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June 26, 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: TCEQ 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 the Brief of Williamson County 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

Enclosures  
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**

**BRIEF OF WILLIAMSON COUNTY**

TO THE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

The Third Court of Appeals has issued a limited remand of the above-referenced matter solely for purposes of having the Texas Commission on Environmental Quality (“*TCEQ*” or the “*Commission*”) provide an explanation for its decision on the operating hours for the Williamson County Recycling and Disposal Facility (the “*Facility*”). Specifically, per the Third Court’s opinion, the remand is for the limited purpose of allowing the Commission to explain its reasoning and grounds for changing the Administrative Law Judges’ (“*ALJs*”) operating hours recommendation as to the operation of heavy equipment and transportation of materials on- and off-site.

The grounds for the change are evident in the record. The only expert to opine on the land use compatibility of the Facility’s operating hours testified that operation of the Facility twenty-four hours a day, seven days a week (“*24/7*”) would be compatible with surrounding land uses. This expert testimony was provided when Williamson County’s pending application requested authorization for 24/7 operations at the Facility. Clearly, the testimony supports the lesser-included authorization that TCEQ issued, which extended the operating hours proposed 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.

Additionally, the hours authorized by the Commission for the operation of heavy equipment and transportation of materials are supported by the hearing testimony of Williamson County Judge Dan Gattis, as clarified by the TCEQ Executive Director's staff during the Commission agenda at which Williamson County's application was considered. 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.

The "necessary work" that Judge Gattis referenced in his testimony was further discussed during the Commission's consideration of Williamson County's application. At the agenda, Commissioner Shaw asked whether the ALJs' proposed operating hours would allow the Facility to operate in an environmentally protective manner. The then-Section Manager of TCEQ's Municipal Solid Waste Permits Section responded that, to facilitate environmentally protective operations, TCEQ typically authorizes municipal solid waste ("*MSW*") landfills, such as the Facility, to operate heavy equipment and transport materials on- and off-site beyond the landfill's authorized waste acceptance hours, so that the facility may properly open and close prior to and following the day's waste acceptance operations. The Commission amended the ALJs' proposed operating hours, consistent with this testimony, to further such environmentally protective operations at the Facility.

## **BACKGROUND**

In its permit amendment application, Williamson County requested the flexibility to operate the Facility, as necessary, 24/7 without limitations on operating hours for any type of Facility operations.<sup>1</sup> In the contested case hearing, Williamson County's land use expert,

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<sup>1</sup> See ALJs' Proposal for Decision ("*PFD*") (Admin. R. Vol. 19, § 1, Item 182) at 82-83.

Mr. Worrall, testified that he considered 24/7 operating hours – *operating hours in excess of those ultimately ordered by the Commission* – in the context of land use compatibility and found such operations compatible with surrounding land uses.<sup>2</sup> In their Proposal for Decision (“*PFD*”), the ALJs reasoned that, “[w]hile the evidence supports round-the-clock operations in emergency situations and for equipment repair, . . . normal operating activities outside normal business hours *might* become incompatible with anticipated residential and commercial development in the area.”<sup>3</sup> In light of the possibility of a future incompatibility, the ALJs proposed to limit the Facility’s “operating hours” to Monday through Friday, 5:00 a.m. to 8:00 p.m., and Saturday 6:00 a.m. to 4:00 p.m.<sup>4</sup> The ALJs’ proposal did not address the distinction in TCEQ’s MSW rules between waste acceptance hours and other hours of operation.

Specifically, the Commission regulation applicable to the Facility’s operating hours expressly distinguishes between (1) waste acceptance hours, (2) hours for operation of heavy equipment and transportation of materials on- or off-site, and (3) operating hours for other activities.<sup>5</sup> The third category of operating hours – hours for “other activities” – does not require specific approval from the Commission, thus the relevant distinction is between waste acceptance hours and hours for heavy equipment operation and transportation of materials on- or off-site.<sup>6</sup>

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<sup>2</sup> See Trial Tr. (Admin. R. Vol. 29, § 3, Item T-10) at 1833:16 to 1834:8 (Worrall).

<sup>3</sup> ALJs’ PFD (Admin. R. Vol. 19, § 1, Item 182) at 83 (emphasis added).

<sup>4</sup> See *id.*; ALJs’ Proposed Order (Admin. R. Vol. 19, § 1, Item 182) at 24 (Finding of Fact No. 161).

<sup>5</sup> See 30 TEX. ADMIN. CODE § 330.118(a) (2005). In May 2005, the TCEQ Executive Director determined that Williamson County’s application was administratively complete. Accordingly, TCEQ’s rules in effect prior to March 27, 2006, apply to the application. See 30 TEX. ADMIN. CODE § 330.1(a)(2) (2013).

<sup>6</sup> See 30 TEX. ADMIN. CODE § 330.118(a) (2005) (“Operating hours for other activities do not require other specific approval.”).

To give effect to this regulatory distinction, the Commission found that the ALJs' proposed limitation on the Facility's operating hours should be modified to reflect the "different types of operating hours at the Facility."<sup>7</sup> The Commission reached this determination only after hearing from Dr. Richard Carmichael, who was, at the time, the Section Manager of TCEQ's MSW Permits Section. At the February 11, 2009, Commission agenda at which Williamson County's application was considered, Commissioner Shaw asked Dr. Carmichael whether, by not distinguishing between waste acceptance hours and hours for heavy equipment operation and transportation of materials on- and off-site, the ALJs' operating hours proposal would allow the Facility to meet "the environmental needs of the landfill" and ensure "that the landfill can be properly managed."<sup>8</sup> Dr. Carmichael responded that, to facilitate landfill cover and proper waste acceptance operations, TCEQ typically authorizes MSW landfills to operate heavy equipment and transport materials on- and off-site for two hours on each end of 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:

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 material to be brought in to cover and to pretty much button

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<sup>7</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 37-38 (Explanation of Changes No. 3).

<sup>8</sup> A transcript of the cited exchange between Commissioner Shaw and Dr. Carmichael at the February 11, 2009, Commission agenda is provided as **Exhibit A** to this brief. The transcript in Exhibit A was prepared by Williamson County from viewing the video of the agenda available online at [http://www.texasadmin.com/agenda.php?confid=TCEQ\\_OM021109&dir=tnrcc](http://www.texasadmin.com/agenda.php?confid=TCEQ_OM021109&dir=tnrcc). See also Admin. R. Vol. 20, § 1, Item CD-1.

it down, and that's why we distinguish between waste acceptance and the operating [hours].<sup>9</sup>

Dr. Carmichael's explanation for the need to extend a landfill's heavy equipment operation and material transport hours beyond the facility's waste acceptance hours was echoed in the hearing testimony of Judge Gattis. 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 even if we're not accepting waste there at that time."<sup>10</sup>

Recognizing both the need and support for amending the ALJs' operating hours proposal, the Commission determined that the Facility's authorized hours of waste acceptance should be Monday through Friday, 5:00 a.m. to 8:00 p.m., and Saturday 6:00 a.m. to 4:00 p.m. – consistent with the ALJs' proposal – and that the Facility's authorized hours for heavy equipment operation and transportation of materials should be Monday through Saturday, 3:00 a.m. to 10:00 p.m.<sup>11</sup>

On appeal, the Third Court ruled that "TCEQ did not . . . provide any explanation or support for the expansion of hours for the operation of heavy equipment and transportation of materials to and from the landfill."<sup>12</sup> "The code requires the TCEQ to 'fully explain' why the ALJs' findings establishing the landfill's operating hours were not supported by the great weight of evidence when overturning those findings."<sup>13</sup>

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<sup>9</sup> Ex. A (Carmichael).

<sup>10</sup> Trial Tr. (Admin. R. Vol. 24, § 3, Item T-2) at 12:13-16 (Gattis).

<sup>11</sup> 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>12</sup> *Heritage on the San Gabriel Homeowners Ass'n v. Tex. Comm'n on Env'tl. Quality*, 393 S.W.3d 417, 439 (Tex. App.—Austin 2012, pet. denied).

<sup>13</sup> *Id.* at 440 (citing TEX. HEALTH & SAFETY CODE § 361.0832(c), (f)).

## ARGUMENT

The Commission should find 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."<sup>14</sup> Texas courts interpret this provision to provide that, "if there is evidence in the record supporting a contrary finding to that of the ALJ, TCEQ could properly weigh the evidence and reject that finding by the ALJ."<sup>15</sup>

The great weight of the evidence on the issue of operating hours was provided by Mr. Worrall, Judge Gattis, and Dr. Carmichael. Mr. Worrall testified as follows that operation of the Facility 24/7 would be compatible with surrounding land uses:

Q: Did you consider the operating hours in the site operating plan?

A: I'm aware of them.

Q: Do you recall what they are?

A: My recollection is that the permit is asking for 24/7 operation.

Q: Did that factor into your land use analyses?

A: Yes.

Q: And how did it factor in?

A: Well, it factors in to the extent that it's an operational characteristic that I think is an important aspect of the land use, and it's something that should properly be considered as – in my opinion as a part of the land use analysis.

Q: ***And you determined that that the operation of the landfill 24 hours a day, 7 days a week is compatible with the surrounding land uses in this case?***

A: ***In a word, yes.***<sup>16</sup>

Mr. Worrall's testimony – that 24/7 operation of the Facility would be a compatible land use – supports the Commission's decision to authorize the Facility to operate heavy equipment and transport materials beyond the hours recommended by the ALJs but less than 24/7. Necessarily,

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<sup>14</sup> TEX. HEALTH & SAFETY CODE § 361.0832(c).

<sup>15</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>16</sup> Trial Tr. (Admin. R. Vol. 29, § 3, Item T-10) at 1833:16 to 1834:8 (Worrall).

Mr. Worrall's testimony provided support for the less-than 24/7 authorization that TCEQ ultimately issued. Mr. Worrall's testimony also supports findings contrary to those of the ALJs, whose proposal to limit the operating hours of the Facility was based solely on concerns regarding the potential for a future land use incompatibility.<sup>17</sup>

Additionally, the testimony of Judge Gattis at the hearing and Dr. Carmichael at the Commission agenda supports the Commission's decision to authorize specific hours for the operation of heavy equipment and transportation of materials to and from the Facility beyond the generic "operating hours" proposed by the ALJs.<sup>18</sup> 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>19</sup> As Dr. Carmichael further explained at agenda, the ALJs' failure to distinguish between waste acceptance hours and hours for the operation of heavy equipment and material transport, and to propose extended hours for the latter category of operations, was not an approach aimed at facilitating environmentally protective operations – landfills need authorization to conduct heavy equipment operations and material transport beyond the facility's waste acceptance hours to open and close properly prior to and following the receipt of waste at the landfill each day.<sup>20</sup>

Accordingly, there is evidence in the record supporting contrary findings to those of the ALJs on the issue of operating hours, and TCEQ can properly weigh the evidence and reject

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<sup>17</sup> See *supra* notes 3 and 4 and accompanying text.

<sup>18</sup> See *Hunter Indus. Facilities, Inc. v. Texas Natural Res. Conservation Comm'n*, 910 S.W.2d 96, 102-03 (Tex. App.—Austin 1995, writ denied) (holding that agency could properly reject an ALJ's finding based on information elicited at an agenda meeting from an agency staff member who had not appeared as a witness at the contested case hearing); *City of Jacksboro*, 2012 Tex. App. LEXIS 5243 at \*60 (citing with approval *Hunter Indus. Facilities* for this proposition).

<sup>19</sup> Trial Tr. (Admin. R. Vol. 24, § 3, Item T-2) at 12:13-16 (Gattis).

<sup>20</sup> See Ex. A (Carmichael).

those findings by the ALJs.<sup>21</sup> The Commission only needs to provide the explanation for its action required by Tex. Health & Safety Code § 361.0832(f). In that regard, Williamson County would respectfully offer the following language for inclusion in an order supplementing the Commission's February 17, 2009, order in this matter:

Per Tex. Health & Safety Code § 361.0832, the Commission found 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 considering the hearing testimony of land use expert John Worrall and Williamson County Judge Dan Gattis, and the agenda statement of Dr. Richard Carmichael, the Section Manager of the Municipal Solid Waste Permits Section. Mr. Worrall testified that operation of the Facility twenty-four hours a day, seven days a week, would be a compatible land use. This expert testimony supports contrary findings to those of the ALJs, whose proposal to limit the operating hours of the Facility was based on concerns regarding the potential for a future land use incompatibility. Judge Gattis testified that the Facility needs to conduct work outside of waste acceptance hours. The hearing testimony of Mr. Worrall and Judge Gattis supports the Commission's decision to authorize the Facility to operate heavy equipment and transport materials on- and off-site beyond the operating hours recommended by the ALJs. Additionally, Dr. Carmichael explained that, to facilitate environmentally protective operations, the Commission typically authorizes municipal solid waste landfills, such as the Facility, to operate heavy equipment and transport materials on- and off-site beyond the landfill's authorized waste acceptance hours, so that the facility may properly open and close prior to and following the day's waste acceptance operations. The Commission amended the ALJs' proposed operating hours, consistent with this explanation, to further such environmentally protective operations at the Facility.

### **CONCLUSION**

For the foregoing reasons, 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 considering the testimony of Mr. Worrall, Judge Gattis, and Dr. Carmichael.

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<sup>21</sup> See *City of Jacksboro*, 2012 Tex. App. LEXIS 5243 at \*60, \*63.

Respectfully submitted,

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**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 26<sup>th</sup> day of June, 2013.



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

Bryan J. Moore

277559v1 Austin 015140

**SERVICE LIST**  
**TCEQ 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**

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# EXHIBIT A

**TCEQ 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**

**TCEQ Commissioner's Agenda 2/11/09**

**New Business Item 1**

**Transcript Excerpt re Operating Hours Question (35:38 – 38:05)**

Commissioner Shaw: One of the issues before us is obviously operating hours ... one, let me back up and first say I think the ALJs did an excellent job of going through and addressing each of these individual issues, and so it was a very clear undertaking that you've laid before us. I appreciate you making that where I could get my mind around that. One of the issues, I guess, that we still need to discuss with regard to operating hours is, you know, there's a ... no specific hours were in your recommendation for the heavy machinery and deliveries and what have you. And so, part of where we're looking at these hours of operation Monday through Friday – let me see if I can get the numbers again in the recommendation – looking at 5:00 a.m. to 8:00 p.m. and Saturday 6 to 4 potentially as waste acceptance hours, and one of the questions I have for ED's staff looking at if we impose different or the same hours for heavy equipment operation and transportation of materials, I want to make sure that we don't inadvertently lead to challenges with meeting the environmental needs of the landfill, and so, if we were looking at allowing waste to be accepted through 8:00 p.m. on a Monday through Friday basis, would allowing the heavy equipment operations to exist an hour before and an hour after waste receiving hours, is that adequate to ensure that the waste is properly covered, the site is properly filled, or if you can give some insight into what we might ... what would be appropriate from the standpoint of ensuring that the landfill can be properly managed?

Dr. Carmichael: Yes sir, Commissioner Shaw, Richard Carmichael, Municipal Solid Waste Permits. 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, if it's covered, or if they've used alternative daily cover, to get it ready for acceptance of waste, and then at the close of business to allow that material to be brought in to cover and to pretty much button it down, and that's why we distinguish between waste acceptance and the operating.

Commissioner Shaw: Thank you, that's exactly what I wanted to know, thank you.