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July 10, 2013

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

VIA CHIEF CLERK'S eFILING SYSTEM

Ms. Bridget C. Bohac
Office of Chief Clerk (MC-105)
Texas Commission on Environmental Quality
12100 Park 35 Circle, Building F
Austin, Texas 78753

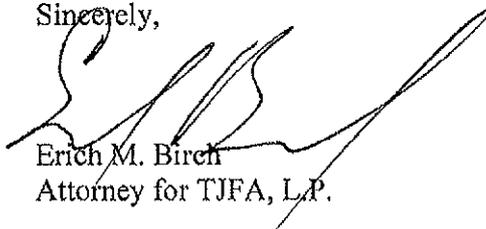
Re: Protestants' Joint Brief in Reply to Briefs Filed by Williamson County and the Executive Director of the Texas Commission on Environmental Quality on the Operating Hours Issue, *In the Matter of the Third Court of Appeals' Remand of the Application of Williamson County for MSW Permit Amendment No. 1405B*, TCEQ Docket No. 2005-0337-MSW, SOAH Docket No. 582-06-3321.

Dear Ms. Bohac:

Enclosed for filing in the above-referenced proceeding is *Protestants' Joint Brief in Reply to Briefs Filed by Williamson County and the Executive Director of the Texas Commission on Environmental Quality on the Operating Hours Issue*. This document has been filed with the Texas Commission on Environmental Quality via the Office of the Chief Clerk's eFiling System on behalf of the Mount Hutto Aware Citizens, the Hutto Citizens Group, the Heritage on the San Gabriel Homeowners Association, Jonah Water Special Utility District, and TJFA, L.P. A copy of the above-referenced document is also being served on the persons identified on the Certificate of Service.

If you have any questions, please telephone me at the above number.

Sincerely,



Erich M. Birch
Attorney for TJFA, L.P.

ENCLOSURES

cc: Persons identified on Certificate of Service
Ms. Marisa Perales, Lowerre, Frederick, Perales, Allmon & Rockwall
Dr. Orlynn Evans
Mr. Dennis Hobbs, TJFA, L.P.

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

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

BEFORE THE
TEXAS COMMISSION
ON
ENVIRONMENTAL QUALITY

2013 JUL 10 PM 2:41
CHIEF CLERKS OFFICE

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

PROTESTANTS' JOINT BRIEF IN REPLY
TO BRIEFS FILED BY WILLIAMSON COUNTY AND THE EXECUTIVE DIRECTOR
OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
ON THE OPERATING HOURS ISSUE

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

COMES NOW, Protestants, the Mount Hutto Aware Citizens, the Hutto Citizens Group, the Heritage on the San Gabriel Homeowners Association, Jonah Water Special Utility District, and TJFA, L.P. (collectively "Protestants"), and presents this their *Joint Brief in Reply to Briefs Filed by Williamson County and the Executive Director of the Texas Commission on Environmental Quality on the Operating Hours Issue* in the above-referenced proceeding:

I. INTRODUCTION

While the Executive Director of the Texas Commission on Environmental Quality ("TCEQ" or the "Commission") and Williamson County make different arguments in their initial briefs, their conclusions are not supported by the evidentiary record in this proceeding. The Executive Director argued that there is "adequate evidence in the record to support the Commission's change to the Administrative Law Judge's recommendation" regarding the operating hours for the operation of heavy equipment and transportation of materials,¹ but, as described in detail below, in reaching that conclusion, the Executive Director ignored the vast majority of the evidence presented during the Hearing on the Merits. Williamson County also

¹ Executive Director's Response to Third Court of Appeals Remand of the Application by Williamson County for MSW Permit 1405b, *Application of Williamson County for a Permit to Amend a Type I Municipal Solid Waste Landfill Facility; (Permit No. MSW-1405 B)*, SOAH Docket No. 582-06-3321, TCEQ Docket No. 2005-0337-MSW at 1 (June 26, 2013) [hereinafter "Executive Director Response"].

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argued that the “grounds for the change are evident in the record.”² Like the Executive Director, though, Williamson County focuses on a very limited amount of evidence largely presented by its own witnesses and ignores the vast majority of the evidentiary record.

Disregard of the entire record is fatal to the positions of the Executive Director and Williamson County. The issue is not whether there is “adequate evidence” to support their position; rather, the recommendation of the Administrative Law Judges can be changed *only* if their recommendation is not supported by the great weight of the evidence. Such a determination can be made only by considering the *entire* evidentiary record.

When the entirety of the evidentiary record is considered, it is clear that the great weight of the evidence supports the finding of the Administrative Law Judges’ to define the operating hours of the Williamson County Recycling and Disposal Facility (the “Landfill”) as Monday through Friday, 5:00 a.m. to 8:00 p.m., and Saturday, 6:00 a.m. to 4:00 p.m.³ Any other conclusion is contrary to the great weight of the evidence because Williamson County failed to carry its burden to support any expanded operating hours. The Commission should not put itself in the position of “fixing” an application where the applicant has failed to carry its burden, and it certainly should not do so based on conclusory, self-serving statements on behalf of the applicant or the statements of TCEQ staff that are not part of the evidentiary record. Such an action would be bad precedent, potentially leading future applicants to sidestep contentious issues during contested case hearings, and then later ask the Commission to “clarify” those issues.

² Brief of Williamson County, *Third Court of Appeals’ Limited Remand of the Application of Williamson County for MSW Permit Amendment No. 1405B*, TCEQ Docket No. 2005-0337-MSW, SOAH Docket No. 582-06-3321 at 1 (June 26, 2013).

³ See Proposed Final Order, *Application of Williamson County for a Permit Amendment to Expand a Type I Municipal Solid Waste Landfill Facility; (Permit No. MSW-1405B)*, SOAH Docket No. 582-06-3321, TCEQ Docket No. 2005-0337-MSW, at Ordering Provision No. 3 at 37 (Feb. 14, 2008) [hereinafter “Proposed Final Order”]; see also *id.* at Finding of Fact No. (“FOF”) 161 at 24.

PROTESTANTS’ JOINT BRIEF IN REPLY TO BRIEFS FILED BY WILLIAMSON COUNTY AND THE EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY ON THE OPERATING HOURS ISSUE

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For the reasons set out below, as well as the reasons previously argued in *Protestants' Joint Brief in Support of the Administrative Law Judges' Recommended Operating Hours*,⁴ Protestants respectfully urge the Commission to enter the following Finding of Fact and Ordering Provision related to the operating hours of the Landfill:

Proposed Finding of Fact: The Application is sufficient to operate the Facility Monday through Friday, 5:00 a.m. to 8:00 p.m., and Saturday, 6:00 a.m. to 4:00 p.m. All normal operations of the Facility, including, but not limited to, waste acceptance, placement of cover, transportation of materials, on-site operation of heavy equipment, and cell construction can only occur during the defined operating hours. Equipment repair is not limited to the defined operating hours. The hours during which the Facility will be open to the public will be posted at the entrance.

Proposed Ordering Provision: Permit No. MSW-1405B shall state the Facility hours of operation will be Monday through Friday, 5:00 a.m. to 8:00 p.m., and Saturday, 6:00 a.m. to 4:00 p.m. All normal operations of the Facility, including, but not limited to, waste acceptance, placement of cover, transportation of materials, on-site operation of heavy equipment, and cell construction can only occur during the defined operating hours. Equipment repair is not limited to the defined operating hours.

II. ARGUMENT AND AUTHORITIES

A. *The Executive Director's "Justification for Expanding the Operating Hours" Ignores the Evidentiary Record in this Proceeding.*

In addressing the Commission's addition of twenty-nine hours per week to the operating hours recommended by the Administrative Law Judges in their Proposal for Decision and Proposed Final Order, the Executive Director states that there is "justification for expanding [the] operating hours," and claims that there is "adequate evidence" to support the Commission's decision.⁵ But while the evidentiary record in this proceeding contains hundreds of pages of documentary evidence and the oral evidence presented during the nine-day Hearing on the

⁴ Protestants' Joint Brief in Support of the Administrative Law Judges' Recommended Operating Hours, *In the Matter of the Third Court of Appeals' Remand of the Application of Williamson County for MSW Permit Amendment No. 1405B*, TCEQ Docket No. 2005-0337-MSW, SOAH Docket No. 582-06-3321 (June 26, 2013).

⁵ Executive Director Response, *supra* note 1, at 4.

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Merits, the Executive Director cites to only two facts in support of his argument, completely ignoring the Administrative Law Judges' justification for their recommendation regarding operating hours. First, he correctly states that Williamson County, in its application for Permit No. MSW-1405B (the "Application"), proposed that the Landfill operate twenty-four hours a day, seven days a week ("24/7").⁶ Second, he points to the testimony of Williamson County's rebuttal land use witness, Mr. John Worrall.⁷ But, in considering Mr. Worrall's testimony, he focuses exclusively on the percentages of the surrounding land that are agricultural and residential and Mr. Worrall's conclusory statement that the 24/7 operation of the Landfill would be compatible with surrounding land uses.⁸ The Executive Director fails to acknowledge the rest of Mr. Worrall's testimony, which demonstrated that Mr. Worrall had only considered the operating hours issue in a cursory fashion. Finally, the Executive Director ignores the great weight of the evidence that provides absolutely no support for the Commission's action.

As argued in detail in *Protestants' Joint Brief*, the great weight of the evidence presented in this proceeding supports the Administrative Law Judges' recommendation to limit the operating hours of the Landfill to 5:00 a.m. until 8:00 p.m., Monday through Friday, and to 6:00 a.m. until 4:00 p.m. on Saturdays.⁹ The Commission can only reject the findings of the Administrative Law Judges pursuant to the authority set out in Texas Health and Safety Code Section 361.0832(c), which provides: "The commission may overturn an underlying finding of fact that serves as the basis for a decision in a contested case only if the commission finds that the finding was not supported by the great weight of the evidence."¹⁰ This standard significantly

⁶ See *id.* at 4; see also Exh. APP-202, Williamson County Recycling & Disposal Facility Permit Amendment Application MSW-1405B at pt. IV § 4.7 at IV-28 (Technically Complete ("TC") 2521 (Tech. Complete Feb. 2006) [hereinafter "Application"].

⁷ See Executive Director Response, *supra* note 1, at 4.

⁸ See *id.*

⁹ See Proposed Final Order, *supra* note 3, at Ordering Provision No. 3 at 37; see also *id.* at FOF 161 at 24.

¹⁰ TEX. HEALTH & SAFETY CODE § 361.0832(c).

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restricts the Commission's discretion to reject an Administrative Law Judge's fact findings. As concluded in *Hunter Industrial Facilities, Inc. v. Texas Natural Resource Conservation Commission*, the Commission is not permitted to overturn an Administrative Law Judge's underlying finding of fact "because it would have reached a contrary decision, but can only exercise its discretion to reverse those findings that do not find support in the 'great weight' of the evidence in the record."¹¹ Here, there is no justification for the Commission overturning the Administrative Law Judges' proposed finding regarding operating hours when the entirety of the evidentiary record is considered.

The Executive Director simply ignores the following evidence that is discussed in detail in *Protestants' Joint Brief*:

- "Flexibility" was the only basis identified by Williamson County for requesting the 24/7 operating hours, but the Application did not state any need for such flexibility, and Williamson County's witnesses could not identify that such flexibility was actually needed for the operation of the Landfill. For example, Mr. James Roy Murray, the engineer-of-record for the Application, testified on behalf of Williamson County that the purpose of the requested 24/7 operating hours was to "provid[e] the flexibility to deal with waste streams that might come in at different times."¹² However, Mr. Murray's testimony revealed that there was actually no need for such "flexibility." He acknowledged that the Landfill currently did not operate with such expansive hours and that he had no knowledge that there had been operational problems because of the operating hours authorized by Permit No. MSW-1405A.¹³ Mr. Murray also testified that he had

¹¹ *Hunter Indus. Facilities, Inc. v. Texas Natural Res. Conservation Comm'n*, 910 S.W.2d 96, 103 (Tex. App.—Austin 1995, writ denied).

¹² See Tr. at 118 lns.8-10 (Cross Exam (by Perales) of Murray) (Aug. 20, 2007).

¹³ See *id.* at 118 lns.16-21.

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not heard of any problems regarding the assumed current inability of the Landfill to operate heavy equipment between the hours of 9:00 p.m. and 5:00 a.m.¹⁴ As previously pointed out by Protestants, Williamson County sought to operate 24/7, but there was no factual or engineering basis for the request.

- While Mr. Worrall testified regarding land use compatibility and claimed that 24/7 operation of the Landfill would be compatible with surrounding land uses, his testimony made clear that he had not fully considered all potential nuisance conditions that could cause concern for area residents, especially as related to nighttime operations. Mr. Worrall did not consider the lack of proposed screening, noise, odor, the waste acceptance rate, the types of waste accepted, or the height of the Landfill.¹⁵ With regard to the proposed 24/7 hours of operation, Mr. Worrall testified: "I just made myself aware of the fact that this was a 24/7 operation -- at least is proposed to be. It may in fact not be, but that's what the permit was seeking. So that was just, you know, a factor, I guess, that you would file away as you start to consider this."¹⁶ As previously identified by Protestants, Mr. Worrall testified that the 24/7 operating hours were compatible with surrounding land uses, but he provided no specifics as to how such expanded hours of operation were consistent with surrounding land uses, and his own testimony minimized his consideration of operating hours at all.¹⁷
- The expansion of the Landfill will increase the waste disposal footprint from 160 acres to 500 acres, and the entire permitted area of the landfill will increase

¹⁴ See *id.* at 122 lns.5-10.

¹⁵ See *id.* at 1831 ln.22 – 1832 ln.7 (Cross Exam (by Perales) of Worrall) (Aug. 30, 2007); see *id.* at 1832 ln.16 – 1833 ln.9.

¹⁶ *Id.* at 1852 lns.5-10.

¹⁷ See *id.* at 1834 lns.5-8 & 1852 lns.3-10.

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from approximately 202 acres to approximately 575 acres. The permitted height of the Landfill will also increase from the previously permitted height of 766 feet above mean sea level (m.s.l.) to approximately 840 feet above m.s.l.¹⁸ The natural ground elevations in the area of the Landfill range from a low of approximately 680 feet above m.s.l. on the southwest boundary to a high of approximately 730 feet above m.s.l. on the northern half of the western boundary.¹⁹ Almost one-half of the residences located within one mile of the Landfill are located to the southwest of the Landfill²⁰—an area of lower elevation where residents will look up at the new, taller landfill in the future.

- The corporate limits of the nearest community—the City of Hutto—are located only 1.6 miles south of the permit boundary of the Landfill. Hutto is considered by many to be the fastest growing city in Texas, with a rate of increase since the year 2000 of greater than 500%.²¹ In addition, Hutto is growing in all directions, including toward the Landfill.²² The rapid rate of growth and the fact that the growth is, in part, in the direction of the Landfill, demonstrates that a larger population of persons will be affected by the expanding Landfill in the future.
- Night operations of the Landfill will be a nuisance to nearby residents. The Site Development Plan describes how overhead lighting will be required at the

¹⁸ See Exh. APP-202, Application, *supra* note 6, at pt. I/II § 1.2 at I/II-2 (TC-20).

¹⁹ See *id.* at pt. I/II § 2.1 at I/II-5 (TC-23).

²⁰ See *id.* at pt. I/II § 3.1.2 at I/II-6 (TC 24); see also *id.* at pt. I/II § 3.1.3 at I/II-7 (TC-25).

²¹ See Tr. at 1788 Ins.12-13 (Direct Exam of Worrall) (Aug. 30, 2007); see also Exh. APP-801, John Worrall Consulting, Rebuttal Land Use Analysis, Williamson County Recycling and Disposal Facility, MSW #1405B, at 2 (June 20, 2007, Rev. Aug. 28, 2007) [hereinafter “Worrall Rebuttal Analysis”]; see also Tr. at 1790 Ins.6-9 (Direct Exam of Worrall) (Aug. 30, 2007).

²² See *id.* at 1793 Ins.3-9 (Direct Exam of Worrall) (Aug. 30, 2007); see also *id.* at 991 Ins.7-9 (Redirect Exam of Borrer) (Aug. 24, 2007).

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gatehouse to illuminate incoming vehicles for waste screening,²³ and Mr. Murray testified that nighttime operation of the Landfill would “[a]t a minimum” require the working face to “be illuminated at least by headlights of the garbage vehicles.”²⁴ As the Landfill expands upwards, nighttime lighting will affect an ever-growing number of residents in the vicinity of the Landfill.

- Steps to minimize loud noises associated with nighttime operations of the Landfill, e.g., back-up beepers on heavy equipment at 3:05 a.m. (which would be allowed to operate pursuant to the expanded operating hours authorized in the Final Order) were not addressed in the Site Operating Plan (“SOP”).²⁵ Thus, while Williamson County proposed 24/7 operations of the Landfill, it made no proposals in the SOP to make overnight or late night operations of heavy equipment at the Landfill less of a nuisance to the surrounding residents.
- Screening of the landfill, which could limit nuisances associated with light and noise during nighttime operations, is not proposed in the Application, and thus, is not part of the approved Permit No. MSW-1405B.²⁶

By ignoring this evidence, the Executive Director failed to apply his own previously-stated standard for the evaluation of operating hours more expansive than the default operating hours defined in 30 TEX. ADMIN. CODE Section 330.118(a) (2005)—a standard of weighing community impacts versus the applicant’s need.²⁷ In fact, the testimony of the Executive Director’s own

²³ See Exh. APP-202, *supra* note 6, at pt. III § 2.3 at III-3 (TC 243).

²⁴ Tr. at 413 lns.4-10 (Cross Exam (by Perales) of Murray) (Aug. 21, 2007).

²⁵ See, e.g., *id.* at 412 ln.14 – 413 ln.3.

²⁶ See *id.* at 1442 lns.11-20 (Cross Exam (by Perales) of Prompungtagorn) Aug. 28, 2007).

²⁷ Executive Director’s Exceptions, *Application of Waste Management of Texas, Inc. for a Municipal Solid Waste Permit Amendment No. MSW-249D*, SOAH Docket No. 582-08-2186, TCEQ Docket No. 2006-0612-MSW, at 3 (Aug. 20, 2009), available at http://www10.tceq.texas.gov/epic/CCD/index.cfm?fuseaction=main.detail&item_id=918436542005258&detail=filing&StartRow=1&EndRow=1&Step=5&requesttimeout=5000.

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witness, Mr. Pladej Prompungorn, made clear that there was no meaningful evaluation conducted by the Executive Director to determine what operating hours would be compatible with surrounding land uses during the technical review of the Application, and the previously-described standard of weighing community impacts versus the applicant's need clearly was not utilized.²⁸

The Executive Director cherry-picked two simple facts out of the entirety of the evidentiary record and concluded: "It stands to reason that fewer operating hours (the hours contained in the Commission's order) would also be compatible with surrounding land use."²⁹ Such a conclusion can only "stand to reason" if Williamson County had met its evidentiary burden in support of the requested 24/7 operating hours. An evaluation of the entire evidentiary record shows that Williamson County only demonstrated that the then-current operating hours authorized by Permit No. MSW-1405A of Monday through Friday, 5:00 a.m. to 8:00 p.m., and Saturday, 6:00 a.m. to 4:00 p.m.,³⁰ *i.e.*, the same operating hours recommended by the Administrative Law Judges, were supported by the great weight of the evidence. While Protestants disagree with the Executive Director's claim that there is "adequate evidence" in the record to support the Commission's decision to overturn the Administrative Law Judges' finding, it must be noted that "adequate evidence" is not the required standard pursuant to Texas Health and Safety Code Section 361.0832(c). Because the Administrative Law Judges' recommended operating hours were supported by the great weight of the evidence, there is no basis for the Commission to overturn the Administrative Law Judges' finding pursuant to Texas Health and Safety Code Section 361.0832(c).

²⁸ See Tr. at 1629 lns.6-22 (Cross Exam (by Humphrey) of Prompungorn) (Aug. 29, 2007); see also *id.* at 1627 ln.16 – 1628 ln.12.

²⁹ Executive Director Response, *supra* note 1, at 4.

³⁰ See Exh. APP-214, Texas Comm'n on Env'tl. Quality, Permit No. MSW-1405A, issued to Williamson County at pt. II.1. at 3 (eff. Aug. 4, 1995), at APP000311.

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B. *In Support of Its Arguments, Williamson County Focuses on the Testimony of Its Own Witnesses and Ignores the Rest of the Evidentiary Record.*

Williamson County also argues that there is evidence in the record supporting the action of the Commission to overturn the recommended findings of the Administrative Law Judges with regard to operating hours. In doing so, it focuses on the fact that it requested 24/7 operating hours in its Application and that two of its witnesses testified in support of the 24/7 operating hours.³¹ In addition, Williamson County places significant weight on an exchange that occurred at the Commissioners' Agenda meeting where the Application was considered.³² Again, Williamson County makes the claim that the 24/7 hours are supported by the evidentiary record, so the twenty-nine hours added by the Commission to the Administrative Law Judges' recommended operating hours must also be supported by the evidentiary record. This claim ignores the obvious fact that the Administrative Law Judges clearly found that Williamson County did not meet its burden to demonstrate a need for 24/7 operating hours. In making its arguments, Williamson County fails to acknowledge evidence contrary to that provided by its own witnesses—evidence that must be considered under the applicable “great weight of the evidence” standard.

As did the Executive Director, Williamson County relied heavily on the testimony provided by its rebuttal land use witness, Mr. Worrall, but as pointed out above, while Mr. Worrall testified that the proposed 24/7 hours were compatible with surrounding land uses, he failed to establish any basis for his conclusion. As shown through Mr. Worrall's rebuttal testimony at the Hearing on the Merits, he had not fully considered all potential nuisance conditions that could cause concern for area residents. He did not consider the lack of proposed screening, noise, odor, the waste acceptance rate, the types of waste accepted, or the height of the Landfill when reaching his conclusions regarding land use compatibility, and thus, the related

³¹ See Brief of Williamson County, *supra* note 2, at 1-3.

³² See *id.* at 4-5.

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conclusion that the proposed 24/7 operating hours were compatible with surrounding land uses.³³ As identified above, Mr. Worrall testified through a conclusory statement that the 24/7 operating hours were compatible with surrounding land uses, but he provided no specifics as to how such expanded hours of operation were consistent with surrounding land uses, and his own testimony minimized his consideration of operating hours at all.³⁴

Williamson County also relies on the testimony of another of its witnesses, Judge Dan Gattis, the representative of Williamson County at the Hearing on the Merits. While Judge Gattis testified that the 24/7 operating hours would provide flexibility to allow the Landfill operator “to operate there and be doing the necessary work they need to do even if we’re not accepting waste there at that time,”³⁵ neither he nor any other Williamson County witness provided any specifics as to the actual need for the 24/7 operating hours or even for the twenty-nine additional hours approved by the Commission in the Final Order. Making the claim that the extended hours will provide “flexibility” in operations does not actually define any need for such flexibility in the operation of the Landfill.

Williamson County’s claim is not even supported by the testimony of its engineer-of-record for the Application. Mr. Murray also made the claim for flexibility, but he could provide no examples of why such flexibility was needed or how Landfill operations had been limited in the past because of the then-currently approved operating hours under Permit No. MSW-1405A. While Judge Gattis and Mr. Murray both claim “flexibility” as the reason for the expanded operating hours, the contractual agreement between Williamson County and Waste Management

³³ See Tr. at 1831 ln.22 – 1832 ln.7 (Cross Exam (by Perales) of Worrall) (Aug. 30, 2007); *see id.* at 1832 ln.16 – 1833 ln.9; *see also id.* at 1852 lns.5-10.

³⁴ *See id.* at 1834 lns.5-8 & 1852 lns.3-10.

³⁵ *Id.* at 12 lns.14-16 (Cross Exam (by Perales) of Gattis) (Aug. 20, 2007).

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of Texas, Inc. (“WMTX”), the long-term contract operator of the Landfill, actually restricts the Landfill’s operating hours even more than Permit No. MSW-1405A.³⁶

While Williamson County ignores the rest of the evidentiary record in the proceeding—thus ignoring all of the other evidence discussed above as well as in *Protestants’ Joint Brief*—it then points to an exchange between the Commissioners and Mr. Richard Carmichael, Ph.D., a former Section Manager of TCEQ’s Municipal Solid Waste Permits Section, that occurred at the Commissioners’ Agenda meeting regarding the Application. The question posed by former TCEQ Commissioner, now Chairman, Bryan Shaw, Ph.D., did not seek any information from Dr. Carmichael regarding the evidentiary record. Instead, Chairman Shaw’s question focused on the general purpose of waste acceptance hours versus other operating hours for the operation of heavy equipment and the transportation of materials.³⁷ Similarly, Dr. Carmichael’s response did not address the evidence in the record of this proceeding. Dr. Carmichael’s response simply described the distinction between waste acceptance hours and other operating hours for the operation of heavy equipment and transportation of materials that exists in TCEQ’s rules and the general reasons for that distinction.³⁸

The exchange between Chairman Shaw and Dr. Carmichael is not in itself evidence and it contains no reference to the evidence in this proceeding. In fact, it cannot reference the evidence in this proceeding because there was no distinction drawn between the different types of operating hours during the Hearing on the Merits. The Application did not distinguish between different types of operating hours and neither did the testimony or other documentary evidence.

³⁶ As pointed out in *Protestants’ Joint Brief*, the operating agreement between Williamson County and WMTX limits what appears to be the hours the Landfill is open to the public for waste acceptance. The operating agreement states: “Contractor shall operate the Landfill from 7:00 a.m. to 5:00 p.m., Monday through Friday, and 7:00 a.m. to 12:00 p.m. on Saturdays.” Exh. TJFA 5, Amended and Restated Williamson County Landfill Operation Agreement at 4 (Oct. 28, 2003), at APP101241 [hereinafter “Landfill Operations Agreement”].

³⁷ See Transcript Excerpt of Commissioners’ Agenda Meeting, New Business Item No. 1 (Feb. 11, 2009), attached to Brief of Williamson County, *supra* note 2, at Exh. A [hereinafter “Agenda Transcript”].

³⁸ See *id.*

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In general, the Administrative Law Judges were faced with very limited evidence regarding the operating hours issue. Because Williamson County took no steps to present evidence to “prove up” any expanded operating hours, it failed to meet its burden of proof. The Administrative Law Judges, when presented with evidence of potential nuisance conditions resulting from expanded operating hours, basically defaulted to the existing operating hours authorized by Permit No. MSW-1405A.

The Administrative Law Judges were well aware of the distinctions between different types of operating hours as established in 30 TEX. ADMIN. CODE Section 330.118(a) (2005) and thus impliedly found that the evidentiary record did not support any such distinction in the Proposed Final Order. In its *Brief in Response to the Administrative Law Judges’ Proposal for Decision*, Williamson County argued that while it would accept the operating hours recommended by the Administrative Law Judges, it believed that “normal operating hours” should be clarified to recognize the regulatory distinction between waste acceptance hours and other hours of operation,³⁹ even though Williamson County had presented no evidence in support of such a distinction. Williamson County argued that the operating hours recommended by the Administrative Law Judges be applied only to the acceptance of waste and that “any other facility activities” be conducted as necessary at any time 24/7.⁴⁰

In their subsequent letter to the Commission, the Administrative Law Judges acknowledged the request made by Williamson County regarding the “clarification” of their intent with regard to the operating hours of the Landfill.⁴¹ The Administrative Law Judges expressly found that while they were not opposed to the operating hours in the permit being cast

³⁹ Applicant Williamson County’s Brief in Response to the Administrative Law Judges’ Proposal for Decision, *Application of Williamson County for a Permit Amendment to Expand a Type I Municipal Solid Waste Landfill Facility*; Permit No. MSW-1405B, SOAH Docket No. 582-06-3321, TCEQ Docket No. 2005-0337-MSW at 2 (Mar. 7, 2008).

⁴⁰ *Id.* at 3.

⁴¹ See Letter from The Honorable Travis Vickery and The Honorable Henry D. Card, Administrative Law Judges, SOAH, to Les Trobman, General Counsel, TCEQ at 2 (Mar. 27, 2008).

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in terms of the language of the Commission’s rules, they were “governed by the record, which is now closed.”⁴² In other words, the operating hours recommended by the Administrative Law Judges were the only operating hours supported by the evidentiary record, even when a counter-proposal was made that the Administrative Law Judges considered as possibly in line with TCEQ rules—if other evidence had existed. There simply was no evidence in this proceeding to support any distinction in types of operating hours.

The issues raised by Chairman Shaw’s and Dr. Carmichael’s exchange regarding operating hours for non-waste acceptance activities are addressed by the Administrative Law Judges’ recommended finding on operating hours when the evidentiary record as a whole is considered. As previously stated, the operating hours recommended by the Administrative Law Judges were Monday through Friday, 5:00 a.m. to 8:00 p.m., and Saturday, 6:00 a.m. to 4:00 p.m.⁴³ The actual waste acceptance hours of the Landfill, though, are 7:00 a.m. to 5:00 p.m., Monday through Friday, and 7:00 a.m. to 12:00 p.m. on Saturdays.⁴⁴ Dr. Carmichael noted to Chairman Shaw:

Generally speaking, we allow landfills two hours on either side of the waste acceptance hours to begin operations in the morning, start up the equipment, get the working face . . . ready for acceptance of waste, and then at the close of business to allow that materials to be brought into cover and to pretty much button down, and that’s why we distinguish between waste acceptance and the operating.⁴⁵

While no distinction is made for types of operating activities at the Landfill, the operating hours recommended by the Administrative Law Judges provided the needed time both before and after waste acceptance operations to prepare and “button down” the Landfill each

⁴² *Id.*

⁴³ See Proposed Final Order, *supra* note 3 at Ordering Provision No. 3 at 37; see also *id.* at FOF 161 at 24.

⁴⁴ Exh. TJFA 5, Landfill Operation Agreement, *supra* note 36, at 4.

⁴⁵ Agenda Transcript, *supra* note 37.

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day.⁴⁶ In other words, the operating hours recommended by the Administrative Law Judges are completely consistent with Dr. Carmichael’s comments and the current operations of the Landfill.

Williamson County does not and cannot point to evidence other than the unsupported conclusory statements of its own witnesses to support the step taken by the Commission to overturn the findings of the Administrative Law Judges regarding operating hours. Williamson County failed to make its case for any expanded operating hours. The Commission should not put itself in the position of “fixing” an application where the applicant has failed to carry its burden. This sets a bad precedent whereby future applicants might sidestep contentious issues during contested case hearings, and then later ask the Commission to “clarify” those issues.

Williamson County proposes explanatory language to be included in a Commission order to justify overturning the Administrative Law Judges’ finding regarding operating hours. The proposed explanatory language suffers from the same weaknesses as Williamson County’s entire argument. First, it relies exclusively on Mr. Worrall’s unsupported conclusion that 24/7 operations were compatible with surrounding land uses, and Judge Gattis’ testimony regarding flexibility in operations. The weaknesses in Mr. Worrall’s conclusion have been discussed above. With regard to Judge Gattis’ testimony, the proposed explanatory language states that he testified “that the Facility needs to conduct work outside the waste acceptance hours,”⁴⁷ but Judge Gattis’ actual testimony stated the additional hours would allow the Landfill operator to “be doing the necessary work they need to do even if we’re not accepting waste there at that

⁴⁶ The Administrative Law Judges’ recommended operating hours of Monday through Friday allow the Landfill to begin operations at 5:00 a.m., but waste acceptance does not begin until 7:00 a.m., and they allow the Landfill to cease operations at 8:00 p.m., even though waste acceptance ends at 5:00 p.m. For Saturdays, the Administrative Law Judges’ recommended operating hours allow one hour for preparation work before waste acceptance begins at 7:00 a.m. and allow four hours to “button down” the Landfill after waste acceptance ceases for the day at 12:00 p.m.

⁴⁷ Brief of Williamson County, *supra* note 2, at 8.

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time.”⁴⁸ Judge Gattis’ testimony does not support the claim that the twenty-nine hours approved by the Commission are somehow needed for the operation of the Landfill. Instead, his testimony demonstrates that there are activities at the Landfill that occur before and after waste is accepted each day. As discussed above, the operating hours found to be appropriate by the Administrative Law Judges address this “need” at the Landfill.

The only other support provided in the proposed explanatory language is the exchange between Chairman Shaw and Dr. Carmichael. Again, the exchange is not evidence in the evidentiary record of this proceeding. Dr. Carmichael was not a witness at the Hearing on the Merits and no party had the opportunity to cross-examine him or address the issues he raised during the exchange. But, more importantly, the exchange between Chairman Shaw and Dr. Carmichael did not attempt to address the evidence presented in this proceeding regarding appropriate and needed operating hours for the Landfill. It was a discussion about the types of operating hours outlined in TCEQ’s applicable rules. As previously stated, while TCEQ’s rules distinguish among different types of operating hours, the evidence presented in this proceeding did not. Even so, the operating hours found to be appropriate by the Administrative Law Judges allowed for other operating hours both before and after the waste acceptance hours in effect at the Landfill at the time of the Hearing. The proposed explanatory language does not rely on the evidence because it cannot. Adoption of such language by the Commission would amount to “fixing” the Application based on basically three statements that simply do not constitute the great weight of the evidence in this proceeding.

The Administrative Law Judges’ finding regarding operating hours was supported by the great weight of the evidence, and thus, there is no basis for the Commission to overturn the Administrative Law Judges’ finding pursuant to Texas Health and Safety Code Section 361.0832(c). Any attempt by the Commission to justify changing the Administrative

⁴⁸ Tr. at 12 Ins.14-16 (Cross Exam (by Perales) of Gattis) (Aug. 20, 2007).

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Law Judges' finding to add the twenty-nine operating hours would require the Commission to create evidence out of whole cloth that is simply not in the evidentiary record in this proceeding.

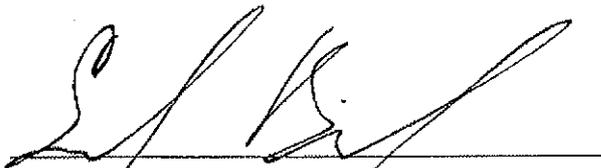
III. CONCLUSION AND PRAYER

For all of the reasons addressed above, Protestants respectfully request that the Texas Commission on Environmental Quality adopt the operating hours recommended by the Administrative Law Judges, which recommendation was based on and not contrary to the great weight of the evidence. Specifically, Protestants request that the Commission adopt the following Finding of Fact and Ordering Provision:

Proposed Finding of Fact: The Application is sufficient to operate the Facility Monday through Friday, 5:00 a.m. to 8:00 p.m., and Saturday, 6:00 a.m. to 4:00 p.m. All normal operations of the Facility, including, but not limited to, waste acceptance, placement of cover, transportation of materials, on-site operation of heavy equipment, and cell construction can only occur during the defined operating hours. Equipment repair is not limited to the defined operating hours. The hours during which the Facility will be open to the public will be posted at the entrance.

Proposed Ordering Provision: Permit No. MSW-1405B shall state the Facility hours of operation will be Monday through Friday, 5:00 a.m. to 8:00 p.m., and Saturday, 6:00 a.m. to 4:00 p.m. All normal operations of the Facility, including, but not limited to, waste acceptance, placement of cover, transportation of materials, on-site operation of heavy equipment, and cell construction can only occur during the defined operating hours. Equipment repair is not limited to the defined operating hours.

Respectfully submitted,



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PROTESTANTS' JOINT BRIEF IN REPLY TO BRIEFS FILED BY WILLIAMSON COUNTY AND THE EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY ON THE OPERATING HOURS ISSUE

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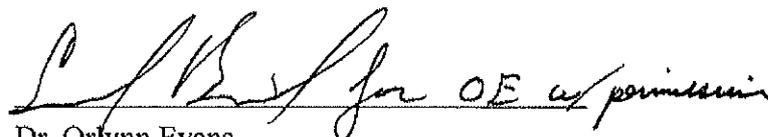
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been served upon all counsel of record via TCEQ e-filing, facsimile, e-mail transmission, first class mail, Federal Express overnight delivery, or hand-delivery addressed to:

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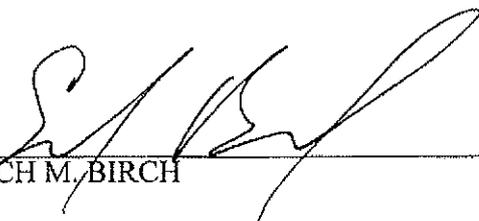
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On this the 10th day of July, 2013,


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PROTESTANTS' JOINT BRIEF IN REPLY TO BRIEFS FILED BY WILLIAMSON COUNTY AND THE EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY ON THE OPERATING HOURS ISSUE