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Erin E. Chancellor, *Interim Executive Director*



Garrett T. Arthur, *Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

March 20, 2023

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: **GCC Sun City Materials, LLC**  
**Docket No. 2023-0323-SLG**

Dear Ms. Gharis:

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

Sincerely,

A handwritten signature in cursive script that reads "Eli Martinez".

Eli Martinez, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

**DOCKET NO. 2023-0323-SLG**

<b>APPLICATION BY GCC SUN</b>	<b>§</b>	<b>BEFORE THE</b>
<b>CITY MATERIALS, LLC FOR</b>	<b>§</b>	<b>TEXAS COMMISSION ON</b>
<b>PERMIT NO. WQ0004636000</b>	<b>§</b>	<b>ENVIRONMENTAL QUALITY</b>

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

**To the Members of the Texas Commission on Environmental Quality:**

The Office of Public Interest Counsel (OPIC) at the Texas Commission on Environmental Quality (the Commission or TCEQ) files this Response to Request for Hearing and Request for Reconsideration in the above-captioned matter and respectfully submits the following.

**I. INTRODUCTION**

**A. Summary of Position**

Before the Commission is the application of GCC Sun City Materials, LLC (Applicant or GCC) for renewal of Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0004636000 (EPA I.D. No. TXL005012), which authorizes the disposal of wastewater treatment plant sewage sludge and water treatment plant residuals on 142 acres.

The Commission received timely comments, a request for a contested case hearing, and a request for reconsideration from the Honorable Johny R. Sheets. For the reasons stated herein, OPIC respectfully recommends the Commission deny the request for hearing and request for reconsideration for the reasons stated herein. However, if the Commission finds that Mr. Sheets is an affected person, OPIC recommends that Issues 1–5 specified in Section III.B be referred for a contested case hearing at SOAH with a maximum duration of 180 days.

## **B. Background of Site**

GCC applied to the TCEQ for a renewal of TCEQ Permit No. WQ0004636000 to dispose of wastewater treatment plant sludge and water treatment plant residuals on 142 acres. This permit would not authorize a discharge of pollutants into water in the state. The disposal unit is designed to handle 882 cubic yards per day of wastewater treatment plant sewage sludge and water treatment plant residuals, with the estimated life of Monofill Area C being 4 years.

The sewage sludge land application site is located 3.3 miles east of the intersection of Gary Lee and Hueco Ranch Roads, at the eastern end of Gary Lee Road, in Hudspeth County, Texas 79938. The sewage sludge land application site is located within the drainage basin of Rio Grande Below Riverside Diversion Dam in Segment No. 2307 of the Rio Grande Basin disposal site.

## **C. Procedural Background**

The TCEQ received GCC's application for permit renewal on April 9, 2021 and declared it administratively complete on June 25, 2021. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published on July 16, 2021 in the *Hudspeth County Herald*. The ED completed technical review of the application on March 28, 2022, and prepared an initial draft permit. The Notice of Application and Preliminary Decision (NAPD) was published on June 10, 2022 in the *Hudspeth County Herald*. A public meeting was held on October 17, 2022 in Desert Havena, and the comment period closed at the end of the public meeting. The Chief Clerk mailed the Executive Director's (ED) Decision and Response to Comments (RTC) on December 21, 2022. The deadline for filing requests for a contested case hearing and requests for reconsideration was January 20,

2023. The Commission received timely comments, a request for a contested case hearing, and a request for reconsideration from the Honorable Johny R. Sheets.

## **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 ED's decision and give reasons why the decision should be reconsidered.

### **B. Request 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 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 requestor'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.

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.

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 ED's 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, to be granted, 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. REQUEST FOR HEARING**

#### **A. Determination of Affected Person Status**

A timely filed request for a contested case hearing was received from the Honorable Johnny R. Sheets. The request raises concerns related to potential negative impacts on surface and groundwater, human health and the environment, roads, property values, potential noxious odors, traffic-related nuisances, proximity of the application site to homes, insufficiency of tax contributions from the Applicant, insufficiency of notice, and

general opposition to the operation. Several of these interests are protected by the law under which this application will be considered.

However, the map prepared by the ED's staff demonstrates Mr. Sheets lives over ten miles from the proposed site. At this distance, OPIC cannot find that a reasonable relationship exists between the interests claimed and the activity regulated. Mr. Sheets therefore does not have an interest in the regulated activity that is distinguishable from members of the general public and cannot be found an affected person. For this reason, OPIC recommends that the hearing request be denied. Should the Commission disagree, we present the following analysis of the issues raised in the request.

## **B. Issues Raised in the Hearing Request**

Mr. Sheets raised the following issues in both timely comments and his hearing request:

1. Whether the draft permit complies with the applicable guidelines and adequately provides for protection of surface water and groundwater quality?
2. Whether the draft permit is adequately protective of human health, safety, and the environment?
3. Whether the draft permit complies with applicable buffer requirements?
4. Whether the draft permit adequately ensures the proposed Facility will not produce nuisance odors?
5. Whether the Applicant complied with all applicable notice requirements?
6. Whether the proposed Facility will cause traffic-related nuisance conditions, including road damage?
7. Whether property values will be negatively impacted by the proposed Facility?
8. Whether the draft permit should be issued despite low tax contributions from the Applicant?
9. Whether the draft permit should be approved despite general community opposition?

**D. Issues Raised in the Hearing Request Remain Disputed**

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

**E. 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. All of the issues raised are issues of fact.

**F. Issues Were Raised by the Requestor During the Comment Period**

All of the issues outlined in Section III.B were raised by Mr. Sheets during the public comment period.

**G. The Hearing Request is Based on Issues Raised in Public Comments Which Have Not Been Withdrawn**

The hearing request is based on timely comments that have not been withdrawn.

**H. Issues Relevant and Material to the Decision on the Application**

The hearing request raises issues that are relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4)(B) and 55.211(c)(2)(A)(ii). To refer an issue to the State Office of Administrative Hearings (SOAH), the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny the permit. Relevant and material issues are those governed by the substantive law under which the permit is to be issued. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-51 (1986).

As discussed above, Mr. Sheets raised concerns regarding protection of surface water and groundwater quality, as well as human health and the environment. The TCEQ has a legislative responsibility to protect water quality in the State of Texas and to



authorize wastewater discharge TPDES permits under Texas Water Code (TWC) Chapter 26, and 30 TAC Chapters 305, 307, and 309, including specific statues regarding wastewater treatment systems under 30 TAC Chapters 217 and 309. Although the draft permit would not allow for the discharge of treatment plant sewage sludge and water treatment plant residuals into waters of the state, the proposed permit must “maintain the quality of water in the state consistent with public health and enjoyment.” 30 TAC § 307.1. Additionally, any runoff from an active disposal unit must be collected and disposed of in accordance with discharge permit requirements and any other applicable requirements. 30 TAC § 312.64(g). Further, sewage sludge or biosolids placed on an active disposal unit must not contaminate an aquifer. 30 TAC § 312.64(n). Finally, “surface waters must not be (rendered) toxic to man from ingestion of water, consumption of aquatic organisms, or contact with the skin, or to terrestrial or aquatic life.” 30 TAC § 307.4(d). The issues relating to surface and groundwater quality, as well as protection of human health and the environment, are therefore relevant and material to the Commission’s decision on this application and are appropriate for referral to SOAH.

Mr. Sheets also raised concerns relating to the proximity of homes to the disposal site. Although the Texas Administrative Code does not provide minimum distance requirements from a disposal site to residences, 30 TAC Chapter § 312.63 does provide guidance regarding distances of a disposal unit from the site property line. These distances are based on metal concentrations in the sewage sludge. The issue of appropriate distancing is therefore relevant and material to the Commission’s decision on this application and is appropriate for referral to SOAH.

Mr. Sheets raised the issue of potential nuisance odors. The draft permit does not allow the operator to maintain or create any nuisance conditions at the monofill site.

Further, the site must be maintained in accordance with the requirements of 30 TAC § 312.83(b)(11) to reduce vector attraction and minimizing any odors. The issue of nuisance odors is therefore relevant and material to the Commission's decision on this application and is appropriate for referral to SOAH.

Mr. Sheets raised the issue of whether the Applicant complied with all applicable notice requirements. 30 TAC Chapter 39 contains requirements relating to notice publication, alternative language publication, mailing of notice, and posting of the application in a public place within the county. The issue of whether the Applicant complied with all applicable notice requirements is therefore relevant and material to the Commission's decision on this application and is appropriate for referral to SOAH.

The hearing request also raises issues that are not relevant and material to the Commission's decision. The concerns relating to traffic, roads, property values, low tax contributions from the Applicant, and general community opposition exceed the TCEQ's jurisdiction under Texas Water Code Chapter 26 and its regulations to control the discharge of pollutants into state waters. Accordingly, these issues are not relevant and material to the Commission's decision on this application, and are not appropriate for referral to SOAH.

#### **I. Issues Recommended for Referral**

As set forth above, OPIC recommends referral of Issues 1–5 specified in Section III.B to SOAH because they are relevant and material to the Commission's decision on this application.

#### **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. REQUEST FOR RECONSIDERATION**

The Honorable Johny R. Sheets submitted a request for reconsideration asserting concerns relating to the absence of a physical address for the Monofil site, truck traffic, odors, proximity of homes to the application site, potential negative impacts on groundwater, potential runoff contamination, insufficiency of notice, uncertainty regarding whether the information contained in the application file is current, and uncertainty as to when the deadline for public comment took effect.

While OPIC is sympathetic with these concerns, a record establishing the evidentiary basis for reconsidering the ED's decision based on these issues would need to exist in order to recommend that the request for reconsideration be granted. As no such record exists, OPIC cannot recommend the request be granted at this time.

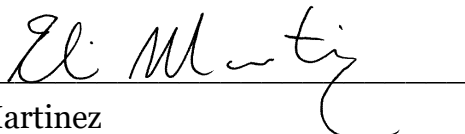
#### **V. CONCLUSION**

Having found that the Honorable Johny R. Sheets does not qualify as an affected person in this matter, OPIC respectfully recommends the Commission deny his hearing request. However, should the Commission find Mr. Sheets to be an affected person, OPIC

recommends that Issues 1–5 specified in Section III.B be referred for a contested case hearing at SOAH with a maximum duration of 180 days. OPIC further recommends the Commission deny the request for reconsideration submitted by Mr. Sheets.

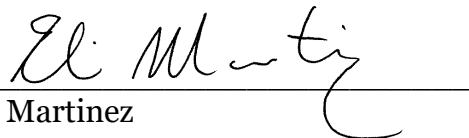
Respectfully submitted,

Garrett T. Arthur  
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**CERTIFICATE OF SERVICE**

I hereby certify that on March 20, 2023, the original of the Office of Public Interest Counsel’s Response to Request for Hearing and Request for Reconsideration was 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.

  
Eli Martinez

**MAILING LIST**  
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**TCEQ DOCKET NO. 2023-0323-SLG**

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