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June 25, 2009

Via Facsimile: (512) 239-3311 and Federal Express
Ms. LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality, MC-105
12100 Park 35 Circle
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Re: TCEQ Docket No. 2005-1371-MSW Montgomery Landfill Solutions, L.P. MSW Permit No. 2324

Dear Ms. Castañuela:

Enclose for filing are an original and seven (7) copies of **Citizens Against Montgomery Landfills' Reply to Responses filed to Hearing Requests and Requests for Reconsideration** in connection with the above referenced matter. Copies of Citizens Against Montgomery Landfills' Reply have been forwarded to all parties of record and the requesters at their addresses listed on the service list.

Should you have any questions or concerns, please do not hesitate to call our office.

Sincerely,

BLACKBURN CARTER, P.C.

by_____
Zona Amerson – Legal Assistant

cc: Service list

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2009 JUN 25 PM 3:14
CHIEF CLERKS OFFICE

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2009 JUN 25 PM 3: 14
CHIEF CLERKS OFFICE

TCEQ DOCKET NO. 2005-1371-MSW

IN THE MATTER OF THE	§	BEFORE THE
APPLICATION BY MONTGOMERY	§	TEXAS COMMISSION ON
LANDFILL SOLUTIONS, L.P.	§	ENVIRONMENTAL QUALITY
FOR MSW PERMIT NO. 2324	§	

CITIZENS AGAINST MONTGOMERY LANDFILLS' REPLY TO RESPONSES FILED TO HEARING REQUESTS AND REQUESTS FOR RECONSIDERATION

COMES NOW, Citizens Against Montgomery Landfills ("CAML") and files this its Reply to the Responses to Hearing Requests and Requests for Reconsideration filed by the Office of Public Interest Counsel ("OPIC") and the Executive Director ("ED") of the Texas Commission on Environmental Quality ("TCEQ" or the "Commission") and to the Applicant Montgomery Landfill Solutions, LP. ("Applicant"). We respectfully request referring this matter to the State Office of Administrative Hearings ("SOAH") for a Contested Case Hearing for MSW Permit NO. 2324.

I. AFFECTED PERSON STATUS

Both the ED and the OPIC find that CAML meets the requirements of 30 T.A.C. §§ 55.203, 55.205 and recommend that the Commission find that CAML is an affected person. (OPIC pp. 7-9 and ED p. 58.) We agree with their recommendations.

The Applicant states that it does not oppose the associational standing, affected person status of CAML as a party in the contested case on issues referred by the Commission to SOAH. (Applicant pp. 5-6). However, it appears that the Applicant's lack of opposition to affected person status for CAML has strings attached. Specifically, the Applicant suggests that "because CAML has alleged that the participation of its individual members is not required, and indeed the associational standing of CAML could not be allowed if its members' participation were required, Applicant objects to the individual participation of individual members of CAML in

any contested case hearing." (p. 6) "If any individual member of CAML seeks his or her own individual participation in the contested case hearing, Applicant requests that such individual be required to appear and seek such individual party status based on sworn testimony and evidence presented by the individual in the preliminary jurisdictional hearing held by SOAH." (p. 6).

We are unaware of any TCEQ rule that holds that a member of an association is not allowed to seek party status as an individual. Indeed 30 T.A.C. § 55.205 requires that a group or association may request a contested case hearing only if the group or association has one or more members that would otherwise have standing to request a hearing in their own right... Accordingly, if a member of CAML has already submitted a request for a contested case hearing and has alleged a personal justiciable interest related to a legal right, duty, privilege, power or economic interest affected by the application, he or she may be determined to be an affected person by the Commission without the sworn testimony and evidence requested by the Applicant. Such persons in this matter include among others Paul Zylman, Dale and Karen Welch, Lawrence Rains, and Travis Mayeux.

An individual who seeks to be a party at the preliminary hearing, would of course be required to establish his or her affected party status at the preliminary hearing before the Administrative Law Judge ("ALJ"). The Applicant also suggests that each individual that is determined to be an affected person should be aligned with CAML. (p. 52) We believe it is premature to make this request, particularly when we do not know how many individuals will be determined to be affected persons, nor their individual interests. Furthermore, according to 30 T.A.C. § 80.4, the ALJ has the authority to "designate and align parties ... 30 T.A.C. § 80.4(c)5. Alignment of parties would be appropriate at the preliminary hearing before the SOAH Judge, or after all the affected persons have been determined.

II. ISSUES RECOMMENDED FOR REFERRAL

We request the disputed issues of fact numbers 1 – 28 identified by OPIC be referred to SOAH for a contested case hearing. Additionally, we request that issues number 1, 10-11, 23-27 recommended by the ED also be referred to SOAH for a contested case hearing. With regard to OPIC issue number 28 "Does Health and Safety Code § 361.123(b) forbid construction of the proposed Type IV Municipal Solid Waste Landfill in Montgomery County?", we believe this issue is jurisdictional, and should be addressed.

This provision holds "the Commission may not issue a permit for a new Type I or new Type IV Municipal Solid Waste Landfill to be located as described by Subsection (a). Health and Safety Code § 361.123(b). This provision was passed to be effective June 18, 2005, and applies to permit applications received by the TCEQ on or after the effective date. As OPIC notes, however, the major amendment to this permit application which was received by the Commission on November 10, 2006, may have constituted an entirely new application as it did for notice provisions." (OPIC p. 19) and therefore the statute may apply precluding this permit.

According to the procedural background in the Response to Hearing Requests prepared by the ED, the application was received on March 17, 2004 and declared administratively complete on April 4, 2004. The ED completed the technical review of the application on October 21, 2004 and prepared a draft permit. In July 2006, the Applicant asked the TCEQ to suspend its processing of the application while amendments to the application and facility layout were considered. On November 10, 2006, the ED received an amended application for review. The technical review of the amended application was completed on September 7, 2007, additional notice was published, and another public meeting was scheduled and held on April 10, 2008. The comment period for this amended application closed on April 11, 2008. The

Applicant submitted additional changes to the amended application on August 21, 2008 revising the entry path to the proposed facility. The ED did additional technical review and prepared his first amended response to public comment which was filed with the TCEQ of the Office of Chief Clerk on February 13, 2009. We believe the statute (Health and Safety Code § 361.123) applies to this permit application and precludes the permit.

III. MAXIMUM EXPECTED DURATION OF HEARING

We respectfully request that the maximum expected duration of the hearing be one year from the first date of the preliminary hearing until the Proposal For Decision is issued.

IV. CONCLUSION

We request that CAML be determined an affected person, that the combined issues from the ED and OPIC be referred to SOAH for a contested case hearing, and that the duration of the hearing be one year.

Thank you for your consideration of this request.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 25th day of June, 2009, a true and correct copy of the foregoing instrument was served on all attorneys and parties of record by the undersigned via regular U.S. Mail, and/or Certified Mail/Return Receipt Requested, and/or hand delivery, and/or facsimile transmission, and/or Federal Express Overnight Mail.

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