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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

September 16, 2024

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 SOUTHWASTE
DISPOSAL, LLC FOR MSW PERMIT NO. 2317
TCEQ DOCKET NO. 2024-1407-MSW**

Dear Ms. Gharis:

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

Sincerely,

A handwritten signature in cursive script that reads "Josiah Mercer".

Josiah T. Mercer, Attorney
Assistant Public Interest Counsel

cc: Mailing List

DOCKET NO. 2024-1407-MSW

APPLICATION BY
SOUTHWASTE DISPOSAL, LLC
FOR MSW PERMIT NO. 2317

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BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO REQUESTS 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 (Commission or TCEQ) files this response to the hearing requests in the above-captioned matter.

I. Introduction

A. Summary of Position

Before the Commission is a limited-scope amendment application (the Application) by SouthWaste Disposal, LLC (Applicant or SouthWaste Disposal) for an existing composting facility—Municipal Solid Waste Permit No. 2317. OPIC notes that the TCEQ Chief Clerk's office received a total of four timely hearing requests and no requests for reconsideration. For the reasons stated herein, OPIC respectfully recommends that the Commission grant the requests of Vincent V. Arreguin, Kathryn Avila, Ashley Perez, and the Southside Independent School District, and refer this application for a 180-day hearing at the State Office of Administrative Hearings (SOAH) on Issue no. 1 contained in §III.B.

B. Description of Application and Facility

SouthWaste Disposal operates a composting facility (the Facility) located at 20805 Old Lamm Road, Elmendorf, Bexar County. The Facility consists of a

28.6-acre tract of land located less than one mile southeast of the intersection of Interstate Highway 37 and Loop 1604. The Facility processes waste products such as grease trap waste into beneficial reuse compost. The Facility includes bulk material chipping and storage areas, a lined grease trap waste/septic/sewage sludge (GSS) processing area, separate composting areas for other approved wastes, retention pond, post-processing area, aboveground feedstock storage tanks, and office areas (which include toilet and potable water facilities). GSS composting and curing processes are restricted to this lined GSS processing area, which comprises 6.5 acres of the Facility.

This Application is a permit amendment application that would authorize changes to the hours of operation, equipment used, energy and mass balance calculations, closure and post-closure care plan, and an increase in the amount of feedstocks received at the composting site. The Application, if granted, would change the hours of operation from 7:00 am to 6:00 pm to 8:00 am to 5:00 pm. The equipment used would change from the current ten 18,000-gallon tanks to four 30,000-gallon tanks requested under the Application. The amount of raw material received at the composting site would increase from 36,400 tons to 73,000 tons annually. Additionally, the volume of this immature compost would change from approximately 8,840 cubic yards or approximately 4,860 tons to 16,900 cubic yards or approximately 6,350 tons.

C. Procedural Background

The Application was received on August 7, 2023. An administrative Notice of Deficiency letter (NOD) was mailed on August 15, 2023. A response to the NOD

was sent on August 18, 2023. The Application was declared administratively complete on September 6, 2023. The Notice of Receipt of Application and Intent to Obtain Municipal Solid Waste Permit Amendment was issued on September 6, 2023, and mailed on September 13, 2023. It was published on September 10, 2023, in Spanish in *La Prensa Texas*; and on September 14, 2023, in *San Antonio Express-News*.

A technical NOD was mailed on October 10, 2023. A response to the NOD was sent on October 17, 2023. The Executive Director (ED) completed the technical review of the application on March 18, 2024. The Notice of Application and Preliminary Decision was published on March 22, 2024, in *San Antonio Express-News*; and on March 24, 2024, in Spanish in *La Prensa Texas*. The public comment period for the Application ended on April 23, 2024. The ED received five public meeting requests on this Application from members of the public, but no public meeting was held. The ED's Response to Comments and Final Decision Letter was mailed on June 25, 2024. The deadline to file hearing requests or request for consideration was on July 25, 2024. The Commission received a total of four requests for a contested case hearing—all of them timely.

II. Applicable Law

This Application was filed on or after September 1, 2015, and is therefore subject to the procedural rules adopted pursuant to Senate Bill 709.¹ Under Title 30, Texas Administrative Code (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

¹ Tex. S.B. 709, 84th Leg., R.S. (2015).

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.²

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. As provided by § 55.203(b), governmental entities, including local governments and public

² 30 TAC § 55.201(d).

agencies, with authority under state law over issues raised by the application may be considered affected persons. 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.³

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.⁴

³ 30 TAC § 55.203(c).

⁴ 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 must 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. Analysis of Hearing Requests

A. Whether the Requestors are Affected Persons

Vincent V. Arreguin

The Commission received a timely hearing request and comments from Vincent V. Arreguin. According to the map provided by ED staff, Mr. Arreguin resides approximately 2 miles from the Facility and owns commercial property within one-half of a mile from the Facility. He is also on the Application's landowner list due to the proximity of his commercial property to the Facility. Mr. Arreguin claims that the smell from the Facility is very unpleasant at his residence and particularly unpleasant on his commercial property. He claims that he cannot enjoy time outside at his residence, and he opines that the odor has made it difficult to market his commercial property. He also worries that the odor could be affecting his health and the health of his neighbors. He is

concerned that the proposed amendment would make these existing issues worse.

Mr. Arreguin's concerns about nuisance odor, human health, and use of property are interests that are protected by the law under which this application is considered, and a reasonable relationship exists between those interests and regulation of the Facility.⁵ The proximity of Mr. Arreguin's residence and his commercial property—in combination with his stated interests—demonstrates that he is likely to be affected in a way not common to members of the general public and possesses a personal justiciable interest in this matter.⁶ Therefore, OPIC finds that Vincent V. Arreguin qualifies as an affected person.

Kathryn Avila

The Commission received a timely hearing request and comments from Kathryn Avila. She claims to reside about two miles from the Facility, but—according to the map provided by ED staff—Ms. Avila's residence is actually within one mile of the Facility. She claims that the odor is so strong at her residence that she cannot spend time outside. She worries that the odor is seeping into her house and could affect her health. She is concerned that the proposed amendment would make these existing issues worse.

Her concerns about nuisance odor, human health, and use of property are interests that are protected by the law under which this application is considered, and a reasonable relationship exists between those interests and regulation of

⁵ See 30 TAC § 55.203(c)(1) & (3).

⁶ See 30 TAC § 55.203(a).

the Facility.⁷ The proximity of Ms. Avila’s residence—in combination with her stated interests—demonstrates that she is likely to be affected in a way not common to members of the general public and possesses a personal justiciable interest in this matter.⁸ Therefore, OPIC finds that Kathryn Avila qualifies as an affected person.

Ashley Perez

The Commission also received a timely hearing request and comments from Ashley Perez. According to the map provided by ED staff, Ms. Perez resides around 1.5 miles from the Facility. Ms. Perez claims that the odor from the proposed facility is so strong that she cannot spend time outside. She opines that the odor is affecting her ability to do any kind of business on her property. She is concerned that the proposed amendment will make these issues worse and will affect her health and the health of her community. Ms. Perez’s concerns about odor, human health, and use of property are interests that are protected by the law under which this application is considered, and a reasonable relationship exists between those interests and regulation of the Facility.⁹

OPIC notes that there is no specific distance requirement imposed by law in this matter.¹⁰ Despite the distance between her residence and the Facility, Ms. Perez claims that the outside space at her residence is overwhelmed by odors from the Facility. Because she may already experience significant odors from the

⁷ See 30 TAC § 55.203(c)(1) & (3).

⁸ See 30 TAC § 55.203(a).

⁹ See 30 TAC § 55.203(c)(1) & (3).

¹⁰ See 30 TAC § 55.201(c)(2).

Facility on her property, it is likely that the proposed amendment could affect her in a way not common to members of the general public.¹¹ For these reasons, OPIC finds that Ms. Perez does possess a personal justiciable interest in this matter and therefore does qualify as an affected person.

Southside ISD

The Commission also received a timely hearing request and comment from Rolando Ramirez, the Superintendent of Schools at Southside Independent School District (Southside ISD). According to GoogleMaps, Southside ISD has one elementary school—Freedom Elementary—that is within one mile of the Facility, and two schools—Heritage Elementary and Julius L. Matthey Middle—within two miles of the Facility. In his comments on behalf of Southside ISD, Mr. Ramirez claims that the odor from the Facility infiltrates the schools and has a negative impact on students and staff. He says that Southside ISD has expended resources related to odor from the Facility—including purchasing air purifiers and investigating foul odors. He claims that maintenance staff are frequently dispatched to investigate for gas leaks only to find that the reported odor is coming from the Facility. Mr. Ramirez is also concerned that the odor is negatively affecting the health of students and staff and worries that all of these issues could be made worse if the proposed amendment is granted.

A relevant factor for determining whether governmental entities qualify as affected persons is their statutory authority over or interest in the issues relevant

¹¹ See 30 TAC § 55.203(a).

to the Application.¹² In his comments on behalf of Southside ISD, Mr. Ramirez claims that the proposed amendment would cause Southside ISD to expend additional resources related to nuisance odor and could potentially impact the health of its students and staff. Southside ISD has an interest in maintaining a healthy and odorless educational experience—something that would be affected if any existing odor issues are made worse. Therefore, Southside ISD has an interest in issues that are relevant to the Application.¹³ Based on the proximity of their schools and their stated interests—OPIC finds that Southside Independent School District has demonstrated that it qualifies as an affected person in this matter under TCEQ rule § 55.203(b) and (c)(7).

B. Which Issues Raised in the Hearing Requests Are Disputed

The affected persons discussed above all raised the following issue:

1. Whether the requested amendment will create or worsen nuisance odor conditions resulting in negative impacts on human health or use of property.

C. Whether the Dispute Involves Questions of Fact or of Law

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. The issues raised here are issues of fact.

D. Whether the Issues Were Raised During the Public Comment Period

The issues were specifically raised by requestors who qualify as affected persons during the public comment period.

¹² 30 TAC § 55.203(c)(7).

¹³ *Id.*

E. Whether the Hearing Requests are Based on Issues Raised Solely in a Withdrawn Public Comment

No public comments were withdrawn in this matter. Therefore, the hearing requests are not based on issues raised in withdrawn comments.

F. Whether the Issues are Relevant and Material to the Decision on the Application

The affected persons' hearing requests raise 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 SOAH, the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit. Relevant and material issues are those governed by the substantive law under which this permit is to be issued.¹⁴

Nuisance Odor, Human Health, and Use of Property

Affected persons in this matter raise concerns that the proposed amendment would create or worsen nuisance odor conditions in the area. They are also concerned that this nuisance odor would negatively affect their health and the use of their property. Under the MSW rules in 30 TAC §330.149, all applications must incorporate an odor management plan specifying the wastes and activities that are most likely to cause odors and how odors will be mitigated. Nuisances—defined in 30 TAC §330.3(97) as including odors aversive to human health, safety, or welfare—are strictly forbidden under 30 TAC §330.15(a)(2). Additionally, under §330.15(a)(3), a MSW facility cannot operate in a way that

¹⁴ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-51 (1986).

endangers human health and welfare or the environment. Therefore, Issue No. 1 is relevant and material to the Commission's decision on the Application.

G. Maximum Expected Duration for the Contested Case Hearing

Commission rule 30 TAC § 50.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that, 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.¹⁵ 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 the Application would be 180 days from the first date of the preliminary hearing until the proposal for decision is issued.

IV. Conclusion

For the reasons stated above, OPIC finds that Vincent V. Arreguin, Kathryn Avila, Ashley Perez, and the Southside Independent School District qualify as affected persons. Therefore, OPIC respectfully recommends that the Commission grant these hearing requests and refer the Application for a contested case hearing at SOAH on Issue no. 1 contained in §III.B with a maximum duration of 180 days.

¹⁵ 30 TAC § 50.115(d)(2).

Respectfully submitted,

Garrett T. Arthur
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CERTIFICATE OF SERVICE

I hereby certify that September 16, 2024, the original of the Office of Public Interest Counsel's Response to Requests for Hearing 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.

Josiah Mercer
Josiah T. Mercer

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