IN THE SUPREME COURT OF MISSISSIPPI
NO. 2010-CA-02098

W. C. FORE d/b/a W. C. FORE TRUCKING, INC. **APPELLANT**

VERSUS

MISSISSIPPI DEPARTMENT OF REVENUE f/k/a MISSISSIPPI STATE TAX COMMISSION, MISSISSIPPI DEPARTMENT OF ENVIRONMENTAL QUALITY AND MISSISSIPPI COMMISSION ON ENVIRONMENTAL QUALITY **APPELLEES**

JOINT BRIEF OF APPELLEES

APPEAL FROM THE CHANCERY COURT OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

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I. STATEMENT OF THE ISSUES

Mississippi Department of Revenue f/k/a Mississippi State Tax Commission (hereinafter "MSTC")[1], Mississippi Department of Environmental Quality and Mississippi Commission on Environmental Quality (hereinafter collectively referred to as "MDEQ")[2] are dissatisfied with the Statement of the Issues presented by W.C. Fore d/b/a W.C. Fore Trucking, Inc. (hereinafter "Fore"). Pursuant to *Miss. R. App. P. 28(b)*, MSTC and MDEQ re-state the issues on appeal as follows:

I. Whether the Delancey and LoBouy Road Sites Were Commercial Nonhazardous Solid Waste Management Facilities and Not Exempt from the Fee Imposed by Miss. Code Ann. § 17-17-219;

II. Whether MSTC's Enforcement of the Reporting Requirements and Fee Imposed by Miss. Code Ann. § 17-17-219 was Violative of Fore's Constitutional Rights Under the 14th Amendment; and

III. Whether Fore is Responsible for All Fees Assessed to the Delancey Site and Thus, Not Entitled to a Refund.

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[1] The Mississippi State Tax Commission was reorganized as of July 1, 2010, and is now known as the Mississippi Department of Revenue. However, for ease of reference and continuity, it is hereafter referred to as "MSTC".

[2] Generally, Mississippi Commission on Environmental Quality and Mississippi Department of Environmental Quality will be referred to collectively as "MDEQ". However, the agencies will be named separately when necessary.

II. STATEMENT OF THE CASE

A. Nature of the Case

Fore appeals the Opinion and Final Judgment of the Chancery Court of the First Judicial District of Harrison County entered on or about November 29, 2010. Said Final Judgment affirmed the assessment of fees against Fore based on the operation of two facilities for the disposal of debris resulting from Hurricane Katrina for the time period of September 2005 to December 2005. Fees in the amount of $333,182.00 were assessed by MSTC pursuant to Miss. Code Ann. § 17-17-219.

It should be noted by this Court, that only fees assessed against Fore for the period of September 2005 to December 2005 are made a part of this appeal. While Fore was assessed for fees during the time the facilities in question operated in 2006, those fees are part of a separate lawsuit that has been stayed pending the outcome of this appeal.

B. Course of Proceedings and Disposition in the Court Below

Following the devastation of the Mississippi Gulf Coast by Hurricane Katrina on August 29, 2005, Fore secured a contract with Harrison County on September 10, 2005, for the removal, transportation and disposal of debris. Fore's two facilities, the Delancey and LoBouy Road sites, were approved for disposal by MDEQ on September 16, 2005, and October 4, 2005, respectively.

On February 8, 2006, MDEQ issued a memorandum to all owners/operators of commercial sites used for disposal of wastes from Hurricane Katrina. Said memorandum was accompanied by a reporting form that the owners/operators were required to file with MDEQ. This reporting form was sent to emergency disposal sites as well as existing permitted facilities that disposed of Hurricane Katrina debris.

Fore submitted reports to MDEQ and MSTC, but failed to pay the statutorily-imposed fee. MSTC issued an assessment of nonhazardous solid waste disposal fees to Fore on or about March 21, 2008 in the amount of $333,182.00 plus associated penalties and interest for a total assessment of $436,468.42. Fore appealed the assessment to the MSTC Board of Review, and a hearing was held on July 1, 2008, wherein the Board of Review upheld and affirmed the assessment via its Order dated August 26, 2008. Aggrieved by this decision, Fore appealed the Board of Review order to the three-member Mississippi State Tax Commission ("Full Commission")[3], and a hearing was held on January 21, 2009. On March 3, 2009, the Full Commission entered an order affirming the assessment in the reduced amount of $333,182.00 due to the abatement of the associated penalties and interest.

On March 31, 2009, Fore paid, under protest, the assessed fees in the amount of $333,182.00, and perfected his appeal to the Chancery Court of the First Judicial District of Harrison County. MDEQ filed a Motion to Intervene on May 18, 2009, and an Agreed Order was entered allowing the intervention. Following recusal by all four of the Chancellors of the Eighth Chancery Court District, the Supreme Court appointed Hon. Eugene L. Fair to preside over the matter. A trial was held commencing March 18, 2010, and Judge Fair entered his Opinion and Final Judgment in favor of MSTC and MDEQ on November 29, 2010. Fore filed his Notice of Appeal and Designation of the Record on or about December 14, 2010.

C. Statement of Facts

Hurricane Katrina struck Mississippi on August 29, 2005, causing widespread and unprecedented damage in Harrison County, Mississippi, as well as other areas of the state. (R.E.

[3] As part of the reorganization of the Mississippi State Tax Commission on July 1, 2010, the prior "Full Commission" became a separate Mississippi agency known as the Mississippi Board of Tax Appeal ("MBTA"). However, for purposes of consistency and to avoid confusion, the MBTA will be referred to as the "Full Commission".

7.)[4] In response to the destruction caused by the hurricane, Harrison County solicited bids from contractors for the removal of debris from public rights-of-way. (R.E. 3.) Fore submitted a bid and was awarded a contract for debris removal, transportation, and disposal for an area designated as Zone 2, at a price of $10.64 per cubic yard ($yd^3$). (R.E. 3.)

The contract with Harrison County was executed on September 10, 2005, and required the following from Fore:

1. "be fully responsible for final debris disposal…";
2. "responsible for coordinating with the County designate disposal sites…";
3. "assume all responsibility for operation of the disposal sites…"; and
4. "pay for all disposal site dumping fees…". (R.E. 3.)

Through execution of the contract with Harrison County, Fore represented the following:

1. He was "familiar with all federal, state, and local ordinances, laws, rules, and regulations with respect to debris pick-up, transportation, and disposal"; and
2. He would "fully comply therewith at all times during performance of work" under the contract. (R.E. 3.)

Following the execution of the contract, Fore requested that Harrison County approve his sites for disposal. (Tr. 197; R.E. 6.) These requests stated that "W.C. Fore agrees to follow all DEQ rules, regulations, and law on this property." (R.E. 6.) Harrison County then sent copies of Fore's requests to MDEQ along with the county's request that these sites be approved. (R.E. 6.) As a result of these requests, Fore received emergency authorization from MDEQ to accept and dispose of building and structural debris, and other specified types of hurricane debris at a site located on Wolf River Road in Harrison County, known as the Delancey site, which ultimately

[4] For clarification purposes, references to exhibits included in the Appellees' Record Excerpts are noted as "R.E."; references to exhibits ***not*** included in the Appellees' Record Excerpts are noted as "Exh."; references to the trial transcript are noted as "Tr."; and references to documents included in Appellant's Record Excerpts are noted as "App. R.E.".

became the largest building and structural debris emergency disposal site in Harrison County. (R.E. 4; Tr. 437-438.) Fore also received emergency authorization from MDEQ to accept and dispose of vegetative debris at a site near the intersection of LoBouy Road and Dubuisson Road in Harrison County, known as the LoBouy Road site. (R.E. 5.) MDEQ granted this authorization to Fore pursuant to Section II.O of Mississippi Commission on Environmental Quality's Nonhazardous Solid Waste Management Regulations & Criteria (hereinafter "SW-2 Regulations"). (Tr. 313-314; R.E. 2.[5]) Said authorizations were memorialized in letters dated September 16, 2005, and October 4, 2005. (R.E. 4 and 5, respectively.)

Following the execution of the contract with Harrison County and receipt of authorization from MDEQ, Fore began picking up debris from public rights-of-way in Harrison County consisting of debris brought to the rights-of-way by various residents of the county. (Tr. 133, 163-165.) In addition to the contract with Harrison County, Fore also received compensation for the disposal of debris pursuant to a contract with the U.S. Coast Guard. The debris Fore collected pursuant to the U.S. Coast Guard was disposed of at the LoBouy Road site. (Tr. 211.) Fore entered into an agreement with another contractor, Phillips and Jordan, Inc. (hereinafter "P & J"), and allowed it, for a fee, to utilize the Delancey site for disposal of hurricane debris that P & J collected pursuant to a contract it signed with the City of Gulfport. (Tr. 121-123.)

On or about February 8, 2006, MDEQ issued a memorandum to all owners/operators of commercial sites used for disposal of wastes from Hurricane Katrina. (Exh. 77.) Said memorandum was accompanied by a reporting form that the owners/operators were required to file with MDEQ. (Exh. 77.) The reporting form was sent to emergency disposal sites as well as existing permitted facilities that disposed of Hurricane Katrina debris. (Exh. 44.) Further, the memo required the owners/operators to report debris disposed of at the sites by volume and

[5] A full copy of the 102-page Nonhazardous Solid Waste Management Regulations can be found in Exh. 21.

weight. A conversion factor of 0.25 tons/cubic yard was to be used if weight scales were not available. (Exh. 77.) (Although Fore admitted to owning a set of portable scales, he failed to use them at either the Delancey or LoBouy Road sites. He neither weighed nor kept any other records regarding the weight of debris disposed of at these sites. (Tr. 166-167; 208-211.)) The 0.25 conversion factor was to be used by emergency disposal sites as well as existing permitted facilities that disposed of Hurricane Katrina debris. (Exh. 44.) It should be noted that owners/operators were permitted to propose the use of an alternate conversion rate and have it approved by MDEQ. (Exh. 77.) Fore neither proposed an alternate conversion rate nor had one approved. (Tr. 166-167; 208-210; 356-357.) In fact, after having received the February 8, 2006 memorandum and form, Fore submitted the required reports to MDEQ utilizing the 0.25 tons/yd^3 conversion factor for both the Delancey and LoBouy Road sites. (Exh. 68 and 72.)

On or about May 19, 2006, MSTC issued a memorandum to nonhazardous solid waste management facilities accompanied by a reporting form that the facilities were required to file with MSTC. (Exh. 78.) Following receipt of the memorandum and form, and following additional communications from MSTC, Fore submitted reports to MSTC on which he reported 298,964 tons of waste managed at the Delancey site and 34,218 tons of waste managed at the LoBouy Road site during 2005. (Exh. 79.) These reports were not accompanied by the payment of the $1.00/ton fee imposed by Miss. Code Ann. § 17-17-219. (Tr. 291; Exh. 79.)

Due to Fore's failure to pay the statutory fee, MSTC issued an assessment of nonhazardous solid waste disposal fees to Fore on or about March 21, 2008, in the amount of $333,182.00, plus associated penalties and interest for a total assessment of $436,468.42. (Exh. 80.) Fore appealed this assessment to the MSTC Board of Review, which entered an order affirming the assessment. Fore then appealed to the Full Commission. After a hearing on the matter, the Full Commission entered an order affirming the assessment in the amount of

$333,182.00 after abating the associated penalties and interest. (Exh. 81.) Fore paid the assessed fees, under protest, and filed his appeal with the Chancery Court of the First Judicial District of Harrison County.

III. SUMMARY OF THE ARGUMENT

A. The Delancey and LoBouy Road Sites Were Commercial Nonhazardous Solid Waste Management Facilities Subject to the Statutory Fees.

Fore asserts that the Delancey and LoBouy Road sites were not commercial nonhazardous solid waste management facilities as defined in both the regulations of MDEQ and Miss. Code Ann. § 17-17-3(d). Rather, Fore's assertion is that due to the emergency situation created by the vast devastation of Hurricane Katrina, these two emergency disposal sites were a completely separate entity. Fore further asserts that the authorization of these sites was done pursuant to the Governor's Resolution and MDEQ's Emergency Order. In fact, the sites were authorized pursuant to MDEQ's regulations. What Fore ignores is the fact that the activities that took place at the Delancey and LoBouy Road sites are identical to those that take place at permitted commercial nonhazardous solid waste management facilities. The only difference between the emergency sites and the permitted sites is that the emergency sites did not have to undergo the lengthy and tenuous process of receiving a permit via the normal channels. Fore wants this Court to accept the proposition that if the permitting requirements did not apply to the emergency sites, then the requirements of paying taxes and fees associated therewith also do not apply. The argument defies logic.

The emergency situation created by Hurricane Katrina in August 2005 was just that—an emergency. Additional sites needed to be up and running quickly in order to facilitate the disposal of the enormous amount of solid waste that was generated by the hurricane. The normal permitting procedures (which can, on average, take up to a year or more) stood in the way of

dealing with the clean-up of the debris. Therefore, they were logically suspended for the emergency disposal sites that were authorized following the hurricane. However, the statutory fees imposed on the disposal activities at issue were not due until July 2006, and were, naturally, not a hindrance to quickly creating emergency sites or quickly beginning the clean-up of the debris. It logically stands to reason that there was no need to suspend the requirement to pay the associated taxes for the emergency sites. Furthermore, the statutory fees are not inconsistent with the Emergency Order.

Fore also complains that he did not receive notice of the fees from MDEQ or MSTC. First and foremost, the contract Fore signed with Harrison County, as well as other pertinent documents discussed below, notified him that he would be responsible for compliance with all applicable laws, regulations and any associated fees. Secondly, MDEQ and MSTC are not required to notify Fore of the fees associated with the business he undertakes, and he is not entitled to notification. Fore should have taken it upon himself to contact MDEQ and/or MSTC pertaining to any question as to fees, and he failed to do so.

Fore claims that the Delancey and LoBouy Road sites are not subject to the fees imposed by Miss. Code Ann. § 17-17-219. He attempts to word this issue as a means of shifting the burden of proof. However, Fore's analysis of this issue is incorrect. The issue is one of exemption, and Fore bears the burden of proving that these sites are exempt from the provisions of Miss. Code Ann. § 17-17-219. As the argument below discusses in more detail, Fore has failed to meet his burden of proof, and he is responsible for the taxes due under the statute.

B. <u>Fore's Equal Protection Rights Under the 14th Amendment Have Not Been Violated.</u>

Fore brings forth his 14th Amendment claim under the "class of one" test pursuant to *Vill. of Willowbrook v. Olech*, 528 U.S. 562 (2000) wherein he must show that he was treated differently from those to whom he was similarly situated and that there is no rational reason for

the different treatment. Fore has failed to meet even one prong of this three-part test. The record is sorely lacking in evidence that Fore was similarly situated to the nine other emergency site operators. Further, there is scant evidence to support his contention that he was treated differently from the other operators. MSTC asserts that any difference in treatment was not only rational but logical and, in many instances, in compliance with statutes. Moreover, the evidence in the record supports the notion that it was another one of the emergency site operators who was the real "class of one", not Fore. This argument lacks merit.

C. Fore is Solely Responsible for Any and All Fees Associated with the Delancey Site.

As an alternate argument, Fore claims that if the statutorily-imposed taxes of Miss. Code Ann. § 17-17-219 apply to the Delancey and LoBouy Road sites, then he is not responsible for paying all of the fees associated with the Delancey site since he was not the only contractor accepting and disposing of solid waste at that site. This argument also lacks merit. *Fore was the only MDEQ-authorized operator for Delancey*. The other contractor accepting solid waste at this particular site was Phillips & Jordan, Inc. ("P & J"), whose authorization to do anything at the Delancey site came solely from Fore.

Fore had a contract with Harrison County to pickup and dispose of solid waste. P & J had a contract with City of Gulfport to pick up and dispose of solid waste. Upon Fore's request, Harrison County sought and obtained approval from MDEQ for the Delancey site which was located within Harrison County's jurisdictional limits. City of Gulfport may have requested that MDEQ approve the Delancey site, but since it did not have jurisdiction over the site (due to its location outside of city limits), those requests are entirely irrelevant. *The bottom line is that P & J never had approval from MDEQ to operate the site*. P & J was there out of the good graces of Fore, who was the only operator approved by MDEQ. As such, Fore is solely responsible for any fees and taxes associated with the site.

IV. ARGUMENT

A. Standard of Review

The matter *sub judice* involves an appeal from a chancery court review of the decision of an administrative agency. Upon review, the Supreme Court is bound by the same standard that the lower court is required to apply, namely the arbitrary and capricious standard. *Molden v. Mississippi State Dept. of Health*, 730 So. 2d 29, 33 (Miss. 1998) (*citing Mississippi State Tax Comm'n v. Mask* 667 So. 2d 1313, 1314-15 (Miss. 1996)) (*further citations omitted*). An agency's decision is not to be disturbed unless it meets the test of the arbitrary and capricious standard. *Wright v. Public Employees' Ret. Sys. of Mississippi*, 24 So. 3d 382, 386 (Miss. Ct. App. 2009 (*citing Public Employees' Ret. Sys. v. Smith*, 880 So. 2d 348, 350-51 (Miss. Ct. App. 2004)) (*further citations omitted*).

Thus, the Court must determine whether the order of the Full Commission, (1) was not supported by substantial evidence, (2) was arbitrary or capricious, (3) was beyond the power of the administrative agency to make, or (4) violated some statutory or constitutional right of the complaining party. *Molden*, 730 So. 2d at 33 (*quoting Mask*, 667 So. 2d at 1315) (*further citations omitted*).

The term "arbitrary" means "'not done according to reason or judgment, but depending on the will alone.'" *Wright*, 24 So. 3d at 388 (*quoting Public Employees' Ret. Sys. v. Marquez*, 774 So. 2d 421, 429 (Miss. 2000)) (*further citations omitted*). "Capricious means 'done without reason, in a whimsical manner, implying either a lack of understanding or a disregard for the surrounding facts and settled controlling principles.'" *Id.* (*quoting Marquez*, 774 So. 2d at 429-430) (*further citations omitted*). "Substantial evidence" has been defined to mean "such relevant evidence as reasonable minds might accept as adequate to support a conclusion" and "more than a 'mere scintilla' or suspicion." *Id.* at 386 (*quoting Marquez*, 774 So. 2d at 425).

In applying the arbitrary and capricious standard, the Court may not re-weigh the evidence or substitute its judgment for that of the agency. *Wright*, 24 So. 3d at 385-86 (*citing Public Employees' Ret. Sys. v. Howard*, 905 So. 2d 1279, 1284 (Miss. 2005)). "A rebuttable presumption exists in favor of the administrative agency's decision and findings, and the challenging party has the burden of proving otherwise." *EMC Enterprise, Inc. v. Mississippi Dept. of Employment Sec.*, 11 So. 3d 146, 150 (Miss. Ct. App. 2009) (*citing Cummings v. Mississippi Dept. of Employment Sec.*, 980 So. 2d 340, 344 (Miss. Ct. App. 2008)). "The decision of an administrative agency or board is afforded great deference upon judicial review by this Court even though we review the decision of the chancellor de novo." *Oxy USA, Inc. v. Mississippi State Tax Comm'n*, 757 So. 2d 271, 284 (Miss. 2000) (citing *St. Dominic-Jackson Mem. Hosp. v. Mississippi State Dep't of Health*, 728 So. 2d 81, 83 (Miss. 1998)) (*further citations omitted*).

Fore further argues that the lower court erroneously determined that it is Fore's burden to present evidence that he is exempt from the tax imposed by Miss. Code Ann. § 17-17-219. Fore reframes the issue, claiming that the real question is whether the emergency disposal sites were subject to the reporting requirements and fees imposed by the statute thereby attempting to shift the burden of proof to MSTC and MDEQ. Fore's evaluation of the issue is incorrect.

As is discussed in detail below, the Delancey and LoBouy Road sites were commercial nonhazardous solid waste management facilities as defined by Miss. Code Ann. § 17-17-3(d) and are subject to tax. Therefore, MSTC and MDEQ assert that the proper issue before the Court is one of exemption requiring Fore to bear the burden of proving that the disposal of waste at emergency disposal sites, particularly the Delancey and LoBouy Road sites, was exempt from the tax levied by Miss. Code Ann. § 17-17-219.

The Court has been consistent in its application of the familiar rule of construction in matters of tax exemption.

> Since tax is the rule and exemption is the exception, and since exemptions from taxation are not favored, general rule is that a grant of exemption from taxation is never presumed; on the contrary, in all cases having doubt as to legislative intention, ***or as to inclusion of particular property within terms of statute, presumption is in favor of taxing power, and burden is on claimant*** to prove or establish clearly his right to exemption, bringing himself ***clearly within terms*** of such conditions that statute may impose.

(Emphasis added.) *Mississippi State Tax Comm'n v. Med. Devices, Inc.*, 624 So. 2d 987, 990 (Miss. 1993) (*citing United States v. State of Miss.*, 578 F. Supp. 348, 349 (S.D. Miss. 1984)). In fact, the Court has held that "all reasonable doubts are resolved against the exemption." *Med. Devices*, 624 So. 2d at 991 (*citing Monaghan v. Jackson Casket Co.*, 136 So. 2d 603, 606 (Miss. 1962)). The Delancey and LoBouy Road sites fit squarely within the statutory definition of a commercial nonhazardous solid waste management facility. Fore bears the burden of clearly establishing his right to an exemption from the tax.

B. The Delancey and LoBouy Road Sites Were "Commercial Nonhazardous Solid Waste Management Facilities" and Not Exempt from the Fee Imposed by Miss. Code Ann. § 17-17-219.

1. *The Delancey and LoBouy Road Sites Were "Commercial Nonhazardous Solid Waste Management Facilities" as Defined in Miss. Code Ann. § 17-17-3(d)*

a. The Delancey and LoBouy Road Sites Met the Statutory Definition of "Commercial Nonhazardous Solid Waste Management Facility"

The Mississippi Commission on Environmental Quality and the Mississippi Department of Environmental Quality are tasked with the "administration and enforcement of the Solid Wastes Disposal Law of 1974" under Miss. Code Ann. § 17-17-2 (amended 1991), including that portion of the law known as the "Nonhazardous Solid Waste Planning Act of 1991," Miss. Code Ann. §§ 17-17-201 to 17-17-235 (Rev. 2003). Under this Act, commercial facilities are

mandated to report and pay a fee on waste pursuant to Miss. Code Ann. § 17-17-219(1), which specifically states:

> Before July 15 of each year the operator of a commercial nonhazardous solid waste management facility managing municipal solid waste shall file with the State Tax Commission and [MDEQ] a statement, verified by oath, showing the total amounts of nonhazardous solid waste managed at the facility during the preceding calendar year, and shall at the same time pay to the State Tax Commission One Dollar ($1.00) per ton of municipal solid waste generated and managed in the state by landfilling . . . .

Fore contests MDEQ's determination that the sites in question were commercial nonhazardous solid waste management facilities. Section I.C. of the SW-2 Regulations (last amended April 28, 2005) specifies the following:

> a 'solid waste management facility' is ***any facility which manages nonhazardous solid waste***, including landfills, rubbish sites, land application sites, processing facilities, composting facilities, transfer stations, and waste incinerators . . . .

(R.E. 2.) (Emphasis added.) It should be noted that Fore's expert witness, Charles Stewart (hereinafter "Stewart"), admitted that the debris disposed of at both sites was solid waste. (Tr. 246-247.) Therefore, this is not an issue before the Court. Further, whether the solid waste disposed of at the Delancey and LoBouy Road sites was nonhazardous has also not been an issue during this litigation.

In regard to the question of whether the Delancey and LoBouy Road sites were "commercial" facilities as contemplated by Miss. Code Ann. § 17-17-219, we must turn to Miss. Code Ann. § 17-17-3(d) which provides the statutory definition of a "commercial nonhazardous solid waste management facility" as follows:

> ***any facility*** engaged in the storage, treatment, processing or ***disposal of nonhazardous solid waste*** for compensation or which accepts nonhazardous solid waste from more than one (1) generator not owned by the facility owner.

Miss. Code Ann. § 17-17-3(d). (Emphasis added.) (See also R.E. 2.) Both the Delancey and LoBouy Road sites were commercial facilities, as they not only met one, but both of the established criteria. Fore admitted that he received compensation from P & J, Harrison County, and the Coast Guard for the waste disposal activities that were undertaken at the Delancey and LoBouy Road sites. (Tr. 120-123, 153-154, 211.) Additionally, Fore admitted that both sites received waste from multiple generators not owned by the facility owner since debris not only from multiple residences in Harrison County was disposed at both the Delancey and LoBouy Road sites (Tr. 120, 153-154, 163-165), but also debris from the Coast Guard was disposed at the LoBouy Road site (Tr. 211) and debris from P & J/City of Gulfport was disposed at the Delancey site. (Tr. 120-121, 143-144).

While Fore asserts that he was never licensed or permitted for operating a commercial disposal site (Appellant's Br., p. 16), the record is clear in this case that he was authorized by MDEQ to operate these sites for the disposal of hurricane debris (R.E. 4 and 5.) Whether the sites were labeled or considered by Fore to be "commercial disposal sites" is irrelevant, because both sites clearly met both the statutory definition and MDEQ's interpretation of "commercial nonhazardous solid waste management facility" (Tr. 347, 355), said interpretation being entitled to deference. S*ee Molden*, 730 So. 2d at 32-33.

Fore's argument that both MDEQ and MSTC were confused about whether the fee was applicable to the activities being undertaken at sites receiving emergency authorization completely mischaracterizes the evidence in this case. (Appellant's Br., pp. 20-21.) In support of his argument, Fore quotes the following language from an internal MSTC email: "There may be some confusion about whether this particular type of waste is subject to the disposal fee. If there are only a few of these DEQ permitted sites we may need to send each site permittee a letter notifying them of their liability for the fee (if DEQ hasn't already done this)." (Exh. 4-13.)

However, this quote clearly implies that any confusion was on the part of the operators, not the agencies.

Additionally, Fore relies heavily on Exhibit 85, which purportedly summarizes a conversation between MDEQ and MSTC.[6] However, the lower court did not admit Exhibit 85 as proof of the truth of its contents but instead for its reflection of the "approach and mental status of some personnel of DEQ regarding application of the tax in June of 2006." (App. R.E. 2, p. 844, f.n.10.) This document was prepared by an MSTC employee, not an MDEQ employee (Tr. 188-191), so it only reflects the approach and mental status of some personnel of MDEQ in so far as the MSTC employee understood it. Moreover, in his brief, Fore fails to include an ellipsis to indicate that language was left out of the quotation taken from Exhibit 85.[7] (Appellant's Br., p. 20.) The complete quotation is as follows:

> DEQ did not formally notify sites that they would be subject to $1.00 per ton fee. They told some verbally. At the time they ***were not sure exactly how they would be classified and*** were not sure the $1.00 fee would be charged.

(Exh. 85.) (Emphasis added.) As the complete quote implies, and MDEQ's representative, Mark Williams (hereinafter "Williams") explained at trial, there were many different types of emergency debris management sites after Hurricane Katrina. (Tr. 303-308.) In addition to emergency sites that landfilled debris, there were also emergency sites that staged, burned, or chipped debris. (Tr. 303-308.) Williams, in his capacity as Administrator of the Solid Waste Policy, Planning, & Grants Branch of MDEQ's Environmental Permitting Division, explained that there was no question to him that emergency sites that landfilled waste for compensation were subject to the fee, but there was some question in the beginning about whether some of the other types of emergency sites were subject to the fee. (Tr. 303-308.)

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[6] Exhibit 85 was admitted over the objection of MDEQ & MSTC. (Tr. 188-191.)

[7] The lower court inadvertently adopted Fore's misquote of Exhibit 85. (App. R.E. 2, p. 844, f.n.10.)

Fore also highlights that, prior to Hurricane Katrina, the fee had not been imposed on sites which were granted emergency authorization by MDEQ. However, an agency's failure to enforce a law does not make the law inapplicable or relieve an agency from the responsibility to enforce the law in the future. "The mere failure of public officers charged with a public duty to enforce statutory and constitutional provisions in respect to the levy and collection of taxes should not be permitted to stand in the way of the correct administration of the law." *Brady v. Getty Oil Co.*, 376 So. 2d 186, 190 (Miss. 1979) (citing *Monaghan v. Jackson Casket Co.*, 136 So. 2d 603, 607 (Miss. 1962)). Fore also argues that neither MDEQ nor MSTC had previously treated emergency disposal sites as commercial nonhazardous solid waste management facilities. (Appellant's Br., p. 21.) However, the evidence Fore cites to support this claim, MDEQ's First Supplemental Response to Interrogatory No. 9 and Williams' trial testimony, actually indicates that the operators of the pre-Katrina emergency disposal sites were required to file reports with MSTC and MDEQ pursuant to Miss. Code Ann. § 17-17-219, but MDEQ could not find the required reports in its files. (Exh. 41; Tr. 309-312.) Neither the Supplemental Response nor Williams stated or implied that MDEQ or MSTC did not consider these sites commercial nonhazardous solid waste management facilities. Neither MSTC nor MDEQ had any doubt that the Delancey and LoBouy Road sites were commercial nonhazardous solid waste management facilities and subject to the fee imposed by Miss. Code Ann. §17-17-219.

b. Fore's Argument that He Relied on the Governor's Resolution and MDEQ's Emergency Order When He Bid on the Harrison County Contract Lacks Merit

Fore entered into his contract with Harrison County for the pickup and disposal of debris on September 10, 2005. (R.E. 3.) The Emergency Order was subsequently issued September 13, 2005. (R.E. 7.) Therefore, Fore could not have relied on the Emergency Order in preparing his bid and entering into his contract with Harrison County for the pickup and disposal of debris, as

the Order was issued three days after the contract was executed. Moreover, MDEQ authorized Fore's use of the Delancey and LoBouy Road sites *after* Fore entered into his contract with Harrison County. (R.E. 3, 4, and 5.) Therefore, when preparing his bid for the Harrison County contract, Fore should have assumed that he would have to use another operator's disposal site (Tr. 359-360). Since Fore's contract with Harrison County required Fore to "assume all responsibility for operation of the disposal sites" and "pay for all disposal site dumping fees" (R.E. 3) and since Fore did not have authorization for his own disposal sites at the time of entering into his contract, Fore presumably included the cost of disposal site dumping fees in his bid.

Furthermore, Fore at all times had access to the laws and regulations governing solid waste disposal as well as to the advice of a solid waste management expert. Fore's expert witness, Stewart, consulted with Fore throughout the bidding process and while the Delancey and LoBouy Road sites were in operation. (Tr. 227, 232-233.) Fore and Stewart, who was also Fore's business partner (Tr. 227), testified regarding the process by which they prepared their bid for the Harrison County contract, including observing the waste and calculating the cost to transport and dispose of it. (Tr. 119, 227, 232-233.) Stewart was admitted as an expert in the field of solid waste management, being a Professional Engineer and having dealt with solid waste management off and on over a span of about thirty years. (Tr. 217-224.) Stewart also testified that he was familiar with the Solid Wastes Disposal Law and MDEQ's regulations. (Tr. 220, 225, 249-250.)

c. Fore's Argument that MDEQ and MSTC Are Required to Give Notice to Taxpayers That a Tax Will Be Imposed Lacks Merit

Fore argued that he received no notice that the fee would be imposed until he received the memorandum sent by MDEQ on February 8, 2006, which included a form on which to report amounts of debris and noting that a fee of $1.00 per ton would be imposed. (Exh. 77.) However,

the February 8, 2006, MDEQ memorandum to emergency site operators for solid waste reporting was sent out at the normal time that permitted site operators were sent reporting forms by MDEQ. (Tr. 353-354.) Furthermore, Fore fails to cite to any law requiring MDEQ or MSTC to provide Fore with notice of taxes and fees that he may incur through his business activities. Fore could not provide said citations because they do not exist. There is no requirement regarding notice of potential tax liabilities. Taxpayers are presumed to know the law. *City of Ellisville v. Smith*, 72 So. 2d 451, 453 (Miss. 1954). No provision of the Solid Wastes Disposal Law, the Mississippi Sales Tax Law under which the fee at issue is administered, or any other law requires that a taxpayer be given notice that taxes are owed.

Fore has a duty to know the nature of the business he transacts and the legal requirements thereof. The Court has held, "Every person must be presumed to know the law, and in [the] absence of some misrepresentation, or illegal concealment of facts, the person must abide the consequences of his contracts and actions." *Royer Homes of Miss., Inc. v. Chandeleur Homes, Inc.*, 857 So. 2d 748, 754 (Miss. 2003) (quoting *Farragut v. Massey*, 612 So. 2d 325, 329 (Miss. 1992)). Clearly, neither agency was required to give prior notice of the applicability of the fee.

However, the record indicates that Fore did have notice of his responsibility for compliance with all applicable laws, rules, and regulations. Through execution of the contract with Harrison County on September 10, 2005, Fore represented that he was "familiar with all federal, state, and local ordinances, laws, rules, and regulations with respect to debris pick-up, transportation, and disposal" and that he would "fully comply therewith at all times during performance of work" under the contract. (R.E. 3.) Fore's contract with Harrison County also required Fore to "assume all responsibility for operation of the disposal sites" and "pay for all disposal site dumping fees." (R.E. 3.) (Emphasis added.) Fore's subsequent requests to Harrison County, dated September 10, 2005, and September 15, 2005, for approval of his disposal sites

included the following language: "W.C. Fore agrees to follow all DEQ rules, regulations, and law on this property."(R.E. 6.) MDEQ's letters to Fore, dated September 16, 2005, and October 4, 2005, authorizing the Delancey and LoBouy Road sites, respectively, provided "should you fail to adhere to the operating requirements outlined above or to other applicable laws, regulations, or ordinances, it may be necessary for MDEQ to require additional operating conditions or terminate this emergency authorization." (R.E. 4 and 5.)

There is no doubt that MDEQ put Fore on notice that there were other applicable laws which he would be required to follow. In fact, Fore had a responsibility to acquaint himself with these requirements. There is no evidence that Fore ever inquired about these applicable authorities. If Fore had questions about his operations, and specifically about any potential tax consequences, he could have sought information from either MDEQ or MSTC. However, there is no evidence in the record that he ever did so prior to undertaking disposal activities at the Delancey and LoBouy Road sites.

2. *The Delancey and LoBouy Road Sites Were Not Exempt from the Fee Imposed by Miss. Code Ann. § 17-17-219*

d. Fore Bears the Burden of Proving that He Is Entitled to a Tax Exemption

Because the Delancey and LoBouy Road sites met the statutory definition of commercial nonhazardous solid waste management facility, by arguing that the fee does not apply to the operations of these sites, Fore is clearly attempting to read an exemption into Miss. Code Ann. § 17-17-219. Fore bears the burden of proving that the management of waste by Hurricane Katrina emergency disposal site operators was exempt from the fee levied by Miss. Code Ann. § 17-17-219. The Mississippi Supreme Court has consistently applied the familiar rule of construction in tax exemption cases:

> Since taxation is the rule and exemption is the exception, and since exemptions from taxation are not favored, general rule is that a grant of exemption from taxation is never presumed; on the contrary, in all cases having doubt as to legislative intention, or as to inclusion of particular property within terms of statute, presumption is in favor of taxing power, and burden is on claimant to prove or establish clearly his right to exemption, bringing himself clearly within terms of such conditions that statute may impose.

Med. Devices, Inc., 624 So. 2d at 990 (citing *United States v. Mississippi*, 578 F. Supp. 348, 349 (S.D. Miss. 1984)). In fact, the Court has held, "All reasonable doubts are resolved against the exemption." *Med. Devices*, 624 So. 2d at 991 (citing *Monaghan v. Jackson Casket Co.*, 136 So. 2d 603, 606 (Miss. 1962)).

e. The Delancey and LoBouy Road Sites Were Not Exempted from the Fee by MDEQ's Emergency Order or the Mississippi Emergency Management Law

Fore places much emphasis on the Emergency Order executed by MDEQ's Executive Director (R.E. 7) and the authority under which it was issued, Miss. Code Ann. § 33-15-31 (Rev. 2010). Miss. Code Ann. § 33-15-31(b) states, in pertinent part:

> All existing laws, ordinances, rules and regulations ***inconsistent with*** the provisions of [the Mississippi Emergency Management Law], or of any order, rule, or regulation issued under the authority of this article, shall be suspended during the period of time and to the extent that such conflict, disaster or emergency exists.

(Emphasis added.) However, this statute would not serve to suspend the subject fee. Fore misinterprets this law by asserting that it served to suspend "all" existing laws and regulations related to the permitting and operation of sites receiving emergency authorization for disposal of hurricane debris. (Appellant's Br. 18.) This is clearly not true, as the law specifically provides that it only suspends those laws, ordinances, rules and regulations ***inconsistent with*** the provisions of the Mississippi Emergency Management Law, or of any order, rule, or regulation issued under the authority of this law. Imposition of the fee was not inconsistent with any provision of the Emergency Order or with any provision of the Mississippi Emergency

Management Law, and it did not hinder any emergency response. Further, the fee did not have to be paid until nearly eleven months after Hurricane Katrina occurred. *See* Miss. Code Ann. § 17-17-219(1). Fore fails to offer any evidence or argument as to how the imposition of the nonhazardous solid waste management fee is inconsistent with the provisions of the Emergency Order or with the provisions of the Mississippi Emergency Management Law. Likewise, Fore has cited no authority which stands for the more general proposition that the imposition of a tax or fee is inconsistent with the Mississippi Emergency Management Law.

The one case cited by Fore to support his argument is clearly distinguishable from this case. The *Bolivar County* case dealt with suspension of the normal purchasing procedures required of governmental entities. *See Bolivar County v. Wal-Mart Stores, Inc.*, 797 So. 2d 790 (Miss. 1999). Just as the emergency nature of a disaster would result in immediate need for supplies and the suspension of the lengthy purchasing process, it would also result, as it did in the case of Hurricane Katrina, in a suspension of other lengthy processes like the permitting process MDEQ oversees related to solid waste management. This process, according to the testimony of MDEQ, takes at least a year to complete (Tr. 394), and, according to Fore's proffered expert, takes a minimum of six months to complete (Tr. 234). However, the imposition of a fee certainly has no bearing and would not hinder the timeliness of responding to a disaster.

What makes *Bolivar County* further distinguishable is that it involves two statutes that appear to conflict with each other: Miss. Code Ann. § 31-7-13(k), addressing emergency purchase procedures, and Miss. Code Ann. § 33-15-17, addressing incurring obligations during times of emergency. The Court in *Bolivar County* found that Miss. Code Ann. § 31-7-13(k) "requires that the statutorily mandated procedures be delayed instead of being forgiven as [Miss. Code Ann. § 33-15-17] allows." *Bolivar County*, 797 So. 2d at 795. However, the Court in *Bolivar County* held, "[Miss. Code Ann. § 33-15-17] states that these obligations may be

incurred absent the formalities mandated elsewhere. Therefore, to require the Act to be read *in pari materia* with Miss. Code Ann. § 31-7-13(k) . . . would be to defeat the purpose of the Act." *Id.* In the current case, we do not have two conflicting statutes as the Mississippi Emergency Management Law, as well as the Emergency Order issued under the authority of that law, do not address disposal site fees and are therefore not in conflict with Miss. Code Ann. § 17-17-219.

While the Emergency Order did temporarily suspend some of the regulatory and proprietary requirements imposed by MDEQ, it did not, for it could not have legally, suspend any of the statutory or regulatory requirements administered and enforced by MSTC, including but not limited to the fee imposed by Miss. Code Ann. §17-17-219. (Tr. 406-407; R.E. 7, section V.7. General Conditions.) Fore's reliance on Miss. Code Ann. § 33-15-31 is misplaced. If this Court were to adopt Fore's interpretation of Miss. Code Ann. § 33-15-31, the Court would be accepting the argument that the Governor of the State of Mississippi has the power to usurp the Legislature's exclusive power to tax. *See Morco Indus., Inc. v. City of Long Beach*, 530 So. 2d 141, 144 (Miss. 1988). Nowhere in the Mississippi Emergency Management Law is there any provision granting the Governor the power to grant a tax exemption.

Further, the Emergency Order is irrelevant to the issues raised in this case because MDEQ did not rely upon it when granting emergency authorization to Fore for the operation of the Delancey and LoBouy Road sites, but rather was utilizing authority which existed in its regulations as discussed below. (Tr. 313-314, 397-398.) The Order set forth more specific provisions regarding how solid wastes were to be managed in order to facilitate quick cleanup and simultaneously minimize the hurricane's negative impact on the environment as much as possible. (R.E. 7.) It also contained provisions to deal with wastewater treatment, air pollution, hazardous waste, asbestos, and underground storage tanks. (R.E. 7.)

f. The Delancey and LoBouy Road Sites Were Not Exempted from the Fee by the SW-2 Regulations

Fore's assertion that there was no specific statutory authority for addressing emergency disposal sites is misleading (Appellant's Br. 16), because the authority did in fact exist in the SW-2 Regulations, which were promulgated pursuant to the statutory authority granted to the Mississippi Commission on Environmental Quality by the Mississippi Legislature. *See* Miss. Code Ann. §§ 17-17-27, 17-17-213, 17-17-229, 17-17-231, 21-27-207, 49-17-17 (Rev. 2003). MDEQ utilized the authority found in Section II.O. of the SW-2 Regulations when granting emergency authorization for emergency disposal sites, including the Delancey and LoBouy Road sites. (Tr. 313-314, 397-398.) Section II.O. of the SW-2 Regulations states, "When a disaster occurs, such as a tornado, hurricane, or flood, and results in urgent need for public solid waste disposal or processing facilities, the Department may approve a site or facility for immediate operation subject to stipulated conditions and for a limited period of time." Section II.O. of the SW-2 Regulations does not state that it must be triggered by an emergency declaration under the Mississippi Emergency Management Law.

Fore incorrectly asserts, "According to Mr. Williams, no other provisions in the rules or regulations addressed the 'requirements' or 'conditions' that emergency disposal sites were required to follow." (Appellant's Br. 17.) However, Williams actually testified that the SW-2 Regulations apply to all types of disposal sites, including sites granted emergency authorization, and that Section II.O. of the SW-2 Regulations merely sets forth an exception to the Section II.A. requirement of obtaining a permit. (Tr. 313-317.) Section II.A., which is found along with Section II.O. in the "Permit Procedures" section of the SW-2 Regulations, states, "No solid waste management facility shall be operated without an individual permit from the Permit Board, or a certificate of coverage under a general permit." Clearly, Section II.O. is an exception to the Section II.A. permit requirement only, but not any other statutory or regulatory requirements or

conditions, including the fee imposed by Miss. Code Ann. § 17-17-219(1). (Tr. 313-317.) Thus, just as the previously permitted commercial facilities were required to pay a fee on the hurricane debris that they accepted for disposal (Tr. 352-353), so were commercial emergency disposal sites, such as the Delancey and LoBouy Road sites. Furthermore, MDEQ interprets the laws regarding the management of solid wastes as allowing it to waive the permit requirement for facilities operating for a limited period of time in the event of a hurricane. (Tr. 313-317, 397-398.) Because MDEQ administers these laws, its interpretation is entitled to deference. *See Molden*, 730 So. 2d at 32-33.

g. Fore Has Not Met His Burden of Proving that He Is Entitled to a Tax Exemption

Fore has not shown that an exemption from the fee was granted to him by any statute, regulation, emergency order, or resolution issued in response to Hurricane Katrina. By arguing that the fee does not apply to the operations of the emergency sites, Fore is clearly attempting to read an exemption into the law that does not exist. He has also failed to show that the fee is inconsistent with any provision of the law, or that it hampered the emergency response initiated by the Governor's Resolution and MDEQ's Emergency Order. Thus, the lower court's decision that the Delancey and LoBouy Road sites met the statutory definition of "commercial nonhazardous solid waste management facilities" and were not exempt from the fee imposed by Miss. Code Ann. § 17-17-219 should be upheld.

C. Fore's Claim of an Alleged Violation of His 14th Amendment Equal Protection Rights is Without Merit.

Fore is not asserting that the tax imposed by Miss. Code Ann. § 17-17-219 is unconstitutional. Rather, he asserts that the application of the statute by MDEQ and MSTC violated his constitutional rights to equal protection under the Fourteenth Amendment. Specifically, Fore asserts that he was denied preferential treatment that he believes was granted

to others who he contends were similarly situated as him. Because MDEQ was not the entity assessing or collecting the tax in issue, these claims cannot stand against it. Furthermore, the claims, as they are asserted against MSTC, are entirely without merit.

In the matter of *Vill. of Willowbrook v. Olech*, 528 U.S. 562 (2000), the United States Supreme Court held that when a Plaintiff does not allege membership in a class or group, the Equal Protection Clause of the Fourteenth Amendment allows for a cause of action to be brought by a "class of one". *Olech*, 528 U.S. at 564. When maintaining this cause of action, it is the Plaintiff's burden to prove that "[he] has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Id.* (*citing Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923); *Allegheny Pittsburgh Coal Co. v. Comm'n of Webster Cty.*, 488 U.S. 336 (1989)). *See also Suddith v. Univ. of S. Mississippi*, 977 So. 2d 1158, 1173 (Miss. Ct. App. 2007) (*citing Olech*, 528 U.S. at 564).

Fore makes no claim to membership in a class or group. Therefore, he necessarily maintains that, under *Olech*, he is a "class of one" alleging that MSTC intentionally treated him differently from other similarly situated emergency site operators and that MSTC had no rational basis for doing so. A close reading of the *Olech* test indicates that it must first be determined that Fore was similarly situated to other emergency site operators before analyzing the issue of whether he suffered disparate treatment. Fore maintains that he provided ample evidence supporting this claim at trial. The evidence upon which he relies is scant at best.

1. ***Fore was not Similarly Situated to the Other Emergency Site Operators***

"'Similarly situated' individuals must be 'prima facie identical in ***all relevant respects***.'" *Suddith*, 977 So. 2d at 1173 (*quoting McDonald v. Vill. of Winnetka*, 371 F.3d 992, 1002 (7th Cir. 2004) (*further citations omitted*). (Emphasis added.) In *Suddith*, the Plaintiff brought suit against the University for wrongful termination. The scope of the meaning of the term "similarly

situated" was in issue. The trial court defined the similarly situated class to be "those professors who have not been forthcoming during the application procedure with their past behavior—specifically those having an affair with a student." *Id.* at 1173-74. Suddith asserted that the class to which he was similarly situated was comprised of "professors who are tenure-track and do not not reap the benefits of the Faculty Handbook." *Id.* at 1174. The Court of Appeals determined that Suddith's class was much too broad, and the trial court's class was "much closer to being 'identical in all relevant respects.'" *Id.* at 1174.

Fore asserts that he is similarly situated to all operators of sites granted emergency authorization after Hurricane Katrina. Granted, these operators were given emergency authority to operate disposal sites under the emergency situation created by Katrina, they all received the same reporting forms to use, and they all submitted reports showing the tonnage received at the sites, but those three factors are not enough. Like *Suddith*, Fore's definition of the similarly situated class is much too broad. Moreover, Fore's brief attempts to illustrate how he is similarly situated to only one other operator, which is entirely insufficient to meet his burden of proof. The record is sorely lacking in evidence that Fore truly is similarly situated to any of these other operators. The only evidence Fore proffered to support the claim is the reporting forms submitted by the other operators and a few pieces of correspondence related to them. (Exh. 41-62.)

Fore completely ignores several relevant respects pertaining to himself and these emergency site operators, including, but not limited to the following:

a. Fore has a significant record of previous interaction and experience with MDEQ. (Tr. 161; 171-174.) The record has no evidence of whether the other emergency site operators had such experience.

b. Starting on the day of Katrina, Fore had daily access to a solid waste expert providing assistance in seeking debris disposal contracts and preparing proposals for those contracts. (Tr. 226-228; 232-233.) The record has no evidence of whether the other emergency site operators had access to such specialized knowledge.

c. Fore had weight scales available for his use. (Tr. 166-167.) No evidence has been produced that the other emergency sites had scales at their disposal.

d. The duties and responsibilities Fore undertook as part of his contract are documented. (R.E. 3; Tr. 150-154.) The contract between Fore and the Harrison County Board of Supervisors unequivocally states that Fore was familiar with state and local laws regarding debris and disposal and that Fore was solely responsible for complying with those laws. (R.E. 3, Section II (B).) Fore was also solely responsible for paying taxes and fees including all disposal site dumping fees. (R.E. 3, Section II (H).) The record contains no evidence of the contracts the other emergency site operators signed much less what their rights and responsibilities were under those contracts.

e. Moreover, there is no evidence of how the other emergency sites were operated, and no evidence of additional communications those operators may have had with MDEQ or MSTC.

f. Finally, the record establishes that almost all of the other emergency site operators filed returns for the 2005 tax period prior to MSTC's issuance of an assessment against them. (Exh. 43, 45-62.) This fact alone rebuts Fore's argument that he was similarly situated with these operators.

Fore's scope of the class to which he claims to be similarly situated is unacceptably broad under *Suddith*. Multiple relevant respects pertaining to Fore and the other emergency site operators are completely ignored, resulting in Fore's failure to provide any substantial evidence that he was similarly situated to them. Fore has not and cannot meet his burden of proof. Thus, he has failed to meet the first prong of the "class of one" test under *Olech*, and this claim is without merit.

2. ***Fore Was Not Treated Differently, and if He Was, There Was a Rational Basis for MSTC's Actions***

In the event the Court determines that Fore was, indeed, similarly situated to the other emergency site operators, MSTC asserts, alternatively, that Fore suffered no disparate treatment, and that any difference in treatment was done on a rational basis. These two portions of the *Olech* test, *supra*, go hand-in-hand and will be discussed herein simultaneously.

The evidence upon which Fore relies to conclude that the other site operators were granted preferential treatment is tenuous at best. As is shown below, the record clearly demonstrates that MSTC actively sought payment of the taxes due from these operators pursuant to Miss. Code Ann. § 17-17-219. Fore mischaracterizes the evidence in an attempt to convince the Court that omissions and delayed responses of MSTC were intentional and done to deprive Fore of his constitutional rights. This assertion is completely unsupported by the record. What *is* supported by the record is that MSTC had a rational reason for each action it took relative to each of the operators. MSTC specifically addresses each operator that Fore claims received preferential treatment as follows[8]:

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[8] On page 11 of its Opinion and Final Judgment, the lower court acknowledges that a taxpayer's information provided to MSTC is confidential. Thus, MSTC will not divulge the identity of the taxpayers discussed, but would rather refer the Court to the specific exhibits associated with the taxpayers and cited herein. It should be noted that the taxpayers are discussed in the same order as they are discussed in the Appellant's Brief (pp. 30-34).

a. **Operator #1 (Exh. 45):** Fore maintains that MSTC intentionally made the decision to not impose or collect taxes from Operator #1 for the year 2005 and that there was no rational reason for this decision. On the contrary, there was a very logical and rational reason that fees were not sought from Operator #1 for 2005. Fore fails to advise the Court of what the record clearly establishes--that during the months of 2005 when Operator #1's site was operational, it merely staged debris and did not dispose of it. In other words, the record shows that Operator #1's site did not conduct any activity in 2005 that triggered the levying of the tax under Miss. Code Ann. § 17-17-219. (Tr. 265-268; 272; 318-321; 354-355.) Disposal of debris triggers the imposition of the tax, not staging. Levying taxes against Operator #1 for staging debris would be violative of the statute. Certainly, MSTC's actions concerning Operator #1's site were rational.

b. **Operator #2 (Exh. 46):** Fore correctly states that Operator #2 reported receiving 50,000 tons of debris for 2005[9]; that he paid only $16,600.00 instead of the $50,000.00 owed; and that MSTC made an assessment for the additional money owed under Miss. Code Ann. § 17-17-219 plus penalties and interest. Where Fore is wrong is his statement that MSTC intentionally made the decision not to pursue the matter. This contention is wholly unsupported by the record and is a gross mischaracterization of the evidence. Fore wants this Court to believe that because MSTC does not have a lien enrolled against Operator #2, this is proof positive of an intention to let slide Operator #2's failure to pay the fees. *Fore neglects to point out to the Court that no liens have been enrolled against him*, and it surely cannot be said that MSTC has not pursued the fees he owes. Otherwise, this appeal would not exist. In her trial testimony, MSTC representative Charmin Tillman explained the reason for the actions taken by MSTC:

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[9] In Fore's brief, he states that Operator #2 reported receipt of 200,000 *tons* of debris. MSTC and MDEQ believe this is simply a typographical error. Exh. 46 clearly shows that Operator #2 reported 200,000 yd^3 which converts to 50,000 tons.

> "This one got stalled because of some confusion between my auditor and DEQ in trying to get an answer on the use of a different conversion factor, but we have done a formal assessment, so it is assessed."

(Tr. 275.) Fore's brief cuts off Ms. Tillman's testimony prematurely, and the full quote is given above. Even a cursory reading of her testimony logically reflects that MSTC's intention was to determine the appropriate fees and proceed with collecting them. Surely these actions by MSTC cannot be viewed as anything but rational. The lack of an enrolled lien is irrelevant and indicative of nothing.

c. **Operator #3 (Exh. 47 and Exh. 44, p. 5):** Again, Fore correctly states that Operator #3 reported 237,969 tons of debris at the site, but paid only $134,643.00. Fore also correctly states that MSTC did not formally assess Operator #3 for the $103,000.00 difference. However, MSTC's reasons for doing so are well-founded as shown in the testimony of its representative, Charmin Tillman. A discrepancy notice was mailed to Operator #3 notifying him of the difference in the tonnage and payment. Operator #3 wrote a letter to MDEQ wherein a question was raised that could presumably affect MSTC. However, no answer came about, and while MSTC was awaiting an answer, the statute of limitations expired, prohibiting MSTC from further action. (Tr. 275-278.) The failure to formally assess Operator #3 for the money owed is the result of a logistical error and a breakdown in communication, not an intent to ignore responsibilities and turn a blind eye to a tax owed. Fore again mischaracterizes the evidence and reaches a conclusion that is wholly unsupported by the record. He would have this Court hold MSTC to the standard of infallibility, which is entirely unreasonable.

d. **Operator #4 (Exh. 48 and Exh. 44, p. 6):** Operator #4 underpaid the taxes due on the tonnage received. Correspondence between MSTC and Operator #4 indicated Operator #4's use of a different conversion factor. Due to a lack of understanding on part of an auditor, Operator #4 was not audited until approximately two years later, after Fore perfected his appeal

in Chancery Court. Fore asserts that the delay in auditing is evidence of MSTC's "acceptance" of Operator #4's position as to the amount of taxes it owed. Fore again attempts to twist the evidence in order to reach an unsupported conclusion. Further, Fore provides only a portion of the relevant deposition testimony given by MSTC's representative, Charmin Tillman, who gave a rational and reasonable explanation for the delay.

A: We didn't get around to auditing those files until recently.

Q: Why—why did you get around to it recently? What caused you to start auditing these files?

A: When we started—when we started working with DEQ, when all of these issues came about, we got—we gained a better understanding of what it was we were doing. My predecessors, to my knowledge, didn't focus a whole lot on nonhazardous. So I didn't have a whole lot of direction in looking at this kind of thing. So when I start—when I came over from Audit and Compliance and became the director of miscellaneous, Roger came to me at that point and stated that the emergency sites had not been, at that point, billed. So that's where we went. We started going down this path. And with everything else going on in the division, it's just one of those things that we finally have gotten around to, based on the information we've gleaned from them and our understanding of our role. So that's kind of where—

Q: And you initiated your investigation for this particular—

A: When I found the letter.

Q: Is that November 24th, 2009?

A: Yes, because I was not given the letter until that point.

Q: And when did you take over the Department?

A: I took over in September 2007.

Q: Did—the initiating of the investigation, was it anything related to the motion I had filed to get these records?

A: I'm sure that played a part in it. But, honestly, I was not aware of the letter that had been sent to Roger until we started going through the files. And once I saw that letter and saw where the problem was, that's when we—which we do back-end auditing all the time. It's not unusual. It's just one of those things. So, yes, your—your request made us look closer to it. So...

> Q: Now, as far as this particular one, if I understand it right—and I got some documents today—that there has now been assessments made against [Operator #4], one in the amount of $66,215.80, and the other in the amount of $29,842.40, and these assessments were made December the 29th, 2009.
>
> A: The formal assessment, that's correct. They were originally billed in November.

(R.E. 1, pp. 27-29.) A delay in auditing a taxpayer is not the same as accepting a taxpayer's position taken on a return. On the contrary, MSTC formally assessed Operator #4 and actively pursued collection of the taxes owed just as it did with Fore. (Tr. 278-282.) Like Operator #3, *supra*, the delay in auditing was due to a logistical issue and not an intent to ignore responsibilities or turn a blind eye to a tax owed.

e. **Operator #5 (Exh. 50-55):** Fore's central complaint with MSTC's actions toward this operator is that MSTC did not bill Operator #5 until November 24, 2009. (Exh. 50-c, 51-d, 52-d, 53-d, 54-d, and 55-e.) The Court should note that this is the same date upon which MSTC billed Operator #4 for taxes owed. (*See* deposition testimony of Charmin Tillman quoted *supra*. *See also* Exh. 48-i.). Again, the delay in auditing is not indicative of MSTC's intent to not pursue collection of the taxes owed. The record evidences that MSTC actively pursued collection of the taxes from Operator #5, just as it is actively pursuing collection of the taxes owed by Fore. (Tr. 285-288.)

f. **Operator #6 (Exh. 56):** Fore's characterization of the evidence attempts to paint the picture that MSTC accepted the 2006 return filed by Operator #6 and then arbitrarily decided to audit the operator. The evidence shows that this operator originally filed a return indicating that no fees were due, because he reportedly accepted the tonnage without receiving payment, thus not triggering the tax levied by Miss. Code Ann. § 17-17-219. However, MSTC investigated the matter further, and Operator #6 was audited just like Fore. (Tr. 288.)

g. **Operator #7 (Exh. 57-58; 60-62):** Fore asserts that MSTC accepted Operator #7's position that it did not meet the definition of a commercial nonhazardous site (as is Fore's position), but then changed its mind once Fore filed a motion to obtain records of the other emergency site operators. The record is devoid of any evidence supporting this assertion. MSTC billed Operator #7 for the taxes due on November 24, 2009. (Tr. 289.) Again, this is the same date that MSTC billed Operator #4 and Operator #5 for the taxes they owed. The reason for the delay is the same reason for the delay with Operator #4 and Operator #5--the result of a logistical issue, and MSTC acted to address the situation when it became aware of it. Assessments have been issued, and MSTC is actively pursuing collection of the fees from Operator #7 just as it is pursuing collection of fees from Fore.

h. **Operator #8 (Exh. 59):** This operator's reporting gave rise to a situation similar to that of Operator #6 in that Operator #8 reported that 200,000 tons of waste were disposed of and no compensation was received. (Tr. 290.) Fore again mischaracterizes MSTC's actions as accepting Operator #8's position that no fees were due. However, the record clearly demonstrates that, like Fore, Operator #8 is under audit, evidencing MSTC's intention to collect the fees owed. (Tr. 290.)

Fore insists that these other emergency site operators received preferential treatment, or in other words, that he was treated differently from them. However, the record indicates otherwise. All of the operators, including Fore, were required to complete the same returns. (Tr. 292.) When they didn't file a return, they got a letter from MSTC, just like Fore did. (Tr. 292; Exh. 45-49 and 50-62.) Almost all of the operators discussed above were audited and assessed just as Fore was audited and assessed. (Tr. 290-291.) Following assessment, the operators were given the opportunity to go through the administrative appeals process with both the MSTC

Board of Review and the Full Commission, the same procedure Fore initiated and completed. (Tr. 293-294.)

It is MSTC's intention to ultimately collect the taxes owed from these operators just as it is MSTC's intention to collect the taxes owed from Fore. (Tr. 291.) To say that a delay in assessing these operators resulted in preferential treatment flies in the face of logic. A delay only results in the accrual of additional interest for which the operators are responsible for paying to MSTC pursuant to Miss. Code Ann. § 27-65-39 (imposing interest of 1% per month from the date a tax is due until it is paid). There is no proof in the record that a delay in assessing these operators was to their benefit at all. Furthermore, there is no evidence in the record that MSTC was arbitrary or capricious in its determinations made as to each of these operators, or to Fore, for that matter.

3. ***Operator #9 is the Real "Class of One"***

In support of Fore's argument that there was no rational basis for the allegedly different treatment he received, Fore focuses on one other emergency site operator not previously discussed, Operator #9. Fore alleges that he was similarly situated to Operator #9 for the same reasons he believes he was similarly situated to the other eight operators outlined hereinabove. (Appellant's Br., pp. 28-29.) Again, being given emergency authority to operate a disposal site under the emergency situation created by Katrina, receiving the same reporting forms to use, and submitting reports showing the tonnage received at a site is not enough to show that Fore was similarly situated to Operator #9. Fore's contention is misplaced. There is no evidence in the record regarding the specific operations undertaken at the Operator #9's site, no evidence proffered of Operator #9's previous experiences with MDEQ or other disaster relief efforts, and no evidence of any contractual obligations Operator #9 may have had. Moreover, the record clearly shows that Fore received compensation of $\$10.64/yd^3$ of waste disposed. (R.E. 3.)

Operator #9 is believed to have charged much less for the debris it received at its site, furthering MSTC's argument that Fore and Operator #9 were not similarly situated[10]. Regardless, Fore was not similarly situated to Operator #9 any more than he was similarly situated to the other emergency site operators.

On or about June 19, 2006, MSTC issued Letter Ruling LR.06.156 granting Operator #9 a waiver of the 2005 taxes owed under Miss. Code Ann. § 17-17-219. (Exh. 49-d.) Several things should be noted about the waiver:

a. Operator #9 was the only emergency site operator to be granted such a waiver (Tr. 291; R.E. 1, p. 15.)

b. The waiver was only for the 2005 taxes owed (Exh. 49-d.)

c. Operator #9 was assessed for the 2006 taxes owed (Exh. 49-h through 49-m.)

When asked about the reasons why Operator #9 received a waiver and Fore did not, MSTC representative Charmin Tillman advised that her predecessor made that decision, and she is not privy as to why. Fore again prematurely cuts off the deposition testimony given by Ms. Tillman. (Appellant's Br., p. 35.) The full quote is as follows:

Q: Do you know why Mr. Fore did not receive the same treatment as [Operator #9] received?

A: I do not know why.

Q: Is there a reason that you know that would justify treating one differently than the other?

A: I don't know why the two were treated differently.

[10] The record reflects that Operator #9 reportedly charged $1.00/ton of vegetative waste that it disposed of at the site. (Exh. 49-l and 49-m, ¶ 7) The Court should note that this is the same rate as the tax imposed by Miss. Code Ann. § 17-17-219. Further, Operator #9 claimed to have lost money on the debris disposal operation. (Exh. 49-l) The difference between the fees reportedly charged by Operator #9 and those charged by Fore is another factor to be taken into consideration when determining whether the two sites were similarly situated.

Q: Was there any other emergency site operator granted the relief that [Operator #9] was granted?

A: No.

Q: Do you know why?

A: *I can attest to what I did.* I even billed—I even billed [Operator #9] because I didn't know about the letter ruling when I took –took over Billy's job. I treated all of them the same, obviously, with the exception of [Operator #9] because the letter ruling had been issued prior to me taking over.

(R.E. 1, pp. 14-15.) (Emphasis added.) Fore twists the testimony given in an attempt to prove that there was no basis, rational or otherwise, for the decision to treat Fore differently from Operator #9, i.e. to deny Fore a waiver as well. The testimony given by Ms. Tillman does not prove that the determination by MSTC was arbitrary and capricious. It merely proves that she did not make the decision, her predecessor did, and she cannot speak for him.

Operator #9 is the only emergency site operator that was given any preferential treatment. He was the only operator to receive a waiver of the 2005 taxes. He was the only one treated differently. As was correctly stated by the lower court in its Opinion and Final Judgment, Operator #9 is the real class of one. Acceptance of Fore's argument is akin to the Court accepting the theory that a law enforcement officer's failure to pull over ten speeding cars, while pulling over only one car and ticketing the driver, would result in that one driver's equal protection rights being violated. Such a result is ludicrous, contradictory to the law, and is clearly not a result intended by the Fourteenth Amendment.

Fore bears the burden of proving that he is similarly situated to the other emergency site operators; that he was treated differently from those operators; and that there was no rational basis for the different treatment. Fore has failed to meet his burden on each portion of the test

under *Olech*. As such, his arguments are without merit, and his equal protection claim cannot stand.

D. Fore Was the Only MDEQ Authorized Operator of the Delancey Site and Therefore Exclusively Responsible for Payment of the Fee Levied by Miss. Code Ann. § 17-17-219.

By letter dated September 10, 2005, Fore requested that Harrison County approve the Delancey site for disposal. (R.E. 6.)[11] On September 15, 2005, Harrison County sent a copy of Fore's request to MDEQ along with the County's request that this site be approved. (R.E. 6.) In response to this request, on September 16, 2005, MDEQ sent Fore a letter granting him emergency authorization to accept and dispose of debris at the Delancey site. (R.E. 4.) By letters dated March 16, 2006, April 28, 2006, and June 1, 2006, MDEQ extended Fore's emergency authorization for the Delancey site. (Exh. 66.) By letter dated July 11, 2006, MDEQ notified Fore of the expiration of his emergency authorization for the Delancey site. (Exh. 67.)

There is no similar evidence in the record indicating that P & J was ever granted authorization by MDEQ to accept and dispose of debris at the Delancey site. (Tr. 348-350.) There is also no evidence that Fore or the jurisdictional government (Harrison County) ever requested that MDEQ jointly or separately authorize any other party to operate the site or any portion thereof, nor is there evidence that P & J independently requested or received authorization to do so. Although Fore emphasizes the City of Gulfport's requests that MDEQ approve the Delancey site for the disposal of debris, these requests were not acted upon, because the City of Gulfport was not the jurisdictional government for the Delancey site (Tr. 323-328), which was located in Harrison County outside of the City of Gulfport. (Tr. 355-356).[12]

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[11] Fore's request to Harrison County (R.E. 6), refers to the Delancey site as the Bell Pit. (Tr. 386-387.)

[12] It is clear from Fore's trial testimony that even he understood this distinction. When asked whether P & J got authorization from Harrison County for a site on Latimer Road, Fore

Clearly, Fore was the only party granted authority by MDEQ to operate the Delancey site. (Tr. 335-336, 348-350, 425, 434.) P & J's sole authority to utilize the Delancey site was granted by Fore through the parties' sublease-type arrangement. (Tr. 330, 336-337; *see also* Tr. 123-124.) Sublease-type arrangements were not uncommon at emergency disposal sites, and MDEQ held the authorized party responsible for compliance. In this case, that authorized party was Fore, and only Fore. (Tr. 336-337, 348-350, 425, 434.) Under their sublease-type arrangement, Fore was clearly compensated by P & J for debris disposed at the Delancey site and for placing the final covering over the debris as required by MDEQ. (Tr. 120-123, 156-158; Exh. 19.)

In addition to the letters from MDEQ to Fore regarding his authorization to use the Delancey site, the lower court found that the record contains "documents in which the DEQ went ***directly*** to Fore for reporting and compliance." (App. R.E. 2 at 851.) (Emphasis added.) Specifically, the record contains six letters and one fax from MDEQ to Fore regarding noncompliance with annual reporting and waste screening requirements for the Delancey site and closure/post-closure requirements for the Delancey site. (Exh. 67.) In addition, the record contains four letters from Fore to MDEQ regarding Fore's compliance with closure/post-closure requirements for the Delancey site. (Exh. 67.) These letters indicate that Fore held himself out as the operator and responsible party for the Delancey site. Moreover, the record also contains an affidavit signed by Fore and filed with the Harrison County Chancery Clerk, stating the following:

> The [Delancey site] has been used as an emergency class one rubbish site ***by me*** from September 2005 until June 30, 2006. Post-closure use shall not disturb the integrity of the final cover, line, or any system components of the container system unless necessary to comply with any other state or federal regulations.

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responded that the County would not have authorized the site, because it was inside the city limits of Gulfport. (Tr. 163.)

(Exh. 69.) (Emphasis added.) This affidavit was mandated by MDEQ as part of its closure requirements. (Tr. 382-383; *see also* MDEQ's Hurricane Katrina Disaster Debris Management Response "Building and Structural Debris Disposal Sites Closure/Post-Closure Policy," which is part of Exh. 67.)

As the evidence in this case clearly provides, Fore was the only party granted authority by MDEQ to operate the Delancey site, and Fore held himself out as the operator and responsible party for said site. Because Fore was the only MDEQ authorized operator of the Delancey site, MDEQ looked solely to Fore for compliance with all applicable laws and regulations, including Miss. Code Ann. § 17-17-219. Therefore, Fore was liable for the entire fee levied by said statute.

Despite the overwhelming weight of the evidence in this case supporting MDEQ and the lower court's finding that Fore, as the sole authorized operator of the Delancey site, was the responsible party for purposes of compliance with Miss. Code Ann. § 17-17-219, Fore attempts to muddle this issue by pointing to a few MDEQ documents wherein P & J was referred to as an operator.[13] A letter regarding issues at the Delancey site states, "It is our understanding that both your company and Phillips and Jordan, Inc. jointly operate and manage certain portions of this emergency disposal site." (Exh. 4-24.) However, MDEQ's representative, Mark Williams explained that although P & J was operating at the Delancey Site, P & J was not an MDEQ authorized operator of the Delancey site. (Tr. 329-330.) It was Williams' understanding that P & J was operating at the Delancey site pursuant to an agreement with Fore. (Tr. 329-330.) Another document lists P & J as the operator for vegetative debris *chip/burn activities* and building debris *staging activities* at the Delancey site. (Exh. 4-27.) However, these listings are irrelevant because

[13] Fore incorrectly states, "MDEQ acknowledged in *various correspondence* received by Fore . . . that P & J was the operator of a portion of the Delancey site." (Appellant's Br., p. 39.) (Emphasis added.) However, Fore only points to one letter, not various correspondence, to support his argument.

chipping/burning activities and staging activities are not subject to the fee. (Tr. 354-355.) Another document lists P & J as the operator for the "Delancey Structural Debris Disposal Site" (Exh. 29), but Williams explained that this designation was incorrect. (Tr. 334-335.) As the record in this case reflects, these documents with scant references to P & J as an operator do not overcome the overwhelming weight of the evidence showing that Fore, as the site's only authorized operator, was responsible for the fees imposed by Miss. Code Ann. § 17-17-219.

Fore misconstrues the interpretation of Miss. Code Ann. § 17-17-219 when he states that "the fee is imposed on the operator who actually managed the debris . . . ." (Appellant's Br., p. 40.)[14] Miss. Code Ann. § 17-17-219(1) states as follows:

> Before July 15 of each year the operator of a commercial nonhazardous solid waste management facility managing municipal solid waste shall file with the State Tax Commission and [MDEQ] a statement, verified by oath, showing the total amounts of nonhazardous solid waste managed at the facility during the preceding calendar year, and shall at the same time pay to the State Tax Commission One Dollar ($1.00) per ton of municipal solid waste generated and managed in the state by landfilling . . . .

MDEQ interprets this statute as applying only to operators authorized by MDEQ. (Tr. 348-350, 425.) Because MDEQ administers this statute, its interpretation is entitled to deference. *See Molden*, 730 So. 2d at 32-33. As discussed above, Fore was the only MDEQ authorized operator of the Delancey site. Furthermore, if Fore is asserting that P & J is responsible for fees related to disposal activities occurring at the Delancey site, and requests that this Court make such a finding, then, pursuant to *Miss. R. Civ. P. 19(a)*, Fore failed to join a necessary party to the underlying action. Any finding by this Court that P & J is a party responsible for fees imposed by Miss. Code Ann. §17-17-219 would certainly prejudice P & J as it has not had any opportunity to defend itself.

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[14] Fore cites to the definition of "operator" contained in the Regulations for the Certification of Operators of Solid Waste Disposal Facilities (SW-8). However, the SW-8 Regulations are not applicable to this case. The applicable definition of "operator" is found in Miss. Code Ann. § 17-17-205(e).

Since Fore was the only MDEQ authorized operator of the Delancey site, Fore was liable for the entire fee levied by Miss. Code Ann. § 17-17-219. Therefore, the lower court's decision holding Fore responsible for reporting the entire amount of debris disposed at the Delancey site, and, thus, holding him responsible for the entire fee attributable to this debris, should be upheld.

V. CONCLUSION

Based upon the facts and the law, the Delancey and LoBouy Road sites were commercial nonhazardous solid waste management facilities. Fore can attempt to label the sites as something different, but the activities carried on there are identical to the activities carried on by the permitted commercial nonhazardous solid waste management facilities. Further, the sites are subject to the fees and taxes imposed by Miss. Code Ann. § 17-17-219, and Fore has failed to show any reason that these sites would be exempt from same.

Fore's Equal Protection rights under the 14th Amendment have not been violated. Contrary to Fore's opinion, the order entered by the MSTC's Full Commission was not arbitrary and capricious. Fore attempts to present himself to the Court as a "class of one", but fails to meet any portion of the test under *Olech*. The record simply does not support his contention that Fore was similarly situated to the other emergency site operators; that he was treated differently from those operators; and that there was no rational reason for the different treatment. On the contrary, the record supports MSTC's contention that any different treatment was done on a rational basis and that one of the other emergency site operators is the real "class of one".

Finally, Fore was the only MDEQ-authorized operator of the Delancey site. The other contractor accepting solid waste at the site was not authorized by MDEQ to be there, and in fact, was only there via an agreement with Fore. Fore is solely responsible for the fees associated with the Delancey site. Moreover, Fore is not entitled to a refund of any of the fees he has paid under protest, much less interest accrued from the date of payment.

RESPECTFULLY SUBMITTED, this the 9th day of September, 2011.

MISSISSIPPI DEPARTMENT OF REVENUE f/k/a MISSISSIPPI STATE TAX COMMISSION

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CERTIFICATE OF SERVICE

I, Gary W. Stringer and/or Abigail M. Marbury, attorney of record for Mississippi Department of Revenue f/k/a Mississippi State Tax Commission, do hereby certify that I have I have this day served a true and correct copy of the foregoing Joint Brief of Appellees, by mailing, by First Class United States mail, this date, postage prepaid, to the following:

Bobby R. Long, Esquire
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Hon. Eugene Fair
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THUS DONE, this the 9th day of September 2011.

Gary W. Stringer
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