

ALSTON & BIRD LLP

One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424

404-881-7000
Fax: 404-881-7777
www.alston.com

Harold Buckley, Jr.

Direct Dial: 404-881-7860

E-mail: harold.buckley@alston.com

April 30, 2010

VIA E-MAIL (JDove@negrc.com)
FIRST CLASS MAIL

Mr. James Dove, Executive Director
Northeast Georgia Regional Commission
305 Research Drive
Athens, GA 30605

Re: Appeal of Negative Finding on DRI Application # 2117 by the Northeast Georgia Regional Commission's DRI Committee (the "DRI Committee").

Dear Mr. Dove:

I represent Mr. J. Lamar Banks, Jr. and JCLL Partners, LLC, the applicants for DRI #2117, which involved a proposed waste management facility in Morgan County. On April 27th, the DRI Committee held a meeting (the "Meeting") during which it considered the applications for DRI #2080, DRI #2081, and DRI #2117 (Collectively the "DRI Applications"). Both DRI #2080 and DRI # 2081 involved proposed waste management facilities in Elbert County. The DRI Committee ultimately found that DRI #2080 and DRI # 2081 were in the best interest of the State but DRI #2117 was not.

This letter serves as my clients' appeal of the negative finding for DRI #2117. The basis for the appeal is set forth in detail below.

I. The DRI Committee's Collective Position on DRI #2117 is Based on Invalid Findings Made by Two of its Members.

A. Tom Mayers' Negative Findings are Invalid Because They Exceeded the Scope of His Regulatory Authority and Were Arbitrarily Made.

Many of the comment letters submitted for DRI #2117 urged the DRI Committee to issue a negative finding based on various environmental issues. The Georgia Environmental Protection Division (the "EPD") is the agency charged with administering the State of Georgia's comprehensive regulations governing the establishment and operation of waste management facilities. For this reason, the Department of Community Affairs ("DCA") advised the DRI Committee to avoid considering environmental factors

outside the normal scope of its DRI review process. Environmental factors to be excluded from consideration included environmental factors that would be considered by the Georgia Environmental Protection Division during its waste management permitting process. Nevertheless, the DRI Committee deliberately based its negative findings on DRI #2117 on environmental issues in direct defiance of DCA's directive.

DRI Committee members Stenette Brooks, Terry Brown, Jim Joiner, Tom Mayers and Melvin Davis made findings on DRI #2117. While he was not present for the committee meeting, Mr. Mayers submitted the following finding in writing:

DRI 2117 I do not see this to be in the best interest of the Region and therefore the State due to the presence of Little Creek and Four Mile Branch on the site in addition to wetlands and flood plains associated with these waterways.

Mr. Mayers' finding on DRI #2117 was recorded with no further explanation.

It is notable that Mr. Brown responded to the reading of Mr. Mayers' findings by stating on the record that EPD was the proper agency to make any necessary determinations relating to water quality issues. The Georgia Environmental Protection Division (the "EPD") administers the State of Georgia's comprehensive regulations governing the establishment and operation of waste management facilities. These regulations prohibit new solid waste management facilities from: (1) restricting the flow or storage capacity of 100-year floodplains, (2) washing out solid waste so as to pose hazards to public health or the environment, or (3) being located within wetlands. EPD's regulations also require the submittal of documentation confirming that waste management facilities comply with these regulations.¹

Mr. Mayers' negative findings fell squarely within the scope of EPD's permitting authority for waste management facilities because they were based solely on water quality, flood plain and wetland issues. Therefore, Mr. Mayers lacked the regulatory authority to issue his negative environmental findings, making those findings invalid.

Mr. Mayers' error was compounded by his findings for the other two DRI Applications. Relative to these other applications, Mr. Mayers wrote:

I do not see anything associated with the Elbert County sites that would cause me to vote against them. With the approvals and permitting by DNR and EPD along with the Elbert County elected officials I believe they will satisfy the requirements for a legal operating waste facility.

¹ Georgia Admin. Code § 391-3-4-.05(1)(d); Id at § 391-3-4-.05(e).

Based on the plain language of these findings, Mr. Mayers clearly understood that the Elbert County waste management facilities were subject to environmental approvals and permits from EPD. Furthermore, he clearly understood that these two waste management facilities would meet the requirements for a legal operating waste management facility if they received required approvals and permits from EPD, along with required local approvals.

Our waste management facility would satisfy the State's environmental requirements every bit as much as the other proposed facilities if we obtain the required permits and approvals from EPD. Despite this fact, Mr. Mayers treated our DRI application differently from the other two DRI Applications.

As explained above, Mr. Mayers lacked the regulatory authority to issue his negative environmental findings on DRI #2117 and his position is not a valid basis for the DRI Committee's collective position. To add insult to injury, these illegal findings had the effect of subjecting my clients' DRI application to a much stricter standard than the other two DRI Applications on the same agenda. For these reasons, Mr. Mayers' illegal findings should be stripped from the DRI Committee's official position on DRI #2117.

B. Stenette Brooks' Finding is Invalid Because it Exceeded Her Authority as an Ex-Officio Member of the DRI Committee.

DRI Committee members Terry Brown and Melvin Davis made findings in support of DRI #2117, while Stenette Brooks, Tom Mayers and Jim Joiner made negative findings. As a result of these positions, the DRI Committee collectively determined that our DRI application was not in the best interest of the State. However, because she did not have the authority to participate in the vote, Ms. Brooks' finding is invalid and should be stripped from the DRI Committee's official determination.

Because she is an ex-officio member of the DRI Committee, Ms. Brooks only votes to resolve a deadlock between regular committee members on a particular application. Ms. Brooks was invited to submit findings on DRI #2117 to break an apparent tie among the other four committee members. However, as explained in detail above, the negative findings submitted by Tom Mayers cannot be applied to our DRI application because they exceeded the scope of his regulatory authority and deprived my clients of equal treatment under the DRI review process. Without Mr. Mayers' findings, the positions taken by the remaining regular committee members would have been 2-1 in favor of DRI #2117 and Ms. Brooks would not have had any role on the committee's final determination.

For these reasons, Ms. Brooks' submittal of findings on DRI #2117 was invalid and cannot be used as a basis for the DRI Committee's final determination on that application.

II. The Negative Findings Issued for DRI #2117 are Invalid Because They Have no Basis in DCA's Mandatory DRI Review Requirements.

DCA is the State agency that regulates the DRI review process. In accordance with its legal authority, DCA has adopted rules governing the DRI process that include the following:

The Regional Commission must prepare an evaluation and analysis of the proposed DRI using the information provided by the applicant and the local government. This evaluation and analysis must be completed using DRI review standards or a review checklist developed by the Regional Commission staff. These DRI review standards or checklist must:

- be based on the model standards or checklist provided by [DCA];
- be consistent with the Regional Commission's regional plan; and
- be approved by a majority of the Regional Commission's Council and subsequently approved by [DCA].²

Currently, the Northeast Georgia Regional Commission does not have any published DRI approval criteria or a published DRI review checklist setting forth any standards for reviewing a DRI application ("Review Standards"). Therefore, the DRI Committee cannot cite any properly adopted Review Standard to support its negative finding for DRI #2117. Because there is no evidence in the record that the DRI Committee applied any properly adopted Review Standards to my clients' DRI request, the DRI Committee's negative finding is invalid and should be overturned.

III. The Negative Findings Issued for DRI #2117 are Invalid Because They Were Inherently Arbitrary.

The agenda for the DRI Committee's April 27th meeting included three DRI Applications, all three of which involved waste management facilities. The DRI Committee issued positive findings for two of those applications, DRI #2080 and DRI #

² Id at § 110-12-3-.03(11).

2081, and a negative finding for DRI #2117. As discussed in detail above, the Northeast Georgia Regional Commission does not currently have any published Review Standards, as required by DCA rules. Without any such standards, the DRI Committee based its DRI findings on regulatory fiat and deprived my clients of their right to a fair and objective review of their DRI application.

DCA requires every Georgia regional commission to publish Review Standards and to apply those standards to each DRI application.³ The DCA rule requiring regional commissions to publish Review Standards is based on sound public policy. When a public agency administers an approval process, it has a responsibility to provide the public with reasonable guidance as to how the approval may be obtained. Approval criteria accomplish this by: (1) providing prospective applicants with an understanding of exactly what is required to obtain the approval they need and (2) providing agency officials with objective parameters for their review of approval applications. Any agency that administers an approval process without such criteria cannot ensure applicants that they are being given a fair review, regardless of the perceived popularity (or lack thereof) of their reasons for seeking approval. In other words, the process becomes completely arbitrary, particularly when the relevant process deficiencies violate governing regulations.

Prior to the DRI Committee meeting, I attempted to obtain a copy of the Review Standards the DRI Committee would use to evaluate my clients' DRI application. I was informed at that time that the Northeast Regional Commission had no such Review Standards and, therefore, there was nothing that I could review in advance to understand the approval requirements for my DRI application. Therefore, I was unable to supplement my clients' DRI application prior to the DRI Committee meeting with information showing how our proposed facility warranted a positive DRI finding. The lack of Review Standards also deprives my clients of the ability to fully prepare this appeal, since we are unable to ascertain from the record exactly how our DRI application failed to meet the requirements for a positive finding. Furthermore, the lack of published Review Standards deprives the full council of the ability to review the record and determine whether the DRI Committee acted properly in issuing a negative finding for DRI #2117. For this reason, the negative findings issued by the DRI Committee on DRI #2117 violate DCA rules, are inherently arbitrary, and should be reversed.

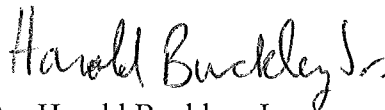
It should be noted that, in addition to having no published Review Standards for DRI applications, the Northeast Georgia Regional Commission has no published standards for DRI appeals. Therefore, my clients are unable to determine exactly what showing is required to obtain a favorable decision on this appeal. We respectfully request a copy of any published standards the Northeast Georgia Regional Commission has for DRI appeals to allow us to supplement our appeal materials with a showing of how we meet these standards.

³ Id.

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For all of the foregoing reasons, Mr. J. Lamar Banks, Jr. and JCLL Partners, LLC respectfully request the reversal of the negative findings issued by the DRI Committee for DRI # 2117. Please let me know if I may provide you with any additional information or clarification.

Sincerely,
ALSTON & BIRD LLP



By: Harold Buckley, Jr.
Attorneys for Mr. J. Lamar Banks, Jr. and
JCLL Partners, LLC

HB:hb

cc: Mr. Jon West (jon.west@dca.ga.gov and first class mail)
Mr. Jim Moneyhun (JMoneyhun@negrc.com and first class mail)
Ms. Camille Banks (camillebanks@bellsouth.ney and first class mail)
Charles Merritt, Esq. (cwmerritt@themerrittlawfirm.com and first class mail)
Mr. Murray Griffin (MGriffin@atlcc.net and first class mail)

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FIRST CLASS MAIL

ALSTON & BIRD LLP

One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309-3424

**Mr. Jim Moneyhun
Northeast GA Regional
Commission
305 Research Drive
Athens, GA 30605**

