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

## 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: US ECOLOGY TEXAS, INC.  
TCEQ DOCKET NO. 2012-1820-IHW**

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in black ink, appearing to read "Garrett Arthur", written over a horizontal line.

Garrett Arthur, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure



**DOCKET NO. 2012-1820-IHW**

**US ECOLOGY TEXAS, INC.           §     BEFORE THE**  
**PERMIT/COMPLIANCE PLAN       §     TEXAS COMMISSION ON**  
**NO. 50052                           §     ENVIRONMENTAL QUALITY**

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

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

The Office of Public Interest Counsel (OPIC) at the Texas Commission on Environmental Quality (TCEQ) files this response to hearing requests in the above-referenced matter.

**I.     Background**

On June 5, 2009, US Ecology Texas, Inc. (USET) submitted an application to TCEQ to amend and renew its Industrial Hazardous Waste Permit and Compliance Plan. USET operates a commercial hazardous and non-hazardous industrial solid waste management facility in Nueces County. The facility is located approximately 3.5 miles south of Robstown.

TCEQ declared the application administratively complete on July 29, 2009. The first newspaper notice was published August 25, 2009 in the *Corpus Christi Caller-Times*. A TCEQ public meeting was held in Robstown on August 25, 2011. The second newspaper notice was published December 13, 2011 in the *Corpus Christi Caller-Times* and December 15, 2011 in the *Tejano y Grupero News*, a Spanish language publication.<sup>1</sup>

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<sup>1</sup> It is OPIC's understanding that at the time of first notice, a Spanish language newspaper meeting TCEQ bilingual notice requirements did not exist. However, at the time of second notice, the *Tejano y Grupero News* did exist and was used to publish the second notice in Spanish.

The public comment period closed January 30, 2012, and the Executive Director's (ED) Response to Comments was mailed August 2, 2012.

The deadline to submit a hearing request or request for reconsideration was September 4, 2012. TCEQ received 67 hearing requests and one request for reconsideration. For the reasons stated herein, OPIC recommends the Commission grant a hearing and deny the request for reconsideration.

## **II. Applicable Law**

### **A. Hearing Request**

This application was declared administratively complete after September 1, 1999, and is therefore subject to the procedural requirements adopted pursuant to House Bill 801 (76th Leg., 1999).

Under Title 30, Texas Administrative Code (TAC) § 55.201(d), 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;
- (2) identify the person's personal 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 the 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 application.

Under 30 TAC § 55.203(a), an “affected person” is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest. Section 55.203(c) provides relevant factors to be considered in determining whether a person is affected. These factors 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, safety, and 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.

Under 30 TAC § 55.205(a), 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 the group or association seeks to protect are germane to the organization's purpose; and
- (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

Under 30 TAC § 55.211(c)(2), a hearing request made by an affected person shall be granted if the request:

- (A) 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;
- (B) is timely filed with the chief clerk;
- (C) is pursuant to a right to hearing authorized by law; and
- (D) complies with the requirements of § 55.201.

#### **B. Request for Reconsideration**

Section § 55.201(e) provides that any person may file a request for reconsideration of the ED's decision, and the request must expressly state that the person is requesting reconsideration of the ED's decision and give reasons why the decision should be reconsidered.

### **III. Analysis of Hearing Requests**

The majority of the individual hearing requests were submitted using form letters, and the few individual hearing requests which are not identical raise the same issues as the form letter hearing requests. The individual hearing requests can therefore be analyzed collectively and divided into two groups based on proximity to the USET facility. The group hearing request from the Clean Economy Coalition (CEC) will be separately analyzed.

**A. Whether the requestors are affected persons**

*Individual Hearing Requestors Within One Mile Of Facility*

As indicated on the map prepared by ED staff, the following individual hearing requestors reside within approximately one mile of the USET facility: Kenneth and Virginia Ahlrich, Alex Gaza, Charlie Jones, Danny Mallett, Jolynn Mallett, Grace and Joe Martinez, Melton Perez, Reynaldo Rosas, Marie Sanders, William and Marolyn Schneider, Esther Svehla, Crissy Tamez, and Michael Winters.

OPIC finds that with the exception of Reynaldo Rosas, all of these requestors qualify as affected persons. Their concerns include odor, health effects, compliance history, water quality, and nuisance. Given these requestors' proximity to the USET facility, their concerns qualify as personal justiciable interests which are not common to members of the general public. Further, these interests are protected by the laws under which the application will be considered, and a reasonable relationship exists between these interests and regulation of the USET facility.

Regarding Mr. Rosas, he states that attached to his hearing request is a specific description of how he is adversely affected in ways not common to the general public. However, the attachment was not submitted, and without it, we cannot find that Mr. Rosas has a personal justiciable interest in this matter.

Using the § 55.203(a) definition of "affected person" and the § 55.203(c) factors to determine affected person status, OPIC finds the following requestors are affected persons: Kenneth and Virginia Ahlrich, Alex Gaza, Charlie Jones, Danny Mallett, Jolynn Mallett, Grace and Joe Martinez, Melton Perez, Marie Sanders, William and Marolyn Schneider, Esther Svehla, Crissy Tamez, and Michael Winters.

*Individual Hearing Requestors Further Than One Mile From Facility*

As indicated on the ED's map, the majority of the individual hearing requests were received from people residing further than one mile from the USET facility. Given the intervening distance between these requestors and the USET facility, OPIC cannot find that they are affected persons. While they have raised relevant concerns, including odor, health effects, compliance history, water quality, and nuisance, OPIC finds that the intervening distance between these requestors and the facility makes it unlikely that the USET facility will impact the requestors' health, safety, or use of property under § 55.203(c)(4). The intervening distance also makes it unlikely that the USET facility will impact the requestors' use of natural resources under § 55.203(c)(5).

OPIC finds the individual hearing requestors residing further than one mile from the USET facility do not qualify as affected persons under § 55.203.

*Group Hearing Request by CEC*

A group hearing request from the Clean Economy Coalition was submitted by Gerald Sansing (CEC's designated representative) and James Klein. For the reasons below, OPIC finds that CEC is an affected person in this matter.

Under § 55.205(a), CEC must first show that one or more members of the group would otherwise have standing to request a hearing in their own right. CEC satisfies this requirement by relying on Kenneth and Virginia Ahlrich. The Ahlrichs are individual hearing requestors in this matter, and as discussed above, OPIC has already found that the Ahlrichs qualify as affected persons. Therefore, CEC, through the Ahlrichs, satisfies the first requirement for group standing.

Under § 55.205(a), CEC must next show that the interests the group seeks to protect are germane to the organization's purpose. According to the hearing request, CEC's mission is to support a robust quality of life in the Coastal Bend by promoting economic development that not only creates jobs but also protects public health and natural assets. CEC further states that the pollution created by USET is at the root of the goals of CEC and its members. CEC seeks to protect interests such as public health and water quality, and based on CEC's stated mission, these interests are germane to the organization's purpose. OPIC therefore finds that CEC has satisfied the second requirement for group standing.

The third and final requirement for group standing under § 55.205(a) is that neither the claim asserted nor the relief requested requires the participation of CEC's individual members in the case. It appears that CEC can be appropriately represented by Mr. Sansing, and the participation of individual CEC members is not necessary. CEC therefore satisfies the third and final requirement for group standing.

OPIC finds that CEC satisfies all of the § 55.205(a) requirements for group standing and should be considered an affected person in this matter.

**B. Which issues raised in the hearing requests are disputed**

All of the issues raised in the hearing requests are disputed.

**C. Whether the dispute involves questions of fact or of law**

All of the disputed issues involve questions of fact.

**D. Whether the issues were raised during the public comment period**

All of the issues were raised during the public comment period.

**E. Whether the hearing requests are based on issues raised solely in a public comment which has been withdrawn**

None of the hearing requests are based on issues raised solely in a public comment which has been withdrawn.

**F. Whether the issues are relevant and material to the decision on the application**

Odor

The hearing requestors have raised the issue of odor from the USET facility. Odor can be characterized as a nuisance issue, and nuisance conditions are addressed in 30 TAC §§ 335.4 and 335.177. Odor is therefore an issue which is relevant and material to the decision on this application.

Air Quality

The hearing requestors are concerned about air emissions from the USET facility. Under Provision X of the proposed permit, USET is subject to Texas Clean Air Act emission standards. Air quality is therefore an issue which is relevant and material to the decision on this application.

Health Effects

The hearing requestors are concerned that USET's operations will adversely impact residents' health. Health effects from hazardous waste facilities are addressed in 30 TAC Chapters 305 and 335, and this issue is therefore relevant and material to the Commission's decision.

### Compliance History

USET's compliance history is an issue of concern for the hearing requestors. Under Texas Water Code Chapter 5, Subchapter Q, the TCEQ is required to consider compliance history when making permitting decisions. Therefore, compliance history is an issue which is relevant and material to the Commission's decision on this application.

### Water Quality

Hearing requestors are concerned about USET negatively affecting surface water quality and groundwater quality. Under 30 TAC § 335.4, the discharge of hazardous waste into surface water is prohibited. Also, USET is required to address groundwater contamination under 30 TAC §§ 335.166 and 335.167. The water quality of surface and groundwater is an issue both relevant and material to the Commission's decision on this application.

### Noise

Hearing requestors are concerned that disturbing noises from the USET facility will increase if USET is allowed to operate 24 hours per day. TCEQ's regulatory jurisdiction is set by the Texas Legislature, and the Texas Legislature has not given TCEQ the statutory authority to regulate noise pollution. This issue is therefore not relevant and material to the Commission's decision. However, OPIC notes that the proposed permit maintains the restriction on USET's operating hours. Under Special Permit Condition XII, USET cannot conduct operational or construction activities requiring the use of heavy machinery or floodlights prior to 7:00 a.m. or later than 8:00 p.m.

### Traffic

Hearing requestors are concerned that amendments to the permit will result in traffic issues including congestion, safety problems, and traffic noise. TCEQ does not have the authority to regulate vehicle traffic on public roads, meaning this issue is not relevant and material to the Commission's decision.

### **IV. Analysis of Request for Reconsideration**

In addition to its hearing request, CEC also submitted a timely request for reconsideration. Under 30 TAC § 55.201(e), a request for reconsideration must give reasons why the ED's decision should be reconsidered. CEC is requesting reconsideration of the ED's decision because CEC members are concerned about air quality, human health and safety, odors, dust problems, and violations of operating procedures. These issues are governed by the laws applicable to this permit and are within the TCEQ's jurisdiction to address in the context of proceedings on this application. However, an evidentiary record would be necessary for OPIC to make a recommendation to the Commission as to whether the ED's decision should be reconsidered. A contested case hearing, which we are recommending, would produce an evidentiary record, but that record does not currently exist, and therefore, OPIC cannot recommend the request for reconsideration be granted.

## V. Conclusion

OPIC finds the following hearing requestors are affected persons: Kenneth and Virginia Ahlrich, Alex Gaza, Charlie Jones, Danny Mallett, Jolynn Mallett, Grace and Joe Martinez, Melton Perez, Marie Sanders, William and Marolyn Schneider, Esther Svehla, Crissy Tamez, and Michael Winters. We also find that all of these requestors have raised issues which are relevant and material to the Commission's decision on the USET application. Having found that these requestors are affected persons and have raised relevant and material issues, OPIC respectfully recommends the Commission grant their hearing requests.

OPIC further recommends the following issues be referred to the State Office of Administrative Hearings for a contested case hearing:

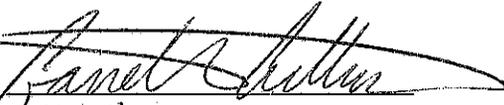
1. Whether the USET facility currently causes or will cause nuisance odors which interfere with the use and enjoyment of property.
2. Whether air emissions from the USET facility currently or will cause or contribute to a condition of air pollution.
3. Whether the USET facility currently causes or will cause adverse health effects.
4. Whether USET's compliance history warrants denial of the application or changes to the proposed permit.
5. Whether the USET facility currently causes or will cause adverse impacts on surface water quality or groundwater quality.

For the contested case hearing, OPIC recommends a duration of nine months from the first day of the preliminary hearing to issuance of the proposal for decision.

Finally, OPIC respectfully recommends the Commission deny the request for reconsideration.

Respectfully submitted,

Blas J. Coy, Jr.  
Public Interest Counsel

By 

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## CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2012, the foregoing document was filed with the TCEQ Chief Clerk, and copies were served to all parties on the attached mailing list via hand delivery, facsimile transmission, electronic mail, inter-agency mail, or by deposit in the U.S. Mail.



Garrett Arthur



**MAILING LIST**  
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**TCEQ DOCKET NO. 2012-1820-IHW**

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