

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

HAAS TRUCKING, INC.

APPELLANT

VERSUS

CAUSE NO.: 2009-TS-00373

**HANCOCK COUNTY SOLID WASTE AUTHORITY; and
HANCOCK COUNTY BOARD OF SUPERVISORS**

APPELLEES

**REPLY BRIEF OF APPELLANT HAAS TRUCKING
APPEAL FROM THE CIRCUIT COURT
OF HANCOCK COUNTY**

(ORAL ARGUMENT REQUESTED)

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HAAS TRUCKING, INC.'S BRIEF IN REPLY TO APPELLEE'S BRIEF

COME NOW YOUR APPELLANTS, Haas Trucking, Inc., (hereinafter "the Appellants"), through counsel, who submit this Brief in Reply to Appellee Hancock County Solid Waste Authority's Brief:

III. SUMMARY OF THE ARGUMENT

1. The Authority acted outside the statutory and regulatory guidelines when it responded to an MDEQ staff letter. The Commission, not its staff, has exclusive authority to approve, disapprove or critique county solid waste plans. By not following the law and regulations, both the Authority and MDEQ were wrong.
2. *Res judicata* barred the Authority from reopening its solid waste plan amendment unless a material change in circumstances occurred. Since no order was issued by the Commission, there was no change in circumstances.
3. Even assuming that the Authority and MDEQ acted within their power, the removal of Haas Trucking, Inc., from the second proposed amended solid waste plan was not based on substantial evidence, and was arbitrary and capricious.

IV. REPLY TO APPELLEE'S ARGUMENTS

4. This is a reply to the Hancock County Solid Waste Authority's brief.

A. The Authority's Decision Did Not Follow Statutory Procedure

5. The Authority's argument that it followed statutory procedure is without merit.
6. In its brief, the Authority fails to recognize the difference in a letter from a staff member and an order issued by MCEQ or, via delegation, its executive director.
7. The Authority's acceptance of and reliance on a MDEQ staff member's letter, rather than an order disapproving the plan, created no authority for the Authority to revise the plan.

8. State law requires the commission, “**by order**,” to approve or disapprove the plan within 180 days. Miss. Code Ann. §17-17-227(6) (emphasis added). If the commission disapproves a plan, the commission must include in its **order** “a statement outlining the deficiencies in the plan” and directing the county to prepare a revised plan within 120 days. *Id.*
9. Even if MCEQ’s alleged delegation of §17-17-227 duties to the MDEQ executive director was appropriate, the executive director still must perform the duties as required by law – either by issuing proper orders or referring matters back to the MCEQ to do so. Here, neither was done.
10. The Appellee never alleges that an order was issued by MCEQ or the MDEQ executive director – because none exists.
11. The Authority looks to Miss. Code Ann. §49-2-13(j) to support its reliance on the staff member’s letter. However, once again, §49-2-13(j) grants the Executive Director of MDEQ the authority to issue **orders** in accordance with §17-17-227, not letters.
12. The Appellant again points to *Miss. Dep’t of Envtl. Quality v. Weems*, 653 So. 2d 266 (Miss. 1995). In that case, the MDEQ executive director wrote letters in response to a request for legal guidance regarding a solid waste permit. This Court noted with approval that the chancellor in *Weems* rejected the MDEQ official’s letters, holding that “[t]he Commission ‘does not speak, nor set policy, through the letters of its Executive Director. It can only speak through its own official action.’ ” *Id.* at 272.
13. This Court commented that “[b]y not considering or acting within the confines of the statute,” the Commission had left the plaintiff (*Weems*) in a “useless forum.” *Id.* at 281.

The Court held that MDEQ had been arbitrary and capricious, and the case was remanded to administrative agencies for further action. *Id.*

14. Following the decision in *Weems*, if an Executive Director of MCEQ does not speak through letters, *id.* at 272, then a staff member cannot speak through a letter. Especially, when the letters related to MCEQ's compliance with statutory guidelines.
15. Further, by "not acting within the confines of the statute," *id.* at 281, MCEQ's actions with regard to the Hancock County Authority solid waste plan amendment were "per se arbitrary and capricious...." *Id.* at 281.
16. With the lack of an order from the commission or, via delegation, its executive director, the MDEQ staff had no authority to direct Hancock County to revise the plan by letter. Thus, the Authority did not have any legitimate basis to reopen and re-evaluate its solid waste plan and the actions of MDEQ should be given no more deference than that afforded the agency in *Weems*.

B. The Decision Was Barred by the Doctrine of *Res Judicata*.

17. The Authority contends that the plan submitted to MDEQ/MCEQ was not a final decision by the Solid Waste Authority.
18. The contention is based on the theory that any decision by the Authority is not final or binding without approval from MDEQ/MCEQ. This contention is meritless.
19. "Once an agency decision is final and the decision remains unappealed beyond the time to appeal, it is barred by administrative res judicata or collateral estoppel." *Zimmerman v. Three Rivers Planning & Dev. Dist.*, 747 So. 2d 853, 861 (Miss. App. 1999).
20. In *Zimmerman*, a permit applicant was barred from challenging the grant of a landfill permit for failure to request a hearing in a timely manner. *Id.*

21. In the instant case, the Authority chose eight (8) prospective sites and a time period was set to appeal that decision. Once that time period to appeal ended, the Authority's decision became final. *See also, Westminster Presbyterian Church v. City of Jackson*, 176 So. 2d 267 (Miss. 1965) (land use decisions not appealed are res judicata).
22. It is specious for the Authority to attempt to denude its own decision-making capacity by claiming that none of its decisions are final because they may be approved or disapproved by the MCEQ. Any decision-making body may be overturned by an authorized review/appellate body, but that fact does not make the underlying decision any less final. Zoning decisions, for example, are routinely overturned or disapproved, but they also may be barred by *res judicata*.
23. The instant appeal began as a bill of exceptions in accordance with Miss. Code Ann. § 11-51-75, as amended; and U.R.C.C.P. 5.01, and 5.03. By definition, this form of appeal must start with a judgment or decision of a body qualified to make the appealed decision. Nothing about the solid waste authority, or the nature of its business, immunizes it from *res judicata*.
24. As an administrative agency, the Solid Waste Authority, similar to a Board of Supervisors, "has ordinarily no power to review or reverse or vacate its own judicial action after final adjournment." *Keenan v. Harkins*, 82 Miss. 709, 35 So. 177 (1903).
25. The Authority has no power to change its decision in the absence of fraud, newly discovered evidence, or a material change of circumstances. *Westminster Presbyterian*, 176 So. 2d at 270.
26. A letter from a staff member at MDEQ does not constitute a material change of circumstances.

27. The Authority had a duty to invoke *res judicata*, not accept the MDEQ staff member's recommendation to re-evaluate the plan, and only act only by **order** from MCEQ or, through proper delegation, the executive director of MDEQ.

C. Authority's Decision Was Not Based upon Substantial Evidence.

28. Appellant is not disputing why the Authority thought the King Site should be included in a revised plan. The issue here is that the Authority's decision to exclude Haas Trucking, Inc., from the revised plan was not based on substantial evidence.
29. In its brief, the Authority provides no information, reasoning, or evidence in support of its decision to exclude Appellant's site. The Authority simply stated that its decision on the King Site was based on four factors. These factors included the accessibility of the King Site from major transportation corridors, location of the site in the County, convenience of the site for citizens, business, and industry, and the ability to expand.
30. In addition, the Authority heavily relied on the factors included in the Neel-Schaffer report. Further, the Authority relied on the report to provide substantial evidence for its decision to remove Appellant from the revised plan.
31. The Neel-Schaffer report provides little explanation as to why Haas Trucking, Inc., fell to a disfavored/rejected site when re-reviewed by Hancock County and Neel-Schaffer. R.E. 105-135. This absence of information gives some insight into flaws in the Authority's approach under Neel-Schaffer.
32. Neel-Schaffer did not physically inspect the Haas site, did not provide a flood plain analysis of the sites, did not analyze the mileage to all the sites, did no detailed analysis of the long-term capacity of the sites, and did not identify the sites that could not be permitted under MDEQ regulations. R.E. 97-99.

33. How can the Authority say that their decision was based on substantial evidence if the engineer they relied so heavily on did not even visit the sites? Neel-Schaffer relied on a 15-minute interview with its engineers during the re-evaluation of the plan amendment. R.E. 131.
34. The Authority had a duty to “say at least minimally why they do what they do so someone can see whether it be arbitrary or capricious.” *McGowan v. Miss. State Oil & Gas Bd.*, 604 So. 2d 312, 322 (Miss. 1992). In the instant case, just like *McGowan*, the agency rejected an applicant’s requested relief, “but we are not sure why.” *Id.* at 323.
35. Accordingly, this Court should vacate the agency’s order because of inadequate findings, and thus not based on substantial evidence and/or arbitrary and capricious. *Id.*; accord *Public Employees’ Retirement System v. Marquez*, 774 So. 2d 421, 430 (Miss. 2000).

D. The Decision Was Arbitrary and Capricious.

36. The Authority states its decision to drop the Haas site was based on the Neel-Schaffer recommendation.
37. The Authority states, “There can be nothing arbitrary and capricious about authorizing an independent technical review of the matter by professionals qualified to conduct such a review.” The Authority described Neel-Schaffer as “professional engineers both educated and experienced in assessing solid waste needs in South Mississippi.”
38. Appellant does not concede the legitimacy of Neel-Schaffer’s recommendations.
39. While not disputing the professional qualifications of the engineers, Appellant questions just how “independent” the review really was. From inception, the MDEQ plan to send Neel-Schaffer to Hancock County was devised to show that too many proposed landfill

- sites were included in the solid waste plan. Not surprisingly, Neel-Schaffer did exactly what MDEQ wanted it to do – and the solid waste authority just went along with it.
40. Being experienced in assessing the needs of South Mississippi, it would seem important, if not essential, for Neel-Schaffer to review, consider, and include a flood plain analysis of the sites.
 41. With the devastation of Katrina's flood water not too far removed, combined with the general flooding history of Hancock County, how could the Authority accept the Neel-Schaffer report?
 42. One of the more glaring defects of the report is that Neel-Schaffer failed to conduct any significant review of any site's suitability under MDEQ permitting requirements.
 43. The report from Neel-Schaffer stated, "Any selected sites must undergo detailed evaluations during the permitting phase." *Id.* R.E. 132.
 44. Since no site can accept solid waste unless it has been permitted, one would assume that consulting engineers – and the solid waste authority – would want to know whether a site might qualify for a permit before choosing it to the exclusion of all other candidates in a 20-year plan.
 45. These two omissions alone (no flood plain analysis and no review of permit requirements) show the Authority's decision was "not done according to reason or judgment, but depending upon the will alone" and in a manner "implying either a lack of understanding of or a disregard for the surrounding facts and settled controlling principles." *McGowan v. Miss. State Oil & Gas Bd.*, 604 So. 2d 312, 322 (Miss. 1992).
 46. In other words, the decision was arbitrary and/or capricious, and should be reversed.

V. CONCLUSION

47. For all of the reasons stated above, and in the incorporated exhibits, Haas Trucking, Inc., requests the Court to reverse the decision of the Hancock County Circuit Court, which had affirmed the Hancock County Solid Waste Authority's decision regarding exclusion of Haas Trucking, Inc., from the county's proposed solid waste site list, and to remand this matter to the agency for further proceedings.

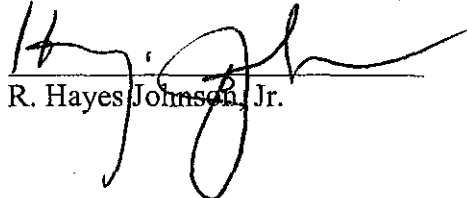
WHEREFORE, PREMISES CONSIDERED, Appellant requests the court to enter an order reversing the decision of the Hancock County Circuit Court, which affirmed the Hancock County Solid Waste Authority, and requiring the Authority to reinstate its Amendment #6 to the county's solid waste plan, including Haas Trucking, Inc., as a recommended Class I rubbish site, and instructing the authority to submit the plan to state environmental authorities for review as provided by state law and administrative regulations.

Appellant also requests general relief.

Respectfully Submitted, this the 14th Day of November, 2009.

HAAS TRUCKING, INC.; AND KEVIN HAAS

By: JOHNSON LAW PRACTICE, PLLC, THEIR ATTORNEYS


R. Hayes Johnson, Jr.

CERTIFICATE OF SERVICE

I, R. Hayes Johnson, Jr., do hereby certify that I have this day caused to be delivered by U.S. Mail, first class, postage prepaid; or by facsimile; or by hand delivery; or by more than one of these methods, a true and correct copy of the above, foregoing pleading to:

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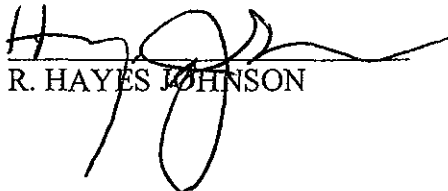
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I, further certify that I have this day caused to be delivered by U.S. Mail, first class, postage prepaid, the original and four (4) copies of this Brief, along with a copy of the brief on disk, to:

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SO CERTIFIED, this the 9th Day of November, 2009.


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