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From: **Marisa Perales**

Date: **March 19, 2008**

DOCUMENTS	NUMBER OF PAGES (not including cover pg.)
PROTESTANTS' REPLY TO EXCEPTIONS TO ALJs' PROPOSAL FOR DECISION	9

COMMENTS:

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March 19, 2008

Ms. LaDonna Castañuela
Texas Commission on Environmental Quality
Office of the Chief Clerk MC-105
P.O. Box 13087
Austin, Texas 78711

Re: Application of Williamson County for a Permit Amendment to Expand a Type I Municipal Solid Waste Landfill Facility (Permit MSW-1405B); SOAH Docket No. 582-06-3321; TCEQ Docket No. 2005-0337-MSW

Dear Ms. Castañuela:

Enclosed please find an original and eleven (11) copies of Protestants Hutto Citizens Group and the Heritage on the San Gabriel Homeowners Association's Reply to Exceptions to the Proposal for Decision.

If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

Marisa Perales

Enclosure
CC: Service List
SOAH ALJs

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 REPLY TO 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 this Reply to the Exceptions submitted by the other parties to this case, namely, Williamson County, the Executive Director of the TCEQ, Jonah Water Special Utility District, and TJFA.

I. DRAINAGE PATTERNS

Protestants, for the most part, agree with TJFA's Exceptions to the PFD regarding drainage patterns. Protestants disagree with the PFD's description of the Applicant's burden in analyzing drainage patterns and impacts; the burden, as described in the PFD, is a departure from TCEQ's and the Executive Director's past practices and decisions, as exemplified in the North Texas case cited in the PFD. *See Application of North Texas Municipal Water District for Permit No. MSW-2294*; SOAH Docket No. 582-02-3386; TCEQ Docket No. 2002-0745-MSW; Proposal for Decision (hereinafter "North Texas PFD").

The analysis in the PFD states that an applicant need look no further than the permit boundary to determine if natural drainage patterns will be significantly altered by the proposed landfill, citing the Blue Flats decision. Protestants do not object to that statement.

But the PFD continues that if a significant increase in run-off volume is shown *at the permit boundary*, TCEQ still does not require any downstream analysis to determine the significance of that increase in volume. Rather, the PFD focuses solely on peak flow rates; so long as peak flow rates do not increase, increases in run-off volume are irrelevant, even if the increase is a 250% increase *at the permit boundary.*

This simply cannot be the law, and it is not supported by the North Texas decision or the Blue Flats decision cited in the PFD. More importantly, it creates a bad precedent.

The Blue Flats case did not need to address the impacts of volume increases off-site because the applicant in that case had not even addressed impacts at the permit boundary. The application was deficient because it lacked an analysis of drainage impacts at the permit boundary of the site, warranting denial of the application. *See Order denying the application by Blue Flats Disposal, LLC, for Permit No. MSW-2262*; TNRCC Docket No. 98-0415-MSW; SOAH Docket No. 582-98-1390, Findings of Fact Nos. 40, 41, 42, & 45.

In the North Texas case, the applicant showed that the landfill application would result in an increase of run-off volume at four discharge points. The ALJ concluded that at least two of those discharge points resulted in a significant increase in run-off volume. Ultimately, the ALJ determined that the increased volumes would not present a danger of increased erosion or flooding because of "the use of detention ponds and other drainage tools reflected in the site development plan." *North Texas PFD*, at p. 41. Importantly, in reaching this decision, the ALJ did analyze the impacts of an increase in volume, and in fact, the applicant provided evidence

regarding impacts (or lack thereof) caused by increases in run-off volume. Indeed, the applicant explained that the issue for a landfill designer is "how much and where are you going to increase the volume, and is it acceptable as far as those increases are concerned." *North Texas PFD*, at p. 39. In other words, the landfill designer must look at impacts of an increase in run-off volume; he cannot focus solely on peak flow rates.

Finally, it is worth noting that the Executive Director's witness in the North Texas case testified that on occasion, the landfill designer must consider impacts downstream and off-site. *North Texas PFD*, at pp. 37-38. Namely, if a significant alteration to drainage patterns is shown at a particular point on the permit boundary, then impacts downstream and off-site have to be considered. The ALJ adopted this position in his analysis. *Id.*

Protestants urge that the ALJ in the North Texas case used the correct analysis. That is, peak flow rates *and* run-off volume should be analyzed in determining whether significant alterations to drainage patterns will be caused by the proposed landfill; this analysis should initially take place at the permit boundary. If there is a significant increase in either peak flow rates *or* run-off volume at the permit boundary, then the applicant must demonstrate why those increases do not present a significant alteration in drainage patterns or run afoul of the TCEQ requirements. This showing can consist of analysis of off-site, downstream impacts.

Protestants admittedly presented no expert on drainage issues. But considering that any impacts caused by drainage alterations will likely affect neighboring landowners, Protestants are troubled by the new standard reflected in the ALJs' PFD, insofar as it suggests that increases in run-off volume and impacts downstream need not be considered by the landfill applicant, even if the application reveals a significant increase in run-off volume at the permit boundary. At least in the North Texas case, the applicant was required to show that the volume increase would not

result in increased erosion or flooding. Protestants respectfully request that the ALJs not depart from this standard.

II. LAND USE COMPATIBILITY

While Protestants generally support and agree with TJFA's discussion of land use compatibility in its Exceptions to the PFD, Protestants emphasize that they do not agree with the proposition that the Applicant's only burden here was to include a bare minimum of information in the application for the Executive Director to review. This description, in the PFD, of the Applicant's burden presents a departure from prior TCEQ decisions.

The Chapter 330 rules include descriptions of what an applicant must include in its application for a landfill permit, including the information regarding land use compatibility. But once an application is referred to SOAH for a contested case hearing, the applicant bears the burden of proof on every issue. Typically, those issues are designated by the Commission. Where, as here, the applicant has requested a direct referral of its application, the applicant bears the burden of proof on every issue.

Regarding land use compatibility, the issue presented is not whether the applicant submitted the specific information required by the TCEQ rules, such as number of nearby wells, schools, and cemeteries, to be considered in a vacuum. Rather, the issue is whether the applicant analyzed growth trends, considered other land use factors that affect the public interest, and looked at impacts on surrounding property owners in designing its proposed landfill. For instance, did the applicant consider adjacent land uses when designing the proposed entry to the landfill? Did the applicant propose adequate screening, considering the surrounding land uses? Is the proposed height of the landfill compatible with surrounding land uses? Are the proposed operating hours compatible with surrounding land uses? In other words, the applicant must

propose a landfill that is compatible with surrounding land uses, and this requires some analysis of surrounding land uses by the applicant.

Indeed, limiting the applicant's burden to providing certain empirical information, without analysis of growth trends or consideration and accommodation of existing land uses, allows the applicant to make a mockery of a land-use-only hearing. This cannot be what the Legislature intended when it allowed a bifurcated process to consider the land use compatibility of a proposed landfill. *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, Proposal for Decision, at p. 11.

Again, Protestants urge the ALJs to reconsider their description of the applicant's burden regarding land use compatibility. Even if the ALJs maintain their finding of land use compatibility, there is no need to alter or confuse the burden of proof borne by the applicant. The applicant bears the burden of proof on every issue in a contested case hearing, including land use compatibility.

III. SITE OPERATING PLAN

Protestants do not object to the Executive Director's exception regarding Finding of Fact # 162.

Protestants object to the County's proposal to conduct landfill operations, other than acceptance of waste, at any time, without limitation. The County argues that this flexibility is necessary to address emergency situations.

TCEQ rules already include the procedure for extending landfill operating hours in emergency situations. The applicant may request a temporary authorization, as explained in the ED's Exceptions to the PFD. Moreover, the ED has provided guidance, in its guidance

document regarding SOPs, on how to request temporary authorizations to extend operating hours in the event of an emergency. Thus, there is no reason to allow the County to operate the landfill 24 hours a day, seven days a week.

Protestants propose that waste acceptance hours be limited as reflected in TCEQ's rules, and other landfill operations likewise be limited in accordance with the rules. *See* Tex. Admin. Code § 330.118. According to TCEQ rule 330.118, transportation of materials and heavy equipment operation must not be conducted between the hours of 9:00 p.m. and 5:00 a.m. Thus, if the Commission grants the County's application for a permit amendment, Protestants request that operating hours be limited in accordance with TCEQ rules.

IV. IDENTITY OF PERMITTEE & INTENT

Finally, Protestants agree with the discussion of the identity of the permittee and the intent of the various parties to this proceeding included in both Jonah SUD's exceptions and TJFA's exceptions. Protestants add that the discussion, in the PFD, of the intent of certain parties to this proceeding further supports the need for clarification of Waste Management's role with regard to this application for a permit amendment. Indeed, the PFD includes a discussion of Steve Jacobs' intent in including his name on the application, but Steve Jacobs did not testify in this matter. And more importantly, Waste Management was not a party to this proceeding, even though it submitted the application and its name appears on the draft permit. Thus, neither the protesting parties nor the ALJs had the opportunity to explore Waste Management's intentions or Steve Jacobs' motivations. Protestants again urge that Waste Management not be included on the face of the permit. Including Waste Management's name on the face of the permit suggests that it may be considered a co-permittee. Yet, it was not a party to this proceeding, and the County's intent is clearly to be the sole permittee.

V. CONCLUSION & PRAYER

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

Respectfully submitted,

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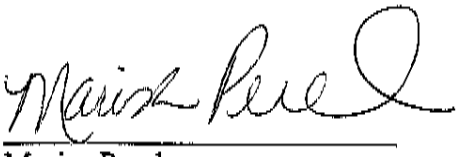
By: 

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 19th day of March, 2008 a true and correct copy of the foregoing **PROTESTANTS' REPLY TO EXCEPTIONS TO THE PROPOSAL FOR DECISION** was served upon the parties identified below by facsimile, first class mail, electronic mail, or hand-delivery.

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