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 TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

MOTION FOR REHEARING OF PROTESTANT JONAH WATER S.U.D.

TO THE HONORABLE COMMISSION:

Jonah Water S.U.D. ("Jonah" or "Protestant"), in the above case, files this motion for rehearing of the Texas Commission on Environmental Quality ("TCEQ" or the "Commission") Order, issued on February 17, 2009, granting the referenced permit application to Williamson County. Jonah disagrees with the Commission's decision to issue Permit No. MSW-1405B (the "Permit") to Williamson County and respectfully requests that, on rehearing, the Permit be denied. In support of this motion, Jonah would respectfully show the following:

The Identity of the Owner, Operator and Applicant

Error No. 1: The Commission erred by concluding and ordering that WMTX is the landfill "operator" as defined in 30 TAC § 330.2(91). This conclusion is not supported by the evidence, is contrary to the evidence and/or is contrary to the law.

In responding to the Protestants' arguments that confusion results from the inclusion of WMTX on the permit, the ALJs conclude such confusion is not grounds for denial of the permit because Judge Gattis's understanding of the relationship between Williamson County is the determining factor (p. 11). The ALJs admit that not only was Judge Gattis confused over legal

definitions of operator, so was Roy Murray, sponsor of the Application. However, since under questioning Judge Gattis was able to accurately describe the relationship between Williamson County and WMTX, the ALJs assume the confusion over legal terminology is irrelevant (p. 11).

Judge Dan Gattis is County Judge now. Will the next judge reach the same understanding that Judge Gattis currently has? What if s/he doesn't? If both the County Judge making the Application and the engineer sponsoring the Application are confused over the legal definitions that determine the identity of the Owner, Operator, and Applicant, then the lack of clarity has reached fatal proportions.

The ALJs reference the Health & Safety Code to demonstrate that a permit must identify the property owner and the operator (p. 12). Footnote 38 states: "While this definition contemplates an operator as a potential permittee, Williamson County is the sole Applicant here, so that the definition of "Site Operator" still applies only to Williamson County." Now if the "operator" so defined by the Health & Safety Code is a potential permittee and for that reason is required to be named on the permit, then a *contract* operator such as WMTX would not by such definition be required to be listed on the permit. Furthermore, no evidence in the record supports the claim that a *contract* operator's name should be on a permit application or historically ever has been.

We know that Williamson County is the sole Applicant because that is Judge Gattis's

understanding. We know that the Health & Safety Code requires a permit to identify the property owner and the operator, operator being defined in such a way as to indicate "Site Operator." The ALJs conclude that since Williamson County is the sole Applicant, the definition of "Site Operator" applies only to Williamson County, yet they assert that both entities—Williamson County and WMTX, the *contract* operator, must be identified in the permit (p. 13). On p. 15, the ALJs find that "Health & Safety Code 361.087(1) requires that the contract 'Operator' be disclosed on the permit." Yet in Footnote 38 on p. 12, the ALJs state that the referenced Health & Safety Code definition "contemplates an operator as a potential permittee." The operator referenced in the Health & Safety Code can't be both a contract operator and a potential permittee and therefore Health & Safety Code 361.087(1) cannot require that both entities, Williamson County, the potential permittee, and WMTX, the contract operator, be identified on the Draft Permit.

The confusion over legal terminology experienced by the County Judge and the Application sponsor appears to extend to the ALJs as well.

The ALJs acknowledge that removing WMTX from the Draft Permit would eliminate confusion and solve the problem. They report that Judge Gattis is not opposed to the removal of WMTX from the DraftPermit and that the ED does not take a position on the matter (p. 14). However, they are opposed to that solution because of a flawed understanding of Health & Safety Code 361.087(1). It is important to note that no examples of a contract operator being

named on any other Permit have been adduced to support their position. Therefore, since all the parties to the case either require the removal of WMTX on the Permit or are neutral on the matter, and the findings of the ALJs regarding the requirements of Health & Safety Code 361.087(1) are seriously flawed and without supporting evidence, the inclusion of WMTX on the Permit should be grounds for its denial.

Land Use Compatibility

Error No. 2: The Commission erred by concluding that the landfill in this proceeding is compatible with surrounding land uses. This conclusions is not supported by adequate findings of fact or by the evidence, is contrary to the evidence and/or is contrary to the law.

The arguments for land use compatibility include the following: 1) the surrounding land is primarily rural and agricultural, 2) Hutto's phenomenal growth is omnidirectional, and 3) Hutto's Growth Guidance Plan envisions institutional growth in the vicinity of the landfill. It is true that at the moment the surrounding land is primarily rural. However, it is worth noting that three of the Protesting groups are composed of citizens of the area who are opposed to the contemplated expansion of the landfill. It is clear that Hutto is experiencing phenomenal growth, and the ALJs state that "Mr. Worrall corroborated Protestants' evidence that Hutto has experienced tremendous growth" (p. 30). Such being the case, it is safe to assume that the

surrounding land will not remain rural. Therefore, that the land is *presently* rural and agricultural does not support an argument for land use compatibility.

From his discussion with the Planning Manager for Hutto, Mr. Worrall concluded that Hutto's tremendous growth is omnidirectional (p. 29). However, SH130 and its access point, Chandler Road/University Drive, have just recently been completed. The ALJs refer to Mr. Worrall's testimony which establishes that he was unaware of University Drive as an access point to SH 130 (p. 30), an access point which will drive development to the north of Hutto along a west/east axis. They conclude the following:

> Although he may have been unaware of the University Drive access point to SH 130, he found SH 130 to be one of three primary reasons for Hutto's growth. So while he did not review "comprehensive data" on the impact of SH 130, he clearly captured its significance and impact on growth trends (pp.30-31).

However, Mr. Worrall clearly did not capture the significance and impact of the University Drive access point, of which he was unaware, even though his own testimony indicated that such access points are driving forces to growth (TR, p. 1885, *ll*, 15-22). University Drive, even though unnamed by Mr. Worrall, will according to his own expert testimony drive development to the north of Hutto in the vicinity of the landfill.

The argument that because Hutto's Growth Guidance Plan envisions future growth around the landfill as institutional, those uses are compatible with the expanded landfill is easily disposed of. A Growth Guidance Plan is simply a vision. There are no zoning restrictions to enforce a reality. The ALJs refer to Mr. Worrall's acknowledgement that the existence of a

school tends to encourage residential development, and HISD plans a school less than a mile from the site.

On p. 35 in a discussion of transportation, the ALJs assert that the expansion of the landfill "will result in a continuation of that traffic longer into the future, but it will not cause its increase." This assumes that the landfill will be limited to the County and its growth. However, there are no restrictions on where waste can come from. Gattis: TR, p. 13, *ll.* 23-25. This point was made even more dramatically in Dr. Evans' questioning of Dr. Borrer. There are no restrictions on the county's acceptance of waste from any county, from any state, from anywhere in the nation, not even from Mexico. TR, p. 1001, *ll.* 10-25; p. 1002, *ll.* 1-6. The inescapable conclusion is that waste brought into Williamson County is not determined solely by the growth in Williamson County. TR, p. 1002, *ll.* 17-20. Clearly the proposed permit would allow unbridled expansion of the landfill. The present facility can accommodate the County for the next 25-50 years. The application for such a vastly expanded landfill indicates an intent to make this a regional—and perhaps beyond—landfill, to which the citizens of Williamson County have expressed their overwhelming opposition. Such a landfill would, of course, be an extreme detriment to development.

Geology/Hydrology/Drainage

Error No. 3: The Commission erred by concluding the Application met the burden of proof with regard to geology, hydrology, and drainage. This conclusion is not supported

by the evidence, is contrary to the evidence, and/or is contrary to law.

Of extreme concern to Jonah Water S.U.D. is the quality of the water we provide and the protection of our customers. The geology and hydrology, and the drainage patterns, of the landfill and its proposed expansion are complex issues. However, the salient point is that the proposed permit simply does not include enough monitoring wells and/or piezometers for the movement of water or its quality to be known.

The final testimony of Ms. Gallup on rebuttal seems to invalidate the entire premise of the proposed permit. If the flow lines in the application were computer generated, and if as a trained geologist Ms. Gallup would have drawn them differently (TR, p. 1928, *ll* 2-4.), then the data are hopelessly compromised. Or as Ms. Gallup so succinctly put it, we simply don't have enough control points to know. TR, p. 1927, *ll*11-12; TR, p. 1929, *ll.* 10-12.

This is, of course, the very point. The unnamed northern tributary flows into the San Gabriel River, from which at Granger Lake many entities, including Jonah Water S.U.D., have contracted to buy water for their customers. To the south, Mustang Creek flows into Brushy Creek, which is likewise the source of drinking water for many people. For Jonah Water S.U.D., the implications are clear. The proposed permit does not provide grounds for the basic and essential knowledge we need to verify that our customers are protected. Therefore, this permit must be denied.

Intent

Error No. 4: The Commission erred by concluding that intent, restricted to one party, was relevant to the proceeding. This conclusion is not supported by the evidence, is contrary to the evidence and/or is contrary to the law.

Statements or speculations about intent appear throughout the Proposal for Decision, although not all parties are scrutinized for intent. Jonah's primary intent can be clearly stated: to assure the safety of the water we distribute to our customers. The ALJs assert that TJFA's intent is competitive (p. 3, p. 13, footnote 42). Common sense would indicate that all parties to the case have an intent. Unfortunately, common sense has not been admitted to the record. On page 8, the ALJs assert that there is nothing sinister about this case, an interesting comment since no one in the record has suggested that there is. In discussing Steve Jacobs' inclusion of a certification, the ALJs speculate that it was *likely* necessary for various reasons, that uncertainty over 30 TAC 305.439B0's requirements *perhaps* explains the appearance of WMTX on the Application (pp. 18-19). However interesting to speculate on the intentions behind these actions, there is no evidence in the record to corroborate any such speculations. We are left to conclude that actions which confuse the identity of the Owner, Operator, Applicant, regardless of indeterminable intent, are grounds for the denial of the Permit.

Process/Proceedings

Error No. 5: **The Commission erred by concluding that the permit application was processed, and the permit proceedings were conducted, in accordance with the rules of the TCEQ and SOAH and in accordance with the Texas Health & Safety Code.**

To the extent that WMTX is named as the "operator" of the facility, as the Commission attempts to rule in its order, then the SOAH and TCEQ processes and proceedings were fatally flawed by the fact that WMTX was not a party to any of the SOAH or TCEQ proceedings.

Additional Bases for Motion for Rehearing

Jonah incorporates into this motion its final argument and exceptions that identify errors in the Proposal for Decision of the Administrative Law Judges. All of the errors involve Commission decisions that are contrary to the clear language of the statutes and/or TCEQ rules and are not supported by adequate findings of fact, conclusions of law or the evidence. Since the ALJs' proposal and draft order were adopted by the Commission with only a few exceptions, the errors identified by Jonah in its final argument and exceptions still apply.

Prayer for Relief

Jonah respectfully requests that its motion for rehearing be granted and/or that the Permit be denied.

Respectfully submitted,

Carol Fox

Carol Fox
Board Member, Jonah Water S.U.D.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been served on the following via hand delivery, express mail, electronic mail, facsimile, and/or U.S. First Class Mail, on this the 10th day of April, 2009.

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