

Bryan W. Shaw, Ph.D., P.E., *Chairman*  
Toby Baker, *Commissioner*  
Zak Covar, *Commissioner*  
Richard A. Hyde, P.E., *Executive Director*



*Vic McWherter, Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

March 9, 2015

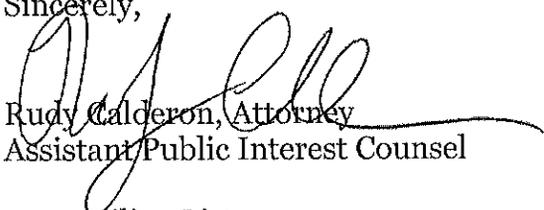
Bridget Bohac, Chief Clerk  
Texas Commission on Environmental Quality  
Office of the Chief Clerk (MC-105)  
P.O. Box 13087  
Austin, Texas 78711-3087

RE: **GALVESTON COUNTY LANDFILL TX, LP**  
**TCEQ DOCKET NO. 2014-1278-MSW**

Dear Ms. Bohac:

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

Sincerely,

  
Rudy Calderon, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure



**TCEQ DOCKET NO. 2014-1278-MSW**

**IN THE MATTER OF THE  
APPLICATION OF GALVESTON  
COUNTY LANDFILL TX, LP FOR  
MAJOR AMENDMENT TO  
PERMIT NO. 1149B**

**BEFORE THE TEXAS  
COMMISSION ON  
ENVIRONMENTAL QUALITY**

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

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

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

**I. Introduction**

**A. Background of Facility**

Galveston County Landfill (GCLF) operates a permitted Type I Municipal Solid Waste (MSW) landfill located at 3935 Avenue A in the cities of La Marque and Hitchcock, Galveston County, Texas. GCLF filed a major amendment Application (MSW-1149B) on June 29, 2012 to expand the landfill. The Application requests authorization for the horizontal and vertical expansion of the landfill for the acceptance and disposal of authorized waste. The total permitted facility will include 469.5 acres of which approximately 333.9 acres will be used for waste disposal. The final elevation of the waste fill and final cover material will be 202.5 feet above mean sea level.

**B. Procedural Background**

The Application was received June 29, 2012 and declared administratively complete on August 3, 2012. Notice of Receipt of Application and Intent to Obtain a

Municipal Solid Waste Permit was published August 14, 2012 in the Galveston County Daily News. The TCEQ Executive Director completed the technical review of the Application on December 17, 2013 and prepared a draft permit. Notice of Application and Preliminary Decision for Municipal Solid Waste Permit (NAPD) was published March 4, 2014 in the Galveston County Daily News. The public comment period closed April 3, 2014. The Office of Chief Clerk mailed the Executive Director's Decision and Response to Comments on July 31, 2014 and the deadline for filing hearing requests was September 2, 2014. The Application was administratively complete on or after September 1, 1999; therefore, the Application is subject to the procedural requirements adopted pursuant to House Bill 801 (76th Legislature, 1999).

TCEQ received timely comments and a request for a contested case hearing from Kenny and Shawn Wagner. For the following reasons, OPIC concludes Kenny and Shawn Wagner are affected persons entitled to a contested case hearing.

## **II. Applicable Law**

The ED declared this application administratively complete on August 3, 2012. Because the application was declared administratively complete after September 1, 1999, a person may request a contested case hearing on the application pursuant to the requirements of House Bill 801, Act of May 30, 1999, 76th Leg., R.S., § 5 (codified at TEX. WATER CODE (TWC) § 5.556).

Under the applicable statutory and regulatory requirements, a hearing request must substantially comply with the following: give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; identify the requestor's personal justiciable interest affected by the application showing why the requestor is an "affected person" who may be adversely affected by the

proposed facility or activity in a manner not common to members of the general public; request a contested case hearing; list all relevant and material disputed issues of fact that were raised during the comment period that are the basis of the hearing request; and provide any other information specified in the public notice of the application.

*30 TAC § 55.201(d).*

An “affected person” is “one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application.”

*30 TAC § 55.203(a).* This justiciable interest does not include an interest common to the general public. *Id.* Governmental entities with authority under state law over issues contemplated by the application may be considered affected persons. *Id.* Relevant factors considered in determining whether a person is affected include:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

*30 TAC § 55.203(c).*

A group or association may request a contested case hearing if:

- (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.

30 TAC § 55.205(a). The ED, OPIC, or applicant may request the group or association provide an explanation of how the group or association meets these requirements. *Id.*

The Commission shall grant an affected person's timely filed hearing request if: (1) the request is made pursuant to a right to hearing authorized by law; and (2) the request raises disputed issues of fact that were raised during the comment period and that are relevant and material to the Commission's decision on the application. 30 TAC § 55.211(c).

Accordingly, responses to hearing requests must specifically address:

- (1) whether the requestor is an affected person;
- (2) which issues raised in the hearing request are disputed;
- (3) whether the dispute involves questions of fact or of law;
- (4) whether the issues were raised during the public comment period;
- (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the Chief Clerk prior to the filing of the Executive Director's Response to Comment;
- (6) whether the issues are relevant and material to the decision on the application; and
- (7) a maximum expected duration for the contested case hearing.

30 TAC § 55.209(e).

### **III. Discussion**

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

##### *Kenny and Shawn Wagner*

According to the hearing request received on April 4, 2014,, Kenny and Shawn Wagner own property adjacent to the site located at 3935 Avenue A in the cities of La Marque and Hitchcock, Galveston County, Texas. According to the map supplied by the Executive Director, the Wagners' property is located adjacent to the site along its western boundary and lies almost entirely within a quarter mile of the site. In their

hearing request, the Wagners raise issues related to the suitability of the site of the proposed expansion as it relates to 100-year floodplain , wetland requirements, the impact to surface and groundwater, compatibility of land use, the adequacy of the liners to be used at the site, the impact of the proposed expansion on endangered and threatened species, the stability of the excavated slopes of the landfill as proposed in the amendment, compliance with easement and buffer zone requirements, GCLF site operating plan deficiencies, compliance with drainage requirements, and nuisance odors.

Due to the Wagners' proximity to the facility and their current issues with the proposed expansion of the site, OPIC recommends that the Commission find that the Kenny and Shawn Wagner are affected persons.

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

The following issues have been raised in the hearing request:

- (1) Whether the proposed expansion meets the 100-year floodplain requirement.
- (2) Whether the proposed expansion meets the wetlands requirement.
- (3) Whether the proposed amendment has adequately addressed impacts on endangered and threatened species.
- (4) Whether the liners to be used are adequate.
- (5) Whether the excavated slopes will be constructed in a way to ensure stability.
- (6) Whether the proposed expansion plan will be protective of groundwater.
- (7) Whether the proposed expansion is a compatible land use .
- (8) Whether easement and buffer zone requirements have been met.
- (9) Whether the site operating plan is deficient.
- (10) Whether the proposed expansion meets drainage requirements.
- (11) Whether the proposed expansion will create nuisance odors.
- (12) Whether the proposed permit amendment is protective of surface water.

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

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

#### **D. Disputed Issues**

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

#### **E. Issues of Fact**

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements. *30 TAC § 55.211(c)(2)(A)*. All of the issues presented are issues of fact appropriate for referral to SOAH.

#### **F. Relevant and Material Issues**

The hearing 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)*. In order to refer an issue to SOAH, the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–51 (1986) (in discussing the standards applicable to reviewing motions for summary judgment the Court stated “[a]s to materiality, the substantive law will identify which facts are material . . . it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs”). Relevant and material issues are those governed by the substantive law under which this permit is to be issued. *Id.* All of the issues raised in the request are governed by the Commission's Chapter 330 rules and are relevant and material to the Commission's decision on the application.

#### **G. Issues Recommended for Referral**

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

- (1) Whether the proposed expansion meets the 100-year floodplain requirement.
- (2) Whether the proposed expansion meets the wetlands requirement.
- (3) Whether the proposed amendment has adequately addressed impacts on endangered and threatened species.
- (4) Whether the liners to be used are adequate.
- (5) Whether the excavated slopes will be constructed in a way to ensure stability.
- (6) Whether the proposed expansion plan will be protective of groundwater.
- (7) Whether the proposed expansion is a compatible land use .
- (8) Whether easement and buffer zone requirements have been met.
- (9) Whether the site operating plan is deficient.
- (10) Whether the proposed expansion meets drainage requirements.
- (11) Whether the proposed expansion will create nuisance odors.
- (12) Whether the proposed permit amendment is protective of surface water.

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

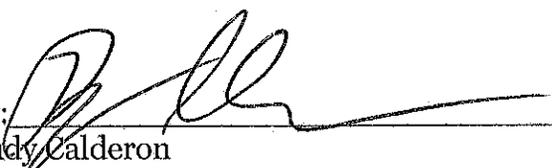
Commission Rule 30 TAC § 50.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year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

#### **IV. Conclusion**

OPIC recommends granting the hearing request from Kenny and Shawn Wagner, on the issues referenced in Section III.G above. OPIC further recommends a hearing duration of one year.

Respectfully submitted,

Vic McWherter  
Public Interest Counsel

By: 

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## CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2015 the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Requests for Hearing 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, electronic mail, or by deposit in the U.S. Mail.



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Rudy Calderon



**MAILING LIST**  
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**TCEQ DOCKET NO. 2014-1278-MSW**

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