



FRITZ, BYRNE, HEAD & HARRISON, LLP

Attorneys at Law

January 30, 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 JAN 30 PM 4:25
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' Brief in Response to the 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 Brief to me in the self-addressed, postage prepaid envelope provided for your convenience.

A copy of the Brief 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 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

VIA FACSIMILE
VIA FACSIMILE
VIA FACSIMILE
VIA FACSIMILE

Value Driven...Client Oriented



2008 JAN 31 AM 10:02

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)

§
§
§
§
§
§

BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS
CHIEF CLERKS OFFICE

PROTESTANTS' BRIEF IN RESPONSE TO THE 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 Brief in Response to the Proposal for Decision.

I. INTRODUCTION

Protestants support the Administrative Law Judges' ("ALJs") Proposal for Decision ("PFD") in the above-captioned matter to the extent it recommends denial of MSW Permit No. 2320 to Roy Eugene Donaldson, II. Protestants reurge permit denial based on all the argument and citations in its Closing Argument and Brief, which is incorporated herein by reference and attached as Exhibit A. Protestants respectfully submit that the PFD and the proposed Order currently exclude discussions and findings on undisputed evidence supporting permit denial and should be accordingly supplemented. In some respects outlined below, the PFD contains inaccuracies or misstatements which warrant correction.

COPY

The Applicant bears the burden of proof to show by a preponderance of the evidence the application meets the technical standards and requirements of the relevant Chapter 332 rules. "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). Protestants believe it appropriate to bring to the Commission's attention all instances where the Applicant failed to meet its burden of proof on pertinent regulations. Accordingly, this Brief sets out additional areas not addressed by the PFD where the Applicant failed to meet its burden of proof.

II. "INSTALLATION" OF THE "ALLEGED" LINER

Protestants submit that the overarching issue in this case involves the alleged clay liner at the composting, processing, and storage areas at the facility¹ and Applicant's representations thereto. The application contained the following representation under the heading Site Investigation: "The site has been in service since 1998 and was constructed over a 2-foot clay liner which was installed following the guidelines of the Commission's 'Liner Construction and Testing Handbook.'" App Ex A-3, pp. 000048. The TCEQ Liner Handbook requires extensive soil testing, laboratory analysis, and reports to the TCEQ in the form of a Soils Liner Evaluation Report (SLER). Ex. P-C-12. The Liner Handbook requires an

¹ 30 T.A.C. § 332.47 (6)(C)(i) requires a liner for all feedstock receiving, mixing, composting, post-processing, screening and storage areas.

approved Soils and Liner Quality Control Plan (SLQCP). The TCEQ must approve the SLER in accordance with the Liner Handbook.

The application contained no substantiation that a SLER had ever been submitted for liner approval to the TCEQ. The application contained no substantiation a SLQCP was ever submitted for the "alleged" liner. The sparse sampling data on pages 000079 and 000080 of the application include 1998 analytical results of five soil samples in the detention pond area and from three unlocated soil samples supposedly somewhere in the composting area. With respect to the composting and processing area, the Liner Handbook requires verification samples every 50,000 square feet. Because this facility constitutes approximately 15 acres, the information in the application regarding number of samples is woefully deficient. Although Applicant's expert relied on the 1998 compost site soil samples (prepared by an engineer he never spoke with) to claim liner compliance with the Liner Handbook, he had no idea where those samples were taken at the facility. TR p. 32, ll.9-16. This sampling data was presented in the form of a 2-page letter dated July 6, 1998 to Texas Organic Recovery from HBC Engineering, Inc., signed by James Bierschwale². These samples were not compliant with the Liner Handbook nor TCEQ rules requiring hydraulic conductivity testing for soil liners.

In the discovery phase of this case, Protestants requested the following from Applicant regarding the alleged liner:

² Mr. Bierschwale did not testify.

1. True and correct copies of any and all invoices from consultants, engineers, contractors, and other professionals related to the design and installation of the liner at the facility.
2. True and correct copies of any and all documents related to the design, installation and testing of the liner facility at the facility.
3. True and correct copies of the field notes, laboratory analysis, specific location of where samples were collected at the facility and any other documents related to the July 6, 1998 report of HBC Engineering included in Appendix D of the permit application.

The requested documents were never produced by Applicant, despite a Motion to Compel. In effect, Applicant has been unable to produce any documents to establish that the facility was constructed over 2-foot clay liner which was installed following the guidelines of the Commission's Liner Handbook. Protestants find this absence of reports, studies and invoices curious, at best, inasmuch as the engineering required to comply with the Liner Handbook would be voluminous and expensive.

Despite responding affirmatively to an interrogatory as to whether there is a liner located under all feedstock receiving, mixing, composting, post-processing, screening storage areas and the detention pond at the facility, the Applicant has been unable to produce any evidence of a clay liner in place at the facility. In response to Request for Admissions, Applicant admitted that the liner "installed" in 1998 was installed following the guidelines

of the TCEQ Liner Construction and Testing Handbook. Again, Applicant has produced no evidence to substantiate this claim. Applicant's representative at the hearing, Mr. Van Sickle, testified, despite the admissions and responses to interrogatories of which he sponsored, that he had no personal knowledge of a liner constructed at the facility in accordance with the Liner Handbook. TR p. 233, l. 20 - p. 234, ll. 1-6.

Applicant's expert witness, Mr. Robert Thonhoff who prepared and sealed the application, could not testify he had personal knowledge of the installation of a liner in accordance with the Liner Handbook. TR p. 41, l. 25 - p. 42, l. 20. He admitted in testimony he had never spoken with Dwight Pittman, P.E., who performed the engineering for the Registration Application in 1998 and supposedly oversaw "installation" of the alleged liner. TR p. 29, ll. 1-5. Mr. Thornhoff never spoke with HBC Engineering, which conducted soil borings in 1998. TR p.28, ll. 22-25. Despite the representations in the application regarding the Liner Handbook and the "installation" of alleged liner, Applicant could produce no documents or testimony verifying that the facility has a 2-foot thick impermeable clay liner constructed in accordance with the Liner Handbook. Applicant's expert testified the liner "probably" was in situ TR p. 48, ll. 24-25 and "probably" was partially constructed TR p. 39, ll. 14-16. Applicant's expert could not tell the Tribunal whether the liner was in situ or a reconstructed clay liner, despite the representation the liner was "installed." He admitted in testimony he could not recall whether the 1998 Registration Application referenced the Liner Handbook. TR p. 42, ll. 9-15.

It remains Protestants' position that Applicant made a false or misleading statement in connection with the application to the TCEQ and this, in itself, warrants permit denial pursuant to 30 T.A.C. § 305.66 (f)(3). The evidence can only support one conclusion; Applicant fabricated the statement that a liner was "installed" in 1998 following the guidelines of the Liner Handbook. Further support for this conclusion is provided below.

III. THE APPLICANT FAILED TO MEET ITS BURDEN OF PROOF TO SHOW THAT OPERATION OF THE FACILITY UNDER THE TERMS OF MSW PERMIT NO. 2320 WILL PREVENT CONTAMINATION OF GROUNDWATER UNDER THE FACILITY

Protestants agree with the PFD with respect to Applicant not meeting its burden of proof on groundwater protection. [CONCLUSION OF LAW NO. 7]. Protestants agree that the Applicant failed to meet its burden of proof that the in situ clay underlying the processing, windrow or mixing areas will protect groundwater. [FINDING OF FACT ("FOF") NO. 81]. Protestants would urge that FOF No. 81 be revised to delete the word "liner." Not only was there no evidence that the TCEQ or its predecessor agencies ever approved an in situ liner at the facility, but there was no evidence that an in situ liner is present at the facility. There was no evidence any liner was "installed." Protestants suggest revising FOF No. 78 to read "there is insufficient evidence that an in situ clay liner extends throughout the processing, windrow and mixing area." Protestants' expert Pierce Chandler's testimony was dispositive that the in situ materials present at the site are not appropriate for an in situ liner. TR p. 370, ll. 10 - 19. It remains Protestants' position that there is no liner

present at the site and certainly Applicant failed to meet its burden of proof to establish otherwise. Ex. P-C-1, p. 29, ll. 21 - 26; TR p. 370, ll. 13 - 15.

On page 20 of the PFD in the second full paragraph is a discussion of water in the monitoring wells at the facility. The PFD states, "there was no conclusive evidence regarding the source of water; the two explanations offered were rain that had fallen into the well due to a failed clay cap or infiltration of rain water." To clarify the record and the PFD, Protestant's expert testified that the presence of water in the monitoring wells was attributable to the absence of a soil liner in both the detention pond and on the composting and processing area. Ex. P-C-1, p. 26, ll. 4-10, p. 27, ll. 4-31. Protestants submit the PFD should be revised to reflect that another explanation of water in the monitoring wells at the site was the absence of a liner allowing leachate to migrate into the groundwater.

Protestants would note there are errors in the PFD on page 22. The PFD states "In support of the application, RED conducted six soil borings on the perimeter of the site to depths of between 40 to 44.2 feet; none appear to have been conducted directly under either the windrow or the processing areas." Rather, the boring locations as depicted on Applicant's Exhibit A-3, page 000164 were all located in the composting or processing area. Testimony from Applicant's expert established that the soil borings were located in the compost area. TR p. 35, ll. 9 - 19. In fact, Applicant's expert testified that the locations of the six soil borings were all areas that would need a liner. TR p. 35, ll. 17 - 19. Protestants believe the PFD should be revised accordingly. Also on page 22, the PFD states "Boring B-1

had clays that met the sieve test at four feet.” This is wrong. As noted in the detailed discussion of Boring B-1 on the same page, the percentage of material passing through a No. 200 sieve was 27.7 at four feet. This fails the sieve test. The PFD should be revised to reflect Boring B-1 failed the sieve test.

The discussion of Boring B-5 on page 23 is in error. There was no sieve test conducted on the boring. The 97.2 number referenced in the PFD was for dry density, not the sieve test. App Ex. A-3, pp 000163. FOF No. 62e should be revised to reflect no sieve testing.

Significantly, the Holt soil borings that were conducted in the composting and processing areas did not include the necessary analytical information required by 30 T.A.C. § 332.47(6)(C)(i). None of the soil borings included testing for hydraulic conductivity, which is specifically required by the regulation regarding liner systems. 30 T.A.C. § 332.47(6)(C)(I). Only one of the six borings (B-6) showed strata in the top four feet passing the required sieve, liquid limit and plasticity tests and this boring had no permeability testing. All of the boring logs showed secondary structures such as joints and cracks which would disqualify the in place material as an approvable liner. Ex. P-C-1, p. 28, ll. 12-21. The presence of large gravel in the upper layers of the borings also disqualify the in place soils as an in situ liner. Ex. P-C-1, p. 28, ll. 30-33. Protestants would point out that Applicant admits that any liner would be in the top few feet below surface and, therefore, the

uppermost strata is significant. The uppermost stratas sampled in Holt boring Nos. 1 and 2 failed the sieve test.

Evidence at the hearing was dispositive and unrefuted that Applicant failed to comply with 30 T.A.C. § 332.47(6)(B)(iv)(II), regarding subsurface evaluation reports. This rule includes a mandatory requirement that all soil borings shall be at least thirty feet deeper than the elevation of the deepest excavation on site and in no case shall be less than thirty feet below the lowest elevation on site. This subsurface investigation in the application included six borings, three of which were less than thirty feet below the lowest elevation on site. The current lowest elevation on site was found to be 681 feet above sea level. TR p. 54, ll. 12 - 16. Once the pond is reconstructed, the lowest elevation on site will be 679 feet above sea level. TR p. 56, ll. 9 - 13. Therefore, pursuant to 30 T.A.C. § 332.47(6)(B)(iv)(II), the exploratory Holt soil borings were required to go at least to an elevation of 651 feet above sea level and more precisely 649 feet above sea level. The testimony was unrefuted that boring Nos. 4, 5 and 6 were less than thirty feet below the deepest excavation at the facility. TR p. 54, ll. 1 - 12; p. 63, l. 9.

Protestants suggest the following additional FOF. Borings B-4, B-5, and B-6 were less than thirty feet deeper than the elevation of the deepest excavation on site and less than thirty feet below the lowest elevation on site.

Protestants suggest an additional conclusion of law as follows. RED failed to meet his burden of proof to show that the subsurface elevation report was conducted in accordance with 30 T.A.C. § 332.47(6)(B)(iv)(II).

30 T.A.C. § 332.47(6)(B)(iv)(V) is a mandatory requirement related to the geologic/hydrogeologic report. This regulation requires that an applicant shall prepare cross-sections utilizing the information from the borings and depicting the generalized strata at the facility. Although the subsurface investigation report included borings, the Applicant failed to include the necessary cross-sections in the application material. TR p. 200, l. 4; p. 201, l. 12.

Protestants suggest the following FOF. The application did not include a geologic/hydrogeologic report with cross-sections utilizing the information from the borings and depicting the generalized strata at the facility.

Protestants suggest the following conclusion of law. RED failed to meet his burden of proof to establish compliance with 30 T.A.C. § 332.47(6)(B)(iv)(V).

Section 332.47(6)(C)(ii) requires that a groundwater monitoring system shall be designed and installed such that the system will reasonably assure detection of any contamination of the groundwater before it migrates beyond the boundaries of the site. The groundwater monitoring wells installed at the site range from depths of 12.5 feet to 19.5 feet below ground surface. Three of the six monitoring wells originally installed at the site no

longer exist. TR p. 186, ll. 5 - 6. These groundwater wells do not extend to the unweathered Taylor Navarro formation, a depth of approximately 40 to 43 feet.

Protestants' expert Mr. Pierce Chandler presented unrefuted testimony that the groundwater monitoring system set forth in the application is not compliant with § 332.47(6)(C)(ii). Mr. Chandler's testimony established that the groundwater monitoring wells both in existence and proposed in the application are too shallow to intercept probable migration pathways in the strata underlying the facility. Mr. Chandler testified that to be compliant with the regulations, the monitoring wells needed to extend downward to the top of the unweathered Taylor Navarro formation- approximately 40 to 43 feet. Ex. P-C-1, p. 15, ll. 5 - 18. For this reason, Mr. Chandler testified that the groundwater monitoring system will not reasonably assure detection of any contamination of groundwater. Applicant presented no testimony to refute Mr. Chandler.

Protestants suggest the following additional FOF. The preponderance of the evidence established that the existing and proposed groundwater monitoring wells are too shallow to intercept probable migration pathways in the stratas underlying the facility.

Protestants recommend the following conclusion of law. RED failed to meet his burden of proof under 30 T.A.C. § 332.47(6)(C)(ii) that the groundwater monitoring system will be designed and installed such that the system will reasonably assure detection of any contamination of the groundwater before it migrates beyond the boundaries of the site.

IV. THE APPLICANT FAILED TO MEET ITS BURDEN OF PROOF TO ESTABLISH IT WILL PREVENT DELIVERY OF UNAUTHORIZED OR PROHIBITED MATERIALS TO THE SITE AND TO SHOW THAT OPERATION OF THE FACILITY WILL COMPLY WITH THE TCEQ RULES ENACTED TO PREVENT UNAUTHORIZED OR PROHIBITED MATERIALS FROM APPLICATION OR INCORPORATION IN THE FEEDSTOCKS, IN-PROCESS MATERIALS, OR PROCESSED MATERIALS

Protestants agree with the PFD regarding Applicant's failure to meet its burden of proof on these two related issues. Prohibited materials in the form of a hazardous constituent was discovered in analytical samples taken from a grease trap tank at the facility. Clearly, Applicant's current and proposed procedures to prohibit delivery and introduction of prohibited materials is noncompliant with TCEQ regulations. [CONCLUSIONS OF LAW NOS. 9 AND 10]. Protestants suggest that the proposed Order encompass a finding related to the presence of prohibited substances in the grease trap in storage tanks at the facility. Ex. P-W-1, p. 7, ll. 11 - 17.

Protestants suggest the following FOF. The hazardous constituent 4 nitrophenol was present in analytical samples of the grease trap waste in Tank 1 at the facility.

V. CONCLUSION

The record in this case clearly and unequivocally supports the PFD's conclusion that the Applicant failed to meet its burden of proof on protection of groundwater. Applicant failed to produce evidence required by TCEQ regulations that the existing in place soils directly under the facility, where Applicant claims a liner is present, does or could meet regulatory standards. The fact that the detention pond leaks is proof of the inadequacy of the

“alleged liner.” In addition, the groundwater monitoring system currently in place and proposed in the application is not sufficient to ensure detection of any contamination of the groundwater before it migrates from the boundaries of the site. This testimony was uncontroverted. Moreover, the subsurface investigation performed by Applicant, which was required to determine how to protect the groundwater, was non-compliant with TCEQ regulations. For these reasons, and additional reasons pointed out in this Brief, there is abundant support for a finding that the Applicant failed to meet his burden of proof with respect to groundwater.

Protestants find it exceedingly troubling that the Applicant maintained in the application and in testimony that a liner was installed in 1998 in accordance with the TCEQ Liner Handbook. The complete absence of evidence on this point, and Applicant’s failure to produce any documents verifying this liner installation, should raise red flags with both the ALJs and the Commissioners. Protestants maintain that Applicant has made a false and misleading statement with regard to the installation of the alleged liner and this mandates permit denial.

Protestants agree with the PFD with respect to the Applicants failing to meet its burden with regard to ensuring that prohibited materials are not delivered on-site or incorporated into materials on-site. The fact that hazardous constituents were discovered in grease trap waste at the facility is evidence in itself that Applicant failed to meet its burden of proof on this matter.

Protestants believe that Applicant also failed to meet its burden of proof on the remaining issues referred to SOAH by the Commissioners. Protestants believe that a reevaluation of their Closing Argument and Brief is warranted with regard to the remaining contested issues. The Closing Argument and Brief is attached and incorporated herein.

WHEREFORE, PREMISES CONSIDERED, Protestants pray that the ALJs revise the PFD and proposed Order as suggested herein. Protestants request that the ALJs reconsider Protestants' arguments set forth in their closing argument and Brief on issues where the PFD finds Applicant met his burden of proof. Finally, Protestants request that the Commission deny Permit No. 2320.

Respectfully submitted,

FRITZ, BYRNE, HEAD & HARRISON, LLP
98 San Jacinto Blvd., Suite 2000
Austin, TX 78701
TEL: 512/476-2020
FAX: 512/477-5267

By: _____

J. D. Head

State Bar No. 09322400

ATTORNEYS FOR PROTESTANTS ANN
MESSER, JULIE MOORE, H. PHILIP
WHITWORTH, JR., JULI PHILLIPS and M. D.
THOMSON (THOMSON FAMILY LIMITED
PARTNERSHIP)

CERTIFICATE OF SERVICE

By my signature above, I hereby certify that on the 30th day of January, 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
300 West Fifteenth St.
Austin, TX 78701

Hon. Roy G. Scudday
Administrative Law Judge
State Office of Administrative Hearings
300 West Fifteenth St.
Austin, TX 78701

Mr. Christopher Malish
Foster, Malish, Blair & Cowan, L.L.P.
1403 West Sixth Street
Austin, TX 78703

Ms. Emily Collins
Public Interest Counsel - MC 103
Texas Commission on Environmental Quality
12100 Park 35 Circle, Bldg. F, 4th Fl.
Austin, TX 78753

EXHIBIT A

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

IN RE: APPLICATION BY	§	BEFORE THE STATE OFFICE
ROY EUGENE DONALDSON, II	§	
FOR A TYPE V-RC MUNICIPAL	§	OF
SOLID WASTE PERMIT IN	§	
TRAVIS COUNTY, TEXAS;	§	
(MSW PERMIT NO. 2320)	§	ADMINISTRATIVE HEARINGS

PROTESTANTS' CLOSING ARGUMENT AND BRIEF

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 Closing Argument and Brief. Protestants request that this permit application be recommended for denial for the reasons set forth herein.

The Commission issued an interim order on December 5, 2005 setting forth the contested issues for the hearing on the application by Roy Eugene Donaldson, II for a Type V-RC municipal solid waste permit.¹ The Applicant bears the burden of proof to show by a preponderance of the

-
- ¹
- (a) Whether odor from the facility will cause nuisance conditions interfering with the use and enjoyment of the requestors' property;
 - (b) Whether the facility's operation will comply with the TCEQ rules enacted to protect groundwater;
 - (c) Whether the facility's operation will comply with the TCEQ rules enacted to prevent the contamination of surface water;
 - (d) Whether the facility will be operated in compliance with 30 T.A.C. § 332.45(10), enacted to prevent unauthorized and prohibited materials from application or incorporation into feedstocks, in-process materials, or processed materials;
 - (e) Whether the facility's operation will comply with 30 T.A.C. § 332.45(11), which requires compliance with end-product testing and standards;
 - (f) Whether the facility's Site Operating Plan includes appropriate fire prevention and control measures;
 - (g) Whether the facility will meet applicable air quality requirements; and
 - (h) Whether the facility will meet applicable requirements for prevention of the delivery of unauthorized and prohibited materials at the site.

evidence that the application meets the technical standards and requirements of the relevant Chapter 332 rules. "Each regulation is a separate requirement with which the applicant must comply in order to receive a 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). Failure to do so mandates permit denial. As fully detailed in this Closing Argument and Brief, Applicant failed to meet its burden of proof on all issues referred by the Commission.

A. Introduction

Roy Eugene Donaldson, II submitted a registration application for the Texas Organic Recovery Compost facility in July 1998. The registration was issued by the then-Texas Natural Resource Conservation Commission now known as the Texas Commission on Environmental Quality ("TCEQ") on December 4, 1998. Pursuant to legislation passed in 2003 by the 78th Texas Legislature, a person commercially composting grease trap waste is required to obtain a permit. § 361.428(d), Texas Health and Safety Code. The TCEQ amended its Chapter 332 compost rules in 2004, in accordance with the new composting legislation, establishing permit procedures for commercial grease trap composters. The Applicant, Roy Eugene Donaldson, II, is subject to the Chapter 332 rules on permitting a grease trap composting facility.

While the Texas Organic composting facility is currently operating under a registration, in order to continue operations with grease trap waste it must obtain a TCEQ permit. In this case, in order to obtain a permit, the Applicant must meet its burden of proof on all referred issues to the State Office of Administrative Hearings ("SOAH") from the Commissioners. The fact that the facility currently has a registration has no bearing on the Applicant's burden of proof to obtain a permit.

The Administrative Law Judges ("ALJs") have requested briefing on whether provisions of the draft permit, prepared by the TCEQ staff, could be considered protective of human health and the environment. While Protestants have herein duly briefed these issues, it is Protestants' unequivocal position that the provisions of a draft permit cannot override the applicant failing to meet its burden of proof on the referred issues. In other words, although a provision of the draft permit might be protective of the environment if complied with, this is irrelevant where the applicant fails to meet its burden of proof.

B. Odor from the Facility Will Cause Nuisance Conditions Interfering with the Use and Enjoyment of Protestants' Property

30 T.A.C. § 332.4(2) stipulates that composting shall be conducted in a manner that prevents the creation of nuisance conditions, including odor nuisance. See, also § 332.45(5). The site operating plan must provide guidance in sufficient detail to enable site management and operating personnel to conduct day-to-day operations to minimize odors. § 332.47(7)(J). Protestants were named parties due to the proximity of their land to the compost facility.

Protestants' expert, Mr. Bruce Wiland, P.E., testified that the primary factors in preventing odors are the moisture content and carbon:nitrogen (C:N) ratio of the composting mixture. Ex. P-W-1, p. 17, ll. 36 - 39. Moisture content higher than 65% can create anaerobic conditions causing odors. C:N ratios lower than 20% can also cause odors. Ex. P-W-1, p. 18, ll. 3 - 6. The application failed to include the energy and mass balance calculations as required by § 332.47(6)(E)(iii) to prove these percentages and ratios can be achieved. Ex. P-W-1, p. 18, l. 18 - p. 19, l. 8. The application merely includes equations, with no information on the moisture content or C:N ratio of any feedstock. Mr. Wiland testified that without the energy and mass balance calculations required by the Chapter 332 regulations, the Applicant failed to demonstrate its ability to prevent odor nuisance conditions. Ex. P-W-1, p. 20, ll. 1 - 5; TR, p. 442, l. 24 - p. 443, l. 17. Mr. Wiland further testified that the absence of these calculations renders the application deficient and non-compliant with the TCEQ regulations. *Id.*

Applicant's representations that composting grease trap waste negates any requirement to conduct energy and mass balance calculations is misplaced. In the first place, the Chapter 332 regulations require these calculations. Moreover, although Applicant admits in testimony (though contrary to representations in the application; Ex. A-3, p. 000008) that it does not compost municipal sewage sludge and composts very little septage (TR, p. 242, ll. 13 - 20; TR, p. 243, ll. 19 - 20), it is requesting authorization in the permit to compost septage and municipal sewage sludge but includes no C:N values or energy or mass balance calculations for anything to be composted.²

In summary, Applicant failed to meet its burden of proof establishing it will prevent odor nuisance conditions. Accordingly, the permit application must be denied.

² The application states on page 000008 that paper, cardboard, yard trimmings, wood, vegetative food matter, grease trap waste, septage and municipal sewage sludge will be composted. The application contains no C:N ratios or energy and mass balance calculations for any of these items.

C. The Facility's Operations and the Application Do Not Comply with TCEQ Rules to Protect Groundwater

Pursuant to 30 T.A.C. § 332.45(2), a composting facility must be constructed, maintained and operated to protect groundwater. At a minimum, groundwater protection shall be in accordance with § 332.47(6)(C). Protection of groundwater includes the protection of perched water or shallow water infiltration. There is shallow groundwater at the facility site. Ex. P-C-1, p. 26, l. 12 – p. 27, l. 8. In order to design a liner and groundwater monitoring system to protect groundwater, an applicant must prepare a geologic/hydrogeologic report in compliance with § 332.47(6)(B). See, § 332.47(6). As Protestants' expert, Pierce Chandler, P.E., testified, the information obtained in the geologic/hydrogeologic report is the basic building block to serve as the basis of design of the facility to protect groundwater. TR, p. 323, ll. 3 - 20. Leachate retention structures and all feedstock receiving, mixing, composting, post-processing, screening and storage areas must be located on a liner that meets the requirements of § 332.47(6)(C)(i). See, §§ 332.45(1) and (2).

With the exception of proposed relining of the leachate retention structure³ (Ex. A-3, p. 000033), the application is woefully deficient regarding a groundwater protection plan. Under Site Investigations, the application states "the site has been in service since 1998 and was constructed over a 2-foot clay liner that was installed following the guidelines of the Commission's Liner Construction and Testing Handbook" ("Liner Handbook"). Ex. A-3, p-000048. Despite this statement, the application contains no substantiation that a liner, either in-situ or constructed soil, was installed at the site in accordance with the Liner Handbook. In response to a Motion to Compel, Applicant could produce no evidence of any engineering data or invoices for installation of a liner. TR, p. 234, l. 13 – p. 235, l. 14.

The Liner Handbook requires Coefficient of Permeability testing in a geotechnical laboratory to establish 1×10^{-7} cm/sec, or less.⁴ Ex. P-C-12, pp. 11 - 12. The application contained no coefficient of permeability testing. TR, p. 30, ll. 4 - 6; TR, p. 31, ll. 8 - 13; TR, p. 33, ll. 2 - 4. The Liner Handbook requires field testing for each 50,000 square feet. Ex. P-C-12, p. 19. There was no evidence of this testing. The Liner Handbook requires the submission to the TCEQ of Soils and Liner Evaluation Reports ("SLER") for approval. Ex. P-C-12, pp. 25 - 26. There was no evidence

³ The application (Ex. A-3, p. 000033) states that the existing clay liner will be tested to confirm compliance or reconstructed to meet compliance with the Liner Handbook.

⁴ Section 332.47(6)(C)(i) requires a liner with a hydraulic conductivity of 1×10^{-7} cm/sec. or less. The terms "hydraulic conductivity" and "coefficient of permeability" are synonymous.

of a SLER ever being submitted for the “alleged” liner. There was no evidence the TCEQ ever approved the “alleged” liner.

The geologic testing done on site, in the processing areas, establishes that in five of the six borings, the Applicant did not conduct the required sieve, liquid limit or plasticity tests in the upper strata (3 feet) where the liner is allegedly located. Ex. A-3, pp.000165 - 000170. In fact, soil Borings B-1 and B-2 reveal failing sieve tests in the upper strata at 4 and 5 feet below ground surface. Ex. A-3, pp. 000165 - 000166; TR, p. 36, ll. 10 - 16; TR, p. 37, l. 1 – p. 38, l. 3. All of the boring logs showed secondary structures such as joints and cracks which would disqualify the in-situ materials as an approvable liner. Ex. P-C-1, p. 28, ll. 12 - 21. Ex. P-C-12, p. 12; 2.2.1. Moreover, the consistent presence of large gravel in the upper layers of the borings would disqualify this material as an in-situ liner. Ex. P-C-1, p. 28, ll. 30 - 33.

Mr. Thornhoff, Applicant’s expert witness, could not testify he had any personal knowledge of installation of an in-situ or constructed liner. TR, p. 41, l. 25 – p. 42, l. 20. Despite his sworn verification of interrogatories that represented the site has a two-foot clay in-situ liner, Applicant’s General Manager and designated representative in this case, Mark Van Sickle, testified he has no personal knowledge of installation of a liner. TR, p. 232, l. 2 – p. 234, l. 6. To the contrary, Mr. Pierce Chandler, P.E., Protestants’ expert witness, testified that there was no evidence of a liner at the site. Ex. P-C-1, p. 29, ll. 21 - 26; TR, p. 370, ll. 13 - 15.

30 T.A.C. § 332.47(6)(B)(iv)(II), Subsurface Evaluation Reports, includes a mandatory requirement that all soil borings shall be at least 30 feet deeper than the elevation of the deepest excavation on site and in no case shall be less than 30 feet below the lowest elevation on site. The Subsurface Investigation in the application (Ex. A-3-000157 - 000171) included six borings, three of which were less than 30 feet below the lowest elevation. TR, p. 54, l. 12 – p. 63, l. 9. The Applicant failed to meet its burden of proof on this regulatory requirement related to groundwater protection and this dictates denial of the permit. Furthermore, the Applicant did not conduct a deep bore in accordance with this regulation despite the existence of the uppermost aquifer above the deepest excavation. Ex. P-C-1, p. 28, ll. 12 - 21. This also mandates permit application denial.

30 T.A.C. § 332.47(6)(B)(iv)(V) is a mandatory requirement related to the geologic/hydrogeologic report. This regulation requires that the applicant shall prepare cross-sections utilizing the information from the borings and depicting the generalized strata at the facility. Although the subsurface investigation report included borings, the Applicant failed to include the necessary cross-sections in the application materials. TR, p. 200, l. 4 – p. 201, l. 12. Applicant

failed to meet its burden of proof with regard to applicable regulations related to groundwater protection.

Section 332.47(6)(C)(ii) requires that a groundwater monitoring system shall be designed and installed such that the system will reasonably assure detection of any contaminant of the groundwater before it migrates beyond the boundaries of the site. When the application was filed, the Applicant had already installed groundwater monitoring wells ranging from depths of 12.5 feet to 19.5 feet below ground surface. Ex. A-3, pp. 000187 - 000192. For reasons unexplained in testimony, 3 of the installed monitoring wells apparently no longer exist at the site. TR, p. 186, ll. 5 - 6.

Mr. Pierce Chandler's testimony was undisputed that the groundwater monitoring system set forth in the application is non-compliant with § 332.47(6)(C). Ex. P-C-1, p. 15, ll. 5 - 18; p. 18, ll. 8 - 11. Mr. Chandler's testimony established that the groundwater monitoring wells both in existence and proposed in the application are too shallow to intercept probable migration pathways in the stratas underlying the facility. For this reason, Mr. Chandler testified that the groundwater monitoring system will not reasonably assure detection of any contamination of groundwater.

The ALJs requested briefing on how the draft permit terms protect the perched water in the upper gravel layers below the facility. Draft MSW Permit No. 2320 at IV.C.1 requires that a liner system pursuant to 30 T.A.C. § 332.47(6)(C)(i) must be installed in all feedstock receiving, mixing, composting, post-processing, screening and storage areas. The draft provision goes on to state "the liner shall be constructed in accordance with and must meet or exceed the specifications in the application materials." Protestants would note that the application materials state that a liner has already been installed and constructed in accordance with the Liner Handbook. The application, with the exception of that portion dealing with reconstructing the pond, does not include any prospective language regarding liner installation. TR, p. 370, ll. 4 - 9. Inasmuch as testimony establishes there is no evidence that a liner has been installed over the processing area, the final sentence of Section IV.C.1 of the draft permit is not protective of the perched water. Because testimony was adduced that the in-situ materials are not appropriate for an in-situ liner, any draft permit provision should require installation of either a reconstructed soil liner or a synthetic liner. TR, p. 370, ll. 16 - 19.⁵

With respect to Provision IV.C.2, relating to the runoff retention pond, the draft permit language only requires a clay liner with a hydraulic conductivity of no less than 1×10^{-7} cm/sec. Any

⁵ It remains Protestants' position that the permit application must be denied, regardless of what the draft permit provides.

permit language should require that the liner for the runoff retention pond meet all the requirements of 30 T.A.C. § 332.47(6)(C)(i) and the Liner Handbook.⁶ Moreover, any final permit language should require the liner be a reconstructed clay liner or a synthetic liner under the runoff retention pond.

D. Applicant Failed to Meet its Burden of Proof to Establish the Facility's Operations and the Application Will Comply with TCEQ Rules to Prevent Contamination of Surface Water

30 T.A.C. § 332.4(1) provides that the activities subject to Chapter 332 (Composting Regulations) shall be conducted in a manner which prevents the discharge of material to or the pollution of surface water or groundwater in accordance with Texas Water Code, Chapter 26 relating to water quality control. The draft permit confirms that composting operations must be managed as no-discharge facilities. Ex. A-4, Draft Permit IV.A.2; IV.B. In addition, an application for a composting permit must comply with the entirety of 30 T.A.C. § 332.47(6)(A); Surface Water Protection Plan.

Applicant failed to prepare a pre-construction on-site drainage map required by § 332.47(6)(A)(v)(II). Applicant likewise neglected to include an erosion control map mandated by § 332.47(6)(A)(v)(VII). Applicant also failed to follow the requirements of § 332.47(6)(A)(v)(IV) regarding the content of the drainage facilities map. TR, p. 96, l. 23 – p. 98, l. 13. Applicant's expert testified that he believed these items were not relevant. TR, p. 98, ll. 14 - 25; TR, p. 96, ll. 2 - 17. Protestants' position is that the TCEQ in adopting the Chapter 332 regulations decided what was relevant and Applicant must comply with these regulations.

With respect to the Applicant's Surface Water Protection Plan (Ex. A-3, pp. 000032 - 000045), Protestants' expert Bruce Wiland, P.E., testified that the water balance was not done properly and was invalid. TR, p. 396, ll. 4 - 12. Applicant underestimated the rainfall runoff (and thus the water entering the retention control structure or pond) by applying a curve number of 90 site-wide. Applicant failed to apply a 100 curve number for the pond. TR, p. 397, ll. 6 - 12. Moreover, the 90 curve number is too low for the impermeable areas of the site, such as roofs and roads. TR, p. 398, ll. 1 - 9. The utilization of the 90 curve number, based on row crops, was inappropriate for a 15 acre site where only 2 acres contain the compost windrows. Therefore, the pond will receive more rainwater than estimated in the Surface Water Protection Plan.

⁶

The Application references the Liner Handbook vis-a-vis the pond at Ex. A-3, p. 000033.

Applicant futilely attempts to resolve its water balance problem by representing it will recycle the water into the compost piles. However, Mr. Wiland testified the volume of water to be recycled into the compost was entirely too much. TR, p. 400, l. 3 – p. 401, l. 11. By its own calculations, Applicant would be applying the equivalent of a one and a half inch rainfall event to the compost every day from June through October, and this is on material sprayed with grease trap waste with a water content of 98%. TR, p. 105, ll. 21 - 23. Mr. Wiland testified that it would be virtually impossible to use that much water from the retention pond in summer months. TR, p. 432, ll. 3 - 7. Mr. Wiland testified the mass balance calculations are inaccurate and the facility, based on the design, would discharge water offsite in violation of 30 T.A.C. § 332.4(1). TR, p. 442, ll. 11 - 23. Mr. Wiland's testimony confirms the retention control pond water contains pollutants. Ex. P-W-1, p. 5, l. 40 – p. 6, l. 25; Ex. P-W-4.

While Applicant's expert testified his Surface Water Protection Plan was adequate, Protestants would point out that it was the miscalculations in the original application by the same engineering firm, which caused the delay in this proceeding to allow for a major amendment to resize the pond and perform the type of mass balance calculations clearly spelled out in the regulations. It was only after Protestants' pre-filed testimony was originally filed, and its experts deposed, that Applicant realized its surface water protection engineering was fatally flawed. This should go to the credibility of Applicant's expert witness.

The Applicant has failed to meet its burden on complying with the regulations relating to surface water protection and this mandates permit denial.

Finally, with respect to the ALJs' inquiry in Order No. 17, Protestants submit only a reconstructed clay liner or a synthetic liner constructed in strict accordance with the Liner Handbook can properly address the current leaking from the pond (Ex. P-C-1, p. 7, ll. 26 - 35; p. 27, l. 33 – p. 28, l. 10; Ex. P-C-15; Ex. P-C-3; Photos 25 - 28) and seepage from the processing area.

- E. The Applicant Failed to Meet its Burden of Proof to Establish the Facility Will Be Operated in Compliance with 30 T.A.C. § 332.45(10) to Prevent Unauthorized and Prohibited Materials from Application or Incorporation into Feedstocks, In-process Materials, or Processed Materials

The Applicant Failed to Meet its Burden of Proof to Establish it Will Prevent Delivery of Unauthorized or Prohibited Materials at the Site, Pursuant to 30 T.A.C. §§ 332.4(8) and 332.45(3)⁷

Applicant's method of screening incoming materials is to have an employee look at the material through a plastic window of a vacuum truck and stick his head into the latch. TR, p. 236, l. 23 – p. 237, l. 22. There is no onsite laboratory (TR, p. 239, ll. 23 - 25) and the Applicant does not take random samples of incoming materials to an off-site laboratory for testing. TR, p. 240, ll. 8 - 15. Evidently, some of the trucks have trip tickets indicating where the contents originated. TR, p. 80, ll. 17 - 21. Applicant's expert was unfamiliar with the trip tickets and whether such tickets indicated the contents of the material or whether a certification is required under penalty of law. TR, p. 82, ll. 3 - 16.

Samples taken of the grease trap in storage tanks at the facility revealed the presence of prohibited substances as that term is defined at § 332.45(10). Ex. P-W-1, p. 5, ll. 30 - 40; p. 7, ll. 1 - 18; Ex. P-W-4; Ex. P-W-5. The hazardous constituent 4-nitrophenol was present in the grease trap waste in Tank 1. Obviously, the facility has received prohibited material. There is no protocol to ensure such received prohibited material is not further applied to or incorporated into feedstocks, in-process materials or processed materials, in violation of § 332.45(10). It is clear that a visual inspection of incoming material in a vacuum truck does not meet the requirements of §§ 332.45(3) and (10). The testimony of Bruce Wiland, P.E. establishes that the application materials and method of operation at the facility do not include safeguards either to prevent the delivery of prohibited materials or the subsequent incorporation of such materials into the compost product. Ex. P-W-1, p. 9, l. 6 – p. 13, l. 15. The Applicant failed to meet its burden of proof on these regulations.

F. Applicant Failed to Meet its Burden of Proof Regarding 30 T.A.C. § 332.45(11) - Compliance with End-Use Standards

Due to the brevity required in the briefing order, Protestants refer the ALJs to Mr. Bruce Wiland's unrefuted testimony on this issue at Ex. P-W-1, pp. 14 - 17, with accompanying Exhibit P-W-8. In summary, Applicant failed to establish compliance with testing requirements for arsenic, salmonella, fecal coliform, weight percentage of foreign matter, pH and salinity.

⁷ This addresses referred issue (h).

G. The Applicant Failed to Meet its Burden of Proof Regarding Fire Prevention and Control Measures

30 T.A.C. § 332.47(7)(E) requires the Site Operating Plan (“SOP”) to include specific guidance on instructions on a fire prevention and control plan that shall comply with the local fire code, provisions for fire-fighting equipment, and special training for fire-fighting personnel. Applicant’s SOP addresses fire protection at Ex. A-3, pp. 000025 - 000026.

The application states that the facility will comply with the City of Austin Uniform Fire Code. However, the facility is subject to the jurisdiction of the Travis County Fire Code. Ex. P-C-1, p. 31, ll. 1 - 9. The Applicant references and incorporates the 1997 Uniform Fire Code, yet Travis County has adopted the 2003 International Fire Code. Ex. P-C-1, p. 31, ll. 11 - 13. The application failed to comport with § 332.47(7)(E) in this respect.

As testified to by Mr. Pierce Chandler, P.E., the application proposes to use fire extinguishers that do not meet the Travis County Fire Code requirements. Ex. P-C-1, p. 31, ll. 26 - 40. This, again, is a violation of § 332.47(7)(E). Finally, the fire protection plan does not specify the special training requirements for fire-fighting personnel. Ex. P-C-1, p. 32, l. 33 – p. 33, l. 13.

H. Applicant Failed to Meet its Burden of Proof Regarding Applicable Air Quality Requirements

Applicant addressed air quality requirements at Ex. A-3, pp. 000027 - 000028 by copying verbatim the regulation from 30 T.A.C. § 332.8(e). TR, p. 85, ll. 7 - 11. The mimicked language on air quality is a component of Applicant’s Site Operating Plan. Ex. A-3, pp. 000020 - 000029. 30 T.A.C. § 332.47(7), entitled Site Operating Plan, mandates a document to provide guidance to site management and operating personnel in sufficient detail to conduct day-to-day operations. The SOP must include specific guidance on various issues, including control of airborne emissions.

The undisputed testimony of Bruce Wiland, P.E., established that the facility does not have a water or mechanical dust suppression system on conveyors that off-load materials from grinders, in violation of 30 T.A.C. § 332.8(e)(5). Ex. P-W-1, p. 14, ll. 20 - 32. This testimony mandates permit denial.

I. A Constructed Liner Is Required in the Processing Area to Comply with § 332.47(6)(C)(i) and Provision IV.C.1 of the Draft Permit⁸

Mr. Pierce Chandler, P.E., Protestants' expert with over 30 years experience with soil borings and subsurface characterization, testified that based on the subsurface characterization at the site, the Liner Handbook would disqualify both the Taylor-Navarro Strata and the upper Quaternary Strata as an in-situ liner. Ex. P-C-1, p. 28, ll. 12 - 33. As noted on page 11 of Exhibit P-C-12, the Liner Handbook states that "[i]n situ soils (soils in place and not disturbed through excavation or recompaction) are rarely acceptable as low-permeability liners due to the frequent occurrence of either primary depositional physical features such as bedding planes, desiccation cracks caused by drying at the time of deposition, or sediment distribution. In addition, secondary features that occur subsequent to deposition such as jointing, fracturing due to stress relief, solution weathering, etc. are common." Mr. Chandler testified that the presence of gravel in the Holt Boring Logs, all of which are in the processing area are generally recognized as poor liner material. Ex. P-C-1, p. 22, ll. 1 - 18. In addition, Mr. Chandler testified to the numerous joints and vertical cracks in the Holt Subsurface Investigation. Ex. P-C-1, p. 17, l. 31 - p. 18, l. 6. Moreover, the Holt Boring Logs evidenced shallow subsurface soils failing to meet the sieve requirement of § 332.47(6)(C). Finally, the logs from the monitoring wells showed unacceptable geologic conditions for an in-situ liner. TR, p. 66, l. 24 - p. 76, l. 17.

The preponderance of the evidence clearly establishes that an in-situ liner will not suffice for the processing area. Accordingly, if the permit is issued, which Protestants strongly submit it should not be, the Applicant would need to install either a reconstructed clay liner or a synthetic liner to comply with the regulations and draft permit.

J. The Commission May Consider Current Operations at the Facility in Evaluating the Permit

Pursuant to §305.66(f)(1), the Commission may deny, suspend for not more than 90 days, or revoke an original or renewal permit if the Commission finds after notice and hearing that the permit holder has a record of environmental violations in the preceding 5 years at the permitted site. Therefore, the Commission surely can consider the operational history of the facility in a permit proceeding.

Pursuant to § 305.66(f)(3), the Commission may deny a permit if the permit holder or applicant made a false or misleading statement in connection with an original or renewal application,

⁸

The briefing order on page 3 included an incorrect cite of 30 T.A.C. § 332.47(6)(c)(I).

either in the formal application or in any other written instrument relating to the application submitted to the Commission, its officers, or its employees. It is Protestants' position that Applicant made a false or misleading statement in the application when it stated at Ex. A-3, p. 000048 that "this site has been service since 1998 and was constructed over a 2 foot clay liner which was installed following the guidelines of the Commission's 'Liner Construction and Testing Handbook'". The Applicant could provide no documentation that this "alleged" liner was ever installed in accordance with the Liner Handbook. Mr. Van Sickle, General Manager and designated representative for the Applicant, testified that although he stated a liner was installed in his sworn interrogatory response, he had no personal knowledge of this fact. TR, p. 232, l. 2 – p. 234 , l. 6. Mr. Thonhoff, Applicant's sponsoring expert on the liner, admitted he had no personal knowledge of installation of the liner in accordance with the Liner Handbook and had seen no SLERs or documentation submitted to the agency corroborating the installation of this alleged liner. TR, p. 43, ll. 14 - 25. As noted previously in this Closing Argument and Brief, Protestants' expert, Pierce Chandler, has testified that he sees no evidence that a liner was installed in accordance with the Liner Handbook. Applicant made false or misleading statements with respect to prior installation of the alleged liner and these false or misleading statements are the basis for denial of the permit.

K. Conclusion

As set out in this Closing Argument and Brief, the record in this proceeding clearly demonstrates that Applicant has failed to meet its burden of proof on the issues referred to SOAH by the Commission. The *Hunter Industrial Facilities, Inc.* case is clear authority that the permit application must be denied. The following quote is germane to the ALJs' determination in this matter, based on the record. "... The legislature, in enacting the SWDA, evinced a clear policy that protection of the public and the environment would constitute the top priority: 'It is the state's policy and the purpose of this chapter to *safeguard the health, welfare, and physical property of the people and to protect the environment* by controlling the management of solid waste. . . .' SWDA § 361.002(a) (emphasis added). Given the primacy of these legislative concerns, the Commission must ensure that every regulation is satisfied. The failure to satisfy the standards is not, as HIFI argues, merely a technical violation. . . . Contrary to HIFI's and the examiners' conclusion that the regulations can be blended so as to compensate for the failure to satisfy some requirements, each regulation is a separate requirement with which an applicant must comply in order to receive a permit." 910 S.W.2d at 107. (Emphasis added).⁹ Protestants request that the ALJs prepare a

⁹ SWDA is an acronym for the Solid Waste Disposal Act which regulates composting of grease trap waste.

Proposal for Decision recommending denial of the permit based on Applicant's failure to meet its burden on each and every referred matter and the TCEQ regulations.

Respectfully submitted,

FRITZ, BYRNE, HEAD & HARRISON, LLP
98 San Jacinto Blvd., Suite 2000
Austin, TX 78701
TEL: 512/476-2020
FAX: 512/477-5267

By: _____

J. D. Head
State Bar No. 09322400

ATTORNEYS FOR PROTESTANTS ANN
MESSER, JULIE MOORE, H. PHILIP
WHITWORTH, JR., JULI PHILLIPS and M. D.
THOMSON (THOMSON FAMILY LIMITED
PARTNERSHIP)

CERTIFICATE OF SERVICE

By my signature above, I hereby certify that on the 9th day of November, 2007, 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
300 West Fifteenth St.
Austin, TX 78701

Hon. Roy G. Scudday
Administrative Law Judge
State Office of Administrative Hearings
300 West Fifteenth St.
Austin, TX 78701

Mr. Christopher Malish
Foster, Malish, Blair & Cowan, L.L.P.
1403 West Sixth Street
Austin, TX 78703

Ms. Emily Collins
Public Interest Counsel - MC 103
Texas Commission on Environmental Quality
12100 Park 35 Circle, Bldg. F, 4th Fl.
Austin, TX 78753