

# State Office of Administrative Hearings



**Shelia Bailey Taylor**  
Chief Administrative Law Judge

2008 FEB 26 PM 2:55  
CHIEF CLERKS OFFICE

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

February 26, 2008

Les Trobman  
General Counsel  
Texas Commission on Environmental Quality  
PO Box 13087  
Austin Texas 78711-3087

VIA FACSIMILE 512/239-5533

**Re: SOAH Docket No. 582-06-0839; TCEQ Docket No. 2005-1510-MSW; In Re: Application by Roy Eugene Donaldson, II for a Type V-RC Municipal Solid Waste Permit in Travis County, Texas (MSW Permit No. 2320)**

Dear Mr. Trobman:

On January 30, 2008, Applicant filed Exceptions to the Proposal For Decision (PFD) issued January 10, 2008. On January 30, 2008, Protestants filed their Brief in Response to the PFD in which they recommended changes to the PFD. On February 12, 2008, the Office of Public Interest (OPIC) filed its Response. The undersigned Administrative Law Judges (ALJs) have reviewed those exceptions and responses and this letter contains our recommendations to the Commission on the disposition of the exceptions.

Overall, the ALJs recommend adoption of the PFD and Proposed Order as submitted, with the exception of the amendments listed below that will more accurately reference the evidence.

Applicant seeks to modify the PFD by changing the recommendation of denial of the permit for failure to show that Applicant's facility will comply with TCEQ rules enacted to protect groundwater. Applicant seeks to modify the recommendation to a future denial conditioned on Applicant's failure to reconstruct the liner under the composting area. However, as the Draft Permit does not contain a special condition requiring reconstruction of the liner, the evidence

SOAH Docket No. 582-06-0839  
TCEQ Docket No. 2005-1510-MSW  
Page No. 2

and analysis focused on whether the existing liner is sufficient. The ALJs are unclear how, without a special condition requiring construction of a liner under the processing area, the necessary precondition could exist. As discussed in greater depth in the OPIC's Response, Applicant's recommendation that a permit approval be conditioned on a future event raises issues of the finality of such a decision. In general, orders conditioned on a future action are conditional, hence not final or appealable.

Applicant also excepts to the PFD's recommendation of denial based on Applicant's failure to show that its intake procedures will prevent the delivery of unauthorized and prohibited materials at the Site, or will prevent unauthorized and prohibited materials, including prohibited pesticides, from application or incorporation into feedstocks, in-process materials, or processed materials. Applicant contends that it met its burden of proof on this issue by demonstrating that it has met the minimum requirements for preventing the delivery and application of unauthorized materials. Applicant also contends that the recommended denial would be arbitrary and capricious based on the issuance by the TCEQ of permits for other composting facilities that require only visual inspection of feedstocks.

First, the recommendation in the PFD was based on the finding that Applicant failed to establish that a visual inspection alone would prevent the delivery of unauthorized materials. As discussed in the PFD at pp. 28-30, there was little, if any, evidence in the record of how visual inspection would identify any of the prohibited materials in the feedstocks that would be authorized by the Draft Permit. Second, the ALJs cannot make a recommendation as regards treatment of other permit holders because the referenced permits are not in the record and cannot be considered by the ALJs. For these reasons, the ALJs concluded there is no basis to support the requested changes.

In their Brief, Protestants suggested specific language changes in the PFD and related Findings of Fact. The ALJs agree that proposed language changes should be made. The recommended changes are listed below, with the proposed amended text in boldface.

1. The last sentence of page 20 of the PFD is incomplete and should be modified as follows: "There was no conclusive evidence regarding the source of the water; the two explanations offered by RED were rain that had fallen into the well due to a failed clay cap or infiltration of rain water, **while Dr. Chandler suggested that the source of the water was surface infiltration due to the absence of a soil liner.**"
2. On Page 22 of the PFD, the second full sentence in the first paragraph should read as follows: "In support of the application, RED conducted six soil borings on the Site to depths of between 40 to 44.2 feet. **One boring (B-4) was in the middle of the Windrows and one boring (B-3) was in the middle of the Processing area.**"

SOAH Docket No. 582-06-0839  
TCEQ Docket No. 2005-1510-MSW  
Page No. 3

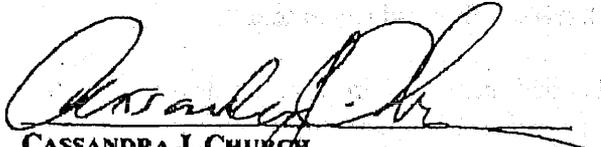
3. On Page 22 of the PFD, the fourth and fifth sentences in that same paragraph should be revised to read as follows: "For example, Boring B-6 showed clays meeting or exceeding the sieve criteria at two feet below the surface. On the other hand, **Boring B-1 had clays that did not meet the sieve test at four feet**, and the soils from Borings B-2 through B-5 did not meet those criteria until depths varying between five and seven feet."
4. On Page 23 of the PFD, the second and third sentence in paragraph number 5 should be revised to read as follows: "**The log does not indicate a percentage passing a No. 20 sieve, liquid limit, or plasticity index.**"
5. Finding of Fact No. 62e of the Proposed Order should be similarly corrected to read as follows: "**The log does not indicate a percentage passing a No. 20 sieve, liquid limit, or plasticity index.**"

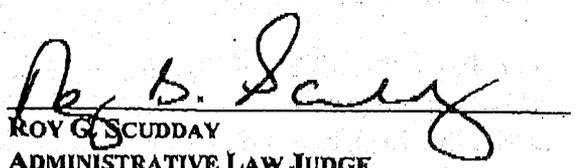
Protestants also seek to have Findings of Fact and Conclusions of Law added to the Proposed Order. Protestants seek to have a Finding of Fact and a Conclusion of Law added that address Applicant's failure to drill all the borings to an elevation at least thirty feet deeper than the lowest elevation of the Site, as required by TCEQ rules. Protestants also seek to have a Finding of Fact and a Conclusion of Law added regarding the failure of Applicant to include cross-sections utilizing the information from the test borings and depicting the generalized strata at the facility in the geologic/hydrogeologic report. However, the ALJs concluded that such findings are not required in order to support the proposed Conclusion of Law regarding the protection of the groundwater in that the soil deficiencies shown by the evidence were all at considerably higher depths than the additional depths that the borings did not attain and were manifest even without the cross-sections. Thus, it is the recommendation of the ALJs that no Findings of Fact or Conclusions of Law on these subjects be added. However, the Findings and Conclusions suggested by Protestants at pages 9 and 12 of their Brief are based on evidence in the record so could be added to the Proposed Order if the Commission desires to do so.

Finally, Protestants seek to have a Finding of Fact and a Conclusion of Law added regarding the insufficiency of the monitoring wells to assure detection of any contamination of the groundwater. The ALJs concluded that such a finding is not required to support the conclusions reached. Protestants' description of Mr. Chandler's testimony is accurate.

SOAH Docket No. 582-06-0839  
TCEQ Docket No. 2005-1510-MSW  
Page No. 4

In summary, it is the recommendation of the undersigned ALJs that the Commission deny all exceptions and adopt the Proposal for Decision and the Proposed Order as submitted to the Commission, with the amendments set forth above.

  
CASSANDRA J. CHURCH  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

  
ROY G. SCUDDAY  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

cc: Mailing List

**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

**AUSTIN OFFICE**

**300 West 15th Street Suite 502  
Austin, Texas 78701  
Phone: (512) 475-4993  
Fax: (512) 475-4994**

**SERVICE LIST**

**AGENCY:** Environmental Quality, Texas Commission on (TCEQ)  
**STYLE/CASE:** TX ORGANIC RECOVERY COMPOST FACILITY  
**SOAH DOCKET NUMBER:** 582-06-0839  
**REFERRING AGENCY CASE:** 2005-1510-MSW

**STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

**ADMINISTRATIVE LAW JUDGE  
ALJ ROY SCUDDAY**

**REPRESENTATIVE / ADDRESS**

**PARTIES**

EMILY COLLINS  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
OFFICE OF PUBLIC INTEREST COUNSEL  
MC-175 P.O. BOX 13087  
AUSTIN, TX 78711-3087  
(512) 239-6823 (PH)  
(512) 239-6377 (FAX)

OFFICE OF PUBLIC INTBREST COUNSEL

CHRIS MALISH  
ATTORNEYS AND COUNSELORS AT LAW  
A REGISTERED LIMITED LIABILITY PARTNERSHIP  
1403 WEST SIXTH STREET  
AUSTIN, TX 78703  
(512) 476-8591 (PH)  
(512) 477-8657 (FAX)

TEXAS ORGANIC RECOVERY FACILITY

J.D. HEAD  
ATTORNEY AT LAW  
FRITZ, BYRNE, HEAD & HARRISON, LLP  
98 SAN JACINTO BLVD., SUITE 2000  
AUSTIN, TX 78701  
(512) 476-2020 (PH)  
(512) 477-5267 (FAX)

(THOMASON FAMILY LIMITED PARTNERSHIP)

ANN MESSER, JULIE MOORE, JULIE PHILLIPS, H.  
PHILIP WHITWORTH

STEVE SHEPHERD  
LEGAL COUNSEL  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
ENVIRONMENTAL LAW DIVISION  
MC-173 P.O. BOX 13087  
AUSTIN, TX 78711-3087  
(512) 239-0464 (PH)  
(512) 239-0606 (FAX)

(COURTESY COPY)

---

xc: Docket Clerk, State Office of Administrative Hearings

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE

300 West 15th Street Suite 502  
Austin, Texas 78701  
Phone: (512) 475-4993  
Fax: (512) 475-4994

DATE: 02/26/2008  
NUMBER OF PAGES INCLUDING THIS COVER SHEET: 7  
REGARDING: EXCEPTIONS LETTER (BY ALJ)  
DOCKET NUMBER: 582-06-0839

JUDGE ROY SCUDDAY

FAX TO:	FAX TO:
J.D. HEAD	(512) 477-5267
CHRIS MALISH	(512) 477-8657
J.D. HEAD	(512) 477-5267
EMILY COLLINS (TEXAS COMMISSION ON ENVIRONMENTAL QUALITY)	(512) 239-6377
STEVE SHEPHERD (TEXAS COMMISSION ON ENVIRONMENTAL QUALITY)	(512) 239-0606

TCEQ Docket Clerk, Fax Number 512/239-3311

NOTE: IF ALL PAGES ARE NOT RECEIVED, PLEASE CONTACT DONNA SWOPE(dsw) (512) 475-4993

The information contained in this facsimile message is privileged and confidential information intended only for the use of the above-named recipient(s) or the individual or agent responsible to deliver it to the intended recipient. You are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone, and return the original message to us at the address via the U.S. Postal Service. Thank you.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
2008 FEB 26 PM 2:55  
CHIEF CLERKS OFFICE