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Emily Lindley, *Commissioner*  
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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*

May 8, 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: **US Ecology Texas, Inc. (Applicant)**  
**TCEQ Docket No. 2023-0531-IHW**

Dear Ms. Gharis:

Enclosed for filing is the Office of Public Interest Counsel's Response to Request for Hearing 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. 2023-0531-IHW**

**APPLICATION BY** § **BEFORE THE**  
**US ECOLOGY, TEXAS, INC.** § **TEXAS COMMISSION ON**  
**FOR IHW PERMIT NO. 50421** § **ENVIRONMENTAL QUALITY**

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

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

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

**I. Introduction**

**A. Summary of Position**

OPIC recommends the Commission deny the pending request for hearing because the requestor lives too far from the proposed facility to be considered an affected person under the relevant Commission rules. Should the Commission find the requestor to be affected, Issues 1-3 listed in Section III. G. could be appropriately referred for a contested case hearing with a duration of 180 days.

**B. Background of Facility**

US Ecology Texas, Inc. (USET or Applicant) has applied to TCEQ for new Industrial and Hazardous Waste (IHW) Permit No. 50421 authorizing the construction and operation of two outdoor container storage areas and one container storage building for the storage of hazardous waste and Class 1, Class 2, and Class 3 nonhazardous industrial solid waste generated on-site and received from off-site on a commercial basis (the Application). USET proposes to construct and operate the facility at 4364 County Road 30, Robstown, in Nueces County.

The wastes proposed to be managed at the facility include a wide variety of hazardous, Class 1, Class 2, and Class 3 industrial solid wastes, solvents, other organic liquids, and waste oils. The proposed facility would be located within the drainage area of Segment Petronila Creek Above Tidal of the Nueces-Rio Grande Coastal Basin (North Latitude 27°43'31.37", West Longitude 97°42'46.90"). The site of the proposed facility is not located in an area subject to the Texas Coastal Management Program.

### **C. Procedural Background**

The Executive Director (ED) received the Application, dated December 22, 2021, from USET on December 30, 2021. The ED declared the Application administratively complete on February 1, 2022. The Notice of Receipt of Application and Intent to Obtain Permit was published on February 9, 2022, in the *Corpus Christi Caller Times*. The ED completed the technical review of the Application and issued the Final Draft Permit on July 15, 2022. The Notice of Application and Preliminary Decision was published on August 2, 2022, in the *Corpus Christi Caller Times*. The TCEQ Office of Chief Clerk (OCC) received public comments on the Application requesting a public meeting. The OCC held an in-person public meeting on December 6, 2022, in Robstown. The public comment period for the Application closed on December 6, 2022. The ED's Response to Comments (RTC) was mailed February 22, 2023. The deadline to submit contested case hearing requests and requests for reconsideration was March 24, 2023.

TCEQ received timely comments and a request for hearing from Christopher Phelan.

## II. Applicable Law

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, 84<sup>th</sup> 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 purposes 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 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(d).

### **III. Analysis of Hearing Request**

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

The Commission received a hearing request on December 6, 2022 from Christopher Phelan (Mr. Phelan or Requestor). Mr. Phelan raised concerns related to waste being blown off site, emergency response coverage, and wastewater retention. These interests are protected by the law under which the application will be considered.

The ED created a map in these proceedings indicating Requestor's residence lies over 18 miles from the proposed facility. Given the distance between Requestor's property and Applicant's facility, OPIC cannot find that a reasonable relationship exists between the interests claimed and the activity regulated. Further, Mr. Phelan lacks the proximity necessary to establish a personal justiciable interest which is distinct from interests common to the general public. Without a personal justiciable interest, a hearing requestor cannot qualify as an affected person. Finally, the intervening distance decreases any likelihood that the regulated activity will impact Requestor's health, safety, or use of property. Therefore, OPIC recommends the Commission determine that

Mr. Phelan is not an affected person. However, should the Commission find Mr. Phelan to be affected, OPIC offers the following analysis of his issues.

### **B. Issues Raised by Requestor**

The following issues have been raised by Requestor:

1. Whether activities at the proposed facility will result in dispersion of wind-blown waste;
2. Whether there are sufficient emergency first response and fire protection resources in the areas of the proposed facility; and
3. Whether there is wastewater retention or treatment onsite at the proposed facility.

### **C. 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 raised by Requestor are issues of fact.

### **D. Issues Were Raised by Requestor During the Comment Period**

All of the issues raised by Requestor were raised in the comment period and have not been withdrawn. 30 TAC §§ 55.201(c) and (d)(4), 55.211(c)(2)(A).

### **E. Disputed Issues**

There is no agreement between Requestor and the ED on the issues raised in the hearing request.

## **F. Relevant and Material Issues**

The hearing request raises 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 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 this permit. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–251 (1986) (in discussing the standards applicable to reviewing motions for summary judgment the Court stated “[a]s to materiality, the substantive law will identify which facts are material...it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs”). Relevant and material issues are those governed by the substantive law under which this permit is to be issued. *Id.*

### Wind-blown Waste

Requestor raised the issue of whether activities at the proposed facility will result in the dispersion of wind-blown waste. The Application contains general facility requirements and an Engineering Report that describes waste containment, and procedures and operations to prevent wind-blown waste. (Part B Application, Appendix III - General Facility Standards, and Appendix V – Engineering Reports). Further, a person is prohibited from allowing the processing or disposal of industrial solid waste in such a manner as to cause the creation or maintenance of a nuisance under 30 TAC § 335.4. Therefore, this issue is relevant and material to the Commission's decision on the Application.

### Emergency Response and Fire Protection

Requestor also raised the issue of whether there are sufficient emergency first response and fire protection resources in the areas of the proposed facility. An



application for a new commercial hazardous waste management facility is required to demonstrate that emergency response capabilities are available in the area in which the facility is proposed to be located. An application must demonstrate “the ability to manage a reasonable worst-case emergency condition associated with the operation of the facility” in accordance with 30 TAC § 305.50(a)(12)(C)(i). An application must also satisfy the requirements of 40 CFR Part 264 Subpart C (relating to Preparedness and Prevention) which is adopted by reference in 30 TAC § 335.152(a)(2). An application for a hazardous waste permit must also include a Contingency Plan depicting how the facility operator will respond to emergencies in accordance with 40 CFR Part 264 Subpart D (Contingency Plan and Emergency Procedures) which is adopted by reference in 30 TAC § 335.152(a)(3). Finally, an application must depict procedures with which facility personnel will document attempts to coordinate with local emergency responders and officials in accordance with 40 CFR §§ 264.37 and 264.52(c), which is adopted by reference in 30 TAC § 335.152(a)(3). Therefore, this issue is relevant and material to the Commission’s decision on the Application.

#### Water Retention

Lastly, Requestor raised the issue of whether there is wastewater retention or treatment onsite at the proposed facility. An application for a new hazardous waste storage permit must demonstrate that the proposed facility and the waste management units are designed, constructed, operated, and maintained to prevent contamination of drainage creeks and stormwater conveyances due to stormwater run-on and run-off due to rainfall and storms, and washout of hazardous wastes from a 100-year flood event in accordance with 40 CFR § 270.14 (b)(8) and (11) which is adopted by reference in 30 TAC § 305.50 (a)(4)(A). An application must also address the prevention of hazards in

unloading operations, prevention of runoff from waste handling areas, prevention of contamination of water supplies, prevent run-on and run-off, and flooding in accordance with 40 CFR § 270.14 (b)(8) and (11) which is adopted by reference in 30 TAC § 305.50 (a)(4)(A). Therefore, this issue is relevant and material to the Commission's decision on the Application.

### **G. Issues Recommended for Referral**

Should the Commission find that Requestor is an affected person, the following disputed issues of fact could be appropriately referred to SOAH for a contested case hearing:

1. Whether activities at the proposed facility will result in dispersion of wind-blown waste;
2. Whether there are sufficient emergency first response and fire protection resources in the areas of the proposed facility; and
3. Whether there is wastewater retention or treatment onsite at the proposed facility.

### **H. Maximum Expected Duration of Hearing**

Commission rule 30 TAC § 50.115(d) requires that any Commission order referring a case 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 180<sup>th</sup> 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 recommends that the duration of hearing on this application

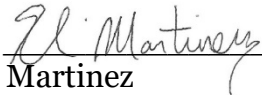
be stated in the Commission's order as 180 days from the first date of the preliminary hearing until the proposal for decision is issued.

### **III. Conclusion**

OPIC recommends the Commission deny the pending request for hearing from Mr. Phelan. However, should the Commission find that Mr. Phelan is an affected person, the issues in Section III. G. could be appropriately referred for a hearing.


Respectfully submitted,

Garrett T. Arthur  
Public Interest Counsel

By   
Eli Martinez  
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### **CERTIFICATE OF SERVICE**

I hereby certify that on May 8, 2023, the foregoing document was filed with the TCEQ Chief Clerk, and copies were served to all parties on the attached mailing list via hand delivery, facsimile transmission, electronic mail, inter-agency mail, or by deposit in the U.S. Mail.

  
Eli Martinez

**MAILING LIST**  
**US ECOLOGY TEXAS, INC.**  
**TCEQ DOCKET NO. 2023-0531-IHW**

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