MEMORANDUM

To: **Lynn Chambers, P.E.**
Mississippi Department of
Environmental Quality

From: NCL Waste, LLC

Re: **Public Hearing regarding NCL Waste, LLC**
December 15, 2011, Comments

Date: December 15, 2011

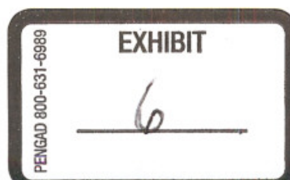
NCL Waste, LLC (NCL) hereby submits its objections to the process of the Mississippi Department of Environmental Quality (MDEQ) with respect to NCL's proposed landfill to be made a part of the record of the public hearing scheduled for December 15, 2011. Please note that these objections address only the setback issue.

1. Introduction

The Mississippi Commission on Environmental Quality (Commission) issued Order No. 5058-05 on August 25, 2005, approving the amendment of the Madison County Solid Waste Management Plan to include the North County Line Landfill. The Mississippi Supreme Court affirmed that Order on April 14, 2011. The Order contains a request of the Commission that the Permit Board "review and consider an increase in the setback distance between the [NCL] landfill disposal area and the adjacent property lines to greater than the minimum requirement of 500 feet . . ." Note that the Commission's request is directed to the Permit Board, not to MDEQ Staff or NCL. Please also note that MDEQ's evaluation of NCL's applications based on a 250 foot setback would necessarily address any issue based on a 500 foot setback. In other words, it would be appropriate for MDEQ to complete their review of NCL's applications based on a 250 foot setback and make whatever recommendation Staff deemed appropriate to the Permit Board for its review and consideration.

2. Summary of the Conflict and Solution

It is currently MDEQ Staff's stated position that NCL's proposal for a 250 foot setback is inconsistent with Commission Order No. 5058-05. Consequently, MDEQ has requested that NCL submit amended plans and specifications which provide for a setback distance between the proposed NCL landfill disposal area and the adjacent property lines in accordance with the Department's interpretation of the Commission's Order. Note that the Commission's Order references 500 feet, however, the applicable regulation is clear that 250 feet is the required setback where adequate onsite screening restricts the offsite view of the landfill, as exists at NCL's proposed site. *See* Exhibits submitted by NCL. Indeed, the fact of adequate screening



cannot be rationally disputed.[1] In any event, as explained in detail below, the Permit Board, *not the Commission*, has exclusive original jurisdiction over permit issuance, including determinations regarding appropriate setbacks and adequacy of screening.

MDEQ further contends that if NCL refuses to submit amended plans and specifications consistent with the Department's interpretation of the Commission's Order, MDEQ will recommend that the Permit Board deny NCL's proposed permits. MDEQ Staff has scheduled a public hearing for December 15, 2011, related to the proposed solid waste management permit application submitted by NCL which includes a 250-foot buffer zone between the landfill disposal area and the property lines. Thereafter, MDEQ has indicated it will recommend denial of the proposed solid waste permit application to the Permit Board. The fact that MDEQ Staff is proceeding with only the solid waste permit application and/or the setback issue is contrary to MDEQ's previously stated position that it would not "decouple" consideration of the water quality certification from the other permit applications of NCL.

MDEQ Staff's interpretation of this request of the Commission to the Permit Board has created an unavoidable conflict for the Department Staff between the Commission and the Permit Board. The Commission staff's apparent attempt to force NCL to modify its application, before the Permit Board even considers it, is a usurpation of the power of the Permit Board to assess and consider whether the set-back modification is required as requested by the Commission in its order. The Permit Board is perfectly capable of honoring the Commission's request embodied in its order approving the Solid Waste Management plan. Should it determine that a different set back is required, it may condition approval upon such modifications as it may lawfully require. *See* Miss. Code Ann. § 49-17-29.

This conflict has resulted in unequal treatment of NCL with respect to MDEQ Staff's review and evaluation of NCL's applications for the landfill. The conflict can be avoided by a request by the Permit Board that the Attorney General appoint independent counsel to advise it with respect to the setback issue.

This memorandum begins with a discussion of the authority of the Permit Board and the Commission. It also addresses correspondence from MDEQ Staff which highlight the conflict referenced above. The memorandum concludes with a recommendation that the Permit Board request the appointment of independent counsel from the Attorney General to represent it with respect to the setback issue.

3. Authority of the Commission and the Permit Board

The Commission is authorized by statute, among other powers, to formulate the policy of the MDEQ and to adopt, modify, repeal, promulgate, and enforce rules and regulations within its jurisdiction. *See* Miss. Code Ann. § 49-2-9.

The Permit Board is the exclusive administrative body to make decisions on permit issuance, reissuance, denial, modification or revocation. *See* Miss. Code Ann. § 49-17-29.

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[1] MDEQ Staff's recent claims that the NCL landfill site does not have adequate screening is further evidence of the conflict between Staff and the Permit Board in this matter. *See* Exhibit E.

Note that applicable statutes provide that the Executive Director and Staff of the MDEQ serve both the Commission and the Permit Board.

Miss. Code Ann. § 49-17-7 provides that the Commission shall exercise the duties and responsibilities of the Mississippi Air and Water Pollution Control Commission through the Mississippi Department of Environmental Quality.

Miss. Code Ann. § 49-17-29 provides that the Executive Director of the Department of Environmental Quality shall also be the Executive Director of the Permit Board and shall have available to him, as Executive Director of the Permit Board, all resources and personnel otherwise available to him as executive director of the department.

The Commission has recognized in a previous Order that the Permit Board has "exclusive original jurisdiction over the issuance, modification, revocation and transfer of applications for permits for nonhazardous solid waste management facilities, which jurisdiction includes the site evaluation process for the preferred landfill site [which includes setbacks]." *See* Commission Order No. 2495-93 issued on March 30, 1993, attached hereto as Exhibit "A". That Order further found that the Commission was without jurisdiction to consider challenges to landfill siting evaluation factors. NCL submits that the Commission to this day is without jurisdiction to consider issues concerning landfill setbacks. Hence, the "request" of the Commission is merely a request, nothing more, and the process should move forward in that respect.

The conflict described above is created by the MDEQ Staff and Executive Director assisting both the Permit Board and the Commission with respect to the interpretation of the Commission's request to the Permit Board regarding the setback for the NCL landfill. The decision regarding setbacks is for the Permit Board, not the Commission or the MDEQ Staff on the front end.

4. Additional Evidence of the Conflict

Additional facts highlight the conflict between the Permit Board and the Commission. These facts are presented in chronological order.

As explained above, MDEQ Staff previously refused to allow the "decoupled review and decision process" for the water quality certification from the solid waste permitting process with respect to NCL. *See* MDEQ letter from Jerry Cain to Jim McNaughton dated September 17, 2009, attached hereto as Exhibit "B". That letter further provides that the MDEQ Staff will recommend that the Permit Board review and consider the recommendation of the Commission concerning the setback issue.

NCL submits that MDEQ Staff's position changed between 2009 and 2011. MDEQ letter from Roy Furrh to Michael Bilberry dated May 20, 2011, attached hereto as Exhibit "C", provides that "since the Commission has requested that the Permit Board review and consider an increase in the setback distance between the proposed NCL landfill disposal area and the adjacent property lines to greater than the minimum requirement of 500 feet, MDEQ, as staff of the Commission pursuant to Miss. Code Ann. §49-17-7, cannot process the plans and specifications submitted by NCL which only provide for the reduced 250-foot setback. MDEQ believes that NCL's proposal

for a reduced setback distance is inconsistent with Commission Order No. 5058-05. Consequently, MDEQ requests that NCL submit amended plans and specifications which provide for a setback distance between the proposed NCL landfill disposal area and the adjacent property lines consistent with [the Department's interpretation of] the Commission's order. If NCL refuses to submit amended plans and specifications consistent [with the Department's interpretation of] the Commission's Order, MDEQ will recommend that the Permit Board deny NCL's proposed permits."

In response to MDEQ's May 20, 2011, letter NCL met with MDEQ Staff, including Trudy Fisher, on three separate occasions in an attempt to address the setback issue. NCL submitted to MDEQ Staff during those meetings a modified plan which proposes a 500.5 foot buffer along a section of North County Line Road across from several residential dwellings. NCL has never received a formal response to that modified plan, a copy of which is attached hereto as Exhibit "D."

Next, an MDEQ letter from Roy Furrh to Betty Ruth Fox dated November 10, 2011, attached hereto as Exhibit "E", provides that since NCL has submitted "applications for environmental permits that are inconsistent with the Commission's position and the MDEQ has not found there is adequate proposed screening to reduce the setback of at least 500 feet, MDEQ intends to recommend denial of the application for a solid waste management permit" to the Permit Board. The letter further provides that "environmental justice and need cannot be adequately evaluated by MDEQ until the Permit Board makes a decision on whether to approve the Commission's request and MDEQ's recommendation for a greater than 500 foot setback distance for the NCL landfill. Therefore, MDEQ intends to move forward to the Permit Board and recommend denial of the solid waste management permit application, since the NCL permit application fails to comply with the requested setback distance."

MDEQ letter from Roy Furrh to Betty Ruth Fox dated December 7, 2011, attached hereto as Exhibit "F", provides that "MDEQ's position is to recommend denial of the proposed solid waste management permit application to the Permit Board due to the proposed 250-foot buffer zone . . . . MDEQ will consider the public comment before making a final recommendation to the Permit Board regarding NCL's proposed solid waste management permit application." NCL submits it is clear MDEQ Staff has made its decision to recommend denial *before* any public hearing.

5. MDEQ's Process Will Result in the Gross Misuse of Resources

The manner in which MDEQ Staff is proceeding to review NCL's applications is a gross misuse of the resources of the MDEQ Staff, the Permit Board and potentially the judiciary. As noted above, MDEQ Staff has scheduled a public hearing for December 15, 2011, related to "the proposed solid waste management permit application submitted by NCL Waste, LLC which includes a 250-foot buffer zone between the landfill disposal area and the property lines." Thereafter, MDEQ has indicated it will recommend denial of the proposed solid waste permit application to the Permit Board. If MDEQ Staff proceeds in this manner it is likely that an interested party may appeal the decision of the Permit Board on one application and/or issue which could potentially take up to two or more years to reach a final nonappealable decision. It is a gross misuse of administrative and/or judicial resources at all levels to proceed with

consideration of only one issue and/or permit application at a time.

Furthermore, at such time as the remaining permit applications are reviewed, another public hearing will be required, along with another presentation to the Permit Board and another appeal that could take up to two or more years. This "decoupled process" is the precise process that MDEQ refused to allow in 2009 with respect to consideration of the water quality certification and NCL's other permit applications. *See* Exhibit "B".

NCL submits that the inconsistencies described above are a direct result of the conflict created by MDEQ Staff in their attempt to serve both the Permit Board and the Commission.

6. MDEQ's Position Conflicts with its General Counsel's Advice

MDEQ Staff's position directly conflicts with the advice of MDEQ's Legal Counsel provided to Counsel for NCL that the Commission's request had no binding effect on the Permit Board and that the setback issue was within the sole jurisdiction of the Permit Board and not the Commission. *See* Affidavit of Eric Hamer attached hereto as Exhibit "G".

7. MDEQ's Position violates the Administrative Procedures Act

MDEQ Staff are interpreting the Commission's request for the Permit Board to review and consider a setback greater than 500 feet as a regulation and not as a mere request in violation of the Administrative Procedures Act and statutory procedures applicable to the Commission's adoption of rules and regulations. The Administrative Procedures Act insures the public has notice and an opportunity to comment on regulations before their adoption and also insures the equal application of regulations on regulated parties.

Applicable law requires that prior to the adoption, amendment or repeal of rules and regulations, the Commission shall conduct a public hearing or hearings thereon after public notice. Such notice shall be given by publication once a week for three (3) successive weeks in a newspaper having a general circulation throughout the state. The notice shall contain a description of the proposed regulation and the time, date and place of the hearing. The statute further requires that the adoption, amendment or repeal of any rule or regulation shall be governed by the "Mississippi Administrative Procedures Law." *See* Miss. Code Ann. §49-17-25.

8. MDEQ's Position conflicts with Its Core Values

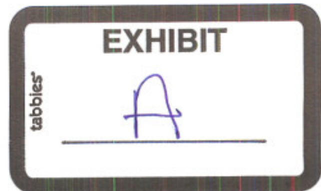
Finally, as a result of the apparent conflict evidenced above, MDEQ is proceeding in a manner which is contrary to its Core Values, to "vigilantly resist bias and prejudice; respond promptly, courteously and as completely as possible to every question, complaint, or request for assistance; and be accountable, individually and collectively, for effective, efficient management and use of the resources provided to accomplish [MDEQ's] mission."

9. Conclusion

NCL submits that the conflict can be addressed by a request to the Attorney General to provide

separate counsel to the Permit Board, which is also authorized by statute. MDEQ Staff serves as staff and legal counsel for both the Permit Board and the Commission. In this situation, in order to avoid any conflict of interest, the Permit Board should request that independent counsel be appointed to advise it on the setback issue. A similar situation occurred in the appeal to the Chancery Court of Hinds County regarding *In re: Hunter's Construction*. In that case, Special Assistant Attorney General Roger Googe of the Mississippi Attorney General's Office represented the Permit Board due to the conflict between MDEQ and the Permit Board. *See In re: Hunter's Construction*, Findings of Fact and Conclusions of Law (Miss. Env. Qual. Permit Bd. Jan. 14, 2003) attached hereto as Exhibit "H" and incorporated herein by reference.

Miss. Code Ann. §49-2-21 provides that the Attorney General shall be counsel and attorney for the Commission and the Department of Environmental Quality and shall provide such legal services as may be requested from time to time, without cost.



BEFORE THE COMMISSION ON ENVIRONMENTAL QUALITY
STATE OF MISSISSIPPI

IN THE MATTER OF:

THE WRITTEN REQUEST BY M. L. WOOD, SPOKESMAN FOR THE PINE GROVE COMMUNITY, JONES COUNTY, MISSISSIPPI FOR A FORMAL HEARING REGARDING ORDER NO. 2368-92, AS ISSUED NOVEMBER 4, 1992

ORDER NO. 2495 93

O R D E R

THIS MATTER came before the Mississippi Commission on Environmental Quality (Commission) on Thursday, February 25, 1993, at the request of the Pine Grove Community, Mr. M. L. Wood, spokesman, for a hearing pursuant to Section 49-17-41 of the Mississippi Code Annotated on the issuance of Commission Order No. 2368-92 to the Pine Belt Regional Solid Waste Management Authority (Authority). The Commission, having reviewed the prefiled direct testimony and documentary evidence submitted by Mr. William Barnett for the Department of Environmental Quality (Department), Mr. Randall Meador, P.E., and Mr. Larry Harris for the Authority, and Mr. M. L. Wood for Pine Grove; having heard the cross-examination of witnesses and arguments of counsel and being fully advised in law and fact, finds as follows:

1. The Commission has jurisdiction of the parties and subject matter pursuant to Sections 49-17-17, 49-17-41 and 17-17-227 of the Mississippi Code Annotated (Supp. 1992).

2. On July 8, 1992, the Authority submitted its Nonhazardous Solid Waste Management Plan (Plan) to the Department as required by the Nonhazardous Solid Waste Planning Act of 1991 codified at

Sections 17-17-201 through 17-17-235 of the Mississippi Code Annotated. The Plan covers the counties of Covington, Jones, Lamar, and Perry, the incorporated areas located therein and the cities of Hattiesburg and Petal.

3. Upon receipt of the Plan, DEQ staff began reviewing the Plan for compliance with Section 17-17-227 of the Mississippi Code Annotated (Supp. 1992) and the Evaluation Criteria adopted pursuant to Section 17-17-225 of the Mississippi Code Annotated. Based upon staff's review of the Plan and recommendation, Commission Order No. 2368-92 was issued to the Authority on November 4, 1992.

4. The Order approved that part of the Plan which proposes to construct a publicly-owned regional nonhazardous solid waste management facility, referred to herein as landfill, to dispose of household and commercial solid wastes. Separate areas at the landfill are proposed for rubbish disposal and for yard waste composting. The proposed landfill location is Sections 3, 4, 9, and 10 of Township 7 North, Range 13 West, Jones County, Mississippi near the Pine Grove Community. The Order also approved the part of the Plan which proposes a system of transfer stations at unspecified locations, but with the provision that a public hearing be held in the vicinity of each proposed transfer station once the locations are announced.

5. On November 30, 1992, Mr. Wood, on behalf of Pine Grove, requested a hearing before the Commission on the issuance of Order No. 2368-92. Mr. Wood listed nine reasons which he contended supported his request that the Commission rescind Order No. 2368-92

and its partial approval of the Plan. The Commission finds that Order No. 2368-92 was properly issued pursuant to Section 17-17-227 and the Evaluation Criteria and rejects the nine reasons presented by Mr. Wood to rescind the Order. The Commission findings as to each complaint are stated below.

A. "The waste stream data includes Forrest County, MS, which is not a member of the Pine Belt Regional Solid Waste Management Authority, therefore the data does not reflect a true estimation of the data for the Pine Belt Master Plan."

The Commission finds that, based upon the substantial evidence, while Forrest County is statistically present in the Plan but is not a participating member of the Plan, the inclusion of Forrest County does not significantly alter the overall recommendations and conclusions of the Plan.

B. "The waste reduction estimate of 28.9%, page AD-2 Addendum One of the Pine Belt Master Plan is not a true reflection of an achievable goal of waste minimization as required by the MS Code of 1972 (Revised 1992)."

The Commission finds that the waste minimization portion of the Plan was not approved in Order No. 2368-92 and, thus, there is no final action of the Department for review by the Commission. Accordingly, the Commission did not consider at the instant hearing any evidence on the waste minimization portion of the Plan.

C. "The site selection process as stated in the Pine Belt Master Plan and statements of the Authority's staff do not reflect the facts used in the decision making process to select the Pine Grove Community site in Jones County, MS."

The Commission finds that Section 17-17-227 does not require the inclusion of the method or process by which the Authority selects a preferred site for the landfill. Thus, allegations that the Authority did not follow the process set forth in the Plan are not a basis by which the Commission may rescind Order No. 2368-92. Section 17-17-227(2) states that a plan "may" include the preferred site for a landfill and the factors which provided the basis for identifying the preferred site. The Department, however, applying formally adopted Commission rules, required the Authority to include in the Plan the identification of the preferred site and the factors providing the basis for identifying the preferred site. The Commission finds, based upon the substantial evidence, that the Authority included the factors which provided the basis for selection of the preferred site and the selection of the preferred site is sufficient for the purpose of establishing the manner in which the Authority will manage its solid waste.

The Commission further finds that pursuant to Section 49-17-29 of the Mississippi Code Annotated the Mississippi Environmental Quality Permit Board has exclusive original jurisdiction over the issuance, modification, revocation and transfer of applications for permits for nonhazardous solid waste management facilities, which jurisdiction includes the site evaluation process for the preferred landfill site applying Section 17-17-229(2) of the Mississippi Code Annotated and regulations promulgated pursuant thereto. The Commission is without jurisdiction to consider the challenges of Pine Grove to the extent that Pine Grove challenges the preferred site of the landfill using the factors listed in Section 17-17-229(2) and the regulations promulgated pursuant thereto.

D. "The cost figures of the construction and annual operation of the landfill site do not reflect the debt service cost to construct and operate the landfill."

"The cost figures for engineering and permitting of the proposed landfill site do not reflect any cost estimates for future lateral expansion which will be required."

"The local Master Plan does not make a clear, concise estimate of the cost to operate a Subtitle D nonhazardous solid waste landfill."

Section 17-17-227(1)(g) requires that the Plan include "an estimation of development, construction, operational, closure and post-closure costs, including a proposed method for financing such costs." Order No. 2368-92 approved that part of the Plan that pertains to the development costs, construction costs, operating costs, closure costs and post-closure costs of the proposed landfill. The Commission finds, based upon the substantial evidence, that the estimated costs included in the Plan satisfy the requirement of Section 17-17-227(1)(g).

E. "The selection of transfer station sites will be premature in that the acquisition of the land and a permit to operate at that site has not yet been accomplished, and a public statement concerning yard composting at the transfer station sites is not in compliance with Order 2368-92."

The Commission finds, based upon the substantial evidence, it is reasonable and necessary to begin the process of selecting the transfer station sites regardless of the final approved landfill site in order to fulfill a reasonable implementation schedule. As a condition of Order 2368-92, the final selection of the transfer

station sites must be made following a public hearing regarding each site for a transfer station.

F. "The local Master Plan does not state the financial liability to the public that it is designed to serve."

The Commission finds that the Planning Act, and particularly Section 17-17-227, does not require the Plan to include potential liability for litigation, fines or catastrophic occurrences. Thus, the Commission finds that, based upon the substantial evidence, failure to state the "financial liability to the public" is not grounds to rescind Order No. 2368-92.

G. "The Pine Belt Regional Solid Waste Management Authority is not in compliance with Public Notice in making their information of the local Master Plan available to the public."

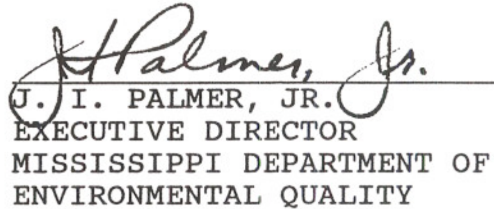
Section 17-17-227(5) sets forth the requirements for publication and public notice of the plans. The Commission finds that the Planning Act, and particularly Section 17-17-227, envisions amendments to plans during and following the comment period. The Commission further finds that although amendments were made to the Plan, the amendments, except for stating the preferred site of the landfill, did not significantly alter the overall recommendations and conclusions of the Plan. The Authority held public hearings on the preferred site for the landfill which sufficiently advised the public of the location of the landfill. The Commission finds that, based upon the substantial evidence, the Authority complied with Section 17-17-227(5) of the Mississippi Code Annotated and that the Plan was available to the public.

PREMISES CONSIDERED, the Commission finds that Order No. 2368-92 was properly issued and is, accordingly, upheld and affirmed.

This is a final Order appealable pursuant to Section 49-17-41 of the Mississippi Code Annotated.

SO ORDERED, this the 30th day of March, 1993.

MISSISSIPPI COMMISSION ON
ENVIRONMENTAL QUALITY

BY: 

J. I. PALMER, JR.
EXECUTIVE DIRECTOR
MISSISSIPPI DEPARTMENT OF
ENVIRONMENTAL QUALITY

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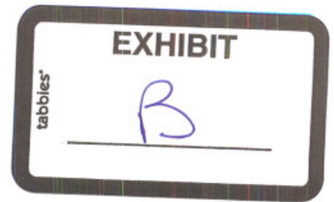


STATE OF MISSISSIPPI
HALEY BARBOUR
GOVERNOR
MISSISSIPPI DEPARTMENT OF ENVIRONMENTAL QUALITY
TRUDY D. FISHER, EXECUTIVE DIRECTOR

September 17, 2009

Mr. Jim McNaughton
Environmental Business Services
5016 West Concord Road
Brentwood, Tennessee 37027

Dear Mr. McNaughton:

Re: NCL Waste LLC, NCL Waste LLC North County Line Landfill
Madison County
COE No. TVGMVK2009107
WQC No. WQC2009033

During a meeting with the staff of Department of Environmental Quality on August 18, 2009, you requested the Department consider allowing the review and application decision for the Section 401 Water Quality Certification (WQC) precede the review of the required Solid Waste Permits. The Department has carefully considered this request and the issues that must be resolved to complete the Section 401 WQC review. It is the position of the Department to not allow the decoupled review and the decision process for the Section 401 WQC from the Solid Waste permitting process.

Furthermore, please be aware that the Department will recommend that the Mississippi Environmental Quality Permit Board review and consider the recommendations of the Mississippi Commission on Environmental Quality. According to the Commission Order No. 4944 05, the recommendations are as follows;

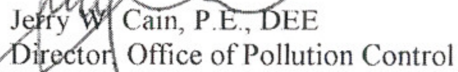
1. An increase of the setback distance between the landfill disposal area and the adjacent property lines to greater than the minimum requirement of 500 feet; and
2. An additional operating condition which would ensure that the operator of the landfill routinely removes and clears litter resulting from waste transportation activities to or from the facility along the North County Line Road right-of-way adjacent to the landfill property and leading to the facility entrance.

40389 WQC20090001

OFFICE OF POLLUTION CONTROL
POST OFFICE BOX 2261 • JACKSON, MISSISSIPPI 39225-2261 • TEL: (601) 961-5171 • FAX: (601) 354-6612 • www.deq.state.ms.us
AN EQUAL OPPORTUNITY EMPLOYER

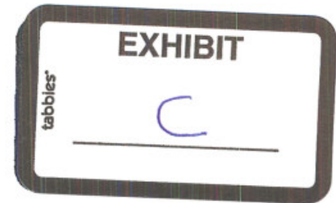
The Department looks forward to your continued cooperation in this review process. Should you have any questions regarding this matter, please contact Mr. Harry Wilson with the Environmental Permits Division at 601-961-5073.

Sincerely,



Jerry W. Cain, P.E., DEE
Director, Office of Pollution Control

cc: Mr. Jeffery L. Allen, Ecosystems
Ms. Betty Ruth Fox, Esq.
Mr. Roy Furrh, Esq.
Mr. Billy Warden, MDEQ Environmental Permits Division
Ms. Florance Watson, MDEQ Environmental Permits Division



STATE OF MISSISSIPPI
HALEY BARBOUR
GOVERNOR
MISSISSIPPI DEPARTMENT OF ENVIRONMENTAL QUALITY
TRUDY D. FISHER, EXECUTIVE DIRECTOR

May 20, 2011

Mr. Michael Bilberry
NCL Waste, LLC
P.O. Box 821429
Houston, Texas 77282

Re: NCL Waste, LLC; North County Line Landfill;
Madison County, MS

Dear Mr. Bilberry :

The staff of the Mississippi Department of Environmental Quality ("MDEQ") has been involved in the review of environmental permit applications from your company for a municipal solid waste landfill proposed for the North County Line Road area of Madison County. As a part of this review, we have had several discussions with representatives of NCL Waste, LLC ("NCL") related to the buffer zone or setback distance between the proposed NCL landfill disposal area and the adjacent property lines. As you are aware, NCL has submitted proposed plans and specifications to MDEQ as part of its solid waste permit application which provides for a reduced setback distance of 250-feet between the landfill disposal area and the adjacent property lines. The permit applications for the proposed landfill will ultimately be considered by the Mississippi Environmental Quality Permit Board ("Permit Board").

The Madison County Board of Supervisors previously received approval from the Mississippi Commission on Environmental Quality in 2004 for an Amendment to the Madison County Solid Waste Management Plan which included the addition of the NCL proposed landfill. Following an evidentiary hearing in 2005, the Mississippi Commission on Environmental Quality ("Commission") approved the requested amendment to the Madison County Solid Waste Management Plan through Commission Order No. 5058 05 dated August 25, 2005. A copy of the Order is attached to this correspondence. On page 22 of the Order, the Commission expressly requested that the Permit Board review and consider an increase in the setback distance between the [proposed NCL] landfill disposal area and the adjacent property lines to greater than the minimum requirement of 500 feet specified in the Mississippi Nonhazardous Solid Waste Management Regulations ("SW-2").

LEGAL DIVISION
POST OFFICE BOX 2261 • JACKSON, MISSISSIPPI 39225-2261 • TEL: (601) 961-5171 • FAX: (601) 961-5349 • www.deq.state.ms.us
AN EQUAL OPPORTUNITY EMPLOYER

On appeal, the Chancery Court of the First Judicial District of Hinds County affirmed the Commission's decision in an Order dated February 25, 2010. A copy of the Chancery Court's Order is included with this correspondence. In paragraph 6 of the Order, the Chancery Court reiterated in part that "[t]he Commission further requested that the Permit Board consider a greater setback distance ..." . On April 14, 2011, the Supreme Court of Mississippi affirmed the Chancery Court order.

Since the Commission has requested that the Permit Board review and consider an increase in the setback distance between the proposed NCL landfill disposal area and the adjacent property lines to greater than the minimum requirement of 500 feet, MDEQ, as staff of the Commission pursuant to Miss. Code Ann. § 49-17-7, cannot process the plans and specifications submitted by NCL which only provide for the reduced 250-foot setback. MDEQ believes that NCL's proposal for a reduced setback distance is inconsistent with Commission Order No. 5058 05. Consequently, MDEQ requests that NCL submit amended plans and specifications which provide for a setback distance between the proposed NCL landfill disposal area and the adjacent property lines consistent with the Commission's order. If NCL refuses to submit amended plans and specifications consistent with the setback distance specified in the Commission's Order, MDEQ will recommend that the Permit Board deny NCL's proposed permits.

If you have any questions related to this matter, please contact me at (601) 961-5260.

Very truly yours,

Roy Furrh
General Counsel

Enclosures

cc: Trudy Fisher
Jerry Cain
Harry Wilson
Billy Warden
Mark Williams
Jeffrey Allen, Eco-Systems, Inc.
Jim McNaughton

Current rubbish site, acreage zoned for landfill.

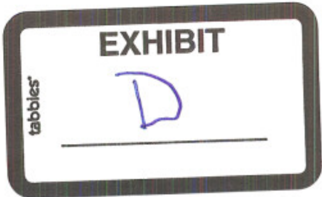
North County Line Road

4.36 acres added next to area already zoned for landfill

DRAFT

DISPOSAL AREA 93.31± ACRES

4.36± ACRES



Area of 500' Setback

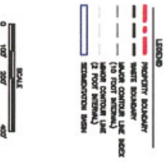
5.33± ACRES

5.33 acres subtracted

General Area where residents live

NCL WASTE, LLC

Property owned by Little Dixie Landfill



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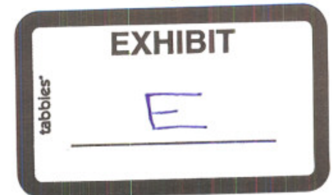

STATE OF MISSISSIPPI
HALEY BARBOUR
GOVERNOR
MISSISSIPPI DEPARTMENT OF ENVIRONMENTAL QUALITY
TRUDY D. FISHER, EXECUTIVE DIRECTOR

November 10, 2011

Betty Ruth Fox, Esq.
Watkins & Eager
P.O. Box 650
Jackson, MS 39205

Re: NCL Waste, LLC; Madison County, MS

Dear Betty Ruth:

This letter is in response to your correspondence to Trudy D. Fisher dated October 7, 2011, related to the proposed landfill project of your client, NCL Waste, LLC (NCL) and pursuant to our meetings on June 7, July 11 and August 16, 2011. Your correspondence maintains that a reduced setback distance of 250 feet proposed by NCL for the North County Line Road landfill site is appropriate and compliant with State Regulations. The correspondence also goes further to provide supporting background information on the proposed project in an attempt to support the reduced setback distance.

As you are aware, after considering all of the testimony and evidence presented in the June 30, 2005, evidentiary hearing, the Commission on Environmental Quality (Commission) affirmed its earlier decision (found in Order No. 4944 05) to request that the Permit Board consider an increase in the setback distance between the landfill disposal area and the adjacent property lines to greater than 500 feet. Commission Order No. 5058 05, which earlier this year was affirmed by the Supreme Court of Mississippi, controls and memorializes the Commission's decision in this matter to include the proposed NCL landfill in the Madison County Solid Waste Management Plan. Paragraph 24 of Commission Order No. 5058 05, a copy of which is attached, specifically indicates in part: "... The order ... directed the Department to work with the Permit Board to consider requiring a greater setback distance from the property line to the disposal area than what is required by State regulations....". On page 22 of Commission Order No. 5058 05, the Commission specified that: "IT IS FURTHER ORDERED AND ADJUDGED THAT the Commission requests that the Mississippi Environmental

LEGAL DIVISION
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Quality Permit Board review and consider an increase in the setback distance between the landfill disposal area and the adjacent property lines to greater than the minimum requirement of 500 feet …".

Furthermore, Section III.T.1.d of the Commission's Nonhazardous Solid Waste Management Regulations ("SW-2") states: "For landfills, the setback shall be at least 500 feet, except where adequate on-site screening, whether natural or artificial, will restrict the offsite view of the landfill, in which case the setback shall be no less than 250 feet." MDEQ has not found that the proposed on-site screening will adequately restrict the offsite view of the proposed new NCL landfill. As you are aware, the ultimate decision on the adequate setback for the proposed landfill rests with the Permit Board as part of the permitting process. However, the Commission in its consideration of the facts in this case has certainly weighed in with its position related to a "greater than" 500 foot buffer zone. Further regulatory support is found in Section IV. A.3. of Commission Regulation SW-2, which provides: "Notwithstanding paragraphs A.1. and A.2. of this section, the Commission or Permit Board may impose additional requirements on any landfill on a case-by-case basis in order to prevent, abate, control or correct groundwater contamination, public endangerment or otherwise determined necessary to protect human health, welfare or the environment."

Pursuant to Miss. Code Ann. section 49-17-7, MDEQ serves as staff of the Commission. Since your client, NCL Waste, LLC, has submitted applications for environmental permits that are inconsistent with the Commission's position and MDEQ has not found there is adequate proposed screening to reduce the setback of at least 500 feet, MDEQ intends to recommend denial of the application for a solid waste management permit to the Mississippi Environmental Quality Permit Board. MDEQ also does not intend to continue review of other components of the application related to the demonstration of need, the resolution of potential remaining environmental justice issues, the water quality certification and certain transportation issues, as we believe these issues cannot be resolved with the fundamental failure of the project to meet the setback distance. MDEQ does not intend to require continued investment of time and resources by MDEQ staff and by your client on these issues until a resolution is reached on the minimum setback distance.

Your October 7 correspondence suggests that environmental justice issues related to the proposed landfill were fully considered by the Commission in the Madison County Solid Waste Management Plan review. MDEQ asserts that decisions with potential environmental justice concerns need to be reviewed throughout the planning and permitting processes. Furthermore, Paragraph 20 of Commission Order 5058 05 clearly indicates in part: "… the Department stated that it considers the environmental justice review by Madison County to be merely a preliminary review, and not a final or in-depth analysis of the issue, which will be conducted by the Department as part of the

subsequent environmental permitting process." We agree that environmental justice concerns and the disparate impacts to minority communities were considered in the planning process. That consideration is evident in the Commission's decision to request an increased setback distance around the landfill to minimize impacts to the community. We do not agree that environmental justice issues were fully resolved at that point. MDEQ has been clear that a detailed environmental justice review is required in the permitting process as expressed in the Commission Order. Since NCL has refused to comply with the request of an adequate setback of greater than 500 feet, MDEQ has been unable to complete the environmental justice review as the setback issue must be decided by the Permit Board before a meaningful MDEQ environmental justice review may be undertaken and a recommendation formulated by MDEQ.

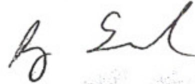
Finally, your October 7 letter suggests that the need for the NCL proposed landfill has also been fully considered by the Commission in the Madison County Solid Waste Management Plan review. Paragraph 17 of Commission Order No. 5058 05 specifies in part: ".. the Commission finds that state law requires the permit applicant [NCL Waste, LLC] to provide a demonstration of need document as part of the permitting process before the Permit Board pursuant to Miss. Code Ann. section 17-17-229 (Rev. 2003). Miss Code Ann. section 17-17-229 (1) (a)-(e) provides the elements that the permit applicant must address. Subsequent to the Commission's decision in 2005, the need law was changed by the 2006 Mississippi Legislative Session. *See Laws, 2006, ch. 587, § 2, eff from and after July 1, 2006.* The new law requires that demonstration of need be addressed in the planning process before the Commission rather than the permitting process before the Permit Board. Your client has clearly recognized that a demonstration of need was required to be provided in the permitting process and submitted a proposed demonstration of need on January 21, 2011. This demonstration of need by your client is based on a disposal area with a setback distance of 250 feet. As you have asserted on behalf of your client, the minimum required setback distance clearly affects the overall disposal capacity of the proposed NCL landfill which is a factor that is considered in formulating a recommendation by MDEQ on the need for the landfill. Consequently, MDEQ cannot fully evaluate your client's demonstration of need as submitted until the setback issue is decided by the Permit Board.

In summary, the issues you raise in your October 7 letter related to environmental justice and need cannot be adequately evaluated by MDEQ until the Permit Board makes a decision on whether to approve the Commission's request and MDEQ's recommendation for a greater than 500 foot setback distance for the NCL Waste, LLC landfill. Therefore, MDEQ intends to move forward to the Permit Board and recommend denial of the solid waste management permit application, since the NCL permit application fails to comply with the requested setback distance. Because State law requires that a public hearing be conducted regarding any permit application decision related to a municipal solid waste landfill, MDEQ will proceed with scheduling a public

hearing at 7 p.m. on Thursday, December 15, at Tougaloo College Holmes Hall Auditorium located at 500 West County Line Road, Tougaloo, MS, 39174, related to the NCL solid waste permit application. Public comments will be provided to the Permit Board for their consideration of this matter. Once the Permit Board acts on MDEQ's recommendation to deny the solid waste permit application, either NCL will need to withdraw or amend its permit application or MDEQ will continue and complete its review of the solid waste management permit application, the associated issues of need and environmental justice and the other related environmental permit applications (e.g. air, water, etc.).

If you have any questions related to this matter, please contact me at (601) 961-5260.

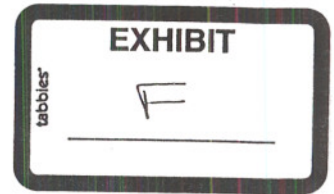
Sincerely,



Roy Furrh
General Counsel

Enclosure

cc: Trudy D. Fisher
Harry Wilson
Melissa Collier
Billy Warden
Lynn Chambers
Florance Watson
Mark Williams



STATE OF MISSISSIPPI
HALEY BARBOUR
GOVERNOR
MISSISSIPPI DEPARTMENT OF ENVIRONMENTAL QUALITY
TRUDY D. FISHER, EXECUTIVE DIRECTOR

December 7, 2011

Betty Ruth Fox, Esq.
Watkins & Eager
P.O. Box 650
Jackson, MS 39205

Re: NCL Waste, LLC; Madison County, MS

Dear Betty Ruth:

This letter is in response to your letter to me dated December 2, 2011. The Mississippi Department of Environmental Quality ("MDEQ") will consider public comment at the public hearing scheduled at 7 p.m on Thursday, December 15, 2011, at Tougaloo College, Holmes Hall Auditorium located at 500 West County Line Road, Tougaloo, Mississippi, related to the proposed solid waste management permit application submitted by NCL Waste, LLC which includes a 250-foot buffer zone between the landfill disposal area and the property lines.

MDEQ's position is to recommend denial of the proposed solid waste management permit application to the Permit Board due to the proposed 250-foot buffer zone as discussed in my letter to you dated November 10, 2011, a copy of which is enclosed. MDEQ will consider the public comment before making a final recommendation to the Permit Board regarding NCL's proposed solid waste management permit application.

If you have any further questions related to this matter, please contact me at (601) 961-5260.

Very truly yours,

Roy Furrh
General Counsel

Enclosure

Cc: Trudy D. Fisher
Harry Wilson
Melissa Collier
Billy Warden
Lynn Chambers
Florance Watson
Mark Williams

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EXHIBIT
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AFFIDAVIT

STATE OF MISSISSIPPI

COUNTY OF HINDS

PERSONALLY APPEARED BEFORE ME the undersigned authority in and for the jurisdiction aforesaid, the within named ERIC T. HAMER who, after being by me first duly sworn, stated on oath the following:

1. My name is ERIC T. HAMER and I am a Mississippi licensed attorney and practice with Hamer & Associates, P.A. in Ridgeland, Mississippi. I am over twenty-one years of age and have personal knowledge of the matters stated in this affidavit.

2. I represented the interests of the Bilberry Family Limited Partnership in 2004 and 2005 in the matter pending before the Mississippi Commission on Environmental Quality ("Commission") styled "Amendment to the Madison County Solid Waste Management Plan (Re: Addition of North County Line Municipal Solid Waste Landfill)" (hereinafter "Plan Amendment").

3. I was present at the November 18, 2004, meeting of the Commission at the time the Plan Amendment was presented. At that meeting, Charles Chisolm, the Executive Director of MDEQ at that time, advised the Commission with respect to its action on the Plan Amendment, that it could approve, disapprove, or take the matter under advisement. On November 18, 2004, the Commission voted to take the Plan Amendment under advisement.

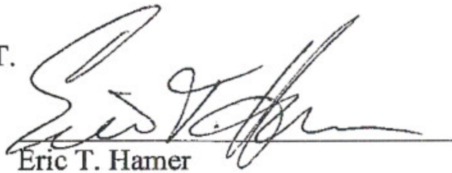
4. I am familiar with Order No. 5058-05 rendered by the Commission on August 25, 2005, which affirmed the Commission's December 16, 2004, approval of the Plan

Amendment. I am also familiar with the Commission's request set forth in Order No. 5058-05 as follows: "the Commission requests that the Mississippi Environmental Quality Permit Board review and consider an increase in the setback distance between the landfill disposal area and the adjacent property lines to greater than the minimum requirement of 500 feet . . ."

5. On behalf of the Bilberry Family Limited Partnership, out of an abundance of caution, I filed Notice of Cross Appeal based on the potential effect of the Commission's request in Order No. 5058-05.

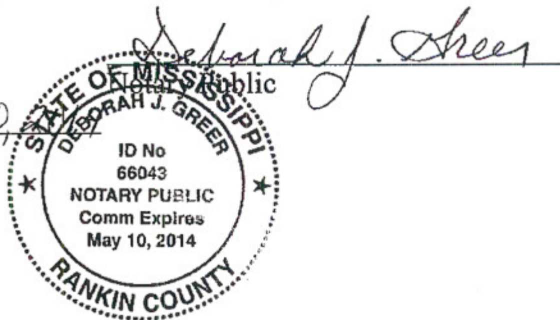
6. After being assured by Roy Furrh, Chief Counsel for the Mississippi Department of Environmental Quality (MDEQ), that the Commission's request had no binding effect on the Mississippi Environmental Quality Permit Board (Permit Board) and that the setback issue was within the sole jurisdiction of the Permit Board, and not the Commission, I withdrew the Notice of Cross Appeal.

FURTHER THE AFFIANT SAYETH NOT.



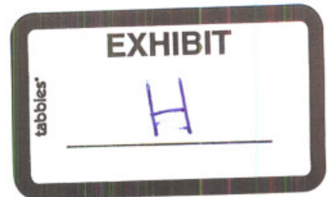
Eric T. Hamer

SWORN TO AND SUBSCRIBED BEFORE ME, this the 8th day of November, 2011.



Notary Public

My Commission Expires: May 10, 2014



Before The Mississippi Environmental Quality Permit Board

In Re: Hunter's Construction, Huntington Park Estates, Lauderdale County
Reconsideration of NPDES Permit No. MS0049867

Findings Of Fact And Conclusions Of Law

Pursuant to Miss. Code Ann. § 49-17-29(b), the Mississippi Environmental Quality Permit Board ("Permit Board") makes its findings of fact and conclusions of law regarding the reissuance of National Pollutant Discharge Elimination System ("NPDES") Permit No. MS0049867 to Hunter's Construction, Huntington Park Estates, Lauderdale County, Mississippi. These specific findings and conclusions support the decision of the Permit Board, after reconsideration of this matter, to reissue Permit No. MS0049867 with the original March 14, 2000 permit conditions. The Permit Board finds and concludes as follows:

I. Procedural History

1. Dr. Eugene Hunter of Hunter's Construction or Huntington Park Estates ("Dr. Hunter") is the owner of a subdivision located in Meridian, Lauderdale County, Mississippi, known as Huntington Park Estates. On June 14, 1994, the Permit Board first issued an NPDES permit to Huntington Park Estates. Commercial wastewater systems such as the one Dr. Hunter constructed on his property are required to obtain an NPDES permit under the state water pollution control regulations adopted by the Mississippi Commission on Environmental Quality ("Commission"), WPC-1. A permit obtained from the Permit Board under WPC-1 satisfies both state and federal permitting requirements, since the United States Environmental Protection Agency has delegated its federal Clean Water Act permitting authority to the State.

2. The Hunter subdivision, as permitted, includes a wastewater treatment system designed to handle sewage from 36 homes at a maximum rate of 15,000 gallons per day. To date, only 4 homes have been built in this subdivision. The system is a low pressure sewerage collection system and a plant/rock filter treatment facility. The wastewater collected is treated on site and then discharged into an intermittent stream or drainage way that also drains the rainwater from the area. In the MDEQ report of a site inspection performed on February 3, 1994, the receiving stream is described as having a depth of 4 to 6 inches and a width of 5 to 6 feet. The effluent limits included in the NPDES permit issued in 1994 were developed to protect water quality in this stream according to the state's water quality standards adopted as Commission Regulation WPC-2.

3. The Permit Board issued Dr. Hunter's original NPDES permit for a 5-year period. When the NPDES permit came up for reissuance, MDEQ staff recommended reissuance because Hunter had complied with all permit limitations and conditions, and there had been no changes in state or federal law or regulations concerning the appropriateness of the discharge location. An adjacent landowner, Ms. Jean Ledbetter ("Ms. Ledbetter"), objected to the reissuance of the permit and requested a public hearing. As Ms. Ledbetter was the only objector, the Permit Board determined that a public hearing was not necessary. MDEQ did respond to the objection received by Ledbetter, and visited the site on at least two additional occasions at the request of Ledbetter. MDEQ Staff originally intended to present the matter before the Permit Board at the October 26, 1999 Permit Board meeting, but the matter was continued several times in order to allow the parties additional time to reach a resolution. Since no agreement resulted between the parties, MDEQ Staff went forward in recommending reissuance of the permit at the March 14, 2000 Board meeting. The Permit Board voted to reissue the permit on March 14, 2000. At that time, Ms. Ledbetter requested a formal evidentiary hearing before the Permit Board pursuant to Miss. Code Ann. § 49-17-29 arguing, among other issues, that the receiving stream, which flows across her property, did not constitute waters of the state as defined under state and federal law. The Permit Board conducted the evidentiary hearing on August 22, 2000. At the conclusion of the evidentiary hearing, the Permit Board rejected MDEQ Staff's recommendation, reversed its preliminary decision, and reissued the permit in a highly modified form that required Dr. Hunter to convert the treatment system into a no-discharge system within 9 months and to allow no more than 4 homes to use the treatment system. *See* Findings of Fact and Conclusions of Law (November 1, 2000).

4. Dr. Hunter then appealed the final Permit Board decision to the Chancery Court of Lauderdale County. While on appeal in Lauderdale County, the parties to that case, Dr. Hunter and the Permit Board[1], agreed to remand the case to the Permit Board for further consideration. The Chancellor in Lauderdale County signed an Order of Remand on May 17, 2002. *See* Order of Remand, Cause No.: 00-929-S (May 17, 2002); Minutes of the Permit Board (May 14, 2002).

5. The Permit Board then requested that all interested parties submit briefs to the Permit Board to address the following narrow issue:

> Whether the discharge point authorized under the Hunter NPDES Permit under consideration for renewal is into waters of the state, acceptable for a point source discharge?

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[1] At the request of MDEQ and the Permit Board, Special Assistant Attorney General Roger Googe of the Mississippi Attorney General's Office represented the Permit Board in the appeal of this matter. This representation separate from representation by the MDEQ Legal Division was necessary because the legal opinions in this matter voiced by MDEQ were, and are, diametrically opposed to the legal conclusions reached by the Permit Board on August 22, 2000. Thus, MDEQ's Legal Division did not participate in the representation of the Permit Board before the Chancery Court.

During this reconsideration, MDEQ Staff, represented by the MDEQ Legal Division, and Dr. Hunter and Ms. Ledbetter, both represented by counsel, submitted briefs for review and consideration by the Permit Board on November 18, 2002. On December 10, 2002, the Permit Board deliberated on this issue but voted to take the matter under advisement to allow the Permit Board members additional time to review the evidence in the case.

6. On January 14, 2003, the Permit Board voted unanimously to reissue the NPDES permit with its original conditions and limitations as included in the 1994 permit and the March 14, 2000 permit. The Permit Board determined that the permit allows a discharge into waters of the state at a point acceptable for a point source discharge.

II. Waters of the State and Appropriate Discharge Points

7. Water pollution control permits are issued for the discharge of pollutants into waters of the state at such points, after such treatment, and in such concentrations and volumes that are protective of the water quality standards set for that water body by the Commission. *See* Miss. Code Ann. § 49-17-29 (Supp. 2002), WPC-1, and WPC-2. Miss. Code Ann. § 49-17-5(f) (Rev. 1999) defines "waters of the state" as: "All waters within the jurisdiction of this state, including all streams, lakes, ponds, impounding reservoirs, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulations of water, surface and underground, natural or artificial, situated wholly or partly within or bordering upon the state, and such coastal waters as are within the jurisdiction of the state, except lakes, ponds or other surface waters which are wholly landlocked and privately owned, and which are not regulated under the Federal Clean Water Act (33 U.S.C. 1251 et seq.)." The definition of "waters of the state" in WPC-1, Section I.A.75, is identical to Miss. Code Ann. § 49-17-5(f), above, except for the addition of the word "wetlands." The federal government's counterpart to Mississippi's law defines "waters of the United States or waters of the U.S." more narrowly, most notably omitting groundwater. However, even the federal definition explicitly includes intermittent streams (and wetlands) as part of the definition. *See* 40 C.F.R. Section 122.2.

8. Ms. Ledbetter argued that "nowhere on the land in question owned by Jean Patterson Ledbetter . . . is there a stream, lake, pond, impounding reservoir, marsh, well, spring, irrigation system, coastal water, or any other 'body or accumulation of water'." *See* Brief of Jean Patterson Ledbetter, November 18, 2002, at 2. Ms. Ledbetter argues that waters of the state do not exist on the land in question, making the discharge unacceptable as against state and federal regulations.

9. Ms. Ledbetter contends that no "watercourse" or "waterway" exists on her property. In the November 2002 brief, Ledbetter refers to a 1910 case in which "watercourse" is defined as "a natural channel . . . with defined bed and banks, of varying width and depth, through which water is conveyed and discharged . . . ." *Belzoni Drainage Commission v. Winn,* 53 So. 778, 779 (Miss. 1910). Ledbetter refers to the record and states that there is no "natural channel with well defined bed and banks" on

Ledbetter's property; therefore, there is no "watercourse" as referred to in the definition of "waters of the state." *See* Brief of Jean Patterson Ledbetter, November 18, 2002, at 3.

10. Ms. Ledbetter also contends that general terms such as "waterway" or "accumulation of water" as seen in the definition of waters of the state should be construed as applying only to objects of the same general class as those enumerated, with the common theme here being the notion of a natural watercourse. Ms. Ledbetter argues that since there is no "stream, lake, pond, impounding reservoir, marsh, watercourse . . . then no waters of the state exist where the Hunter NPDES Permit would authorize a discharge of human waste to occur." *See* Brief of Jean Patterson Ledbetter, November 18, 2002, at 5.

11. To the contrary, the definition of "waters of the state" is broad, capturing every water body in the state with the exception of hydrologically isolated water bodies not regulated by the federal Clean Water Act. The Permit Board interprets § 49-17-5(f)'s definition to include all waters within the jurisdiction of the federal Clean Water Act, plus groundwater, plus any other waters "within the jurisdiction of the state" except privately-owned surface waters that are not hydrologically connected to other surface waters (i.e. are "landlocked"). This includes intermittent streams and "drainageways" such as the area in question here. MDEQ presented as an exhibit to its November 2002 brief a United States Geological Survey ("USGS") quadrangle map dated 1971 (Revised 1982) that designates the tributary into which the effluent discharges as an intermittent stream. *See* Brief of MDEQ, November 18, 2002, Exhibit A. Ms. Ledbetter disputed the reliability of the topographic map, but the Permit Board regularly refers to topographic maps and accepts USGS topographic maps as credible indicators of streams and other water bodies. Here, the USGS indication also was corroborated by MDEQ's site visit. An intermittent stream is "water within the jurisdiction of this state" that is not excluded by the statutory definition and that is appropriate for discharge from a wastewater system, given that the permit conditions allowing the discharge are required to protect water quality in that particular stream. MDEQ Staff determined after an on-site inspection that the drainage system into which the effluent discharges constitutes waters of the state as defined in state law and regulations. *See* Affidavit of Rickey Terry[2] at 4, Section 6.

12. The discharge point discharges into an intermittent stream that is waters of the state, and the permit conditioning the discharge is protective of the water quality standards set for this water body.[3] The Permit Board previously has issued permits allowing for a discharge into streams very similar to the one at hand with similar permit conditions. *See* Second Affidavit of Rickey Terry at 4, Section 9.

13. It is obvious from the nature of the language of the statutory definition that the Legislature intended the definition of "waters of the state" in Section 49-17-5(f) to be

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[2] Rickey Terry is the Chief of the Municipal and Private Facilities Branch of MDEQ's Environmental Permits Division.

[3] Ms. Ledbetter does not argue or present evidence indicating that this discharge has caused or will cause a water quality violation.

construed broadly, as public health statutes normally are construed in a civil or administrative context, in order to protect the environment and the citizens of the state. *See generally, U.S. v. Plaza Health Laboratories, Inc.*, 3 F.3d 643, 647-48 (2d Cir. 1993). Thus, the Permit Board construes the statute broadly in order to require permits of the greatest number of discharges allowed by law. This is consistent with the Legislature's direct charge to the Permit Board found in Section 49-17-29(1)(b), where the Legislature states that permits are to be required both of discharges directly into waters of the state and to the placement of wastes "in a location where they are likely to cause pollution of any waters of the state." *Id.*

III. Public Notice Requirements in WPC-1

14. During the August 22, 2000 evidentiary hearing, counsel for Ms. Ledbetter argued that the original 1994 permit was issued with improper notice, making the permit invalid. Ms. Ledbetter argued that the notice did not name properly the receiving stream, that the public notice was not as specific as it could have been, and that therefore the public notice was invalid. WPC-1, Chapter 1, Section I.C. includes the following requirements for public notice:

> A public notice of a draft State, UIC, or NPDES permit shall contain the following:
>
> a. the date of posting or publication of the public notice;
> b. the address and telephone number of the Department office in Jackson;
> c. the name and address of the applicant, except in the case of a draft general NPDES permit or a draft general State permit;
> d. a concise description of the activities and operations which result in the discharge identified in the draft permit;
> e. the name of the receiving waters into which the discharge is being made or is proposed to be made, including the location of the proposed existing discharge point (in the case of general permits, a description of geographical area and/or allowable receiving waters);
> f. a concise description of the procedures for the formulation of the final determinations; and
> g. the address and telephone number of the Department office where additional information on the draft permit, copies of the draft permit and fact sheets may be obtained or any other applicable forms and related documents may be inspected or copied.

15. Ms. Ledbetter argued during the August 22, 2000 evidentiary hearing that Section I.C.e., above, was not satisfied. *See* Trancript at 42. The 1994 public notice stated that the receiving stream is into "an unnamed tributary of Chickasawhay River," which is accurate, but Ms. Ledbetter argued that Sowashee Creek should have been listed since it is the first named stream downstream from the discharge point. Ms. Ledbetter argued that simply listing Chickasawhay could be somewhat confusing to someone looking for the discharge point.

16. MDEQ Staff disputed this argument since the city, address of the subdivision, and subdivision development name was printed in the public notice, which helps a reader identify the proposed discharge point. The notice further describes the discharge point as originating from Huntington Park Estates with treated domestic waste water from a sewage treatment facility into an unnamed tributary of Chickasawhay River. *See* Ledbetter Exhibit 1, August 22, 2000. The Chickasawhay River is a "receiving water" as stated in the regulations, WPC-1.

17. In reviewing the public notice criteria set forth in WPC-1, Chapter 1, Section I.C., the public notice complied with the regulations. The intent of the public notice regulations adequately was met by listing the Chickasawhay River. The notice published in the Meridian Star includes sufficient information regarding the project and satisfactorily meets the requirements of WPC-1, Chapter 1, Section I.C.1. It is also obvious that if Ledbetter, upon seeing the notice, needed incrementally more detailed information, she could have contacted the MDEQ office listed. Therefore, the argument that proper public notice was not given is without merit.

IV. Receiving Streams May Be Natural or Artificial

18. The Permit Board's previous Findings of Fact and Conclusions of Law executed on November 1, 2000 states that "while the evidence suggested that there is a natural drainage way running roughly west to eat across a great deal of the Hunter property, there is no doubt there now exists a defined channel along that drainage way on the Hunter property. The evidence was conflicting as to how long that defined channel has existed, how far it extended, and whether a defined channel existed on Mrs. Ledbetter's property." *See* "Findings of Fact and Conclusions of Law" at 3, Section 8. Ledbetter argued that construction ensued in the drainage way on or around the time of original issuance of the permit in 1994, that the drainage way was man-made, and therefore did not constitute "waters of the state." The simple fact is that a drainage way, or stream, exists that satisfies state and federal law and regulations, and the dispute regarding construction in the stream is not an issue that should affect the outcome of this case.

19. Referring to the definition of "waters of the state" as defined in Miss. Code Ann. § 49-17-5(f), waters of the state includes "all waters within the jurisdiction of this state, including all streams, lakes, ponds, impounding reservoirs, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulations of water, surface and underground, ***natural or artificial*** . . ." Emphasis added. Although Ledbetter argued and debated the issue of whether or not parts of the intermittent stream were artificially created, the issue is irrelevant. The definition includes streams that are natural or artificial, and no regulation exists stating anything to the contrary.

20. Neither MDEQ nor the Commission has a written policy stating that defined beds and banks of certain linear feet must be established before a stream becomes

waters of the state. The Permit Board has approved discharge points very similar to this one, and the Permit Board for years has issued permits that allow sufficiently conditioned discharges to occur in similar streams that may or may not flow across another private property owner's land. The Permit Board must make the decision regarding reissuance of Dr. Hunter's permit on the facts as they exist today and in a manner consistent with prior application of state law and regulations on point. The issue regarding a natural or artificial stream is not relevant.

V. Permittee's Reissuance Requirements in WPC-1

21. During the August 22, 2000 evidentiary hearing, Ms. Ledbetter argued that Dr. Hunter did not make timely application for reissuance of his NPDES permit that was issued in 1994. Ledbetter argued that by failing to make timely application, the Permit Board should not even consider reissuance of the permit.

22. A review of the public record file in this matter demonstrates that Dr. Hunter did fail to submit his application timely. WPC-1 states that a permittee that wishes to continue to operate under an existing NPDES permit shall submit an application for reissuance at least 180 days prior to the expiration date of the permit. *See* WPC-1, Chapter One, Section V.B.1. at 29. The expiration date included in Dr. Hunter's permit was May 31, 1999, so under the regulations, Dr. Hunter should have submitted his reissuance application 180 days prior to May 31, 1999, or by December 2, 1998. Dr. Hunter submitted his application on March 11, 1999.

23. The overwhelming majority of permit reissuance applications received by MDEQ for wastewater systems such as Dr. Hunter's are not submitted timely; however, MDEQ goes forward in processing the applications and reissuing permits when the delay does not cause MDEQ hardship and does not encourage or allow damage to the environment. During the August 22, 2000 evidentiary hearing, Rickey Terry of MDEQ Staff testified that it is very common to receive applications for reissuance of these types of facilities prior to expiration of the existing permit, but not 180 days in advance of expiration. Mr. Terry goes on to say that "we also routinely send letters to remind people that their permit will expire, because a lot of these small commercial dischargers just will not remember exactly when their permit expires. So we routinely try to notify them." *See* Transcript at 62-63. In this instance, MDEQ did send a letter reminding Dr. Hunter to submit an application for reissuance, and Dr. Hunter sent in his application prior to the expiration of his then existing permit. This delay in submitting the application is an error, but is considered a harmless error in this case. The error did not affect the substantial rights of the parties to this case and did not encourage or allow harm to the environment, since Dr. Hunter's system continued to operate within the parameters set by his permit during the period of lapse. This error is not sufficient on its own to support a decision of denial of reissuance of Dr. Hunter's NPDES permit.

24. Rule 61 of the Mississippi Rules of Civil Procedure, entitled "Harmless Error," states:

> No error in either the admission or the exclusion of evidence and no error in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

By analogy, the issue of late filing for reissuance in this case does not lead a reasonable mind to conclude that Dr. Hunter's right to reissuance of his NPDES permit should be denied. The failure to timely submit an application for reissuance does not, absent harm or evidence of important misfeasance or malfeasance, warrant denial of reissuance. The Commission's authority to consider an enforcement action in an appropriate similar situation is in no way jeopardized by the Permit Board's action to reissue a permit.

VI. The Permit Board's Scope of Authority

25. In reviewing the reissuance of Dr. Hunter's permit, the Permit Board is limited to state and federal law and regulations as they exist today, and must not act outside those boundaries. The Permit Board must make a decision consistent with existing regulations, and must act within the scope of authority set forth in statutes pertaining to it.

26. Miss Code Ann. § 49-17-28 (Rev. 1999) sets forth the Permit Board's role, which includes "issuing, reissuing, modifying, revoking or denying, under the conditions, limitations and exemptions prescribed in Section 49-17-29." For the Permit Board to attempt to redefine what is considered waters of the state is beyond its scope of authority. The Commission has the "right and obligation to adopt such rules and regulations as may be needed to specify methodology and procedure to meet the requirements of the law, which shall include . . . rules and regulations specifying the terms and conditions under which the Permit Board shall issue, modify, suspend, revoke or deny such permits as may be required by law," *Mississippi Department of Environmental Quality v. Weems*, 653 So.2d 266 at 272 (Miss. 1995), but neither the Commission nor the Permit Board can rewrite a state statute. The Permit Board, in addition, is constrained by Miss. Code Ann. § 49-17-34(4) to include in a permit only those requirements that have a direct basis in Commission regulations.

27. The Permit Board's authority in considering the reissuance of Dr. Hunter's NPDES Permit is limited to the criteria of WPC-1 regarding an application for reissuance. WPC-1, Section V.B.2., states as follows:

> The Permit Board shall review the application and before reissuing a permit shall be assured that:
>
> (a) The permittee is in compliance with or has substantially complied with the terms, conditions, requirements, and schedules of compliance of the existing permit.

(b) The Permit Board has up-to-date information on the permittee's production levels, waste treatment practices and the nature, contents and frequency of the permittee's discharge.

(c) The discharge is consistent with applicable effluent standards and limitations, water quality standards, and other applicable requirements, including any additions to, revisions or modifications.

28. At the close of the evidentiary hearing on August 22, 2000, the Permit Board made a decision to reissue Dr. Hunter's permit in a modified form that was not based on applicable laws and regulations. Dr. Hunter's reissuance application satisfies the considerations outlined in WPC-1, Section V.B.2.

29. The Permit Board understands that it must not act arbitrarily or capriciously in making this decision, but rather must follow applicable rules and regulations. MDEQ Staff refers to the *Weems* case in its November 2002 brief, citing:

> An act is arbitrary when it is done without adequately determining principle; not done according to reason or judgment, but depending upon the will alone, -- absolute in power, tyrannical, despotic, non-rational, --implying either a lack of understanding of or a disregard for the fundamental nature of things . . . An act is capricious when it is done without reason, in a whimsical manner, implying either a lack of understanding of or a disregard for the surrounding facts and settled controlling principles.

Id. at 274.

30. In the context of the Permit Board's history of issuing permits and the interpretation of state laws and regulations, the Permit Board cannot conclude that Dr. Hunter's permit should not be reissued. Rather, Dr. Hunter's permit should be reissued with its original permit conditions. To act otherwise would be for the Permit Board to make an arbitrary and capricious decision not based on law or regulation.

31. In addition to the issue of what constitutes "waters of the state" appropriate for a point source discharge, Ms. Ledbetter argued that certain procedural issues were not followed properly by MDEQ and therefore Dr. Hunter's permit should not be reissued. The Permit Board did not make a ruling on those issues in its November 1, 2000 Findings of Fact and Conclusions of Law, stating:

> The Permit Board recognized that petitioner has argued that certain procedural requirements were not followed by MDEQ staff and/or Dr. Hunter in the processing of Dr. Hunter's original application and application for reissuance. While the Board acknowledges that those issues cause it concern, it chooses not to make any findings or conclusions concerning them at this time. The Permit Board's decision herein is based solely upon the Permit Board's finding and conclusion that the discharge point in question is not waters of the state acceptable for a point source discharge.

See Findings of Fact and Conclusions of Law (November 1, 2000). Although the Permit Board did not base its August 2000 decision on the procedural issues raised, at this time the Permit Board concludes that the procedural arguments raised during the August 22, 2000 hearing do not present an adequate basis for denying the reissuance of Dr. Hunter's permit. The only issue raised to date that raises the level of concern of this board to a degree that would warrant denial or revocation of Dr. Hunter's permit is the question of whether the discharge point is into "waters of the state" acceptable for a point source discharge, and that issue has been addressed.

VII. Conclusion

32. Upon reconsideration of this matter, and having reviewed the evidence presented to it from the inception of this matter, the Permit Board concludes that the NPDES permit originally issued to Dr. Hunter in 1994 and reissued in 2000 should be reissued with its original permit conditions and limitations. The Permit Board finds that the existing discharge point does discharge into waters of the state requiring a permit and that the discharge point is acceptable. The Permit Board also finds, and it is not disputed, that the permit conditions are protective of water quality. The Board concludes that the NPDES permit initially issued by the Board on March 14, 2000 falls within the Permit Board's statutory and regulatory authority and is legally sound.

WHEREFORE, PREMISES CONSIDERED, the Mississippi Environmental Quality Permit Board, by affirmative vote cast in open session and recorded in the minutes of this body, adopts these findings of fact and conclusions of law in support of its January 14, 2003 decision to reissue NPDES Permit No. MS0049867 to Hunter's Construction, Huntington Park Estates, Lauderdale County, Mississippi. The cost bond for appeal of this matter is set at $500.

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S. Cragin Knox
Chairman

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Date