

Bryan W. Shaw, Ph.D., *Chairman*
Carlos Rubinstein, *Commissioner*
Toby Baker, *Commissioner*
Zak Covar, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

June 26, 2013

Ms. Bridget C. Bohac
Office of the Chief Clerk MC 105
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711

Re: William County MSW-1405B
TCEQ Docket No. 2005-0337-MSW
SOAH Docket No. 582-06-3321
Executive Director's Response to Third Court of Appeals Remand of the Application by
Williamson County for MSW Permit 1405b

Dear Ms. Bohac,

Please find the enclosed original plus 7 copies of the Executive Director's Response to the Third Court of Appeals Remand of the Application by Williamson County for MSW Permit 1405b for filing.

If you have any questions, please contact me at (512) 239-5778.

Sincerely,

A handwritten signature in black ink, appearing to read "Anthony Tatu", enclosed in a rectangular box.

Anthony Tatu
Staff Attorney
Environmental Law Division

Cc: service list.

SOAH Docket No. 582-06-3321
TCEQ Docket No. 2005-0337-MSW

Application of
**WILLIAMSON COUNTY FOR A
PERMIT TO AMEND A TYPE I
MUNICIPAL SOLID WASTE
LANDFILL FACILITY; (PERMIT
NO. MSW-1405 B)**

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Before the
**TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

**EXECUTIVE DIRECTOR’S RESPONSE TO THIRD COURT OF APPEALS REMAND
OF THE APPLICATION BY WILLIAMSON COUNTY FOR MSW PERMIT 1405b**

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

The Executive Director of the Texas Commission on Environmental Quality (TCEQ or Commission) files this Response to the General Counsel’s letter dated June 3, 2013, providing an opportunity to file a brief on the limited issues that are the basis for the Third Court of Appeals’ remand in this case.

It is the Executive Director’s position that there is adequate evidence in the record to support the Commission’s change to the Administrative Law Judge’s recommendation on the hours of operation of heavy equipment and transportation of materials to and from the landfill in reference to Williamson County’s permit amendment application.

I. BACKGROUND

This application was originally filed in October of 2003. Williamson County (Applicant) initially filed parts I and II of this permit amendment application and requested that TCEQ make

a land use compatibility determination on its proposed permit amendment pursuant to 30 TAC Section 330.61. Subsequently, Williamson County elected to forego the separate land use compatibility determination and filed Parts III and IV of the application on December 27, 2004. The application amendment requested that the maximum permitted elevation of the landfill be increased by 74 feet from 766 feet above mean sea level (msl) to 840 feet above msl. The requested lateral expansion of the landfill would increase by 373 acres from 202 acres to 575 acres. The Executive Director declared the application technically complete on March 14, 2006. Public meetings were held on this application on the following dates: October 11, 2004, August 25, 2005, and July 26, 2006. All public meetings were held in Hutto, Texas. On August 29, 2006, Williamson County requested that the application be directly referred to the State Office of Administrative Hearings (SOAH).

The Hearing on the Merits commenced on Monday August 20, 2007, and was completed on Thursday, August 30, 2007. On February 14, 2008, the ALJ's issued a Proposal for Decision (PFD) which recommended that the permit be issued with the following revisions: 1) Williamson County be identified as the "Owner" and "Site Operator" and Waste Management of Texas (WMTX) be identified as the "Operator"; 2) References to WMTX be removed from page one of the application in the "Applicant Name" section and the "Customer Reference Number" only identify Williamson County and Williamson County's customer reference number; 3) the operating hours of the facility be changed to Monday to Friday, 5:00am to 8:00pm and Saturday 6:00am to 4:00pm.

At the Commission Agenda on February 11, 2009, the Commission voted to adopt the SOAH Judge's PFD, while amending findings of fact on operating hours and on reporting and transcription cost allocation. The Commission issued a Final Order on February 17, 2009. 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 4:00p.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 3) "Other activities" - no specified hours, as set forth in former 30 TEX. ADMIN. CODE § 330.118.

Protestants initially sought judicial review in Travis County District Court, where the agency's decision was affirmed. Subsequently, the case was appealed to The Third Court of Appeals.

II. THE THIRD COURT OF APPEALS DECISION

The Court of Appeals overruled four out of the six issues raised on appeal, and found one issue to be moot. With regard to the issue of revised operating hours, the court found the Commission's order to be insufficient under Health and Safety Code Section 361.0832 (f). That section requires the Commission to issue a written order which fully explains the reasoning and grounds for overturning a finding of fact or conclusion of law or for rejecting a proposal for decision. The court specifically noted that the Commission changed the operating hours recommended by the ALJ, but in its explanation contained in the final order, stated only that the

operating hours were being “clarified.” The law requires the TCEQ to fully explain why the ALJ’s findings were not supported by the great weight of the evidence when overturning those findings. The court remanded the case to the TCEQ for further processing consistent with its opinion.

III. JUSTIFICATION FOR EXPANDING OPERATING HOURS

TCEQ rules require that a site operating plan specify operating hours. Waste acceptance hours may be any time between 7:00am and 7:00pm, Monday through Friday, unless otherwise approved by the Executive Director or the Commission. The operating hours for operating heavy equipment and transporting materials may be any time between 5:00am and 9:00pm, Monday through Friday, unless otherwise approved. 30 TEX. ADMIN. CODE Section 330.229 (a).

There is adequate evidence in the record to support the Commission’s decision to revise the operating hours proposed by the ALJ. In the application, Williamson County requested operating hours 24 hours a day, seven days a week (for a total of one hundred sixty eight hours weekly). The Applicant’s land use expert, Mr. John Worrall, testified at hearing that ninety percent of the surrounding land use is agricultural, and only seven percent is residential. When Mr. Worrall was specifically asked about the proposed operating hours in the application, he confirmed that he had considered those hours and that he determined that the operation of a landfill 24 hours a day, 7 days a week is compatible with the surrounding land use in the area. (Administrative Record, Transcript, page 1833, line 16 through page 1834, line 8). It stands to reason that fewer operating hours (the hours contained in the Commission’s order) would also be compatible with surrounding land use.

IV. CONCLUSION

The Commissioners have broad authority under the Texas Health and Safety Code and the Texas Administrative Code to set operating hours for a landfill. In this case the Commission considered the evidence that was developed during the contested case hearing process and which was contained in the administrative record. The Executive Director respectfully recommends that the Commission re-issue the Order granting the Application for Permit No. MSW-1405 to Williamson County, with additional language stating that the changes were made based on the ample evidence contained in the record.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Anthony Tatu", enclosed in a thin black rectangular border.

Anthony Tatu, Staff Attorney
TCEQ Environmental Law Division
State Bar No. 00792869

Representing the EXECUTIVE
DIRECTOR of the TEXAS
COMMISSION ON
ENVIRONMENTAL QUALITY

CERTIFICATE OF SERVICE

I certify that on June 26, 2013, the foregoing was sent by first-class mail, agency mail, or facsimile to all persons on the attached mailing list.

A handwritten signature in black ink, appearing to read "Anthony Tatu", enclosed in a thin black rectangular border.

Anthony Tatu, Staff Attorney
Environmental Law Division
Texas State Bar No. 00792869

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