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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

October 17, 2011

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

Re: **REPUBLIC WASTE SERVICES OF TEXAS, LTD.**
SOAH DOCKET NO. 582-10-2069
TCEQ DOCKET NO. 2009-2058-MSW

Dear Ms. Bohac:

Enclosed for filing is the Office of Public Interest Counsel's Exceptions to the Proposal for Decision in the above-entitled matter.

Sincerely,


Amy Swanholm, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

**SOAH DOCKET NO. 582-10-2069
TCEQ DOCKET NO. 2009-2058-MSW**

IN THE MATTER	§	
OF THE APPLICATION OF	§	BEFORE THE
REPUBLIC WASTE SERVICES	§	TEXAS COMMISSION ON
OF TEXAS, LTD. FOR TCEQ	§	
PERMIT	§	ENVIRONMENTAL QUALITY
NO. MSW-2356		

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S
EXCEPTIONS TO THE PROPOSAL FOR DECISION**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE WILFONG AND TCEQ COMMISSIONERS:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files these Exceptions in the above-referenced matter and respectfully shows the following: this permit should be denied because the Applicant has not shown that the permit, including incorporated portions of the application, can comply with TCEQ rules designed to prevent water pollution and protect the public.

I. Introduction

A. Facility Background

Republic Waste Services of Texas, Ltd., 1212 Harrison Avenue, Arlington, Texas 76011 has applied to the Texas Commission on Environmental Quality (TCEQ) for a permit to authorize construction and operation of a Type V Municipal Solid Waste transfer station. The facility is proposed to be located on the west side of Nu Energy Drive approximately 0.3 mile southwest of the intersection of Interstate Highway 20 and Nu Energy Drive, near the

City of Aledo in Parker County, Texas 76008. The TCEQ received this application on April 7, 2008.

The TCEQ Executive Director has completed the technical review of the application and prepared a draft permit. The draft permit, if approved, would establish the conditions under which the facility must operate. The Executive Director has made a preliminary decision that this permit, if issued, meets all statutory and regulatory requirements.

B. Procedural Background

TCEQ received this application on April 7, 2008. On May 29, 2008, the Executive Director (ED) declared the application administratively complete. The Notice of Receipt and Intent to Obtain a New Municipal Solid Waste Permit (NORI) was published on June 23, 2008 in the *Fort Worth Star Telegram*. Two public meetings were held on February 12, 2009, and May 21, 2009. The ED completed its technical review of the permit application on September 6, 2009, and issued the Notice of Application and Preliminary Decision for a New Municipal Solid Waste Permit (NAPD) on September 21, 2009. It was published on September 28, 2009 in the *Weatherford Democrat*. The public comment period ended on October 28, 2009. On December 16, 2009, the Applicant requested that the matter be directly referred to the State Office of Administrative Hearings (SOAH) for a hearing on the merits. The ED filed its decision and Response to Comments on December 28, 2009. The matter was referred to SOAH on January 6, 2010 and the hearing on the merits was held on February 28 to March 4, 2011. The Proposal for Decision (PFD) was issued on September 26, 2011.

II. Transportation

OPIC excepts to Findings of Fact (FOF) Nos. 58, 59, 60, 75, 76, 77, and 82 as well as Conclusions of Law (COL) Nos. 8, 11, and 14.

30 TAC § 330.61(i) requires the Applicant to submit information in its application showing:

- 1) The availability and adequacy of roads that the owner or operator will use to access the site;

- 2) the volume of vehicular traffic on access roads within one mile of the proposed facility, both existing and expected, during the expected life of the proposed facility;
- 3) the projected volume of traffic expected to be generated by the facility on the access roads within one mile of the proposed facility; and
- 4) coordination of all designs of proposed public roadway improvements such as turning lanes, storage lanes, etc., associated with site entrances with the agency exercising maintenance responsibility of the public roadway involved and coordination with the Texas Department of Transportation for traffic and location restrictions.

Although the Applicant has submitted information on this topic, the preponderance of the evidence shows that the proposed facility would not comply with these requirements.

A. Adequacy and Availability of Roads

The ALJ concludes that the roads surrounding the facility are adequate to meet the requirements of 30 TAC § 330.61(i). Instead of considering the testimony of Yetkin Yildirim and others testifying that Nu Energy Road is suffering great wear and can not sustain continued use by heavy trucks, the ALJ concludes that because large vehicles currently drive on Nu Energy Drive, and the record contains photographs of vehicles travelling on Nu Energy Drive, there is no further need to analyze the opposing parties arguments. OPIC respectfully disagrees and asserts that the preponderance of the evidence does not support the ALJ's conclusion.

The ALJ also incorrectly concludes that TCEQ does not have legal recourse to address issues related to transportation. Although the TCEQ's jurisdiction does not extend to road maintenance, enforcement of road safety, or the maintenance of public roadways, the TCEQ does have authority over whether to approve Republic's application. The rules under which Republic's application is considered include a review of whether the proposed facility would meet the requirements of 30 TAC § 330.61(i). If the Applicant cannot show that the proposed facility would meet these requirements through submitting adequate information to the TCEQ, TCEQ's recourse is not to fix the roads or dictate traffic routes. It cannot, because as the ED accurately stated, this is outside its jurisdiction. Instead, TCEQ's recourse is to deny the permit application.

Although Parker County is responsible for maintaining Nu Energy Drive, assuming that the road will be maintained by the county renders meaningless the requirement that Republic show access roads are adequate.¹ All public roads are maintained by some governmental entity. What must be shown, for the purposes of TCEQ's permitting process, is that the roads that Republic will use to access the proposed facility are adequate to support traffic generated by the proposed facility. The preponderance of the evidence does not show this.

OPIC urges the ALJ to reevaluate whether Nu Energy Road is adequate to support the traffic generated by the facility. The examination of the evidence as presented by the PFD is incomplete in that it does not address evidence presented by Walsh Aligned Parties. When this evidence is examined, the preponderance of the evidence shows that the roads are not adequate to handle the truck traffic generated by the proposed facility.

As argued in OPIC's Closing Arguments, the roads around the proposed facility do not appear to be physically adequate to handle the increase in truck traffic that would be associated with the facility. Mr. Jahn presented no evidence on the physical adequacy of the roads to handle the increased traffic, instead looking at whether the proposed facility would cause traffic congestion. Mr. Sloan, testifying for the Applicant on the volume of traffic that would be generated by the proposed facility was not aware of any stressors on Nu Energy Drive.² In fact, he could not testify on what roadway stressors look like.³ Further, in his estimate that the roadways could withstand heavy vehicle traffic, he made only a visual inspection by driving along the roads. This estimate was not guided by any reference materials and not informed by any expert.⁴

The Protestants put on extensive evidence showing that Nu Energy Drive is inadequate to support heavy vehicle traffic associated with the proposed facility. This testimony showed that the small, two-lane road was not designed for heavy truck

¹ 30 TAC § 330.61(i).

² T at 320.

³ T at 325.

⁴ T at 319-320.

traffic.⁵ It is not currently in good condition⁶ and without future maintenance and repair, would cause unsafe driving conditions.⁷ This is particularly concerning because of the nearby high school, and the potential use of Nu Energy Drive by students and parents looking to avoid traffic on other roadways in the area.

B. Applicant's Traffic Study

The traffic study also does not adequately depict the volume of vehicular traffic on access roads within one mile of the proposed facility.⁸ Mr. Jahn testified that the traffic counts associated with the study were conducted before the construction of several schools in the area, and that the construction of schools can alter traffic volumes on surrounding roads.⁹ Because all vehicles accessing the proposed facility would travel on Nu Energy Road, underestimating the facility-generated traffic leads to an underestimation of the impact the proposed facility would have on surrounding roadways. Yet even with the unreliable numbers put forth by Mr. Sloan, the evidence shows that Nu Energy Road cannot sustain large truck traffic.

The Applicant's traffic report did not analyze the impact of traffic from the facility during peak hours, even though this would normally be included in a traffic study. Mr. Jahn did not include this information because the Applicant did not plan to have vehicles on the road during peak hours.¹⁰ Although this may be the Applicant's intention, there is no restriction in the draft permit that would prevent the Applicant from receiving waste or transporting waste off-site during peak hours.¹¹ A report that accurately shows existing road traffic and the proposed facility's expected impact on this traffic would have included this information.

⁵ Ex. W-32 at 14-15.

⁶ Id. at 12.

⁷ Id. at 14.

⁸ 30 TAC § 331.061(i)(2).

⁹ T at 355-357.

¹⁰ T at 378-379.

¹¹ T at 405-406.

Mr. Jahn stated that the Applicant did not request a peak-hour analysis because this was not requested by the ED. However, the ED did not specify whether the Applicant should conduct a peak-hour analysis or a 24-hour analysis.¹² Furthermore the TCEQ staff member who reviewed the traffic information admitted that he was not an expert on traffic analysis or roadway design.¹³

C. Facility Generated Traffic

The study also does not reasonably predict the traffic generated by the proposed facility. Mr. Jahn relied upon traffic volume estimates made by Mr. Sloan. However, Mr Sloan offered unreliable estimates based on no experience.

Mr Sloan was put forward as Republic Waste's representative, and the person responsible for supplying estimates on the number of vehicles that would be entering and exiting the proposed facility.¹⁴ However, Mr. Sloan has never had any role in accepting waste at a waste transfer station. Nor has he ever had a role in measuring waste acceptance rates or conducted a traffic count. He also has no formal training in traffic issues and possesses no licenses from the TCEQ.¹⁵

In estimating the number of small vehicles that would access the facility, Mr. Sloan had no supporting data and admits that his numbers are just an estimate.¹⁶ He could account for the number of commercial vehicles from the Duncan Waste facility that would access the site, but not vehicles from other companies that may access the site. He estimated these numbers, but had no way to know how accurate these estimates were.¹⁷

The Applicant has not met its burden of proof to show that it would comply with TCEQ rules governing traffic surrounding the proposed facility. The traffic study

¹² T at 427.

¹³ Ex. W-17 at 14.

¹⁴ T at 285.

¹⁵ T at 296.

¹⁶ T at 312-314.

¹⁷ T at 332-334.

submitted by the Applicant is inadequate to meet the requirements of 30 TAC § 330.61(i). Much of the data is based on estimates or absent, painting an incomplete picture of the proposed facility's impact on current and future traffic in the area. Furthermore, the Walsh Aligned Parties presented evidence showing that Nu Energy Road is inadequate to support the heavy truck traffic that would be generated by this proposed facility.

The ALJ's analysis of this issue ignores arguments raised by protestants and OPIC. The Applicant's Evidence on this issue is scant and unreliable, while the Walsh Aligned Parties presented evidence from several credible witnesses.

The Applicant's failure to meet its burden of proof on traffic issues and the Protestants' uncontroverted evidence showing that the surrounding roads are not equipped to handle the increase in heavy vehicle traffic. Therefore this permit should be denied.

III. Sanitation (water supply and wastewater disposal)

OPIC excepts to Findings of Fact Nos. 197.B, C and D, and Conclusions of Law Nos. 17.B, C, and D. OPIC asks the Commission to reject these procedurally unworkable findings and conclusions and instead deny the permit. The ALJ correctly states the ED's policy that applicants for TCEQ permits may need other authorizations from local agencies, and that those applicants do not have to apply for these authorizations before receiving a permit from TCEQ. However, the ALJ disregards inconsistencies between the local authorizations at issue here and the TCEQ application as reviewed by the ED and incorporated into the Draft Permit.

Looking at the information in the application, the Applicant has not shown that it can handle wastewater generated on-site in a manner that will not violate TCEQ rules. Currently, the application contemplates expanding the wastewater treatment system on adjacent property, the Duncan Disposal facility, as opposed to treating the wastewater on-site.¹⁸ This violates TCEQ rules prohibiting cluster systems.¹⁹ A cluster system is

¹⁸ Ex. A-78 at 15-1-1.

¹⁹ 30 TAC § 285.6.

defined as a sewage collection, treatment, and disposal system designed to serve two or more sewage-generating units on separate legal tracts of land where the total combined flow does not exceed 5,000 gpd.²⁰ Nor does the application show how it will provide enough potable water to supply the needs of the proposed facility.

Despite this, the ALJ finds that “there is no deficiency in Republic’s MSW permit application...relating to water supply or wastewater.”²¹ But in an apparent contradiction of this finding, the Proposed Order would require the Applicant to amend the application’s provisions on wastewater and water supply.²² If there is no deficiency, there should be no need to amend the application.

The crux of the problem is that the application in its current form is inconsistent with the Amended Water Service Agreement with the City of Willow Park, as well as with the OSSF permit issued by Parker County. The ALJ’s opinion rests on these authorizations. However, these authorizations are not consistent with the information in the application, as reviewed by the ED and incorporated into the Draft Permit.

The Applicant could not both comply with the TCEQ draft permit and these local permits. They proposed different methods for dealing with water and wastewater. These different methods would require different infrastructure and potentially different facility layouts. The ALJ recognized this, but instead of denying the permit, he has directed the applicant to amend the application and Draft Permit to conform to these non-TCEQ authorizations.

OPIC respectfully disagrees with the proposed remedy for the problem of inconsistent authorizations. The TCEQ does not look into these ancillary permits when reviewing an MSW permit application because the MSW application is reviewed by the ED. Any authorizations relying on the TCEQ permit specs are presumably consistent with the TCEQ rules, as they rely on a permit that complies with TCEQ rules. What the ALJ proposes, though, would have the Applicant making major amendments to a TCEQ permit, based on authorizations that have not been reviewed by the ED’s technical staff. OPIC cannot support this approach.

²⁰ 30 TAC § 285.2(10).

²¹ See Proposal for Decision at 27.

²² See Proposed Order at 25-26, and 32-33.

First, the changes necessary to make the TCEQ application consistent with the Parker County OSSF permit may be extensive. These changes could involve structural changes to the proposed facility, supplementing maps in the application, and potential changes to the location of underground piping. These are the types of changes that should be subject to a technical review by the Executive Director. Without a technical review of these and other possible changes, there is no way to ensure that the amended application would meet TCEQ rules.

Second, these changes may, at a minimum, require the Applicant to reissue notice and provide for comment on the changes, as the changes could amount to a major amendment. Major amendments include changes in proposed waste disposal methods and changes that would require extensive technical review. 30 TAC § 281.23(b)(1). This is especially problematic considering that the ALJ has also proposed that the Recycling Center be removed from the application and the Draft Permit as well. All of these changes would most likely constitute a major amendment to the application.²³

Third, these proceedings were abated for several months so that the Applicant could find a way to manage wastewater and supply freshwater without violating TCEQ's rules. However, at the end of the abatement period, the Applicant failed to amend its application and after further delay, was prohibited by the ALJ from any further amendment. It is fundamentally unfair for the ALJ, after the contested case hearing process is complete, to order the Applicant to make the same amendments to the application that were previously foreclosed by the same ALJ. At the hearing, after the Applicant failed to apply for an amendment with the ED.

Fourth, the Applicant presented evidence showing that it had applied for an on-site-sewage facility (OSSF) permit with Parker County during the hearing on the merits but the protesting parties were given little opportunity to review the contents of this application. It was not part of the Applicant's prefiled testimony, OPIC did not receive a copy of it until the hearing on the merits had already commenced, and the Parker

²³ There are two types of permit amendments; major and minor. A major amendment is an amendment that changes a substantive term, provision, requirement, or a limiting parameter of a permit. A minor amendment is an amendment to improve or maintain the permitted quality or method of disposal of waste. A minor amendment includes any other change to a permit issued under this chapter that will not cause or relax a standard or criterion which may result in a potential deterioration of quality of water in the state. 30 TAC § 305.62(c).

County OSSF application itself was not admitted into the record until very late in hearing. The actual authorization from Parker County was not admitted into the record until after all parties had submitted closing arguments. This late introduction foreclosed meaningful discovery and cross examination. If these changes are further not subject to a technical review, there is no assurance that the final permit would comply with TCEQ rules.

The Applicant's attempt to bolster a flawed application by going to Parker County to seek authorization for an OSSF substantially different from the TCEQ application shows the material flaws with this application. Republic can either comply with the OSSF permit granted by Parker County, or comply with the specs in the TCEQ application, which would be incorporated as part of the TCEQ permit. It cannot comply with both. OPIC cannot agree with the ALJ's attempt to harmonize these and other²⁴ inconsistencies through what would amount to a major amendment to the permit after the contested case hearing has been concluded. TCEQ rules state that major amendments to permit applications after the draft permit has been issued require a new notice and comment period.²⁵ There is also a right to a contested case hearing on major permit amendments. Therefore, the only recourse is to begin the application and hearing process anew, or deny Republic's application.

IV. Site Operating Plan

A. Recycling Facility

The ALJ finds that the current configuration of on-site road access is a public safety hazard. Based on this finding, the ALJ recommends that the citizens recycling center be removed from the Brazos Transfer Station Plan. He also proposes that this public health hazard could be addressed through a minor permit amendment to remove the Recycling Facility. OPIC supports the ALJ's finding that the Site Operating Plan

²⁴ See FoF No. 197 and CoL No. 17.

²⁵ 30 TAC § 281.23.

would create hazards to citizens desiring to access the facility.²⁶ Although OPIC supports this finding, OPIC disagrees with the ALJ's recommendation for addressing this deficiency. For reasons listed in Section IV, this recommendation would violate several TCEQ rules and essentially require that the applicant begin the permitting process anew. The proper outcome, in light of this and other deficiencies, would be to deny the permit.

OPIC also notes that the Proposed Order contains no findings, conclusions or ordering provisions on this topic.

Based on the record developed at the hearing, it simply cannot be determined whether removing the recycling center would constitute a minor permit amendment. There are two types of permit amendments; major and minor. A major amendment is an amendment that changes a substantive term, provision, requirement, or a limiting parameter of a permit. A minor amendment is an amendment to improve or maintain the permitted quality or method of disposal of waste. A minor amendment includes any other change to a permit issued under this chapter that will not cause or relax a standard or criterion which may result in a potential deterioration of quality of water in the state. 30 TAC § 305.62(c).

There may be other changes to the application that would have to be made if the recycling center were removed. For example, roads may have to be relocated and the entrance may be moved. And for every change made to the proposed facility, the application would have to be changed to reflect this. These would not be small changes. These would most likely change a substantive term, or provision of the portion of the application incorporated into the Draft Permit. In addition, by eliminating the recycling facility, the amendment would change the proposed waste disposal methods, a change that would require changes to provisions in the Draft Permit. Therefore removing the recycling center from the proposed facility designs could very well constitute a major amendment rather than a minor amendment.

As this is a major amendment, it would require that Republic renounce the application. 30 TAC § 281.23 prohibits major amendments to applications after the chief clerk has issued notice of the application and draft permit, unless new notice is

²⁶ Proposal for Decision at 33.

issued which includes a description of the proposed amendments to the application. Affected persons would also have a right to a hearing on the major amendment. Therefore if the ALJ's recommended changes to the application are adopted by the Commission, TCEQ rules regarding notice and right to a hearing would require that the permitting process essentially begin anew.

The only administrative remedy for the Applicant's failure to ensure the safety of the public while visiting the facility is to either amend the application through the ED review pursuant proper TCEQ procedures, including providing notice and comment periods, as well as the opportunity to request a hearing on the amendment application, or deny the application.

V. Conclusion

The Commission has authority to deny a permit for issues relating to public health, air or water pollution, or land use.²⁷ This permit should be denied because the Applicant has not shown that it can comply with TCEQ rules designed to prevent water pollution and protect the public.

The ALJ has submitted a Proposed Order requiring the Applicant to fundamentally alter the application and requiring these alterations to be automatically incorporated into the permit. The information that would be included in the application has not been scrutinized through the contested case hearing process, nor would it be reviewed for technical compliance by the ED.

The ALJ has acknowledged that the application and draft permit are insufficient. Therefore the proper procedural step is to deny the application. The changes proposed by the ALJ likely would constitute a major amendment to the application and to the draft permit. A major amendment to an application or a permit would trigger public notice requirements and afford the right to a hearing. This would essentially require that the Applicant start the permitting process over.

OPIC cannot find that there is any way to address the deficiencies in the current application, absent the submittal of a major amendment to the permit application. The

²⁷ THSC § 361.089.

current application and draft permit do not comply with TCEQ rules and must be denied.

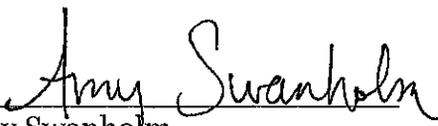
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2011 the original and copies of the Office of Public Interest Counsel's Exceptions to the Proposal for Decision was filed with the State Office of Administrative Hearings and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.


Amy Swanholm

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TCEQ DOCKET NO. 2009-2058-MSW

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