material to the Commission's decision on the Application.

Moreover, USET's request to add a new site entrance does not raise a disputed fact issue. It raises an issue of law only. The permit application requirements in 30 Tex. Admin. Code Chapter 305 do not mention site entrance roads. Section 305.45 (a)(6), which requires a map showing the facility and "any other structure or location regarding the regulated facility and associated activities," is the only rule possibly covering their identification in a permit application. The TCEQ's Part B permit application form is similarly silent on site entrance roads. Section V.A.1. of the Part B form requires the general engineering report accompanying a permit application to "provide an overall plan view of the facility." While site entrance roads might typically be included on this "overall plan view," they certainly are not expressly required to be identified.

The absence of any express references to site entrance roads in the TCEQ's rules or forms suggests that USET is not required to obtain TCEQ's approval to add a second facility entrance. This lack of guidance in specific rules and regulations means, at a minimum, that there is no disputed issue of fact for the Commission to resolve concerning USET's request to add a new site entrance.

The hearing requestors do not dispute the factual information in the Application depicting the new entrance's location at the northwest corner of the Facility's western side. In fact, their hearing requests refer to this location; therefore, its location is an undisputed fact. As stated above, the matters raised in support of the opposition to a new entrance are irrelevant and outside of the scope of a proceeding to renew and amend a permit for an existing facility. Therefore, the only issue presented for the Commission's decision is an issue of law whether the Application depicts the new entrance's location. Accordingly, the Commission should simply approve the new entrance shown in the Application.

### **C. Increased Capacity of Container Storage Area**

The hearing requestors also oppose USET's request to increase the capacity of the container storage area at the Facility. These requests do not raise a disputed question of fact because the hearing requestors' opposition is based on a factual misunderstanding about the Application. In addition, USET's request to increase the container storage capacity does not involve a factual inquiry under the TCEQ's regulations and involves a question of law only. Accordingly, the Commission should not refer this issue to SOAH for a contested case hearing.

By way of background, USET is authorized to operate Uncovered Waste Storage Areas for outdoor container storage. These areas are identified in the Permit as Permit Unit No. 9. The term "uncovered" merely means that the area is not roofed. It does not mean that waste in containers stored in Permit Unit No. 9 is "uncovered." TCEQ rules require that containers must

always be kept closed during storage. *See* 40 CFR § 264.173 (a) (incorporated by reference at 30 Tex. Admin. Code § 335.152 (a)(7)). This requirement is incorporated into the Permit. The storage of free liquids in Permit Unit No. 9 is also prohibited by the Permit. The Application requests authorization to increase the capacity of Permit Unit No. 9 to handle more closed containers as necessary to meet the needs of the Facility's customers.

The hearing requestors' opposition is based on the mistaken belief that USET's request to increase the permitted capacity of Permit Unit No. 9 is instead a request to allow the storage of opened containers. Their comments have no connection to the facts contained in the Application. USET has not proposed, and would not propose or request, authority to store containerized waste in this manner. Such storage is specifically disallowed by TCEQ rules, as stated above. This factual misunderstanding, confusing an uncovered storage area with uncovered containers, is apparent on the face of the hearing requests. For example, the requestors describe their opposition in terms of the "danger of toxins being blown off-site by prevailing high east and southeast winds." Such a threat would be associated with uncovered containers, not the outdoor storage of closed containers described in the Application.

USET is not alone in making the observation that this comment is not based on the facts presented in the Application. The Executive Director also observed this phenomenon and directly responded to it in the RTC. As elucidated by the Executive Director, the term Uncovered Waste Storage Area "refers to a permitted existing outdoor container storage area that is not under a roof" and does not refer to individual containers which "are required to be covered except during sampling, processing, or consolidation of waste streams in accordance with 40 CFR 264.173 and 30 TAC § 335.152(a)(7)." RTC, p. 13.

Having based their opposition and comment on a circumstance that is neither allowed by TCEQ rules nor rooted in the Application, the commenters have failed to present a disputed

question of fact, a required criterion for referral to SOAH. Moreover, lacking a factual basis in the Application, the comment is not relevant and material to the Commission's decision on the Application.

Furthermore, the Commission should not refer this issue to SOAH because the requested increase in storage capacity presents an issue of law on which the Commission should act without hearing. Other than requiring that maximum storage capacity be identified in a permit, TCEQ rules contain no standards regulating or limiting container storage capacity. For example, the rules do not establish maximum capacity requirements, nor do they specify any standards that must be met before storage capacity can be increased. The container management standards in 30 Tex. Admin. Code § 335.152(a)(7)(incorporating by reference 40 C.F.R. Part 264, Subpart D) do not regulate storage area capacity; therefore, compliance with these standards is a separate and distinct issue. The Application's compliance with the container management standards in 30 Tex. Admin. Code § 335.152(a)(7) was not raised in public comment.

In conclusion, USET's request to increase the storage capacity of its container storage area presents a question of law which is ripe for Commission decision without a hearing. Although container storage capacity is a limiting term specified in the Permit, TCEQ's rules do not establish any criteria for increasing storage capacity. Therefore, there are no factual issues to be adjudicated in a contested case hearing. Moreover, the issue is not subject to referral on the further ground that the hearing requestors' opposition to its increased capacity is based on a fundamental misunderstanding that USET's request involves increasing the storage of open containers rather than the storage capacity of Permit Unit No. 9. Lacking a factual basis in the Application, the comment does not involve a disputed fact question for adjudication and is not relevant and material to the Commission's decision on the Application.

#### **D. Authorized Wastes**

The hearing requestors oppose any requests for any hazardous wastes not previously authorized in 1999. They cite nuclear wastes as an example, which must be federally licensed. The Application does not request any changes to the types of wastes authorized for receipt and management at the Facility. As stated by the Executive Director in the RTC, “the Application does not propose any new waste streams or waste codes that are not authorized by [the] existing Permit.” RTC, p. 15. Therefore, due to the absence of any such request in the Application, this comment cannot possibly raise a disputed question of fact. Likewise, this comment does not meet the criterion of being relevant and material to the Commission’s decision because it is not part of the Application. Accordingly, this comment does not meet the SOAH referral criteria in 30 Tex. Admin. Code § 50.115 (c).

#### **E. Nueces County Drainage Ditch**

After stating the specific grounds of opposition to the Application, discussed in Section IV.A. through D. above, a few hearing requestors mentioned a further “concern” about discharges from the Facility into the Nueces County drainage ditch. This “concern” does not meet the referral criteria in 30 Tex. Admin. Code § 50.115(c). First, it is not relevant and material to the Commission’s decision on the Application. Discharges into the drainage ditch are regulated under USET’s storm water discharge permit, TPDES Permit No. WQ0002888000. This permit establishes Effluent Limitations and Monitoring Requirements for discharges at four outfalls from the Facility into the drainage ditch. Therefore, this “concern” is outside the scope of the Commission’s jurisdiction in this proceeding.

The specification of run-off controls in the Application does not alter this conclusion. The public comment does not express any concern about, or even mention, these run-off controls. It is rooted in fear and speculation about the “dangers of toxins” without regard to the

technical information contained in the Application, and the comment presents no factual data of any kind to support this fear and speculation. Hence, the comment raises no fact question. Therefore, any translation of this public comment into a disputed technical issue about engineered run-off controls specified in the Application would be pure guesswork undeserving of the time and resources associated with a public hearing.

In conclusion, the Commission should not include the concern about the Nueces County drainage ditch as an issue for referral to SOAH. This concern relates to discharges which are regulated under the Facility's TPDES permit which are beyond the scope of this proceeding. Therefore, it is not relevant and material to the Commission's decision. In addition, because it is based purely on fear and speculation, it does not present a disputed question of fact. Failing to meet the referral criteria under 30 Tex. Admin. Code §50.115 (c), this comment should not be referred to SOAH as an issue for contested case hearing.

#### **F. Health Concerns**

The end of the form hearing request contains an entry stating, "Health concerns/conditions of my family member(s) are," followed by a blank space for completion. In this way, persons have been invited and prompted to associate any medical conditions they have with the Facility and to list them on the form. Random listings of medical conditions have no legal or factual significance. As a threshold matter, such statements lie outside the scope of this proceeding and, therefore, are not relevant and material to the Commission's decision. The Commission has no authority to adjudicate medical claims, regardless of how spurious or unsubstantiated they may be. As explained by the Executive Director in the RTC, the scope of the Executive Director's review relates to whether the Application and draft permit satisfy applicable hazardous and industrial waste rule requirements because it is presumed that "if a hazardous industrial solid waste treatment storage and disposal facility is designed and operated

in compliance with the applicable state and federal rules that the authorized waste management activities will be protective of human health and the environment.” RTC, p.24. It is important to note that none of the complainants asserts that the Application does not comply with these applicable TCEQ rules. The Commission should not refer any issue to SOAH based on these allegations.

### **G. Groundwater**

Although public comments referred to groundwater, none of these comments raises a disputed question of fact. One commenter merely stated “future concerns” about the water table. Another posed “the question of groundwater contamination by toxic materials.” There is no information given in these comments allowing for reliable discernment of a disputed fact issue for adjudication by SOAH. Therefore, the Commission should decline to refer any issues based on these comments to SOAH for a contested case hearing.

### **H. Air Quality**

The public comments of Jennifer Borrer, Johnny Moffett, and Rev. Dale Brynestad focused on air quality. Rev. Brynestad’s comments were filed with the Commission after the close of the public comment period; therefore, they are ineligible for referral for SOAH. The comments on air quality made by the other commenters are also ineligible, regardless of their timeliness, because they raise matters under the Texas Clean Air Act, Tex. Health & Safety Code Chapter 382, which are outside the scope of this proceeding. As a result, these comments are not relevant and material to the Commission’s decision on the Application. Moreover, much of this comment was merely seeking information or asking questions about air quality aspects of the Facility. None of these comments is eligible for referral to SOAH.

## **I. Compliance History**

USET's compliance history does not present a disputed question of fact which is material and relevant to the Commission's decision. The Commission's compliance history rules in 30 Tex. Admin. Code Chapter 60 govern the use of compliance history in contested case hearings. Only unsatisfactory performers or repeat violators risk denial or suspension of their permits under those rules. *See* 30 Tex. Admin. Code § 60.3(a)(3). Neither the Facility nor USET itself is within either category. Their compliance performance is rated as Satisfactory under TCEQ rules. In addition, the Commission's authority under Chapter 60 to consider compliance history in permit renewal actions does not extend to hazardous waste permit renewals under the Solid Waste Disposal Act, Tex. Health & Safety Code Chapter 361 (West 2012). Therefore, any comments received about the Facility's compliance history are not relevant and material to the Commission's decision on the Application, nor do they present a disputed question of fact. Consequently, they are ineligible for referral to SOAH for a contested case hearing.

## **J. 1999 Settlement Agreement**

Kenneth Ahlrich provided comments about the effect of a prior Settlement Agreement between USET, Mr. Ahlrich, and others. The Commission lacks authority to adjudicate contracts; therefore, these comments are outside the scope of the Commission's jurisdiction and ineligible for referral to SOAH. The Executive Director agrees that the "TCEQ's jurisdiction does not encompass third party contract disputes." RTC, p. 12.

## **V. Response to CEC's Request for Reconsideration**

Gerald Sansing filed a request for reconsideration in the name of the Clean Economy Coalition ("CEC"). This request should be denied on numerous grounds. As emphasized in Section III of this Response, CEC is a dissolved corporation having no legal status. In addition, the request for reconsideration does not include any additional information that would change the

analysis performed by the Executive Director in the RTC. Finally, the requested action that the Public Interest Counsel interview CEC's former members prior to further action on the Application is wholly without legal precedent and authority. For all of these reasons, the request for reconsideration should be denied.

#### **VI. Duration of Contested Case Hearing**

As explained in the foregoing section, the public comments received on the Application fail to meet the referral criteria under 30 Tex. Admin. Code § 50.115(c) because they either do not involve a disputed question of fact or are not relevant and material to the Commission's decision on the Application. Therefore, the Commission is authorized to act on the Application under 30 Tex. Admin. Code § 55.211(b)(2) and (3)(B). To the extent that the Commission disagrees with this conclusion, USET requests that the maximum duration of any contested case hearing be nine months.

#### **VII. Conclusion and Prayer**

The Commission should act to grant the Application without a contested case hearing. Although 11 hearing requestors arguably satisfy the Commission's standing requirements, their hearing requests do not raise disputed issues of fact or present issues that are relevant and material to the Commission's decision on the Application, and, therefore, these requests must be denied in accordance with 30 Tex. Admin. Code § 55.211 (c)(2)(A).

In addition, the public comment received on the Application does not meet the criteria in 30 Tex. Admin. Code § 50.115(c) for referral to SOAH. The Application's request to delete the operating hours restriction presents a question of law, not a fact question, as to the Commission's authority to impose this type of restriction at industrial and hazardous waste facilities. Traffic concerns expressed about the new site entrance are outside the scope of this proceeding, and, therefore, are not relevant and material to the Commission's decision because the Facility is an

existing facility to which TCEQ permit application rules on traffic and transportation do not apply. In addition, because TCEQ rules do not mention site entrance roads and commenters do not dispute its proposed location, the Application's request does not involve a disputed question of fact. Thus, the Commission may simply approve this request without a contested case hearing.

For similar reasons, the Application's request to increase the Facility's container storage capacity does not present a disputed fact question. TCEQ rules do not restrict container storage capacity or specify standards that must be met before storage capacity can be increased. Compliance with container storage standards in 30 Tex. Admin. Code §335.152(a)(7) (incorporating by reference 40 C.F.R. Part 264, Subpart I) is a separate and distinct issue, which was not raised in the public comment period. In addition, this public comment is based on a factual misunderstanding about the nature of USET's request, and, therefore, does not present a disputed fact issue rooted in the information contained in the Application. Lacking any factual basis in the Application, the comment is also not relevant and material to the Commission's decision on the Application.

Public comment opposing any requests for hazardous waste not previously authorized does not present an issue meeting SOAH referral criteria because the Application does not request any changes to the list of wastes which it is authorized to receive. Therefore, this public comment does not raise a disputed fact question based on information presented in the Application. In addition, due to the absence of any such request in the Application, this public comment is not relevant and material to the Commission's decision on the Application.

Public comment about the Nueces County drainage ditch and air quality concern matters which regulated under other TCEQ programs, and therefore, lie outside the scope of this

proceeding. Therefore, this public comment is not relevant or material to the Commission's decision on the Application.

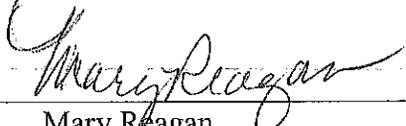
Public comment about a prior settlement agreement and various alleged medical conditions concern civil matters outside the scope of the Commission's jurisdiction. Therefore, they are not relevant and material to the Commission's decision and do not raise a disputed fact question capable of resolution in an administrative hearing conducted by SOAH.

Public comment about groundwater based on speculation and future concerns does not raise a discernible question of fact for referral to SOAH. Likewise, the Facility's compliance history does not present a disputed fact issue for resolution under the Commission's compliance history rules in 30 Tex. Admin. Code Chapter 60 due to the Facility's performance status scored as "Satisfactory" under those rules. In addition, the Commission's authority to consider compliance history in permit renewal actions does not extend to hazardous waste permit renewals.

Therefore, Premises Considered, USET respectfully requests that the Commission act under its authority in 30 Tex. Admin. Code §55.211(b)(2) and (3)(B) to approve the Application for the renewal and amendment of the Permit and issue the draft Permit recommended by the Executive Director excepting the special provision restricting the Facility's hours of operation, which should be deleted from the issued Permit.

Respectfully submitted,

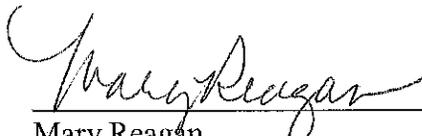
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**CERTIFICATE OF SERVICE**

I certify that on October 5, 2012, a true and correct copy of the foregoing has been served in accordance with 30 TEX. ADMIN. CODE § 1.11, Order No. 1 and 1 TEX. ADMIN. CODE § 155.103 as follows:

  
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