No. 03-19-00815-CV

IN THE COURT OF APPEALS
FOR THE THIRD JUDICIAL DISTRICT
AUSTIN, TEXAS

TJFA, L.P., ENVIRONMENTAL PROTECTION IN THE INTEREST OF CALDWELL COUNTY, JAMES ABSHIER, AND BYRON FRIEDRICH,
Appellants,

v.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY AND 130 ENVIRONMENTAL PARK, LLC,
Appellees.

On Appeal from 459th Judicial District Court
Travis County, Texas, Trial Court No. D-1-GN-17-006632

AMICI CURIAE BRIEF OF THE CITY OF WACO, TEXAS, AND THE TEXAS LONE STAR CHAPTER OF THE SOLID WASTE ASSOCIATION OF NORTH AMERICA, INC.

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September 16, 2020

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TO THE HONORABLE COURT:

This amici brief is being submitted by the Texas Lone Star Chapter, Solid Waste Association of North America, Inc. ("TxSWANA"), and the City of Waco, Texas ("Waco") (collectively "Amici"). TxSWANA and Waco have no interest in the ultimate question in the above-referenced cause (whether the Texas Commission on Environmental Quality's ("TCEQ") granting of the application of 130 Environmental Park, LLC ("130EP") for a Municipal Solid Waste ("MSW") Permit should ultimately be upheld or remanded). However, Amici have an interest in ensuring that the statute and rules associated with permitting and operating MSW landfills are interpreted reasonably and predictably. For this reason, Amici urge the Honorable Court to clarify that Texas Health and Safety Code §§ 363.112 or 364.012 (collectively, the "Siting Ordinance Statutes") do not empower local governments to prohibit the processing or disposal of municipal solid waste in an area for which an applicant has filed a Parts I/II application that is pending before the TCEQ prior to the adoption of the local government's Siting Ordinance.

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INTEREST OF AMICI

The Solid Waste Association of North America ("SWANA") is an international organization comprising more than 10,000 individual members. The Texas Lone Star Chapter, Solid Waste Association of North America, Inc. ("TxSWANA") is the Texas chapter of SWANA. TxSWANA currently has more than 550 individual members who represent public entities and municipalities, special districts, and private corporations that are interested in advancing the practice of environmentally and economically sound management of municipal solid waste in Texas.

TxSWANA fulfills this mission in several ways. It provides its members with updated training, leadership opportunities, an accessible network of solid waste professionals, safety initiatives, and community service opportunities and provides its members with the opportunity to participate effectively in the public processes involved in shaping the solid waste management legislative and regulatory framework. One of the ways it does this is by enabling its members to join together to file amicus briefs in cases that impact the solid waste industry in Texas.

The City of Waco ("Waco") is a municipality in the State of Texas that owns and operates an MSW landfill for the benefit of its citizens and the surrounding communities and individuals. That existing landfill is near capacity, and is

expected to be filled to capacity within the next five to six years. Waco filed a Parts I/II application to site a new landfill that would straddle Limestone and McLennan Counties (the majority of which would be in Limestone County), prior to Limestone County passing a Siting Ordinance. If this Court finds that the filing of a Parts I/II application does not "grandfather" an application from a subsequently enacted Siting Ordinance, then (assuming *arguendo* that Limestone County's Siting Ordinance is otherwise valid) Waco's efforts to site a landfill could be set back such that Waco might not be able to permit a new landfill site before its existing landfill is filled to capacity, and its considerable investment of public funds spent in pursuing and permitting the current site will potentially have been wasted.

Amici Curiae TxSWANA and Waco are responsible for the costs associated with preparing this brief.

I. SUMMARY OF ARGUMENT

Municipalities and counties are empowered to regulate the disposal of solid waste within their jurisdictions by, and subject to the requirements of, Sections 363.112 and 364.012 of the Texas Health and Safety Code (the "Siting Ordinance Statutes"). The Siting Ordinance Statutes strike a delicate and important balance between the interests of local governments to plan for solid waste disposal in their jurisdictions on the one hand, and the necessity that the solid waste industry be able to provide solid waste services, particularly landfill capacity, for the state on the other. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 363.112, 364.012. If local governments could wholesale prohibit landfills in their jurisdiction, it would be politically expedient, and perhaps even inevitable, that virtually every municipality and county would do so, and it would become next to impossible for a new landfill to be sited in the state.

So, for those municipalities and counties that want to be proactive in planning for solid waste in their jurisdictions, the Siting Ordinance Statutes set forth two important requirements. First, to exercise the authority to plan for solid waste and prohibit landfills in a part of the local governments' jurisdiction, the Siting Ordinance Statutes require that the local government also establish areas where landfills *can* be sited. § 363.112(a); § 364.012(b). Second, the Siting Ordinance Statutes prevent local governments from prohibiting landfills in areas

where a landfill permit application is already pending before the Texas Commission on Environmental Quality ("TCEQ") at the time the ordinance is adopted. § 363.112(c)(1); § 364.012(e)(1). Without these requirements, local governments could avoid the hard choices necessary to plan for solid waste capacity in their jurisdiction, and instead wait for an application to be filed, then react by prohibiting the landfill proposed. That is exactly what Caldwell County attempted to do in this case when it adopted its Siting Ordinance.

The intended effect of these requirements of the Siting Ordinance Statutes is to require local governments to be proactive, rather than reactive, in using the power to regulate landfill siting, and to base the decision of where to prohibit and allow landfills in their jurisdictions on technical merits of the areas rather than on resistance to a particular application.

II. ARGUMENT AND AUTHORITIES

A. The Siting Ordinance Statutes do not require Parts III / IV.

A Parts I/II application is exactly what the legislature contemplated when it required that an "application" be filed to grandfather the area from a Siting Ordinance.

The legislature recognized that preparing a landfill permit application is an expensive and time-consuming process. Before an applicant can prepare even a

Parts I/II application, the applicant has to obtain the necessary property interest (usually a fee simple interest, but at a minimum, an option to purchase, with an agreement by the property owner to sign the application). *See* 30 Tex. Admin. Code § 330.59(d)(2) (requiring the signature of the property owner). And before purchasing that property interest (particularly where public funds are being spent), the applicant must investigate the site thoroughly enough to be comfortable that the site will be appropriate for a landfill. This investigation requires, at a bare minimum, a desktop review of the area geology, groundwater hydrology, drainage, jurisdictional waters, potential for endangered species habitat, a title review of applicable easements, area traffic capacities, and a study of the land uses in the area. Then, if the site still appears viable, the permit engineer has to prepare the Parts I/II application, also time consuming and expensive.

The legislature was aware of this when it struck this balance and prevented local governments from prohibiting a landfill after the application was submitted. *See* House Research Organization, Bill Analysis at 3, Tex. S.B. 486, 76th Leg., R.S. (1999) (attached, Tab A), stating, on behalf of supporters of the bill:

> SB 486 would stop cities and counties from enacting ordinances in response to proposed landfills after the applicants have spent millions of dollars on their applications. It is unfair for a landfill applicant to buy or option land, spend millions of dollars for engineering studies and applications, and then be barred from a site one month before opening it because a city or county has passed an ordinance to stop the application.

The balance struck hinged, and continues to hinge, on preventing a local government from prohibiting landfills once it has notice that a landfill is proposed in its jurisdiction, recognizing the reality that those living in the area potentially impacted by that specific landfill application would pressure the local government to prohibit the landfill. The legislature was likewise cognizant of this reality. *See id*. at 4, stating, on behalf of supporters:

> Requiring a landfill applicant to notify local governments before applying for a permit would encourage local governments to pass ordinances to prevent the siting for political reasons in almost every case. SB 486, in contrast, would encourage local governments to be prospective rather than reactive in their landfill policies and to pass ordinances based on the technical merits of actual sites and their impacts on public health and the environment, rather than in reaction to specific permits… Opposition to any identifiable site would, in almost every instance, make it politically impossible for a city council or commissioners court to approve the area for a landfill.

The legislature did not specify that the application be "complete," nor even that it only be "administratively complete." This was not an oversight by the legislature; rather, the issue was specifically raised by opponents of the legislation, and documented in the bill analysis. *See id*. at 5, stating, on behalf of opponents:

> The bill is unclear in stipulating that a city or county could not prohibit solid waste disposal or processing if an application was filed or pending. It should specify instead that an application be administratively complete. Otherwise, applicants could file token applications to prevent counties from enacting ordinances. The bill should set criteria by which the industry would have to abide to ensure a prima facie sufficient application, and it should establish sanctions for those who file superficial applications.

The legislature declined to make any changes to the bill, or otherwise impose any specific requirements regarding the adequacy of the application. The legislature did not simply ignore opponents' comments. In fact, the legislature amended the bill in response to opponents' comments (for example, comments related to the effective date), *see id.* at 5-6 (in the "notes" section), but not to comments related to the completeness of the application.

Appellants seek to add a wholly new requirement, not included in the Siting Ordinance Statutes' language, inserting the word "complete" into the statutes, and without even defining what "complete" means. If all four parts of all applications are submitted concurrently, is the application complete on the date the application is filed? Once filed, the application is then reviewed for administrative completeness, which generally takes a few weeks, and Administrative Notices of Deficiency ("Administrative NODs") are then issued by the TCEQ to the application. The applicant then addresses the Administrative NODs, and the application is declared "administratively complete" usually a few weeks to a few months after the application was submitted. If there was even one Administrative NOD issued, was the application not complete when filed, but complete when the applicant addressed the final Administrative NOD? Or is it complete when the TCEQ actually finds that the application is administratively complete? After the application is administratively complete, the application is then technically

reviewed by TCEQ staff, and Technical Notices of Deficiencies ("Technical NODs") issued and addressed by the applicant, which generally takes many months to a few years (longer if significant coordination from federal agencies are required). If even one Technical NOD was issued, was the application not complete until the applicant addressed that Technical NOD, or when the TCEQ found the application technically complete? This seems to be the interpretation that the Appellants request – an interpretation that violates the plain language of the Siting Ordinance Statutes and their underlying policies. *See* Appellants' Br. at 25 (Mar. 23, 2020) (stating that the Siting Ordinance Statute "confirms that the permit application must be *final and* complete") (emphasis added). In any interpretation that requires the filing of a Part III, the applicant must spend millions of additional dollars, at least a year on invasive site investigations (involving numerous soil borings and groundwater well installation, data collection and analysis) and design, and potentially several years of review. No applicant would undertake that effort and expense at the very real risk of being barred from obtaining a permit retroactively. That is precisely the result that the legislature was seeking to avoid.

Appellants worry that applicants will game the system. However, an applicant that tries to do so risks its application being returned by the TCEQ, resulting in the Siting Ordinance applying.

Appellants also claim that a Parts I/II application cannot be an "application" because the permit cannot be granted. See, e.g., Appellants' Brief at 26-27. However, a Parts I/II application can result in a final decision on the permit; the application can be denied.

Further, a "final" determination that the Parts I/II meets the land use criteria may be made by the agency, and that determination is final, absent a material change in the application that renders the decision no longer appropriate. *See* Tex. Health and Safety Code § 361.069 ("The commission in its discretion may, in processing a permit application, make a separate determination on the question of land use compatibility, and, if the site location is acceptable, may at another time consider other technical matters concerning the application").

TCEQ regulations implementing this statute, at 30 TAC Sec 330.57(a), state that:

> An owner or operator applying for a permit may request a land-use only determination. If the executive director determines that a land-use only determination is appropriate, the owner or operator shall submit a partial application consisting of Parts I and II of the application. The executive director may process a partial permit application to the extent necessary to determine land-use compatibility alone. If the facility is determined to be acceptable on the basis of land use, the executive director will consider technical matters related to the permit application at a later time.

It defies logic that the legislature would specifically authorize TCEQ to determine a site's land use compatibility and then allow local governments to

invalidate that determination by adopting an ordinance that negates TCEQ's determination.

Finally, even if a land-use only determination application is not an "application for a permit" as contemplated by the Siting Ordinance Statutes, a land-use only determination application is an "other authorization under Chapter 361." See Tex. Health & Safety Code Ann. § 363.112(c) and § 364.012(e) ("…may not prohibit the processing or disposal of municipal or industrial solid waste in an area…for which (1) an application for a permit or other authorization under Chapter 361 has been filed with and is pending…") (emphasis added). If not an application, a land-use only determination application is an application for a determination under Chapter 361 (specifically, § 361.069) authorizing the applicant to proceed with an application for the "other technical matters concerning the application," without having to further consider land use.

B. Caselaw Cited by Appellants Supports Deference to the TCEQ's Decision.

The cases cited by Appellants are not landfill cases, and deal with entirely different statutes and different applications.

Appellants' reliance on *Stark v. Geeslin* is misplaced. In *Stark v. Geeslin*, this Court upheld the Texas Department of Insurance's (the "Department") interpretation of the relevant statute. *Stark v. Geeslin*, 213 S.W.3d 406, 416 (Tex.

App.—Austin 2006, pet. denied) ("We give serious consideration to an administrative agency's construction of the statute it is charged with enforcing, so long as the agency's construction is reasonable and consistent with the plain language of the statute"). Further, in *Stark*, the Department had a specific rule stating that "a Form A application is not considered to be filed within the meaning of the statute until it is complete." *Id*. This Court deferred to the Department's interpretation of the rule. *Id*. ("An administrative agency's interpretation of its own regulations is also entitled to deference by the courts"). In the case at bar, the TCEQ has a long-standing history of interpreting the Siting Ordinance Statutes and its own rules such that a Parts I/II application grandfathers an application from a subsequent local Siting Ordinance. In applying *Stark* to the case at bar, this Court should again defer to the TCEQ's long-standing interpretation.

Appellants' reliance on *Shelby Operating Co. v. City of Waskom* is similarly misplaced. In *Shelby*, the Court's holding turned, not on the fact that Shelby's application was incomplete, but rather on the fact that, at the time the city's ordinance was changed, Shelby had no application pending. *Shelby Operating Co. v. City of Waskom*, 964 S.W.2d 75, 79-80 (Tex. App.—Texarkana 1997, pet. denied) ("Had Shelby had an application pending at the time Ordinance 96 was amended, we might reach a different conclusion"). In *Shelby*, Ordinance 96 had been passed on June 24, 1987; Shelby's incomplete application was filed

December 16, 1996, which was not granted. *Id*. at 79. As a result of Shelby's lawsuit, the City amended Ordinance 96 on May 28, 1997. *Id*. at 79. At most, *Shelby* stands for the proposition that, if a Parts I/II application was filed, a valid siting ordinance then passed, and the Parts I/II application denied, the siting ordinance would operate against the filing of a subsequent application.

Appellants also seem to argue that the Siting Ordinance Statutes are intended to encourage applicants to communicate and negotiate with local governments. *See* Appellants' Br. at 31 (Mar. 23, 2020). TxSWANA extensively represents local governments, and Waco is a local government, and both certainly agree that that communication is important. That is exactly why local governments are identified as "affected parties" and entitled to party status. *See* 30 Tex. Admin. Code § 55.203(b). The Siting Ordinance Statutes' limits on the ability of a local government to prohibit a landfill do not prevent negotiations; rather, they level the playing field and encourage good-faith negotiations. In the absence of these limits, local governments could, and would (as the legislature recognized) avoid the tough decisions necessary to proactively regulate solid waste disposal in their jurisdiction, take action only when it is clear from the necessary site investigation that a landfill application is imminent, then dictate, rather than negotiate, whether the landfill should be allowed, all in the face of the significant local opposition that landfill applications nearly always draw.

C. A Parts I/II Application is Appropriate to Grandfather Applications from Siting Ordinances.

The purpose of a Parts I/II application is to evaluate the compatibility of a proposed landfill with surrounding land uses, including its compliance with local government requirements. Part II of the application requires information on "land use, zoning in the vicinity, community growth patterns, and other factors associated with the public interest." 30 Tex. Admin. Code § 330.61(h). Whether the application complies with a Siting Ordinance would therefore be included in Part II, and would only be relevant to whether Part II shows that the proposed facility is a compatible land use. There is nothing in Parts III or IV that would impact a proposed landfill's compliance (or failure to comply) with a Siting Ordinance.

Part III, however, does require extensive, site specific data. For example, among the data required in Part III is a geology report that includes "the results of investigations of subsurface conditions" and "must describe all borings drilled on site to test soils and characterize groundwater." 30 Tex. Admin. Code § 330.63(e)(4). The drilling necessary to obtain the data required by Part III is extensive, requiring at least 29 borings for a small (250 acre) site. *Id*. Soil boring operations require heavy equipment and are obvious to even casual observers.

Once undertaken, the public is quickly aware that the site is being evaluated for a landfill.[1] After the borings are taken, the data is used to develop the design in Part III; Part III cannot be completed until months after the boring operation is completed. Likewise, Part IV, the Site Operating Plan, is heavily dependent on the specific design of the landfill, and, therefore, cannot be finalized without a completed Part III.

Therefore, the public will always know about a proposed landfill project long before a Part III can be prepared and submitted. The practical effect is that, if submittal of Parts III and IV is required to grandfather a site from a Siting Ordinance, then no site will be grandfathered from a Siting Ordinance, and the Siting Ordinance Statutes' provisions preventing local governments from prohibiting landfills that have submitted an application are rendered meaningless.

[1] Where the landfill is being developed by a municipality, subject to open records requests, the public will be aware of a proposed landfill project even sooner.

III. CONCLUSION AND PRAYER

Amici concur with TCEQ's long history of recognizing that the filing of a Parts I/II application grandfathers a site from a Siting Ordinance. This history is well founded on not only the language of the statutes authorizing Siting Ordinances, but on the real-world practicalities of landfill development. The legislature enacted a delicate balance between local governments' valid interest in comprehensive planning for solid waste, while not providing those local governments with a veto power over specific landfill applications, under the guise of planning.

Applicants rely on this history in preparing their applications, and a reversal of this historical interpretation will have a real and detrimental impact on not only pending applications that began with submittal of Parts I/II applications, but on future applicants' ability to permit landfills in areas of the state with the greatest need for solid waste disposal capacity in the years to come.

Amici respectfully pray that this Honorable Court not find error in the TCEQ's long-standing interpretation of the Siting Ordinance Statutes (providing that the filing of a Parts I/II application is sufficient to grandfather a site from a Siting Ordinance).

Respectfully submitted,

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IV. CERTIFICATE OF COMPLIANCE

Based on a word count run in Microsoft Word 2016, this brief contains 4257 words, excluding the portions of the brief exempt from the word count under Texas Rule of Appellate Procedure 9.4 (i)(1).

By: /s/ Jeffrey S. Reed
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V. CERTIFICATE OF SERVICE

I hereby certify that on September 16 2020, a true and correct copy of this brief was served via electronic service through eFile.TXCourts.gov on parties through counsel of record, listed below:

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VI. APPENDIX

TAB A

SUBJECT: City and county authority over landfill siting

C0MMITTEE: Environmental Regulation — favorable, with amendment

VOTE: 9 ayes — Chisum, Allen, Culberson, Dukes, Howard, Kuempel, Palmer, Talton, Zbranek

0 nays

SENATE VOTE: On final passage, March 11 — voice vote

WITNESSES: For — Bob Gregory, National Solid Waste Management Association, Texas Chapter; Margaret Ligarde, Waste Management; Mary Miksa, Texas Association of Business and Chambers of Commerce

Against — None

BACKGROUND: The Texas Natural Resource Conservation Commission (TNRCC) regulates the management of solid waste under the Solid Waste Disposal Act (Health and Safety Code, chapter 361). The act governs permits for landfills, transfer stations, and other facilities for processing and disposing of solid waste.

Other statutes relevant to the siting of solid waste facilities are found in chapter 363, describing the authority of cities and counties to govern the siting of solid-waste processing and disposal facilities, and chapter 364, concerning the power of county commissioners courts to govern the siting of solid-waste disposal facilities.

Under sec. 363.112, the governing body of a city or county may prohibit the processing or disposal of solid waste in certain areas of its territory. To make such a prohibition, the city or county must, by ordinance or order, designate a specific area of the city or county in which solid waste disposal will not be prohibited. Under sec. 364.012, a county may prohibit the disposal of solid waste in the county if the disposal would threaten public health, safety, or welfare. To make such a prohibition, the commissioners court must adopt an ordinance specifically designating the area of the county in which solid waste disposal is not prohibited.

DIGEST:

SB 486, as amended, would revise Health and Safety Code, sec. 363.112 and sec. 364.012 to specify that these sections would apply to *municipal or industrial* solid waste. It also would amend the law to provide that a city or county could not prohibit the processing or disposal of municipal or industrial solid waste in an area of the city or county for which an application for a permit or other authorization under chapter 361 had been filed or was pending before TNRCC or for which the commission already had issued a permit or other authorization.

TNRCC could not grant an application for a permit to process or dispose of municipal or industrial solid waste in an area where it was prohibited by a city or county ordinance or order, unless that ordinance or order had violated the provisions of SB 486 by prohibiting processing or disposal in an area for which an application had been filed or for which TNRCC had issued a permit. TNRCC could establish procedures by rule for determining whether an application was for processing or disposal in an area where it had been prohibited by a city or county ordinance or order.

SB 486, as amended, would provide that Health and Safety Code, secs. 363.112 and 364.012, including the restrictions added by this bill, would not apply in cases involving industrial plants that have private storage and disposal operations on their own property within 50 miles of a plant or operation that is the source of the waste. Under SB 486, the solid waste practices of these types of facilities also would not be affected by county commissioners court rules regulating collection, handling, storage, and disposal of solid waste under sec. 364.011.

The bill would delete language providing that sec. 363.112 does not apply to a city or county that adopted certain solid-waste management plans approved by TNRCC. It would delete similar language providing that sec. 364.012 does not apply if the county adopted solid-waste disposal guidelines approved by TNRCC.

The bill would delete the current statutory requirement that an applicant for a solid waste permit submit any additional information that TNRCC deems necessary to ensure that the application is administratively complete no later than the 270th day after the applicant receives notice from TNRCC that more information is needed. Instead, SB 486 would require TNRCC, by rule, to

establish a deadline by which this additional information would have to be submitted.

The bill, as amended, would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. The section of the bill concerning deadlines for administrative completeness would apply only to an application submitted on or after the bill's effective date.

The remaining provisions of SB 486, as amended, would not apply until January 1, 2000, for any application submitted after September 1, 1998, for a facility proposed to be located in a county in which the commissioners court had provided notice by September 1, 1999, of intent to enact an ordinance.

SUPPORTERS SAY:

SB 486 would stop cities and counties from enacting ordinances in response to proposed landfills after the applicants have spent millions of dollars on their applications. It is unfair for a landfill applicant to buy or option land, spend millions of dollars for engineering studies and applications, and then be barred from a site one month before opening it because a city or county has passed an ordinance to stop the application. Under SB 486 as amended, landfill applications still could be protested to the TNRCC and still would be subject to contested case hearings.

SB 486 would continue to allow city and county ordinances to prohibit landfills in certain areas but would limit the application of those ordinances to permit applications filed with TNRCC *after* the ordinances took effect. Limiting the ordinances to prospective application would allow landfill applicants to rely on the ordinance in effect at the time the application for a permit for a new facility was filed.

Counties have had years to pass ordinances concerning landfills, so there is no need to give them more time to try to stop applications now on file by quickly passing ordinances before this bill goes into effect. The bill would give counties until January 1, 2000, to pass ordinances relating to applications filed after September 1, 1998, as long as the county posted a notice by September 1, 1999, of its intention to pass such an ordinance.

This bill would give cities and counties the flexibility to change their designations of suitable landfill areas to reflect changing conditions in the area and to ensure the quality of life for city and county residents. However,

it also would ensure that these changes could not be enacted expressly to stop a certain facility for which a permit application already had been filed or a permit had been issued.

SB 486 would not affect ordinances enacted before the bill's effective date. Any new permit applications for landfills filed with TNRCC after the bill's effective date could not be in areas where the city or county had prohibited their siting. TNRCC would have to adhere to local landfill ordinances enacted before the landfill application was filed with TNRCC.

Requiring a landfill applicant to notify local governments before applying for a permit would encourage local governments to pass ordinances to prevent the siting for political reasons in almost every case. SB 486, in contrast, would encourage local governments to be prospective rather than reactive in their landfill policies and to pass ordinances based on the technical merits of actual sites and their impacts on public health and the environment, rather than in reaction to specific permits.

Opposition to any identifiable site would, in almost every instance, make it politically impossible for a city council or commissioners court to approve the area for a landfill. Despite public resistance, the need for new landfills in Texas is inevitable. If landfills were sited only in remote, unpopulated areas, the cost to transport waste to them would push the cost of waste disposal to rates that would be unacceptable for most Texans. The state must find ways to identify sites that are near enough to the sources of waste to keep disposal costs down while minimizing the effects these sites have on the surrounding community. Fewer and fewer landfill companies are willing to operate in Texas because they know they can be barred from a site after spending millions of dollars to prepare an application for it.

Requiring TNRCC to establish a deadline for submission of material needed to make an application administratively complete would speed up the permit process and encourage applicants to file better applications the first time. An application can fill dozens of binders of information, and TNRCC sometimes must spend a year or more working with an applicant to complete it. This not only is an inefficient use of the agency's time, but it gives rise to the public perception that agency staff work so closely with applicants that they lose their objectivity about the application.

The 270-day timeline for administrative completeness that SB 486 would delete was intended originally to encompass both administrative completeness and technical review. These two functions are now separate.

OPPONENTS SAY:

The section of the bill governing when certain provisions would take effect is very confusing and could be the subject of future litigation. For example, stipulating that most provisions would not apply until January 1, 2000, for certain applicants raises questions as to how the law could be applied after that date and whether the bill intended that current law, as well as the provisions added by SB 486, would not take effect until 2000.

The bill could apply retroactively for certain applications on file before September 1, 1998, because once the bill took effect, counties could not pass ordinances affecting those applications. SB 486 should apply only to applications filed after its effective date and not retroactively to those filed before September 1, 1998. The rules should apply to equally to all applicants. In fact, the whole bill should take effect September 1, 1999, rather than immediately upon enactment.

OTHER OPPONENTS SAY:

The bill should be amended to require permit applicants to post notice of a proposed application well before they file an application with TNRCC. This would allow local governments to examine the request on its technical merits and would give communities time to react to proposed landfills before an applicant spent a lot of money on the permit process. Current law does not require applicants to notify counties of their intent to file an application — notice is required only after an application has been filed.

The bill is unclear in stipulating that a city or county could not prohibit solid waste disposal or processing if an application was *filed or pending.* It should specify instead that an application be administratively complete. Otherwise, applicants could file token applications to prevent counties from enacting ordinances. The bill should set criteria by which the industry would have to abide to ensure a *prima facie* sufficient application, and it should establish sanctions for those who file superficial applications.

NOTES:

The House committee amendment to the Senate-passed bill deleted a clause providing that the bill would take effect September 1, 1999, and added language specifying that the bill would take immediate effect except for

applications submitted after September 1, 1998, for any facility proposed to be located in a county in which the commissioners court had provided notice by September 1, 1999, of intent to enact an ordinance. For such applications, the provisions of the committee substitute governing landfills would not apply until January 1, 2000.

A related bill, SB 487 by Brown, which includes the same provision as in SB 486 that would require TNRCC to establish a deadline for when a solid waste application would be administratively complete, passed the Senate on March 11 and was reported favorably by the House Environmental Regulation Committee on April 19.