

# Vinson & Elkins

**Bryan J. Moore** bmoore@velaw.com  
Tel 512.542.8729 Fax 512.236.3257

April 7, 2008

***Via Hand Delivery***

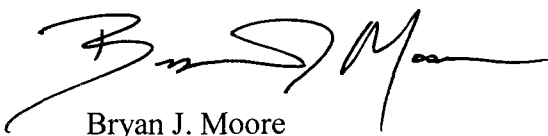
Ms. La Donna Castañuela  
Chief Clerk (MC-105)  
ATTN: Agenda Docket Clerk  
Texas Commission on Environmental Quality  
12100 Park 35 Circle, Bldg. F  
Austin, Texas 78753

Re: SOAH Docket No. 582-07-0863; TCEQ Docket No. 2006-1931-MSW  
Application of Waste Management of Texas, Inc. for a Municipal Solid  
Waste Permit Amendment; Permit No. MSW-66B

Dear Ms. Castañuela:

Enclosed for filing in the above-referenced docket, please find one original and twelve copies of Applicant's Brief in Response to the Administrative Law Judge's Proposal for Decision. Please return one file-stamped copy to the courier. Thank you.

Respectfully submitted,



Bryan J. Moore

Enclosures

cc: Service List

**SOAH DOCKET NO. 582-07-0863  
TCEQ DOCKET NO. 2006-1931-MSW**

<b>APPLICATION OF</b>	§	<b>BEFORE THE STATE OFFICE</b>
<b>WASTE MANAGEMENT OF TEXAS, INC.</b>	§	
<b>FOR A MUNICIPAL SOLID WASTE</b>	§	<b>OF</b>
<b>PERMIT AMENDMENT;</b>	§	
<b>PERMIT NO. MSW-66B</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**APPLICANT WASTE MANAGEMENT OF TEXAS, INC.’S BRIEF IN RESPONSE  
TO THE ADMINISTRATIVE LAW JUDGE’S PROPOSAL FOR DECISION**

COMES NOW Applicant Waste Management of Texas, Inc. (“*Applicant*” or “*WMTX*”) and, per 30 Tex. Admin. Code § 80.257(a), files this brief in response to the Administrative Law Judge’s (“*ALJ’s*”) Proposal for Decision (“*PFD*”) in the above-captioned matter. WMTX believes that the PFD is thorough and well reasoned. Furthermore, the findings and recommendations in the PFD are supported by the evidence put forth in this proceeding. Accordingly, WMTX accepts – with a single limited exception – the ALJ’s PFD and proposed order (“*Proposed Order*”). This exception, and the attendant conforming changes, are set forth below.

**I.**  
**ARGUMENT**

**A. IF LIMITATIONS ARE TO BE PLACED ON OPERATING HOURS, PER THE APPLICABLE REGULATORY REQUIREMENTS, THE PERMIT SHOULD DISTINGUISH BETWEEN WASTE ACCEPTANCE HOURS AND OTHER HOURS OF OPERATION**

As discussed in the ALJ’s PFD, in its application, WMTX requested the flexibility to operate the Mesquite Creek Landfill, as necessary, without limitations on the facility’s operating hours.<sup>1</sup> In the PFD, the ALJ reasoned that “continuous operations could be disturbing to nearby residents” and that the evidence put forward did not support a finding that “waste management

---

<sup>1</sup> See PFD at 55-56.

operations” at the facility required such flexibility.<sup>2</sup> The ALJ also took note that WMTX chose to accept some limitations on its operating hours in order to reach agreement with Guadalupe County on a number of other issues, which are set forth in the parties’ settlement agreement.<sup>3</sup> In light of the foregoing, the PFD proposes to limit the facility’s “operating hours” to the hours specified in the agreement between WMTX and Guadalupe County.

While WMTX maintains that the facility can be operated with the flexibility requested in the application without disturbing area residents, WMTX nevertheless accepts – and does not take exception to – the ALJ’s proposal to limit the facility’s operating hours to the hours specified in the agreement with Guadalupe County. However, WMTX respectfully submits that the ALJ’s proposal regarding “operating hours” should be clarified to recognize the regulatory distinction between waste acceptance hours and other hours of operation. Specifically, the regulation applicable to facility operating hours expressly distinguishes between (1) waste acceptance hours, (2) hours for transportation of materials on- or off-site and operation of heavy equipment, and (3) operating hours for other activities.<sup>4</sup> The third category of operating hours – hours for “other activities” – does not require specific approval from the Texas Commission on

---

<sup>2</sup> *Id.* at 57-58.

<sup>3</sup> *See id.* at 56; Ex. CCL-5. The first sentence in paragraph 2.2 of the settlement agreement with Guadalupe County specifically states the hours that the facility is currently open and accepting “Waste Material for disposal.” Ex. CCL-5 at 2. The second sentence in that paragraph modified only those hours – i.e., only the facility’s waste acceptance hours. Although the agreement uses the words “Landfill operation hours” in the second sentence of paragraph 2.2, the agreement was not drawn with regulatory definitions or distinctions in mind. *Id.* The first and third sentences of paragraph 2.2., read in conjunction with the second sentence, demonstrate that the parties’ intent was only to address the facility’s “waste acceptance hours,” not the operating hours for other activities recognized and discussed in 30 Tex. Admin. Code § 330.118(a ) (e.g., transportation of materials on- or off-site and operation of heavy equipment).

<sup>4</sup> *See* 30 TEX. ADMIN. CODE § 330.118(a) (distinguishing between “waste acceptance hours and the hours when materials will be transported on or off site, and the hours when heavy equipment may operate,” as well as “[o]perating hours for other activities”).

Environmental Quality (“*TCEQ*” or the “*Commission*”), thus the relevant distinction is between waste acceptance hours and hours for transportation of materials on- or off-site and operation of heavy equipment.<sup>5</sup>

To give effect to this regulatory distinction, WMTX respectfully requests that the ALJ’s proposed limitation on the facility’s operating hours be clarified to provide that the limitation applies only to the hours during which the facility may accept waste – i.e., that the facility’s authorized hours of waste acceptance are limited to Monday through Friday, 4:00 a.m. to 8:00 p.m., and Saturday 4:00 a.m. to 3:00 p.m., and that such limitation does not apply to any other facility activities, such as transportation of materials on- or off-site and operation of heavy equipment. WMTX further requests, in accordance with the ALJ’s findings and TCEQ’s rules, that transportation of materials on- or off-site and operation of heavy equipment be allowed Monday through Saturday, from 4:00 a.m. to 9:00 p.m., and on Sunday from 5:00 a.m. to 9:00 p.m.<sup>6</sup> Per TCEQ’s rules, operating hours for other activities do not require the Commission’s approval and, therefore, should not be limited by the facility’s permit.<sup>7</sup>

These clarifications would (1) honor and effectuate the ALJ’s proposal to limit the hours of “normal operations” and “waste management operations;”<sup>8</sup> (2) properly distinguish between waste acceptance hours and other hours of operation, in accordance with the regulatory

---

<sup>5</sup> See *id.* (“Operating hours for other activities do not require other specific approval.”); see also 29 TEX. REG. 11,054, 11,069 (Nov. 24, 2004) (“[F]acility operating hours include waste acceptance hours, hours when materials may be transported on or off site, and hours when heavy equipment may operate.”).

<sup>6</sup> See 30 TEX. ADMIN. CODE § 330.118(a) (establishing a default 9:00 p.m. curfew for “[t]ransportation of materials and heavy equipment operation”).

<sup>7</sup> See *id.* (“Operating hours for other activities do not require other specific approval.”).

<sup>8</sup> PFD at 58.

distinction in TCEQ's rules;<sup>9</sup> (3) honor and effectuate the intent of the settlement agreement with Guadalupe County, which was intended to address only waste acceptance hours; (4) allow the facility to make full use of its waste acceptance hours, and safely transport non-waste materials and operate equipment for purposes other than waste acceptance outside of waste acceptance hours when the facility is less busy and personnel are available and not tasked with managing disposal activities;<sup>10</sup> and (5) effectuate, at least in part, WMTX's stated intentions regarding operation of the facility.<sup>11</sup>

While the ALJ is correct that the "operating hours" in WMTX's agreement with Guadalupe County will provide for extended operations beyond the hours authorized in WMTX's current permit, it should be recognized that WMTX's existing permit was issued prior to TCEQ's 2004 revisions to its rules for site operating plans for municipal solid waste facilities ("**SOP Rules**").<sup>12</sup> Prior to those revisions, TCEQ's SOP Rules – and permits issued pursuant to those rules – specified only the facility's "operating hours" and did not otherwise specifically limit the hours when materials may be transported on- or off-site, and when heavy equipment may be operated.<sup>13</sup> As TCEQ recognized in the preamble to its revised SOP Rules, prior to those rules specifying standard hours for such activities, facilities may not have interpreted their

---

<sup>9</sup> See 30 TEX. ADMIN. CODE § 330.118(a); see also 29 TEX. REG. at 11,069.

<sup>10</sup> See 29 TEX. REG. at 11,069 ("The standard operating hours for when materials may be transported on or off site, and when heavy equipment may operate have been adopted in consideration of comments requesting flexibility and extended operating hours."); *id.* ("The extended operating hours for when materials may be transported on or off site, and hours when heavy equipment may operate enables a facility to make full use of its waste acceptance hours. A facility can use those hours outside of its waste acceptance hours so it can be ready to receive waste upon opening the gates and can continue to receive waste up until closing its gate.").

<sup>11</sup> See PFD at 55-56.

<sup>12</sup> See *id.* at 5 (noting that WMTX's current, existing permit was issued in 2003).

<sup>13</sup> See 30 TEX. ADMIN. CODE § 330.118 (2003) (limiting a facility's "operating hours" only).

authorized “operating hours” as a limit on the hours when materials may be transported on- or off-site, and when heavy equipment may be operated.<sup>14</sup>

For the foregoing reasons, WMTX respectfully requests that proposed Findings of Fact 97 through 99 in the Proposed Order<sup>15</sup> be clarified as follows:

97. The operating hours in the settlement agreement will provide Applicant with several more hours per day for ~~landfill~~ waste acceptance activities than Applicant currently has.
98. Applicant has been operating for many years with fewer ~~operating~~ waste acceptance hours than those described in the settlement agreement.
99. Applicant’s ~~operating~~ waste acceptance hours should be limited to those stated in its agreement with Guadalupe County.

On the same grounds, WMTX also respectfully requests that proposed Conclusion of Law 14<sup>16</sup> be revised as follows:

14. The facility’s ~~operating~~ waste acceptance hours should be Monday through Friday from 4:00 a.m. to 8:00 p.m. and Saturday from 4:00 a.m. to 3:00 p.m., unless an emergency requires extended ~~operating~~ waste acceptance hours. Transportation of materials on- or off-site and operation of heavy equipment should be allowed Monday through Saturday, from 4:00 a.m. to 9:00 p.m., and on Sunday from 5:00 a.m. to 9:00 p.m. Other activities should not be limited to specified hours and may be conducted by the facility, as necessary, at any time.

---

<sup>14</sup> See 29 TEX. REG. at 11,060 (“If a facility elects to continue a current practice of allowing materials to be transported on or off site, or operating heavy equipment beyond the standard hours expressed in the rules or *outside the hours currently authorized in the facility permit*, it may submit a request to modify its site operating plan under §330.111(b).”) (emphasis added).

<sup>15</sup> See Proposed Order at 23-24.

<sup>16</sup> See *id.* at 32.

Additionally, WMTX also respectfully requests that proposed Ordering Provision 1.a.<sup>17</sup>

be revised as follows:

- a. the facility's ~~operating~~ waste acceptance hours should be Monday through Friday from 4:00 a.m. to 8:00 p.m. and Saturday from 4:00 a.m. to 3:00 p.m., unless an emergency requires extended ~~operating~~ waste acceptance hours; transportation of materials on- or off-site and operation of heavy equipment may be conducted Monday through Saturday, from 4:00 a.m. to 9:00 p.m., and on Sunday from 5:00 a.m. to 9:00 p.m.; other activities are not limited to specified hours and may be conducted by the facility, as necessary, at any time.

**B. PROPOSED MODIFICATIONS TO CORRECT INADVERTENT TYPOGRAPHICAL ERRORS**

In a few instances in the Proposed Order there are, what appear to be, simple, inadvertent, typographical errors that, if left uncorrected, could be potentially misleading or otherwise confusing. To address these inadvertent typographical errors, WMTX proposes the following modifications to the ALJ's Proposed Order:

<b>PAGE NO. (Proposed Order)</b>	<b>PARAGRAPH NO.</b>	<b>PROPOSED MODIFICATION</b>	<b>BASIS FOR MODIFICATION</b>
4	20	Delete "Suite 502"	"Suite 502" refers to the ALJs' offices rather than the actual hearing room.
7	32	"th" should be "the"	Typo.
9	37.b	Replace first "ft/bgs" with "feet below ground surface (ft/bgs)"	Clarification. The term "ft/bgs" is not defined prior to this paragraph.
15	58.b	Replace "from" with "form"	Typo.

---

<sup>17</sup> See *id.* at 33.

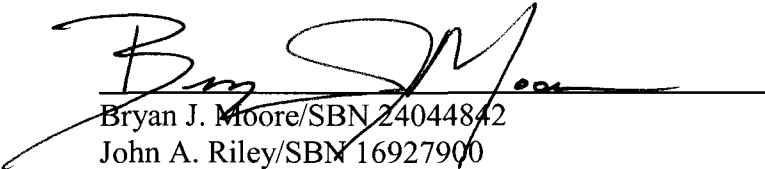
PAGE NO. (Proposed Order)	PARAGRAPH NO.	PROPOSED MODIFICATION	BASIS FOR MODIFICATION
30	143	Delete "a" between "As" and "statutory"	Typo.

**II.**  
**CONCLUSION**

For the foregoing reasons, Applicant WMTX respectfully requests that the ALJ's Proposed Order be modified as proposed above and issued by the Commission with those modifications.

Respectfully submitted,

**VINSON & ELKINS L.L.P.**  
2801 Via Fortuna, Suite 100  
Austin, Texas 78746  
Telephone: 512.542.8729  
Facsimile: 512.236.3257

  
 Bryan J. Moore/SBN 24044842  
 John A. Riley/SBN 16927900  
 M. Nicole Adame Winningham/SBN 24045370

COUNSEL FOR APPLICANT  
WASTE MANAGEMENT OF TEXAS, INC.



**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing brief has been served on the following on this the 7th day of April, 2008:

Anthony C. Tatu  
Amie Dutta Richardson  
Texas Commission on Environmental Quality  
P.O. Box 13087, MC-173  
Austin, Texas 78711-3087  
Phone: 512.239.0600  
Fax: 512.239.0606

*Representing the Executive Director of the  
Texas Commission on Environmental Quality*

Garrett Arthur  
Office of Public Interest Counsel  
Texas Commission on Environmental Quality  
P.O. Box 13087, MC-103  
Austin, Texas 78711-3087  
Phone: 512.239.6363  
Fax: 512.239.6377

*Representing the Texas Commission on  
Environmental Quality Office of Public  
Interest Counsel*

James Ballowe  
Solid Waste Manager  
424 S. Castell Avenue  
New Braunfels, Texas 78130  
Phone: 830.221.4044  
Fax: 830.608.2109

*Representing City of New Braunfels*

Lawrence G. Dunbar  
Dunbar Harder, PLLC  
One Riverway, Suite 1850  
Houston, Texas 77056  
Phone: 713.782.4646  
Fax: 713.782.5544

*Representing TJFA, L.P.*

Nancy Schwarzlose  
2041 Schwarzlose Road  
New Braunfels, Texas 78130  
Phone: 830.372.1500  
Fax: 830.372.4233

*Representing Concerned Citizens and  
Landowners*

John Holtman  
1520 Schwarzlose Road  
New Braunfels, Texas 78130  
Phone: 210.364.4618

*Representing Concerned Citizens and  
Landowners*

Hon. Sarah G. Ramos  
State Office of Administrative Hearings  
300 West 15th St., Suite 502  
Austin, Texas 78701  
Phone: 512.475.4993  
Fax: 512.475.4994

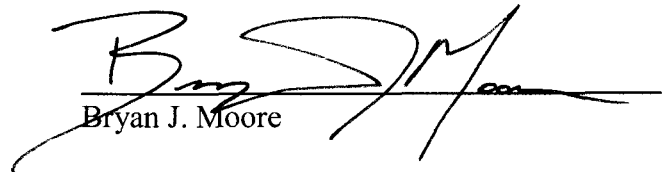
*Administrative Law Judge, State Office of  
Administrative Hearings*

LaDonna Castañuela, TCEQ Chief Clerk  
Office of the Chief Clerk, MC-105  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087  
Phone: 512.239.3300  
Fax: 512.239.3311

*Chief Clerk, Texas Commission on  
Environmental Quality*

Les Trobman, General Counsel  
Office of General Counsel, MC-101  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087  
Phone: 512.239.5525  
Fax: 512.239.5533

*General Counsel, Texas Commission on  
Environmental Quality*

  
Bryan J. Moore

970267\_1.DOC