

ORIGINAL

**SOAH DOCKET NO. 582-06-3321
TCEQ DOCKET NO. 2005-0337-MSW**

APPLICATION OF WILLIAMSON	§	BEFORE THE STATE OFFICE
COUNTY FOR A PERMIT	§	
AMENDMENT TO EXPAND A TYPE I	§	OF
MUNICIPAL SOLID WASTE	§	
LANDFILL FACILITY; (PERMIT NO.	§	ADMINISTRATIVE HEARINGS
MSW-1405B)	§	
	§	

**ORDER NO. 4
DENYING MOTION TO DENY PARTY STATUS,
DENYING PLEAS TO JURISDICTION
AND REQUIRING CLARIFICATION OF APPLICANT**

I. Motion to Deny Party Status

On November 17, 2006, Applicant, Williamson County (Applicant) filed a Motion to Deny TJFA, L.P. Party Status (Motion). On November 27, 2006, Protestant, TJFA, L.P. (TJFA) filed a Response to the Motion (Response). For the reasons set forth below, the Administrative Law Judge (ALJ) denies the Motion, and grants TJFA party status.¹

Applicant argues that TJFA is a competitor of Waste Management of Texas, Inc. (WMI), operator of the Applicant's landfill in this matter. The ALJ agrees that TJFA's purpose in seeking party status is largely competitive. As reflected in the Motion, the evidence establishes that:

Bobby Gregory is TJFA's limited partner, president of the general partner, the only employee of either entity, and the only person who profits from income generated by either entity;²

¹ Order No. 1 granted TJFA provisional party status.

² Deposition of Bobby Gregory, at 23, 24, 26, 32 and 57.

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Mr. Gregory is the owner of Texas Disposal Systems Landfill, Inc. (TDSL), Texas Disposal Systems, Inc. (TDS) and Texas Landfill Management, Inc. (TLM), who compete directly against WMI for business in Central Texas.³

TJFA invests in real estate near landfills;⁴

All ten of TJFA's properties are within one mile of a Central Texas landfill, and two are within one mile of the Applicant's landfill;⁵

Mr. Gregory first purchased property within one mile of the Applicant's landfill, some six months after notice of the expansion application was first published on December 16, 2003, and later transferred the property to the newly formed TJFA;⁶

TJFA has requested a contested case hearing on WMI's application to expand a landfill in Comal County, where TJFA purchased real estate within one mile of the landfill, between the time of the public notice of the expansion application and the close of the public comment period;⁷ and

Mr. Gregory has lobbied Williamson County officials to drop WMI and retain TDSL for landfill operations.⁸

Based on the findings above, the ALJ agrees that TJFA is an entity, designed in part, for the purpose of competing with other landfill operators in Central Texas. Mr. Gregory articulates a real estate investment strategy that involves buying property, not just close to landfills, but within one mile of them, for appreciation so long as the facility in question is run properly.⁹ Absent empirical economic evidence proving the efficacy of such a strategy, the ALJ declines to be so persuaded. Add

³ Gregory Deposition, at 28-30, and 73.

⁴ Gregory Deposition, at 24, 36-37.

⁵ Gregory Deposition, at 36, 44-46; Motion, Attachments 6.

⁶ Motion, Attachments 4 and 5.

⁷ Motion, Attachments 3 and 7.

⁸ Gregory Deposition, at 65.

⁹ Gregory Deposition, at 37, 41, 89, 94-95.

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to this the attendant litigation costs associated with insuring the landfill is properly run, and the proposition becomes doubly dubious – once again, absent evidence otherwise.

Yet, even if the true nature of TJFA is that of an element in a competitive scheme, its bundle of property rights mirrors that of any other property owner within one mile of a landfill. TJFA derives rental income from the two properties in question.¹⁰ At least one of the properties is downwind of the landfill, and in comments submitted to the Commission on May 12 and July 27, 2006, TJFA raised issues involving alleged operational flaws and “regulated impacts such as dust, odor, litter, surface water run-off, groundwater contamination, etc.”¹¹ These issues match those normally articulated by affected persons under 30 TEX. ADMIN. CODE (TAC) § 55.203, and factors considered in the analysis of a landfill application under 30 TAC § 330.53. The ALJ notes that other parties have voiced the same concerns. It is for these reasons – and not the overarching motive of TJFA, that it is granted party status.

In the event that the ALJ denied the Motion, the Applicant requested that this issue be certified to the Commission. The ALJ has already determined that TJFA facilitates competitive interests. The ALJ has also determined that TJFA has claimed interests commonly articulated by landowners in such proceedings. In apparent recognition of TJFA’s articulation of relevant interests, the Applicant claimed in the Motion that: “[t]he motive behind TJFA’s property purchases is the only fact in dispute.”¹² As stated above, while TJFA facilitates a competitive motive, it also possesses the same interests as any landowner within a mile of a landfill. The ALJ declines to certify to the Commission whether a landowner’s motive is relevant to issues of party status. Even a landowner who competes with an operator, may possess and claim interests “protected by law” that bear a “reasonable relationship” to the regulated activity.¹³ Nothing in the applicable rules suggests

¹⁰ Gregory Deposition, at 91-92.

¹¹ Response, at 9; citing to Response Attachments 3 and 4; and Gregory Deposition, at 50, 52, 55, and 68.

¹² Motion, at 2.

¹³ 30 TAC § 55.203(c)(1) and (3).

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that such an affected person may not be a party if it has other motives. In fact, some of the most active parties admitted under the same rules in other types of TCEQ cases, such as applications for certificates of convenience and necessity, are the entities who desire to supplant the applicant or operator.

The ALJ will pay close attention to the relevance of any discovery sought, or evidence offered at hearing. Even though TJFA has competitive interests, the issues to be addressed in this proceeding shall not deviate from the norm. As with any other docket, discovery and the evidence presented in this proceeding shall be governed by the Commission's and the State Office of Administrative Hearings (SOAH) procedural rules, the Texas Rules of Civil Evidence and the Texas Rules of Civil Procedure. This proceeding is not an opportunity to gain competitive advantage and the parties are so forewarned.

For the reasons set forth above, the ALJ denies the Motion and grants TJFA party status.

II. Pleas to the Jurisdiction

Pleas to the jurisdiction were filed by the Hutto Citizens Group (HCG) and the Heritage on the San Gabriel (Heritage) (collectively filed and referred to as HCG), Mount Hutto Aware Citizens (MHAC) and TJFA on November 17, 2006. The ED and the Applicant filed separate responses on November 27, 2006. The Applicant and the ED's position is that the Applicant has substantially complied with the Commission's rules regarding the notice and application. On December 9, 2006, MHAC filed a response to the ED's and Applicant's responses.

A. Capital Area Council of Governments Review

MHAC objects to jurisdiction arguing that the application is technically incomplete since the Capital Area Council of Governments (CAPCOG) did not submit comments on the application in accordance with the Commission's rules. The ED, however, responded that a letter from CAPCOG

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dated May 10, 2005, stated that its then current waste management plan did not allow for the review of permit applications:

Tim Champagne, with Waste Management, recently forwarded Williamson County's Municipal Solid Waste (MSW) Permit No. 1405B to [CAPCOG] for purposes of review in accordance with Chapter 363.066 of the Texas Health and Safety Code. Given that our most recent Regional Solid Waste Management Plan (RSWMP) . . . has not been adopted by the Texas Commission on Environmental Quality . . . and that our current (adopted) RSWMP . . . does not include any provisions for reviewing MSW permit applications, CAPCOG believes that it has no authority to review MSW Permit No. 1405B.¹⁴

According to CAPCOG's letter, Williamson County's landfill operator submitted the permit application to CAPCOG, who declined to review the permit for lack of authority to do so. The Health and Safety Code requires conformance with existing regional plans.¹⁵ But neither Health and Safety Code § 363.066, nor 30 TAC § 330.51(b)(10) (2005)¹⁶ raise jurisdictional issues. Since the Applicant attempted to obtain CAPCOG's review in compliance with these provisions and since CAPCOG's RSWMP did not permit such a review, it appears that Applicant is in compliance with those provisions. While compliance with an adopted regional plan is still an issue for the hearing, the ALJ sees no jurisdictional defect in the lack of a review letter.

¹⁴ See May 10, 2005, Letter From CAPCOG to TCEQ, attached to the EL's response. Although this letter is unsworn, it was also unobjected to. The ALJ takes it under consideration in light of the likelihood that it will be offered and admitted at the hearing on the merits.

¹⁵ TEX. HEALTH & SAFETY CODE (Health and Safety Code) § 363.066, reads: "CONFORMITY WITH REGIONAL OR LOCAL SOLID WASTE MANAGEMENT PLAN. (a) On the adoption of a regional or local solid waste management plan by commission rule, public and private solid waste management activities and state regulatory activities must conform to that plan."

¹⁶ 30 TAC § 330.51(b)(10) (2005) reads: "(b) Required information. The information required by this subchapter defines the basic elements for an application. . . (10) The applicant shall submit demonstration of compliance with regional solid waste plan."

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B. Waste Management's Role in the Application

HCG and TJFA filed similar pleas to the jurisdiction, arguing that since the filing of the application and in later notices, there has been confusion as to the identity of the Applicant, permittee, and operator, and that this confusion is the basis for dismissing this matter for lack of jurisdiction. The ED and Applicant respond that Williamson County has substantially complied with notice provisions and that the Commission and SOAH have jurisdiction over this matter. The ALJ agrees with the Applicant and the ED and finds that SOAH has jurisdiction over this matter. The pleas to the jurisdiction are denied.

HCG and TJFA's arguments are wide-ranging, and make much of alleged deficiencies in the application and notice resulting from Williamson County and WMI's appearance as co-applicants. Since these are pleas to the jurisdiction, the ALJ begins with the basis for jurisdiction of the Commission and SOAH. The Commission generally has jurisdiction over matters involving municipal solid waste under Health and Safety Code § 361.011. The Commission's specific jurisdiction over applications for solid waste facility permits is found in Health and Safety Code § 361.061, which reads:

... [T]he commission may require and issue permits authorizing and governing the construction, operation, and maintenance of the solid waste facilities used to store, process, or dispose of solid waste under this chapter.

The Commission's authority to conduct a hearing on an application for a solid waste facility arises upon proof of "substantial compliance" with the Health and Safety Code's requirement "that proper notice of the hearing was given to affected persons."¹⁷ HCG and TJFA argue that the notice of the preliminary hearing was deficient because it listed both WMI and Williamson County as the applicant and the entities to contact with questions. Under 30 TAC § 39.411(b)(2), (d), and 30 TAC

¹⁷ Health and Safety Code § 361.081(a) and (b).

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§ 39.501(f), the published and mailed notice must contain the "name, address, and telephone number of the applicant and a description of the manner in which a person may contact the applicant for further information."¹⁸ The notice read, in part:

APPLICATION. Williamson County (Owner), 301 Southeast Inner Loop, Suite 109, Georgetown, Texas 78626, a county government, and Waste Management of Texas, Inc. (Operator), 9900 Giles Road, Austin, Texas 78754, have applied to the Texas Commission on Environmental Quality (TCEQ) for a permit amendment to authorize a lateral and vertical expansion of the existing Williamson County Recycling and Disposal Facility, a Type I municipal solid waste landfill.

* * *

INFORMATION . . . The permit application, executive director's preliminary decision, and draft permit are available for viewing and copying at the Williamson County Courthouse, 301 S.E. Inner Loop, Suite 109, Georgetown, Texas 78625, telephone (512) 943-1550. Further information may also be obtained from Waste Management of Texas, Inc. at the address stated above or by calling Tim Champagne at 512-475-3445, at least one week prior to the hearing.¹⁹

The Applicant clearly listed its name, Williamson County, address and the phone number of the county courthouse where the application could be viewed. The Applicant also provided the phone number for its operator, WML, who likely possesses far more information on the application, and operations, than the County. The standard is whether the Applicant substantially complied with the

¹⁸ 30 TAC § 39.411(b)(2).

¹⁹ ED Ex. 1.

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notice requirements.²⁰ Since Williamson County listed the names, addresses and phone numbers for itself and its operator, that requirement has been met.

TJFA and HCG also complain that WMI and its contact information appeared in the notice. The ED and the Applicant argue that nothing prohibits WMI from being listed in the notice – especially since WMI's role as operator means it is in the best position to provide further information regarding the application as required by 30 TAC § 39.411(b)(2). The ALJ finds that § 39.411(b)(2) has been complied with, granting SOAH and the Commission jurisdiction over this proceeding.²¹

The majority of TJFA and HCG's briefing deals not with notice of the preliminary hearing, but rather with WMI's appearance in the application as a co-applicant. First, such issues are the domain of the hearing on the merits. This is a direct referral, governed by 30 TAC § 55.210(b), which reads:

After receipt of a request filed under this section and after the executive director has issued his preliminary decision on the application, the chief clerk shall refer the application directly to SOAH for a hearing on whether the application complies with all applicable statutory and regulatory requirements. [Emphasis added].

Consistent with § 55.210(b), the ALJ declines to consider HCG and TJFA's arguments as determinative of jurisdiction. The ALJ does note, however, that in letters and in the revised draft permit, Williamson County altered the application to reflect that Williamson County is the owner, Applicant and permittee, and that WMI is the operator and is not seeking status as a permittee.²²

²⁰ Health and Safety Code § 361.081(b).

²¹ SOAH ALJs have jurisdiction to conduct a hearing and prepare a Proposal for Decision on contested cases referred by the TCEQ. TEX. GOV'T CODE ANN. § 2003.47.

²² See generally, TJFA's plea, at 3-7, and attachments.

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Some parties are confused over whether WMI is seeking party status and whether it can rightfully be classified as an operator in light of its contract with Williamson County. The Health and Safety Code contemplates the coexistence of separate owners and operators of a solid waste facility. Some confusion may arise from 30 TAC § 305.43(b), which appears to shift the duty to "submit" an application to the operator where a site is owned and operated by separate entities. "Submit" is perhaps a vague term that could mean "submit on behalf of" or "submit as an applicant." While this issue may be addressed in the course of the hearing, TJFA, HCG and the ED have requested clarification of the Applicant's and the permittee's identity. To clarify this matter, Williamson County shall file in this docket a statement of the identity of the Applicant and party to this docket, the role of WMI, and any other related issues, no later than December 29, 2006.

HCG also raised concerns about who will represent the Applicant in depositions and at hearing. Consistent with the ruling by Judge Seitzman during the deposition of Mr. Gregory, Williamson County may designate counsel for WMI as its attorney in depositions and at hearing so long as only one attorney questions or presents each witness on behalf of the Applicant. HCG also complained that WMI's attorney, John Riley, asked irrelevant questions during the deposition that deviated from the interests of Williamson County, and that this may happen again if he is allowed to participate on behalf of the county. The ALJ has reviewed much of the deposition and has determined that the questions asked were aimed at denying TJFA party status due to its competitive motive. Denying TJFA party status was clearly in Williamson County's interest in seeking the permit that forms the basis of this action.

SIGNED December 19, 2006.



TRAVIS VICKERY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

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STYLE/CASE: WILLIAMSON COUNTY RECYCLING & DISPOSAL FACILITY
SOAH DOCKET NUMBER: 582-06-3321
REFERRING AGENCY CASE: 2005-0337-MSW

**STATE OFFICE OF ADMINISTRATIVE
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12/19/2006

NUMBER OF PAGES INCLUDING THIS COVER SHEET:

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REGARDING:

ORDER NO. 4 - DENYING MOTION TO DENY PARTY STATUS DENYING PLEAS TO JURISDICTION AND REQUIRING CLARIFICATION OF APPLICANT

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582-06-3321

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