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

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

PROTESTANTS HUTTO CITIZENS GROUP AND THE HERITAGE ON THE SAN GABRIEL HOMEOWNERS ASSOCIATION'S EXCEPTIONS TO THE PROPOSAL FOR DECISION

TO THE HONORABLE JUDGE VICKERY AND JUDGE CARD:

Hutto Citizens Group and the Heritage on the San Gabriel Homeowners Association (collectively, "Protestants") submit these Exceptions to the Proposal for Decision issued February 14, 2008.

I. INTRODUCTION

Protestants agree with and adopt the Exceptions filed by TJFA. In addition, Protestants present their exceptions regarding the land use compatibility issue, the site operating plan issue, and the owner/operator issue.

II. LAND USE COMPATIBILITY

A. Summary of Argument

The County has failed to adequately consider the land uses—both current and future—in the area of the proposed landfill expansion. Consequently, its application includes insufficient information by which the TCEQ Executive Director could conduct a thorough analysis of the land use compatibility of the proposed landfill expansion. Similarly, the evidence presented during the County's direct case in the administrative hearing was also inadequate and insufficient

to support a finding of land use compatibility of the proposed landfill expansion. The inadequacy and insufficiency of the land use compatibility evidence is especially disturbing, considering that the County is the applicant in this case and has access to land use and growth trend information.

An applicant for a landfill permit bears the responsibility of providing the Executive Director with sufficient and accurate information to conduct a land use compatibility analysis. TCEQ rules provide a "framework" for the type of information that an applicant must provide to assist the Executive Director in his land use compatibility analysis. Tr. p. 1830, ll. 11-13; 30 TAC § 330.53(b)(8)(A)-(E). While some of the required information may be characterized as factual or objective data, other factors included in the rule suggests that some analysis is required to determine land use compatibility; simply providing basic, factual data is not sufficient.

Nevertheless, in this case, the County provided the bare minimum. And even then, Mr. Murray, the person responsible for preparing the land use portion of the application, did not have the expertise to conduct a land use analysis. Tr. p. 115, ll. 19-23. Nor did he address any factors related to the public interest. His growth trend analysis did not take into account the explosive growth that has been occurring in the direction of the landfill. In sum, the County utterly failed to conduct a sufficient investigation to provide adequate and accurate information regarding land uses in its application, and the Executive Director, in turn, relying on the County's data, made a determination regarding land use compatibility based on this inadequate information.

B. Applicant's Burden

In the PFD, the ALJs conclude that so long as the Applicant has provided the required information (*i.e.*, the information specifically enumerated in 30 TAC § 330.53(b)(8)) to the Executive Director, it met its burden of proof. *PFD*, at p. 25. This recitation places too great of

a burden on the Executive Director's staff and too light of a burden on the Applicant, particularly an applicant like the one in this case—a County with access to information that may be relevant to a land use compatibility analysis.

In this case, the County relied on Mr. Murray to prepare the land use portion of the application, even though Mr. Murray is not a land use expert. The application included only the bare minimum information. Lacking from the application was an analysis of growth trends and community growth patterns. Yet, it is the applicant's burden to evaluate growth trends. *See In the Matter of the Application of Blue Flats Disposal, LLC, For Proposed Permit No. MSW-2262*, Proposal for Decision, p. 8 (hereinafter, "*Blue Flats*").

Placing this burden on the applicant makes sense. Although Mr. Prompuntagorn has experience in evaluating landfill applications, he is not a land use expert and cannot conduct a growth trend analysis. Moreover, he must rely on the information submitted by the applicant. If the applicant fails to include growth trend analysis or information regarding "other factors associated with the public interest," the TCEQ staff will have insufficient data by which to conduct a land use compatibility analysis. That is precisely what happened in this case.

Indeed, the lack of land use compatibility information in the application becomes evident upon review of the PFD. The Analysis of Land Use Compatibility section of the PFD repeatedly cites to and relies on Mr. Worrall's testimony and opinions.[1] That is because the County relied on Mr. Worrall to satisfy its land use compatibility burden. The application simply did not include enough information for a land use compatibility analysis.

[1] Protestants re-urge their objection to Mr. Worrall's testimony, for his expert opinion had not been disclosed to Protestants before the hearing, and his expert opinions constituted improper rebuttal. The County relied on Mr. Worrall to supplement its direct case, because it could not satisfy its burden of proof without his testimony. Thus, Mr. Worrall should have been presented as part of the County's direct case; waiting until its rebuttal case to present Mr. Worrall was improper and prejudicial to the Protestants.

Likewise, Mr. Worrall's analysis did not take into account all of the factors contributing to the character of the land use surrounding the facility. As the ALJs point out, Mr. Worrall's analysis of SH 130's impact on growth trends was based on incomplete information. Equally troubling is the fact that Mr. Worrall did not consider the characteristics of the proposed landfill expansion, which would more than double the existing landfill and expand the operating hours. The mere proposal, in the application, to expand the operating hours suggests that the County failed to consider projected growth trends. Mr. Worrall also did not consider screening, access to the residential areas, the proximity of a new school proposed by the District, noise,[2] and topographic considerations, even though these are all important factors for a land use compatibility analysis.[3]

In addition, it appears that the ALJs have placed some significance on the fact that a landfill already exists. Indeed, in their conclusion on this issue, they quote OPIC's Reply Brief, wherein OPIC argues that "increasing the size of the existing landfill is most likely a better alternative to building a new landfill elsewhere." *PFD*, p. 38. OPIC suggests that "those who may be interested in moving to the Hutto area will be aware of the existence of the current landfill and take that fact into consideration when choosing where to live." *Id.* And finally, OPIC concludes that the "uncertainty of where [] a new landfill might be placed would have a chilling effect in the development of other areas in Williamson County." *Id.* But none of these statements has any support in the record and thus, should not be relied on.

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[2] The ALJs excluded any evidence related to noise issues. This, in spite of the fact that noise has been considered part of a land use compatibility analysis in the past. *See, e.g., In the Matter of BMFS, Inc. for Spring Cypress Landfill Permit No. MSW2249*; SOAH Docket No. 582-96-1760; TNRCC Docket No. 96-1634-MSW. Protestants continue to maintain that the exclusion of this evidence and the failure to consider it in analyzing land use compatibility was erroneous.

[3] Tr. p. 1850, ll. 3-14.

First, comparing an existing landfill to a new one is not the focus of a land use compatibility analysis. Nowhere in the regulations is it suggested that in evaluating surrounding land uses and growth trends, the applicant or the Executive Director should consider whether another site is preferable. The focus is on whether the proposed expansion is compatible with existing land uses and growth trends.

Second, OPIC's suggestion that people moving into the area will take into consideration the existing landfill in choosing where to live is also irrelevant. A land use compatibility analysis does not require that others modify their actions to accommodate the landfill. Rather, the landfill applicant must take into consideration the existing and future trends and propose a landfill that is compatible with those trends. Here, the Applicant has simply proposed to more than double the existing landfill, with no consideration whatsoever of existing growth patterns. Although the County may have held public meetings about the proposed expansion, it did not implement the community's concerns in preparing this application. Again, the mere fact that it proposed expanding its operating hours evidences the lack of concern for the surrounding community.

And third, there is simply no evidence in the record to suggest that the prospect of a new landfill elsewhere in Williamson County will have a chilling effect on development in other areas of the County. This is simply an unsupported assertion. And it is an irrelevant assertion, for there is nothing in the rules to suggest that the Commission is to speculate about future development in areas other than the vicinity of the proposed landfill. Rather, the focus should be on the community surrounding the proposed landfill expansion.

In sum, the Applicant failed to include sufficient information for the Executive Director to conduct a reliable land use compatibility analysis. The Applicant itself failed to include any

growth trend analysis in the application. Both the County and OPIC attempt to justify these omissions by focusing on irrelevant factors that are not the proper focus of a land use compatibility analysis. The Applicant bore some burden in this case—the burden to include a growth trend analysis and other relevant data to assist the Executive Director in performing a thorough evaluation of land use compatibility, at the very least. But the Applicant failed to meet even this burden. Its application should therefore be denied.

III. SITE OPERATING PLAN

If the permit amendment is granted, Protestants agree that the operating hours should be limited. They do not agree, however, that an adequate fire protection plan has been proposed. The rules regarding a fire protection plan are clear: for landfills that include specific activities, such as solidification basins and brush collection areas, the SOP "must address fire protection measures *specific to each individual activity*." 30 TAC § 330.115 (emphasis added). In this case, the SOP identifies two working faces, a brush collection area, and a liquid waste collection area. Ex. App-202, p. 2519. Yet, the County has relied upon a general fire protection plan to address these various specific activities. Tr. pp. 407-408. Both the Executive Director and the Applicant argued, and the ALJs agreed, that the general fire protection plan proposed in the SOP would apply to both working faces. But the rule requires measures *specific to each individual activity;* the focus of the rule is on each individual activity. The Applicant has failed to provide a plan that focuses on each individual activity, as required by the rule.

IV. IDENTITY OF PERMITTEE

Finally, Protestants take issue with the ALJs conclusion regarding the roles of Williamson County and WMTX. The ALJs concluded that WMTX should be named as the "operator," and Williamson County is the "owner."

The solid waste rules define an operator as the "person(s) responsible for operating the facility or part of a facility." 30 TAC § 330.2 (91). Owner is defined as one "who owns a facility of part of a facility." *Id.* (94). Site operator (in this case, Williamson County, according to the ALJs), is the "holder of, or the applicant for, a permit (or license) for a municipal solid waste site." *Id.* (132). And finally, section 361.087 of the Health and Safety Code defines an owner as the one "who owns the land on which the solid waste facility is located." Tex. Health & Safety Code § 361.087.

So, by identifying Williamson County as the site operator and owner, the ALJs have characterized the County as being no more than the entity who owns the land and the facility and holds the permit. It is not, however, responsible for the operation or control of the facility, at least not under the definitions quoted above. WMTX, as operator of the facility, is the only entity responsible for operating the facility. Yet, Williamson County characterizes itself as the sole permittee, the sole applicant, and it was the only party named on the draft permit to participate in the administrative hearing. Williamson County even attempted to characterize itself as the entity ultimately responsible for operation of the facility. The ALJs, however, have in effect placed ultimate responsibility for the operation of the landfill in the hands of WMTX by naming it as the operator on the face of the permit. This is inconsistent with the expressed intent of the County.

V. CONCLUSION & PRAYER

Because the County has failed to conduct an adequate investigation of the land uses surrounding the proposed expanded landfill and thus, has failed to provide the Executive Director with adequate information to conduct a thorough land use compatibility analysis, its application fails to comply with TCEQ rules. And it has failed to satisfy its burden of proof in

this case. Therefore, Protestants respectfully request that the Honorable ALJs deny this application for an amended permit.

Respectfully submitted,

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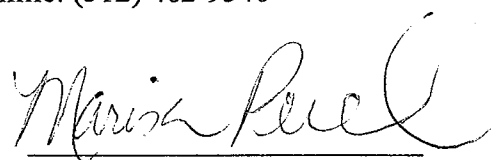
By: 

Marisa Perales
For the Heritage on the San Gabriel Homeowners Association and

For Hutto Citizens Group

CERTIFICATE OF SERVICE

By my signature below, I certify that on the 7th day of March, 2008 an original and eleven (11) copies of the foregoing **PROTESTANTS' EXCEPTIONS TO THE PROPOSAL FOR DECISION** was served upon the Chief Clerk and copies were served upon the parties identified below by facsimile, first class mail, electronic mail, or hand-delivery.

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