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July 10, 2013

Ms. Bridget C. Bohac  
Chief Clerk (MC-105)  
Attn: Agenda Docket Clerk  
Texas Commission on Environmental Quality  
12100 Park 35 Circle, Bldg F  
Austin, TX 78753

*Via E-Filing*

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

Dear Ms. Bohac:

Enclosed for filing in the above-referenced docket, please find Williamson County's Response to Protestants' Joint Brief regarding the Third Court of Appeals' Limited Remand of the Application of Williamson County for MSW Permit Amendment No. 1405B. Thank you.

Respectfully submitted,



R. Mark Dietz  
Counsel for Williamson County

Enclosure

cc: Service List

**TCEQ DOCKET NO. 2005-0337-MSW  
SOAH DOCKET NO. 582-06-3321**

**THIRD COURT OF APPEALS' LIMITED REMAND OF  
THE APPLICATION OF WILLIAMSON COUNTY  
FOR MSW PERMIT AMENDMENT NO. 1405B**

**WILLIAMSON COUNTY'S RESPONSE TO PROTESTANTS' JOINT BRIEF**

TO THE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

In their joint brief, Protestants misconstrue the standard for changing the Administrative Law Judges' ("*ALJs*") operating hours recommendation for the Williamson County Recycling and Disposal Facility (the "*Facility*"). As discussed in Williamson County's initial brief, the Third Court of Appeals has recently held (in another landfill case) that the Texas Commission on Environmental Quality ("*TCEQ*" or the "*Commission*") can reject any finding proposed by an ALJ "if there is evidence in the record supporting a contrary finding to that of the ALJ."<sup>1</sup> As the permitting agency and ultimate decision-maker, TCEQ has the authority and discretion to weigh the evidence and make findings different than those proposed by an ALJ.<sup>2</sup> Here, in the case at hand, this standard is readily satisfied. As discussed more fully in Williamson County's initial brief, the grounds for changing the ALJs' proposed findings regarding the Facility's operating hours are evident in the administrative record.

**ARGUMENT**

Protestants argue that the Commission should weigh two factors when deciding the Facility's operating hours: (1) land use compatibility and (2) Williamson County's need for extended hours for the operation of heavy equipment and transportation of materials on- and off-

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<sup>1</sup> *City of Jacksboro v. Two Bush Cmty. Action Group*, No. 03-10-00860-CV, 2012 Tex. App. LEXIS 5243 at \*60 (Tex. App.—Austin June 28, 2012, no pet.).

<sup>2</sup> *See id.*

site. Although the applicable regulation does not specify any factors that the Commission shall consider when deciding a facility's operating hours,<sup>3</sup> both of these factors were addressed in the administrative proceeding and in Williamson County's initial brief on remand.

**A. Land Use Compatibility**

As to land use compatibility, the ALJs' operating hours proposal was based solely on concerns regarding the potential for a future land use incompatibility.<sup>4</sup> Notably, the ALJs did not find that operation of the Facility twenty-four hours a day, seven days a week ("24/7") would be incompatible with surrounding land uses, but rather that such operations "may" or "might" become incompatible.<sup>5</sup> However, the only expert to opine on the land use compatibility of the Facility's operating hours testified that 24/7 operations would be a compatible land use.<sup>6</sup> This expert testimony supports findings contrary to those proposed by the ALJs.

Whereas the ALJs provided an exhaustive analysis of land use compatibility and discussed in detail the evidence supporting their conclusion that the expanded Facility will be compatible with surrounding land uses,<sup>7</sup> the ALJs provided only a cursory discussion of the operating hours issue.<sup>8</sup> Mr. Worrall's expert testimony that 24/7 operations at the facility would be compatible with surrounding land uses was not addressed in the ALJs' Proposal for Decision. The Commission may – and should – weigh that expert testimony and find that it supports the operating hours authorization that TCEQ issued, which extended the operating hours proposed

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<sup>3</sup> See 30 TEX. ADMIN. CODE § 330.118(a) (2005).

<sup>4</sup> See ALJs' Proposal for Decision ("PFD") (Admin. R. Vol. 19, § 1, Item 182) at 83; ALJs' Proposed Order (Admin. R. Vol. 19, § 1, Item 182) at 24 (Finding of Fact No. 163).

<sup>5</sup> ALJs' PFD (Admin. R. Vol. 19, § 1, Item 182) at 83; ALJs' Proposed Order (Admin. R. Vol. 19, § 1, Item 182) at 24 (Finding of Fact No. 163).

<sup>6</sup> See Trial Tr. (Admin. R. Vol. 29, § 3, Item T-10) at 1833:16 to 1834:8 (Worrall).

<sup>7</sup> See ALJs' PFD (Admin. R. Vol. 19, § 1, Item 182) at 21-39 (discussing land use compatibility).

<sup>8</sup> See *id.* at 83 (discussing operating hours).

by the ALJs only with respect to the operation of heavy equipment and transportation of materials on- and off-site, and which did not authorize 24/7 hours for any operations at the Facility.<sup>9</sup>

Protestants attempt to discount Mr. Worrall's testimony, but they cannot discount the fact that Mr. Worrall was the only land use expert to address the operating hours issue; that he testified unequivocally that he considered the Facility's proposal to operate 24/7; and that he concluded that such operations would be compatible with surrounding land uses.<sup>10</sup> Nor can Protestants discount Mr. Worrall's qualifications. For approximately 20 years prior to his testimony in the contested case hearing, Mr. Worrall specialized in performing land use compatibility analyses for solid waste facilities, and had conducted such analyses for "some two dozen municipal solid waste facilities throughout the State of Texas."<sup>11</sup> He has testified as a land use expert in a dozen or more proceedings before the State Office of Administrative Hearings regarding the compatibility of municipal solid waste facilities.<sup>12</sup>

Mr. Worrall was, by far, the witness most qualified to render an opinion on the land use compatibility of 24/7 operations at the Facility, and he testified unequivocally that such operations would be compatible with surrounding land uses.<sup>13</sup> His testimony cannot reasonably be discounted. And his testimony unquestionably supports the Commission's decision to authorize the Facility to operate heavy equipment and transport materials beyond the hours

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<sup>9</sup> See TCEQ's February 17, 2009, *Order Granting the Application for Permit No. MSW-1405B to Williamson County*, TCEQ Docket No. 2005-0337-MSW, SOAH Docket No. 582-06-3321 ("**TCEQ Order**") (Admin. R. Vol. 20, § 1, Item 200) at 24 (Finding of Fact No. 161), 37-38 (Explanation of Changes No. 3), 38 (Ordering Provision No. 3).

<sup>10</sup> See Trial Tr. (Admin. R. Vol. 29, § 3, Item T-10) at 1833:16 to 1834:8 (Worrall).

<sup>11</sup> Trial Tr. (Admin. R. Vol. 29, § 3, Item T-10) at 1777:12-23 (Worrall); see also Ex. APP-800 (Admin. R. Vol. 22, § 2, Item App-800).

<sup>12</sup> See Trial Tr. (Admin. R. Vol. 29, § 3, Item T-10) at 1777:24 to 1778:13 (Worrall).

<sup>13</sup> See *id.* at 1833:16 to 1834:8 (Worrall).

recommended by the ALJs but less than 24/7. Additionally, given that the ALJs' proposal to limit the Facility's operating hours was based solely on concerns regarding the potential for a future land use incompatibility, Mr. Worrall's testimony necessarily supports findings contrary to those of the ALJs.

## **B. Need**

As to need, Williamson County's need for the additional operating hours authorized by the Commission was noted by Judge Gattis in his testimony at the hearing and was explained by Dr. Carmichael at the Commission's agenda meeting on Williamson County's application. At the hearing, Judge Gattis testified that Williamson County's request to operate the Facility 24/7 would allow the Facility operator to conduct "the necessary work they need to do" when the Facility is not accepting waste.<sup>14</sup> The "necessary work" (i.e., need) that Judge Gattis referenced in his testimony was further discussed by Dr. Carmichael at the agenda. As Dr. Carmichael explained, to facilitate landfill cover and proper waste acceptance operations, TCEQ typically authorizes landfills to operate heavy equipment and transport materials on- and off-site before and after the landfill's authorized waste acceptance hours, so that the facility has time to operate the heavy equipment and transport the materials necessary to open the facility each day for waste acceptance and close the facility following the day's waste acceptance operations.<sup>15</sup>

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<sup>14</sup> Trial Tr. (Admin. R. Vol. 24, § 3, Item T-2) at 12:13-16 (Gattis).

<sup>15</sup> A transcript of the relevant exchange between Commissioner Shaw and Dr. Carmichael at the February 11, 2009, Commission agenda was provided as *Exhibit A* to Williamson County's initial brief in this remand proceeding.

## CONCLUSION

As discussed above and more fully in Williamson County's initial brief, there is evidence in the record supporting contrary findings to those of the ALJs on the issue of operating hours, and ICEQ can properly weigh that evidence and reject those findings by the ALJs<sup>16</sup> Accordingly, Williamson County respectfully requests that the Commission enter an order supplementing its February 17, 2009, order in this matter and explaining that the ALJs' proposed findings regarding operating hours (Finding of Fact No. 161 and Ordering Provision No. 3) were not supported by the great weight of the evidence.

Respectfully submitted,

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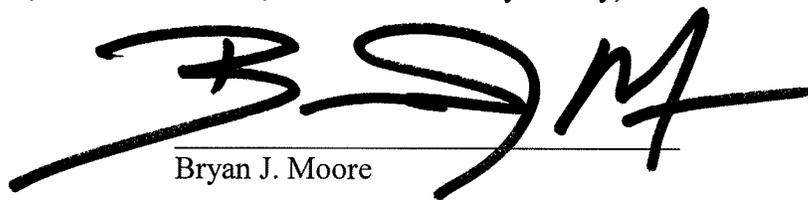
*Attorneys for Williamson County*

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<sup>16</sup> See *City of Jacksboro*, 2012 Tex App LEXIS 5243 at \*60, \*63.

**CERTIFICATE OF SERVICE**

I certify that the foregoing brief was served on the persons on the attached service list for this matter, via electronic mail, facsimile, or first class mail, on this the 10<sup>th</sup> day of July, 2013.



A handwritten signature in black ink, appearing to read 'BJM', is written over a horizontal line. The signature is stylized and cursive.

Bryan J. Moore

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**SERVICE LIST**  
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**SOAH Docket No. 582-06-3321**  
**Application of Williamson County for a Permit Amendment to Expand a**  
**Type I Municipal Solid Waste Landfill Facility; Permit No. MSW-1405B**

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