

SOAH DOCKET NO. 582-04-0975
TCEQ DOCKET NO. 2003-0729-MSW

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IN THE MATTER OF THE § BEFORE THE STATE OFFICE OF THE CHIEF CLERKS OFFICE
APPLICATION OF REGIONAL LAND §
MANAGEMENT SERVICES, LTD., § OF
FOR A NEW TYPE I MUNICIPAL §
SOLID WASTE LANDFILL (PERMIT § ADMINISTRATIVE HEARINGS
NO. 2286) §

WEBB COUNTY'S REPLY TO EXCEPTIONS TO THE PROPOSAL FOR DECISION OF APPLICANT, REGIONAL LAND MANAGEMENT SERVICES, LTD.

Protestant Webb County (Webb County) files its Reply to Exceptions to the Proposal for Decision of Applicant, Regional Land Management Services, Ltd. dated September 29, 2008, and would show the following:

**I.
Introduction and Summary**

Webb County submits that the Proposal for Decision (PFD) and corresponding Order by the Administrative Law Judges (ALJs) is factually and legally flawed and should not be accepted by the Texas Commission on Environmental Quality (TCEQ). The RLMS application should be denied because the applicant failed to meet the requirements established by the TCEQ.

Webb County incorporates as evidentiary and factual support the arguments set forth in its Exceptions to the Proposal for Decision filed on September 29, 2008. Further, Webb County adopts the Exceptions filed by Highway 359 Landowners Coalition and Guillermo Cavazos filed on September 29, 2008.

II. Issues

A. Groundwater Monitoring Special Provision

As stated in the TCEQ rules, "the applicant shall present evidence to meet its burden of proof on the application, followed by the protesting parties, the public interest counsel, and if

named as a party, the executive director.”¹ It is not the responsibility of the Protestants to develop a groundwater monitoring program to demonstrate any defect in the application, as inferred by the applicant when it stated that “neither Mr. Rice nor the parties on whose behalf he testified offered any specifics regarding the groundwater monitoring program he thought should be implemented.”²

The TCEQ rules require that “a groundwater monitoring system must be installed that consists of a sufficient number of monitoring wells, installed at appropriate locations and depths to yield representative groundwater samples from the uppermost aquifer as defined in 330.2 of this title.”³ Additionally, the TCEQ rules require that “the groundwater monitoring program shall include consistent sampling and analysis procedures that are designed to ensure monitoring results that provide an accurate representation of groundwater quality at the background and downgradient wells, or other monitoring system....”⁴ The applicant must “submit a groundwater sampling and analysis plan to the executive director for review and approval prior to commencement of sampling and shall maintain a current copy in the operating record.”⁵ Finally, the groundwater sampling and analysis plan “shall be a part of the site development plan.”⁶

It is evident that the applicant now wants to avoid the groundwater monitoring requirement and restrict the TCEQ’s and the ALJs’ findings to no monitoring plan or the sketchy, last-minute, unspecific plan introduced by the applicant during the hearing. The applicant acknowledges that the plan submitted in Exhibit A-287 is insufficient to meet the TCEQ requirements. Specifically, the applicant states that “RLMS is concerned about a

¹ 30 TAC § 80.117(b).

² Exceptions to PFD of Applicant, page 3.

³ 30 TAC § 330.231(a).

⁴ 30 TAC § 330.233(a).

⁵ 30 TAC § 330.233(b).

⁶ *Id.*

requirement stating that ‘the permittee shall install a groundwater monitoring system’...” because “such a requirement could be interpreted as requiring the type of groundwater monitoring system described in the Commission’s rules at 30 TAC §330.231(a).”⁷ During the hearing process, “RLMS ... directed its consulting hydrogeologist, Vince Barlock, to develop a program to monitor groundwater in the shallow Yegua Formation.”⁸

Further, “RLMS is concerned that an order approving a permit that includes a non-specific groundwater monitoring requirement would be subject to challenge on appeal based on the concept of finality.”⁹ Webb County asserts that its due process and a full and fair opportunity to participate in the contested case hearing was denied by the ALJs by admitting the applicant’s exhibit concerning groundwater monitoring. By allowing either Exhibit A-287 or an undetermined groundwater monitoring plan, all Protestants have been denied meaningful participation in the application/hearing process for the proposed landfill.

Since the applicant was worried that its application was incomplete, it improperly attempted to file the untimely groundwater monitoring program during the hearing process. The applicant acknowledges that it did not include a groundwater monitoring plan nor did it provide a groundwater sampling and analysis plan in its application. Only after testimony demonstrating the applicant’s failure to meet the TCEQ rules by Mr. Rice did the applicant scurry to find a groundwater sampling and analysis plan and a groundwater monitoring program. Even with this inappropriate addition, the application continues to fail to meet the TCEQ requirements.

Now, the applicant is requesting that the TCEQ grant it a “special provision” by adopting and limiting its groundwater monitoring to only those provisions described in Exhibit A-287.

⁷ Exceptions to PFD of Applicant, page 7.

⁸ Exceptions to PFD of Applicant, pages 4-5.

⁹ Exceptions to PFD of Applicant, page 7.

Essentially, the applicant is requesting that the TCEQ ignore its rules and set precedent by allowing special provisions to circumvent the TCEQ rules.

Further, the applicant continues to ignore its burden of proof to establish that: (1) its application was complete and contained all required information concerning groundwater monitoring in compliance with the TCEQ, or (2) it was exempt from providing the required information concerning groundwater monitoring and the groundwater sampling and analysis plan. Instead, the evidence and testimony demonstrates that the applicant failed to meet its burden by adequately addressing the need for Groundwater Monitoring.

Finally, the applicant attempts to avoid this obligation and limit the TCEQ by stating that if it is not granted the special provision as the applicant describes it; then, the applicant “requests that the Commissioner’s order not include a special provision regarding groundwater monitoring.” The applicant has still failed to demonstrate where in its application, Pre-Filed Testimony or proper Rebuttal Testimony that it adequately addressed the need for groundwater monitoring.

For these reasons, the application should be denied.

B. Revisions to Findings of Fact and Conclusions of Law

1. Floodplains.

The applicant requests that an additional conclusion of law be added which states that “the application meets TCEQ site selection criteria with regard to floodplains.”¹⁰

The TCEQ requires that the “owners or operators of new municipal solid waste landfill (MSWLF) units, existing MSWLF units, and lateral expansions located in 100-year floodplains shall demonstrate that the unit will not restrict the flow of the 100-year flood, reduce the temporary water storage capacity of the floodplain, or result in washout of solid waste so as to

¹⁰ Exceptions to PFD of Applicant, page 9.

pose a hazard to human health and the environment.”¹¹ The site development plan states that “the site is not located within the limits of the 100 year flood plain.”¹² Further, it states that “Lobo Creek crosses Hwy 359 approximately 3000 feet east of the proposed permit boundary” and that “the floodplain, at its closest, lies approximately 250 feet from the proposed permit boundary.”¹³

The record shows that the applicant has not provided sufficient data to demonstrate that the proposed landfill site is not within the 100 year floodplain and that the unit will not restrict the flow of the 100-year flood. The applicant attached three maps which provided an estimate of the location of the 100 year floodplain.¹⁴ The evidence shows that the map states that it “is for use in administering the National Flood Insurance Program” and that it “does not necessarily identify all areas subject to flooding particularly from local drainage sources of small size.”¹⁵ The record demonstrates that there is no data within these maps to determine the surface water elevations.¹⁶ Additionally, Mr. Murray, applicant’s expert, testified that he “reviewed the FEMA studies that they used in preparing this map (Exhibit A-161) and the detailed studies ended much further downstream on Lobo Creek.”¹⁷ Mr. Guillermo Cavazos, protestant, testified that he has “observed the flow of water to the north of the proposed site, along Highway 359, after rainfall events.”¹⁸ Additionally, the record include photographs that demonstrate the large amounts of water near the proposed landfill site during the November 16, 2001, rainfall event.¹⁹ Due to the unreliability and the incompleteness of the data relied on by the applicant, the permit application

¹¹ 30 TAC § 330.301 (West 2003).

¹² Exhibit A-106, page III-13.

¹³ *Id.*

¹⁴ Exhibits A-161, A-162, & A-163.

¹⁵ Exhibit A-162.

¹⁶ Testimony of Applicant’s Expert Murray, Transcript page 212 lines 16 – 18.

¹⁷ *Id.* at lines 21 – 24.

¹⁸ Exhibit P-1, page 6 lines 43 – 46.

¹⁹ Exhibits P-1, page 7 lines 2 – 33, P-1B, P-1C & P-1D.

fails to provide sufficient data concerning the 100 year floodplain, especially to the north along State Highway 359 where the estimated floodplain within 250 feet.

Webb County objects to the inclusion of the conclusion of law requested by the applicant as well as, the findings of fact submitted by the ALJs concerning floodplains. Further, the application should be denied as it failed to meet the TCEQ requirements.

2. Hydrology

The applicant requests that an additional conclusion of law be added which states that “the information submitted on hydrology for the site is adequate.”²⁰ Webb County has previously addressed this issue above and in its Exceptions to the Proposal for Decision. Therefore, Webb County objects to the inclusion of this conclusion of law as well as, the findings of fact submitted by the ALJs, and continues to urge that the application should be denied as it failed to adequately address hydrology.

3. Financial Assurance

The applicant requests that an additional conclusion of law be added which states that “the applicant proposes adequate financial assurance.”²¹

Webb County objects to the inclusion of this conclusion of law and the findings of fact concerning financial assurance as the application continues to state that “the required documentation demonstrating financial assurance for this facility will be provided to the TNRCC at least 60 days before the date on which waste is first received.”²² Further, Mr. Trevino testified that he does not know if there is a written lease or agreement between the owner of the property, 359 P4 L.L.C., and the applicant for the operation of the Ponderosa Regional Landfill.²³

²⁰ Exceptions to PFD of Applicant, page 9.

²¹ Exceptions to PFD of Applicant, page 11.

²² Exhibit A-267, page III-A8-1.

²³ Id. at page 35 line 22 through page 36 line 2; page 49 line 3 through page line 14.

Additionally, the applicant cannot provide adequate financial assurance because the applicant has no assets.²⁴

4. Transportation

The applicant requests that an additional conclusion of law be added which states that “the applicant presented adequate transportation information.”²⁵

The TCEQ rules require that the applicant “(A) provide data on the availability and adequacy of roads that the applicant will use to access the site; (B) provide data on the volume of vehicular traffic on access roads within one mile of the proposed facility, both existing and expected, during the expected life of the proposed facility; and (C) project the volume of traffic expected to be generated by the facility on the access roads within one mile of the proposed facility.”²⁶ The record shows that the data submitted by the applicant concerning transportation information was prepared by James Roy Murray, who is not a traffic engineer.²⁷ Further, the record demonstrates that the information did not adequately take into consideration the growth trends of the City of Laredo.²⁸ The evidence shows the applicant relied on data from TxDOT from 1997, over ten years old.²⁹ Finally, the record demonstrates that Mr. Murray testified that he relied on the data taken thirteen miles away from the site, near the small town of Aguilares, instead of the traffic measurements from eight miles from the site near the City of Laredo landfill.³⁰

²⁴ Testimony of Trevino, Transcript page 44 lines 15 – 18.

²⁵ Exceptions to PFD of Applicant, page 11.

²⁶ 30 TAC § 330.53(b)(9)(A), (B) and (C) (West 2003); Exhibit A-253.

²⁷ Testimony of Applicant’s Expert Murray, Transcript page 179 lines 20 – 24.

²⁸ See Exhibit Webb 14, page 3 line 29 through page 5 line 45; See also discussion from above in Section A “Is the proposed facility compatible with area land uses?”

²⁹ Exhibit 95, pages I/II – 7 through I/II – 9.

³⁰ Testimony of Applicant’s Expert Murray, Transcript page 177 line17 – page 17 line19; page 181 line 15 through page 184 line 8; Exhibit A-92, page 3 lines 11 -16.

By relying on data from Aguilares, Mr. Murray estimated daily traffic for the proposed landfill site to be between 3,500 and 4,000 vehicles per day.³¹ As shown by TxDOT's information and the testimony concerning the growth trends of the Laredo area, Mr. Murray underestimated the daily traffic volume and provided inadequate information in the application concerning transportation information.

Therefore, Webb County objects to the inclusion of the conclusion of law requested by the applicant as well as, the findings of fact submitted by the ALJs concerning transportation. Further, the application should be denied as it failed to meet the TCEQ requirements.

III. Conclusion

For these reasons, Webb County requests that the application of Regional Land Management Services, Ltd. for a New Type I Municipal Solid Waste Landfill, Permit No. 2286, be denied.

Respectfully submitted,



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³¹ *Id.*

CERTIFICATE OF SERVICE

I, James P. Allison, do hereby certify that on this the 6th day of October, 2008, a true and correct copy of the foregoing **Webb County's Reply to Exceptions to the Proposal for Decision of Applicant, Regional Land Management Services, Ltd.** has been forwarded to the following:

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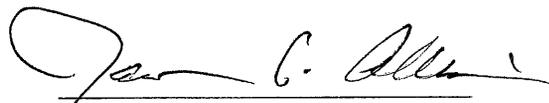
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