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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

March 25, 2013

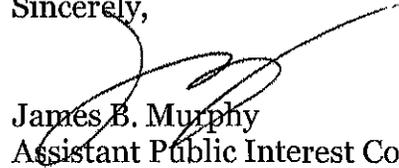
Bridget Bohac, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

**Re: CITY OF FARMERS BRANCH
TCEQ DOCKET NO. 2013-0437-MSW**

Dear Ms. Bohac:

Enclosed for filing is the Office of Public Interest Counsel's Response to Motion to Overturn in the above-entitled matter.

Sincerely,



James B. Murphy
Assistant Public Interest Counsel

cc: Mailing List

TCEQ DOCKET NO. 2013-0437-MSW

**IN THE MATTER OF THE MOTION
TO OVERTURN THE EXECUTIVE
DIRECTOR'S DECISION TO GRANT
THE CITY OF FARMERS BRANCH'S
APPLICATION FOR
MODIFICATION OF MSW PERMIT
NO. 1312A FOR THE CAMELOT
LANDFILL**

**BEFORE THE

TEXAS COMMISSION ON

ENVIRONMENTAL QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO MOTION
TO OVERTURN**

To the Honorable Members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Response to Motion to Overturn in the above-referenced matter and respectfully shows the following.

I. Introduction

Celina Romero, on behalf of the City of Carrollton, filed a motion to overturn the TCEQ Executive Director's (ED) decision to approve the application of the City of Farmers Branch (Farmers Branch or Applicant) for a modification of its municipal solid waste permit for the Camelot Sanitary Landfill located in Lewisville in Denton County. The permit modification authorizes the facility to use contaminated soil as alternative daily cover on a permanent basis.

Farmers Branch applied for this modification on May 22, 2012. The ED mailed a Notice of Deficiency (NOD) to Farmers Branch on July 19, 2012. In response to the NOD, Farmers Branch submitted additional information on or about August 7, 2012. The ED completed technical review of the application and a draft permit modification

on September 10, 2012. According to a certification of notice, Farmers Branch mailed the Notice of Application and Preliminary Decision (NAPD) on September 24, 2012. The public comment period ended on October 17, 2012. The ED issued the modification and a courtesy response to public comment letter on February 6, 2013. The deadline to file a motion to overturn was March 1, 2013.

Ms. Romero filed a public comment letter on behalf of Carrollton on October 17, 2012 and the motion to overturn on February 27, 2013. For the reasons discussed below, OPIC recommends the Commission grant the motion.

II. Applicable Law

A. Motion to Overturn

The applicant, OPIC, or any person may file with the TCEQ Chief Clerk a motion to overturn the ED's action on a modification application. Title 30, Texas Administrative Code (TAC), Subsections 50.139(a), 305.70(m). A motion to overturn must be filed no later than 23 days after the date the agency mails notice of the decision to the applicant and persons on any required mailing list for the action. 30 TAC 50.139(b). An action by the ED is not affected by a motion to overturn unless expressly ordered by the Commission. 30 TAC 50.139(e). The Commission or General Counsel may extend the period of time for filing motions to overturn and for taking action on the motions. 30 TAC 50.139(e). Wherever other agency rules refer to a "motion for reconsideration," that term should be considered interchangeable with the term "motion to overturn executive director's decision." 30 TAC 50.139(a).

B. Modification of Municipal Solid Waste Permit

Municipal solid waste (MSW) permit modifications "apply to minor changes to an MSW facility or its operation that do not substantially alter the permit or registration

conditions and do not reduce the capability of the facility to protect human health and the environment.” 30 TAC 305.70(d). Modifications may not authorize any increase in the permitted daily maximum limit of waste acceptance. 30 TAC 305.70(c). In order to receive authorization for the modification from the ED, the permittee must submit an application that at a minimum includes:

- (1) a description of the proposed change;
- (2) an explanation detailing why the change is necessary;
- (3) appropriate revisions to all applicable narrative pages and drawings of Attachment A of a permit or a registration (i.e., a site development plan, site operating plan, engineering report, or any other approved plan attached to a permit or a registration document). These revisions shall be marked and include revision dates and notes as necessary in accordance with [30 TAC 330.57(g)];
- (4) a reference to the specific provision under which the modification application is being made; and
- (5) for those modifications submitted in accordance with [30 TAC 305.70(l)] that the executive director determines that notice is required and for those listed in [30 TAC 305.70(k)], an updated landowners map and an updated landowners list as required under [30 TAC 330.59(c)(3)].

30 TAC 305.70(e).

C. Alternative Daily Cover

In general, Type I landfills must apply a daily cover comprised of six inches of well-compacted earthen material not previously mixed with garbage, rubbish, or other solid waste at the end of each operating day to control disease vectors, fires, odors, windblown litter or waste, and scavenging, unless the ED requires a more frequent interval. 30 TAC 330.165(a). The use of an alternative daily cover (ADC) may be allowed only by a temporary authorization followed by a major amendment or a modification in accordance with 30 TAC 305.70(k)(1). 30 TAC 330.165(d). The use of an ADC on a permanent basis is a modification that requires public notice by first-class mail in accordance with 30 TAC 39.106 and 39.413. 30 TAC 305.70(k)(1). Before acting on an

application, the ED shall review and consider any timely written public comments, but is not required to file a response to comments. 30 TAC 305.70(i).

The applicant must include an alternative daily cover operating plan (ADCOP) in its request for a temporary authorization or in a site development plan that includes:

- (A) a description and minimum thickness of the alternative material to be used;
- (B) its effect on vectors, fires, odors, and windblown litter and waste;
- (C) the application and operational methods to be utilized at the site when using this alternative material;
- (D) chemical analysis of the material and/or the Material Safety Data Sheet(s) for the alternative material; and
- (E) any other pertinent characteristic, feature, or other factors related to the use of this alternative material.

30 TAC 330.165(d)(1). "A status report on the alternative daily cover must be submitted on a two-month basis to the executive director during the temporary authorization period describing the effectiveness of the alternative material, any problems that may have occurred, and corrective actions required as a result of such problems. If no unresolved problems have occurred within the temporary authorization period, status reports may no longer be required." 30 TAC 330.165(d)(2).

Use of alternative daily cover is limited to a 24-hour period after which either waste or daily cover must be placed. 30 TAC 330.165(d). "Alternative daily cover must not be allowed when the landfill is closed for a period greater than 24 hours, unless the executive director approves an alternative length of time." 30 TAC 330.165(d)(3).

Constituents of concern in contaminated soil used as ADC shall not exceed the concentrations listed in Table 1, "Constituents of Concern and Their Maximum Leachable Concentrations," located at 30 TAC 335.521(a)(1). Additionally, the contaminated soil must not contain:

(A) polychlorinated biphenyl wastes that are subject to the disposal requirements of 40 Code of Federal Regulations Part 761; or
(B) total petroleum hydrocarbons in concentrations greater than 1,500 milligrams per kilogram. The owner or operator may submit a demonstration for executive director approval that material exceeding 1,500 milligrams per kilogram (mg/kg) total petroleum hydrocarbons can be a suitable alternative daily cover. The demonstration shall include information regarding the risk to human health and the environment and the information required in [30 TAC 330.165(d)(1)]. If approved, the executive director may impose additional permit requirements regarding the use of this material.

30 TAC 330.165(d)(4). In addition, ADC must not exceed constituent limitations imposed on waste authorized to be disposed at the facility. 30 TAC 330.165(d)(5). “The executive director may require the owner or operator to test runoff from areas that have alternative daily cover for compliance with Texas Pollutant Discharge Elimination System storm water discharge limits or manage the runoff as contaminated water.”
30 TAC 330.165(d)(6).

III. Discussion

As an initial matter, the motion is timely under 30 TAC 50.139(b). The rule requires filing a motion to overturn with the TCEQ Chief Clerk no later than 23 days after the agency mails the decision. The TCEQ Chief Clerk mailed the decision on February 6, 2013, and Carrollton filed the motion on February 27, 2013, which is within the 23-day period.

The motion states several grounds for overturn. Carrollton argues: (1) Applicant failed to demonstrate the use of contaminated soil as ADC will not cause an increase in volatile organic compound (VOC) emissions from the site, (2) Applicant failed to demonstrate it will properly manage storm water that comes into contact with the contaminated soil, (3) Applicant failed to demonstrate the soil it accepts will not exceed constituent concentration limits, (4) Applicant failed to demonstrate compliance with

closure cost requirements, (5) the modification allows Applicant to stockpile unlimited amounts of contaminated soil in violation of 30 TAC 335.4, (6) the modification will worsen existing groundwater contamination detected at the site, and (7) the application contains errors and inadequate technical information. Carrollton requests the Commission deny the motion, or in the alternative, consolidate the ADC application into the facility's Major Permit Amendment Application No. 1312B, which is under technical review with the ED.

A. Air Emissions

Carrollton is concerned contaminated soil stockpiles and their use as daily cover will increase VOC emissions because of greater air exposure to contaminated soil. Carrollton states, "Applicant has made no demonstration that the use of these soils will not cause an increase in VOC fugitive emissions from the landfill." Motion to Overturn, at 3. Carrollton argues Applicant is required to amend its air permits to authorize additional emissions from the contaminated soil but has not done so.

Carrollton argues the Municipal Solid Waste Landfill Title V General Operating Permit (GOP) requires prior New Source Review (NSR) authorization to add contaminated soil stockpiles and to use the soil as daily cover. Subsection (b)(5)(A) of the GOP provides, "The permit holder shall comply with 30 TAC Chapter 116 by obtaining a NSR authorization prior to new construction or modification of emission units located in the area covered by this GOP."

OPIC agrees Applicant must seek prior authorization under Chapter 116 for air emissions from contaminated soil used as ADC. Chapter 116 includes case-by-case permits, standard permits, permits by rule, and other authorizations. *See* 30 TAC 116.110(a). In particular, a standard permit authorizes minor sources at municipal solid

waste landfills. *See* 30 TAC 330.981–330.995 (Subchapter U, Standard Air Permits for Municipal Solid Waste Landfill Facilities and Transfer Stations). Camelot currently is authorized under this standard permit. Carrollton argues Applicant has not authorized the use of contaminated soil under the standard permit.

The standard permit appears to authorize the use of contaminated soil as ADC. It states, “Air emissions from the following stationary sources are authorized by this standard permit . . . (4) landfill cell construction, operation, and closures, including landfill gas emissions and associated capture and control equipment[.]” 30 TAC 330.991(a)(4). The application of daily cover is a stage in the process of cell construction, operation, and closure. Therefore, it appears the standard permit encompasses the use of contaminated soil as ADC.

The question remains whether Applicant must take further action to obtain coverage under the standard permit for its use of contaminated soil. The standard permit requires the owner or operator to certify that the permit holder will comply with all terms of the standard permit. 30 TAC 330.987(b). All representations with regard to construction plans, operating procedures, maximum emission rates, and permit coverage become conditions upon which the landfill must be constructed and operated. 30 TAC 330.989(b). “The owner or operator must submit a revised certification for changes that vary from the original representations[.]” in accordance with 30 TAC 330.987. 30 TAC 330.989(b).

Section 330.987 sets out a process for submission of revised certifications, the timing of which depends on the amount of increased emissions. 30 TAC 330.987(d)–(f). *See, e.g.,* 30 TAC 330.987(f) (update site certification within one year of modification if cumulative amount of new emissions is less than five or twenty-five tons per year in

nonattainment or attainment areas respectively). *See also* 30 TAC 116.615(2) (“If the facility remains eligible for a standard permit, the owner or operator of the facility shall notify the executive director of any change in conditions which will result in a change in the method of control of emissions, a change in the character of the emissions, or an increase in the discharge of the various emissions as compared to the representations in the original registration or any previous notification of a change in representations.”). So long as Applicant follows the procedures outlined in 30 TAC 330.987 to ensure coverage under the standard permit, the issue of air emissions is not a basis to overturn the ED’s decision to approve the ADC permit modification.

B. Storm Water

Carrollton argues Applicant failed to demonstrate that its operating plan for use of contaminated soil is adequate to ensure contaminated storm waters will be properly managed and disposed. Carrollton points out that the temporary ADC authorization requires Farmers Branch to manage storm water runoff that comes into contact with the contaminated soil as contaminated water. Carrollton also argues Applicant failed to demonstrate it has capacity to handle a higher volume of contaminated water runoff, because little detail is provided on the design of containment berms, the location and volume of stockpiles, storage capacity, and operational procedures.

OPIC agrees the ADCOP is inadequate on the issue of storm water. The temporary authorization provides: “Stormwater runoff from areas that have been covered with the ADC and from ADC stockpiles shall be managed as contaminated water.” Temporary Authorization, Municipal Solid Waste Permit No. 1312A, Camelot Landfill, at ¶ 4 (issued May 11, 2011). Yet, the approved ADCOP omits reference to storm water that comes in contact with areas that have been covered with the ADC:

Stormwater runoff to and runoff from the contaminated soil piles will be controlled by containment berms and/or diversion berms or by covering the contaminated soil stockpiles with a minimum of six inches of clean soil. Stormwater that comes into contact with the contaminated soil in a stockpile will be considered contaminated water and managed consistent with the requirements for contaminated water in the site's Leachate and Contaminated Water Plan.

ADCOP, at 3 § 3.1.

Owners and operators of MSW landfills shall collect, contain, and properly manage contaminated water so that all liquids resulting from the operation of the landfills will not cause surface water or groundwater pollution. 30 TAC 330.207(a)–(b). The TCEQ's administrative rules define the term "contaminated water" as "[l]eachate, gas condensate, or water that has come into contact with waste." 30 TAC 330.3(36). Thus, the definition includes water that comes in contact with contaminated soil stockpiles and with contaminated soil in use on the working face. *See also* 30 TAC 330.305(g) ("The owner or operator shall handle, store, treat, and dispose of surface or groundwater that has become contaminated by contact with the working face of the landfill or with leachate in accordance with [30 TAC 330.207]."). The ED also has express authority to require a landfill owner or operator to manage runoff from areas that have ADC as contaminated water. 30 TAC 330.165(d)(6).

Accordingly, OPIC concludes the ADCOP must include additional operational procedures for storm water that comes into contact with areas that have been covered with contaminated soil. Therefore, OPIC recommends the Commission overturn the ED's decision and order a revision to the ADCOP to include this additional requirement.

C. Constituent Concentration Limits

Carrollton argues the ADCOP's procedures for acceptance and testing of contaminated soil fails to ensure protection of human health and the environment.

Specifically, Carrollton states that the ADCOP does not require testing for constituents of concern listed in Table 1 of 30 TAC 335.521(a)(1) or polychlorinated biphenyl (PCB) and relies on generator supplied data rather than its own tests.

OPIC agrees the ADCOP is inadequate on soil testing. The ADCOP appropriately prohibits acceptance of soil that contains constituents of concern above concentration totals in Table 1, PCBs, and total petroleum hydrocarbons (TPH) greater than 1,500 milligrams per kilogram (mg/kg). ADCOP, at 2 § 2.2. The ADCOP also requires Farmers Branch to maintain in its site operating record the generator waste profile sheets that accompany the waste at the time of acceptance. Thus, the language used in the ADCOP appears to meet the requirements of 30 TAC 330.165(d)(4).

The generator waste profile sheets submitted with the two-month reports, however, do not include sufficient proof of testing in compliance with 30 TAC 330.165(d)(4). The waste profile sheets show testing for pesticides, hazardous waste, and PCBs, among other pollutants. It does not appear, however, that the waste generator tests for TPH to determine if the soil exceeds 1,500 mg/kg as required by 30 TAC 330.165(d)(4)(B). The two-month reports include no reference elsewhere to testing for TPH conducted by Farmers Branch. As a result, there is an open question whether the soil accepted for use as ADC exceeds the concentration limit in 30 TAC 330.165(d)(4)(B).

Accordingly, OPIC concludes Applicant failed to demonstrate compliance with 30 TAC 116.165(d)(4)(B) while operating under its temporary authorizations. OPIC recommends the ADCOP include additional language outlining a more specific procedure for testing for TPH, including a description of whether the tests will be conducted by Farmers Branch or the waste generator.

D. Closure Costs

Carrollton argues Applicant failed to adjust its facility closure cost estimate to account for the removal of contaminated soil stockpiles. Carrollton states that the increase in cost could be significant because the permit does not limit the amount of contaminated soil authorized for use as ADC.

The owner or operator of a MSW landfill “shall provide a written cost estimate showing the cost of hiring a third party to close the largest waste fill area that could potentially be open in the year to follow and those areas that have not received final cover in accordance with the final closure plan.” 30 TAC 330.503(a). Any changes to the final closure plan or landfill conditions that increase the maximum cost of closure at any time during the remaining active life of the unit require the owner or operator to increase the closure cost estimate and the amount of financial assurance. 30 TAC 330.503(a)(2). The closure plan shall include “an estimate of the maximum inventory of wastes ever on-site over the active life of the unit or MSW facility.” 30 TAC 330.457(e)(3). “The owner or operator shall review the facility’s permit conditions on an annual basis and verify that the current active areas match the areas on which closure cost estimates are based.” 30 TAC 330.503(a)(1).

OPIC concludes the use of ADC is unlikely to result in an increase in the maximum cost of closure. The maximum cost of closure is linked in part to the maximum inventory of wastes ever on-site over the active life of the unit or facility. The authorization to use contaminated soil as ADC does not authorize an increase in the maximum amount of waste accepted on site, but instead authorizes a particular use for a type of waste already accepted at the facility. Although an increase to the maximum amount of waste accepted on site likely would necessitate a modification to the closure

cost estimate, the modification to use ADC authorizes no such increase in total waste acceptance. As a result, the closure cost estimate is an insufficient basis to overturn.

E. Limit on Amounts in Stockpiles

Carrollton argues the ADC authorization endangers human health and the environment because it does not place any limit on the volume of contaminated soil accepted for use and stockpiling as ADC, citing to the general prohibitions in 30 TAC 335.4 on unauthorized discharges to state water, creation of nuisances, and endangerment of public health and welfare. OPIC finds this argument unpersuasive.

OPIC finds no rule limiting the amount of stockpiled ADC or requiring a description of stockpile locations. With the exception of the additional language recommended above in Section III.B, OPIC concludes the storm water management procedures in the ADCOP are sufficient to prevent an unauthorized discharge to state water, the creation of a nuisance, or endangerment of public health and welfare. Accordingly, the absence of a limit on stockpile volume does not justify overturn.

F. Groundwater Contamination

Carrollton argues the ADC authorization will worsen existing groundwater contamination from the Camelot Landfill. OPIC is unable to evaluate this concern without additional information.

Carrollton provides no supporting documentation or test results in its motion or the public comments. The TCEQ rates the compliance history of both Farmers Branch and the Camelot Landfill as high performers. *See* Compliance History on RN101479038, available at <http://www11.tceq.texas.gov/oce/ch/#gotrn> (Mar. 25, 2013). As a result, it is difficult to determine the severity and frequency of groundwater contamination referenced by Carrollton and whether it justifies denial of the ADC application.

Accordingly, OPIC concludes there is insufficient information on groundwater contamination to support overturn.

G. Application Errors

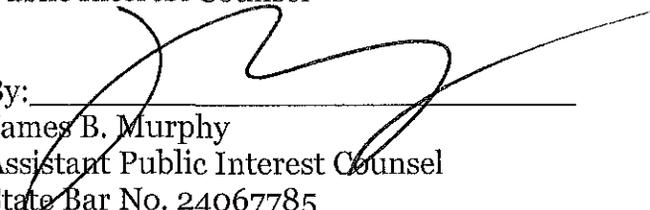
Carrollton argues there are errors in the application, specifically pointing to a citation error in the ADCOP. OPIC agrees the citation on page B-1 of the ADCOP should be revised to substitute 30 TAC 330.133(c) and (c)(2) with 30 TAC 330.165(d) and (d)(2).

IV. Conclusion

OPIC recommends the Commission grant the motion. OPIC further recommends the Commission order Farmers Branch to (1) include in the ADCOP additional operational procedures for storm water that comes into contact with areas that have been covered with contaminated soil, (2) include in the ADCOP additional language outlining a more specific procedure for testing for TPH, including a description of whether the tests will be conducted by Farmers Branch or the waste generator, and (3) correct the citation error on page B-1 of the ADCOP.

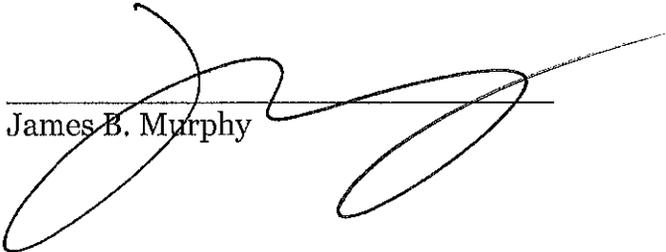
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CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2013 the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Motion to Overturn was filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.


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