SOAH DOCKET NO. 582-06-3321
TCEQ DOCKET NO. 2005-0337-MSW

APPLICATION OF WILLIAMSON COUNTY FOR A PERMIT AMENDMENT TO EXPAND A TYPE I MUNICIPAL SOLID WASTE LANDFILL FACILITY; (PERMIT NO. MSW-1405B)	**§**	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

TJFA, L.P.'S PLEA

TO THE JURISDICTION

AND

BRIEF IN SUPPORT OF PLEA

TO THE JURISDICTION

November 17, 2006

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TABLE OF CONTENTS

EXHIBIT LIST

Exhibit Number	Exhibit Description
1	Application Part A, p. 1 of 9, October 2003
2	Application Part A, p. 8 of 9, October 2003
3	Application Part A, p. 9 of 9 October 2003
4	Application Part A, p. 10 of 9 October 2003
5	Application Part A, p. 11 of 9 October 2003
6	Executive Director Preliminary Decision, April 2004
7	Application Part A, p. 10 of 9, July 2005
8	Application Part A, p. 11 of 9, July 2005
9	Application Part A, p. 8a of 9, November 2005
10	Application Part A, p. 9a of 9, November 2005
11	Draft Permit with Co-Permittees, March 2006
12	Mark Dietz Letter to TCEQ, June 2006
13	Williamson County Letter to TCEQ, June 2006
14	TCEQ Letter to Chief Clerk revised Draft permit, June 2006
15	TCEQ letter to Williamson County –revised draft Permit, June 2006
16	SOAH Order No. 1, November 1, 2006
17	Williamson County letter to TCEQ re Audit, September 2005
18	TCEQ Response to Williamson County, November 2005
19	Public Notice issued May 18, 2004
20	Public Notice issued September 14, 2004
21	Public Notice issued May 13, 2005
22	Public Notice issued July 28, 2005
23	Public Notice issued March 24, 2006
24	Public Notice issued June 28, 2006

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TJFA, L.P.'S PLEA TO THE JURISDICTION AND BRIEF IN SUPPORT OF PLEA TO THE JURISDICTION

TO THE HONORABLE TRAVIS VICKERY, ADMINISTRATIVE LAW JUDGE OF THE STATE OFFICE OF ADMINISTRATIVE HEARINGS:

COMES NOW, Protestant, TJFA, L.P. ("TJFA"), and hereby files this Plea to the Jurisdiction and Brief in Support of the Plea to the Jurisdiction in the above-styled matter. Because the Application has failed to properly identify the Applicant and the required public notice has failed to properly identify the Applicant, subject-matter jurisdiction under SOAH does not exist and this Application should be returned to the TCEQ.

I. PROCEDURAL BACKGROUND

The original Application for Municipal Solid Waste Permit No. MSW-1405B was filed with the Texas Commission on Environmental Quality ("TCEQ") on or about October 10, 2003. The Application was declared technically complete by the TCEQ Executive Director on Parts I & II on about April 7, 2004 and on Parts III and IV on or about March 24, 2006. Public notices regarding this Application were published on several occasions. Williamson County was listed as the sole applicant on the early public notices. Williamson County and Waste Management of Texas, Inc. ("WMI") were both listed as co-applicants in the most recent public notices. TJFA filed objection to the application and its concerns about this co-applicant status with the TCEQ on July 27, 2006. Several requests for a contested case hearing were also filed with the TCEQ. The Applicant chose to not correct this defect in its Application and instead requested direct

referral to the State Office of Administrative Hearings on August 9, 2006. The initial preliminary hearing was held by SOAH on October 26, 2006. Although the ALJ has stated "jurisdictional objections can be raised at anytime, even at the appellate level," a schedule for filing jurisdictional objections was provided and some of the parties indicated they are already prepared to submit such objections and briefs. The parties seeking such affirmative relief at this time are scheduled to file their request by November 17, 2006. This plea and brief are being filed pursuant to that schedule.

II. TCEQ RULES REQUIRE THE PERMIT TO BE ISSUED TO EITHER THE OWNER OR OPERATOR

This Application is governed by the TCEQ rules under 30 Texas Administrative Code Chapter 330 in effect prior to March 27, 2006, according to 30 TAC § 330.1(a)(2) and the County's election to proceed under those prior rules.

The effective TCEQ rules governing this major amendment Application specify under the definition of a permit that a MSW permit issued by the TCEQ "… may authorize the owner or operator…", but not both, to operate a MSW facility (30 TAC § 330.2(97). A similar definition of a permit refers to the "permittee" as being authorized to operate such a facility when issued a permit by the TCEQ (30 TAC § 305.2(27).

The existing permittee for this MSW facility is Williamson County. Under the TCEQ rules, a permittee may request an amendment to its permit (30 TAC § 305.62). When doing so, such a permittee must complete, sign and submit an application to the Executive Director of the TCEQ for processing (30 TAC § 305.42(a)).

In this case, Part A of the Application for a permit amendment to Permit No.MSW-1405A was originally filed October 10, 2003. On page 1 of 9 (Exhibit 1) in that Part A on the line for the "Applicant Name", the following was shown:

Applicant Name: Williamson County (Site Owner)

Waste Management of Texas, Inc. (Site Operator)

In the original Part A was an "Applicant's Statement" on page 8 of 9 (Exhibit 2) and "Applicant's Certificate" on page 9 of 9 (Exhibit 3) both signed and sworn to by Williamson County Judge John Doerfler. These documents state that Williamson County is the Applicant who is seeking a major amendment to its existing permit for its MSW facility

However, also included with this Part A were additional pages created by WMI apparently without the awareness of Williamson County, identified as page 10 of 9 (Exhibit 4) and page 11 of 9 (Exhibit 5). These pages include another Applicant's Statement and Certification asserting that WMI is the Applicant under the TCEQ rules.

Clearly, at this point the Application contained two applicants in violation of TCEQ rules. This defect in the application was never corrected during TCEQ's administrative and technical review process. This defective Application resulted in an Executive Director's Preliminary Decision on April 7, 2004 (Exhibit 6) that the Application was compatible with surrounding land uses. That preliminary decision also listed both Williamson County and WMI as co-applicants, contrary to the TCEQ rules. This defect was further compounded by subsequent filings which were also prepared by WMI, and by similarly defective public notices, which were published by WMI.

For example, in July 2005, a revised Part A, pages 10 of 9 (Exhibit 7) and 11 of 9 (Exhibit 8) were created and submitted by WMI listing itself as a co-applicant. This was followed by another revised Part A in November 2005 prepared by WMI which also included an Applicant Statement, this time identified by WMI as page 8a of 9 (Exhibit 9) and Applicant's Certification, page 9a of 9 (Exhibit 10) similarly claiming applicant status for WMI along with Williamson County.

The TCEQ review process resulted in a draft permit issued in March 2006 (Exhibit 11). This draft permit proposed co-permittee status for Williamson County and WMI, contrary to TCEQ rules such as §330.2(97). A review of MSW permit files and inquiries of TCEQ staff have yet to yield an example of another landfill with co-permittees.

Williamson County became aware of this issue and attempted to correct the defect. In June 2006 Dietz and Jarrard, P.C., on behalf of Williamson County, sent a letter to the TCEQ (Exhibit 12) requesting the draft permit be changed without amending the underlying Application which controls the draft permit. Attached to this letter was a joint letter from Williamson County and WMI (Exhibit 13) to change the draft permittee listing to be the same as the current permit number MSW-1405A. The TCEQ staff made that change on or about June 30, 2006 and issued the revised draft permit (Exhibit 14). TCEQ staff sent a letter at that time to the Williamson County Judge describing the change to the permit as "a minor editorial change" without changing the underlying Application that controls the permit (Exhibit 15).

This change was made simply to the draft permit. The fact that Williamson County and WMI now claim the intent was to only have one permittee does not correct the underlying Application which would be the basis of the new permit. It is still defective. The TCEQ staff did not require Williamson County to amend the underlying Application or revise the published public notices. The underlying application still has Williamson County and WMI listed as co-applicants for the permit and a draft permit cannot be approved unless it is in accordance with the underlying Application. Since TCEQ rules require either the owner or the operator to be issued the permit pursuant to § 330.2(97), SOAH has no subject-matter jurisdiction over such an application with co-permittees. Therefore, the only remedy is for SOAH to return the application to TCEQ for further amendment and renotice under the TCEQ rules.

WMI's continued insistence on being involved in this permitting process as a co-applicant is confusing and obstructive. WMI is not a party to this SOAH proceeding, yet, its legal counsel is participating in these proceedings as representing non-party WMI. It is confusing to have WMI attempt to participate in these proceedings like a party when it is not, such as appearing as a party on the service list in SOAH Order No. 1 (Exhibit 16). The confusion is compounded by the identification in SOAH Order No. 1 of Mr. Dietz, the attorney representing the applicant Williamson County, being shown as representing WMI.

III. WASTE MANAGEMENT OF TEXAS, INC. SHOULD NOT BE ON THE APPLICATION BECAUSE THEY ARE NOT AN OWNER NOR AN OPERATOR AS DEFINED UNDER § 305.43(b)

WMI has asserted that the TCEQ rules require their name to be on the Williamson County permit amendment application. Counsel for WMI, John Riley, made this statement at a town hall meeting in Hutto on October 11, 2006. Mr. Riley quoted text from 30 TAC § 305.43(b). That subsection reads as follows:

> (b) For solid waste and hazardous waste permit applications, it is the duty of the owner of a facility to submit an application for a permit or a post-closure order, unless a facility is owned by one person and operated by another, in which case it is the duty of the operator to submit an application for a permit or a post-closure order.

Williamson County is the existing permittee and is the owner and operator of its MSW facility for which it is seeking this permit amendment. As such, Williamson County has the duty to submit an application for its permit amendment. If WMI's position were accurate, then §305.43(b) would require WMI to be the sole applicant and, therefore, the only entity that should be listed as the permittee. WMI's position would cause the control of this permit to be shifted from Williamson County to WMI. Williamson County had an appraisal done in 2005 which estimated the permit value to be worth millions of dollars to the County. WMI's position would cause Williamson County to lose significant value through an administrative proceeding without

compensation. WMI's claim to status as "the operator" under § 305.43(b) is contrary to the TCEQ rules and therefore cannot be sustained.

The definition of "operator" as used in § 305.43(b) is "the person responsible for the overall operation of a facility" (30 TAC §305.2(24)). The definition of "owner" is "the person who owns a facility or part of a facility" (30 TAC §305.2(26)). If you examine the Contract between Williamson County and WMI, statements by Williamson County representatives, and statements by TCEQ legal staff, it becomes clear that WMI is merely a contractor for the County not a § 305.43(b) operator. Since WMI is not an "operator" as defined in this subsection and, since WMI is not an "owner" as defined under § 305.2(26), then, 30 TAC §305.43(b) does not allow WMI to be listed on the permit Application.

The Contract between Williamson County and WMI authorizing WMI to assist the County in obtaining this permit amendment is dated October 28, 2003. It is a revision of a contract dated November 5, 1990. The main purpose of the Contract was supposedly for the County to hire WMI to perform certain functions related to management of the landfill. Williamson County did not make WMI ultimately responsible for the overall operation of the facility. For example, if any violation, enforcement order and fine were issued by TCEQ for WMI's conduct, it would be issued to Williamson County. Any negative impact of such TCEQ action would count against Williamson County's compliance history, not WMI's.

In September 2005 Williamson County notified the TCEQ it was going to conduct an environmental audit of "its facility" (Exhibit 17). The TCEQ responded in November 2005 acknowledging Williamson County's notice and stated, "It appears that the audit will include a review of Williamson County's compliance…" (Exhibit 18). This correspondence regarding Williamson County's compliance history again demonstrates the County's and TCEQ's intent that the County is ultimately the "operator" responsible under § 305.43(b).

Williamson County control is further illustrated through Section 2 of the Contract which says:

> 2. County Oversight.
>
> County may appoint a Landfill oversight committee or representative whose function will be: (1) to observe all aspects of the Landfill Operation; (2) make periodic reports thereon to County; (3) represent the County in discussions with Contractor as to Landfill operation, marketing or development circumstances or practices as they affect the health, safety, welfare and reputation or other legitimate interest of the County (4) and to explore possible solutions to problems and investment in opportunities as may serve the interests of the parties such as recycling or other waste reduction strategies to maximize the useful life of the landfill. Such representative or committee shall further be authorized to communicate on behalf of the County directly with the Texas Commission on Environmental Quality ("TCEQ") and such other state or federal environmental agencies as may have jurisdiction over the Contractor or the Landfill to seek enforcement of laws and regulations governing these activities. Provided that the foregoing language shall not be construed to limit the power or ability of the County Commissioner's Court to make contact with any regulatory agency in any manner it deems appropriate. Such representative or committee will have an opportunity to review and comment on material changes in operating procedures prior to submission to the appropriate regulatory agency.

It is clear the mechanism provided by this Contract section gives the County the right to control WMI's activities either through the Landfill Oversight Committee, or County representative, or by the County directly. The Landfill Oversight Committee, or County representative, has the authority to represent the County in dealing with the Contractor, which is defined as WMI under the Contract, overall aspects of the "Landfill operation, marketing, safety, welfare, and reputation or other legitimate interest of the County." The Landfill Oversight Committee, or County Representative, is clearly authorized to bind the County with the TCEQ or other regulatory agencies. This section also clearly allows the County to deal directly with the regulatory agencies by the statement, "the foregoing language shall not be construed to limit the power or ability of the County Commissioner's

Court to make contact with any regulatory agency in any manner it deems appropriate." If the County has ultimate authority to deal with the regulatory agencies regarding the landfill operation, then the County is the responsible party defined as the "operator" under Chapter 305.

This position is supported by statements made by Williamson County representatives regarding WMI's control. During a TCEQ public meeting held in Hutto on July 27, 2006, the following question was asked of County Commissioners Lisa Birkman and Frankie Limmer who responded as follows:

> MAHLON ARNETT: I have a question for either Commissioner if I might. Was it ever your intention for Waste Management to gain any type of control or ownership of a permit, a new permit, not the existing permit, or the existing permit, either way?
>
> COMMISSIONER BIRKMAN: No.
>
> COMMISSIONER LIMMER: No.

Also heard at a town hall meeting held later in Hutto on October 11, 2006 was County Judge-Elect Dan Gattis, Sr. emphatically stating that there was to be only one applicant and one owner of the permit. He said:

> "There are not two applicants on the permit. There is only one entity that is the owner of that permit and that would be Williamson County."

It is important to note that Judge-Elect Gattis has been given a very active role in negotiating on behalf of the County by the current Williamson County Commissioners Court. His statement makes it clear WMI's name should not be on the application and, therefore, could not be an operator under § 305.43(b).

On December 6, 2005 Williamson County commissioners processed AGENDA ITEM 23 "Discuss and take appropriate action on payment to WMI for expenses incurred for obtaining the

landfill permit." The County Commissioners ultimately voted on this date to pay WMI over $600,000.00 for preparing the landfill application. As part of that discussion on December 6, 2005, the Commissioners made confirming statements about the operation of the landfill being the responsibility of the County. To support his position to pay WMI, Commissioner Greg Boatright said, "I'm concerned about the county's liability, and we need to be in control of that thing (landfill)." Commissioner Frankie Limmer also supported this payment and said, "People who live in the area (of the landfill) want us to pay so that we have control." The County Commissioners confirmed their position with another vote on February 7, 2006 to pay WMI and keep control of the landfill.

TCEQ's Office of Legal Services also weighed in on this issue in the July 27, 2006 TCEQ public meeting. TCEQ Legal was represented by Todd Galiga who made the following statements in response to questions:

> MODERATOR: Let me clarify. Perhaps this is an appropriate time to do this -- Todd, can you describe for us – the county is the applicant, as with the county being the applicant, where does the responsibility remain from the agency's perspective for the application as well as if the permit is issued?
>
> GALIGA: The responsibility would lay with the County. We would consider them the responsible party for this permit and for the landfill.
>
> MODERATOR: Thank you. Next question. Yes, sir. I believe what Todd just said -- You may need to come down a little lower. Do we need to be louder? Todd does. Todd, get a little closer to the microphone.
>
> GALIGA: The question was whether or not we would consider who would be the responsible party if this permit is issued and that would be the county. The county is the permit holder and they are the party the state would hold to for responsibility for this landfill.
>
> * * *
>
> MAHLON ARNETT. I have several questions. One for the TCEQ, and that is if a facility is managed and run by one entity, and the real estate is owned by another, as in this case, Williamson County owns the property and it is run and managed by Waste Management, and the contract indicates that the owner of the real estate will have ultimate control of the facility, is not the real

> estate owner really the operator under the regulations of TCEQ since the operator is responsible for the overall operations of the facility?
>
> MODERATOR: Todd
>
> GALIGA: As I understand the arrangement between the County and the operator, the operator is responsible if they entered into a contract, for the day-to-day operations. From the TCEQ's perspective, we look to the permit holder, in this case the county as the party who is ultimately responsible even if they are not directly controlling the day to day activities.

The evidence presented above clearly indicates neither Williamson County nor TCEQ ever intended for WMI to be "the person responsible for the overall operation of the landfill", so the Application is defective if WMI is included as an applicant or is a co-permittee. Yet WMI is clearly still listed as one of the Applicants for the permit in the Application according to Exhibits 1-5 and 7-10. These exhibits were all prepared by WMI or its subcontractors according to Williamson County. This was clearly stated by Commissioner Frankie Limmer at the July 27, 2006 public meeting when he said, "They did the actual paperwork on it. The county did not do the actual paperwork on it, so that's how it came and it was submitted to the TCEQ." One can only assume WMI attempted to increase its control of the landfill and arguably gain an ownership interest in the proposed permit amendment MSW-1405B by bootstrapping itself into the Application by claiming itself to be a § 305.43(b) operator. However, the overwhelming evidence cited above proves this is not WMI's true status. Additional discovery into this matter may be necessary depending on the response of WMI and Williamson County.

Therefore, the Application should be returned to the TCEQ for an amendment to remove WMI as an Applicant and to issue proper public notice with only Williamson County as the Applicant.

IV. THE VARIOUS PUBLIC NOTICES ARE DEFECTIVE AND MISLEADING

The various public notices are defective and misleading to the public due to the erroneous listing of WMI as an Applicant in the most recent published notices. This defect in the published notices makes the notices insufficient to confer jurisdiction to the State Office of Administrative Hearings.

The original public notices were not accurate because it listed only Williamson County as the applicant when the Application actually includes WMI as an applicant also. For example, a public notice issued May 18, 2004 (Exhibit 19) was of the completed technical review of the land-use compatibility portion of the permit application. This notice identified Williamson County as the sole applicant when the Application and Executive Director Preliminary Decision, April 2004 clearly had both Williamson County and WMI as applicants (See Exhibits 1-10). Therefore, the public was not on notice of WMI's true status under the Application and had no opportunity to object to WMI's status as a co-applicant for a permittee in violation of TCEQ rules.

The next public notice for a public meeting on the Application was issued on September 14, 2004 (Exhibit 20). It suffers from the same problem of listing Williamson County as the sole applicant when the application also included WMI. Therefore, the public was deprived of another opportunity to object to WMI as an applicant for co-permittee status in violation of TCEQ rules. Another public notice issued May 13, 2005 (Exhibit 21) of an intent to obtain a MSW permit amendment and Notice of Administrative Completeness issued July 28, 2005 (Exhibit 22) also were defective for the same reasons as stated above.

The public notices then changed, beginning with the notice that technical review was completed that was issued March 24, 2006 and published on April 12, 13 and 16, 2006 (Exhibit 23). This notice included both Williamson County and WMI as co-applicants for the permit. This was the first time the public was made aware there was a problem with the Application for

including WMI as a co-permittee. Subsequent public notices for a public meeting issued June 28, 2006 (Exhibit 24) and the Notice of Preliminary Hearing issued September 19, 2006 (Exhibit 25) also erroneously included both Williamson County and WMI as the co-applicants for the permit.

These notices with co-applicants were clearly defective because § 330.2(97) allows only one permittee and, according to Williamson County, the applicant should only be the County, not WMI. WMI is also not an "operator" or "owner" under 305.43(b), and therefore does not give them a basis to be the applicant for this permit.

WMI's status as a contractor for Williamson County does not give it any rights in the Application or rights to participate in the application process other than at the direction of and as representing Williamson County. Furthermore, after WMI is removed from the public notice and the Application by the TCEQ, the public notice should be correctly published.

V. CONCLUSION

The Application for TCEQ Permit MSW-1405B is deficient because two applicants for co-permittee status are included in the pending Application. TCEQ regulation § 330.2(97) requires the permit be issued to an owner or the operator, not both. Furthermore, since WMI is not an operator as defined under §305.2(24), it should not have been included in any application or public notices. The public notices were insufficient to confer jurisdiction on SOAH and SOAH should not give further consideration to the Application.

VI. PRAYER

THEREFORE, PREMISES CONSIDERED, TJFA prays that its Plea to the Jurisdiction be granted and the Application with co-applicants be returned to TCEQ for amendment to remove WMI as an applicant and to properly post public notice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above instrument has been served upon Defendant as provided by the Texas Rules of Civil Procedure.

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November 17, 2006

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