

Bryan W. Shaw, Ph.D., *Chairman*  
Toby Baker, *Commissioner*  
Zak Covar, *Executive Director*



## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

January 31, 2014

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: WASTE CONTROL SPECIALISTS, LLC  
TCEQ DOCKET NO. 2013-2210-IWD**

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 cursive script that reads "Eli Martinez".

Eli Martinez, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

**TCEQ DOCKET NO. 2013-2210-IWD**

<b>IN THE MATTER OF THE</b>	<b>§</b>	<b>BEFORE THE</b>
<b>APPLICATION BY</b>	<b>§</b>	
<b>WASTE CONTROL SPECIALISTS</b>	<b>§</b>	<b>TEXAS COMMISSION ON</b>
<b>FOR TPDES PERMIT NO.</b>	<b>§</b>	
<b>WQ0004857000</b>	<b>§</b>	<b>ENVIRONMENTAL QUALITY</b>

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

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

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (the Commission or TCEQ) and files this Response to Hearing Requests in the above-referenced matter.

**I. INTRODUCTION**

Waste Control Specialists, LLC (Applicant or WCS) operates the Byproduct Material Disposal Facility (BMDF), a facility that receives, pretreats, and disposes byproduct material, which is a type of radioactive waste as defined in 30 TAC § 336.1105(4) and the Texas Health and Safety Code § 401.003(3)(B) in a landfill operated under the authority of Radioactive Material License (RML) No. R05807. Currently the only authorized byproduct material disposed in the BMDF is sealed Fernald waste canisters. The Applicant has applied for a major amendment to remove Other Requirement No. 16, which was included in the existing permit based on an agreement between the Applicant and the State of New Mexico to address New Mexico surface water quality standards.

The draft permit authorizes the discharge of previously monitored effluents (PMEs) from internal Outfall 103, non-contact industrial stormwater, and stormwater associated with

construction activities at the BMDF at a daily average dry weather flow not to exceed 0.44 million gallons per day (MGD) via Outfall 005; landfill wastewaters (i.e., landfill leachate, gas collection condensate, drained free liquids, laboratory derived wastewater, contact industrial stormwater, washwater [from washing the surfaces of trucks, equipment, containers, and other items that have come in direct contact with waste at the BMDF and that have not been adequately decontaminated], and personnel decontamination) only from the Byproduct Material Disposal Unit (BMDU), associated with the disposal of Fernald waste containers only in the BMDU, at the BMDF, at a daily average flow not to exceed 0.44 MGD via internal Outfall 103; and non-contact industrial stormwater and stormwater associated with construction activities at the BMDF on an intermittent and flow variable basis via Outfall 004.

The effluent is discharged via Outfalls 004 and 005 to an unnamed ditch in the State of Texas; thence to an unnamed ditch in the State of New Mexico; thence to Monument Draw in the State of New Mexico; thence to Monument Draw in the State of Texas; thence to Upper Pecos River in Segment No. 2311 of the Rio Grande Basin.

The unclassified receiving waters have minimal aquatic life use for the unnamed ditch in the State of Texas. The designated uses for Segment 2311 are high aquatic life use and primary contact recreation. The plant site is located at 9998 State Highway 176 West, approximately 1.25 miles north of the intersection of State Highway 176 with the Texas and New Mexico state line, Andrews County, Texas.

WCS's application was received on July 27, 2011, and declared administratively complete on August 11, 2011. The Notice of Receipt of Application and Intent to Obtain Permit (NORI) was published on August 25, 2011 in the *Andrews County News*, Andrews County,

Texas. The NORI was also published in the *Hobbs News-Sun*, Hobbs, New Mexico. The Executive Director completed the technical review of the application on January 2, 2013, and prepared a draft permit. The Notice of Application and Preliminary Decision was published on June 13, 2013 in the *Andrews County News* in Andrews County, Texas. The NAPD was also published in the *Hobbs News-Sun* in Hobbs, New Mexico. The comment period for this application closed on July 15, 2013. The Executive Director's Response to Comments was completed on September 13, 2013, and the Final Decision Letter was mailed on November 18, 2013. The deadline for requests for reconsideration or a contested case hearing elapsed thirty calendar days later on December 18, 2013 pursuant to 30 TAC §55.201(a).<sup>1</sup>

This application was administratively complete after September 1, 1999; therefore, this application is subject to the procedural requirements adopted pursuant to House Bill 801, 76th Legislature, 1999.

## II. REQUIREMENTS OF APPLICABLE LAW

This application was declared administratively complete after September 1, 1999, and is subject to the requirements of Texas Water Code § 5.556 added by Acts 1999, 76<sup>th</sup> Leg., ch 1350 (commonly known as "House Bill 801"). 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

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<sup>1</sup> 30 TAC §55.201(a)

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 application. 30 TEXAS ADMINISTRATIVE CODE (TAC) § 55.201(d). 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." This justiciable interest does not include an interest common to the general public. 30 TAC § 55.203(c) also provides relevant factors that will 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 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.

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, pursuant to 30 TAC § 55.209(e), 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 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.

### III. DISCUSSION

#### A. Determination of Affected Person Status

The Office of the Chief Clerk received timely-filed requests for a contested case hearing from Rose Gardner and Peggy Pryor.

##### 1. Peggy Pryor

Peggy Pryor submitted a request for a contested case hearing on November 10, 2011, but failed to raise any justiciable interests relevant to the proposed permit as required by 30 TAC §55.201(d)(2). Furthermore, the Commission's Office of Legal Services created a map that demonstrates Peggy Pryor is located approximately 29 miles from WCS's facility, in the opposite direction of the streamflow from the permitted discharge route. A reasonable relationship therefore does not exist between the requestor's property and the regulated activity as required by 30 TAC §55.203(c)(3). OPIC therefore recommends that the hearing request of Peggy Pryor be denied.

##### 2. Rose Gardner

Rose Gardner submitted a request for a contested case hearing on July 12, 2013 that articulated a need for more information from both the TCEQ and New Mexico Environmental Department on the proposed changes in WCS's permit. Ms. Gardner raises concerns about possible radioactivity of the permitted discharge and its effect on Ms. Gardner's property, health, groundwater, and potentially affected wildlife. Ms. Gardner also questioned whether possible

alternatives to disposal at the proposed site existed and generally expressed concern about potential negative effects on the community of Eunice, New Mexico. The concerns relating to potential effects on property, health, groundwater, and wildlife are protected by the law under which the application will be considered.<sup>2</sup>

Rule 30 TAC §55.203(c)(3) requires that a reasonable relationship exist between the interests raised in a hearing request and the activity the commission is regulating.<sup>3</sup> The proposed activity must furthermore affect the requestor in a manner not common to members of the general public. Proximity to the facility or discharge route has an important bearing on whether a reasonable relationship exists between the requestor's concerns and the regulated activity, as well as the determination as to whether the requestor is affected in a manner not common to the general public.

Ms. Gardner states that she is a resident of Eunice, New Mexico, but her request does not contain a home address. The Commission's Office of Legal Services created a map that demonstrates the center of Eunice, New Mexico is approximately five miles from WCS's facility, in the direction of the discharge route. OPIC finds the information provided does not establish a reasonable relationship between the interests claimed by Ms. Gardner and the activity regulated without more specific information about the location of Ms. Gardner's property and its proximity to the facility or discharge route. We cannot conclude that Ms. Gardner is an affected person. OPIC therefore recommends the Commission deny the hearing request of Rose Gardner. Should the requestor submit additional information relating to the location of her property

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<sup>2</sup> 30 TAC § 55.203(c)(1).

<sup>3</sup> 30 TAC § 55.203(c)(3).

relative to the facility or discharge route, or if the Commission otherwise finds that Ms. Gardner is an affected person, OPIC offers the following analysis of the issues raised in the request.

**B. Issues raised in 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) & (d)(4), 55.211(c)(2)(A).

**C. Disputed Issues**

There is no agreement between the Applicant, the Executive Director, and the Requestors on the issues presented above.

**D. 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. *See* 30 TAC §55.211(b)(3)(A) and (B). The issues concerning possible alternatives to the disposal site and route, the need for information from the New Mexico Environmental Department or the TCEQ beyond what is required by law, and general concerns for the community of Eunice, New Mexico are not issues of fact and are therefore not appropriately referred to the State Office of Administrative Hearings (SOAH) for a contested case hearing.

**E. Relevant and Material Issues**

The hearing request raises 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). Relevant and material issues are those that are governed by the substantive law under which this permit is to be issued.<sup>4</sup>

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<sup>4</sup> See 30 TAC §55.209(e)(6)

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.<sup>5</sup>

Pursuant to Texas Water Code sections 26.027(a) and 26.003, the Commission may issue permits for wastewater discharges based upon the draft permit's effectiveness in maintaining the water quality of the state. Water contamination is therefore a relevant and material issue to the permitting process. Likewise, Ms. Gardner's concerns related to her health, use and enjoyment of property, and propagation and protection of terrestrial life is specifically protected by the Texas Water Code.<sup>6</sup>

**F. Issues Recommended for Referral**

Should the Commission find that Ms. Gardner or Ms. Pryor are affected persons, OPIC recommends that the following disputed issues of fact be referred to the State Office of Administrative Hearings for a contested case hearing:

- 1) Will operations under the proposed permit adequately protect water quality?
- 2) Will operations under the proposed permit adversely affect the health of the requestor?
- 3) Will operations under the proposed permit adversely affect animal life?
- 4) Will operations under the proposed permit interfere with the requestor's use and enjoyment of their property?

**G. Maximum Expected Duration of Hearing**

Commission Rule 30 TEX. ADMIN. CODE § 55.115(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

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<sup>5</sup> See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-251(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.")

<sup>6</sup> See Water Code §26.003.

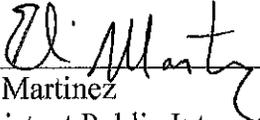
date the proposal for decision is issued. To assist the Commission in stating a date by which the judge is expected to issue a proposal for decision, and as required by 30 TEX. ADMIN. CODE §55.209(d)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be six months from the first date of the preliminary hearing until the proposal for decision is issued.

#### IV. CONCLUSION

OPIC recommends denying the hearing requests of Peggy Pryor and Rose Gardner. Should the Commission find either or both of the requestors are affected persons, OPIC recommends referring the matter to SOAH for an evidentiary hearing on the issues recommended above with a hearing duration of nine months.

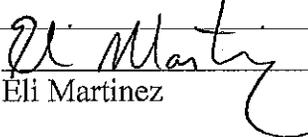
Respectfully submitted,

Blas J. Coy, Jr.  
Public Interest Counsel

By   
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#### CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2014 the original and seven true and correct copies of the Office of the Public Counsel's Response to Hearing Requests were 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 or by deposit in the U.S. Mail.

  
Eli Martinez

**MAILING LIST**  
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**TCEQ DOCKET NO. 2013-2210-IWD**

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