

Bryan W. Shaw, Ph.D., P.E., *Chairman*
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Jon Niermann, *Commissioner*
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Vic McWherter, Public Interest Counsel

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

September 12, 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: **IESI TX LANDFILL LP**
TCEQ DOCKET NO. 2016-1211-MSW

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 "Aaron Tucker".

Aaron Tucker, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2016-1211-MSW

**IN THE MATTER OF
THE APPLICATION
OF IESI TX LANDFILL
LP FOR MUNICIPAL
SOLID WASTE
PERMIT NO. 1983C
PROPOSED
AMENDMENT**

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**BEFORE
THE
TEXAS
COMMISSION
ON
ENVIRONMENTAL
QUALITY**

**THE 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) of the Texas Commission on Environmental Quality (TCEQ) files this Response to Hearing Requests in the above-referenced matter and respectfully shows the following.

I. INTRODUCTION

a. Background of Facility

On March 4, 2015, IESI TX Landfill LP (“IESI” or “Applicant”) applied to the TCEQ to amend the permit for the IESI Fort Worth C&D Landfill located at 4144 Dick Price RD, Ft. Worth, Tarrant County, Texas 76140. The landfill is a Type IV landfill, which only accepts brush, construction and demolition waste, and rubbish. IESI applied for a major amendment to increase the maximum permitted height of the landfill and to increase the total waste disposal capacity of the landfill. The application also includes updates and revisions to the landfill’s site development plan, waste acceptance plan, site operating plan, and other supporting permit documents.

Currently, the permitted landfill facility encompasses 151.73 total acres. Only 77.7 acres of that total are used for waste disposal. The maximum permitted height of waste fill is currently

719 feet above mean sea level (msl) and the maximum permitted height of final cover is 721.5 msl. If this permit amendment is approved, the height of the final waste fill and final cover would be increased by 99 feet. Therefore, the amended maximum permitted height of waste fill would be 818 msl and the amended maximum permitted height of the final cover would be 820.5 msl. According to the application, authorized wastes are currently accepted at an initial rate of approximately 364,344 tons per year, forecasted to grow to a rate of approximately 413,560 tons per year by 2035.

The currently permitted landfill capacity is 12 million cubic yards which IESI estimates will be depleted in 2023. If this permit amendment is approved, the landfill capacity will be increased by 6.3 million cubic yards for a total of 18.4 million cubic yards and its estimated site life would be extended by approximately 12.5 years to the year 2035.

The amended permit would authorize the expansion of the existing Type IV municipal solid waste landfill with a total net disposal volume (waste and weekly cover) of approximately 18.4 million cubic yards, in addition to support structures and facilities as described in the permit amendment application and subject to the limitations contained in the draft permit and commission rules. The existing permitted landfill facility consists of a site entrance with security fencing, a gatehouse, scales, a paved entrance road to the site, all-weather access roads, soil stockpiles, a landfill gas monitoring system, a groundwater monitoring system, and the solid waste disposal area. Within the permitted landfill facility, there will continue to be a composting area, a large items/white goods unloading and storage area, a construction and demolition (C&D) recyclable sorting area, and a wood recycling area (they are all authorized under the current permit). The permitted landfill facility also includes structures for surface drainage and stormwater run-on/runoff control and a perimeter drainage system to convey stormwater runoff around the site.

The amended permit would modify the drainage system and add mechanically-stabilized earth and other berms, ditches, detention ponds and associated drainage structures.

b. Procedural Background

This permit application is for a major permit amendment. The Waste Permits Division received the application on March 4, 2015 and declared it administratively complete on May 5, 2015. The Notice of Receipt and Intent to Obtain (NORI) was published in English on May 5, 2015, in the *Fort Worth Star Telegram* and in Spanish in *La Estrella*. The application was declared technically complete on March 1, 2016. The Notice of Application and Preliminary Decision (NAPD) was published in English on March 19, 2016, in the *Fort Worth Star Telegram* and in Spanish in *La Estrella*. The public comment period ended on April 18, 2016. The Chief Clerk mailed the Executive Director's Decision and Response to Public Comment on June 20, 2016 and the deadline for filing requests for a contested case hearing was July 20, 2016.

For the reasons stated herein, OPIC respectfully recommends the Commission grant the hearing requests received from the following people: Babette Birchett, Joan Cauley, Sheila Fiorella, Terry Leese, Jessica Monreal, Lora Simpson, and Cliff Uranga.

II. APPLICABLE LAW

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 § 55.211(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.

III. DISCUSSION

a. Determination of Affected Person Status

Thirteen individuals submitted timely hearing requests. OPIC finds that seven individuals qualify as affected persons based on a personal justiciable interest identified in their hearing requests. Those individuals are Babette Birchett, Joan Cauley, Sheila Fiorella, Terry Leese, Jessica Monreal, Lora Simpson, and Cliff Uranga. Four individuals stated no personal justiciable interest in their hearing requests thus OPIC was unable to find that they qualified as affected persons. Two individuals subsequently withdrew their hearing requests and their requests were not analyzed.

Affected

The following people reside near the facility and have all raised personal justiciable interests in their hearing requests: Babette Birchett, Joan Cauley, Sheila Fiorella, Terry Leese, Jessica Monreal, Lora Simpson, and Cliff Uranga. All of the requesters state that they are adversely affected by odors coming from the current operation of the landfill and are concerned that the proposed expansion of the facility will only exacerbate this problem. The requesters' concerns about odor and the adverse impact to the use and enjoyment of their property are interests protected by the law under which the application will be concerned. Furthermore, these concerns reasonably

relate to the potential expansion of the landfill facility. Finally, as the requesters state that they are currently affected by the landfill's operations, OPIC concludes that they are likely to be impacted from the proposed expansion. Therefore, OPIC finds that the following individuals are affected persons based on the factors set forth in 30 TAC § 55.203(c): Babette Birchett, Joan Cauley, Sheila Fiorella, Terry Leese, Jessica Monreal, Lora Simpson, and Cliff Uranga

Not Affected

Certain requestors have stated no personal justiciable interest. These requestors are Liliane Garza, Randall Kahan, Chandra Moore, and Susan Thomas. They all ask that a public hearing be held but provide no information regarding their individual concerns. As required by 30 TAC § 55.201(d)(2), a hearing request must "identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining ... 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" Without further information, OPIC must find that Liliane Garza, Randall Kahan, Chandra Moore, and Susan Thomas do not qualify as affected persons.

Withdrawn

Kathy Carroll and Gloria Villaire both submitted hearing requests in April 2016. Both requests were subsequently withdrawn by letters received by TCEQ in July 2016. The letters state that these requestors no longer desire a contested case hearing. Therefore, OPIC considers these two hearing requests to be withdrawn.

b. Issues Raised in the Hearing Requests

The hearing requests raise the following issues:

1. Whether the proposed amendment to the facility will cause nuisance odors and interfere with the use and enjoyment of requester's property?
2. Whether the proposed amendment to the facility will adversely affect the health and safety of the surrounding community?
3. Whether the proposed amendment to the facility necessitates additional visual screening?
4. Whether the proposed operations adequately protect local surface and groundwater resources?
5. Whether the facility's compliance history necessitates denial of the permit amendment?
6. Whether the proposed amendment to the facility will lower property values?

c. Issues Raised During the Public Comment Period

Issues must be raised during the comment period and must not have been withdrawn. 30 TAC §§ 55.201(c), (d)(4), 55.211(c)(2)(A). All issues were raised during the comment period.

d. Disputed Issues

There is no agreement between the hearing requests 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 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 review motions for summary judgment the Court stated “[a]s to materiality, the substantive law will identify which facts are materials . . . 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.*

TCEQ rules prohibit the operation of a municipal solid waste facility in a manner that would cause a nuisance. 30 TAC § 330.15(a)(2). Therefore, Issue No. 1 relating to nuisance odors as well as the use and enjoyment of property is relevant and material. TCEQ rules prohibit the operation of municipal solid waste facility in a manner that would cause the endangerment of human health and welfare or the environment. 30 TAC § 330.15(a)(3). Therefore, Issue No. 2 relating to the health and safety of the surrounding community is relevant and material. TCEQ rules provide that under certain circumstances visual screening must be provided by an owner or operator for a facility. 30 TAC § 330.175. Therefore, Issue No. 3 relating to additional visual screening is relevant and material. Numerous TCEQ rules protect water resources from a municipal solid waste facility including 30 TAC § 330.15(h). Therefore, Issue No. 4 relating to protection of local surface and ground water resources is relevant and material. TCEQ rules require consideration of an applicant’s compliance history. 30 TAC § 60.1. Therefore, Issue No. 5 relating to the facility’s compliance history necessitates denial of the permit amendment. Finally, TCEQ does not have jurisdiction to consider property value when deciding whether to issue or deny this permit. Therefore, Issue No. 6 relating to property value is not relevant and material.

g. Issues Recommended for Referral

OPIC recommends referring Issues No. 1-5 in § III.b to SOAH for a contested case hearing.

h. Maximum Expected Duration for the Contested Case 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 setting a date by which the judge is expected to issue a proposal for decision, and as required by 30 TAC § 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. CONCLUSION

OPIC finds that Babette Birchett, Joan Cauley, Sheila Fiorella, Terry Leese, Jessica Monreal, Lora Simpson, and Cliff Uranga all qualify as affected persons. Also, each of these affected persons has raised at least one issue which is relevant and material to the Commission's decision on this application. Therefore, we respectfully recommend the Commission grant each of these hearing requests.

We further recommend the Commission refer the following issues to the State Office of Administrative Hearings for a contested case hearing:

1. Whether the proposed amendment to the facility will cause nuisance odors and interfere with the use and enjoyment of requester's property?
2. Whether the proposed amendment to the facility will adversely affect the health and safety of the surrounding community?

3. Whether the proposed amendment to the facility necessitates additional visual screening?
4. Whether the proposed operations adequately protect local surface and groundwater resources?
5. Whether the facility's compliance history necessitates denial of the permit amendment?

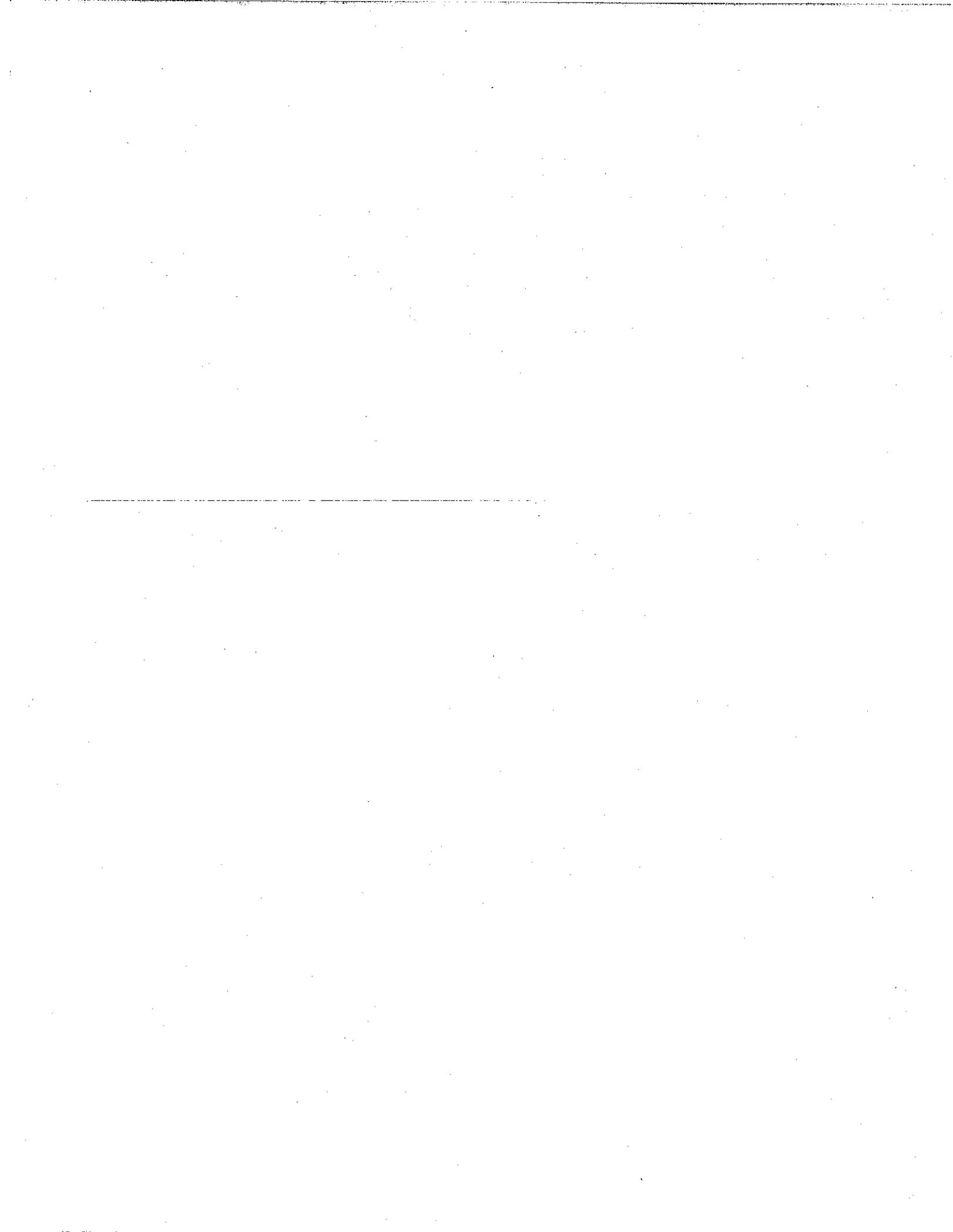
For the contested case hearing, OPIC recommends a duration of nine months from the first day of the preliminary hearing to issuance of the proposal for decision.

Respectfully submitted,

Vic McWherter
Public Interest Counsel

By: 

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IESI TX LANDFILL LP
TCEQ DOCKET NO. 2016-1211-MSW

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