



Fritz, Byrne, Head & Harrison, LLP

Attorneys at Law

February 11, 2008

VIA FACSIMILE NO. 239-3311

- and -

U. S. FIRST CLASS MAIL

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

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2008 FEB 11 PM 4: 29
CHIEF CLERKS OFFICE

Re: 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);
SOAH Docket No. 582-06-0839; TCEQ Docket No. 2005-1510-MSW

Dear Ms. Castañuela:

Enclosed are an original and twelve copies of Protestants' Reply to Applicant's Exceptions to Initial Proposal for Decision which we respectfully request be filed among the other papers in the above-referenced proceeding. Please return a file-stamped copy of the Reply to me in the self-addressed, postage prepaid envelope provided for your convenience.

A copy of the Reply is being forwarded to all parties of interest as set forth below. Thank you for your assistance in this matter.

Very truly yours,

FRITZ, BYRNE, HEAD & HARRISON, LLP

By: Ann M. Devers

Ann M. Devers
Assistant to J. D. Head

JDH/amd
Enclosures

cc: Hon. Cassandra J. Church
Hon. Roy G. Scudday
Mr. Christopher Malish
Ms. Emily Collins

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SOAH DOCKET NO. 582-06-0839
TCEQ DOCKET NO. 2005-1510-MSW

2008 FEB 12 PM 3:14

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)

§ BEFORE THE STATE OFFICE
§
§ OF
§
§
§ ADMINISTRATIVE HEARINGS

CHIEF CLERKS OFFICE

**PROTESTANTS' REPLY TO APPLICANT'S
EXCEPTIONS TO INITIAL PROPOSAL FOR DECISION**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES:

COMES NOW, Protestants Ann Messer, Julie Moore, H. Philip Whitworth, Jr., Juli Phillips and M. D. Thomson (Thomson Family Limited Partnership), Protestants in the above-captioned matter, and files this their Reply to Applicant's Exceptions to Initial Proposal for Decision and would respectfully show as follows:

A. The Liner Issue

Applicant's burden of proof regarding groundwater protection in this case is founded upon compliance with 30 T.A.C. § 332.47(6)(C) which states "the application shall demonstrate that the facility is designed so as not to contaminate the groundwater and so as to protect the existing groundwater quality from degradation. For the purposes of these sections, protection of the groundwater includes the protection of perched water or shallow surface infiltration . . ." (Emphasis added). Groundwater protection includes a liner system and a groundwater monitoring system. The Applicant failed to meet its burden of proof on

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groundwater protection and nothing in its Exceptions to Initial Proposal for Decision negates this fact.

Robert H. Thonhoff, Jr., P.E., the expert witness of the Applicant on groundwater and liner issues, stated in his First Amended Direct Testimony:

In addition, the geologic soil evaluation indicated that we had in place a minimum two foot soil liner, which meets TCEQ the [sic] requirements.

Ex. A-6, p. 5, ll. 2 - 3.

Cross-examination of Mr. Thonhoff exposed that there was in fact no geologic soil evaluation which confirmed the existence of a liner in accordance with Texas Commission on Environmental Quality (“TCEQ”) regulatory requirements and the Liner Handbook. To the contrary, Protestants’ expert Pierce Chandler gave dispositive testimony that the in-situ materials present at the site are not appropriate for an in-situ liner. TR p. 370, ll. 10 - 19. The application contained an insufficient number of borings, complete lack of any permeability testing and no Soils and Liner Quality Control Plan or Soil Liner Evaluation Reports or TCEQ approvals thereof. Not only was the sworn direct testimony of the Applicant’s expert a misrepresentation of fact, but the engineer-sealed application itself misrepresented to the Commission that “the site was constructed over a two foot clay liner which was installed following the guidelines of the Commission’s Liner Construction and Testing Handbook.” Ex. A-3, p. 000048.¹ Protestants’ Closing Argument and Brief and

¹ Section 305.66(f)(3) warrants permit denial for Applicant’s false or misleading statements in connection with the application.

Protestants' Brief in Response to the Proposal for Decision set out in detail the fallacy of the Applicant's expert witness testimony and statements in the application regarding the existence of a liner over the facility's composting and processing area.

Despite these brazen misstatements to the TCEQ and SOAH, the Applicant now suggests its failure to meet its burden of proof under § 332.47(6)(C) can be remedied by it complying with statements in the draft permit regarding installation of a liner. This is nonsensical. The draft permit language regarding a liner for the composting and processing area refers to the liner meeting or exceeding the specifications in the application materials. Ex. A-4, draft permit IV, C.1. However, the application materials do not anticipate any liner construction over the composting and processing area and, in fact, falsely states a TCEQ compliant in-situ liner is already in place. In effect, the Applicant admits it failed to meet its burden of proof on the liner issue but requests the Administrative Law Judges ("ALJs") and the Commissioners to disregard its false and misleading statements on groundwater protection and issue a permit requiring installation of a liner.

The Applicant never suggested in its application that it would prospectively be installing a liner in accordance with TCEQ rules and the Liner Handbook in the composting and processing area. Rather, Applicant represented that such a liner already existed. However, on cross-examination, Applicant could not establish that a liner, in fact, existed in accordance with the Liner Handbook or TCEQ rules. The evidence was totally contrary to Applicant's sworn testimony. If the Applicant's position prevails in this case, this would

stand for the proposition that no contested cases are ever necessary. The Commission would just forego evidentiary hearings and hope that the permittee complies with the conditions of the draft permit. Such a scenario is contrary to the Texas Administrative Procedures Act and established case law in Texas. “Each regulation is a separate requirement with which the applicant must comply in order to receive their permit.” *Hunter Industrial Facilities, Inc. v. Texas Natural Resource Conservation Commission*, 910 S.W.2d 96, 107 (Tex.App.–Austin [3rd Dist.] 1995, writ denied). In sum, the application did not demonstrate compliance with the groundwater protection regulation at § 332.47(6)(C) and this mandates permit denial.

Applicant, on page 2 of its exceptions cleverly left out a portion of the quotation of the Office of Public Interest Counsel’s (“OPIC”) Closing Argument. The quote of the OPIC was conditioned on “if the ALJs and Commission finds the Applicant has met its burden of proof on the other parts of the groundwater issue.” The OPIC’s Closing Argument recommended that the ALJs find the Applicant failed to meet its burden of proof on the groundwater issue given inadequate groundwater characterization and the conclusion that the groundwater monitoring system has not been designed or installed to reasonably ensure detection of groundwater contamination prior to its migration offsite. It remains both OPIC’s and Protestants’ position that the groundwater monitoring system fails to ensure protection of groundwater and Applicant failed to meet its burden of proof on this issue.

B. Prevention of the Delivery and Application of Unauthorized and Prohibited Materials at the Site

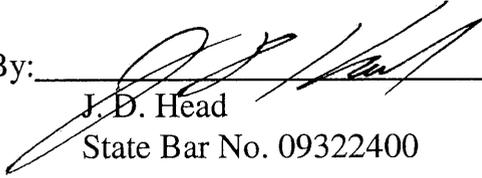
Applicant's Exceptions to Initial Proposal for Decision contains approximately fifty pages of documents not in the record. The record for the evidentiary hearing closed on November 16, 2007. The documents attached to Applicant's exceptions are not in evidence and should not be considered by the ALJs or the Commissioners. Applicant's argument related to facts not in evidence should similarly be disregarded.

WHEREFORE, PREMISES CONSIDERED, Protestants request the ALJs revise the Proposal for Decision and proposed Order in accordance with Protestants' Brief in Response to the Proposal for Decision. Protestants request the Commissioners deny Permit No. 2320.

Respectfully submitted,

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By: _____


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PARTNERSHIP)

CERTIFICATE OF SERVICE

By my signature above, I hereby certify that on the 11th day of February, 2008, the foregoing document was served via facsimile and first class mail to the following:

Hon. Cassandra J. Church
Administrative Law Judge
State Office of Administrative Hearings
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Hon. Roy G. Scudday
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