

TCEQ DOCKET NO. 2022-0977-MSW

IN RE THE APPLICATION OF THE §  
CITY OF WACO FOR MUNICIPAL §  
SOLID WASTE PERMIT NO.2400 §  
§  
§  
BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

**SAFE, JAMES TRAYLER AND TCWCID#1’S REPLY TO  
RESPONSES TO HEARING REQUESTS**

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

Save Axtell Families and the Environment (“SAFE”), Mr. James Trayler, and the McLennan and Hill Counties Tehuacana Creek Water Control and Improvement District #1 (“TCWCID#1”) (jointly, “Requestors”) hereby submit this Reply to the Executive Director’s (“ED”), the Office of Public Interest Counsel’s (“OPIC”) and Applicant the City of Waco’s (“Applicant”) Responses to Hearing Requests regarding the application by the City of Waco for new Type I Municipal Solid Waste (MSW) Landfill Proposed Permit No. 2400. The Commission should find that Requestors are affected persons and should grant their requests for a contested case hearing. The Commission should refer no less than 24 issues for hearing, as clarified and explained more thoroughly below.

**I. The ED, OPIC, and Applicant correctly determined that the Requestors are affected persons.**

The ED and OPIC recommend granting the hearing requests of SAFE, James Trayler, and TCWCID#1,<sup>1</sup> and the Applicant does not oppose the granting of their

---

<sup>1</sup> Executive Director’s Response to Hearing Requests and Requests for Reconsideration (hereinafter, “ED’s Response”) at 7-8; The Office of Public Interest Counsel’s Response to Requests for Hearing and Request for Reconsideration (hereinafter, “OPIC’s Response”) at 7-10.

hearing requests.<sup>2</sup> By this Reply, Requestors confirm that although Mr. Trayler's property is not identified on the ED's GIS map, the map of adjacent landowners that appears in the application and that was included in the ED's Response accurately depicts the location of Mr. Trayler's property directly adjacent to the site of the proposed landfill.

**II. The ED properly raised the following issues, which should be referred for hearing with some changes.**

The Commission should refer the issues identified by the ED, with some small clarifications, as follows. In addition to the twenty issues identified in the ED's Response, the Commission should also refer no less than four additional issues included in Requestors' comments and hearing requests. For ease of reference, Requestors begin by following the numbering used in the ED's Response.

**1. Whether the permit application is adequately protective of endangered and threatened species. (RTC no. 2)**

The ED and OPIC recommend referral of this issue, and both have identified SAFE and Mr. Trayler as raising the issue. Applicant also acknowledges that SAFE and Mr. Trayler raised this issue and does not object to it being referred.<sup>3</sup> Requestors agree that it was raised by SAFE and Mr. Trayler and should be referred to SOAH.

**2. Whether the proposed facility is compatible with existing land uses. (RTC nos. 3 and 9)**

The ED and OPIC recommend referral of this issue; however, though the ED and OPIC acknowledge that SAFE raised the issue, the ED, unlike OPIC, failed to

---

<sup>2</sup> Applicant's Response to Requests for Hearing (hereinafter, "Applicant's Response") at 9-10.

<sup>3</sup> Applicant's Response at 11-12.

acknowledge that Mr. Trayler also raised the issue.<sup>4</sup> Applicant also acknowledges that SAFE and Mr. Trayler raised this issue and does not object to it being referred.<sup>5</sup> Requestors agree that it was raised by SAFE and Mr. Trayler and should be referred to SOAH.

**3. Whether the Applicant has demonstrated that the proposed landfill would be adequately protective of groundwater. (RTC no. 5)**

The ED and OPIC recommend referral of this issue, and both have identified SAFE, Mr. Trayler, and TCWCID#1 as raising this issue.<sup>6</sup> Applicant also acknowledges that SAFE, Mr. Trayler, and TCWCID#1 raised this issue and does not object to it being referred.<sup>7</sup> Requestors agree that it was raised by SAFE, Mr. Trayler, and TCWCID#1 and should be referred to SOAH. This issue should also be inclusive of whether the Applicant has demonstrated that the facility includes an adequate groundwater monitoring system.<sup>8</sup>

**4. Whether the Applicant has demonstrated that the proposed landfill would be adequately protective of surface water. (RTC no. 6)**

The ED and OPIC recommend referral of this issue, and both have identified SAFE and Mr. Trayler as raising this issue, though only OPIC acknowledges that TCWCID#1 also raised the issue.<sup>9</sup> Applicant also acknowledges that Mr. Trayler and TCWCID#1 raised this issue, but fails to recognize that SAFE raised the issue; however,

---

<sup>4</sup> OPIC's Response at 15 (OPIC Issue 8).

<sup>5</sup> Applicant's Response at 11 (Applicant Issue 9).

<sup>6</sup> OPIC's Response at 15 (OPIC Issue 9).

<sup>7</sup> Applicant's Response at 11 (Applicant Issue 5).

<sup>8</sup> See Requestors' Hearing Request at 3 (Issue 9).

<sup>9</sup> OPIC's Response at 15 (OPIC Issue 9).

Applicant does not object to it being referred.<sup>10</sup> Requestors agree that it was raised by SAFE, Mr. Trayler, and TCWCID#1<sup>11</sup> and should be referred to SOAH.

**5. Whether the Applicant has provided an adequate delineation of the relevant floodplains, floodways, and wetlands and adequately addressed potential impacts of the proposed facility upon floodplains, floodways, and wetlands. (RTC no. 7)**

The ED and OPIC recommend referral of this issue, and both identified SAFE and Mr. Trayler as raising the issue, while the ED identified TCWCID#1 as also raising this issue.<sup>12</sup> Applicant also acknowledges that SAFE and Mr. Trayler raised this issue and does not object to it being referred.<sup>13</sup> Requestors agree that it was raised by SAFE, Mr. Trayler, and TCWCID#1<sup>14</sup> and should be referred to SOAH.

**6. Whether the Applicant has adequately addressed geologic and slope stability at the proposed facility. (RTC no. 8)**

The ED and OPIC recommend referral of this issue.<sup>15</sup> Applicant does not object to it being referred.<sup>16</sup> Requestors agree that it should be referred to SOAH.

**7. Whether the Applicant has demonstrated sufficient availability of soils for the construction of a liner. (RTC no. 8)**

The ED recommends referral of this issue, but failed to recognize that SAFE raised the issue of adequate soils for construction of the liner,<sup>17</sup> and also failed to

---

<sup>10</sup> Applicant's Response at 11 (Applicant Issue 6).

<sup>11</sup> Requestors' Hearing Request at 3 (Issues 5 and 7, including impacts on the downstream reservoir, Site 19).

<sup>12</sup> OPIC's Response at 15 (OPIC Issue 7).

<sup>13</sup> Applicant's Response at 11 (Applicant Issue 7).

<sup>14</sup> Requestors' Hearing Request at 3 (Issues 3 and 4, including issues related to whether the Applicant provided an adequate surface water drainage report).

<sup>15</sup> OPIC's Response at 15 (OPIC Issue 11).

<sup>16</sup> Applicant's Response at 11 (Applicant Issue 8).

<sup>17</sup> Requestors' Hearing Request at 4 (issue 12, referencing SAFE's prior comments).

recognize that both SAFE and Mr. Trayler raised the issue of whether the design and operation of the landfill liner meet all applicable requirements.<sup>18</sup> OPIC<sup>19</sup> and Applicant<sup>20</sup> also acknowledge that SAFE, Mr. Trayler, and TCWCID#1 raised this issue related to the liner in that it is relevant to whether groundwater would be protected. Applicant does not object to it being referred.<sup>21</sup> Therefore, Requestors assert that the issues related to whether the design and operation of the landfill liner will meet applicable requirements and will be sufficient, including whether the Applicant has demonstrated sufficient availability of soils for the construction of the liner, were raised by SAFE, Mr. Trayler, and TCWCID#1 and should be referred to SOAH.

**8. Whether the proposed design and operation of the landfill cover meets all applicable requirements. (RTC no. 13)**

The ED recommends referral of this issue, but failed to recognize that SAFE raised the issue of adequate cover.<sup>22</sup> Though OPIC's and Applicant's responses are silent as to the issue of cover, both acknowledge that windblown waste, odor, and vectors are issues within TCEQ's jurisdiction that were raised by SAFE,<sup>23</sup> and OPIC further acknowledges that SAFE and Mr. Trayler raised the issue of whether the application contains an adequate Site Operating Plan.<sup>24</sup> (Requestors maintain, however, that the issue of the design and operation of the landfill cover is separate from whether the SOP is

---

<sup>18</sup> See Requestors' Hearing Request at 4 (issue 17, referencing Mr. Trayler's and SAFE's prior comments).

<sup>19</sup> OPIC's Response at 15 (OPIC Issue 11).

<sup>20</sup> Applicant's Response at 11 (Applicant Issue 5).

<sup>21</sup> Applicant's Response at 11 (Applicant Issue 8).

<sup>22</sup> Requestors' Hearing Request at 4 (issue 12, referencing SAFE's prior comments).

<sup>23</sup> OPIC's Response at 14 (OPIC Issue 4) and Applicant's Response at 11 (Applicant Issues 20, 21, 22).

<sup>24</sup> OPIC's Response at 15 (OPIC Issue 12).

adequate.) Therefore, Requestors assert that the issue related to whether the proposed design and operation of the landfill cover will meet applicable requirements was raised by SAFE and should be referred to SOAH.

**9. Whether the proposed application includes adequate buffer zones. (RTC no. 14)**

The ED failed to acknowledge that TCWCID#1 raised the issue of buffer zones, but it is an issue, as was well-articulated in OPIC's Response, that is directly tied to the issues of easement protection, and whether the Applicant has the authority to conduct waste unloading, storage, disposal, or processing in certain areas crossing the site.<sup>25</sup> As pointed out below, the ED and Applicant acknowledge that TCWCID#1 raised the issue of easement protection and requisite property interests. Because the issue of buffer zones is directly related and these issues were raised by TCWCID#1, they should be referred to SOAH.<sup>26</sup>

**10. Whether the application adequately delineates and addresses easements and whether the Applicant has requisite property interests at the proposed site. (RTC no. 15)**

The ED and OPIC recommend referral of this issue, and both identified TCWCID#1 as raising the issue.<sup>27</sup> Applicant also acknowledges that TCWCID#1 raised this issue and does not object to it being referred as to whether the Application complies with 30 Tex. Admin. Code § 330.141, but does object "to an expansive issue related to other parties' potential property rights."<sup>28</sup> Rule 330.141 references Rule 330.543, in that

---

<sup>25</sup> OPIC's Response at 17 (OPIC Issue 3).

<sup>26</sup> Requestors Hearing Request at 3 (Issue 6, referencing prior comments by TCWCID)

<sup>27</sup> OPIC's Response at 15 (OPIC Issue 3).

<sup>28</sup> Applicant's Response at 11, 13 (Applicant Issue 15).

it mandates that minimum separating distance shall be maintained between solid waste processing and disposal activities within and adjacent to the facility boundary on property owned or controlled by the owner or operator as determined by the requirements of §330.543. Further, Rule 330.67 provides the Commission with jurisdiction to determine whether the Applicant has acquired a sufficient interest in or right to use of the surface estate of the property for which a permit is sought, include the access route. This means that the Commission does have jurisdiction to determine certain property rights, as necessary for determining the requirements in §§330.141, 330.543, & 330.67. Therefore, Requestors agree that this issue was raised by TCWCID#1 and should be referred to SOAH.

**11. Whether the Applicant has provided an adequate Site Operating Plan, including provisions for fire and emergency response. (RTC no. 17)**

The ED and OPIC recommend referral of this issue,<sup>29</sup> and Requestors agree that the issue should be referred to SOAH.

**12. Whether the Applicant has adequately addressed traffic impacts and traffic safety. (RTC no. 18)**

The ED and OPIC recommend referral of this issue, and both identified Mr. Trayler as raising the issue, while the ED also recognizes SAFE raised the issue.<sup>30</sup> Whether the roads used to access the facility site are available and adequate is an issue

---

<sup>29</sup> OPIC's Response at 15 (OPIC Issue 12).

<sup>30</sup> OPIC's Response at 15 (OPIC Issue 5).

that is within the Commission’s jurisdiction,<sup>31</sup> and it is an issue that was raised by SAFE and Mr. Trayler.<sup>32</sup> Therefore, the issue of whether the Applicant has adequately addressed traffic impacts and traffic safety and the roads used to access the facility site are available and adequate are issues that should be referred to SOAH.

**13. Whether the application adequately meets the applicable requirements for addressing visual impacts. (RTC no. 19)**

Requestors agree with the ED’s recommendation that this issue be referred to SOAH.

**14. Whether the Applicant has adequately addressed the control of windblown waste and debris. (RTC no. 20)**

The ED and OPIC recommend referral of this issue, and both identified SAFE as raising the issue.<sup>33</sup> Applicant also acknowledges that SAFE raised the issue and does not object to it being referred.<sup>34</sup> Requestors agree that the issue should be referred to SOAH.

**15. Whether the Applicant has adequately addressed the control of vectors at the proposed facility. (RTC no. 21)**

The ED and OPIC recommend referral of this issue, and both identified SAFE as raising the issue.<sup>35</sup> Applicant also acknowledges that SAFE raised the issue and does not object to it being referred.<sup>36</sup> Requestors agree that the issue should be referred to SOAH.

**16. Whether the application includes a sufficient odor control plan. (RTC no. 22)**

---

<sup>31</sup> See Interim Order concerning the application by Rancho Viejo Waste Management, LLC for new MSW Permit No. 2374, TCEQ Docket No. 2013-1506-MSW (Oct. 17, 2013) (referring issue N. “Whether the application adequately addresses traffic impacts and adequacy of roads”).

<sup>32</sup> Requestors Hearing Request at 4 (Issue 15, referencing prior comments by Mr. Trayler and SAFE).

<sup>33</sup> OPIC’s Response at 15 (OPIC Issue 4).

<sup>34</sup> Applicant’s Response at 11 (Applicant Issue 20).

<sup>35</sup> OPIC’s Response at 15 (OPIC Issue 4).

<sup>36</sup> Applicant’s Response at 11 (Applicant Issue 21).



The ED and OPIC recommend referral of this issue, and both identified SAFE and Mr. Trayler as raising the issue.<sup>37</sup> Applicant also acknowledges that SAFE raised the issue and does not object to it being referred.<sup>38</sup> Requestors agree that the issue should be referred to SOAH.

**17. Whether the Applicant has adequately addressed the hours of operation. (RTC no. 23)**

Requestors agree with the ED's and OPIC's recommendation that this issue be referred to SOAH.<sup>39</sup> Though the table included on pages 11 and 12 of Applicant's response includes an objection to "Noise and Operating Hours," a closer reading reveals that Applicant only objects to the referral of noise, but has no objection to the issue of operating hours being referred.<sup>40</sup> Therefore, the issue should be referred to SOAH.

**18. Whether the Applicant has an acceptable compliance history and has demonstrated evidence of competency. (RTC no. 30)**

The ED and OPIC recommend referral of this issue,<sup>41</sup> and Requestors agree.

**19. Whether the application is in violation of local ordinances prohibiting the processing and disposal of municipal solid waste. (RTC no. 32)**

The ED and OPIC both recommend referral of this issue, though to be clear, the issue was raised by both SAFE and Mr. Trayler; Requestors agree that the issue should be referred.<sup>42</sup> Applicant does not argue that this issue is outside the scope of the

---

<sup>37</sup> OPIC's Response at 15 (OPIC Issue 4).

<sup>38</sup> Applicant's Response at 11 (Applicant Issue 22).

<sup>39</sup> OPIC's Response at 15 (OPIC Issue 6).

<sup>40</sup> Applicant's Response at 14.

<sup>41</sup> OPIC's Response at 15 (OPIC Issue 14).

<sup>42</sup> OPIC's Response at 14 (OPIC Issue 1).

Commission's jurisdiction or not relevant or material to the decision on the application. Rather, Applicant argues only that the issue is not in dispute. But it is not the Applicant that determines whether the issue is disputed, it is those who are requesting a hearing. In his response to comments, the ED determined that landfill siting ordinances were adopted after the Applicant filed with TCEQ its application for a permit to construct and operate the proposed landfill facility. Requestors dispute this determination. Therefore, the issue should be referred to SOAH.

**20. Whether the application is adequately protective of human health.  
(RTC no. 1)**

Requestors agree with the ED and OPIC, that this issue should be referred to SOAH. Applicant argues, without support, that any allegation based on a general health or environmental concern must be premised on a specific violation of another statute or rule. This is simply not the test for whether the Commission should refer an issue to SOAH for a contested case hearing, and adopting such an argument would be contrary to the law. That evidence to rebut the presumption must demonstrate that the draft permit violates a specifically applicable state or federal legal or technical requirement, does not mean that the issue of whether the draft permit will be protective of human health is not one that is in dispute and involves questions of fact or law. The Texas Solid Waste Disposal Act and 30 TAC Chapter 330 were promulgated to protect human health and so the issue is certainly relevant and material to the Commission's decision on the application and should be referred to SOAH.

**III. The ED failed to identify the following issues that should also be referred to a hearing.**

In addition to those issues identified by the ED, OPIC's Response identified the following issues that were raised by one of the Requestors and should also be referred to hearing:

- a. **Whether the proposed Facility's design includes sufficient measures for erosion control and prevention?** (OPIC Issue 10)<sup>43</sup>
- b. **Whether the application includes a sufficient landfill gas management plan?** (OPIC Issue 4)<sup>44</sup>
- c. **Whether the Applicant has performed an adequate subsurface investigation and characterization?**<sup>45</sup>
- d. **Whether the Applicant accurately characterized the groundwater at the site, including the uppermost aquifer, and the seasonal high water level?**<sup>46</sup>

#### IV. Conclusion

For the reasons stated above, Requestors respectfully requests that the Commission grant its hearing request and refer this case and no less than the above-mentioned 24 issues to the State Office of Administrative Hearings.

Respectfully submitted,

/s/ Lauren Ice  
Marisa Perales  
State Bar No. 24002750  
[marisa@txenvirolaw.com](mailto:marisa@txenvirolaw.com)  
Lauren Ice  
State Bar No. 24092560  
[lauren@txenvirolaw.com](mailto:lauren@txenvirolaw.com)

---

<sup>43</sup> OPIC's Response at 15.

<sup>44</sup> OPIC's Response at 14.

<sup>45</sup> Requestors' Hearing Request at 3 (Issue 10)

<sup>46</sup> Requestors' Hearing Request at 4 (Issue 11)

**PERALES, ALLMON & ICE, P.C.**

1206 San Antonio Street

Austin, Texas 78701

Tel. (512) 469-6000

Fax (512) 482-9346

COUNSEL FOR

SAFE, James Trayler, & TCWCID#1

**CERTIFICATE OF SERVICE**

I hereby certify that, on September 13, 2022, a true and correct copy of the Reply to Responses to Hearing Requests was electronically filed with the Chief Clerk of TCEQ, and that copies were served upon the following parties via deposit in the U.S. mail or e-mail.

/s/ Lauren Ice  
Lauren Ice

**For the Applicant:**

Jeffrey Reed  
LLOYD GOSSELINK  
ROCHELLE & TOWNSEND, P.C.  
816 Congress Avenue, Suite 1900  
Austin, Texas 78701  
Ph.: (512) 322-5800  
Fax: (512) 472-0532

**For the Executive Director:**

Anthony Tatu, Staff Attorney  
Heather Haywood, Staff Attorney  
Kayla Murray, Staff Attorney  
Texas Commission on Environmental Quality  
Environmental Law Division (MC-173)  
P.O. Box 13087  
Austin, Texas 78711  
Tel: (512) 239-0600  
Fax: (512) 239-0606

**For the Public Interest Counsel:**

Sheldon P. Wayne  
Texas Commission on Environmental Quality  
Public Interest Counsel (MC-103)  
P.O. Box 13087  
Austin, Texas 78711  
Tel: (512) 239-6363  
Fax: (512) 239-6377