

Bryan W. Shaw, Ph.D., P.E., *Chairman*
Toby Baker, *Commissioner*
Jon Niermann, *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

June 13, 2016

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: BENEFICIAL LAND MANAGEMENT, LLC
TCEQ DOCKET NO. 2016-0665-IWD**

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in black ink, appearing to read "Rudy Calderon".

Rudy Calderon, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2016-0665-IWD

**IN THE MATTER OF THE
APPLICATION OF BENEFICIAL
LAND MANAGEMENT, L.L.C. FOR
RENEWAL OF PERMIT
NO. WQ0004666000**

**BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL QUALITY**

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

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 Requests for Hearing and Request for Reconsideration in the above-referenced matter and respectfully shows the following.

I. Introduction

A. Background of Facility

Beneficial Land Management, L.L.C. (BLM or Applicant) has applied to the TCEQ for renewal of Permit No. WQ0004666000 that would authorize the beneficial land application of Class B wastewater treatment plant (WWTP) sewage sludge at a rate not to exceed 8 dry tons per acre per year. The land application site is located on 726.1 acres within a larger approximately 2,881 acre parcel of land, which is located ten miles northwest of the City of Inez, on Farm-to-Market Road 444 and 2.5 miles northeast of the intersection of Karnes Road and Farm-to-Market Road 444, in Victoria County, Texas 77968. The land application site is located in the drainage area of Lavaca Bay and Chocolate Bay in Segment No. 2453 of the Lavaca-Guadalupe Coastal Basin, however, this permit does not authorize a discharge of pollutants into waters in the State

The original draft permit proposed to authorized the permittee to land apply sewage sludge mixed with grit trap and grease trap waste (GG waste) under an experimental use authorization. The experimental use authorization was to expire on October 31, 2016 or one year from the date of permit issuance, whichever occurred first. However, at the close of the public comment period, the Executive Director (ED) made changes to the draft permit by removing the experimental use authorization and all applicable provisions.

B. Procedural Background

TCEQ received the application on December 5, 2011 and declared it administratively complete on January 24, 2013. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published on October 16, 2014 in the *Victoria Advocate*. The ED completed the technical review of the application on May 8, 2014 and prepared a draft permit. The Notice of Application and Preliminary Decision (NAPD) for a Water Quality Permit was published on July 22, 2015 in the *Victoria Advocate*. The notice of public meeting was published on December 22, 2015 in the *Victoria Advocate*. A public meeting was held on January 21, 2016 in Victoria, Texas. The comment period closed on January 21, 2016. On March 21, 2016, the ED filed his Response to Public Comment, and on March 28, 2016, the Chief Clerk mailed notice of the ED's final decision and Response to Comments. The deadline to request a contested case hearing or reconsideration of the ED's decision was April 27, 2016.

TCEQ received timely comments and requests for a contested case hearing from BLM, the County of Victoria, Dorothy Simons, the City of La Coste, Cynthia Doyle, and

Steve Holzheuser. Additionally, the TCEQ received a timely Request for Reconsideration from BLM.

II. Applicable Law

Hearing Request

The ED declared this application administratively complete on January 24, 2013. 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).

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).

Request for Reconsideration

Any person may file a request for reconsideration of the ED's decision. 30 TAC § 55.201(e). The request must be in writing and be filed with the TCEQ no later than 30 days after the TCEQ mails the ED's Decision and Response to Comments. *Id.* The request for reconsideration must expressly state that the person is requesting reconsideration of the ED's decision, and give reasons why the decision should be reconsidered. *Id.* A response to a request for reconsideration should address the issues raised in the request. 30 TAC § 55.209(f).

III. Discussion

A. Determination of Affected Person Status

Beneficial Land Management, L.L.C.

As the applicant in this matter, BLM is entitled to participate as a party in any hearing on this application. 30 TAC § 80.109(b)(4). OPIC also notes that a permit applicant is statutorily entitled to request the direct referral of its application to the State Office of Administrative Hearings (SOAH). Texas Water Code § 5.557. While BLM has not requested a direct referral for a contested case hearing on whether its application complies with all applicable statutory and regulatory requirements, OPIC nevertheless finds the authority discussed compelling support for granting BLM's request for a contested case hearing.

County of Victoria

According to the hearing request, the County of Victoria is the county in which the land application site is located. As the governmental entity charged by statute with protecting the health, safety, and welfare of its residents, the county may be considered

an affected person under 30 TAC § 55.203(b). In its hearing request, the county raises issues related to the impact on the water quality of both surface and groundwater by the land application of sludge, the health effects on its residents from the land application of sludge, the adequacy of the buffer zones to protect waterways and residents of the county, and the impact on air quality from the land application of sludge.

OPIC finds that the County of Victoria is an affected person based on the factors set forth in 30 TAC §§ 55.203(b) and (c) and that a reasonable relationship exists between the County of Victoria's concerns and the issuance of the proposed permit renewal.

Dorothy Simons

According to a map provided to OPIC by the ED and the location provided in the hearing request, Ms. Simons is an adjacent land owner who is located approximately one mile from the boundary of the application site. In her hearing request, Ms. Simons raises issues related to the impact on human health by contaminants contained in sludge, the impact on the water quality of both surface and groundwater by the land application of sludge, the impact on flora and fauna by the land application of sludge, the adequacy of the buffer zones to protect waterways, and the impact on air quality from the land application of sludge. Due to the proximity of Ms. Simons to the application site and the issues raised in her hearing request, OPIC has determined that Dorothy Simons is an affected person and should be granted a contested case hearing.

Cynthia Doyle

According to a map provided to OPIC by the ED and the location provided in the Ms. Doyle's hearing request, Ms. Doyle's property is located approximately three miles from the land application site. In her hearing request, Ms. Doyle raises the issue of the

impact on water quality. However, any adverse effects or concerns would be attenuated by her location and distance from the application site. Therefore, OPIC has concluded that Ms. Doyle does not qualify as an affected person and should not be granted a contested case hearing.

Steve Holzheuser

According to a map provided to OPIC by the ED and the location provided in the hearing request, Mr. Holzheuser is not an adjacent landowner. Mr. Holzheuser's property is located approximately five miles from the land application site. In his hearing request, Mr. Holzheuser raises issues related to the impact on human health by contaminants contained in sludge, the impact on the water quality of both surface and groundwater by the land application of sludge, the impact on flora and fauna by the land application of sludge, the possibility of a nuisance odor interfering with the use and enjoyment of his property, and the impact on air quality from the land application of sludge. However, any adverse effects or concerns would be attenuated by his location and distance from the application site. Therefore, OPIC has concluded that Mr. Holzheuser does not qualify as an affected person and should not be granted a contested case hearing.

The City of La Coste

The City of LaCoste has not asserted an interest in its hearing request related to statutory authority over the environmental issues related to the pending application, but rather bases its standing as an affected person on lost revenues and adverse impacts on its business arrangements with Partners Dewatering International, Inc. (PDI) and BLM. OPIC finds that impacts on this business relationship – independent of any alleged environmental impact – are outside the scope of the Commission's jurisdiction in this

matter. In matters where impact to economic interests have served as the basis for the finding of a personal justiciable interest, there has been a direct link between potential environmental harm and a claimed adverse effect on economic interests. For example, an owner of a pecan orchard may be an affected person in proceedings related to an adjacent power plant's air permit based on the potential impact to her pecan trees and related business interests caused by power plant emissions; or a fishing tour guide may claim a personal justiciable interest based on the impact to fishing habitats and water quality caused by discharges under a TPDES permit. Here, the financial interest argument by the City of La Coste is more similar to the property values argument the Commission often sees in hearing requests: the mere existence of a landfill or permitted facility near a requestor's home or property will result in diminution of property value. Such contentions – independent of alleged environmental impact – repeatedly have been rejected by the Commission as being outside the Commission's jurisdiction. Therefore, these contentions have not been accepted as the basis for affected person status. For these reasons, OPIC cannot find that the City of La Coste is an affected person.

B. Issues Raised in the Hearing Request

The following issues have been raised in the hearing requests of affected persons:

- (1) Whether the land application of sludge will adversely affect surface water quality?
- (2) Whether the land application of sludge will adversely affect groundwater water quality?
- (3) Whether the land application of sludge will adversely affect human health?
- (4) Whether the land application of sludge will adversely affect flora and fauna?
- (5) Whether the buffer zones at the site are adequate to protect human health, the environment and water quality?
- (6) Whether the land application of sludge will adversely affect air quality?
- (7) Whether grit and grease trap waste mixed with domestic sludge as proposed by BLM is considered or classified as domestic sludge appropriate for land application under Chapter 312 of the Commission's rules?
- (8) Has the Executive Director demonstrated that the Special Provision included in the Draft Permit, which would prohibit BLM from land applying WWTP sewage sludge from the La Coste WWTP co-processed with grease and grit trap waste, i.e., domestic sludge, is technically justified and supported by state law and applicable TCEQ rules?
- (9) Is an experimental use authorization pursuant to 30 TAC §312.3(k) necessary to authorize BLM to land apply domestic sludge? If an experimental use authorization pursuant to 30 TAC §312.3(k) is necessary to authorize BLM to land apply domestic sludge, is there any legal, health, or environmental reason why such an experimental use authorization should not be included in the reissuance of TCEQ Permit No. WQ0004666000?

C. Issues Raised in the Comment Period

Issues 8 and 9, as specifically worded, were raised for the first time in BLM's April 27, 2016 hearing request and request for reconsideration. In addition to finding these issues are inappropriate for referral because they are more issues of law or policy than issues of fact, OPIC also cannot support referral of Issues 8 and 9 because they were raised after the close of the comment period. Therefore, Issues 8 and 9 do not satisfy the requirements of 30 TAC § 55.201(d)(4). All other issues raised in the hearing requests 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

Before referring an issue to hearing, the Commission is required to consider whether the issue is one of fact, rather than one of law or policy. TWC §5.556(d)(1). Issues of fact are appropriate for referral to SOAH for a contested case hearing. 30 TAC § 55.211(c)(2)(A). Responses to hearing requests are required to address whether issues raised in a request are disputed issues of fact or disputed issues of law. 30 TAC § 55.209(e)(3).

As noted in Section III C, OPIC cannot recommend referral of Issues 8 and 9 because they were not raised during the comment period. More significantly, OPIC finds Issues 8 and 9 to be disputed issues of law and policy more appropriately reserved for the Commission's deliberation, rather than issues of fact appropriate for referral to SOAH.

To the extent Issues 8 and 9 contain mixed questions of law, policy and fact, the factual elements of these issues are subsumed within Issue 7. Issue 7, raised during the comment period by BLM's August 20, 2015 letter, may be a mixed issue of law, policy and fact; however, OPIC finds Issue 7 to be more typical of issues of fact appropriate for referral to SOAH.

F. Relevant and Material Issues

The hearing requests raise 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.*

Health Effects

Dorothy Simons and the County of Victoria have raised the issue of the potential for adverse health effects on humans posed by the land application of sludge at the application site. This issue is addressed by the statutes and rules applicable to this application. Tex. Health & Safety Code § 361.002; 30 TAC §§ 312.11(g)(2) and 312.44(j)(1). Therefore, OPIC finds that this issue is therefore relevant and material to the Commission’s decision on the application and is appropriate for referral to SOAH for a contested case hearing on this matter.

Impact on Flora and Fauna

Dorothy Simons has raised the issue of the effects of the land application of sludge at the application site on flora and fauna in the area. Protection of flora and fauna by reducing vectors is addressed by 30 TAC § 312.83. Therefore, OPIC finds that this issue is therefore relevant and material to the Commission’s decision on the application and is appropriate for referral to SOAH for a contested case hearing on this matter.

Grit and Grease Trap Waste Appropriate Under 30 TAC § 312

BLM has raised the issue of whether grit and grease trap waste mixed with domestic sludge is considered or classified as domestic sludge appropriate for land application under 30 TAC § 312. While OPIC finds this issue to be a mixed issue of law, policy and fact, it is more typical of issues of fact appropriate for referral to SOAH. Therefore, OPIC finds that this issue is therefore relevant and material to the Commission's decision on the application and is appropriate for referral to SOAH for a contested case hearing on this matter.

Water Quality

Dorothy Simons and the County of Victoria have raise the issue of impact on both surface and groundwater quality by the land application of sludge at the application site. The TCEQ regulates the impact of land application of sludge on surface and groundwater. 30 TAC § 312.44. Therefore, OPIC finds that this issue is therefore relevant and material to the Commission's decision on the application and is appropriate for referral to SOAH for a contested case hearing on this matter.

Buffer Zone Requirements

Dorothy Simons and the County of Victoria have raise the issue of the adequacy of the buffer zones to protect against runoff and contamination of both surface and groundwater surface by the land application of sludge at the application site. The TCEQ regulates buffer zone requirements for the land application of sludge. 30 TAC § 312.44(c)(2). Therefore, OPIC finds that this issue is therefore relevant and material to the Commission's decision on the application and is appropriate for referral to SOAH for a contested case hearing on this matter.

Air Quality

Dorothy Simons and the County of Victoria have raise the issue of impact on air quality by the land application of sludge at the application site. The TCEQ regulates the impact on air quality due to sludge debris blowoff from a land application site. 30 TAC § 312.44(j)(2). Therefore, OPIC finds that this issue is therefore relevant and material to the Commission's decision on the application and is appropriate for referral to SOAH for a contested case hearing on this matter.

G. Issues Recommended for Referral

OPIC recommends that the following disputed issues of fact are appropriate for referral to SOAH for a contested case hearing.

- (1) Whether the land application of sludge will adversely affect surface water quality?
- (2) Whether the land application of sludge will adversely affect groundwater water quality?
- (3) Whether the land application of sludge will adversely affect human health?
- (4) Whether the land application of sludge will adversely affect flora and fauna?
- (5) Whether the buffer zones at the site are adequate to protect human health, the environment and water quality?
- (6) Whether the land application of sludge will adversely affect air quality?
- (7) Whether grit and grease trap waste mixed with domestic sludge as proposed by BLM is considered or classified as domestic sludge appropriate for land application under Chapter 312 of the Commission's rules?

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 nine months from the first date of the preliminary hearing until the proposal for decision is issued.

IV. Analysis of Request for Reconsideration

BLM has requested reconsideration of the ED's decision to prohibit the land application of grit and grease trap waste. BLM is requesting that the ED remove the prohibitive sections from the draft permit and continue to allow BLM to land apply sludge that has been mixed with grit and grease trap waste. BLM argues that 30 TAC § 312 allows the mixed sludge to be characterized as domestic sludge and therefore can be land applied.

OPIC recommends the request for reconsideration be denied. The request is based on one of the issues OPIC supports referring to hearing: Whether grit and grease waste mixed with domestic sludge as proposed by BLM is considered or classified as domestic sludge appropriate for land application under Chapter 312 of the Commission's rules. An evidentiary record on this issue and a Commission evaluation of related issues of law and policy will be necessary before a decision can be made on the issues raised by the request for reconsideration.

V. Conclusion

OPIC recommends granting the hearing requests of BLM, the County of Victoria, and Dorothy Simons and denying the hearing requests of the City of La Coste, Cynthia Doyle, and Steve Holzheuser. OPIC finds the issues referenced in Section III.G above,

are appropriate for referral. OPIC recommends denial of BLM's Request for Reconsideration. OPIC further recommends a hearing duration of nine months should a contested case hearing be granted.

Respectfully submitted,

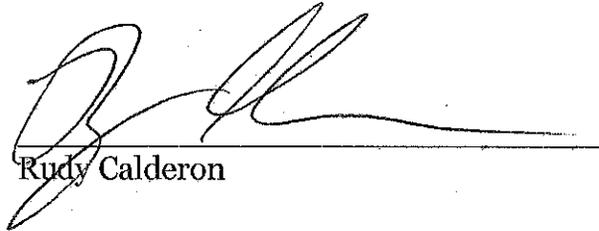
Vic McWherter
Public Interest Counsel

By: 

Rudy Calderon
Assistant Public Interest Counsel
State Bar No. 24047209
P.O. Box 13087, MC 103
Austin, Texas 78711-3087
(512) 239-3144 Phone
(512) 239-6377 Fax

CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2016 the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Requests for Hearing and Request for Reconsideration 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.



Rudy Calderon

MAILING LIST
BENEFICIAL LAND MANAGEMENT, LLC
TCEQ DOCKET NO. 2016-0665-IWD

FOR THE APPLICANT:

Carter Mayfield
Beneficial Land Management, L.L.C.
P.O. Box 6870
San Antonio, Texas 78209-0870
Tel: 210/828-0525 Fax: 210/359-6301

Carter Mayfield
SOS Companies
P.O. Box 201480
San Antonio, Texas 78220-8480

FOR THE EXECUTIVE DIRECTOR:

Ashley McDonald, Staff Attorney
TCEQ Environmental Law Division
MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-0600 Fax: 512/239-0606

Kellie Crouch-Elliot, Technical Staff
TCEQ Water Quality Division,
MC- 148
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-2435 Fax: 512/239-4430

Brian Christian, Director
TCEQ Environmental Assistance
Division, MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4000 Fax: 512/239-5678

FOR ALTERNATIVE DISPUTE
RESOLUTION

Kyle Lucas
TCEQ Alternative Dispute Resolution,
MC-222
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4010 Fax: 512/239-4015

FOR THE CHIEF CLERK:

Bridget Bohac
TCEQ Office of Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-3300 Fax: 512/239-3311

REQUESTERS:

Erich Birch
Birch Becker & Moorman LLP
4601 Spicewood Springs Rd,
Ste. 4-101
Austin, Texas 78759-7814

Cynthia Doyle
3012 Benbow Rd.
Inez, Texas 77968-3328

Steve Holzheuser
3200 Grandview St., Apt. 16
Austin, Texas 78705

J. Eric Magee
Allison Bass & Magee LLP
402 W 12th St.
Austin, Texas 78701-1817

John A. Riley
Jackson Gilmour & Dobbs PC
1115 San Jacinto Blvd., Ste. 275
Austin, Texas 78701-1413

C. George Salzman
City of La Coste
PO Box 112
La Coste, Texas 78039-0112

Dorothy B. Simons
2021 McDuffie St.
Houston, Texas 77019-6133

