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Vic McWherter, Public Interest Counsel

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 30, 2022

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

RE: **IN THE MATTER OF THE APPLICATION BY THE CITY OF WACO
FOR PERMIT NO. 2400
TCEQ DOCKET NO. 2022-0977-MSW**

Dear Ms. Gharis:

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 "Sheldon P. Wayne".

Sheldon P. Wayne, Attorney
Assistant Public Interest Counsel

cc: Mailing List

TCEQ DOCKET NO. 2022-0977-MSW

**IN THE MATTER OF THE
APPLICATION BY THE CITY OF
WACO FOR PERMIT NO. 2400**

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**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 submits the following.

I. INTRODUCTION

A. Summary of Position

OPIC recommends the Commission grant the hearing requests of Tehuacana Creek Water Control and Improvement District No. 1, Save Axtell Families and the Environment, Cynthia Banik Dunlap, Joe Wilburn Dunlap, Darren Porter, Melissa Porter, David Reed, Jr., Elisabeth Rigby, Steven Rigby, Susan Swaner, and James Trayler. OPIC recommends denying the remaining hearing requests. OPIC further recommends the Commission refer the issues specified in Section III.C for a contested case hearing at the State Office of Administrative Hearings (“SOAH”) with a maximum duration of 180 days. Finally, OPIC recommends the Commission deny the pending request for reconsideration.

B. Background of Facility

On August 8, 2018, the City of Waco (“Waco” or “Applicant”) applied to the TCEQ for a permit to authorize the construction of a new municipal solid waste (“MSW”) landfill (the “Facility”). The Facility is proposed to be located approximately 0.4 miles south of the intersection of TK Parkway and State Highway 31 in McLennan and Limestone Counties. If the permit is issued, Waco will be authorized to construct and operate a Type I MSW landfill with a total permit boundary of 502.5 acres, of which approximately 173.8 acres would be used for waste disposal. Authorized wastes may be accepted at an average rate of approximately 1,070 yards per day, with an estimated maximum of 1,590 yards per day. and may increase to a maximum of 900 tons per day.

The Executive Director (“ED”) has prepared a draft permit (“Draft Permit”) that would authorize Waco to dispose of household waste, yard waste, commercial waste, construction and demolition waste, special waste, Class 2 non-hazardous industrial wastes, and Class 3 non-hazardous industrial wastes which include rock, brick, glass, dirt, certain plastics and rubber, and other waste as approved by the ED.

C. Procedural Background

TCEQ received this application on August 8, 2018, and declared it administratively complete on September 14, 2018. The first Notice of Receipt of Application and Intent to Obtain a Municipal Solid Waste Permit (NORI) was published in English and Spanish on September 26, 2018 in *Waco Tribune-Herald* in McLennan County, and in English and Spanish on September 26, 2018 in *Mexia News* in Limestone County. The second NORI was published in English and Spanish on July 11, 2020 in *Waco Tribune-Herald* in McLennan County, and in English and

Spanish on July 11, 2020, in *Mexia News* in Limestone County, and in English and Spanish on July 16, 2020, in *Groesbeck Journal* in Limestone County.

The ED completed the technical review of the application on October 18, 2021 and prepared a draft permit. The Notice of Application and Preliminary Decision (NAPD) was published in English and Spanish on October 27, 2021, in *Waco Tribune-Herald* in McLennan County, in English and Spanish on October 27, 2021, in *Mexia News* in Limestone County, and in English and Spanish on October 28, 2021, in *Groesbeck Journal* in Limestone County.

The ED held two public meetings on the application. The first public meeting was held on August 15, 2019 at the Axtell High School Gymnasium in Axtell. Notice of the public meeting was published in English on July 24, July 31, and August 7, 2019, in *Mexia News* in Limestone County, and in English on July 24, July 31 and August 7, 2019, in *Waco Tribune-Herald* in McLennan County. The second public meeting was held virtually through webinar on September 23, 2021. Notice of the public meeting was published in English and Spanish on September 1, September 8, and September 15, 2021, in *Mexia News* in Limestone County, in English and Spanish on September 2, September 9, and September 16, 2021, in *Groesbeck Journal* in Limestone County, and in English and Spanish on September 1, September 8, and September 15, 2021, in *Waco Tribune-Herald* in McLennan County.

The public comment period for this application closed on November 29, 2021. The Chief Clerk mailed the ED's Decision and Response to Comments (RTC) on May 10, 2022. The deadline for filing requests for a contested case hearing was June 9, 2022. The Commission received a request for reconsideration and numerous timely-filed hearing requests as discussed below.

II. APPLICABLE LAW

A. Request for Reconsideration

Any person may file a request for reconsideration of the ED's decision under Title 30, Texas Administrative Code ("TAC") § 55.201(e). The request must be in writing and filed with the Chief Clerk no later than 30 days after the Chief Clerk mails the ED's decision and RTC. The request must expressly state that the person is requesting reconsideration of the decision and give reasons why the decision should be reconsidered.

B. Requests for Hearing

The application was filed after September 1, 2015, and is therefore subject to the procedural rules adopted pursuant to Senate Bill 709. Tex. S.B. 709, 84th Leg., R.S. (2015). Under Title 30 TAC § 55.201(c), a hearing request by an affected person must be in writing, must be timely filed, may not be based on an issue raised solely in a public comment which has been withdrawn, and, for applications filed on or after September 1, 2015, must be based only on the affected person's timely comments.

Section 55.201(d) states that 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 by the requestor 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 ED's responses to the requestor's comments that the requestor disputes, the factual basis of the dispute, and list any disputed issues of law; and

(5) provide any other information specified in the public notice of application.

30 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. An interest common to members of the general public does not qualify as a personal justiciable interest. Relevant factors to be 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;
- (6) for a hearing request on an application filed on or after September 1, 2015, whether the requestor timely submitted comments on the application that were not withdrawn; and
- (7) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

30 TAC § 55.203(c).

Under § 55.203(d), to determine whether a person is an affected person for the purpose of granting a hearing request for an application filed on or after September 1, 2015, the Commission may also consider the following:

- (1) the merits of the underlying application and supporting documentation in the administrative record, including whether the application meets the requirements for permit issuance;
- (2) the analysis and opinions of the executive director; and
- (3) any other expert reports, affidavits, opinions, or data submitted by the executive director, the applicant, or hearing requestor.

30 TAC § 55.203(d).

Under 30 TAC § 55.211(c)(2)(A)(ii), for an application filed on or after September 1, 2015, the Commission shall grant a hearing request made by an affected person if the request raises disputed issues of fact that were raised by the affected person during the comment period, that were not withdrawn by filing a withdrawal letter with the Chief Clerk prior to the filing of the RTC, and that are relevant and material to the Commission's decision on the application. Under § 55.211(c)(2)(B)–(D), the hearing request must also be timely filed with the Chief Clerk, pursuant to a right to hearing authorized by law, and comply with the requirements of § 55.201.

III. DISCUSSION

A. Request for Reconsideration

Fred Swaner submitted a request for reconsideration of the ED's decision on June 9, 2022. He requested that the ED reconsider the application on the basis that it inadequately addressed traffic, litter, and noise pollution. An evidentiary record would be necessary for OPIC to make a recommendation to the Commission as to whether the ED's decision should be denied based on these concerns. As discussed below, OPIC is recommending that many of these issues be referred for a contested case hearing. For these reasons, OPIC recommends denial of Fred Swaner's request for reconsideration.

B. Determination of Affected Person Status

Requests by Elected Officials and Governmental Entities

State Representative Kyle Kacal

State Representative Kyle Kacal submitted a request on November 24, 2021. While there are special statutory and regulatory provisions relating to a legislator's request for a public meeting, there are no specific requirements relating to requests for a contested case hearing filed by a legislator. It is unclear whether Representative Kacal intended to request a second public meeting or a contested case hearing; therefore, out of an abundance of caution, OPIC has analyzed his submittal as a hearing request. His request details concerns regarding the first public meeting, but does not contain any specific statements of how he may be affected by the proposed landfill. A requestor must articulate an interest that relates to a legal right, duty, privilege, power, or economic interest affected by the application in their request. 30 TAC § 55.203(a). Because the request does not contend that creation of the proposed landfill would affect his personal interests, OPIC is unable to find that Representative Kacal has demonstrated that he possesses a personal justiciable interest in this matter and must respectfully recommend denial of his hearing request.

Tehuacana Creek WCID No. 1

McLennan and Hill Counties Tehuacana Creek Water Control and Improvement District No. 1 (the "District") timely submitted comments on September 27, 2021 and a contested case hearing request on June 6, 2022. In both request and comments, the District stated that it holds an easement at the site of the proposed landfill and consequently, operation of the landfill will violate 30 TAC § 330.543(a), which does not allow certain solid waste activities to occur within any easement. In its comments, the District provided a map which appears to show that the easement encompasses the proposed Facility's footprint.

A holder of an easement over the subject property possesses a legal right, duty, privilege, power, or economic interest affected by the application under 30 TAC § 55.203(a). Further, this demonstrates that the District, as a governmental entity, has an interest in issues relevant to the application. 30 TAC § 55.203(c)(7). This interest is unique to the District, rather than being common to members of the general public. Additionally, given that the easement directly affects the subject property, OPIC finds there is a reasonable relationship between the District's interest and the regulated activity. Therefore, OPIC finds that the District has successfully demonstrated that it qualifies as an affected person and respectfully recommends that the Commission grant its hearing request.

Additionally, the District jointly submitted a hearing request with the group Save Axtell Families and the Environment on June 9, 2022. The request details a number of issues as discussed below. Of those issues, water quality and negative impact to wildlife were also raised by the District in timely comment and therefore are appropriate for referral to the State Office of Administrative Hearings.

Group Requests

Save Axtell Families and the Environment ("SAFE") timely submitted a combined comment and hearing request on November 29, 2021, and a later hearing request on June 9, 2022. SAFE states that it is a non-profit organization with the goal of protecting public health, quality of life, and the environment in Limestone, Hill, and McLennan Counties. As such, the interests the group or association seeks to protect are germane to the organization's purpose as required by 30 TAC § 55.205(b)(3). The request identifies James Trayler as a group member who would otherwise have standing to request a hearing in his own right. The request explains that Mr. Trayler owns 375 acres of property adjacent to the proposed landfill, which he uses for recreational

activities. While not shown on the ED's map, Mr. Trayler's property is identified on the adjacent landowner's map submitted as part of the application. Given his property's location relative to the proposed landfill, Mr. Trayler would have standing to request a hearing in his own right as required by 30 TAC § 55.205(b)(2). Further, neither the claim asserted nor the relief requested requires the participation of the individual members in the case as required by 30 TAC § 55.205(b)(4).

In its requests, SAFE details a large number of concerns, including those regarding land use compatibility, floodplains, odor, adverse impacts to water quality and wildlife. Because OPIC concludes that SAFE has met all requirements for group standing, OPIC finds that it qualifies as an affected person and respectfully recommends that the Commission grant its hearing request.¹

Individual Requests

1. Requests That Have Articulated an Interest Related to a Legal Right, Duty, Privilege, Power, or Economic Interest Affected by the Application or an Interest Protected by the Law Under Which This Application is Considered

All of the requestors in the below two groups have articulated interests that are within the Commission's jurisdiction to consider in the context of a landfill application. Their stated concerns include concerns about odor, land use compatibility, and potential negative impacts on human health, water quality, and the environment.

A. Requestors Located Within One Mile of the Facility's Boundaries

The requestors in this section are located approximately one mile or less from the proposed landfill's boundaries, which greatly increases the likelihood that they will be affected in a way not common to members of the general public. Their locations, taken in combination with their stated concerns, demonstrate that these requestors possess a personal justiciable interest in this matter. Accordingly, OPIC respectfully recommends that the following requestors be found as affected

¹ OPIC notes that James Trayler additionally submitted multiple comments and hearing requests in his individual capacity as discussed in Section III.1.A (Individual Requests).

persons by the Commission: Cynthia Banik Dunlap, Joe Wilburn Dunlap, Darren Porter, Melissa Porter, David Reed, Jr., Elisabeth Rigby, Steven Rigby, Susan Swaner, and James Trayler.

Cynthia Banik Dunlap submitted a timely hearing request on June 9, 2022 raising issues she previously raised in her own timely comment. Her request raises concerns related to odor, litter, feral hogs, noise, traffic, operating hours of the facility, and potential negative impacts on human health, water quality, and the environment. These interests include interests that are protected by the law under which this application will be considered. The map created by the ED's staff confirms that Cynthia Dunlap is located within a mile of the Facility. Given her proximity to the Facility and the nature of her interests, OPIC finds there is a reasonable relationship between the interests claimed and the activity regulated. For these reasons, OPIC finds that Cynthia Dunlap is an affected person and respectfully recommends that the Commission grant her hearing request.

Joe Wilburn Dunlap submitted a timely hearing request on June 8, 2022 raising issues he previously raised in his own timely comment. His request articulates concerns regarding odor, litter, traffic, and negative impacts to human health. These interests are protected by the law under which this application will be considered. Additionally, the ED's map confirms that Mr. Dunlap is located less than one mile from the proposed Facility. Based on these stated concerns and his proximity to the proposed Facility, OPIC finds there is a reasonable relationship between the interests claimed and the activity regulated. For these reasons, OPIC finds that Joe Dunlap is an affected person and respectfully recommends that the Commission grant his hearing request.

Darren and Melissa Porter jointly submitted a timely hearing request November 17, 2021. The request was filed during the comment period, and raised concerns related to odor, impacts on wetlands and groundwater, the floodplain, and land use compatibility issues. These interests are protected by the law under which this application will be considered. The ED's map demonstrates

that the Porters lives within a mile of the proposed Facility. Given their proximity to the Facility and the nature of their stated interests, OPIC finds there is a reasonable relationship between the interests claimed and the activity regulated. For these reasons, OPIC finds that Darren and Melissa Porter are affected persons and respectfully recommends that the Commission grant their hearing request.

David Reed, Jr. submitted a timely hearing request on June 7, 2022 based on timely comments he previously submitted. In his request, he raised concerns regarding the effect of surface water run-off from the landfill on water quality generally and, specifically, on the nearby Reservoir 19. This interest is protected by the law under which this application will be considered. Mr. Reed provided only a P.O. box address in his hearing request; consequently, his location was not depicted on the ED's map. However, Mr. Reed's property is identified on the adjacent landowner's map submitted as part of the application. Given the requestor's proximity to the Facility and the nature of his interest, OPIC finds there is a reasonable relationship between his claimed interest and the activity regulated. For these reasons, OPIC finds that David Reed, Jr. is an affected person and respectfully recommends that the Commission grant his hearing request.

Elisabeth Rigby submitted two timely hearing requests on September 26, 2018. The requests were filed during the comment period, and raised concerns related to potential negative impacts on human health and water quality. These interests are protected by the law under which this application will be considered. The ED's map demonstrates that Elisabeth Rigby lives within a mile of the Facility. Given the requestor's proximity to the Facility and the nature of her interests, OPIC finds there is a reasonable relationship between her claimed interests and the activity regulated. For these reasons, OPIC finds that Elisabeth Rigby is an affected person and respectfully recommends that the Commission grant her hearing request.

Steven Rigby submitted a timely hearing request on September 26, 2018. The request was filed during the comment period, and raised concerns related to traffic, noise, and potential negative impacts on water quality, the environment, and wildlife. These interests are protected by the law under which this application will be considered. The ED's map demonstrates that Steven Rigby lives within a mile of the Facility. Given the requestor's proximity to the Facility and the nature of his interests, OPIC finds there is a reasonable relationship between his claimed interests and the activity regulated. For these reasons, OPIC finds that Steven Rigby is an affected person and respectfully recommends that the Commission grant his hearing request.

Susan Swaner submitted a timely hearing request on September 25, 2018. The request was filed during the comment period, and raised concerns related to odor, attraction of feral hogs, and potential negative impacts on water quality and the environment. These interests are protected by the law under which this application will be considered. The ED's map demonstrates that Susan Swaner lives within a mile of the Facility. Given the requestor's proximity to the Facility and the nature of her interests, OPIC finds there is a reasonable relationship between her claimed interests and the activity regulated. For these reasons, OPIC finds that Susan Swaner is an affected person and respectfully recommends that the Commission grant her hearing request.

James Trayler, in addition to being a member of SAFE, submitted multiple timely individual hearing requests. The requests were filed during the comment period, and raised concerns related to odor, flooding, traffic, property values, aviation, and potential negative impacts on water quality and the environment. These concerns include interests protected by the law under which this application will be considered. While not depicted on the ED's map, Mr. Trayler explains that he owns property that adjoins the proposed Facility. Given the requestor's proximity to the Facility and the nature of his interests, OPIC finds there is a reasonable relationship between

his claimed interests and the activity regulated. For these reasons, OPIC finds that James Trayler is an affected person and respectfully recommends that the Commission grant his individual hearing request.

B. Requestors Located Beyond One Mile of the Facility's Boundaries

This group of requestors articulated interests that are relevant to the Commission's consideration of this landfill application, however they all provided addresses that are located at distances greater than one mile from the proposed Facility's boundaries. While some of their concerns include interests which are protected by the law under which this application will be considered, because of the intervening distance between these requestors and the proposed Facility, OPIC cannot conclude that they will be impacted by the Facility in a manner which is not common to the general public. Therefore, OPIC finds that they have failed to demonstrate that they possess a personal justiciable interest in the matter as required by 30 TAC § 55.203(a). Consequently, OPIC respectfully recommends that the Commission deny the requests of Jose Alvarez, Kaylee Engledow, Angela Green, Jasmin Guillen, Mary Harris, Phillip Kirk Harris, Suzanne Johnson, Charles Klanika, Kimberly Lucien, Christi Manning, Janet Burke McMillan, Ricky Pierce, Vicki Michelle Pierce, Randi Price, Kathleen Rigby, Dr. Alcario Serros, III, Leslie Gail Souders, David Stefka, Benjamin Luke Stokes, and Robert Stone.

2. Requests That Fail to Articulate Issues That Are Relevant and Material to the Application

The Commission received requests from the following individuals that did not articulate issues relevant and material to the application, and, therefore, did not demonstrate that these requestors possess a personal justiciable interest in this matter: Stephanie Marie Amy, Alton Boyett, Cynthia Ann Boyett, Dr. Julie Michelle Brannen, Denise Graham, Vickie Haynes, Stacy Howard, Katy Lynch, Mary Mann, Candace Nickel, Cathryne Nivin, Ernest Taylor Nivin, Stacy

Roof, Keven Tennison, Virginia Tierce, and Brent Weatherby.

These requests failed to articulate how and why the requestors believe they will be affected by the activity in a manner not common to members of the general public or otherwise fail to state an interest related to a state legal right, duty, privilege, power, or economic interest affected by the application. *See* 30 TAC § 55.203(a), (c). This group of requestors either did not explain how they believe they will be affected by the proposed landfill or otherwise did not state concerns that are within the jurisdiction of TCEQ to address when considering this landfill application. Therefore, OPIC respectfully recommends denial of this group of requestors.

C. Issues Raised in the Hearing Requests of Affected Persons

The affected persons discussed above raised the following issues in both comment and request:

- 1) Whether issuance of the Draft Permit is consistent with applicable local ordinances? (Raised by Save Axtell Families and the Environment (“SAFE”) and James Trayler)
- 2) Whether the Draft Permit is protective of human health, wildlife, including endangered or threatened species, and the environment, including wetlands? (Raised by Cynthia Dunlap, Joe Dunlap, SAFE, Darren Porter, Melissa Porter, Elisabeth Rigby, Steven Rigby, Susan Swaner, and James Trayler)
- 3) Whether the application demonstrates that the proposed Facility will comply with the easement and buffer zone requirements contained in 30 TAC § 330.543? (Raised by Tehuacana Creek Water Control and Improvement District No. 1 (the “District”), SAFE, and James Trayler)
- 4) Whether the Draft Permit provides sufficient measures to prevent the following nuisance conditions: odors, including its odor management and landfill gas management plan, noise, attraction of feral hogs, and litter? (Raised by Cynthia Dunlap, Joe Dunlap, Darren Porter, Melissa Porter, SAFE, Steven Rigby, Susan Swaner, and James Trayler)
- 5) Whether the proposed Facility will cause traffic congestion, traffic hazards, and damage to roads? (Raised by Cynthia Dunlap, Joe Dunlap, Melissa Porter, Steven Rigby, and James Trayler)

- 6) Whether the operating hours of the proposed landfill are unacceptable and should be altered, or otherwise limited? (Raised by Cynthia Dunlap)
- 7) Whether the proposed Facility complies with applicable floodplain rules, including whether the floodplain has been adequately delineated? (Raised by Darren Porter, Melissa Porter, SAFE, and James Trayler)
- 8) Whether the proposed Facility is compatible with surrounding land use? (Raised by Darren Porter, Melissa Porter, SAFE, and James Trayler)
- 9) Whether the Draft Permit contains sufficient provisions to adequately protect surface water quality, including nearby Reservoir 19, and groundwater quality, including assurance that groundwater has been adequately characterized, and that an adequate landfill liner is required? (Raised by Darren Porter, Melissa Porter, SAFE, the District, David Reed, Jr., Elisabeth Rigby, Susan Swaner, and James Trayler)
- 10) Whether the proposed Facility's design includes sufficient measures for erosion control and prevention? (Raised by SAFE and James Trayler)
- 11) Whether the geotechnical design of the landfill is adequate, including long-term slope stability? (Raised by SAFE and James Trayler)
- 12) Whether the application contains an adequate Site Operating Plan? (Raised by SAFE and James Trayler)
- 13) Whether the application contains adequate provisions to protect against the hazards of methane gas discharge? (Raised by James Trayler)
- 14) Whether the Applicant has demonstrated an adequate level of competency to operate the Facility? (Raised by SAFE and James Trayler)
- 15) Whether the operation of the proposed Facility will adversely affect affected persons' aviation activities? (Raised by James Trayler)
- 16) Whether the construction and operation of the proposed Facility will negatively affect property values? (Raised by James Trayler)

D. Issues Raised in the Hearing Requests Remain Disputed

There is no agreement between the hearing requestors and the ED on the issues raised in the hearing requests; thus, they remain disputed.

E. Whether the Disputed Issues Are 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). The issues listed above are issues of fact.

F. Issues Were Raised by the Affected Persons During the Comment Period

All of the above issues were raised by the affected persons during the public comment period.

G. The Hearing Requests are Based on Issues Raised in Public Comments Which Have Not Been Withdrawn

The hearing requests are all based on timely comments that have not been withdrawn.

H. Issues That are Relevant and Material to the Decision on the Application

The affected persons raise issues that are relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A), as well as issues that are not relevant and material. 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. The Commission can only consider issues within its jurisdiction. Therefore, relevant and material issues include those governed by the substantive law of the permit at issue. *Anderson v. Liberty Mutual, Inc.*, 477 U.S. 242, 248-51 (1986).

Local Ordinances

The affected persons specifically raise concerns regarding the proposed Facility's compliance with local ordinances prohibiting the disposal of municipal solid waste. Under Tex. Health & Safety Code § 364.012(a) and (b), a county may prohibit solid waste disposal in the county by adopting an ordinance designating an area where such activity is not prohibited. Therefore, Issue No. 1 is relevant and material.

Protection of Human Health, Wildlife, and the Environment

The affected persons raised concerns regarding their health, wildlife, including endangered or threatened species, and the environment. The Texas Solid Waste Disposal Act and 30 TAC Chapter 330 were promulgated to protect human health and the environment. 30 TAC § 330.61(h) requires that the use of any land for a municipal solid waste facility not adversely impact human health or the environment. Also, TCEQ rules require that the permit have provisions to safeguard human health and welfare, and the environment. Additionally, under § 330.551(a), the operation of a facility must not adversely affect an endangered or threatened species or its critical habitat. Therefore, Issue No. 2 is relevant and material.

Easement and Buffer Zones

TCEQ rules prohibit the unloading, storing, processing, or disposal of solid waste within any buffer zone, easement, or right of way that crosses the Facility. 30 TAC §§ 330.543(a), 330.141(a). Therefore, Issue No. 3 is relevant and material.

Nuisance Conditions

30 TAC § 330.15(a)(2) prohibits the creation and maintenance of a nuisance. Nuisance, defined by 30 TAC § 330.3(97), is “municipal solid waste that is stored, processed, or disposed of in a manner that causes the pollution of the surrounding land, the contamination of groundwater or surface water, the breeding of insects or rodents, or the creation of odors adverse to human health, safety, or welfare.” Also, TCEQ rule § 330.149 requires that the site operating plan feature an odor management plan to control odors.

In accordance with 30 TAC § 330.239, Applicant must take necessary measures to minimize noise pollution. While TCEQ rules do not place specific limits on facility-generated noise, noise is indirectly addressed by buffer zone requirements. 30 TAC § 330.141(b) requires

establishment and maintenance of buffer zones between waste management activities and the site permit boundary. Also, the Applicant must provide procedures for controlling scavenging animals, such as feral hogs. 30 TAC § 330.151.

Regarding litter, under 30 TAC § 330.139, the operation standards for landfills require that the working face of the landfill must be maintained and operated in a manner to control windblown solid waste and litter. Additionally, in accordance with 30 TAC § 330.145, the Facility must take steps to encourage vehicles hauling waste to the Facility to be enclosed or provided with effective measures to securely contain loads of waste. Clean-up of waste materials spilled along roads that serve the facility for two miles beyond the facility entrance is governed by 30 TAC §§ 330.139 and 330.145. Therefore, OPIC finds that Issue No. 4 is relevant and material.

Traffic

Under 30 TAC § 330.61(i), an MSW landfill application must include data on access roads for the proposed facility, including: availability and adequacy of roads that the owner or operator will use to access the site; volume of vehicular traffic on access roads within one mile of the proposed facility, both existing and expected, during the expected life of the facility; and projections on the volume of traffic expected to be generated by the facility on the access roads within one mile of the proposed facility. Therefore, Issue No. 5 is relevant and material.

Operating Hours

The proposed Facility must comply with the operating hours laid out in 30 TAC 330.135(a). Therefore, Issue No. 6 is relevant and material.

Floodplain Issues

Floodplains are regulated, in part, under 30 TAC 330.547(a), which states that a MSW facility may not conduct waste disposal operations in a 100-year floodway. Further, a landfill

located in a floodplain may not restrict the flow of a 100-year flood, reduce the floodplain's capacity to store water, or cause washout of solid waste. 30 TAC § 330.547(b). Therefore, Issue No. 7 is relevant and material.

Land Use Compatibility

The affected persons raise the issue of whether the construction and operation of the Facility is compatible with surrounding land use. 30 TAC § 330.61(h) requires that the owner or operator of an MSW facility provide information regarding the likely impacts of the facility on cities, communities, groups of property owners, or individuals by analyzing the land use, zoning in the vicinity, community growth patterns, water wells, and other factors associated with the public interest. Therefore, Issue No. 8 is relevant and material.

Surface and Ground Water Quality

TCEQ's rules in 30 TAC §§ 330.61(j) and (k), and 30 TAC §§ 330.63(e) and (f) require an applicant to provide adequate information about soils, geology, groundwater, and surface water within and around the site, and a groundwater monitoring program, including a sampling and analysis plan in the application. The groundwater monitoring program must include a monitoring system, based on site-specific technical information, to detect any contamination from the Facility prior to migration off-site. The system must consist of a sufficient number of wells, installed at appropriate locations and depths, to yield representative groundwater samples from the uppermost aquifer. Also, the landfill must be constructed with a composite liner and leachate collection system meeting the groundwater protection design criteria in 30 TAC § 330.331(a)(2).

Additionally, liquids that have contacted waste must be disposed of in a manner that does not cause contamination of ground or surface water. 30 TAC § 330.207(a). Finally, the ED's Response to Comments states that the application does not allow any contaminated water to be

discharged offsite to surface waters that may be sued to water crops and livestock.² Therefore, Issue No. 9 is relevant and material.

Erosion Control

TCEQ rules address erosion in 30 TAC 330.305(d), which states that the landfill must provide effective erosional stability during all phases of landfill operation, closure, and post-closure care. Therefore, Issue No. 10 is relevant and material.

Geotechnical Design

Under 30 TAC § 330.63(e)(5), An applicant is required to submit geotechnical data describing the geotechnical properties of the subsurface soil along with a discussion about the suitability of the soils and strata for landfill development. An applicant must also demonstrate that the liner will not undergo uplift from certain conditions. 30 TAC § 330.337(b). Finally, MSW facilities are subject to location restrictions related to unstable areas, fault areas, and seismic impact zones. 30 TAC §§ 330.559, 330.555, 330.557. Therefore, Issue No. 11 is relevant and material.

Site Operating Plan

The requirements for site operating plans are set forth in 30 TAC § 330.127. Therefore, Issue No. 12 regarding the Facility's site operating plan is relevant and material.

Landfill Gas Management

TCEQ's rules in 30 TAC § 330.63(g) and § 330.371 require control of landfill gas to prevent possible explosive hazards due to migration and accumulation of methane. Therefore, Issue No. 13 is relevant and material.

² ED's Response to Comments, p. 6 of 71.

Applicant's Competency

Under 30 TAC § 330.59(f)(1), an Applicant is required to demonstrate competency by making several showings, including listing all solid waste sites managed by the applicant for the last ten years and employing a licensed MSW supervisor. Further, the issue regarding Applicant's competency may be construed as an inquiry into whether Applicant's compliance history demonstrates that it possesses the requisite competency to operate the Facility. Under Texas Health and Safety Code §§ 361.084(c) and 361.089(f), and 30 TAC §§ 60.1(a)(1)(A) and 60.3(a)(1), the Commission must consider an Applicant's compliance history in making a decision regarding issuance of a permit. Therefore, OPIC finds Issue No. 14 is relevant and material.

Aviation

Affected person James Trayler raised the issue of the landfill affecting his personal aviation activities. He explained that he operates a helicopter at his property, and because birds will be attracted to the landfill, is concerned about the hazard posed by bird strikes. While TCEQ rules require the ED to coordinate with the Federal Aviation Administration for all MSW land disposal facilities in the vicinity of airports, no rules contemplate consideration of the impact a landfill may have on personal aviation activities, such as Mr. Trayler's. Therefore, OPIC finds that Issue No. 15 is not relevant and material to the Commission's decision to grant or deny this permit.

Property Values

The TCEQ does not have jurisdiction to consider the proposed permit's impact on property values. Therefore, Issue No. 16 is not relevant and material to the Commission's decision to grant or deny this permit.

I. Issues Recommended for Referral

For the reasons discussed above, OPIC recommends referring Issue Nos. 1-14 in Section III.C to SOAH for a contested case hearing.

J. 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, for applications filed on or after September 1, 2015, the administrative law judge must conclude the hearing and provide a proposal for decision by the 180th day after the first day of the preliminary hearing, or a date specified by the Commission, whichever is earlier. 30 TAC § 50.115(d)(2). 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 § 55.209(e)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be 180 days from the first date of the preliminary hearing until the proposal for decision is issued.


IV. CONCLUSION

OPIC recommends the Commission grant the hearing requests of Tehuacana Creek Water Control and Improvement District No. 1, Save Axtell Families and the Environment, Cynthia Banik Dunlap, Joe Wilburn Dunlap, Darren Porter, Melissa Porter, David Reed, Jr., Elisabeth Rigby, Steven Rigby, Susan Swaner, and James Trayler. OPIC recommends denying the remaining hearing requests. OPIC further recommends the Commission refer Issue Nos. 1-14 specified in Section III.C for a contested case hearing at SOAH with a maximum duration of 180 days. Finally, OPIC recommends the Commission deny the pending request for reconsideration.

Respectfully submitted,

[Signature on Next Page]

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2022, the original of the Office of Public Interest Counsel's Response to Hearing Requests and Request for Reconsideration was filed with the Chief Clerk of the TCEQ and a copy was served on all persons listed on the attached mailing list via electronic mail, and/or by deposit in the U.S. Mail.



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