SOAH DOCKET NO. 582-08-2186
TCEQ DOCKET NO. 2006-0612-MSW

AUSTIN COMMUNITY RECYCLING AND DISPOSAL FACILITY TCEQ PERMIT NO. MSW-249-D PERMIT AMENDMENT APPLICATION	§ § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

PROTESTANT NORTHEAST NEIGHBORS COALITION'S CLOSING ARGUMENT

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TABLE OF CONTENTS

Page

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COMES NOW, Northeast Neighbors Coalition and affected parties aligned with Northeast Neighbors Coalition, Jean Breazeale, Harris Branch Residential Property Owners Association, Williams, L.T.D., Mark McAfee, Melanie McAfee, Janet Smith, John Wilkins, George K. Edwards, John P. Murphy, Alto S. Nauert, Rosemary M. Nauert, Cecil Remmert and Evelyn Remmert (collectively "NNC" or "Protestants"), and pursuant to Order 12 file this closing argument in the above referenced matter. Protestants request that this Permit Application be recommended for denial for the following reasons:

I. INTRODUCTION

This Closing Argument is submitted on behalf of NNC, a non-profit corporation comprised of homeowners and business owners that will be affected by the proposed expansion of the Waste Management of Texas, Inc., Austin Community Landfill ("ACL"). The primary issues of concern to NNC are: (1) the Application fails to demonstrate that the proposed expansion of the Landfill will be compatible with the surrounding community which is grounds for denial pursuant to 30 T.A.C. § 305.66(c); (2) the existing landfill as is, and the proposed expansion application are in violation of 30 T.A.C. § 330.15(a)(2), which prohibits operation of a land fill in a manner that causes nuisance conditions to the surrounding communities; (3) the Application fails to conform with the Regional Solid Waste Management Plan as required by TEX. HEALTH & SAFETY CODE § 366.066(a); and (4) the existing landfill as is, and the proposed

expansion application are in violation of 30 T.A.C. § 330.15(a)(3), which prohibits operation of a landfill in a manner that endangers human health and welfare or the environment.

NNC has prepared this Closing Argument by issue and following the outline in Order No. 12 with citations to the Hearing Transcript (denoted as "TR") and to the Prefiled Testimony that was submitted, as well as to the Exhibits presented both in Prefiled submittals and at the Hearing on the Merits. NNC's Closing Argument addresses issues identified in Order 12 relevant to the four issues listed above. Although Order 12 does not explicitly identify the issue, NNC's argument regarding endangerment to human health and welfare or the environment will focus on the posed threat of the groundwater contamination resulting from the Industrial Waste Unit located on the Austin Community Landfill. Multiple issues presented at hearing, such as the appropriate point of compliance and the monitoring well system, may underscore NNC's arguments. Protestants may adopt closing briefs, or relevant excerpts, from other protesting parties at the appropriate time.

II. PARTIES

According to Order No. 1, the following persons appeared and were admitted as parties:

Waste Management of Texas, Inc. ("Applicant" or "Waste Management"); Executive Director of the Texas Commission on Environmental Quality ("Executive Director" or "ED"); Office of Public Interest Counsel of the Texas Commission on Environmental Quality ("OPIC"); City of Austin; Travis County; Giles Holdings; TJFA, LP; Williams Ltd.; Bob Lanford, individually and as Trustee; Mark and Melanie McAfee; Cecil and Evelyn Remmert and Alfred Wendland; Janet L. Smith; Janet Breazeale; John Wilkins; George K. Edwards; John P. Murphy; Alto S. and Rosemary M. Nauert; Northeast Neighbors Coalition; and Harris Branch Residential Property Owners Association ("HBRPO").

III. JURISDICTION

The Commission has jurisdiction over this application pursuant to Texas Health & Safety Code § 361 and Texas Water Code Chapters 5 and 26. The State Office of Administrative Hearings ("SOAH") has authority to conduct a hearing and present the Proposal For Decision pursuant to Texas Water Code § 5.311 and Texas Government Code §§ 2003.021 and 2003.047.

IV. PROCEDURAL BACKGROUND

The Executive Director received Waste Management's Permit Application 249D ("Application") on August 26, 2005, and declared it administratively complete on September 15, 2005. Also on September 15, 2005, the Texas Commission on Environmental Quality ("TCEQ") Office of the Chief Clerk ("Chief Clerk") mailed Notice of Receipt of Application and Intent to Obtain a Municipal Solid Waste Permit Amendment. Applicant subsequently elected to update the application to meet the March 2006 Revisions of Chapter 330 of Title 30 of the Texas Administrative Code (T.A.C.). The updated application was submitted on October 10, 2006.

Executive Director completed the technical review of the application on January 4, 2008, and prepared a draft permit. The Chief Clerk mailed the Notice of Application and Preliminary Decision for a Municipal Solid Waste Permit on February 8, 2008. Waste Management published its first notice on February 14 and 15, 2008, in English in the *Austin American-Statesman*, and on the same dates in Spanish in *El Mundo*. The Chief Clerk mailed the Amended Notice of Application and Preliminary Decision and Notice of Public Meeting for Municipal Solid Waste Permit on March 13, 2008.

On February 15, 2008, Applicant requested that the permitting matter be directly referred to the State Office of Administrative Hearings for a hearing on the application, pursuant to Tex. Admin. Code § 55.210. The Executive Director held a public meeting April 14, 2008, in Austin,

Texas. The Hearing on the Merits was held in Austin, Texas from March 30, 2009 through April 13, 2009. Final written arguments are due May 8, 2009.

V. BACKGROUND FACTS

Waste Management of Texas, Inc. has applied to the Texas Commission on Environmental Quality for a Permit Amendment to authorize a lateral expansion to increase the volume and site life of the Austin Community Landfill, an existing Type I municipal solid waste landfill. The facility accepts municipal solid waste and brush, construction demolition waste, special waste, non-hazardous Class II and Class III industrial solid waste. The facility is located at 9900 Giles Road, approximately 250 feet north of the intersection of Giles Road and Highway 290, Austin, Travis County, Texas.

The proposed lateral expansion will add 71.11 acres to the permitted boundary of the facility, for a total permitted area of 359.71 acres. According to Waste Management's application, the additional acreage would increase the permitted capacity from 26,679,840 cubic yards to approximately 39,137,000 cubic yards, a 46% increase in capacity. Such an expansion would extend the remaining life of the facility to the year 2025.

Various operators of the ACL existed prior to Waste Management of Texas, Inc. Notably, in 1971, Industrial Waste Materials Management, Inc. ("IWMM") took over ownership of the facility and began to dispose of industrial waste on a portion of the site. The location of the Industrial Waste Unit is within Waste Management's current permitted boundary, which is illustrated on Figure Number 1 – 3 of the application. Don Smith, Waste Management's Area Vice-President for South Texas and corporate representative for this application, made clear that

Waste Management "absolutely" assumes responsibility for everything within the permit boundary.[1]

VI. ISSUES

As stated above, this permit application was directly referred to the State Office of Administrative Hearings. The Administrative Law Judge ("ALJ") issued Order 12 on April 17, 2009, identifying a list of issues relevant to this proceeding. Various issues of concern are related and have been grouped, accordingly. Pursuant to 30 T.A.C. §80.17(a), Waste Management of Texas, Inc. bears the burden to prove by the preponderance of evidence its application satisfies the TCEQ regulations.

LAND USE COMPATIBILITY:

(B) Whether the application provides assurance that operation of the site will pose no reasonable probability of adverse effects on the health, welfare, environment, or physical property of nearby residents or property owners. 30 T.A.C. § 330.15(a)(2) & (3); 30 T.A.C. 330.61(h); 30 T.A.C. § 305.66(c).

Land use compatibility is an issue separately identified in the TCEQ rules from the technical requirements for a landfill application. Specifically, 30 T.A.C. § 305.66(c) provides:

> "The Commission may for good cause, deny, amend, revoke or suspend, . . . any permit it issues or has authority to issue for a solid waste storage processing or disposal facility for good cause for reasons pertaining to public health, air or water pollution, land use, or for violations of the Texas Solid Waste Disposal Act or any other applicable laws or rules controlling the management of solid waste." (emphasis added)

According to the TCEQ rules, a permit application is required to address the issue of land use in its submittal to the TCEQ.

[1] 2 TR. 224:9 – 14 (Smith).

Land Use. A primary concern is that the use of any land for a municipal solid waste site not adversely impact human health or the environment. The owner or operator shall provide information regarding the likely impacts of the facility on cities, communities, groups of property owners, or individuals by analyzing the compatibility of land use. To assist the executive director in evaluating the impact of the site on a surrounding area, the applicant shall provide the following:

1. If available, a published zoning map for the facility and within two miles of the facility for the county or counties in which the facility is or will be located;

2. *information about the character of surrounding land uses within one mile of the proposed facility;*

3. *information about growth trends within five miles of the facility with directions of major development;*

4. *the proximity to residences and other uses (e.g. schools, churches, cemeteries, historic structures and sites, archaeologically significant sites, sites having exceptional aesthetic quality, etc.) within one mile of the facility. The owner or operator shall provide the approximate number of residences and commercial establishments within one mile of the proposed facility including the distances and directions to the nearest residences and commercial establishments. Population density and proximity to residences and other uses described in this paragraph may be considered for assessment of compatibility; and*

5. a description and discussion of all known wells within 500 feet of the proposed facility…; and

6. any other information requested by the executive director.[2]

Additionally, technical requirements in Part III of the application require that the site development plan must "include criteria that in the selection and design of a facility will provide for the safeguarding of the health, welfare, and physical property of the people and the environment through consideration of geology, soil conditions, drainage, land use, zoning, adequacy of access roads and highways, and other considerations as the specific site dictates."[3]

[2] 30 T.A.C. § 330.61(h).
[3] 30 T.A.C § 330.63(a)

The application includes evidence detailing surrounding land uses to the ACL. However, "the Executive Director does not make a preliminary determination on land use nor whether the location of a landfill is compatible with surrounding land use."[4] Rather, this Court makes a recommendation to the Commission and "the Commission is the ultimate decision maker on issues related to land use compatibility."[5] Given the limited role of the Executive Director in a land use determination, agency evaluation of compatibility has yet to occur. The only governmental entity to review compatibility of the facility with the surrounding land use is the Capital Area Council of Government ("CAPCOG"), which, incidentally, determined the facility is incompatible. In fact, the only opinion suggesting the facility is compatible comes from Mr. Worrall, the Applicant's hired land planning consultant.

On the other hand, the City of Austin's own Director of the Neighborhood Planning and Zoning Department, Greg Guernsey, opined that "even if the landfill operations are in compliance with the minimum standards established by the TCEQ, those minimum standards as set forth in the application are not sufficient to mitigate the multitude of negative impacts created by an active landfill located adjacent to the residential area."[6] In other words, compliance with the TCEQ regulations does not automatically indicate a facility is compatible with the surrounding land use.

Mr. Guernsey's opinion derives from the fundamental understanding that "as the number of rooftops or number of households that are next to a landfill increases, the incompatibility would also increase."[7] Unquestionably, as residential use of surrounding land increases, a correlating increase of residents affected by the nuisance conditions created by the landfill will

[4] ED. Ex. 1 at 18:39 – 41.
[5] *Id.* at 18:41 – 42.
[6] COA Ex. GG-1 at 6:8 – 11.
[7] 9 TR. 2019:17 – 20 (Guernsey).

occur. Mr. Guernsey identifies these conditions as "odor, traffic, litter, noise [and] visual aesthetics" and concluded the application as proposed does not mitigate them.[8] Mr. Guernsey further explains that this relationship is crucial given the ACL facility, including the proposed expansion, lie within Austin's Desired Development Zone.[9]

According to Guernsey, the Desired Development Zone is the area where the City wants to encourage growth and has already begun experiencing rapid growth.[10] The application documents this rapid growth already occurring within one mile of the permitted area. Specifically, the application notes that in 2003 there were approximately 750 residential units within one mile of the ACL.[11] According to a study submitted with the application, this number increased to 1183 by September, 2006, at which time there were also three recreational areas documented.[12] Applicant revised this study merely two years later in 2008 and found that residential units had increased to 1447 and there were now a total of five recreational areas.[13] The numbers indicate residential units doubled from between 2003 and 2008. The study also shows an increase in commercial use of the surrounding land by nine acres during the same two-year time period. *Id.* This population data exemplifies the increased land use incompatibility with current operations of the ACL. More importantly, it also foreshadows the far greater concern as the number of nearby citizens greatly increases, evidenced by the undisputed anticipated increased growth within one mile of the facility[14] and "substantial residential growth" within a five-mile radius of the facility.[15]

[8] COA Ex. GG-1 at 6:12 – 14.
[9] 9 TR. 2017:5 – 8 (Guernsey).
[10] 9 TR. 2016:5 – 8 (Guernsey).
[11] APP-202, Vol. I: 176.
[12] APP-202, Vol. I: 174.
[13] APP-302, 00004.
[14] 4 TR. 725:1 – 4 (Worrall)
[15] APP-300 at 15:29 – 30.

Mr. Guernsey explained at the hearing that incompatibility with the surrounding land use if the application to expand is granted is demonstrated in two ways: "[1] time… people will be able to feel the effects of the landfill for a longer period of time;" and "[2] proximity … as the landfill would move closer to a residence … odors and noise, maybe light, would be experienced more by a residen[ce] because its proximity is much closer than it was before."[16] If this permit is issued, the lifespan of the ACL facility is anticipated, depending on waste flows, to continue until 2025[17] - an approximate ten years longer than the current anticipated expiration of 2015.[18] This significant extension emphasizes the concerns expressed by Mr. Guernsey that the citizens living and working near the facility would face the previously mentioned adverse, nuisance impacts from the facility for an additional sixteen-year time-period.

John Worrall, the land planning consultant hired by Applicant to conduct a land use inquiry to aid the Commission in its compatibility decision, completely fails to analyze the scope of nuisance impacts posed by the current and projected rapidly increasing growth trends. Specifically, when asked whether the ACL facility is compatible with the five-year growth trends, he simply concludes that "there is no evidence indicating that the presence of [this] facility have deterred, are deterring, or will deter growth."[19] Not only did Mr. Guernsey testify that the landfill was in fact deterring development of PUDs closest to the landfill[20], but Mr. Worrall's conclusions overlook a major component of land use compatibility. In Mr. Worrall's

[16] 9 TR. 2004: 6 – 17 (Guernsey).
[17] 2 TR. 87:1 – 6 (Smith).
[18] 2 TR. 87:11 – 13 (Smith).
[19] APP-300 at 18:6 – 8.
[20] COA Ex. GG-1 at 4:7 – 13 ("The development of detached single family homes within the Harris Branch Planned Unit Development (PUD) and the Pioneer Crossing PUD has not occurred on parcels approved for single family uses closest to the existing landfill sites, but has occurred on other parcels further away).

conclusions, not once does he address the issue of residents potentially impacted by odor, windblown trash, noise, traffic or dust.[21]

The number of residential units near the facility do not appear to cause Mr. Worrall concern, but he does acknowledge that "the proximity to particular land uses are of particular concern of the TCEQ,"[22] so "[he] paid particular attention"[23] to the distances between the proposed expansion and the nearest residence, historical sites, schools and daycares. Mr. Worrall admitted that if the landfill was getting closer to an historical site it would be a concern.[24] Interestingly, looking at figure LU-3[25] of the permit application, the proposed expansion of the clearly extends a portion of the facility directly closer to the Barr Mansion – an historical site that was built in 1898. However, Mr. Worrall surprisingly maintained his opinion that this was in fact not the case. In response to his opinion, even the ALJ commented that "you're going to have to explain that, because it looks closer to me."[26]

Mr. Worrall simply measured the distance from the facility by "tak[ing] a protractor … stick the point on the Barr Mansion and stick it on the closest point of 249C, and then you strike a radius up" and you see that the expansion comes no closer than the already existing closest point of the facility. Mr. Worrall's conclusion, that "the expansion, *per se*, does not change the distance to the Barr Mansion … [or] the school … [or] the day care center"[27] is a blatant misrepresentation to the TCEQ. Mr. Worrall even agreed that this method of measuring ignores that "there is going to be a larger piece of the [ACL] facility much closer to the Barr Mansion

[21] APP-300 at 18:1 – 9; *Id.* at 19:1 – 23.
[22] 4 TR. 712:9 – 10 (Worrall).
[23] *Id.* at 712:13 (Worrall).
[24] *Id.* at 712:21 – 22.
[25] APP-202, Vol. I at Tech. Complete 182.
[26] 4 TR. 714:10 – 11 (Worrall).
[27] APP-302 at 00009.

than currently exists."[28] What Mr. Worrall refuses to acknowledge is that the seventy-acre expansion would intensify nuisance impacts from the facility on the Barr Mansion and any other residents in that area. Use of a protractor is not enough to mitigate the effects of odors, wind-blown trash, trucks, noise, and the unsightly operations of a landfill.

Aditionally, Mr. Worrall's conclusion that the landfill is compatible with surrounding land use was made without considering the impacts the Industrial Waste Unit (IWU) may have on the surrounding land use. Consider the following exchange between the ALJ, Ms. Farhardi (Counsel for City of Austin) and Mr. Worrall:

> Q. (Judge Scudday): If the land was used for an industrial waste site, do you think that would -- how would that go into your thinking?
>
> A. (By Mr. Worrall): … So I don't really have an opinion about how industrial waste would differentially cause my findings to be different.
>
> Q. (By Ms. Farhardi): I think you might have said this, so I'm sorry if I'm duplicating. You didn't consider it when performing your analysis?
>
> A. That's right.
>
> Q. Is your opinion and your resulting land use analysis in this case on land use compatibility only referring to the expansion area, or does it refer to the entire ACL facility?
>
> A. … It refers to the entire permit boundary, existing and proposed facility. [29]

Given the severity of the potential contamination from the IWU explained by Dr. Kier, at a minimum, it is disconcerting that the land use expert did not consider potential impacts of the IWU in his conclusion of compatibility. One can only imagine if the groundwater is contaminated and migrates throughout the area and ultimately comes into contact with the neighborhoods. This potential nightmare scenario became a reality when Mr. Alto Nauert, a

[28] 4 TR. 707:15 – 22 (Worrall).
[29] 4 TR. 664:5 – 25 (Worrall).

local resident and member of the Northeast Neighbors Coalition, testified to the potential hazards.

Mr. Nauert witnessed large quantities of acid being dumped at the IWU almost 40 years ago.[30] Additionally, he testified that there is a 66-inch water main on the Giles Road side of the Waste Management property.[31] As a local resident he expressed concern that the City of Austin has a "big storage tank … and if that thing ever breaks on Giles Road and undermines back to where them pits are, if [the industrial waste] is still there, someone's going to have a lot of trouble."[32] Even though Mr. Worrall did not consider the IWU in his determination of compatibility, the Commission should consider it, not only the number of citizens already at risk, but also because of the large number of future citizens that are heeding the City's encouragement and locating to the area.

The evidence illustrates that Mr. Worrall consistently omitted crucial variables and blatantly manipulated the proximity of the expansion to the Barr Mansion to make his determination that the landfill is compatible. Although such omissions are discomforting, they are not surprising given Mr. Worrall's long history as a hired consultant for landfill applicants. Mr. Worrall has consulted on over thirty solid waste facilities and not once has he submitted a review on behalf of a protestant.[33] Fortunately for the affected communities and residents, the Commission has not always accepted Mr. Worrall's conclusions.

For example, Mr. Worrall testified as a rebuttal witness in the Spring-Cypress municipal solid waste permit proceeding,[34] which, as discussed in detail, below, shared similar land use

[30] NNC Ex. AN-1 at 3.
[31] 10 TR. 2298:5 – 18 (Nauert).
[32] *Id.*
[33] 4 TR. 564:23 – 565:3 (Worrall).
[34] 4 TR. 728:6 – 11 (Worrall).

issues with this ACL expansion proceeding.[35] Yet, despite the documented and projected rapid residential growth in the Spring-Cypress area, Mr. Worrall still offered the opinion that "the proposal was compatible from a land use point of view" as required under the Texas Administrative Code.[36] Contrary to Mr. Worrall's opinion in that case, the Commission ultimately determined that the "proposed Spring-Cypress Landfill is incompatible with the surrounding land uses as determined pursuant to Commission rules."[37]

Specifically, the Commission ruled that the primary existing uses surrounding the proposed site of the Spring-Cypress Landfill are residential and agricultural and are quickly becoming primarily residential:[38]

- There are currently over 1,427 homes within one mile of the facility[39].
- Within one mile of the facility are Doerre Intermediate School, two child-care facilities, three churches, and a fire station.[40]
- Doerre Intermediate School is approximately 1,800 feet from the proposed land fill site.[41]
- The proposed Spring-Cypress Landfill is in the path of significant residential growth.[42]

The Commission further held that Applicant failed to prove that the Spring-Cypress Landfill will not impact the surrounding residential community, the neighboring property owners, and individuals in the vicinity in a negative manner:[43] "the proposed Spring-Cypress Landfill may cause residential development to 'leapfrog' over the area

[35] NNC-1 at Finding of Facts
[36] 4 TR. 730:8 – 12 (Worrall).
[37] NNC Ex. 1 at 15 – 16, Conclusion of Law No. 4.
[38] *Id.*-1 at 5, Finding of Fact No. 16.
[39] *Id.*-1 at 5, Finding of Fact No. 16a.
[40] *Id.*-1 at 6, Finding of Fact No. 16(b)(3).
[41] *Id.*-1 at 6, Finding of Fact No. 16(b)(4).
[42] *Id.* at 7, Finding of Fact No. 18.
[43] *Id.* at 8 - 9, Finding of Fact No. 19.

surrounding the landfill site, encouraging urban sprawl.[44] The Spring-Cypress Landfill will lower the character and quality of life of the surrounding community.[45] Applicant failed to prove that residents living nearby homes will not be impacted by dust, noise, and windblown trash from the landfill."[46]

Surrounding land use of the ACL facility is very similar in nature. Comparing the data from the Spring-Cypress facility to the data submitted by Applicant for the surrounding land use of the ACL facility suggests a very similar environment. Consider the following ACL land use data:

- Blue Trail Elementary School, located about 4,823 feet from the site[47];
- an historic site (the Barr Mansion), located approximately 2,400 feet from the site[48];
- a day care center (the Children's Courtyard) located approximately 3,445 feet from the site[49];
- a golf course (Bluebonnet Hill Golf Course) located approximately 2,400 feet from the site[50];
- 1,447 existing residential units within one mile of the ACL facility[51];
- Five recreational areas (including the golf course)[52];
- anticipated increased growth within one mile of the facility[53] and "substantial residential growth" within a five-mile radius of the facility.[54]

The number of residences within one mile of the ACL facility is higher than the number of residences within one mile of the proposed, and ultimately denied, Spring-Cypress facility: 1447 as opposed to 1427, respectively. The number of residential units is undoubtedly higher at this

[44] *Id.* at 9, Finding of Fact No. 19(c).
[45] *Id.* at 9, Finding of Fact No. 19(d).
[46] *Id.* at 9, Finding of Fact No. 19(e).
[47] ED. Ex. 1 at 18:1 -2.
[48] ED. Ex. 1 at 18:3 – 4.
[49] ED. Ex. 1 at 18:6 – 7.
[50] ED. Ex. 1 at 18:8 – 9.
[51] APP-302 at 00004.
[52] *Id.*
[53] 4 TR. 725:1 – 4 (Worrall)
[54] APP-300 at 15:29 – 30.

time and is certain to continue to rise. Just as the location for the Spring-Cypress facility was in an area of significant future growth, so is the proposed ACL expansion. Coupled with the flawed and incomplete evaluation by Mr. Worrall, Protestants respectfully request that this ALJ follow the prior reasoning of the Commission and find that the surrounding land use is incompatible with the proposed expansion to the ACL facility and recommend that the Commission deny permit application 249D.

NUISANCE ISSUES:

(B)(2) Whether the application includes adequate provisions to prevent the creation or maintenance of a nuisance including odors, control of spilled and windblown waste, dust control and maintenance of site access roads, in compliance with agency rules. 30 T.A.C. § 330.15(a)(2); § 30 T.A.C. 330.3(95).

(B)(3) Whether the application includes adequate provisions to control noise, in compliance with agency rules. 30 T.A.C. § 330.15(a)(2); § 30 T.A.C. 330.3(95).

Nuisance is also an issue of concern. Inasmuch as this ACL facility is an existing landfill, its past operations should be considered in making this permit decision. The nuisance conditions referenced above and explained by nearby citizens in more detail, below, will intensify should the expansion be granted – 1) the number of affected citizens will increase; 2) citizens affected by current operations will encounter an escalation as the facility expands closer to them; and 3) conditions will be present for an additional ten years past the currently expected closure date.

All nuisance conditions created by operations are explicit factors in determining land use compatibility. TCEQ Rules state as follows:

> "A person may not cause, suffer, allow or permit the collection, storage, transportation, processing or disposal of municipal solid waste or the use or

> operation of a solid waste facility to store, process or dispose of solid waste. . . in violation of the Texas Health and Safety Code, or any regulations, rules, permit, license, order of the commission or in such a manner that causes:
>
> . . .
>
> 2. The creation and maintenance of a nuisance."[55]

30 T.A.C. § 330.3(95) defines nuisance as: "Municipal solid waste that is stored, processed, or disposed of in a manner that causes the pollution of the surrounding land, the contamination of groundwater or surface water, … or the creation of odors adverse to human health, safety or welfare." Additional requirements in the TCEQ Rules identify:

> Control of windblown solid waste and litter:
> The working face must be maintained and operated in a manner to control windblown solid waste. Windblown material and litter must be collected and properly managed in accordance with paragraph 1 and 2 of this section to control unhealthy, unsafe, or unsightly conditions.
>
> 1. Windblown waste and litter at the working face must be controlled by using engineering methods or measures . . .
>
> 2. Litter scattered throughout the site, along fences and access roads, and at the gate must be picked up once a day on the days the facility is in operation and properly managed. The site operating plan must specify the means for complying with this requirement.[56]
>
> ****
>
> The site operating plan must have an odor management plan that addresses the sources of odors that includes general instructions to control odors or sources of odors. . . .[57]
>
> ****
>
> Tracked mud and associated debris at the access to the facility on the public roadway must be removed at least once per day on days when mud and associated debris are being tracked onto the public roadway. . . .

[55] 30 T.A.C. § 330.15 (a)(2).
[56] 30 T.A.C. § 330.139.
[57] 30 T.A.C. § 330.149.

> Dust from onsite and other access roadways must not become a nuisance to surrounding areas. . . .
>
> All onsite and other access roadways must be maintained in a clean and safe condition. Litter and any other debris must be picked up at least daily and taken to the working face. Access roadways must be regraded to minimize depressions, ruts and potholes . . . [58]
>
> ****
>
> The facility owner or operator shall take steps to encourage the vehicles hauling waste to the facility are enclosed or provided with a tarpaulin net or other means to effectively secure the load in order to prevent the escape of any part of the load by blowing or spilling. . . . On days when the facility is in operation, the owner or operator shall be responsible for at least once per day cleanup of waste materials spilled along and with the right-of-way of public access roads serving the facility for a distance of two miles in either direction from any entrances used for delivery of waste to the facility . . . . [59]

NNC argues that the role of a landfill in an urban setting is to meet higher standards in order to refrain from being a bully to its neighbors. Fact witness testimony, as will be seen in the paragraphs below, demonstrates that the Waste Management of Texas, Inc., Austin Community Landfill has failed to be a good neighbor to the community and has failed to meet the minimum standards required by TCEQ Rules listed above.

MARK MCAFEE

Mr. Mark McAfee and his wife Melanie are the proud owners of the Barr Mansion, located at 10463 Sprinkle Road, Austin, Texas 78754.[60] The Barr Mansion was built in 1898 and is a registered historical building.[61] With the proposed expansion the ACL facility will be

[58] 30 T.A.C. § 330.127.
[59] 30 T.A.C. § 330.145.
[60] NNC Ex. MM-1 at 1:6 – 7.
[61] APP-302 at 00009.

approximately 1/3 miles away.[62] The McAfees use the Mansion for events and weddings. The first paid event was in 1982.[63] There was only one employee at the time, Melanie.[64] Now, twenty-seven years later, there are approximately 115 employees for certain events.[65] Mr. McAfee can currently see the ACL facility and testified that it will be much closer if the expansion occurs.[66] During the winter, when the leaves are gone, the landfill can be viewed from many portions of the Barr Mansion site, including the Victorian Mansion, and the yard area where most weddings occur outdoors whenever possible.[67] Understandably, wedding pictures with a landfill in the background are not compatible. Similarly, marketing the venue for weddings with landfill operating noise and trucks is not compatible. Similarly, having a wedding with a foul odor from the nearby landfill is incompatible.

Mr. McAfee also testified about a particularly embarrassing odor event, which took place at a holiday party with a client who had used the Mansion for many years.[68] This particular client has not held their holiday party at the Barr Mansion since this odor event.[69] Waste Management appears to attempt to discredit the nuisance conditions created by the ACL by identifying the success of the Barr Mansion.[70] However, as Mr. McAfee made clear at the hearing, the success of Barr Mansion has unquestionably been "in spite of the landfill."[71] It remains unknown how much more successful the Mansion would be if the landfill did not exist. Authorizing the proposed expansion would force the Barr Mansion to continue to underachieve

[62] NNC Ex. MM-1 at 1:22.
[63] 4 TR. 2263:13 (McAfee).
[64] 4 TR. 2267:7 10 (McAfee).
[65] 4 TR. 2267:13 (McAfee).
[66] 10 TR. 2215:23 – 2217:6 (McAfee).
[67] 10 TR. 2221:7 – 2222:2 (McAfee).
[68] NNC Ex. MM-1 at 2:27 – 29.
[69] *Id.*
[70] 10 TR. 2215:15 – 22 (McAfee).
[71] 10 TR. 2269:19 – 24 (McAfee).

for an additional 16 years. In fact, it will be to a heightened degree as the impacts intensify as the landfill moves closer directly towards the Barr Mansion.[72]

DELMER ROGERS

Delmer Rogers lives in the Harris Branch neighborhood at 5901 Speyside Drive.[73] Mr. Rogers began taking pictures of the Austin Community Landfill in January, 2007.[74] Included in Mr. Rogers' Exhibit DR-2 are several pictures that are worth a thousand words. For example, NNC(WMI)004278 demonstrates clearly, a view of garbage readily visible from nearby roads.[75] NNC EX. DR-2, NNC(WMI)004275 shows a similar scene from the road demonstrating the dust problem. Mr. Rogers endures odor incidents deriving from the landfill two to three times per month at his home.[76] Mud on the roads caused by trucks entering and leaving the ACL facility causes Mr. Rogers concern for the safety for himself and other drivers.[77]

JOHN WILKINS

John Wilkins is trustee for 119 acres located at Cameron Road and Blue Goose Road.[78] This tract is adjacent to part of the ACL facility.[79] Mr. Wilkins's father and partners acquired this property back in 1973 and he became trustee in 1985.[80] Mr. Wilkins echoes the concerns put forth by other nearby landowners regarding noise, truck traffic and odor. However, Mr. Wilkins also testified that the landfill limits his ability to develop his property. Specifically, he states,

[72] APP-202, Vol. I at Technically Complete 182.
[73] NNC Ex. DR-1 at 4.
[74] Ex. NNC DR-1 at 1 - 2.
[75] TR, p. 1678.
[76] NNC Ex. DR-1 at 2:26 – 27.
[77] NNC Ex. DR-1 at 4:8 – 14.
[78] NNC Ex. JW-1 at 1:6 – 7.
[79] *Id.*
[80] NNC Ex. JW-1 at 2:16 – 17.

"no on would want to build a house out there or build a commercial enterprise with the two landfills within close proximity."[81]

EVAN WILLIAMS

Evan Williams is the managing partner of partnerships that own property near the Waste Management facility.[82] The partnerships own a 23-acre tract that Mr. Williams considers to be impacted by the ACL facility.[83] It is located on Springdale road and adjoins the ACL property line.[84] His family has owned this property since the 1960s, prior to the existence of the ACL facility.[85] Mr. Williams does not frequent this tract of land often, but expresses the similar concerns to other nearby landowners regarding windblown trash, odor and dust. Mr. Williams has "tried to find users to purchase the land and [he] has been unsuccessful due to the presence of the landfill. So, we have waited expecting the permit to expire so we could move forward."[86]

CONFORMANCE WITH REGIONAL SOLID WASTE MANAGEMENT PLAN (RSWMP):

E) Whether the application provides adequate information that the waste management of the MSW facility will conform to the regional solid waste management plant, in accordance with the state laws. Tex. Health & Safety Code § 363.066(a).

Texas Health and Safety Code § 363.066(a) explicitly states that "on the adoption of a regional or local solid waste management plan by commission rule, public and **private solid**

[81] NNC Ex. JW-1 at 4:1 – 2.
[82] NNC Ex. EW-1 at 1:10 – 11.
[83] NNC Ex. EW-1 at 1:13.
[84] NNC Ex. EW-1 at 1:17 - 20.
[85] NNC Ex. EW-1 at 1:22.
[86] NNC Ex. EW-1 at 5:16 – 18.

waste management activities and state regulatory activities must conform to that plan."[87] This statutory requirement has been implemented by commission rule at 30 T.A.C. § 330.641(d) as follows: "If a regional or local solid waste management plan is adopted by the commission, public and private solid waste management activities and state regulatory activities shall conform to the adopted regional or local solid waste management plan." Applicant has failed to demonstrate conformance with the regional plan in the ACL application, and there is no evidence that the Applicant sought a variance from this requirement. See 30 T.A.C. § 330.641(g) & (h).

As the Executive Director correctly testified, "the role of councils of governments in determining whether permit applications comply with a RSWMP is to make the initial determination of compliance and conformity."[88] The Capital Area Council of Government is a group of local governments within State Planning Region 12, including both the City of Austin and Travis County. The majority of members are represented by elected officials. Travis County Judge Sam Biscoe and Austin city councilmember Laura Morrison are both on the CAPCOG Executive Committee.

The CAPCOG Executive Committee officially adopted the RSWMP for years 2002 – 2022 on January 10, 2005.[89] As the ACL expansion application acknowledges, the TCEQ formally adopted the RSWMP for 2002 – 2022 on May 31, 2007.[90] The TCEQ formal adoption of the plan is included in Applicant's prefiled testimony.[91] On January 31, 2006, CAPCOG issued a letter stating it had determined that the permit application for the ACL expansion is incompatible with surrounding land use. [92] The same letter noted CAPCOG had also determined

[87] See also 30 T.A.C. § 330.641(d).
[88] ED-1 at 27:36 – 37.
[89] APP-218 at 00010.
[90] APP-218 at 00001.
[91] *Id.* at 00001 0 00008.
[92] COA Ex. JW-5 at 1 (Letter from CAPCOG executive director reaffirming its prior determination of incompatibility with surrounding land use and nonconformance with the RSWMP.)

the ACL application was not in conformance with the Regional Solid Waste Management Plan (RSWMP).[93]

Specifically, CAPCOG determined that the application failed to satisfy all eight obligations mandated under Goal #15.[94] At the Hearing, opposing counsel appeared to raise issue whether the RSWMP CAPCOG used to review the ACL application had been approved by TCEQ.[95] However, the language of Goal #15 cited in CAPCOG's January 31, 2006 letter of non-conformance is taken verbatim from the plan adopted by TCEQ on May 31, 2007. Therefore, regardless of the status of TCEQ's adoption of the plan at the time the CAPCOG conducted its review, the current, applicable plan for this application included the exact Goal that was ultimately determined to be unsatisfied. Furthermore, in a letter dated December 6, 2005, a date prior to the CAPCOG letter of non-conformance and incompatibility, the TCEQ wrote to CAPCOG informing it that "a land use/impact study is submitted in an application and your evaluation of this study is well within your role as a regional planning entity."[96]

Two subparts of Goal #15 of the RSWMP are directly related to incompatibility with the surrounding land use. First, CAPCOG found that the application did not "ensure that the use of a site for a MWS facility does not adversely impact human health or the environment by evaluating and determining impact of the site upon counties, cities, communities, groups of property owners, or individual in terms of compatibility of land use, zoning in the vicinity, community growth patterns, and other factors associated with the public interest."[97] In its determination, CAPCOG notes that "The facility is within the Desired Development Zone of the City of Austin and is adjacent to numerous existing-and future homes, schools, historic sites, and

[93] *Id.*
[94] APP-218 at 00050.
[95] APP-9.
[96] *Id.*
[97] COA Ex. JW-5 at 5.

other sensitive receptors. … In terms of siting facilities to avoid nuisances to neighbors and communities, this site is a poor choice. The existing and future land uses are incompatible with ongoing waste disposal activities."[98] For the same reasons, CAPCOG determined that this application does not sufficiently "avoid or minimize nuisance conditions" as required by the final subpart of Goal #15.[99] Mr. Guernsey's testimony and the Spring-Cypress permit denial are both consistent with the CAPCOG's finding of nonconformance of Goal #15.

Although the COG's determination is not binding on the Commission, the Texas Health & Safety Code makes clear that it is the COG that "has primary responsibility for the regional planning process."[100] The Texas Health and Safety Code further mandates that the planning regions are responsible for "develop[ing] a regional solid waste management plan." Given this statutory authority, it is understandable that CAPCOG is best suited to make the initial determination regarding the conformance of the RSWMP and should be given considerable weight.

The Applicant's permit engineer of record, Mr. Charles Dominguez, was not even aware whether Applicant was obligated to conform to the RSWMP.[101] When questioned by the ALJ, he openly admitted that he never even considered Texas Health and Safety Code § 363.066(a) when preparing the application for submission to the TCEQ.[102] Mr. Dominguez does not offer an opinion on whether the application conforms to the RSWMP, but rather merely states that Goal #15 is encompassed within the Chapter 30 Section 330 rules, which are addressed in the permit application.[103] Thus, Applicant relies on the land use analysis conducted by Mr. Worrall to

[98] *Id.*
[99] APP-218 at 00051.
[100] Tex. Health & Safety Code § 363.0615(a).
[101] 3 TR. 509:21 – 25 (Dominguez).
[102] 3 TR. 516:11 – 25.
[103] APP-200 at 37:20 – 38:8.

demonstrate conformance to the RSWMP. However, for the same reasons Mr. Worrall's testimony is unpersuasive and inferior to Mr. Guernsey regarding land use compatibility it is equally unpersuasive and inferior to CAPCOG's nonconformance determination. Therefore, the permit should be denied for failure to satisfy Texas Health & Safety Code § 363.066(a) and 30 T.A.C. § 330.641(d).

ENDANGERMENT TO HUMAN HEALTH OR ENVIRONMENT:

(A)(1) Whether the application includes adequate protection of ground water and surface water, in compliance with agency rules, particularly in relation to the effects of the IWU and Phase I on the groundwater and surface water. 30 T.A.C. § 330.15(3)

There is a long history of disposing industrial waste at the ACL facility dating back to 1971.[104] Identified on figure 1 – 3 of the application clearly identifies where the waste was disposed of and labeled the location as the Industrial Waste Unit ("IWU").[105] Its location is within the proposed permit boundary identified in ACL expansion application.[106] Although titled IWU, eye witness testimony by Alto Nauert, and ample documented evidence presented by Dr. Bob Kier leave little doubt that during its operation in the early 1970s and beyond, the facility accepted hazardous waste as defined by the Environmental Protection Agency. No evidence has been presented suggesting that any of this waste has ever been excavated. On the other hand, evidence indicates that the waste has caused groundwater contamination that is migrating away from the ACL facility. Accordingly, there is a potential groundwater contamination nightmare that continues to brew underneath the facility. Don Smith, Waste Management's corporate representative ardently acknowledged that Waste Management

[104] TJFA-203.
[105] APP-202, Vol I. at Tech. Complete 112.
[106] *Id.*

"absolutely" maintains responsibility for what has happened on the ACL site before Waste Management of Texas, Inc. became the owner and since they became owner.[107] The ALJ also confirmed that "the permit boundary in this case is the whole facility."[108]

Under the circumstances, authorizing this expansion, and thereby, enabling operation for an additional sixteen years is a direct violation of the TCEQ regulations. Specifically, TCEQ Rules state as follows:

> "A person may not cause, suffer, allow or permit the collection, storage, transportation, processing or disposal of municipal solid waste or the use or operation of a solid waste facility to store, process or dispose of solid waste. . . in violation of the Texas Health and Safety Code, or any regulations, rules, permit, license, order of the commission or in such a manner that causes:
>
> . . .
>
> 2. the creation and maintenance of a nuisance; or
>
> 3. the endangerment of the human health and welfare or the environment." [109]

Mr. Nauert testified that he was hired to do work at the IWU facility and was on the ACL site on multiple occasions back in 1971 and 1972.[110] Mr. Nauert was a plumber that was hired to help unstop trucks that the contents were so thick that they wouldn't drain.[111] Once he unstopped the trucks, acid began discharging into the pits.[112] To illustrate the toxicity of the acids being discharged, Mr. Nauert explained that when the acid hit the ground it would react by bubbling up about twenty feet in the air.[113] The acid came into contact with his clothing once,

[107] 2 TR. 224:9 – 14 (Smith).
[108] 6 TR. 1237:13 – 14 (Hunt).
[109] 30 T.A.C. § 330.15 (a)(2) & (3).
[110] 10 TR. 2285:22 – 25 (Nauert).
[111] 10 TR. 2290:3 – 8 (Nauert).
[112] 10 TR. 2292:3 – 11 (Nauert).
[113] NNC Ex. AN-1 at 3:22 – 23.

which caused the fabric to disintegrate into thin air.[114] He also testified about an incident where the acid caused an entire tree and fence to disappear.[115]

In addition to the acids discharged into pits, Mr. Nauert witnessed the burial of an entire trailer full of leaking barrels.[116] He also witnessed a separate pit with "a lot of drums [and that] a hole [had been] dug just for drums."[117] Mr. Nauert's testimony is, at a minimum, eye opening and troublesome. Even more frightening is the vast amount of documentation that not only verifies Mr. Nauert's testimony[118], but also suggests the waste Mr. Nauert witnessed has actually caused groundwater contamination beneath the site.

Exhibit TJFA-203 is a compilation of documents that illustrate, to the best of the known available information, the extent of the industrial/hazardous waste deposited at the IWU during its operation. For example, according to a permit application filed by IWMM with the Texas Water Quality Board, as of February 14, 1972, it was "indicated that each month the facility received approximately 200,000 gallons of liquid and semi-liquid wastes consisting of spent solvents, spent acids, and industrial process wash water."[119] Some materials disposed of at this site were documented as "hazardous, flammable, and explosive."[120] Surrounding neighbors have good cause for extreme concern regarding this facility especially given there has never been a thorough investigation of groundwater quality.[121]

[114] NNC Ex. AN-1 at 3:24 - 26.
[115] *Id.*
[116] NNC Ex. AN-1 at 26 – 28.
[117] *Id.* at 6:9 – 16.
[118] 5 TR. 959:2 – 20 (Winters) (Testifying that boring log indicated finding a piece of a metal drum. Mr. Winters testified that it would be very unlikely any metal drum would still be in tact because metal rusts).
[119] TJFA-200 at 46:6 – 11 (Kier).
[120] TJFA-200 at 48:13 – 17 (Kier); see also TJFA-200 at 45:25 - 46:6.
[121] TJFA-200 at 54:11 – 16 (Kier).

Mr. Nauert testified that when unstopping the trucks he was assured there was no problem with disposing the waste because it was being dumped on clay.[122] Incidentally, on cross-examination Mr. Winters testified that based on multiple boring logs, industrial waste was placed in direct contact with "weathered" clay.[123] Mr. Winters acknowledged that weathered clay is more permeable than unweathered clay.[124] Furthermore, Dr. Kier testified that the result of acids, waste and the saline industrial wash water would be "synergistic" and desiccate the alleged clay liner upon contact.[125] The end result would be an increase in hydraulic conductivity.[126]

Documents report that on three occasions groundwater has been sampled from the area in which contamination was detected.[127] The Texas Department of Water Resources conducted groundwater sampling in 1980 at the facility and found multiple constituents (Xylene, Benzene, and Napthalene) listed by EPA as hazardous substances as well as Decahydronapthalene and hydrocarbons.[128] These findings led the author of the study to determine that "seepage and/or percolation of industrial wastes from the landfill … into the groundwater."[129]

Making matters worse, Dr. Kier testified at the hearing that there is a preferential flow pattern of the groundwater that ultimately goes towards Walnut Creek, which goes near the citizens.[130] Keeping in mind that the ACL facility is located in the Desired Development area for the city of Austin, it becomes a major concern with rapidly increasing potential impacts. As

[122] NNC Ex. AN-1 at 7:6 – 7.
[123] 5 TR. 948:16 - 19 (Winters); *Id.* at 949:18 – 25 (Winters); *Id.* at 953:1 – 4.
[124] 5 TR. 948:12 – 15 (Winters).
[125] TJFA-200 at 54:25 – 55:3.
[126] TJFA-200 at 55:1 – 3.
[127] TJFA-200 at 56:4 – 57:2.
[128] TJFA-203 at 049;
[129] TJFA-203 at 049; see also TJFA-200 at 61:11 – 21 ("The semi-volatile organic compounds, which are normally not highly mobile in ground water, have migrated so far from the IWU at the ACL facility indicates that the hydraulic conductivity of the weathered Taylor down dip from the IWU is much greater than laboratory tests of samples taken during subsurface investigations or "slug tests" in piezometers remote from the IWU indicate").
[130] 7 TR. 1400:8 – 1401:25 (Kier).

previously explained, Mr. Worrall completely omitted the IWU from his land use compatibility determination. He was not the only one. Mr. Udenenwu, the Engineering Specialist from the Executive Director, testified that he, too, did not evaluate the IWU as an endangerment to human health.[131] However, the Commission now has the evidence of what is occurring at this facility. Mr. Nauert coupled with Dr. Kier clearly exposes that continuing to allow the facility to operate for an additional sixteen years is not an option and would be in direct violation of 30 T.A.C. 330.15(a)(3).

VII. TRANSCRIPT COSTS

The Commission's rules provide the transcript cost will not be assessed against the ED or OPIC. And the commission's rules also provide a list of factors to be considered when determining a proper allocation of transcript costs.[132] NNC believes "the financial ability of the party to pay the costs" is an important consideration in determining that NNC should pay no costs of the transcript, or at most a very limited amount. Although NNC participated fully in the hearing process, they presented no expert witnesses, and instead presented only lay citizen witnesses (three of five were cross-examined by excerpts from deposition transcripts). The Applicant participated in the hearing extensively, presented the most witnesses of any party, presumably has the financial resources to bear the costs and arguably benefits most from the transcript because if the permit amendment is granted, it is certainly the Applicant that will benefit. Accordingly we ask that NNC be excused from payment of transcript costs and the Applicant be allotted 100 percent of the cost.

[131] 11 TR. 2411:10 – 22 (Udenenwu).
[132] 30 T.A.C. § 80.23(d).

VIII. SUMMARY

The proposed expansion of the Austin Community Landfill should be denied. Both the City of Austin government and the Travis County Government have taken strong stances opposing this expansion. The facility is located in one of the fastest growing parts of the city of Austin. Greg Guernsey and CAPCOG have opined that the facility is simply incompatible with the surrounding residents and commercial uses of the nearby land. The land use surrounding the facility is very similar the use that was surrounding the proposed Spring-Cypress facility which the Commission ultimately denied issuing the permit in part because of the land use incompatibility. Mr. Worrall incorrectly determined the land use was surrounding the Spring-Cypress facility was compatible and has made the similar mistake in this case. It is for precisely the kind of permit we have before us that the Commission is granted authority to deny a permit for land use purposes under Texas Health and Safety Code § 305.66(c).

CAPCOG also determined that the proposed expansion of the ACL facility does not conform to the Regional Solid Waste Management Plan as required by Texas Health and Safety Code § 363.066(a) and 30 T.A.C. § 330.641(d). State law mandates that CAPCOG create the regional solid waste management plan. Accordingly, it is entirely understandable it is CAPCOG's responsibility to make the preliminary decision whether an application conforms with this plan. The Commission does have the authority to overrule CAPCOG's determination, but Protestants respectfully suggest the Commission not exercise this authority given the nuisance conditions and future growth trends that are entirely consistent with the nonconformance determination.

For years citizens have been enduring odor, wind-blown trash, noise, truck traffic, dust, inability to develop their property and various other nuisances as a result of the ACL facility.

Although some of the hardships faced by the nearby residents derive from the neighboring BFI landfill, however, that facility will no longer operate after 2015. The proposed expansion is anticipated to elongate the life of the ACL facility until 2025 causing continued hardship not only on the citizens that already live there, but also on the large number of residents heeding the encouragement of the city to move to the area. Operation of the facility in this manner is a violation of 30 T.A.C. § 330.15(a)(2).

Finally, there is a groundwater contamination issue that poses severe danger to any citizen that lives nearby. Alto Nauert testified to the industrial and, arguably hazardous, waste was buried on this site in the early 1970s. Dr. Kier verified and explained in further detail what Alto saw with his own eyes. Dr. Kier also established that it was disposed of in a manner that would not keep the waste from penetrating the clay liner or from migrating away from the ACL site. To date, the dangerous waste has yet to be excavated and has allegedly in fact caused contamination in the groundwater and migrated away from the facility. Applicant's and ED's failure to consider the issue as part of this proceeding is unacceptable. Operation of the ACL facility is a direct violation of 30 T.A.C. § 330.15(a)(3), which prohibits operating a landfill in a manner that causes endangerment to human health or welfare.

IX. FINDINGS OF FACT

NNC hereby incorporates Sections IV and V of this Closing Argument as suggested Findings of Facts. In addition to the Findings of Fact identified as Sections IV and V earlier in this text, NNC offers the following Findings of Facts regarding the issues briefed above:

Fact Finding Regarding Land Use – The continued operation of the Waste Management of Texas, Inc., Austin Community Landfill proximate to the Harris Branch residential subdivision represents an incompatible land use.

Fact Finding Regarding Land Use – The area surrounding the proposed expansion is within the City of Austin Desired Development Zone and is an area experiencing rapid residential growth.

Fact Finding Regarding Land Use – There are currently over 1,447 homes within one mile of the facility.

Fact Finding Regarding Land Use – Within one mile of the facility there is one school, one daycare, one historical building and five recreational areas.

Fact Finding Regarding Land Use – Blue Trail Elementary School, located about 4,823 feet from the site.

Fact Finding Regarding Land Use – An historic site (the Barr Mansion), located approximately 2,400 feet from the site.

Fact Finding Regarding Land Use – A day care center (the Children's Courtyard) located approximately 3,445 feet from the site.

Fact Finding Regarding Nuisance – Nuisance conditions have been caused in the past due to the operation of the Waste Management of Texas, Inc., Austin Community Landfill and continue to occur on occasion from the operation of the Waste Management of Texas, Inc., Austin Community Landfill.

Fact Finding Regarding the Regional Solid Waste Management Plan – The proposed Austin Community Landfill expansion rails to conform to the objective in the CAPCOG regional plan requiring the facility to ensure that the use of a site for a MSW facility does not adversely impact human health or the environment by evaluating and determining impact of the site upon counties, cities, communities, groups of property owners, or individual in terms of compatibility

of land use, zoning in the vicinity, community growth patterns, and other factors associated with the public interest.

X. CONCLUSIONS OF LAW

NNC offers the following Conclusions of Law regarding the issues briefed above:

Conclusion of Law Regarding Land Use: The proposed expansion is not compatible with land use in the surrounding area, thereby violating 30 T.A.C. § 330.61(h).

Conclusion of Law Regarding Nuisance: The continued operation of this landfill constitutes a nuisance, in violation of 30 T.A.C. § 330.15(a)(2).

Conclusion of Law Regarding the Regional Solid Waste Management Plan: The continued operation of this landfill does not conform to the Regional Solid Waste Management Plan, in violation of Texas Health & Safety Code § 363.066(a) and 30 T.A.C. § 330.641(d).

Conclusion of Law Regarding Endangerment to Human Health: The continued operation of this landfill constitutes an endangerment to human health and welfare or the environment, in violation of 30 T.A.C. § 330.15(a)(3).

Conclusion of Law Regarding Permit Denial: This proposed application should be denied because various rules of the Commission as identified above would be violated if it were issued.

XI. ORDERING PROVISIONS

NNC hereby recommends that the following provisions be ordered:

1. That the Application of Waste Management of Texas, Inc. for a Major Amended to Type I MSW Permit No. MSW-249D be denied.

2. That the Applicant Waste Management of Texas, Inc. pay all transcription and reporting costs.

3. That all motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted, be denied.

4. That the effective date of the Administrative Law Judge's Order be the date the Order is final, as provided by 30 T.A.C. § 80.273 and Gov't Code § 2001.144.

5. That the Commission's Chief Clerk forward a copy of Administrative Law Judge's Order to all parties.

6. That if any provision, sentence, clause, or phrase of Administrative Law Judge's Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of the Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 8th day of May, 2009, a true and correct copy of the foregoing instrument was served on all attorneys of record by the undersigned via regular U.S. Mail, and/or Certified Mail/Return Receipt Requested, and/or hand delivery, and/or facsimile transmission, and/or Federal Express Overnight Mail, and/or electronic mail (e-mail).

Adam M. Friedman

The Honorable Roy Scudday
Administrative Law Judge
State Office of Administrative Hearings
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