

TCEQ DOCKET NO. 2014-1278-MSW

APPLICATION BY GALVESTON	§	BEFORE THE
COUNTY LANDFILL TX, LP FOR	§	TEXAS COMMISSION ON
MUNICIPAL SOLID WASTE PERMIT	§	ENVIRONMENTAL QUALITY
NO. 1149B	§	

**KENNY AND SHAWN WAGNER’S REPLY TO
RESPONSES TO HEARING REQUESTS**

I. Introduction

For the reasons set forth below, Kenny and Shawn Wagner continue to ask that their hearing request be granted; that each issue identified by the Office of the Public Interest Counsel be referred for hearing; and that compliance history be referred to hearing as previously requested.

II. Reply to Office of Public Interest Counsel and Executive Director.

The Wagners concur with the affected person analysis of the Executive Director, and the Office of Public Interest Counsel. The Wagners agree with OPIC’s recommendation of a twelve-month duration for the hearing in this matter. As a large facility with numerous complicated issues is involved, a twelve-month duration is justified.

The Wagners dispute certain recommendations of the Executive Director. The Executive Director states that noise is not appropriate for referral based on an allegation that it is not covered by the applicable regulations. But, applicable regulations 30 TAC § 330.15(a)(2) provide that the operation of a facility to dispose of solid waste shall not be operated in a manner resulting in the creation and maintenance of a nuisance. Under this regulation, noise is relevant to the Commission’s consideration of the Application. Furthermore, this issue is also relevant to the consideration of land use compatibility.

The Executive Director has further said that it is inappropriate for the Commission to consider impacts from “extreme weather events” because TCEQ rules allegedly do not require that such events be addressed. Within their comments and hearing request, the Wagners raised concerns regarding impacts upon the facility from a storm surge. As noted in their request, such impacts are relevant pursuant to 30 TAC § 330.61(a), requiring the identification of any site-specific conditions that require special design consideration. Insofar as the Executive Director intends to preclude the consideration of storm surge impacts, the consideration of this issue is also relevant pursuant to 30 TAC § 330.63(c)(2)(C), which provides that if the site is located within the 100-year floodplain then the operator shall, “provide information detailing the specific flooding levels and other events (e.g., design hurricane projected by Corps of Engineers) that impact the flood protection of the facility.” In this case, the Wagners contend that the site is located within the 100-year floodplain. Thus, flood events such as a storm surge are encompassed within the rules applicable to this facility.

The Executive Director further contends that it is inappropriate for the Commission to consider risks to groundwater from existing facilities within the context of this application. However, TCEQ rules require that an applicant submit data about site-specific groundwater conditions at or near the site.¹ Further, TCEQ rules require that monitoring wells be placed in a manner to allow the detection of groundwater contamination in the uppermost aquifer.² An adequate characterization of existing groundwater quality, including impacts from existing facilities, is necessary to ensure that the groundwater monitoring system design will meet this objective. Moreover, the applicable TCEQ rules require that an applicant provide a geologic report including the composition of the aquifer,³ as well as sampling of groundwater for contaminants such as chloride, total dissolved solids, chromium, and volatile organic compounds.⁴ In short, a

¹ 30 TAC § 330.61(k)(1).

² 30 TAC § 330.403(a)(2).

³ 30 TAC § 330.63(e)(3)(B).

⁴ 30 TAC § 330.63(e)(6)(E).

fundamental purpose of TCEQ's rules applicable to municipal solid waste facilities is the protection of groundwater quality. The existing groundwater quality, and a consideration of that groundwater quality, is required in order to provide this protection. Thus, existing groundwater contamination and the potential for future contamination from existing facilities is relevant to the consideration of this application.

Each issue identified for referral by the Executive Director is encompassed within the issues recommended for referral by the Office of the Public Interest Counsel. Furthermore, issues of noise, storm surge, and the protection of groundwater in light of existing groundwater conditions also fall within the issues recommended for referral by the Office of the Public Interest Counsel. Thus, the Wagners support referral of all issues identified by the Office of the Public Interest Counsel for hearing.

In addition, the Wagners have placed in dispute whether the permit should be modified or denied in light of the Applicant's compliance history. This issue was independently acknowledged by the Executive Director in the Executive Director's Response to Comments. Among other places, the Wagners sought a hearing on this issue when requesting a hearing on all issues raised in any comments submitted to the TCEQ in their April 24, 2014 hearing request.

III. Reply to Response by Applicant.

By its response, Applicant essentially attempts to place a burden on the Wagners to marshal a case on the merits within their hearing request. Of course, Applicant bears the burden of proof, and the Wagners have not yet had the opportunities associated with discovery, cross-examination and argument that a contested case hearing would provide. Furthermore, the purpose of the State Office of Administrative Hearings is to provide an impartial finder of fact who has not developed ownership of the application. Thus, it would be inappropriate for the Commission to refuse to refer an issue to SOAH based on a pre-judgment on the merits of the issues involved. By virtue of the fact that the ED in its response to comments has rejected the Wagners' criticisms, each issue raised is

appropriately considered “disputed.” Even so, the Wagners wish to more particularly note the manner in which each issue is disputed.

With regard to groundwater protection, the Wagners have identified specific errors including:

- the insufficient consideration of numerous existing recharge features,
- the assumption of a continuous clay layer contrary to the best interpretation of the borings performed,
- the incorrect characterization of material as clay when the layer contains significant quantities of silt and sand,
- incorrect characterization of aquifer conditions, including thickness, flow rate, flow directions, and temporal fluctuations in flow;
- the impact of dewatering operations, which will be needed due to site-specific groundwater conditions;
- the problems presented by groundwater flow that is influenced by site-specific considerations such as pre-subtitle D cells, and existing borrow pits.

Applicant asks that the TCEQ refuse to refer issues related to groundwater essentially because its own experts disagree with the Wagners. This is an issue appropriate for referral to SOAH for resolution of the fact issues involved, and should not be pre-judged by refusing to refer the issue for hearing.

With regard to surface water, Applicant alleges that the Wagners are not impacted by this issue. But, the Wagners have pointed out that surface water in this area is connected to groundwater, thus rendering their own groundwater impacted by insufficient surface water protection.⁵ Applicant’s argument is based on a factual disagreement

⁵ The Wagners further note that Applicant’s allegation confuses the affected person analysis with the analysis of issues proper for referral for hearing. The analysis of whether an issue was (1) raised during the comment period; (2) relevant and material to the Commission’s decision on an application, and (3) involves a disputed issue of fact is separate and apart from the Commission’s determination of whether the Wagners are affected persons.

regarding this connection. Again, this issue involves a sophisticated technical analysis that warrants the development of a robust record, and consideration by an administrative law judge who can carefully weigh the full body of evidence. Again, it is inappropriate for the Commission to refuse to refer this issue by pre-judging the facts that go to the merits of the application.

With regard to stormwater flooding, the Wagners have presented specific information regarding FEMA's most recent mapping of the area, and FEMA modeling of potential flooding in the area. Applicant attempts to foreclose consideration of this issue based FEMA maps that FEMA itself has called into question. TCEQ rules provide only that FEMA maps are *prima facie* evidence of the extent of the 100-year floodplain.⁶ The use of this term was intentional, and was intended to leave open the opportunity for protestants to present evidence rebutting the applicant's depiction of the floodplain, even if that depiction is premised on a FEMA floodplain map. For the Commission to refuse to refer this issue to SOAH results in giving an outdated FEMA floodplain map the preclusive affect that the Commission rejected in adopting its rules.

Applicant contends that "wetlands" are limited to federally-jurisdictional wetlands, and thereby asks that the Commission refuse to refer any issue related to the presence of wetlands. However, the Commission has repeatedly held that TCEQ's jurisdiction is not circumscribed in the same manner as the U.S. Army Corps of Engineers, and thus the relevant "wetlands" under the TCEQ rules are not limited to federally-jurisdictional wetlands.⁷ In short, the United States Supreme Court cannot dictate the scope of wetlands under Texas statute and Texas regulations. Instead, the extent of wetlands turns on a fact-specific analysis of the presence of factors such as the presence of hydrophytic vegetation, hydrophytic soils, and hydrology. Furthermore, the

⁶ 30 TAC § 330.63(c)(2)(B).

⁷ *See, e.g.* Order Denying the application of Far Hills Utility District for proposed TPDES Permit No. WQ0014555001; Docket No. 2005-1899-MWD (September 7, 2007)(Denying application for Water Quality Permit pursuant to 30 TAC § 309.13 without regard to whether located in federal-jurisdictional wetlands).

destruction of wetlands requires an analysis of available alternatives. It is inappropriate for the Commission to pre-judge such fact-specific questions.

With regard to endangered and threatened species, the Wagners have identified ways in which Applicant's analysis is deficient, including the failure to consider impacts on nearby riparian areas, and the impact of vectors attracted to the landfill. The Commission has previously denied a landfill application premised on precisely such omissions from a landfill application.⁸ Particularly given that the Applicant bears the burden of proof, and that the Wagners have identified specific omissions in the application, this issue is appropriate for referral.

With regard to liner integrity, this site is characterized by the deposition of waste at significantly different periods of time, is characterized by the deposition of waste with varying characteristics due to the acceptance of hurricane debris, and this facility is also distinguishable from other facilities due to the placement of new waste above pre-subtitle D waste based on the use of an overliner. Each of these factors identified by the Wagners heightens the potential that the liner integrity will be compromised. Particularly given that the Wagners have identified such site-specific factual considerations, issues of liner integrity and slope stability should be referred to SOAH for a full development of the facts.

The Wagners have also placed slope stability in dispute. They have placed this issue in dispute through the identified factors relevant to slope stability such as an insufficient characterization of the material at issue, the role of required ballast, the location of the site within the floodplain, and the potential exposure of the facility to extreme winds.

With regard to easements, the Wagners have identified particular easements of concern in the design of the landfill. The Wagners dispute Applicant's decision as to

⁸ Application of Tan Terra Environmental Services for MSW Permit No. 2305, Docket No. 2004-0743-MSW.

which easements may interfere with the landfill. The potential interference of easements at the site raises a fact issue appropriate for referral to SOAH.

The Wagners have sufficiently placed the issue of compliance history in dispute. In their August 24, 2012, hearing request, the Wagners expressed that they had concerns regarding “potential regulatory violation issues associated with this landfill,” and they went on to note constant problems associated with birds and odor, as well as a questionable liner. In their April 3, 2014 request, the Wagners noted that “the current operation of the landfill exacerbates serious health problems for the Wagners.” The Wagners further noted prior violations of TCEQ rules limiting waste acceptance and notice requirements.

Somewhat unbelievably, Applicant somehow claims that the Wagners’ concerns regarding health and enjoyment of property are indistinguishable from the general public. The Wagners own property and reside adjacent to the landfill. The decision on the issues appropriate for referral is distinct from a consideration of the Wagners’ affected person status. Even so, the Wagners wish to note that Applicant’s claim that their concerns regarding health and enjoyment of property are clearly distinguishable from the general public in light of their proximity to the facility.

IV. Conclusion

For these reasons, the Wagners continue to ask that their hearing request be granted. They have shown themselves to be an affected person. The Wagners request that all issues previously raised in their past hearing requests be referred for hearing. Furthermore, the Wagners ask that each issue identified by the Office of the Public Interest Counsel be referred for hearing, with the understanding that each issue identified for referral by the Executive Director falls within the scope of issues identified for referral by OPIC. In addition, the Wagners ask that the Commission refer the following issues to SOAH:

- Whether Applicant's compliance history warrants modification or denial of the draft permit.

As explained above, the Commission should reject Applicant's request that the Commission refuse to refer certain issues by pre-judging the merits in this matter without providing the opportunity for a contested case hearing on those issues going to the merits of the application.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

By my signature below, I, Eric Allmon, do hereby certify that on this 23rd day of March, 2015, a true and correct copy of Kenny and Shawn Wagner's Reply to Responses to Hearing Request was served upon the parties identified on the attached mailing list via facsimile transmission or deposit in the U.S. mail.



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