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, Mt. HUTTO AWARE CITIZENS, AND THE HERITAGE ON THE SAN GABRIEL HOMEOWNERS ASSOCIATION'S MOTION FOR REHEARING

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

Hutto Citizens Group, Mt. Hutto Aware Citizens, and the Heritage on the San Gabriel Homeowners Association (collectively, "Protestants") submit this Motion for Rehearing and in support of this Motion, respectfully show the following:

I. INTRODUCTION

Protestants agree with and adopt the Motions for Rehearing filed by TJFA and by Jonah Water S.U.D. In addition, Protestants discuss the following errors in TCEQ's Final Order, signed February 17, 2009.

II. LAND USE COMPATIBILITY: TCEQ's Findings of Fact 33 through 42 do not support Conclusion of Law 23; Conclusions of Law 21 and 23 are contrary to the evidence and contrary to the law.

The evidence presented via the permit application and at the evidentiary hearing is inadequate to support a finding or conclusion that the proposed landfill expansion is compatible with land uses. It is only logical that when considering land use

compatibility, one must look at *future* land uses, prospective growth trends, and the impact that the landfill expansion will have on future uses and growth. To be sure, the expansion has not yet been constructed. Thus, it is not logical to conduct a land use compatibility analysis based only on historical uses of the area.

Yet, the Findings of Fact include little information in support of a land use analysis—an analysis that actually analyzes prospective land uses and growth trends. This is due to the lack of evidence presented by the County in support of the land use compatibility portion of its application.

The Administrative Law Judges, in their Proposal for Decision, acknowledged that the proposed expansion, in its current location, will impact the northerly growth of Hutto. Once this fact was established, what should have followed is an analysis of how the growth will be impacted, and how the expansion will accommodate the expected growth or mitigate any impacts on the expected growth. Absent this analysis, one cannot conclude that the proposed expansion is compatible with land uses. It is simply not enough to acknowledge that explosive growth is expected, but the City of Hutto can adjust to the facility's expansion.

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.

In this case, the County relied on Mr. Murray to prepare the land use compatibility analysis. But Mr. Murray 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. Also 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*"). In sum, the County utterly failed to conduct a sufficient investigation to provide adequate and accurate information regarding land uses in its application.

Ultimately, the County produced Mr. Worrall, a land use expert, in the rebuttal phase of the hearing. As an initial matter, if the County failed to satisfy its burden of proof during its direct case, then, it should not be given a second bite at the apple during the rebuttal phase. Rebuttal evidence is intended to address new evidence presented by the opposing party. But in this case, the County relied exclusively on its rebuttal evidence to satisfy its burden of proof on the issue of land use compatibility. Indeed, its rebuttal evidence was, in essence, akin to supplemental application information. This is evidenced by the numerous citations to Mr. Worrall's testimony in the Proposal for Decision's discussion of land use compatibility.

Yet, even Mr. Worrall's testimony was lacking and insufficient to prove that the expansion was compatible with land uses. 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 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,[1] and topographic considerations, even though these are all important factors for a land use compatibility analysis.[2]

In sum, neither the Applicant nor the Executive Director conducted a land use compatibility analysis. The County failed to include any growth trend analysis in the application, although as a governmental entity, it should have had access to such information. Although the County attempted to present a land use analysis via Mr. Worrall during the rebuttal phase of the hearing, Mr. Worrall's analysis was based on inadequate information. The County failed to meet its burden of proof in this case, and its application should therefore be denied.

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[1] 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.

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

III. OPERATING HOURS: The Commission erred in changing the Proposal for Decision's recommended operating hours; this change is arbitrary, capricious, unsupported by the evidence, and contrary to law.

The Administrative Law Judges determined that the site operating hours should be limited, to address the land use compatibility concerns raised by Protestants. The ALJs determined that the evidence presented supports the limitation on operating hours. And the Executive Director all but agreed, seeking only to clarify the proper procedure to follow in cases of emergency.

In changing the proposed Finding of Fact No. 161 and Ordering Provision No. 3, the Commission provided no explanation for the changes. There is no reference to any evidence in support of the changes, other than the Brief submitted by the Applicant. Not even the current TCEQ rules support the operating hours included in the Commission's Order.

Section 361.0832 of the Health and Safety Code explains the circumstances under which the TCEQ may overturn an ALJ's findings of fact and conclusions of law in landfill permitting matters such as the one presented here. The Commission may overturn a finding "only if the commission finds that the finding was not supported by the great weight of the evidence." Tex. Health & Safety Code § 361.0832. And it may overturn a conclusion "only on the grounds that the conclusion was clearly erroneous in light of precedent and applicable rules." *Id.* And finally, the Commission must fully explain the reasoning and grounds for overturning each finding of fact or conclusion of law. *Id.*

Here, the Commission failed to comply with the law. It overturned factual findings; it amended an ordering provision; and it provided no explanation for the changes. This was erroneous.

IV. IDENTITY OF PERMITTEE: The Commission erred in concluding that WMI is an "operator" that must be named on the permit, and that it need not have participated as a party to the proceeding.

Protestants take issue with the Commission's decision regarding the roles of Williamson County and WMTX.

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, Commission has 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. Thus, the Commission erred in determining that Waste Management should be identified on the face of the permit; it is simply not a permittee. By including its name on the face of the permit, the Commission has only confused the issue regarding the entity ultimately responsible for operation of the facility under the terms of the permit.

This decision is contrary to law, to the TCEQ's own rules, and by allowing Waste Management to avoid participating in the hearing as a party, it deprives the Protestants of their due process rights.

V. TRANSCRIPT COSTS: The Commission erred in ordering some of the Protestants to pay for part of the transcript costs.

In short, the ALJs recommended that the County be responsible for all transcript costs. The County did not except to this recommendation. None of the parties excepted to this recommendation. Indeed, because the parties did not except to this recommendation, the Protestants did not even present to the Commission briefs or arguments regarding the transcript costs issue. They did not prepare oral comments regarding the transcript costs. There was simply no notice that the Commission would change the ALJs' recommendation, especially since no party requested the change.

Moreover, this change was contrary to law. It is worth revisiting the requirements under the Solid Waste Disposal Act. The Commission may overturn a finding "only if the commission finds that the finding was not supported by the great weight of the evidence." Tex. Health & Safety Code § 361.0832. And it may overturn a conclusion "only on the grounds that the conclusion was clearly erroneous in light of precedent and

applicable rules." *Id.* And the Commission must fully explain the reasoning and grounds for overturning each finding of fact or conclusion of law. *Id.* Also, this is not the type of decision that involves an ultimate finding of compliance with or satisfaction of a statutory standard. *See id.* (e).

The explanation for the changes made by the Commission is lacking, to say the least. There is no recitation or description of the evidence that supports allocating a portion of the transcript costs against the Hutto Citizens Group and the Heritage on the San Gabriel Homeowners Association. This is likely due to the fact that there was no evidence in the record regarding these two protesting groups' ability to pay the costs.

This decision is made more disturbing in light of the fact that the Applicant here is the County, and the two protesting groups are comprised of residents of the County. By, in effect, punishing these protesting groups for participating in this hearing, the Commission is sending a message that discourages citizens from participating in a process that involves their own local government and its elected officials. This is contrary to the intent of the Legislature, as explained by the Austin Court of Appeals, which is to encourage public discourse in these administrative proceedings and to uphold the public interest:

> [A]dministrative tribunals are created to ascertain and uphold the public interest through the exercise of their investigative, rulemaking and quasi-judicial powers. Any stricture upon standing in an administrative agency would thus be inconsistent with the proposition that the agency ought to entertain the advocacy of various interests and viewpoints in determining where the public interest lies and how it may be furthered.

Texas Ind. Traffic League v. Railroad Comm'n, 628 S.W.2d 187, 197 (Tex. App.—Austin), *rev'd on other grounds*, 633 S.W.2d 821 (Tex. 1982), *but generally resurrected by Texas Ass'n of Bus.*, 852 S.W.2d 440.

VI. CONCLUSION & PRAYER

For the reasons discussed above, Protestants request that the TCEQ grant this Motion for Rehearing and deny this application for a permit amendment.

Respectfully submitted,

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