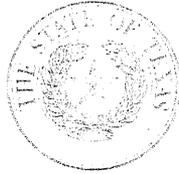


Buddy Garcia, *Chairman*  
Larry R. Soward, *Commissioner*  
Bryan W. Shaw, Ph.D., *Commissioner*



Blas J. Coy, Jr., *Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

February 11, 2008

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

CHIEF CLERKS OFFICE

2008 FEB 11 PM 12:23

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

Re: Application by Roy Eugene Donaldson, II for a Type V-RC Municipal Solid Waste Permit  
SOAH Docket No. 582-06-0839  
TCEQ Docket No. 2005-1510-MSW

Dear Ms. Castañuela:

Enclosed for filing in the above-referenced matter is the Office of Public Interest Counsel's Reply to Exceptions.

Sincerely,

A handwritten signature in cursive script that reads "Emily A. Collins".

Emily A. Collins, Attorney  
Office of Public Interest Counsel

Cc: Mailing List

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 • P.O. Box 13087 • AUSTIN, TEXAS 78711-3087 • 512-239-6363

P.O. Box 13087 • Austin, Texas 78711-3087 • 512-239-1000 • Internet address: [www.tceq.state.tx.us](http://www.tceq.state.tx.us)

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)

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BEFORE THE STATE OFFICE  
OF  
ADMINISTRATIVE HEARINGS

OFFICE OF PUBLIC INTEREST COUNSEL'S REPLY TO EXCEPTIONS

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES AND THE HONORABLE  
COMMISSIONERS:

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (TCEQ or Commission), and submits the following Exceptions in the above-captioned matter and would respectfully show the following:

**I. INTRODUCTION AND BACKGROUND**

Mr. Roy Eugene Donaldson, II, (hereinafter "Applicant") submitted a permit application to TCEQ on January 26, 2004, for authorization to continue operating a currently registered composting facility, called the Texas Organic Recovery Compost Facility, in Travis County, Texas, in accordance with Texas Health and Safety Code section 361.428(d).<sup>1</sup> The Applicant submitted a major amendment to his application on June 20, 2006.<sup>2</sup> The draft permit authorizes composting of grease trap waste, municipal sewage sludge, septage, and "positively sorted

<sup>1</sup> Applicant's Ex. 3.

<sup>2</sup> SOAH Order No. 13.

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
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CHIEF CLERK'S OFFICE

organic material,” including paper, cardboard, wood, and organic food matter, and confines composting and curing to the lined portion of the 15.23 acre permitted facility boundary.<sup>3</sup>

On December 6, 2005, the Commission issued an interim order stating that Ann Messer, Julie Moore, Juli Phillips, M.D. Thompson, and H. Philip Whitworth are affected persons entitled to a hearing, and referred eight issues to the State Office of Administrative Hearings (hereinafter “SOAH”) for a contested case hearing.<sup>4</sup> A preliminary hearing was held on February 13, 2006.<sup>5</sup> The Applicant submitted a major amendment to its application on June 29, 2006, and a Notice of Amended Application, Preliminary Decision, and Contested Case Hearing for a Municipal Solid Waste Permit was mailed on June 14, 2007.<sup>6</sup> A second preliminary hearing was held on August 2, 2007.<sup>7</sup> The hearing on the merits occurred September 20 and 21, 2007.<sup>8</sup> On January 10, 2008, the Administrative Law Judges (“ALJs”) issued a Proposal for Decision (“PFD”) recommending denial of the application based on their finding that the Applicant did not meet its burden of proof on three of the issues referred. The Applicant filed a four-page exceptions brief on January 30, 2008.

While OPIC agrees with the ALJ’s ultimate recommendation of denial, OPIC files this Reply to the Applicant’s Exceptions to ensure that OPIC’s position on this application is not misconstrued.

---

<sup>3</sup> Applicant’s Ex. 4.

<sup>4</sup> Applicant’s Exhibit 1.

<sup>5</sup> SOAH Order No. 1.

<sup>6</sup> Applicant’s Ex. 5.

<sup>7</sup> SOAH Order No. 15.

<sup>8</sup> SOAH Order No. 16.

**II. The Applicant Attempts to Use OPIC's Closing as Supportive of Its Exceptions, But Ignores that OPIC Recommended Denial on Six of the Eight Issues Referred and Disregards the Context of the Statement Quoted from OPIC's Closing.**

The Applicant argues in its Exceptions that the remedy to its failure to meet its burden of proof on the groundwater issue is a conditional denial rather than outright denial, and such an approach is consistent with OPIC's recommendation in our Closing Argument. OPIC disagrees. First, the Applicant's proposal would result in a nonfinal Commission Order by deferring a decision the Commission is required to make in the case.<sup>9</sup> Second, the Applicant's attempt to argue that OPIC's groundwater recommendation is consistent with its proposed remedy is incorrect.<sup>10</sup>

OPIC analyzed the groundwater issue in two parts: (1) the Applicant's geologic and hydrogeologic report failed to characterize groundwater, and (2) the Applicant's Groundwater Protection Plan failed to protect groundwater from degradation and fails to insure detection of groundwater contamination.<sup>11</sup> As subparts of the second part of OPIC's groundwater analysis, OPIC looked at the following: (a) the accuracy of Applicant's representation that the soils present on the site constitute a liner in compliance with TCEQ rules, and (b) the effectiveness of the Applicant's monitoring well system and the adequacy of its groundwater characterization.<sup>12</sup> While OPIC found that the Applicant did not meet its burden of proof on the groundwater issue

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<sup>9</sup> *Coalition of Cities for Affordable Utility Rates v. PUC*, 798 S.W.2d 560, 564 (Tex. 1990), *cert. denied*, 499 U.S. 983 (1991); *Gulf States Utilities Co. v. PUC*, 947 S.W.2d 887, 891 (Tex. 1997).

<sup>10</sup> In fact, the Applicant deliberately omitted a crucial part of the quote from OPIC's Closing Argument. The entire quote is the following: "[i]f language is added to specifically reference Appendix K of the application, OPIC finds that the combination of Provision IV(C)(1) and Provision IV(E) sufficiently require a liner that meets 30 TAC section 332.47(6)(C) if the ALJs and the Commission find the Applicant has met its burden of proof on the other parts of the groundwater issue." See OPIC's Closing Argument, page 8, attached as OPIC's Attachment A.

<sup>11</sup> OPIC's Closing Argument, pages 4-9, attached as OPIC's Attachment A.

<sup>12</sup> *Id.* at 7-9.

as a whole, OPIC did, indeed, argue in the alternative that the liner requirements in the draft permit, if slightly modified, would meet the Applicant's burden of proof for the sub-issue of liner compliance.<sup>13</sup> However, OPIC found that due to inadequate groundwater characterization, shallow depths of the monitoring wells already constructed (and in some cases apparently missing), and the possibility of faulty construction of the existing wells, the groundwater monitoring system has not been designed or installed to reasonably ensure detection of groundwater contamination prior to its migration off-site.<sup>14</sup> Based on the second part of the groundwater issue, OPIC recommended that the ALJs find the Applicant failed to meet his burden of proof on the issue. In addition, OPIC continues to recommend to the Commission that the Applicant failed to meet his burden of proof on odor, groundwater protection, surface water protection, incorporation of prohibited substances into the feedstock, and fire prevention.<sup>15</sup> Therefore, it is incorrect to suggest that OPIC's recommendation is in any way consistent with the Applicant's exceptions.

## II. CONCLUSION

For the reasons stated above and for the reasons stated in OPIC's Closing Argument, attached hereto as OPIC's Attachment A, OPIC respectfully requests that the Commission deny the permit.

Respectfully submitted,

Blas J. Coy, Jr.  
Public Interest Counsel

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<sup>13</sup> *Id.* at page 8.

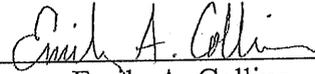
<sup>14</sup> *Id.* at page 9; 30 TAC § 332.47(6)(C)(ii).

<sup>15</sup> While OPIC does not except to the PFD's ultimate recommendation of denial, we note that our reasons for denial and number of issues for which we recommend denial differ (in some cases substantially) from the PFD. *See* OPIC's Attachment A.

By Emily A. Collins  
Emily A. Collins  
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**CERTIFICATE OF SERVICE**

I hereby certify that on February 11, 2008, the original and eleven true and correct copies of the Office of Public Interest Counsel's Reply to Exceptions were 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 or by deposit in the U.S. Mail.

  
\_\_\_\_\_  
Emily A. Collins

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

2008 FEB 11 PM 12: 23

CHIEF CLERKS OFFICE

MAILING LIST  
TEXAS ORGANIC RECOVERY COMPOST FACILITY  
SOAH DOCKET NO. 582-06-0839  
TCEQ DOCKET NO. 2005-1510-MSW

FOR SOAH:

Hon. Cassandra J. Church  
Hon. Roy Scudday  
Administrative Law Judges  
State Office of Administrative Hearings  
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*Courtesy Copy*

# OPIC's Attachment A

Kathleen Hartnett White, *Chairman*  
Larry R. Soward, *Commissioner*  
H. S. Buddy Garcia, *Commissioner*



Blas J. Coy, Jr., *Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

November 9, 2007

The Honorable Cassandra J. Church  
The Honorable Roy Scudday  
Administrative Law Judges  
State Office of Administrative Hearings  
300 West Fifteenth St.  
Austin, TX 78701

CHIEF CLERKS OFFICE

2007 NOV - 9 PM 4: 39

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

RE: TEXAS ORGANIC RECOVERY COMPOST FACILITY  
SOAH DOCKET NO. 582-06-0839  
TCEQ DOCKET NO. 2005-1510-MSW

Dear Judge Church and Judge Scudday:

Enclosed for filing is the Public Interest Counsel's Closing Arguments in the above-entitled matter.

Sincerely,

Handwritten signature of Emily A. Collins in cursive.

Emily A. Collins, Attorney  
Public Interest Counsel

cc: Mailing List

Enclosure

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)

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BEFORE THE STATE OFFICE  
OF  
ADMINISTRATIVE HEARINGS

OFFICE OF PUBLIC INTEREST COUNSEL'S CLOSING ARGUMENT

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES:

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (TCEQ or Commission), and submits the following Closing Argument in the above-captioned matter and would respectfully show the following:

**I. INTRODUCTION AND BACKGROUND**

Mr. Roy Eugene Donaldson, II, (hereinafter "Applicant") submitted a permit application to TCEQ on January 26, 2004, for authorization to continue operating a currently registered composting facility, called the Texas Organic Recovery Compost Facility, in Travis County, Texas, in accordance with Texas Health and Safety Code section 361.428(d).<sup>1</sup> The Applicant submitted a major amendment to his application on June 20, 2006.<sup>2</sup> The draft permit authorizes composting of grease trap waste, municipal sewage sludge, septage, and "positively sorted organic material," including paper, cardboard, wood, and organic food matter, and confines composting and curing to the lined portion of the 15.23 acre permitted facility boundary.<sup>3</sup>

On December 6, 2005, the Commission issued an interim order stating that Ann Messer, Julie Moore, Juli Phillips, M.D. Thompson, and H. Philip Whitworth are affected persons entitled to a hearing, and referred eight issues to the State Office of Administrative Hearings

<sup>1</sup> Applicant's Ex. 3.

<sup>2</sup> SOAH Order No. 13.

<sup>3</sup> Applicant's Ex. 4.

(hereinafter "SOAH") for a contested case hearing.<sup>4</sup> A preliminary hearing was held on February 13, 2006.<sup>5</sup> The Applicant submitted a major amendment to its application on June 29, 2006, and a Notice of Amended Application, Preliminary Decision, and Contested Case Hearing for a Municipal Solid Waste Permit was mailed on June 14, 2007.<sup>6</sup> A second preliminary hearing was held on August 2, 2007.<sup>7</sup> The hearing on the merits occurred September 20 and 21, 2007.<sup>8</sup>

## II. ISSUES REFERRED TO HEARING

### A. Whether Odor from the Facility will cause Nuisance Conditions Interfering with the Use and Enjoyment of the Requesters' Property?

Applicants seeking to operate a composting facility that utilizes grease trap waste in its operations must meet several requirements regarding air quality to obtain authorization under an air quality standard permit.<sup>9</sup> Two of the requirements that must be met involve odor. First, the Applicant must show that "[p]rior to receiving any material with a high odor potential...the operator shall insure that there is an adequate volume of bulking material to blend with the cover material, and shall begin processing the material in a manner that prevents nuisances."<sup>10</sup> The rule provides examples of materials with high odor potential, which include dairy material feedstocks, sewage sludge, meat, fish, oil and grease feedstocks, grease trap waste, and municipal solid waste.<sup>11</sup> The second odor requirement for obtaining an air quality standard permit states that "[a]ll activities which could result in increased odor emissions such as turning of compost piles shall be conducted in a manner that does not create nuisance conditions...."<sup>12</sup> In addition, TCEQ requires applicants for a composting facility to submit a site development plan consisting of several elements, including a site operating plan ("SOP") that includes "specific guidance or instructions" on "minimizing odors," among other things.<sup>13</sup>

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<sup>4</sup> Applicant's Exhibit 1.

<sup>5</sup> SOAH Order No. 1.

<sup>6</sup> Applicant's Ex. 5.

<sup>7</sup> SOAH Order No. 15.

<sup>8</sup> SOAH Order No. 16.

<sup>9</sup> 30 TAC § 332.8(e) (2007).

<sup>10</sup> 30 TAC § 332.8(e)(2).

<sup>11</sup> *Id.*

<sup>12</sup> 30 TAC § 332.8(e)(6).

<sup>13</sup> 30 TAC § 332.47(7)(J) (2007).

The Applicant has proposed to receive several of the materials listed as having a “high odor potential,” such as sewage sludge, grease trap waste, and municipal solid waste.<sup>14</sup> Mr. Thonhoff, a Professional Engineer registered with the State of Texas, testified that if the SOP procedures are followed, the facility will generate little if any “objectionable” odor.<sup>15</sup>

Bruce Wiland, P.E., for the Protestants, testified that the primary factors considered to prevent odors from composting processes are moisture content and the Carbon to Nitrogen (“C:N”) ratio of the composting mixture.<sup>16</sup> Mr. Thonhoff’s SOP describes site processes to include maintenance of adequate amounts of wood chips on site to “ensure the ability to achieve proper mixture of carbon source to nitrogen source.”<sup>17</sup> According to the SOP, the site operator can control odors by determining the characteristics of the composting material<sup>18</sup> and using the provided equations to adjust the material content to achieve the optimum C:N ratio and moisture content of the composting materials.<sup>19</sup>

While Mr. Thonhoff provided the C:N ratio and moisture content equations in the SOP, he did not calculate the equations based on the proposed feedstocks in the application.<sup>20</sup> Mr. Thonhoff testified that he does not have personal knowledge of the C:N ratios for the proposed feedstock materials, and the site operator should utilize the equations set forth in the SOP to determine the appropriate amount of wood chips and water to be applied to the compost piles.<sup>21</sup>

Mr. Wiland testified that without making the calculations in the application, no demonstration exists that the process proposed in the SOP will adequately control odors.<sup>22</sup> The Applicant’s SOP states that “adequate amounts of wood chips will be kept on site at all times” to turn compost piles,<sup>23</sup> but does not provide enough information for the site operator to determine what volume of wood chips are necessary to prevent nuisance odors given the moisture content and C:N ratios of the proposed feedstock materials, which are also unknown.

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<sup>14</sup> Applicant’s Ex. 3, page 8.

<sup>15</sup> Applicant’s Ex. 8, page 4, lines 3-5.

<sup>16</sup> Protestants’ Ex. W-1, page 17, lines 36-39.

<sup>17</sup> Applicant’s Ex. 3, page 21.

<sup>18</sup> Applicant’s Ex. 3, page 22-23. The SOP states that the characteristics of the composting materials will be determined through the use of either an analysis of the composting materials or an estimate of the C:N ratio of the materials based on the On-Farm Composting Handbook. *Id.*

<sup>19</sup> Applicant’s Ex. 3, page 23.

<sup>20</sup> *Id.*

<sup>21</sup> Tr. at 83, lines 24-25, 84, lines 1-4.

<sup>22</sup> Protestants’ Ex. W-1, page 18, lines 18-25.

<sup>23</sup> Applicant’s Ex. 3, page 21; 30 TAC § 332.8(e)(2), (6).

Mr. VanSickle, the site operator, testified that he does not currently utilize the equations provided by Mr. Thonhoff to monitor the composting system because of the low nitrogen content of grease trap waste.<sup>24</sup> This appears to be in accordance with Mr. Thonhoff's SOP, which states that the "C/N ratio method of monitoring the compost process is not applicable to grease trap feedstock compost."<sup>25</sup> Mr. VanSickle further testified that if the facility accepted high-nitrogen content feedstocks, such as cardboard, paper, or septage, then he would utilize the equations in the SOP.<sup>26</sup> Yet, the SOP would refer Mr. VanSickle to the On-Farm Composting Handbook to determine the C:N ratio of the feedstocks, and that resource does not contain the necessary information to determine either the C:N ratio of feedstocks or the moisture content.<sup>27</sup> The SOP also provides the option of an analytical determination of the characteristics of the feedstock materials, but fails to state how and where this would be performed.<sup>28</sup>

In short, the Applicant has failed to provide "specific guidance or instructions" on "minimizing odors" when the information necessary to calculate the proper mixture of feedstocks, bulking material, and water, is neither provided in the SOP nor appropriately referenced.<sup>29</sup> The failure to include necessary information to perform the mass balance equations has also led to the Applicant's failure to insure that there is an adequate volume of bulking material to blend with the cover material.<sup>30</sup> Therefore, OPIC recommends that the ALJs find that the Applicant failed to meet its burden of proof on the odor issue.

#### **B. Whether the Facility's Operation Will Comply with the TCEQ Rules Enacted to Protect Groundwater?**

TCEQ rules require the Applicant to conduct his composting activities "in a manner that prevents the discharge of material to or the pollution of surface water or groundwater" pursuant to Chapter 26 of the Texas Water Code.<sup>31</sup> Accordingly, composting operations cannot discharge "materials" to surface water or groundwater.<sup>32</sup> The permit application must demonstrate that

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<sup>24</sup> Tr. at 254-256.

<sup>25</sup> Applicant's Ex. 3, page 23.

<sup>26</sup> Tr. at 252, lines 9-13; Tr. at 255, lines 4-17.

<sup>27</sup> Protestants' Ex. W-1, page 18, lines 31-40, page 19, lines 10-22.

<sup>28</sup> Applicant's Ex.

<sup>29</sup> 30 TAC § 332.47(7)(J).

<sup>30</sup> 30 TAC § 332.8(e)(2).

<sup>31</sup> 30 TAC § 332.4(1).

<sup>32</sup> 30 TAC § 332.4(3).

construction, maintenance and operation of composting facilities protect groundwater from degradation,<sup>33</sup> including degradation of perched water or shallow surface infiltration.<sup>34</sup> The groundwater protection plan must include a proposed liner system and a groundwater monitoring system.<sup>35</sup> In addition, the Applicant must submit a geologic/hydrogeologic report that describes the regional geology of the area, describes any geologic processes activity around the facility, describes the regional aquifers in the vicinity of the facility, and includes a subsurface investigation report and a groundwater investigation report.<sup>36</sup>

Mr. Thonhoff testified that the facility will comply with groundwater rules because the facility is not located within 500 feet of a public or private water well and is not located in the Edwards Aquifer Recharge Zone.<sup>37</sup> Mr. Thonhoff also testified that the geologic soil evaluation shows that a two-foot soil liner is in place.<sup>38</sup> Michael R. Thornhill, P.G., who evaluated groundwater conditions and prepared the geologic/hydrogeologic report for the application testified that no aquifers or “significant water-bearing units” lie in the vicinity of the facility.<sup>39</sup> Mr. Thornhill opined that the facility’s underlying geology is not conducive to groundwater flow or movement, and that the high gravels and Taylor-Navarro clays form localized groundwater flow systems that move extremely slow through the clays.<sup>40</sup>

#### 1. The Geologic/Hydrogeologic Report Fails to Characterize Groundwater.

The subsurface investigation report, which serves to test soils and characterize groundwater through borings,<sup>41</sup> did not contain adequate information to fulfill its purposes. Specifically, the subsurface investigation report, which was prepared by Holt Engineering, an entity unaffiliated with any of the Applicant’s witnesses, states the following: “[t]he purpose of

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<sup>33</sup> 30 TAC § 332.45(2).

<sup>34</sup> 30 TAC § 332.47(6)(C).

<sup>35</sup> 30 TAC § 332.47(6)(C)(i), (ii).

<sup>36</sup> 30 TAC § 332.47(6)(B)(i)-(v).

<sup>37</sup> Applicant’s Ex. 8, page 4, lines 18-21, page 5, line 1.

<sup>38</sup> Applicant’s Ex. 8, page 5, lines 1-3.

<sup>39</sup> Applicant’s Ex. 9, page 1-2.

<sup>40</sup> Applicant’s Ex. 9, page 2.

<sup>41</sup> 30 TAC § 332.47(B)(iv) (stating that the subsurface investigation report “shall describe all borings drilled on site to test soils and characterize groundwater...” [emphasis added]). By contrast, the groundwater investigation report serves to document groundwater flow characteristics at the site. 30 TAC § 332.47(B)(v).

this investigation was to characterize subsurface soil conditions...,” but the “report is not intended to be an in-depth study of groundwater conditions.”<sup>42</sup>

Pierce Chandler, Jr., P.E., testified that the Holt subsurface investigation provided enough information to at least infer the presence of groundwater to the top of the unweathered Taylor-Navarro strata.<sup>43</sup> In characterizing groundwater, the goal lies in projecting potential migration paths.<sup>44</sup> The boring logs in the Holt report indicated jointing, calcareous deposits, oxidation staining, and mineralization which, according to Mr. Chandler, should have prompted the Applicant to place monitoring wells deep enough to discover any possible contamination at the interface of the weathered and unweathered Taylor-Navarro strata.<sup>45</sup> The weathered Taylor-Navarro, which is encountered in the first thirty to forty feet from the surface, may house perched water due to its secondary structure (jointing and vertical cracking) from unloading and shrink-swell and mineralization in the primary and secondary structure, and may, therefore allow vertical and horizontal movement of contaminated water.<sup>46</sup>

Mr. Thornhill agrees that water may be currently migrating off the site,<sup>47</sup> but, assuming that contaminated water leaked into the weathered Taylor-Navarro, Mr. Thornhill testified that it would move with extreme slowness.<sup>48</sup> As described below, the draft permit requires installation and validation of a liner for the pond and the processing areas.<sup>49</sup> However, TCEQ regulations require characterization of groundwater *in addition to* and presumably in furtherance of the adequate installation of a liner. Furthermore, the groundwater characterization is used to determine the proper location of the groundwater monitoring wells.<sup>50</sup>

Aside from the issue of perched groundwater in the weathered Taylor-Navarro, the Applicant also failed to bore to the required depth to identify the uppermost aquifer and underlying hydraulic interconnected aquifers.<sup>51</sup> While the Executive Director can waive the deep bore requirement when the Applicant demonstrates that the uppermost aquifer is more than

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<sup>42</sup> Applicant’s Ex. 3, pages 159-162.

<sup>43</sup> Protestants’ Ex. C-1, page 17, lines 23-40, page 18, lines 1-6; Tr. at 358-359.

<sup>44</sup> Tr. at 352, lines 18-22.

<sup>45</sup> Protestants’ Ex. C-1, page 18, lines 8-11.

<sup>46</sup> Protestants’ Ex. C-1, page 17, lines 31-40, page 18, lines 1-6; Tr. at 326-329.

<sup>47</sup> Tr. at 175, lines 10-15.

<sup>48</sup> Tr. at 197, lines 24, 25, 198, lines 1-13.

<sup>49</sup> Applicant’s Ex. 4, pages 5, 6.

<sup>50</sup> 30 TAC § 332.47(6)(C)(ii); Protestant’s Ex. C-1, page 14, lines 37-40, page 15, lines 1-3.

<sup>51</sup> Protestants’ Ex. C-1, page 18, lines 23-38 – page 20, line 30; 30 TAC § 332.47(6)(B)(iv)(II); Tr. at 56, lines 9-17 (finding that borings would need to be at least as deep as 651 feet).

300 feet below the deepest excavation, no evidence exists in the record that a waiver occurred.<sup>52</sup> The Applicant's failure to provide important information clearly required to support its application renders the application fatally defective. Therefore, and as further developed below, Applicant has failed to meet its burden with regard to groundwater.

2. The Groundwater Protection Plan Fails Protect Groundwater From Degradation and Fails to Insure Detection of Groundwater Contamination.

a. *The Applicant's Representation that the Soils Present on the Site Constitute a Liner Compliant with 30 TAC section 332.47(6)(C)(I) and the Draft Permit Demonstrates that the Groundwater Protection Plan will not Adequately Protect Groundwater.*

TCEQ rules require adequate lining of the surface areas for feedstock receiving, mixing, composting, post-processing, screening and storage to control seepage.<sup>53</sup> Liners composition may vary from soil, synthetic, or alternative material equivalent to two-feet of compacted clay with a hydraulic conductivity of  $1 \times 10^{-7}$  centimeters per second or less.<sup>54</sup> Soil liners must have more than 30 percent passing a number 200 sieve, have a liquid limit greater than 30 percent, and a plasticity index greater than 15.<sup>55</sup>

Mr. Thonhoff testified that a two-foot soil liner is currently in place at the facility that meets TCEQ requirements,<sup>56</sup> but testified on cross that he had no personal knowledge that such a liner exists.<sup>57</sup> In general, the Applicant's witnesses provided conflicting and confusing testimony on the current status of the liner, and none of the witnesses had personal knowledge of construction or testing of the current liner.<sup>58</sup>

While Mr. Thonhoff pledged during his cross-examination that "[u]pon permitting the facility, we are going to retest and reconstruct the liner,"<sup>59</sup> the information in the application demonstrates that an initial test was never completed to determine if the existing soils provided

<sup>52</sup> 30 TAC § 332.47(6)(B)(iv)(II). The Applicant also failed to provide cross-sections from the boring logs that depict the general strata at the facility as required by 30 TAC section 332.47(6)(B)(iv)(V). Tr. at

<sup>53</sup> 30 TAC § 332.47(6)(C)(i).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 332.47(6)(C)(i)(I).

<sup>56</sup> Applicant's Ex. 8, lines 1-3.

<sup>57</sup> Tr. at 28, lines 2-25, page 29, lines 1-16.

<sup>58</sup> Tr. at 29, lines 11-20, page 34, lines 13-23, pages 35-38, 46-51; Applicant's Ex. 3, pages 76-78, 163-171.

<sup>59</sup> Tr. at 39, lines 18-19.

an adequate lining to control seepage.<sup>60</sup> Furthermore, the application only refers to reconstruction of the liner for the leachate pond, not the composting area.<sup>61</sup> Thus, the Applicant appears to be representing that a liner already exists for the composting area, but the Holt report shows that 30 percent of the soil passes a number 200 sieve, and information on the liquid limit and plasticity index is absent.<sup>62</sup> Therefore, the proposed liner for the processing area does not insure that the facility is designed to prevent contamination of groundwater, including perched water and shallow surface infiltration.<sup>63</sup>

The draft permit, however, requires installation and verification of an adequate liner for the pond and the composting areas.<sup>64</sup> If language is added to specifically reference Appendix K of the application, OPIC finds that the combination of Provision IV(C)(1) and Provision IV(E) sufficiently require a liner that meets 30 TAC section 332.47(6)(C) if the ALJs and Commission find the Applicant has met its burden of proof on the other parts of the groundwater issue.

*b. The Applicant's Monitoring Well System Design is Ineffective and Deficient because of Inadequate Depth of the Wells and Inadequate Groundwater Characterization.*

The Applicant's monitoring well system design is dependent on the characterization of groundwater characterization and flow information contained in the groundwater investigation report.<sup>65</sup> The application must provide details on monitor well construction and placement in the site plan.<sup>66</sup> The Applicant proposes using seven monitoring wells, six of which have already been constructed.<sup>67</sup> The first six monitoring wells have depths ranging between 12.5 feet and 19.5 feet.<sup>68</sup> As discussed above, the weathered Taylor-Navarro may have depths between 30 to 40 feet,<sup>69</sup> and Mr. Chandler testified that the monitoring wells should reach the interface of the weathered and unweathered Taylor-Navarro strata.<sup>70</sup> Mr. Thornhill's firm discovered groundwater at one monitoring well site in October of 2004, and discovered a substantial rise in

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<sup>60</sup> Applicant's Ex. 3, pages 76-78, 163-171.

<sup>61</sup> Applicant's Ex. 3, page 33.

<sup>62</sup> Applicant's Ex. 3, pages 157-171.

<sup>63</sup> 30 TAC § 332.47(6)(C).

<sup>64</sup> Applicant's Ex. 4, pages 5, 6.

<sup>65</sup> 30 TAC § 332.47(6)(C)(ii); Protestant's Ex. C-1, page 14, lines 37-40, page 15, lines 1-3.

<sup>66</sup> 30 TAC § 332.47(6)(C)(ii)(I).

<sup>67</sup> Applicant's Ex. 3, page 48-1.

<sup>68</sup> Protestants' Ex. 1

<sup>69</sup> Protestants' Ex. C-1, page 17, lines 31-40, page 18, lines 1-6; Tr. at 326-329.

<sup>70</sup> *Id.*

groundwater levels again at two monitoring well sites in April of 2005.<sup>71</sup> Mr. Thornhill testified that a recent check of the monitoring wells found water in MW-6 and MW-2.<sup>72</sup> Mr. Thornhill also testified that during that same visit he either could not find MW-1, MW-3, and MW-4 or they were no longer in existence.<sup>73</sup> According to Mr. Thornhill, the presence of groundwater in four wells could indicate groundwater movement,<sup>74</sup> but it could also mean faulty well construction.<sup>75</sup>

Given the inadequate groundwater characterization described above, the shallow depths of the monitoring wells already constructed (and in some cases apparently missing), and the possibility of faulty construction of the existing wells, OPIC finds that the groundwater monitoring system has not been designed or installed to reasonably ensure detection of groundwater contamination prior to its migration off-site.<sup>76</sup> Therefore, OPIC recommends that the ALJs find the Applicant has failed to meet its burden of proof on the groundwater issue.

### **C. Whether the Facility's Operation Will Comply with the TCEQ Rules Enacted to Prevent the Contamination of Surface Water?**

The Applicant must provide a surface water protection plan that includes, *inter alia*, a design for a run-on control system, a runoff management system, and a contaminated water collection system.<sup>77</sup> The application states that the enlargement of the pond will result in containment of the base storage volume, the 25-year, 24-hour runoff volume, and freeboard to contain a 100-year, 24-hour storm event for a total capacity of 506,074 ft<sup>3</sup> with additional capacity of 43,926 ft<sup>3</sup>.<sup>78</sup> The water balance in the application serves to calculate the proper amount of storage to collect and control the peak discharge from the facility generated from a 25-year, 24-hour storm event as well as all leachate,<sup>79</sup> and, as calculated in the application, requires 467,959 ft<sup>3</sup> of storage.<sup>80</sup>

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<sup>71</sup> Protestants' Ex. No. 2.

<sup>72</sup> Tr. at 185, lines 16-25, page 186, lines 1-3.

<sup>73</sup> Tr. at 186, lines 5-10.

<sup>74</sup> Tr. at 188, lines 4-11.

<sup>75</sup> Tr. at 188, lines 1-3.

<sup>76</sup> 30 TAC § 332.47(6)(C)(ii).

<sup>77</sup> 30 TAC § 332.47(6)(A)(i)-(iii).

<sup>78</sup> Applicant's Ex. 3, page 33.

<sup>79</sup> Tr. at 113, lines 12-20; 30 TAC § 332.47(6)(A)(ii), (iii).

<sup>80</sup> Applicant's Ex. 3, page 42.

While Mr. Chandler testified that adequacy of the berms constituted his only concern regarding surface water protection,<sup>81</sup> Mr. Wiland specifically evaluated the Applicant's water balance to formulate an opinion on nuisance odors, an evaluation factoring in moisture of the feedstocks and compost piles.<sup>82</sup> Mr. Wiland testified that the Applicant's calculation of the 25-year, 24-hour storm event failed to account for higher curve numbers for the retention pond area (1.5 acres), the roadway areas, roof areas of buildings on-site.<sup>83</sup> Mr. Thonhoff testified that he used a curve number of 90 based on flow from a 15-acre surface area comprised entirely of windrows, which may only cover a total of 3-acres at the Applicant's site.<sup>84</sup> In addition, Mr. Wiland opined that designing for a 25-year, 24-hour storm event will statistically result in three to four discharges per twenty-five years.<sup>85</sup>

Mr. Wiland also disagreed with the amount of water the Applicant plans to recycle onto the compost piles, which between June and October equaled approximately 1.5 inches of rainfall a day to the piles.<sup>86</sup> While Mr. Thonhoff testified that the recycling values and volume of wastewater stored (most of which are negative) in the water balance are a result of the ability of the compost to hold a lot more water,<sup>87</sup> Mr. Thonhoff never calculated the proper amount of moisture that can be applied to the windrows.<sup>88</sup> These inaccuracies, part of which can be traced back to the Applicant's failure to provide the information to calculate the mass-balance equations described in the nuisance odors section above,<sup>89</sup> result in a significant underestimation of needed storage capacity.<sup>90</sup> Therefore, the leachate pond design, which must be sized based on a water balance,<sup>91</sup> will not contain all leachate and runoff from the 25-year, 24-hour rainfall event. OPIC cannot find that the Applicant met its burden of proof on the surface water protection issue.

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<sup>81</sup> Tr. at 350, lines 1-13.

<sup>82</sup> Protestants' Ex. W-1, page 17, lines 36-39; Tr. at 395, lines 18-25.

<sup>83</sup> Tr. at 397-399.

<sup>84</sup> Tr. at 99, lines 9-23; Tr. at 400, lines 21-25.

<sup>85</sup> Tr. at 398, lines 18-23.

<sup>86</sup> Tr. at 400-401, lines 1-11.

<sup>87</sup> Tr. at 105, lines 21-25, page 106, lines 1-14.

<sup>88</sup> Tr. at 403, lines 10-13; Tr. at 106, lines 15-20.

<sup>89</sup> *Id.*

<sup>90</sup> Tr. at 402, lines 2-16.

<sup>91</sup> 30 TAC § 332.47(6)(A)(iv)(III).

**D. Whether the Facility Will Be Operated in Compliance with 30 TAC § 332.45(10), Enacted to Prevent Unauthorized and Prohibited Materials from Application or Incorporation into Feedstocks, In-Process Materials, or Processed Materials? Whether the Facility Will Meet Applicable Requirements for Prevention of the Delivery of Unauthorized and Prohibited Materials at the Site?**

TCEQ rules prohibit the application of fungicides, herbicides, insecticides, or other pesticides containing constituents listed in 40 C.F.R. Part 261, Appendix VIII or on the Hazardous Substance List in CERCLA to feedstocks, in-process materials, or processed materials.<sup>92</sup> The Applicant also must prevent the delivery of unauthorized or prohibited materials by having at least one employee on-site at all times “inspecting each delivery of feedstock” to insure such materials are not incorporated into the feedstock.<sup>93</sup> The term “inspecting” is not defined in the rule.

The SOP in the application states that incoming trucks will be inspected “during the dumping process” to screen “unprocessable, prohibited, and unauthorized material.”<sup>94</sup> Mr. Thonhoff clarified that the screening process involves visual inspection and “the smell test” to determine if the load contains prohibited materials or constituents.<sup>95</sup> Mr. Thonhoff acknowledged that a visual inspection could not identify all prohibited materials.<sup>96</sup> Mr. Wiland testified that a visual inspection cannot prevent delivery and application of unauthorized or prohibited material, and random sampling would provide a reasonable method to screen incoming materials.<sup>97</sup> OPIC agrees that visual inspection cannot reasonably detect materials such as pesticides within the grease trap waste. Without the ability to detect many unauthorized materials, the Applicant cannot prevent delivery of all unauthorized materials and certainly cannot meet the more absolute requirement that prohibited substances “shall not be applied to or incorporated into feedstocks, in-process materials, or processed materials.” The term “inspecting” can reasonably be interpreted to include random sampling to determine contents of the waste. While a permit condition requiring random sampling may suffice to make up for the Applicant’s failure to meet its burden of proof on these issues, no evidence exists to provide a

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<sup>92</sup> 30 TAC §§ 332.45(10), 332.4(a).

<sup>93</sup> 30 TAC § 332.45(3).

<sup>94</sup> Applicant’s Ex. 3, page 25, section E.

<sup>95</sup> Tr. at 80, lines 11-25, page 81, lines 1-22.

<sup>96</sup> Tr. at 81, lines 18-22.

<sup>97</sup> Protestants’ Ex. W-1, page 10, lines 30-38; Tr. at 394, lines 18-25, page 395, lines 1-17.

specific protocol for random sampling. Therefore, OPIC recommends that the ALJs find the Applicant simply failed to meet its burden of proof on these issues.

**E. Whether the Facility's Operation Will Comply with 30 TAC § 332.45(11), which Requires Compliance with End-Product Testing and Standards?**

TCEQ has fairly detailed rules regarding end-product testing. According to Mr. Wiland, the Applicant failed to provide analytical information on maturity and stability, weight percentage of foreign matter, pH, or salinity.<sup>98</sup> Yet, the rule only requires the use of specific analytical methods in characterizing the final product for each of the parameters alleged as missing.<sup>99</sup> Furthermore, while only a mere recitation of the rule language, the application states that the Applicant will use the analytical methods listed in the rule.<sup>100</sup> Therefore, OPIC finds that the Applicant met its burden of proof on the end-product requirements.

**F. Whether the Facility's Site Operating Plan Includes Appropriate Fire Prevention and Control Measures?**

As part of the SOP, the Applicant must provide specific guidance or instructions on a fire prevention and control that complies with "provisions of the local fire code, provision for fire-fighting equipment, and special training requirements for fire-fighting personnel."<sup>101</sup> The application references the City of Austin Uniform Fire Code (1997) as the local fire code with which it will comply.<sup>102</sup> However, the applicable local fire code comes from Travis County, which has adopted the 2003 International Fire Code.<sup>103</sup> The Travis County Fire Code requires a different rating for portable fire extinguishers on vehicles and equipment operating on composting piles and at all processing equipment.<sup>104</sup> In addition, the Travis County Fire Code requires a 20-foot separation between windrows to accommodate fire department vehicles and equipment, but the windrows currently only allow a 14-foot separation distance.<sup>105</sup> Finally, the

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<sup>98</sup> Protestants' Ex. W-1, page 16, lines 17-40.

<sup>99</sup> 30 TAC § 332.71(b).

<sup>100</sup> Applicant's Ex. 3, page 251.

<sup>101</sup> 30 TAC § 332.47(7)(E).

<sup>102</sup> Applicant's Ex. 3, page 25.

<sup>103</sup> Protestants' Ex. C-1, page 31, lines 1-18.

<sup>104</sup> *Id.* at page 31, lines 30-40.

<sup>105</sup> *Id.* at page 32, lines 1-12.

application fails to provide specific training requirements for fire-fighting personnel.<sup>106</sup> Consequently, the Applicant has failed to meet its burden of proof on this issue.

### G. Whether the Facility Will Meet Applicable Air Quality Requirements?

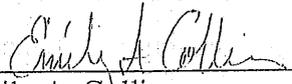
An applicant cannot secure an air quality standard permit without showing, *inter alia*, that “[a]ll conveyors which off-load materials from grinders at a point which is not enclosed inside a building shall have available a water or mechanical dust suppression system.”<sup>107</sup> The application merely recites the rule without analyzing any site-specific equipment or conditions.<sup>108</sup> Mr. Wiland testified that he witnessed the presence of conveyors at the composting site, but they did not contain any water or mechanic dust suppression system.<sup>109</sup> While the rule certainly requires such a system, and a mere recitation of the rule language does not provide evidence of any probative value, OPIC recommends that the ALJs find the Applicant met its burden of proof on the air quality issues unrelated to odor.

### III. CONCLUSION

Based on the reasons stated above, OPIC requests that the ALJs recommend denial of the permit.

Respectfully submitted,

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<sup>106</sup> *Id.* at page 32, lines 28-36.

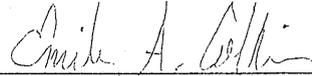
<sup>107</sup> 30 TAC § 332.8(e)(5).

<sup>108</sup> Applicant's Ex. 3, page 27.

<sup>109</sup> Protestants' Ex. W-1, page 14, lines 20-32.

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2007, the original of the Office of Public Interest Counsel's Closing Argument was filed with the TCEQ Chief Clerk's Office and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.



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