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FROM: Erich Birch      DIRECT LINE: (512) 349-9300      FAX: (512) 349-9303

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Re: 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.

Enclosed please find *Protestants' Joint Brief in Support of the Administrative Law Judges' Recommended Operating Hours* filed in the above referenced matter. The cover letter states that the brief is being filed electronically, but I encountered an error while attempting to file the brief. The brief is now being fax filed instead.

Sincerely,

Sarah Johnson

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June 26, 2013

**VIA CHIEF CLERK'S eFILING SYSTEM  
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Ms. Bridget C. Bohac  
Office of Chief Clerk (MC-105)  
Texas Commission on Environmental Quality  
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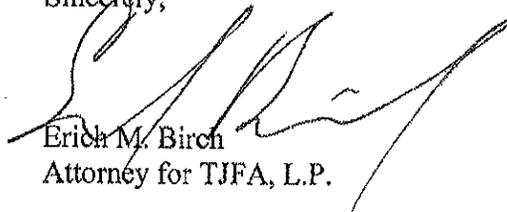
Re: Protestants' Joint Brief in Support of the Administrative Law Judges' Recommended Operating Hours, *In the Matter of the Third Court of Appeals' Remand of the Application of Williamson County for MSW Permit Amendment No. 1405B*, TCEQ Docket No. 2005-0337-MSW, SOAH Docket No. 582-06-3321.

Dear Ms. Bohac:

Enclosed for filing in the above-referenced proceeding is *Protestants' Joint Brief in Support of the Administrative Law Judges' Recommended Operating Hours*. 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. Because the document plus attachments is over twenty pages long, seven copies have also been filed with the Office of the Chief Clerk via hand delivery pursuant to 30 TEX. ADMIN. CODE § 1.10(d). 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

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BEFORE THE  
TEXAS COMMISSION  
ON  
ENVIRONMENTAL QUALITY

CHIEF CLERKS OFFICE  
2013 JUN 26 PM 4: 19  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

PROTESTANTS' JOINT BRIEF IN SUPPORT OF THE  
ADMINISTRATIVE LAW JUDGES' RECOMMENDED OPERATING HOURS

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 Support of the Administrative Law Judges' Recommended Operating Hours* in the above-referenced proceeding:

I. INTRODUCTION

By letter dated June 4, 2013, the General Counsel of the Texas Commission on Environmental Quality ("TCEQ" or the "Commission"), Mr. Les Trobman, provided the opportunity for all parties in this proceeding to file briefs "on the limited issues that have been remanded by the Third Court of Appeals."<sup>1</sup> This brief addresses those issues related to the operating hours of the Williamson County Recycling and Disposal Facility (the "Landfill"), as remanded by the Third Court of Appeals. As argued in detail below, the Commission should adopt the operating hours recommended by the Administrative Law Judges in their Proposal for Decision ("PFD") and Proposed Order because such hours are the only operating hours supported by the evidentiary record in this proceeding. Namely, the Commission should adopt

<sup>1</sup> Letter from Les Trobman, General Counsel, TCEQ, to Persons on Mailing List, TCEQ Docket No. 2005-0337-MSW, SOAH Docket No. 582-06-3321 (June 4, 2013).

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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. BACKGROUND AND PROCEDURAL HISTORY

In its application for Permit No. MSW-1405B ("Application"), Williamson County proposed that the Landfill would operate twenty-four hours a day, seven days a week ("24/7").<sup>2</sup> Based on the Application, the Draft Permit issued by the Executive Director of TCEQ stated: "The operating hours for receipt of waste and for all landfill related operations at this municipal solid waste facility shall be Monday through Sunday, 24 hours per day."<sup>3</sup>

After the conclusion of the nine-day Hearing on the Merits and final briefing, the Administrative Law Judges, after their review of the entirety of the evidentiary record, recommended authorizing Williamson County to operate the Landfill from 5:00 a.m. until

<sup>2</sup> See 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"].

<sup>3</sup> Exh. APP-205, Texas Comm'n on Envtl. Quality, Draft Permit for Williamson County Recycling & Disposal Facility at pt. II.A. at 3.

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8:00 p.m., Monday through Friday, and from 6:00 a.m. until 4:00 p.m. on Saturdays.<sup>4</sup> The reasoning for this recommendation is discussed below.

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."<sup>5</sup> 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.<sup>6</sup>

In a 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.<sup>7</sup> The Administrative Law Judges expressly found that while they were not opposed to the operating hours in the permit being cast in terms of the language of the Commission's rules, they were "governed by the record, which is now closed."<sup>8</sup> 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 even the Administrative Law Judges considered as possibly in line with TCEQ rules—

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<sup>4</sup> 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); see also *id.* at Finding of Fact No. ("FOF") 161 at 24.

<sup>5</sup> 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) [hereinafter "Wilco Response to PFD"].

<sup>6</sup> *Id.* at 3.

<sup>7</sup> 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).

<sup>8</sup> *Id.*

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if other evidence had existed. Such evidence does not exist in the evidentiary record for this proceeding.

The Commission issued its Final Order granting Permit No. MSW-1405B on February 17, 2009.<sup>9</sup> In its Final Order, TCEQ revised the Administrative Law Judges' recommended operating hours, adding twenty-nine operating hours per week during which Williamson County would be authorized to operate heavy equipment and transport materials to and from the Landfill.<sup>10</sup> The Final Order stated:

Permit No. MSW-1405B, shall state the Facility's waste acceptance hours as Monday through Friday, 5:00 a.m. to 8:00 p.m. and Saturday, 6:00 a.m. to 4:00 p.m. Permit No. MSW-1405B shall state the Facility's hours for operation of heavy equipment and transportation of materials to and from the Facility as Monday through Saturday, 3:00 a.m. to 10:00 p.m. Permit No. MSW-1405B shall not specify hours for other activities, in accordance with former 30 TEX. ADMIN. CODE § 330.118, which applies to this Application.<sup>11</sup>

With regard to this change to the operating hours recommended by the Administrative Law Judges, the Final Order stated:

The Commission modified Finding of Fact No. 161 and Ordering Provision No. 3 to clarify the different types of operating hours at the Facility. The Commission determined that the appropriate facility operating hours are: 1) Waste Acceptance – Monday through Friday, 5:00 a.m. to 8:00 p.m. and Saturday, 6:00 a.m. to 4:00 p.m., as agreed to by the Applicant in its Brief in Response to the ALJs' PFD; 2) Heavy equipment operation and transportation of materials – Monday through Saturday, 3:00 a.m. to 10:00 p.m.; and 2) [*sic*] "Other activities" – no specified hours, as set forth in former 30 TEX. ADMIN. CODE § 330.118, which applies to this Application.<sup>12</sup>

On appeal, the Third Court of Appeals found that TCEQ did not provide the required explanation or support for overturning the Administrative Law Judges' finding regarding the

<sup>9</sup> An Order Granting the Application for Permit No. MSW-1405 [*sic*] to Williamson County, *Application of Williamson County for a Permit Amendment to Expand a Type I Municipal Solid Waste Landfill Facility*; (Permit No. MSW-1405B), TCEQ Docket No. 2005-0337-MSW, SOAH Docket No. 582-06-3321 (Feb. 17, 2009) [hereinafter "Final Order"].

<sup>10</sup> *See id.* at Ordering Provision No. 3 at 38; *see also id.* at FOF 161 at 24.

<sup>11</sup> *Id.* at Ordering Provision No. 3 at 38.

<sup>12</sup> *Id.* at Explanation of Changes No. 3 at 37-38.

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operating hours for the Landfill.<sup>13</sup> Thus, the Third Court of Appeals remanded the application for Permit No. MSW-1405B to TCEQ, stating that “TCEQ may resume exercising its discretion from the point at which it exceeded its authority, i.e., when it issued the order that failed to explain its reasoning and grounds for changing the operating hours.”<sup>14</sup>

### III. ARGUMENT AND AUTHORITIES

**A. *The Commission Cannot Meet the Legal Standard Defined in Texas Health and Safety Code Section 361.0832 to Overturn the Administrative Law Judges’ Finding Regarding Operating Hours Because Such Finding Was Supported by the Great Weight of the Evidence.***

To reject the findings of the Administrative Law Judges, TCEQ must do so pursuant to the authority granted to it by Texas Health and Safety Code Section 361.0832, which provides in relevant part:

(c) 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.

(d) The commission may overturn a conclusion of law in a contested case only on the grounds that the conclusion was clearly erroneous in light of precedent and applicable rules.

(e) If a decision in a contested case involves an ultimate finding of compliance with or satisfaction of a statutory standard the determination of which is committed to the discretion or judgment of the commission by law, the commission may reject a proposal for decision as to the ultimate finding for reasons of policy only.

(f) The commission shall issue written rulings, orders, or decisions in all contested cases and shall fully explain in a ruling, order, or decision the reasoning and grounds for overturning each finding of fact or conclusion of law or for rejecting any proposal for decision on an ultimate finding.<sup>15</sup>

The Commission’s Explanation of Change No. 3 contained in the Final Order claimed that the Commission was clarifying the different types of operating hours at the Landfill, but the addition

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<sup>13</sup> See *Heritage on the San Gabriel Homeowners Assoc. v. Texas Comm’n on Envtl. Quality*, 393 S.W.3d 417, 439 (Tex.App.—Austin 2012, pet. denied).

<sup>14</sup> *Id.* at 441.

<sup>15</sup> TEX. HEALTH & SAFETY CODE § 361.0832(c)-(e).

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of twenty-nine operating hours was not a clarification. There is simply no evidence in the record to support the additional twenty-nine operating hours—even if such hours are not for the acceptance of waste at the Landfill. The Administrative Law Judges’ finding is supported by the great weight of the evidence, and thus, it is not possible for the Commission to meet the standard of Texas Health and Safety Code Section 361.0832(c) to overturn the Administrative Law Judges’ finding.

While the operating hours approved by the Commission in the Final Order were not the 24/7 operating hours proposed in the Application, Williamson County also failed to offer any evidence in support of the more limited operating hours during which waste could not be accepted that were ultimately approved by the Commission. As with all permit hearings, the applicant, Williamson County, had the burden of proof on all issues raised by its Application, including operating hours for the Landfill.<sup>16</sup> Three important facts influence whether sufficient evidence was provided to support, by a preponderance of the evidence, the operating hours approved by the Commission.

First, the hours of operation defined in the then-existing permit, Permit No. MSW-1405A (issued to Williamson County effective August 4, 1995), were “Monday through Friday 5:00 a.m. to 8:00 p.m. and Saturday 6:00 a.m. to 4:00 p.m.”<sup>17</sup> Williamson County produced no evidence demonstrating that these operating hours were not sufficient for the Landfill, nor did it produce evidence that additional operating hours were needed.

Second, TCEQ’s applicable rule at the time, 30 TEX. ADMIN. CODE Section 330.118(a), contained “default operating hours” established by TCEQ:

The site operating plan must specify the waste acceptance hours and the operating hours when materials will be transported on or off site, and the hours

<sup>16</sup> See 30 TEX. ADMIN. CODE § 80.17(a).

<sup>17</sup> Exh. APP-214, Texas Comm’n on Env’tl. Quality, Permit No. MSW-1405A, issued to Williamson County at pt. II.A. at 3 (eff. Aug. 4, 1995), at APP000311.

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when heavy equipment may operate. The waste acceptance hours of a municipal solid waste facility may be any time between the hours of 7:00 a.m. and 7:00 p.m., Monday through Friday, *unless otherwise approved in the authorization for the facility.* Waste acceptance hours within the 7:00 a.m. to 7:00 p.m. weekday span do not require other specific approval. Transportation of materials and heavy equipment operation must not be conducted between the hours of 9:00 p.m. to 5:00 a.m., *unless otherwise approved in the authorization for the facility.* Operating hours for other activities do not require other specific approval.<sup>18</sup>

Operating hours outside of those defined in the existing municipal solid waste (“MSW”) permit for the Landfill or outside the “default hours” defined by TCEQ rule must have specific TCEQ authorization, and such authorization in the case of a contested case hearing such as this must be based on the evidentiary record. The Executive Director of TCEQ, in pleadings in other MSW landfill permitting cases, has espoused a standard of evaluating proposed operating hours that are more expansive than the “default operating hours” based on a weighing of the interests:

The ED has consistently interpreted 30 TAC § 330.135<sup>19</sup> to mean that applicants may propose alternate hours which are then evaluated on a case-by-case basis, and often authorized as the plain language of the rule provides. The ED recognizes that the Commission may restrict the hours based on considerations, such as potential impacts on the community, weighed against an applicant’s need for the proposed hours.<sup>20</sup>

When the twenty-nine additional operating hours are evaluated using the Executive Director’s standard of weighing community impacts versus the applicant’s need, there is *no* evidentiary basis for approval of the additional operating hours. Williamson County never enunciated a need of any sort for the increased operating hours. As discussed in detail below, the only stated basis

<sup>18</sup> 30 TEX. ADMIN. CODE § 330.118(a) (2005) (emphasis added).

<sup>19</sup> 30 TEX. ADMIN. CODE §330.118 was re-numbered Section 330.135 in a 2006 TCEQ rulemaking. See 31 Tex. Reg. 2502, 2512 & 2628 (Mar. 24, 2006). The “default operating hours” established in Section 330.118(a) were not changed when the section was renumbered. See 30 TEX. ADMIN. CODE § 330.135(a) (2006).

<sup>20</sup> 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&detailed=filing&StartRow=1&EndRow=1&Step=5&requesttimeout=5000](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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for requesting more expansive operating hours was “flexibility,” and “flexibility” alone does not demonstrate a need for the operating hours approved by the Commission.

Third, because the Administrative Law Judges specifically included a finding about operating hours in their PFD, TCEQ can only overturn that finding if it was not supported by the great weight of the evidence.<sup>21</sup> No such evidentiary basis exists for TCEQ to overturn the Administrative Law Judges’ finding regarding operating hours in this proceeding.

***B. The Only Stated Reason for the Expanded Operating Hours was “Flexibility,” and the Need for Such Flexibility Was Not Demonstrated Through the Evidence Presented, and Therefore, Cannot Be the Basis for the Commission to Overturn the Administrative Law Judges’ Finding.***

During the Hearing on the Merits, the only basis for requesting operating hours more expansive than those authorized in the then-current permit was “flexibility.”<sup>22</sup> For example, the engineer-of-record for the Application, Mr. James Roy Murray, testified that the purpose of the requested 24/7 operating hours was to “provide[] the flexibility to deal with waste streams that might come in at different times.”<sup>23</sup> As an example, Mr. Murray referenced waste streams from shopping malls or strip centers and restaurants that may be picked up in the middle of the night, and thus, with more expansive operating hours could also be delivered to the Landfill in the middle of the night rather than waiting until morning.<sup>24</sup> Mr. Murray admitted, though, that the Landfill currently did not operate with such expansive hours and that he had no knowledge that there had been problems because of the operating hours authorized by Permit No. MSW-1405A.<sup>25</sup> In addition, Mr. Murray testified that he had not heard of any problems

<sup>21</sup> See TEX. HEALTH & SAFETY CODE § 361.0832(c).

<sup>22</sup> See, e.g., Tr. at 118 Ins.5-10 (Cross Exam (by Perales) of Murray) (Aug. 20, 2007); *id.* at 360 Ins.11-16 (Cross Exam (by Ekoh) of Murray) (Aug. 21, 2007); *id.* at 378 Ins.19-22 (Clarifying Exam (by ALJ Vickery) of Murray) (Aug. 21, 2007).

<sup>23</sup> *Id.* at 118 Ins.8-10 (Cross Exam (by Perales) of Murray) (Aug. 20, 2007).

<sup>24</sup> See *id.* at 118 Ins.10-15.

<sup>25</sup> See *id.* at 118 Ins.16-21.

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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.<sup>26</sup>

The Administrative Law Judges solicited additional evidence regarding the need for operating hours more expansive than those permitted under Permit No. MSW-1405A. At one point, the Honorable Travis Vickery asked Mr. Murray a series of questions regarding the operating hours proposed in the Application:

Q. . . . But in general, with this proposed amendment, can the current operating hours handle whatever projected increase in needed capacity that the landfill is going to have to accommodate? Can the current hours of operation fulfill the needs as seen in your projections – or these projections? . . .

A. We really didn't look at what the market forces were for, you know, determining what waste vehicles would be coming to the landfill at what times. That was really – because we were requesting the flexibility of the 24/7, it was left up to the site operator to ascertain as the development of the landfill and the filling of the landfill continue.

There's no reason for them to have people out there to operate the landfill in the middle of the night if there's no garbage trucks coming. That said, if they're – so they would only be open if, you know, economically it was feasible to be open and to address those people. But, no, we did not look at any projections into the market and what that might be, just that over time, as traffic gets there, they'll – you know, clearly as the need develops and can support it, then – then it would be something they would go to.<sup>27</sup>

In other words, Williamson County sought to operate 24/7, but there was no factual or engineering basis for the request. In fact, while Williamson County was seeking “flexibility” in its operations by proposing significantly more expansive operating hours, the acceptance of waste at the Landfill was actually more limited by the contractual agreement between Williamson County and Waste Management of Texas, Inc. (“WMTX”), the long-term contract

<sup>26</sup> See *id.* at 122 lns.5-10.

<sup>27</sup> *Id.* at 378 ln.6 – 379 ln.8 (Clarifying Exam (by ALJ Vickery) of Murray) (Aug. 21, 2007).

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operator of the Landfill, than it was by Permit No. MSW-1405A.<sup>28</sup> Because Williamson County provided no evidence to support operating hours more expansive than those currently permitted, the operating hours authorized by the Commission in the Final Order also were not supported by the evidentiary record.

A review of the entirety of the evidentiary record makes clear that Williamson County was seeking flexibility to operate the Landfill whenever it chose simply for its benefit and to the detriment of the people living near the Landfill, without any demonstrated need by Williamson County. As noted by the Administrative Law Judges in their PFD: "Williamson County explained that it does not intend to operate the Facility 24-hours a day, but that it envisions a situation where 24-hour access might be needed, so it prefers such operating hours for flexibility."<sup>29</sup> The only examples cited by the Administrative Law Judges of why 24/7 operations might be needed were emergencies (such as hurricanes) and equipment repair.<sup>30</sup> In reaching their determination regarding the operating hours' issue, the Administrative Law Judges were clear that they were relying on the evidentiary record in recommending that the hours under Permit No. MSW-1405A be maintained: "While the evidence supports round-the-clock operating in emergency situations and for equipment repair, the ALJs agree with Protestants that normal operating activities outside normal business hours might become incompatible with

<sup>28</sup> 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; *see also* Tr. at 34 ln.6 – 35 ln.22 (Cross Exam (by Dunbar) of Gattis) (Aug. 20, 2007) (testifying that Exhibit TJFA 5 was the contract between Williamson County and WMTX that currently controls the County's relationship with WMTX for operations of the Landfill).

<sup>29</sup> 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 83 (Feb. 14, 2008) [hereinafter "PFD"].

<sup>30</sup> *See id.* at 83.

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anticipated residential and commercial development in the area.”<sup>31</sup> The “flexibility” to address emergency situations and equipment repair is specifically addressed in TCEQ’s rules,<sup>32</sup> any additional “flexibility” sought by Williamson County was not supported by the evidentiary record and was correctly deemed inappropriate by the Administrative Law Judges for a landfill with approximately 130 residences within one mile (over sixty of which are within one-third of a mile) and that is located within a growth trajectory of a rapidly expanding city. There was simply no evidence to support any expanded hours of operation.

**C. *The Administrative Law Judges Understood that Their Recommended Operating Hours Were Inclusive of All Normal Landfill Activities, Not Just Hours for the Acceptance of Waste.***

As identified above, Williamson County, in its *Brief in Response to the Administrative Law Judges’ Proposal for Decision*, 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.”<sup>33</sup> 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.<sup>34</sup> While the operating hours adopted by the Commission in the Final Order did not go so far as the 24/7 for “any other facility

<sup>31</sup> *Id.* at 83.

<sup>32</sup> 24/7 operations in emergency situations and for equipment repair do not require specific authorization in the MSW permit. Section 330.118(c) (2005) provided: “The commission’s regional offices may allow additional temporary operating hours to address disaster or other emergency situations, or other unforeseen circumstances that could result in the disruption of waste receipt at the facility.” 30 TEX. ADMIN. CODE § 330.118(c) (2005); *see also* 30 TEX. ADMIN. CODE § 330.135(c). With regard to equipment repair, Section 330.118(a) provided that “[o]perating hours for other activities [*i.e.*, activities not consisting of waste acceptance, materials transport on or off site, and heavy equipment operation] do not require other specific approval.” 30 TEX. ADMIN. CODE § 330.118(a) (2005); *see also* 30 TEX. ADMIN. CODE § 330.135(a).

<sup>33</sup> Wilco Response to PFD, *supra* note 5, at 2.

<sup>34</sup> *See id.* at 2-3.

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activities” as proposed by Williamson County, any potential justification for the Commission’s additional twenty-nine operating hours fails for the same reasons that Williamson County’s proposal fails. The twenty-nine additional operating hours, even if limited to the purposes of operation of heavy equipment and transportation of materials to and from the Landfill, are not supported by the evidentiary record.

First, contrary to the arguments made by Williamson County, the additional twenty-nine operating hours do not “honor and effectuate the ALJs’ proposal to restrict the hours of ‘normal operating activities.’”<sup>35</sup> While waste acceptance is certainly a “normal operating activity” at any landfill, activities such as the operation of heavy equipment, transportation of materials, placement of cover, *et cetera*, are also “normal operating activities” at all landfills. No evidence was presented distinguishing among the different types of operating activities at the Landfill, and thus, there was no basis in the evidentiary record for the Administrative Law Judges to distinguish between various types of activities when they recommended operating hours in their PFD and Proposed Order.<sup>36</sup> Further, there is no evidence supporting the need for any particular number of additional hours for “normal operating activities” outside of waste acceptance hours. The additional twenty-nine hours authorized by the Commission were arbitrary and without evidentiary support.<sup>37</sup> There is nothing in the evidentiary record to support the Commission overturning the Administrative Law Judges’ proposed Finding of Fact on the basis that the recommended operating hours were not supported by the great weight of the evidence as required by Texas Health and Safety Code Section 361.0832(c).

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<sup>35</sup> *Id.* at 3.

<sup>36</sup> As previously identified, the only activities that the Administrative Law Judges believed could be appropriately operated 24/7 were operations in emergency situations and equipment repair. *See* PFD, *supra* note 29, at 83.

<sup>37</sup> There is no evidence to explain why the Commission specifically selected 29 additional hours as opposed to some other arbitrary number of additional hours.

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Second, while TCEQ's operating hours rule at former 30 TEX. ADMIN. CODE Section 330.118(a) distinguishes between waste acceptance hours and other hours of operation, again, the evidence presented during the Hearing on the Merits made no such distinction.<sup>38</sup> The evidence does not support the Commission overturning the Administrative Law Judges' proposed Finding of Fact; the great weight of the evidence supported the finding, and thus, the Commission's action was improper under Texas Health and Safety Code Section 361.0832(c).

Overall, 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" expanded operating hours, it failed to meet its burden of proof, and the Administrative Law Judges, when presented with evidence of potential nuisance conditions resulting from expanded operating hours, basically defaulted to the existing operating hours established by Permit No. MSW-1405A. There is simply no evidence to support a different conclusion, and thus, there is no evidence on which the Commission can rely to overturn the Administrative Law Judges' finding.

***D. The Evidence Demonstrated that Nuisance Conditions Could Result from Expanded Operating Hours, and There Was No Evidence that Williamson County Had Taken Steps to Address or Reduce Such Nuisance Conditions.***

A number of factors related to the operation of the Landfill must be considered when determining whether increased operating hours would be compatible with surrounding land uses. These factors include: the expanded lateral size of the Landfill; the expanded vertical height of the Landfill; the number of residences in the area of the Landfill; population growth in the vicinity of the Landfill; the actual operation of the Landfill pursuant to the Site Operating Plan ("SOP"); and potential nuisance issues such as light, noise, lack of screening of operations,

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<sup>38</sup> As noted by the Third Court of Appeals, the Commission, in its appellate briefing, "acknowledge[d] that the ALJs intended for all the landfill's operations to be conducted during the recommended operating hours because they did not distinguish among the different types of hours that the agency's rule established." *Heritage on the San Gabriel*, 393 S.W.3d at 440.

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odors, *et cetera*. The Commission at the time of the adoption of the Final Order did not consider any evidence regarding land use compatibility and the relationship of that evidence to its determination to expand the operating hours of the Landfill. When such evidence is considered, it becomes clear that the Administrative Law Judges' finding is supported by the great weight of the evidence.

The expansion of the Landfill approved through issuance of Permit No. MSW-1405B increased the waste footprint—*i.e.*, the area for the disposal of waste—from 160 acres to approximately 500 acres. The entire permitted area of the landfill was increased from approximately 202 acres to approximately 575 acres. The permitted height of the Landfill was also increased from the previously permitted height of 766 feet above mean sea level (m.s.l.) to approximately 840 feet above m.s.l.—a vertical increase of more than seventy feet.<sup>39</sup> The height of the Landfill is particularly important to its compatibility with surrounding land uses. 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 west boundary.<sup>40</sup> As will be discussed more specifically below, almost one-half of the residences located within one mile of the Landfill are located to the southwest of the Landfill—an area of lower elevation that will look up at the new, taller landfill in the future.

Williamson County's own witnesses agreed that there were between 113 and 130 residential structures within one mile of the Landfill at the time of the Hearing on the

<sup>39</sup> See Exh. APP-202, Application, *supra* note 2, at pt. I&II § 1.2 at I/II-2 (TC 20).

<sup>40</sup> See *id.* at pt. I/II § 2.1 at I/II-5 (TC 23).

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Merits.<sup>41</sup> The greatest concentration of residences occurs in a subdivision of approximately sixty residences located less than one-third of a mile southwest from the perimeter of the Landfill.<sup>42</sup>

The nearest community to the Landfill is the City of Hutto. At the time of the Hearing on the Merits the corporate limits of Hutto were approximately 1.6 miles south of the permit boundary of the Landfill.<sup>43</sup> As Williamson County's rebuttal land use expert, Mr. John Worrall, testified, "Hutto has been growing at a very tremendous rate."<sup>44</sup> Mr. Worrall continued: "It's by some measures the fastest growing city in Texas. And its rate of increase since the year 2000 is greater than 500 percent, resulting in a population estimated to be about 10,000 people."<sup>45</sup> According to Mr. Worrall's testimony, between the years 2000 and 2006 the population of Hutto had grown by over 1,000 persons per year.<sup>46</sup> Similarly, Williamson County Judge Dan Gattis, appearing as the representative of Williamson County, also testified that Hutto's growth is "very rapid" and that the site of the Landfill would soon be included in Hutto's extraterritorial jurisdiction ("ETJ").<sup>47</sup>

In addition to the rate of Hutto's population growth, Mr. Worrall, as well as other witnesses, addressed the direction of that growth. The evidence on the direction of growth differed. Mr. Worrall, on the one hand, testified that the direction of growth for Hutto was

<sup>41</sup> See *id.* pt. I/II § 3.1.2 at I/II-6 (TC 24); see also *id.* at pt. I/II § 3.1.4 at I/II-8 (TC 26); 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"].

<sup>42</sup> See Exh. APP-202, Application, *supra* note 2, 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).

<sup>43</sup> See Tr. at 1788 Ins.12-13 (Direct Exam of Worrall) (Aug. 30, 2007); see also Exh. APP-801, Worrall Rebuttal Analysis, *supra* note 41, at 2.

<sup>44</sup> Tr. at 1790 Ins. 5-6 (Direct Exam of Worrall) (Aug. 30, 2007).

<sup>45</sup> *Id.* at 1790 Ins.6-9.

<sup>46</sup> See *id.* at 1791 Ins.3-5.

<sup>47</sup> *Id.* at 16 ln.24 – 17 ln.1 & 30 Ins.23-35 (Cross Exam (by Evans) of Gattis) (Aug. 20, 2007).

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“omnidirectional.”<sup>48</sup> In other words, Mr. Worrall concluded that Hutto is growing rapidly and in all directions, including toward the Landfill. Dr. David Borrer, the Superintendent of the Hutto Independent School District (“Hutto ISD”), testifying on behalf of the Hutto Citizens Group and the Heritage on the San Gabriel Homeowners Association, identified that the Hutto ISD believed that growth of the City of Hutto was to the north toward the Landfill.<sup>49</sup> All of this information—the rapid rate of growth and the fact that the growth is to some degree toward the Landfill—demonstrates that a larger population of persons will be affected by the expanding Landfill in the future.

Night operations of the Landfill require lighting that will be a nuisance to nearby residents. The Site Development Plan included in the Application identifies: “Overhead lighting will be provided at the gatehouse and entry gates. Gatehouse lighting will be such that, if required, the waste screening program can be conducted during night operations so that incoming waste loads may be illuminated for inspection as well as the vehicle.”<sup>50</sup> Mr. Murray, the engineer-of-record for the Application, was asked about nighttime operations of the Landfill and the need for illumination. Mr. Murray testified that if operated in the middle of the night or really anytime after dark, “[a]t a minimum” the “working face would be illuminated at least by headlights of the garbage vehicles.”<sup>51</sup> Even if the Landfill is not engaged in “waste acceptance” during nighttime hours, heavy equipment working in the vicinity of the active working face or elsewhere on the Landfill, as would occur pursuant to the Commission’s additional twenty-nine operating hours, would involve light emanating from the Landfill. Lighting at the Landfill during nighttime operations would contribute to nuisance conditions resulting from the operation

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<sup>48</sup> *Id.* at 1793 Ins.3-9 (Direct Exam of Worrall) (Aug. 30, 2007).

<sup>49</sup> *See id.* at 991 Ins.7-9 (Redirect Exam of Borrer) (Aug. 24, 2007).

<sup>50</sup> Exh. APP-202, Application, *supra* note 2, at pt. III § 2.3 at III-3 (TC 243).

<sup>51</sup> Tr. at 413 Ins.4-10 (Cross Exam (by Perales) of Murray) (Aug. 21, 2007).

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of the Landfill. As the Landfill expands upwards such lighting will be suffered by the growing number of residents in the area of Landfill. Notably, whereas the vast majority of operating hours recommended by the Administrative Law Judges involve operations during daylight hours, virtually *all* of the twenty-nine additional hours authorized by the Commission would involve operations after dark that would require artificial lighting.

While prefiled testimony related to noise was inexplicably struck in this proceeding, noise-related testimony was taken at the Hearing on the Merits. Loud noises from the Landfill would contribute to nuisance conditions, and nuisance conditions resulting from the operation of MSW landfills are prohibited pursuant to TCEQ rules.<sup>52</sup> One noise-related problem at landfills is caused by the back-up beepers on heavy equipment. During the Hearing on the Merits, Mr. Murray was asked whether he knew of any alternatives to the back-up beepers usually associated with heavy equipment that would limit noise during overnight operations. Mr. Murray's response was that one would "probably have to contact OSHA" for such information, and that he was not familiar with any facilities that used heavy equipment that had alternatives to the back-up beepers.<sup>53</sup> In other words, while Williamson County had proposed 24/7 operations of the Landfill, it had 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. The expanded hours adopted by the Commission would result in the same types of

<sup>52</sup> 30 TEX. ADMIN. CODE § 330.15(a)(2) states:

(a) A person may not cause, suffer, allow, or permit the collection, storage, transportation, processing, or disposal of municipal solid waste (MSW) . . . in violation of the Texas Health and Safety Code, or any regulations, rules, permit, license, order of the commission, or in such a manner that causes:

\* \* \*

(2) the creation and maintenance of a nuisance . . .

30 TEX. ADMIN. CODE § 330.15(a)(2).

<sup>53</sup> Tr. at 412 ln.14 – 413 ln.3 (Cross Exam (by Perales) of Murray) (Aug. 21, 2007).

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nuisance conditions because of Williamson County's failure to alleviate potential nuisance situations. In addition, expanded operating hours at the Landfill, even though not for waste acceptance, would result in more truck traffic at night to and from the Landfill. Such traffic could also result in noise nuisance conditions.

Screening of the landfill could potentially limit to some degree the nuisances associated with light and noise during nighttime operations, but as identified by Mr. Pladej Prompungorn, testifying for the Executive Director of TCEQ, the Application does not propose any screening of the operations of the Landfill except for existing bushes and landscaping.<sup>54</sup>

Incredibly, Mr. Prompungorn testified that while TCEQ requires applicants such as Williamson County to provide data on, for example, the number of residences within one mile of a MSW landfill facility, the Executive Director does not analyze the impact of the proposed facility on the identified residences during his technical review of an application. Specifically, Mr. Prompungorn testified as follows:

- Q. According to your prefiled testimony, you identified approximately 120 residential structures within one mile of the facility. Is that correct?
- A. Yes, sir.
- Q. Once you identify those residential structures, do you conduct an analysis to determine the impact of the proposed facility on those residential structures?
- A. No, sir.
- Q. Why is it then that you gather that information, if you do not conduct such an analysis?
- A. The information is required by the rule. Once we get that information coming in, we just look at it, and if the residential is within one mile – and we look at the topography and the map that shows where residents are, and if it's not too close to the landfill, that would be okay.
- Q. So you basically take note of where they're located, but you don't conduct a specific analysis of the impact. Is that right?
- A. No, sir.<sup>55</sup>

<sup>54</sup> See *id.* at 1442 ln.11-20 (Cross Exam (by Perales) of Prompungorn) (Aug. 28, 2007).

<sup>55</sup> *Id.* at 1627 ln.16 – 1628 ln.12 (Cross Exam (by Humphrey) of Prompungorn) (Aug. 29, 2007).

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With regard to his approval of the 24/7 operating hours in the Draft Permit, as part of the technical review process, Mr. Prompungorn testified as follows:

- Q. So if I may summarize, based on your experience about allowing other landfills to operate on 24-hour-7-basis, you thought that this one was similar enough to those that it would be acceptable for this one. Is that a fair statement?
- A. Not similar to those but this is to my determination, that it probably would be okay because I know to the fact that most of the sites that I have there, even though they're proposed to have 24 hours – 24/7, but just for the flexibility of the hours that they operate, but they would not go – they would not use those 24 hours. The trucks would not be coming in all 24 hours.
- Q. So based on your allowing other facilities to operate 24/7, you thought it would be acceptable for this one to do the same?
- A. Yes, sir.<sup>56</sup>

While the 24/7 operating hours were not approved by TCEQ, there was no meaningful review conducted by the Executive Director to determine what operating hours would be compatible with surrounding land uses, and clearly the Executive Director's standard of weighing community impacts versus the applicant's need was not utilized. As outlined in detail above, there was no information in the evidentiary record to support the additional twenty-nine operating hours approved by TCEQ.

Similarly, while Mr. Worrall, as Williamson County's rebuttal land use expert, testified regarding the potential compatibility of the expanded Landfill with surrounding land uses, his testimony made it clear that he had not fully considered all potential nuisance conditions that could cause concern for area residents. For example, Mr. Worrall did not consider any proposed screening at the Landfill.<sup>57</sup> He also testified that he did not consider noise, odor, the waste

<sup>56</sup> *Id.* at 1629 ln.6-22. Mr. Prompungorn had previously testified: "I can say all of the sites that I approved 24/7, they're not going to accept the waste – accepting waste 24 hours." *Id.* at 1467 ln.16-18 (Cross Exam (by Perales) of Prompungorn) (Aug. 28, 2007).

<sup>57</sup> *See id.* at 1831 ln.22 – 1832 ln.7 (Cross Exam (by Perales) of Worrall) (Aug. 30, 2007).

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acceptance rate, the types of waste accepted, or the height of the Landfill.<sup>58</sup> In addition, Mr. Worrall, who testified that he began his analysis with the assumption that the Landfill will be operated properly and in compliance with regulatory requirements, did not look at the SOP to determine how the Williamson County Landfill would be operated.<sup>59</sup> And while Mr. Worrall testified that he did consider the proposed 24/7 operating hours as part of his land use analysis, he stated: "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."<sup>60</sup> Thus, Mr. Worrall testified that the proposed 24/7 hours of operation were consistent with surrounding land uses, but he provided no specifics as to how such expanded hours of operation were consistent; instead, even his own testimony minimized his consideration of the operating hours at all.<sup>61</sup>

Simply put, the additional twenty-nine hours are not compatible with the surrounding land uses, as described in the evidentiary record, and the Administrative Law Judges' finding to maintain the operating hours from Permit No. MSW-1405A at the Landfill was supported by the great weight of the evidence.

For all of these reasons, Protestants urge the Commission to adopt the operating hours recommended by the Administrative Law Judges in their PFD and Proposed Order because such hours of operation were supported by the great weight of the evidence. Any other determination is contrary to the entirety of the evidentiary record and cannot meet the standard set out in Texas

<sup>58</sup> See *id.* at 1832 ln.16 – 1833 ln.9.

<sup>59</sup> See *id.* at 1903 ln.3 – 1904 ln.11.

<sup>60</sup> *Id.* at 1852 lns.5-10.

<sup>61</sup> See *id.* at 1834 lns.5-8 & 1852 lns.3-10.

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Health and Safety Code Section 361.0832(c) for overturning the finding of an Administrative Law Judge.

**IV. 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. 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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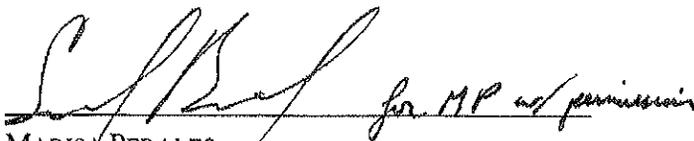
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**CERTIFICATE OF SERVICE**

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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