

Closure

Georgia Department of Natural Resources

205 Butler St. S.E., East Floyd Tower, Atlanta, Georgia 30334
Lonice C. Barrett, Commissioner
Carol A. Couch, Ph.D., Director
Environmental Protection Division
(404) 656-4713

MEMO

To: John Hennelly
Senior Assistant Attorney General
Law Department

From: David M. Word

Subject: Petition for Hearing from City of Atlanta
Challenging Administrative Order No. EPD-AQC-4275
City of Atlanta Gun Club Road Landfill

Date: June 28, 2004



FILE COPY

Please find enclosed a petition for a hearing from the City of Atlanta challenging Administrative Order No. EPD-AQC-4275 City of Atlanta Gun Club Road Landfill This petition was received and logged-in on June 25, 2004.

I would appreciate your review of the petition and completion of OSAH Form 1. The person to be listed in Paragraph 2 of OSAH Form 1 is Ron Methier, Branch Chief, Air Protection Branch. His address is 4244 International Parkway, Suite 120, Atlanta, Georgia 30334, and phone number is: 404-363-7000.

DMW:lm

Enclosure

C: Lou Musgrove

BEFORE THE BOARD OF NATURAL RESOURCES

STATE OF GEORGIA

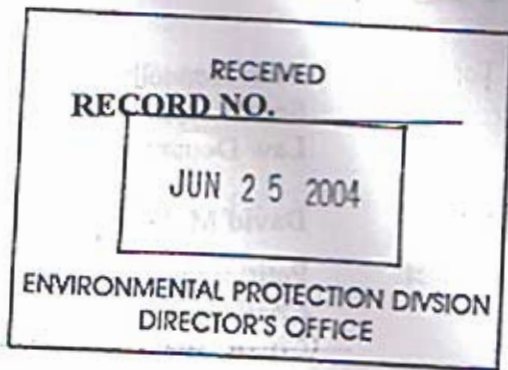
THE CITY OF ATLANTA, a political)
subdivision of the State of Georgia,)

Petitioner,)

v.)

CAROL A. COUCH, Ph.D.,)
DIRECTOR OF THE GEORGIA)
DEPARTMENT OF NATURAL)
RESOURCES, ENVIRONMENTAL)
PROTECTION DIVISION,)

7903 3117
COPY Respondent.



PETITION FOR HEARING

The City of Atlanta, Georgia (the "City"), Petitioner herein, files this its Petition for Hearing ("Petition") and shows the following:

STATEMENT OF JURISDICTION AND INTEREST

1.

This Petition is filed pursuant to O.C.G.A. §§ 12-2-2(c)(2), 12-9-15(a), and 50-13-13(a). This Petition seeks a review of an administrative order dated May 26, 2004 (the "Administrative Order") issued to the City by Dr. Carol A. Couch, Director of the Georgia Department of Natural Resources (the "Director"), Environmental Protection EPD ("EPD"). A copy of the Administrative Order is attached hereto as Exhibit "A" and incorporated herein by reference.

2.

This Petition is authorized by, and the Office of State Administrative Hearings has jurisdiction in this matter under, O.C.G.A. §§ 12-2-2(c)(2) and 50-13-13(a) and Ga. Comp. R. & Regs. Chapter 391-1-2-.03(1). The City is a person who is aggrieved or adversely affected by the issuance of the Administrative Order within the meaning of O.C.G.A. § 12-9-15(b). The Order has caused and will continue to cause the City injury in fact to interests within the zone of interests to be protected or regulated by the Georgia Air Quality Act, O.C.G.A. §§ 12-9-1 through 12-9-57 (the "Air Quality Act") and the Georgia Rules for Air Quality Control Chapter 391-3-1 (hereinafter called the "Rules"). Specifically, the Administrative Order contains decisions that adversely affect the City's post closure care for its Gun Club Road Municipal Landfill, as required by the Closure Certificate for said Landfill, and that otherwise would impose unlawful terms, conditions and obligations on the City. A copy of the Closure Certificate is attached hereto as Exhibit "B" and incorporated herein by reference. Pursuant to O.C.G.A. § 12-2-2(b), the Director is performing the duties of the Director of EPD. The Director's issuance of the Administrative Order is an "order or action of the director" as contemplated by O.C.G.A. §§ 12-2-2(c)(2) and 12-9-15(a).

3.

This Petition automatically stays the effectiveness of the Administrative Order pursuant to Ga. Comp. R. & Regs. Rule 391-1-2-.07(1).

STATEMENT OF FACTS AND APPLICABLE LAW

4.

The City specifically incorporates the averments set forth in the preceding Paragraphs 1- 3 and realleges them herein.

5.

In reply to the factual allegations contained in the Administrative Order, the City states as follows:

For the first WHEREAS clause, the City owns the Club Road Landfill, a closed municipal solid waste landfill, at 1401 Gun Club Road, Fulton County, Atlanta, Georgia (the "Landfill").

For the second WHEREAS clause, the City acknowledges the Landfill is generally subject to the provisions of the provisions of the Georgia Air Quality Act, O.C.G.A. § 12-9-1, *et.seq.*, and the Georgia Rules for Air Quality Control Chapter 391-3-1, although the City contests whether certain aspects of the Air Quality Act and the Rules apply in this case.

For the third and fourth WHEREAS clauses, the City states that such clauses set forth legal conclusions, do not set forth factual allegations, and therefore no reply is necessary. The City further denies the substance of the legal determinations recited in such clause.

For the fifth WHEREAS clause, the City acknowledges that the cited Rule required the City to submit an initial design capacity report for the Landfill by October 1, 1997.

For the sixth WHEREAS clause, the City acknowledges the EPD issued written information requests on or about the dates indicated.

For the seventh WHEREAS clause, the City acknowledges that the City submitted a report on or about March 12, 2003, which report speaks for itself. The City denies that such report correctly ascertained the Landfill's "design capacity" within the meaning of that term under the Act and the Rules.

For the eighth and ninth WHEREAS clauses, the City states that such clauses set forth legal conclusions, do not set forth factual allegations, and therefore no reply is necessary. The City further denies the substance of the legal determinations recited in such clause.

For the tenth WHEREAS clause, the City acknowledges the EPD issued the referenced Notice of Violation to the City, but the City does not admit and specifically denies the alleged violations contained in that Notice of Violation.

For the eleventh WHEREAS clause, the City acknowledges that the referenced meetings occurred and that the City submitted responses to the Notice of Violation, which speak for themselves. The City acknowledges the City submitted a July 18, 2003 response that included a corrected design capacity report that stated that the design capacity of the Landfill is 2,592,359 cubic yards.

For the twelfth WHEREAS clause, the City acknowledges that City representatives met with EPD representatives on or about October 22, 2003.

For the thirteenth WHEREAS clause, the City acknowledges that the EPD made the estimates and calculations referenced in that clause, but the City specifically denies that the estimates and calculations are technically accurate, proper or consistent with the

Act or the Rules. The City further states that the WHEREAS clause correctly specifies that the relevant design capacity determination is what the design capacity was as of October 1, 1997, and the City further states that, under the definition of the term "design capacity," the EPD's "determination" of design capacity and NMOC emissions as of October 1, 1997 is unsupported by facts or law.

For the fourteenth and fifteenth WHEREAS clauses, the City states that such clauses set forth legal conclusions, do not set forth factual allegations, and therefore no reply is necessary. The City further denies the substance of the legal determinations recited in such clause.

For the sixteenth WHEREAS clause, the City states that such clause sets forth legal conclusions, does not set forth factual allegations, and therefore no reply is necessary. The City further denies the substance of the legal determinations recited in such clause.

For the seventeenth WHEREAS clause, the City acknowledges the EPD proposed a Consent Order to the City, but denies that the terms and conditions of that Consent Order were proper, justified by the Act or the Rules, or constituted a good faith effort by the EPD to resolve any alleged violations.

For the eighteenth WHEREAS clause, the City acknowledges that the City met with the EPD on or about February 4, 2004, and that disagreements between the parties were discussed.

For the nineteenth WHEREAS clause, the City acknowledges that the City submitted a counterproposal on or about March 4, 2004 to the EPD as a means to resolve alleged violations.

For the twentieth WHEREAS clause, the City acknowledges that the EPD issued a letter on or about March 31, 2004 claiming deficiencies in the City's counterproposal, but denies that the content of that letter was proper, justified by the Act or the Rules, or constituted a good faith effort by the EPD to resolve any alleged violations.

For the twenty first WHEREAS clause, the City acknowledges that on or about April 26, 2004 it submitted an amended counterproposal, but the City denies that such proposal failed to address alleged deficiencies, if any, in the City's earlier proposal.

For the twenty second WHEREAS clause, the City specifically denies that the EPD has provided adequate consideration of information provided by the City. The City further states that the EPD's conclusions concerning the Landfill's design capacity are erroneous, not supported by the Act or the Rules, and comprise an abuse of discretion. The City further denies any allegations that it has failed to comply with the Rules.

For operative paragraphs 1-5 and the remainder of the Administrative Order, the City states that such portions of the Administrative Order do not contain factual allegations and therefore no reply is required. The City further states that the requirements set forth in paragraphs 1-5 are in violation of statutory provisions, in excess of the Director's authority, made upon unlawful procedure, affected by error of law, clearly erroneous in view of the reliable, probative and substantial evidence, arbitrary and capricious and/or characterized by an abuse of discretion, and/or clearly unwarranted by the exercise of discretion.

In addition to the replies set forth above, the City sets forth additional relevant facts and applicable law as set forth further below.

6.

The City is a political subdivision of the State of Georgia. The City is a "person" as defined in O.C.G.A. §§ 50-13-2(5), 12-9-3(a)(23), and Ga. Comp. R. & Regs. Rule 391-1-2-.01(k).

7.

From 1977 until 1995, the City operated the Landfill pursuant to EPD Permit No. 060-026D(SL), dated February 4, 1977. A copy of EPD Permit No. 060-026D(SL) is attached hereto as Exhibit "C" and incorporated herein by reference. Pursuant to a 1986 modification to the Permit, the City installed a gas collection and control system ("GCCS") at the Landfill. In 1995, the City commenced closure procedures for the Landfill pursuant to EPD Consent Order No. EPD-SW-1104 (the "1995 Consent Order"). A copy of the 1995 Consent Order is attached hereto as Exhibit "D" and incorporated herein by reference.

8.

The City submitted a Landfill Closure Plan in October 1995 pursuant to EPD rules. In November 1996, the EPD approved a Landfill Closure Plan for the Landfill that included upgrades and expansions of the Landfill's existing GCCS, which were to be installed in two phases, with the first phase to be installed as part of the initial closure of the Landfill and the second phase to be installed only if required at a future time. The Landfill Closure Plan limited the Landfill's design capacity to solid wastes that were in-place at the Landfill at the time of closure. At closure, the Landfill's design capacity was limited to 1,777,275 megagrams.

7.07
time

9.

With certain exceptions, Rule 391-3-1-.02(2)(ggg) incorporates and adopts by reference the requirements and provisions of 40 C.F.R. Part 60 Subpart WWW.

10.

Subpart WWW, 40 C.F.R. § 60.752(b)(2)(i), requires operators of municipal landfills with a design capacity of at least 2.5 million megagrams (approximately 3.27 million cubic yards) and an annual non-methane organic emission ("NMOC") rate exceeding 50 megagrams to submit a collection and control system design plan conforming to the requirements of Subpart WWW within one year. Rule 391-3-1-.02(2)(ggg)3.(i.)(III) requires operators of municipal landfills with a design capacity of at least 2.5 million megagrams (approximately 3.27 million cubic yards) to submit an application for a Part 70 Operating Permit by June 23, 1997.

11.

Subpart WWW, 40 C.F.R. § 60.751, defines the term "design capacity" as:

[T]he maximum amount of solid waste a landfill can accept, as indicated in terms of volume or mass in the most recent permit issued by the State, local, or Tribal agency responsible for regulating the landfill, plus any in-place waste not accounted for in the most recent permit...

According to § 60.757(a)(2)(ii), if the maximum design capacity of the landfill in question is not specified in a permit, the maximum design capacity is calculated using "good engineering practices." EPA guidance further provides that a landfill owner "should use the best credible information to estimate the design capacity in the absence of a permit limit," and that a closure plan "could be a good source" of such information. U.S. EPA, Office of Air Quality Planning and Standards, *Municipal Solid Waste Landfill New Source Performance Standards (NSPS) and Emission Guidelines (EG) – Questions*

and Answers, at 16 (Nov. 1998). Facilities subject to Rule 391-3-1-.02(2)(ggg) were required to submit an initial design capacity report by October 1, 1997.

12.

EPD Permit No. 060-026D(SL), the 1995 Consent Order, and the Closure Plan together had the effect of requiring closure of the Landfill. The Landfill was in the process of closure as of the effective date of the rules and as of October 1, 1997, the date for submission of the design capacity report. That closure process limited the Landfill's design capacity to solid wastes in place at the time of closure. Consequently, the closure process placed a legal limit on the Landfill's design capacity of less than the regulatory threshold of 2.5 million megagrams (approximately 3.27 million cubic yards) as of the effective date of the Rules and the deadline for submission of the design capacity report.

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13.

Further, utilizing good engineering practices in accordance with the Rules, the City's staff and professional engineering consultants, reevaluated the most recently available data for the Landfill and the restrictions contained within the Landfill's Closure Plan. Based on a typical waste density of 1,000 pounds per cubic yard, the City concluded that the Landfill's design capacity as of October 1, 1997 was approximately 1,177,275 megagrams (less than 2.6 million cubic yards). Consequently, the Landfill's design capacity was lower than the regulatory threshold set forth in Subpart WWW, as adopted by Rule 391-3-1-.02(2)(ggg).

→ City doesn't have good data on what is in landfill

14.

The Director issued the Administrative Order, in which she alleged that the City had violated the requirements of Rule 391-3-1-.02(2)(ggg) by failing to:

17.

EPD Permit No. 060-026D(SL), together with the 1995 Consent Order and the EPD-approved Closure Plan, had the effect of requiring closure of the Landfill such that the Landfill ceased or virtually ceased acceptance of waste by the time the initial design capacity determination was required on October 1, 1997.

18.

In light of the EPD-required closure of the Landfill, the appropriate measurement of design capacity was the amount of waste actually contained within the Landfill. That amount of waste is less than 2.5 million megagrams (approximately 3.27 million cubic yards). *→ not valid*

19.

Further, in addition to the fact that closure of the Landfill limited design capacity to the waste present at the time of closure, good engineering standards may be used pursuant Subpart WWW, 40 C.F.R. § 60.757(a)(2)(ii) to establish design capacity. *→ not when capacity was also reported by the City*

20.

EPD did not use good engineering practices to calculate its design capacity estimate for the Landfill of 7,090,533 cubic yards. Instead, the EPD derived its erroneous design capacity estimate from the City's original 1977 rough estimate of the amount of cut and fill "earth quantities" that would be involved at the Landfill, without considering legal and physical restrictions on the placement of waste that had the effect of substantially reducing the Landfill's actual design capacity. The use of these cut and fill "earth quantity" estimates without consideration of such legal and physical restrictions is inconsistent with good engineering practices.

21.

Using good engineering practices, the City's public works staff and professional engineering consultants determined that the Landfill's design capacity was equivalent to the approximately 1,177,275 megagrams (2,592,359 cubic yards) of waste that was in place at the Landfill at the time of its closure. ^{→ not based on good data} Consequently, the landfill emissions reporting and control requirements set forth in the Administrative Order do not apply to the Landfill.

22.

Accordingly, the Administrative Order including the requirements set forth in operative paragraphs 1-5 thereof, is in violation of statutory provisions; is in excess of the Director's authority; is made upon unlawful procedure; is affected by error of law; is clearly erroneous in view of the reliable, probative and substantial evidence; is arbitrary and capricious; is characterized by an abuse of discretion; and/or is clearly unwarranted by the exercise of discretion.

COUNT II-

The Administrative Order is Unlawful Because it Requires The City to Design and Install a GCCS Even Though the Landfill's Annual NMOC Emissions Rate Is Below The Regulatory Threshold.

23.

The City specifically incorporates the averments set forth in the preceding Paragraphs 1-22 and realleges them herein.

24.

With certain exceptions, Rule 391-3-1-.02(2)(ggg) incorporates and adopts by reference the requirements and provisions of the Emissions Guidelines of 40 CFR 60 Subpart WWW ("Subpart WWW").

25.

In § 60.752(b)(2), Subpart WWW requires operators of municipal landfills with a design capacity of at least 2.5 million megagrams (approximately 3.27 million cubic yards) and an annual NMOC rate exceeding 50 megagrams to design and install a GCCS design plan conforming to the requirements of Subpart WWW.

26.

The Administrative Order directs the City to design and install a GCCS that meets certain requirements in the Rules.

27.

As set forth in detail above, the City's technical analysis demonstrates that the Landfill's design capacity is substantially less than the regulatory threshold of 2.5 million megagrams (approximately 3.27 million cubic yards).

28.

Further, the City's site-specific testing demonstrates that the Landfill's NMOC emission rate would be far lower than 50 megagrams per year. ^{NO TEST DATA OR REPORT AV.} This testing also indicated that, even if the EPD's design capacity estimate of 7,090,533 cubic yards were accurate, the Landfill's annual NMOC emission rate would not exceed 50 megagrams per year. The City made EPD aware of this testing, and EPD improperly failed or refused to consider the testing results. ^{NO TEST WAS PRODUCED}

29.

Because the Landfill's design capacity and annual NMOC emission rate fall below the relevant regulatory thresholds, the City is not required to design and install a GCCS that meets the requirements of the Rules or Subpart WWW. Consequently, the

landfill emissions reporting and control requirements set forth in the Administrative Order do not apply to the Landfill.

30.

Accordingly, the Administrative Order including the requirements set forth in operative paragraphs 1-5 thereof, is in violation of statutory provisions; is in excess of the Director's authority; is made upon unlawful procedure; is affected by error of law; is clearly erroneous in view of the reliable, probative and substantial evidence; is arbitrary and capricious; is characterized by an abuse of discretion; and/or is clearly unwarranted by the exercise of discretion.

COUNT III-

The Administrative Order is Unlawful Because It Orders The City to Obtain a Part 70 Operating Permit Even Though the Landfill is Exempt From This Requirement.

31.

The City specifically incorporates the averments set forth in the preceding Paragraphs 1-30 and realleges them herein.

32.

Rule 391-3-1-.02(2)(ggg) applies to all Georgia municipal solid waste landfills that were constructed before May 30, 1991 and accepted waste at any time since November 8, 1987, or have additional design capacity available for future waste. In addition, Rule 391-3-1-.02(2)(ggg)(3) requires all existing municipal landfills to comply with the applicable standards, requirements and provisions of Subpart WWW.

33.

Subpart WWW, 40 C.F.R. § 60.752(c), provides that operators of regulated landfills with a design capacity of less than 2.5 million megagrams (approximately 3.27

million cubic yards) are not required to obtain a Part 70 Operating Permit, unless the landfill is otherwise subject to either part 70 or part 71.

34.

As set forth in this Petition, the Landfill's design capacity is significantly less than 2.5 million megagrams (approximately 3.27 million cubic yards). Further, the Landfill is not otherwise subject to either part 70 or part 71. Consequently, the Landfill is not required to obtain a Part 70 Operating Permit.

35.

Accordingly, the Administrative Order including the requirements set forth in operative paragraphs 1-5 thereof, is in violation of statutory provisions; is in excess of the Director's authority; is made upon unlawful procedure; is affected by error of law; is clearly erroneous in view of the reliable, probative and substantial evidence; is arbitrary and capricious; is characterized by an abuse of discretion; and/or is clearly unwarranted by the exercise of discretion.

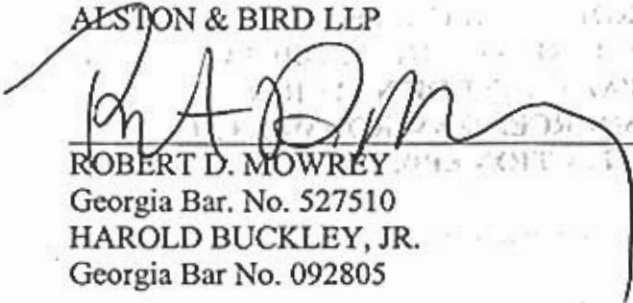
NOW THEREFORE, the City respectfully prays for the following relief:

- 1) That the Administrative Order including the requirements set forth in operative paragraphs 1-5 thereof, be determined to be in violation of statutory provisions; is in excess of the Director's authority; is made upon unlawful procedure; is affected by error of law; is clearly erroneous in view of the reliable, probative and substantial evidence; is arbitrary and capricious; is characterized by an abuse of discretion; and/or is clearly unwarranted by the exercise of discretion;

- 2) That the Administrative Order be repealed and have no further force or effect; and
- 3) Such other relief that as may be just and appropriate.

Respectfully submitted this 25th day of June, 2004.

ALSTON & BIRD LLP



ROBERT D. MOWREY
Georgia Bar No. 527510
HAROLD BUCKLEY, JR.
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Attorneys for Petitioner

BEFORE THE BOARD OF NATURAL RESOURCES
STATE OF GEORGIA

THE CITY OF ATLANTA, a political)
subdivision of the State of Georgia,)

Petitioner,)

v.)

RECORD NO. _____

CAROL A. COUCH, Ph.D.,)
DIRECTOR OF THE GEORGIA)
DEPARTMENT OF NATURAL)
RESOURCES, ENVIRONMENTAL)
PROTECTION EPD,)

Respondent.)

CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies filing an original and three copies of the foregoing "Petition for Hearing" with the following:

Director of the Environmental Protection EPD
Georgia Department of Natural Resources
c/o Commissioner of Natural Resources
205 Butler Street, S.E., Suite 1252
Floyd Towers East
Atlanta, Georgia 30334-1703

and simultaneously serving a copy of the foregoing "Petition for Hearing" by CERTIFIED MAIL, RETURN RECEIPT REQUESTED addressed as follows:

Thurbert E. Baker
Attorney General
State of Georgia
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300

This 25th day of June, 2004.

ALSTON & BIRD LLP

Harold Buckley Jr.
HAROLD BUCKLEY, JR.
Georgia Bar No. 092805

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