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

APPLICATION OF WASTE MANAGEMENT OF TEXAS, INC. FOR MUNICIPAL SOLID WASTE PERMIT AMENDMENT NO. MSW-249D	§ § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

CITY OF AUSTIN'S CLOSING ARGUMENT

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

COMES NOW City of Austin ("City") and files this its Closing Argument in the above referenced matter. In support thereof, the City of Austin would respectfully show as follows[1]:

I. INTRODUCTION

The City of Austin is opposed to the issuance of a permit amendment to extend the size and life of the WMI landfill facility located in northeast Travis County. The WMI landfill is no longer compatible with surrounding land uses, is not in conformance with the Regional Solid Waste Management Plan, is not protective of human health, welfare, and the environment, will not comply with Texas Pollution Discharge Elimination System ("TPDES") storm water requirements, does not include adequate provisions for erosion control, and fails to demonstrate improved operational controls to prevent past violations from occurring again.

The burden is on the Applicant to adequately demonstrate that its permit amendment application meets or exceeds all applicable statutory and regulatory

[1] References to exhibits are in the following format: Exhibit, Page:Line (or paragraph No.). References to the court reporter's record are in the following format: CR. V.No., Page:Line.

requirements.[2] The Applicant has failed to meet its burden to prove that its application complies with all requirements. Specifically, the Applicant has not demonstrated that the proposed permit is protective of human health, welfare and the environment; has not shown that the proposed permit is compatible with surrounding land uses; and has not shown that the proposed permit is in conformance with the Regional Solid Waste Management Plan.

II. PARTIES

The Applicant is Waste Management of Texas, Inc. ("WMI"). There are multiple protesting parties in this case. The parties that participated in the contested case hearing are:

GROUP	LEAD ATTORNEY
City of Austin ("City")	Meitra Farhadi
Travis County ("County")	Annalyn Cox
Protestants 1: Williams Ltd., Mark and Melanie McAfee, Cecil and Evelyn Remmert, Alfred Wendland, Janet L. Smith, Jean Brezeale, John Wilkins, George K. Edwards, John P. Murphy, Alto S. and Rosemary M. Nauert, Northeast Neighbors Coalition (NNC), Harris Branch Residential Property Owners Association (HBRPO)	Jim Blackburn
TJFA, LP	Erich Birch
Executive Director ("ED")	Amie Richardson
Office of Public Interest Counsel ("OPIC")	Amy Swanholm

III. JURISDICTION

Jurisdiction was established at the preliminary hearing held April 16, 2008. The Commission has jurisdiction to consider WMI's application under Section 361.061 of the Texas Health and Safety Code. Under Section 2003.047 of the Texas Government Code,

[2] 30 TEX. ADMIN. CODE §80.17(a).

the State Office of Administrative Hearings ("SOAH") Administrative Law Judge ("ALJ") has jurisdiction to conduct a hearing and prepare a proposal for decision ("PFD") in a contested case hearing referred by the Commission.

IV. PROCEDURAL HISTORY

This case was directly referred by the Applicant for a contested case hearing at the State Office of Administrative Hearings. A preliminary hearing to determine party status was held on April 16, 2008. The contested case hearing was held from March 30, 2009 until April 13, 2009.

V. BACKGROUND FACTS

The WMI landfill is currently located on a 288.60 acre site in northeast Travis County.[3] WMI filed this permit amendment for an expansion of the existing landfill to add 71.11 acres to the northwestern edge of the permitted area of the facility for a total permitted area of 359.71 acres.[4] The additional acreage would increase the permitted capacity from 26,679,840 cubic yards to approximately 39,137,000 cubic yards; and extend the remaining life of the facility from approximately 2015 to 2025.[5]

VI. ISSUES

A. Whether the application includes adequate provisions for the protection of human health and welfare, and the environment in general.

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.

[3] APP 202, tech. comp. p.7:¶1.
[4] APP 202, tech. comp. p.12:¶1; APP 202, tech. comp. p.45-46.
[5] APP 202, tech. comp. p.6:¶1; APP 100, 6:15-16; COA 12.

The application does not include adequate protection of groundwater and surface water in relation to the effects of the IWU and Phase I areas. WMI did not adequately assess the boundaries of the phase one area or the IWU area. In addition, WMI failed to properly assess the site history, including leaks, or the municipal and industrial waste materials disposed in the units and the chemical fate and transport of associated contaminants. In fact, the WMI expert testified that he did not review any records from the time when materials were disposed of in the IWU and he was not aware of what was in the IWU disposal areas.[6] There is waste material of unknown characteristics located adjacent to and below and above the drainage channel between the IWU and Phase I area. Applicant did not properly assess this area and consequently critical characteristics were not taken into account in the groundwater monitoring system and point of compliance design.

The application is deficient in protecting surface water in that groundwater elevation reports as part of the voluntary monitoring agreement between the City and WMI have consistently reported groundwater levels in PZ 31 several feet higher than the base of the tributary between the IWU and Phase I. This represents a real threat of release of leachate from the IWU to the tributary.[7] Therefore the application does not include adequate protection of groundwater and surface water in relation to the effects of the IWU and Phase I areas.

2. Whether the application includes adequate provisions for groundwater monitoring, in compliance with agency rules, particularly the sufficiency of the Groundwater Monitoring Plan and the Point of Compliance to assess effects of the IWU and Phase I on the groundwater.

[6] CR. V. No. 5, 939:8-11 & 942:20-21 & 943:3-10.
[7] CR. V. No. 10, 2140:9-16.

The groundwater monitoring and point of compliance plans are insufficient to assess the effects of the IWU and Phase I on the groundwater. The agency rules require a groundwater monitoring plan for the proposed permitted facility. The groundwater monitoring wells should be placed along the point of compliance and they must ensure detection of groundwater contamination. Point of compliance wells and the groundwater monitoring system as a whole are the tools available to detect releases or migration of contaminants. The rules do not set an upper limit for how many groundwater monitoring wells you can have – just a minimum number. However, the monitoring system *must* ensure detection of groundwater contamination from municipal solid waste landfill units within the facility in the upper most aquifer. The Executive Director's witness Arten Avakian testified that the Phase I and IWU are solid waste management units and also municipal solid waste units if they contain household waste.[8] The evidence in the application clearly demonstrates that both Phase I and the IWU likely contain household waste.

The Applicant has proposed a multi-unit monitoring system for the entire facility. The agency rules require that a multi-unit system must be as protective of human health and the environment as individual monitoring systems.[9] The proposed system does not comply with this requirement. There are disparate levels of monitoring throughout the various units and these are not consistent with known site characteristics.

The requirements for the groundwater monitoring system are set out at 30 TAC 330.403 which provides:

> *(a) A groundwater monitoring system must be installed that consists of a sufficient number of monitoring wells, installed at appropriate locations*

[8] CR. V. No. 11, 2487:20-21.
[9] 30 TEX. ADMIN. CODE §403 (b).

and depths, to yield representative groundwater samples from the uppermost aquifer as defined in §330.3 of this title (relating to Definitions).

(1) Background monitoring wells shall be installed to allow determination of the quality of background groundwater that has not been affected by leakage from a unit. Background monitoring wells may be placed in locations that are not hydraulically upgradient of the waste management area if hydrogeologic conditions do not allow the owner or operator to determine which wells are hydraulically upgradient or if sampling at other wells will provide a better indication of background groundwater quality than is possible from upgradient wells.

(2) *The point of compliance monitoring system must include monitoring wells installed to allow determination of the quality of groundwater passing the point of compliance as defined in §330.3 of this title and to ensure the detection of groundwater contamination in the uppermost aquifer.* Monitoring well spacing for a municipal solid waste landfill unit shall not exceed 600 feet without an applicable site-specific technical demonstration that may be supplemented with a multi-dimensional fate and transport numerical flow model as set forth in subsection (e) of this section. The owner or operator of a municipal solid waste landfill unit must install a groundwater monitoring system at the point of compliance, as required by 40 Code of Federal Regulations §258.51(a)(2). When physical obstacles preclude installation of the groundwater monitoring wells at existing units, the wells may be installed at the closest practicable distance to the point of compliance as defined in §330.3 of this title that will ensure detection of groundwater contamination of the uppermost aquifer.

(b) *The executive director may approve a multi-unit groundwater monitoring system instead of separate groundwater monitoring systems for each municipal solid waste management unit when the facility has several units, provided the multi-unit system meets the requirement of subsection (a) of this section and will be as protective of human health and the environment as individual monitoring systems for each unit, based on the following factors:*

(1) number, spacing, and orientation of the solid waste management units within an overall waste management area;

(2) hydrogeologic setting;

(3) site history;

(4) engineering design of the units; and

(5) type of waste accepted at the units. (emphasis added).

The WMI facility does not have a common configuration and consequently the factors listed above are critical for the design of the point of compliance and for the multi-unit

groundwater monitoring system for the entire facility. The groundwater monitoring system does not take all the required factors into account and consequently it is not designed to detect potential groundwater contamination and leaks from the units within the facility.

The Applicant's proposed multi-unit groundwater monitoring system is intended to monitor the East Hill, the West Hill, Phase I and IWU areas.[10] The IWU is located within the facility and in-between the East Hill, West Hill and Phase I area units. The Phase I area is located close to the IWU and along the southern boundary. The groundwater monitoring design of the West Hill expansion area took into consideration the fact that the tributary drained into Walnut Creek and the topography of the waste unit sloped down to the tributary. In light of these factors, with respect to well spacing, WMI proposes four ground water monitoring wells placed along each of the three drainage channels, or tributaries, in the West Hill expansion area and at two different depths.[11] WMI chose to use multiple wells for two reasons: the first being that the tributary drains into Walnut Creek, which WMI considers to be a sensitive receptor because of the potential for an adverse impact on human health and the environment;[12] the second reason being that WMI is excavating deeper than the Stratum I/II interface where the unit extends down the hill toward the tributary. One of the groundwater wells is placed at the Stratum I/II interface and a second well is placed at a level lower than the interface in order to detect potential releases from the bottom of the excavated unit.[13]

---

[10] CR. V. No. 5, 988:12-19 & 1015:22 & 1016:2-25; APP 1, 2999.
[11] CR. V. No. 5, 1028:16 & 1029:4.
[12] CR. V. No. 5, 1029:15-19.
[13] CR. V. No. 5, 1029:19 & 1031:20 & 1030:7 & 1031:20.

The IWU and Phase I areas share these same characteristics as the West Hill expansion area which WMI determined called for a "belts and suspenders" design; yet WMI chose to limit the number of wells and their depth for the IWU and Phase I areas which have similar physical characteristics, but contain waste with much higher hazards. The same reasons for multiple wells exists for the IWU and the Phase I area: both slope down towards the tributary between them; and the tributaries, or drainage channel, between the two areas flows to Walnut Creek which flows to the Colorado River.[14] This less protective design for the Phase I and IWU area makes no sense in light of the similar surface water and geological setting and the fact that the materials in the West Hill will be municipal solid waste in lined cells, whereas the Phase I and IWU areas are pre-subtitle D unlined units, with a myriad of waste materials including solvents, acids, and saline solution, all of which are known dangers to human health and many have physical properties that make releases difficult to detect with traditional groundwater monitoring systems.

WMI witness Jay Winters asserted that Phase I is monitored only by MW 11 and MW 51[15] because putting any others wells in would not qualify as the point of compliance because they are not down gradient.[16] This is not true as the evidence indicates that the north side of Phase I would in fact qualify.[17] Furthermore, MW 11 is not placed in the best position to monitor these areas and is, at best, on a side gradient from the IWU/Phase I groundwater flow path.[18] Further, very little, if any, of the Phase I

[14] CR. V. No. 10, 2146:13-23.
[15] CR. V. No. 5, 1023:23.
[16] CR. V. No. 5, Page: 1017, Lines 14-15.
[17] APP 1, 3022; CR. V. No. 5, 1017:1-5.
[18] CR. V. No. 10, 2143:17-22 & 2144:1-6.

or IWU areas are up gradient from MW 51.[19] The evidence therefore indicates that the design of WMI's proposed groundwater monitoring system all but ignores the IWU and Phase I areas.

With respect to the hydrogeologic setting, the area south of the IWU has reported shallow groundwater levels which are higher than the bottom of the tributary adjacent to the south. This indicates that groundwater could flow off-site without intersecting MW 11 which is placed below this shallow level.[20] The groundwater could be released to the surface as leachate, which has been previously reported[21], or travel through shallower, more pervious soils or waste. Either of these mechanisms provides a pathway for contaminated groundwater to travel undetected off-site. While placing groundwater wells in waste may not be a best case scenario, given the large volumes and significant hazards of the wastes reported at the IWU, placing a well and monitoring groundwater at that location is justified and should be required for the application.[22]

With respect to the history of the site as well as the engineering design of the units, some units are unlined, pre-subtitle D, some contain industrial waste, and some are uncharacterized. There is baffling testimony on the part of ED witness Avakian that perhaps the IWU or Phase I areas do not need to be within the point of compliance because they were pre-Subtitle D areas. However, much of the East Hill is pre-Subtitle D and the TCEQ regulations are clear on the applicability of the monitoring requirements for pre-Subtitle D units.[23]

---

[19] APP 1, 3022.
[20] CR. V. No. 10, 2149:14 – 2150:4.
[21] CR. V. No. 5, 1008:10-20.
[22] CR. V. No. 10, 2148:24 & 2149:4.
[23] 30 TEX. ADMIN. CODE §330.401.

With respect to the type of waste accepted at the units, the IWU accepted a plethora of chemicals and industrial waste materials many of which are considered hazardous materials under the existing regulations. The JD Consulting/Thermoretec report of materials accepted at the IWU contains a number of substances, trichlorobenzene, methylene chloride, and multiple PCB's, and others that are within the IWU. These materials are known to *not* be readily detectable by a monitoring system design based solely on groundwater flow direction because they tend to travel along the direction of gravity rather than groundwater flow.[24] The monitoring design for the IWU did not take into account the materials in the unit and thus did not consider their impact on the groundwater pathways or the possible scenarios of contamination transport. The placement of MW 11 assumes a very broad groundwater pathway resulting from low velocity of the groundwater flow however, if groundwater is contaminated the groundwater velocity will increase and the pathway may very well be narrower.[25]

With respect to the IWU, the groundwater contamination risk is from two classes of contaminants; dense non-aqueous phase liquids ("DNAPLs") and light non-aqueous phase liquids ("LNAPLs"). These two classes are located at very different levels and exhibit markedly different contaminant transport mechanisms. LNAPLs tend to float at the top of groundwater or mix with groundwater and travel in the general direction of the dominant groundwater path whereas DNAPLs sink to the bottom of the groundwater column and flow according to gravity- along the direction of the bedding plane, fractures, or other geological features. [26] The orientation of the bedding plane of the WMI facility

[24] CR. V. No. 11, 2482:6-16.
[25] CR. V. No. 5, 1064:19 – 1065:5.
[26] CR. V. No. 11, 2482:5 & 2483:16.

is to the southeast.[27] Consequently, DNAPLs will tend to flow to the southeast and not in the southwest direction, which is the assumed preferential pathway for contaminated groundwater at the facility. This southwest flow direction is the basis for the groundwater monitoring system design described in the WMI application and does not take into account the possibility of southeast flow of DNAPLs.[28]

Applicant points to MW 30 and MW 11 as sufficient for the IWU although the groundwater flow maps do not indicate that MW 30 will monitor the flow from the area.[29] The application shows that MW 30 may not actually catch even the NW corner of the IWU flows.[30] Therefore MW 11 is the only well available to detect contaminants emanating from the IWU area. This single well is not sufficient for leak detection for this large area and it is highly unlikely that it could detect any leaks of DNPLS as these contaminants would likely flow away from MW 11.

In fact as Executive Director expert Avakian testified, the IWU is not being monitored directly. Mr. Avakian explained that monitoring of the IWU was incidental to the monitoring program and not its objective, and he did not consider the contents of the IWU in his evaluation of the proposed groundwater monitoring system.[31] In a multi unit groundwater monitoring system, the entire facility must be monitored. All MSW landfill units must be monitored and the IWU is one of these units as described by the ED's testifying expert.[32] Although it stopped taking materials in the 1970's these municipal solid waste landfill units are still in place and are part of the facility. At the hearing, ED expert Avakian clarified that although he had previously opined that the IWU and Phase I

[27] CR. V. No. 11, 2479:17 & 2482:6.
[28] APP 1, 3022.
[29] CR. V. No. 5, 989:3 – 991:24; Att. 4-19A; TJFA 7.
[30] Attachment 5-4 at page 3023; CR. V. No. 11, 2485:4-17.
[31] CR. V. No. 11, 2488:8-23.
[32] CR. V. No. 11, 2491:5-13.

area were not municipal solid waste units, the rules actually provides that if a landfill contains household waste, then by definition it would be a municipal solid waste landfill unit.[33] In fact, it appears that this misconception during the Executive Director's review resulted in a perception that monitoring of the IWU was incidental to the monitoring program and not its objective; and further that no plume of contamination had entered the groundwater from an MSW unit. This conclusion appears to be based on the reviewer, Mr. Avakian's, notion that he should not consider data concerning releases from the IWU. Although Mr. Avakian acknowledged that the IWU and Phase I areas are part of the permitted facility, he did not know if groundwater monitoring should include the IWU. Consequently and in evaluating the monitoring system, the ED reviewer did not consider the IWU or the 1,4-dioxane reports.[34]

3. Whether the groundwater monitoring system proposed in the application should sample and analyze for any constituents in addition to those required to be tested by agency rules.

The groundwater monitoring system proposed in the application does not have adequate constituent sampling. The Commission must require a system with placement of wells around the IWU to the east, the south, the southeast and southwest and a more robust constituent list for sampling. The rules provide that in addition to the Appendix 1 constituent list, the ED may add constituents if they are reasonably expected to be in or derived from waste contained in the unit.[35]

There was considerable testimony concerning a voluntary monitoring agreement between the City and WMI ("WMI/COA Agreement"). While the results of the sampling from the WMI/COA Agreement are informative, they do not provide regulatory

[33] CR. V. No. 11, 2491:5-13.
[34] CR. V. No. 11, 2483:21 – 2484:7; 2488:4-23; 2494:17 – 2495:16.
[35] CR. V. No. 11, 2494:1-12.

oversight, the terms are not enforceable by TCEQ, and the results are not used by TCEQ for detection of leaks as a part of the permittee groundwater monitoring system. Additionally the TCEQ stated that they did not consider this groundwater data in their evaluation of the proposed groundwater monitoring system.[36] For the WMI/COA monitoring agreement WMI refused to include sampling of groundwater between IWU and the drainage channel adjacent to the IWU southern boundary.[37] Under the WMI/COA Agreement, WMI agreed to: (1) Place a cap over the IWU area due to concerns the City has about storing dirt on top of the surface, and (2) Put in piezometer and groundwater wells, sample, and send reports of the results to the City and TCEQ.[38] If WMI abandons the sampling or fails to perform in any way under the WMI/COA Agreement, the sole remedy is the City may cancel any contracts it has with WMI.[39]

A study by J.D. Consulting, L.P. ["Human Health Risk Evaluation Report, Closed Industrial Waste Unit, Austin Community Landfill", Feb. 9, 2001], provided information concerning the type of materials historically dumped at the IWU. The evidence establishes that the IWU unit contains solvents, acids and saline water all of which may desiccate clays.[40] Although WMI states that it is in light of these characteristics that they have monitoring wells around the IWU, in fact this is not the case. The groundwater monitoring plan proposed by the Applicant has only one well which will conceivably detect any of the potential contaminants in groundwater from the IWU. The plan does not have constituent testing for many of the materials in the IWU. The only wells which have the broader constituents for testing are those few under the agreement between the

[36] CR. V. No. 11, 2487:8-23.
[37] CR. V. No. 10, 2148:5-10.
[38] CR. V. No. 10, 2143:13-16; COA 6.
[39] COA 6.
[40] CR. V. No. 5, 1043:2-9.

City of Austin and WMI, and are not part of any TCEQ detection monitoring system.[41] WMI itself suggested the testing of a broader list of contaminants for a voluntary monitoring agreement between the City and WMI. While the placement of the wells for the voluntary plan is far from sufficient, even these have detected contaminants emanating from the IWU. These contaminants are not on the Appendix 1 list which is the list proposed for monitoring by the Applicant in the voluntary monitoring agreement between the City and WMI.

The City has received sampling results as required under WMI/COA agreement from 2003 through 2008.[42] After repeated groundwater level elevations above the base of the tributary between the IWU and the Phase I areas, the City of Austin requested WMI to sample PZ 31. That sampling in May 2004 detected 1,4 dioxane in that well. Without the City's knowledge WMI resampled PZ 31 on October 20, 2004 and much higher levels of dioxane as well as trichlorobenzene were found in PZ 31.[43] A December 19, 2004 letter reposting sampling results did not contain the October 20, 2004 sampling results from pages 2-31.[44] 1,4, Dioxane is evidence of human induced contamination and although a one-time detection may not be of concern, repeated detections could indicate a release.[45] 1,4 Dioxane has consistently been found in PZ 26 and in PZ 31.[46]

MW 11 is not being monitored for 1,4, dioxane. MW 11 is only being monitored for the Appendix 1 list and the Appendix 1 list does not contain dioxane.[47] Under the WMI/COA monitoring agreement WMI tests for a list of constituents which were

[41] CR. V. No. 5, 1043:12-13; & 1046:8-20.
[42] CR. V. No. 10, 2165:23 – 2166: 7.
[43] CR. V. No. 10, 2166:18-21 & 2167:2-15.
[44] CR. V. No. 10, 2166:9-2167.
[45] CR. V. No. 5, 1041:20 – 1042:16.
[46] CR. V. No. 10, 2139:13 – 2142:5.
[47] CR. V. No. 10, 2142:8-11.

proposed by WMI based on sampling done in the J.D. Consulting Thermotec Report, and because WMI was aware that the Appendix 1 constituents list did not include a number of the contaminants that were found in the sampling of the industrial waste unit.[48] This constitutes an admission on WMI's part that their existing MSW monitoring system is not adequate for detecting contaminants from the IWU.

4. Whether the application includes sufficient information demonstrating how the MSW facility will comply with applicable TPDES storm water permitting requirements.

The Applicant has failed to demonstrate how the facility will comply with applicable TPDES storm water permitting requirements.[49] WMI has filed a sworn conclusory statement that they will obtain the appropriate TPDES coverage[50], but they have failed to demonstrate how the proposed expansion will be able to comply with the TPDES permit.[51]

Specifically, neither the Erosion and Sedimentation Control Plan[52] nor any other part of the application or associated TPDES Stormwater Pollution Prevention Plan substantively improves upon the current and historical erosion and sedimentation control practices sufficiently to prevent the ongoing problems at the facility from continuing to occur.[53] The application states that "the sequencing of drainage and runoff controls" are described in detail in Part I/II of the application[54], when in fact there is a complete lack of detail in the application (including Part I/II) regarding what, when, how, and where

[48] CR. V. No. 10, 2135:25 & 2136:8.
[49] 30 Tex. Admin. Code §330.61(k)(3).
[50] APP 202, tech. comp. 105.
[51] CR. V. No. 3, 476:2-8.
[52] APP 202, tech. comp. 602-606.
[53] CL 1, 5:105-109.
[54] App 202, tech. comp. 602:¶4.

temporary erosion and sedimentation controls will be used at the facility.[55] The primary control to prevent discharge of sediment laden water from the expansion area appears to be a sedimentation and biofiltration pond on the west edge of the expansion area.[56] These types of structures are generally used for treating stormwater runoff from traditional, "hard" development with parking lots, buildings, and landscaping. They are generally not used for treatment of runoff from sites with large areas of disturbed soil like construction sites or landfills and are particularly unsuited for this purpose when they are the primary control method. No specific maintenance plans or specifications for the ponds were found in the application.[57]

The TPDES Multi-Sector General Permit provides that all active landfills must comply with contains a benchmark monitoring requirement for total suspended solids ("TSS") of 100 mg/L.[58] The permittee must compare the results of analyses to the benchmark values, and must include this comparison in the overall assessment of the Stormwater Pollution Prevention Plan ("SWPPP") effectiveness. A facility's SWPPP must: (1) identify sources of pollution that may affect the quality of storm water discharge from the facility; (2) establish practices and controls that will prevent or reduce pollution in storm water discharges from the facility and ensure compliance with the terms of the TPDES permit; (3) describe how the selected practices and controls will prevent or reduce pollution and are appropriate for the facility; and (4) discuss how the practices and controls comprise an integrated, facility-wide approach for pollution

[55] CL 1, 5-6:110-122.
[56] APP 202, tech. comp. 603:¶2.
[57] CL 1, 7:137-151.
[58] TF 5, 75:¶6.

prevention in storm water discharge.[59] Failure to meet a benchmark value is an indication that a permittee's SWPPP may need to be modified. The permittee's Pollution Prevention Team must investigate the cause for each exceedance and must document the results of this investigation in the SWPPP within 90 days following the sampling event.[60]

Without a very robust erosion prevention and sediment capture system from the source areas to the property boundaries, it is highly unlikely, if not impossible, that WMI can comply with or come close to complying with this discharge limit.[61] To realistically attempt to meet such a stringent requirement, in addition to the described property boundary controls, the application should include detailed plans for limiting areal coverage of disturbed areas, rapid revegetation and/or stabilization of disturbed areas, intermediate area controls (silt fences, berms, matting, etc.) placed in series on slopes and ditches, irrigation plans, soil specifications, maintenance schedules for temporary and permanent controls, specific descriptions of location and proper installation and use of controls, etc. The WMI application does not contain such a system and it is very unlikely that the facility can meet the TPDES permit requirements.

The Applicant has failed to demonstrate that they will be able to meet the TPDES benchmark values for TSS. In designing the proposed facility, the Applicant's engineer testified that he did not performed any calculations as part of the application to determine if the facility will be able to meet the TPDES benchmark values for TSS, despite the fact that he has seen reports demonstrating that the facility currently has trouble meeting the 100 mg/L benchmark value for TSS.[62] City expert Tom Franke has performed three TSS

[59] TF 5, 26:¶1.
[60] TF 5, 48:¶2; TF 1, 11:244-251.
[61] CR. V. No. 10, 2160:9-19.
[62] CR. V. No. 3, 465:8-12.

removal analyses on the proposed sedimentation and detention ponds to model particle settling analysis using pond information provided in the Application; and Mr. Franke has determined that the application as proposed cannot meet the TPDES benchmark values for TSS.[63] The values used by Mr. Franke to model the proposed ponds were developed assuming that the ponds are maintained on a regular basis and very little sediment is allowed to accumulate in either pond.[64] Even with these assumptions working in favor of the Applicant, Mr. Franke's analyses demonstrate that even if the proposed sedimentation and detention ponds as proposed in the application achieve very good performance, they still are not adequate to remove the amount of total suspended solids necessary to achieve the TPDES 100 mg/l effluent benchmark value.[65] Furthermore, the Applicant clearly did not account for the long periods of time (up to 6 months) allowed by the TCEQ regulations for revegetation of intermediate cover and assumed 60 percent cover when calculating soil loss [66] Without a doubt this resulted in a significant underestimate of the soil loss at the facility. Therefore, more robust erosion and sedimentation controls are necessary during the long term construction of the landfill.[67]

5. Whether the application includes adequate provisions for erosion control, in compliance with agency rules.

The application does not include adequate provisions for erosion and sedimentation control. This site has historically had poor erosion and sedimentation control and, in particular, poor revegetation of intermediate cover and problems with other source control methodologies such as silt fencing, mulching, or limiting areal

[63] APP 202, tech. comp. 620, 653-654; TF 1, 8:172-174, & 9:187-191, 194-197.
[64] TF 1, 9:184-187.
[65] TF 4, 1-3.
[66] APP. 1, 849.
[67] CR. V. No. 10, 2125:21-25 & 2126:1-13.

coverage of disturbed soil.[68] Over the past 12 years and as recently as January 2009, City expert Charles Lesniak has personally observed large areas of unvegetated or poorly vegetated side slopes and "top deck" that have likely contributed to polluted stormwater runoff from the facility, improperly installed erosion and sedimentation controls, as well as ineffective sedimentation controls at the WMI facility.[69] The erosion and sedimentation controls proposed in this application and in the current SWPPP are not designed for long term construction projects and the current sedimentation and detention ponds are not effective in the removal of total suspended solids removal.[70] The result is an increase in TSS in the storm water discharge from the site, which directly impacts water quality and likely violates the TCEQ requirement in 30 T.A.C. §330.305(d) for allowable soil loss of 50 tons per acre per year. As described earlier, the assumption of 60 percent cover in calculating soil loss from intermediate cover areas fails to adequately describe "real world" conditions at the WMI facility and thus the application incorrectly predicts annual soil loss in violation of TCEQ regulations.

Additionally, the WMI facility needs specific instructions included in its permit as to what, how, where, and when erosion and sedimentation controls are to be applied at the facility. Currently, WMI improperly applies what erosion and sedimentation controls it chooses to utilize, leading to inadequate erosion and sedimentation control.[71] In order to be in compliance with the TPDES permit, as well as prevent the degradation of water quality, the following conditions should be added to the permit: (1) place intermediate cover and temporarily stabilize the cover over side slope areas that will not be disturbed

[68] CL 1, 4:67-70.
[69] CL 1, 4:70-80, 84-89, & 6:127-134.
[70] TF 1, 3:67-68 & 4:69-72.
[71] CL 1, 4:84-89 & 5:94-102; CR. V. No. 10, 2170:5-19.

for 60 days and do the same for top deck areas that will not be disturbed for 120 days.; (2) top deck areas should include a buffalo grass sod vegetated filter strip from the top of the downchute to 100 feet upgradient of the downchute and be wide enough to capture all runoff that flows down each downchute; (3) methods for establishing vegetative cover should comply with the City of Austin's Environmental Criteria Manual, Section 1.4.7; (4) silt fences or mulch berms should be place at the top of the side slope between the vegetated filter strip and the down chute, as well as at the bottom of each downchute; (5) perimeter sedimentation controls (such as silt fence, mulch berms, mulch) should be in place prior to establishment of stockpiles; (6) for piles that have slope lengths greater than 20 ft, a mid slope silt fence/mulch berm should be installed within 14 days of establishment of the stockpile; (7) all side slopes with intermediate cover should have similar perimeter controls installed within 14 days of installation of cover; and (8) perimeter controls should be at the base of all such slopes and on the top deck at a point before the top of the adjacent slope.[72] These specifications should be shown on a typical detail drawing that illustrates proper placement and use of these controls. This provides facility personnel and TCEQ inspectors guidance on exactly how these controls are to be installed and used. These practices and drawings should be included in the permit to minimize the chances of noncompliance with the TPDES permit as well as minimize the chances of endangerment to human health, welfare, and the environment.

9. Whether the application includes adequate provisions for cover, in compliance with agency rules.

The application does not include adequate provisions for daily or intermediate cover; nor does the 60 percent coverage target for intermediate cover meet City of Austin

[72] TF 1, 7:152-160, 8:161-168.

requirements.[73] The application describes revegetation and mulching practices, however, no topsoil, irrigation, fertilization or other specifications necessary to achieve adequate vegetation are included.[74] From City expert Charles Lesniak's visits to the WMI facility and discussions with the WMI staff, it appears to be very difficult to establish vegetation on the facility because in addition to the available soil on site having little or no organic matter or nutrients, the vegetation is completely dependent on rainfall to establish growth.[75] The application only provides for *final* cover soil to have a 6" layer of topsoil "capable of supporting native vegetation"[76]. There is no such specification for intermediate cover soils. It has often taken years beyond the allowed 180 days to get adequate revegetation of intermediate cover. Moreover, there is no evidence this was accounted for in the acceptable soil loss calculations.[77] The application doesn't indicate whether or not the soil loss calculations take into account the 180 days allowed by the application for commencing revegetation nor the time necessary for vegetative growth to actually occur. It is during this critical period of time that is unaccounted for by the application that the erosive potential is high and is likely to result in erosion of the intermediate cover.[78]

TCEQ guidance requires an operator to provide a "plan to minimize erosion during all phases of landfill operations with the intent of controlling soil loss and sediment transport from top dome surfaces and external embankment side slopes." By focusing controls at the WMI facility only on catching sediment at the facility boundaries rather than preventing "soil loss and transport", this application fails to meet the

[73] CL 1, 10:219-220.
[74] APP 202, tech. comp. 604-605:¶4.3.2.1.
[75] CL 1, 9:192-196.
[76] APP 202, tech. comp. 607:¶4.4.2.
[77] CL 1, 9:199-202.
[78] CL 1, 10:213-220.

requirements of the TCEQ guidance document on Addressing Erosional Stability During All Phases of Landfill Operation.[79]

The application is also lacking in enforceable daily cover specifications. The complete lack of detail regarding the implementation of erosion and sedimentation controls during the daily cover phase of the site operations is unacceptable.[80] To prevent the continuance of the current failures witnessed on the site regarding erosion and sedimentation controls during the daily cover phase of the site operations[81], the design engineer, as the person most familiar with the phases of operation, should detail in the application what controls are to be used at what time, in what manner, and in what locations.[82]

11. Whether the application provides adequate information related to transportation, in compliance with agency rules.

While the Applicant has provided information on traffic counts and availability of infrastructure to serve the facility, it has not demonstrated that the roadways cited are capable of withstanding the significant number of heavy trucks that landfill traffic will generate.[83] In fact, Applicant expert Mike McInturff admitted that he is not a pavement structural engineer, that an investigation of the structural capacity of the roadways was beyond the scope of services he was contracted for, that he assumed the roadways would be adequate because state law allows up to 80,000 lb. trucks and therefore he assumed that the roadways would be designed to support 80,000 lb. trucks, and that he had "no information about the design of Blue Goose Road".[84] Nor has the Applicant shown that

[79] CL 1, 10-11:221-228.
[80] CR. V. No. 10, 2189:4-14.
[81] CL 1, 9:186-189.
[82] CR. V. No. 10, 2189:4-14.
[83] CR. V. No. 6, 1080:3-8 & 1092:2-5, 9-15, 17-25 & 1093:1-3.
[84] CR. V. No. 6, 1092:17 – 1093:3; & 1095:12 – 1096:8.

the roadways will not be adversely impacted by mud trafficked onto them during wet weather conditions at the facility.[85] The City is concerned that landfill traffic will cut through the nearby Harris Branch Parkway, which is not designed for the potential volume of heavy vehicles generated by the landfill facility, and that the ongoing operation of this facility will continue to degrade the quality of Blue Goose Road, which is already a structurally failing facility.[86] The Applicant did not meet their burden of demonstrating the adequacy of roadways accessing the facility as required by 30 T.A.C. §330.61(i)(1), since they did not investigate the structural capacity of the roadways, but merely made assumptions.

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.

The application fails to provide assurance that the WMI facility will not pose a reasonable threat of adverse impacts on the health, welfare, environment, or physical property of nearby residents and property owners. The mere fact that WMI has chosen to seek this application for extension is proof that the public cannot rely on *any* assurances given by WMI.[87] The City, nearby property owners, businesses, developers, and residents had an expectation that the WMI landfill would close upon reaching its currently permitted capacity, at which point the landfill's impacts on their quality of life and potential uses of their property would no longer be a significant factor.

1. Whether the application includes adequate information regarding the compatibility of land use to show that the MSW facility will not adversely impact human health or the environment.

[85] CR. V. No. 6, 1080:9-17 & 1081:6-25.
[86] CR. V. No. 6, 1098:14-24.
[87] CR. V.No. 10, 2260:24-25 & 2264:20-22.

The Applicant's one and only witness, the very same witness who created their land use analysis, John Worrall, predicates his opinion on the lack of credibility of the Travis County Commissioner's findings and the CAPCOG's nonconformance determination on his personal definition of "adjacent". Specifically, Mr. Worrall urged that the above entities' findings and recommendations should not be considered, as they are based on an incorrect use of the term "adjacent". Mr. Worrall testified that in his opinion "adjacent" means touching.[88] However, the two dictionaries that were presented for review during the hearing on the merits, Black's Legal Dictionary and the American Heritage Dictionary, both defined "adjacent" as "close to" or "lying near."[89]

Mr. Worrall additionally predicates much of his determination of compatibility on the fact that "from 1980 to 2007, the City's population more than doubled . . . A significant portion of that growth has occurred in northeast Austin, including the areas within one mile of the [WMI] facility. This area is expected to continue to grow into the future." [90] However, in granting WMI's current permit to operate, Permit No. 249C, the TCEQ stated in a finding of fact that "[t]here has been little growth in the area as compared with other parts of the City."[91] It is inapposite to argue that if there is slow growth in the area the WMI landfill is compatible with surrounding land uses, as well as if there is robust growth in the area it also demonstrates that the WMI landfill is compatible with surrounding land uses. The fact of the matter is that the area surrounding the WMI facility is one of the fastest growing areas in the City, and the more it grows so will the complaints for nuisances felt from the WMI facility.

---

[88] CR. V. No. 4, 735:25 – 738:8.
[89] CR. V. No. 4, 805:21 – 806:25.
[90] APP 300, 17:27-30.
[91] Jon White 5, 44:¶17.

The application does not address the continued negative affects created by WMI facility on the existing and proposed residential and civic land uses in the adjacent area.[92] The approval of this application will allow WMI to continue to adversely impact human health and the environment for another decade. The WMI landfill and the adjacent property are located within the City's Desired Development Zone, which is an area that the City has designated for future growth and development. It is anticipated that additional residential uses will be built within the Pioneer Crossing PUD and the Harris Branch PUD located to the north, northwest and northeast over the next five to ten years. Even if the WMI 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. Specifically, the application does not mitigate all negative impacts from odor, traffic, litter, noise, visual aesthetics or the loss of additional property tax revenue by the City of Austin created by the delay in land development adjacent to the land fill site.[93]

There is evidence that the presence of the WMI facility has deterred, and is deterring, development in the area.[94] Specifically, 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.[95] The development community needs to be able to rely on closure once permit capacity is

---

[92] GG 1, 6:1-3.
[93] GG 1, 6:3-15; Joe Word 1, 5:110-113.
[94]CR. V. No. 9, 1979:9-12.
[95] GG 1, 4:7-16, 23-24 & 5:1-2.

reached. Granting a substantial increase in capacity, particularly with no time-certain closure date in the near future, will continue to adversely affect development, and enjoyment of property, in this vicinity for decades. The old Travis County Landfill is now closed. BFI has committed to close their landfill no later than November 1, 2015. After November 1, 2015, WMI will be the only active landfill in the area.[96] The operation of the WMI landfill has and will continue to impact the surrounding neighborhoods, as evidenced by repeated and voluminous complaints regarding odors, traffic, litter, dust, erosion and sedimentation of streams, and other complaints. By virtue of its recent record of operation, and failure to make any significant changes to its site operating plan ("SOP") in this application, the applicant has failed to demonstrate that the facility will not adversely impact human health or the environment, as required by 330.61(h).[97]

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.

This application should be denied because it fails to meet the requirements of 30 TAC §330.15(a)(2); which specifically prohibits the operation of a municipal solid waste ("MSW") facility in such a manner that causes the creation and maintenance of a nuisance. The term "nuisance" is defined in the regulations as being, among other things, the processing or storage of MSW in a way that causes the pollution of surrounding land, contamination of ground or surface water, or the creation of odors adverse to human health, safety, or welfare.[98] The Applicant has failed to demonstrate that the application

[96] Joe Word 1, 5:114 – 6:115.
[97] Joe Word 1, 6:121-126 & 8:180-183.
[98] 30 TEX. ADMIN. CODE §330.3(95).

includes adequate provisions to prevent the creation or maintenance of a nuisance. Most notably, the Applicant failed to provide testimony from any witness with knowledge of the facility's operational practices.[99]

The application and supporting testimony from the Applicant fail to demonstrate that the WMI facility will be able to meet the TPDES 100 mg/L benchmark value. Coupled with the fact that residential areas are adjacent to the facility, the granting of this proposed expansion would subject the neighboring landowners to increased localized flooding and degraded water quality.[100] The Applicant has also failed to demonstrate how its operating practices will vary in any meaningful way so as to prevent the current nuisance conditions of foul odors and windblown waste felt on the adjacent properties.

3. Whether the application includes adequate provisions to control noise, in compliance with agency rules.

The application fails to include adequate provisions to control noise. The application gives WMI the ability to operate heave machinery at all hours of the day and night, excluding Sundays.[101] Testimony was presented that the beeping noise from trucks backing up on the WMI facility can be heard from neighboring properties. Additionally, WMI presented evidence that it could create large earthen berms or plant large areas of vegetation in its buffer zone, but that it is not proposing to do so in this application. As such, the Applicant has failed to provide any solutions to mitigate the nuisance created by noise coming from the facility.

4. Whether the landfill's operational hours are appropriate.

The operational hours proposed in the application are not appropriate for the

[99] CR. V.No. 2, 186:21 – 190:2.
[100] TF 1, 11:234-239.
[101] APP 202, tech. comp. 3394:¶3.

location of this facility. Under the application, WMI is able to operate 24 hours a day Monday through Friday, and until 7pm on Saturdays.[102] This means that WMI may operate heavy equipment, receive waste, and conduct any other activities or operations all through the night.[103] The sound of heavy equipment backing up creates a beeping noise that can be disturbing to nearby property owners.[104] The lights used on the working face can create light pollution affecting nearby property owners. It is simply unacceptable to give complete discretion to a MSW facility on what hours it may operate in an urbanized area.

5. Whether the application includes adequate provisions for buffer zones and landscape screening, in compliance with agency rules.

The application fails to contain adequate provisions for buffer zones or landscape screening. There is nothing in the Applicant's proposed site operating plan that is significantly different from their existing plan. Based upon the nuisance impacts that have historically occurred, either the site operating plan itself is insufficient to prevent impacts to nearby neighborhoods, or the site operator has been inconsistent in operating in compliance with that plan.[105] Merely complying with the 125 foot buffer requirement is not sufficient to mitigate the nuisance impacts on surrounding properties. Nuisances such as odors, litter, dust, noise, and sediment-laden storm water runoff, can and do travel distances much greater than 125 feet. [106] For these reasons alone, this facility is in dire need of much larger buffer zones to minimize the impacts on the surrounding community from the poor operational practices currently in place and proposed under the application.

---

[102] APP 202, tech. comp. 3394:¶3.
[103] APP 202, tech. comp. 3394:¶3.
[104] Joe Word 1, 11:244-247.
[105] Joe Word 1, 8-9:180-193
[106] Joe Word 1, 7:144-156; 12:256-272.

C. Whether the application should be denied based on the Applicant's compliance history, in accordance with state laws and agency rules.

If ever there was a case where an MSW landfill permit amendment to extend the life of the facility should be denied, this is that case. In 2004 WMI was assessed the largest fine ever levied by the TCEQ on a MSW operator in the State of Texas.[107] Over 10 violations, which contributed to serious odor nuisances to the surrounding communities, were documented by the TCEQ in just one enforcement action.[108] The nuisances generated by the WMI facility continue to this day. The absence of ongoing TCEQ investigations and enforcement orders against WMI, does not mean that there are not violations occurring at the facility. Specifically, there have been a lack of complaints to the TCEQ and an increase in complaints made to the local authorities as a direct result of the TCEQ Region 11 enforcement director informing the citizens that it would do no good for them to complain about the facility to the TCEQ anymore.[109]

One of the many reasons this application should be denied, is that the operation of this facility has and will continue to impact the surrounding neighborhoods, as evidenced by the repeated and voluminous complaints regarding odors, traffic, litter, dust, erosion and sedimentation of streams.[110] By virtue of its recent record of operation, the Applicant has failed to demonstrate that the facility will not adversely impact human health or the environment, as required by 330.61(h).

E. Whether the application provides adequate information that the waste management activities of the MSW facility will conform to the regional solid waste management plan, in accordance with state laws.

The application fails to conform with the Regional Solid Waste Management Plan

[107] Jon White 1, 18:11-12; 19:6-7; Joe Word 1, 6:129-130.
[108] Jon White 6, 7-8; Jon White 1, 18:12-14; Joe Word 1, 6-7:130-139.
[109] MM 1, 4:4-14; TC 6; CR. V.No. 10, 2114:23-25 & 2115:1-2.; CR. V.No. 9, 2071:12-17.
[110] Joe Word 1, 6:121-124 & 7:150-156; TC 6; MM 1, 3:5-29 & 4:1-3.

("RSWMP") as required by state law.[111] The Capital Area Council of Governments ("CAPCOG") is the regional solid waste planning agency recognized by the TCEQ for the ten county region that the WMI facility is located in.[112] CAPCOG adopted a Regional Solid Waste Management Plan in May 1992, amended it in 1996, 2000, 2002 and again in 2005. The TCEQ approved the CAPCOG's RSWMP plan on May 31, 2007 based upon materials dated July 10, 2002, as revised on May 22, 2006.[113] The TCEQ rules require applicants for MSW permits to submit portions of their applications to the CAPCOG for review and conformance determination.[114] WMI submitted their letter requesting a conformance determination to the CAPCOG in October of 2006.[115] In January 2006, and *again in April 2008*, the CAPCOG executive committee voted to determine that the WMI application was not in conformance with the adopted and approved RSWMP.[116] Since CAPCOG made its initial determination of nonconformance, WMI has revised its application with the TCEQ six times, and yet WMI never revised the RSWMP portion of the application to reflect its receipt of the CAPCOG's determination letter.

CAPCOG determined that WMI's application is not compatible with land use in the area, does not conform with the RSWMP, and that there are significant local concerns about the site.[117] CAPCOG also supports the Travis County request that the WMI facility cease operations by November 15, 2015, and that WMI include adequate buffer zones and other safeguards around any new landfills in the eastern portion of Travis County.

---

[111] COA 2; TEX. HEALTH & SAFETY CODE ANN. §363.066
[112] Joe Word 1, 7:158-160.
[113] TC 5; APP 218.
[114] 30 TEX. ADMIN. CODE §330.61(p).
[115] APP 202, tech. comp. 168.
[116] COA 2.
[117] COA 2.

CAPCOG also expressed concern about the applicant's compliance history, the applicant's failure to go beyond minimum operating requirements in its site operating plan, future land use compatibility, and inadequate programs to support community cleanup events and curtail or clean up illegal dumping.[118] Per Section 363.066 of the Texas Health and Safety Code, "...public and private solid waste management activities must conform to that plan." The only exception in statute is for cases in which the TCEQ grants a variance from the adopted RSWMP.[119] WMI has not sought an exception to the RSWMP.[120] Pursuant to this section of the Health and Safety Code, and CAPCOG's determination of nonconformance with the RSWMP, this application must be denied.

VII. TRANSCRIPT COSTS

The City should not be assessed reporting and transcription costs in this matter for several reasons: (1) the City had no other option but to protest the issuance of a draft permit by the Executive Director of the TCEQ in order for land use compatibility and conformance with the Regional Solid Waste Management Plan to be taken into consideration at all in determining whether or not this permit should be issued; (2) the City of Austin is a home-rule city, municipal corporation and body politic and is under serious budgetary constraints in the current economy; and (3) the City was able to provide valuable expertise and insight (which were not obtainable through any other protestant) into the effect on the surrounding land uses and development; the voluntary groundwater monitoring plan in place between the City and WMI, and the sampling results obtained through that monitoring. For these reasons the City should not be

[118] COA 2; Joe Word 1, 8:168-177.
[119] TEX. HEALTH & SAFETY CODE ANN. §363.066(b).
[120] CR. V.No. 2, 209:7 – 210:4.

required to bear any portion of the reporting and transcription costs associated with this contested case hearing.

VIII. SUMMARY

Land use compatibility is the key issue in this permit amendment application. In weighing the credibility of witnesses, it is significant to note that three governmental entities: Travis County, the City of Austin, and the CAPCOG, are all opposed to the issuance of this permit amendment to extend the size and life of the WMI landfill facility as it is an incompatible land use. The Applicant, on the other hand, is a corporation charged with making the most profits for its shareholders. Without being able to establish that the proposed permit amendment is compatible with surrounding land uses, the application must fail. Every other issue is irrelevant if it is not a compatible land use. WMI has not and cannot demonstrate that the granting of this amendment is compatible with surrounding land uses. To approve this application would be setting the stage for an exacerbation of effects of the ongoing nuisances on the surrounding community as it continues to develop around the WMI facility.

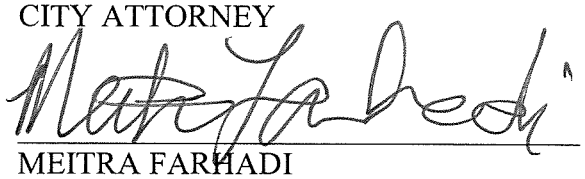
Notwithstanding the absolute fact that the WMI facility is an incompatible land use, the evidence before this court demonstrates that the Applicant did not meet its burden on several other regulatory requirements as well. First, the Applicant failed to obtain all necessary approvals from local governments and submit those as part of its application, as required by the TCEQ regulations.[121] Specifically, the Applicant has not obtained the required site plan permit for the expansion of the facility.[122] Second, the application is not in conformance with the approved RSWMP as is required by Texas

[121] 30 TEX. ADMIN. CODE §330.61(h)(1).
[122] COA 13; TF 1, 10-11:225-231.

Health & Safety Code §363.066(a). Third, the MSW monitoring system proposed in the application is not adequate for detecting the release of contaminants. Fourth, the application as proposed will not meet the benchmark values required by state law for TSS. And fifth, the Applicant did not meet their burden of demonstrating the adequacy of roadways for accessing the facility as required by 30 T.A.C. §330.61(i)(1), since they did not investigate the structural capacity of the roadways.

RESPECTFULLY SUBMITTED,

DAVID ALLAN SMITH
CITY ATTORNEY

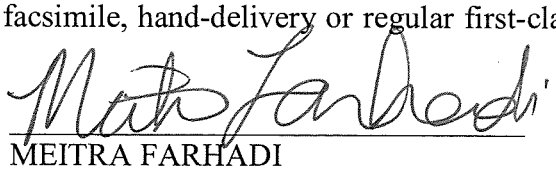


MEITRA FARHADI
Assistant City Attorney
State Bar No. 24036547
HOLLY NOELKE
State Bar No. 04651000
City of Austin Law Department
Post Office Box 1546
Austin, Texas 78767-1546
(512) 974-2310
(512) 974-6490 [FAX]

ATTORNEYS FOR CITY OF
AUSTIN, TEXAS

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2009, a true and correct copy of the City of Austin's Closing Argument was served via facsimile, hand-delivery or regular first-class mail to the persons listed below.



MEITRA FARHADI

Amie Richardson
Litigation Division
TCEQ MC-175,
P. O. Box 13087
Austin, Texas 78711-3087
Fax (512) 239-3434
arichard@tceq.state.tx.us

Erich M. Birch
Birch, Becker & Moorman, LLP
7000 North Mopac Expressway Plaza 7000,
Second Floor
Austin, Texas 78731
Fax (512) 514-6267
ebirch@birchbecker.com
amoorman@birchbecker.com

Bryan J. Moore
Vinson & Elkins, LLP
2801 Via Fortuna, Suite 100
Austin, Texas 78746-7568
Fax (512) 236-3257
bmoore@velaw.com

Mary W. Carter
Blackburn Carter, P.C.
4709 Austin
Houston, Texas 77004
Fax (713) 524-5165
mcarter@blackburncarter.com

Evan Williams
524 North Lamar,
Suite #203
Austin, Texas 78703
Fax (512) 320-8507
ew@austin.rr.com

Paul M. Terrill
The Terrill Firm,
P.C.810 W. 10th St.
Austin, Texas 78701
Fax (512) 474-9888
pterill@terill-law.com

Annalynn Cox
Assistant County Attorney
Travis County Attorney's Office
P. O. Box 1748
Austin, Texas 78767
Fax (512) 854-4808
annalynn.cox@co.travis.tx.us

Amy Swanholm
Office of Public Counsel
TCEQ MC-103
P. O. Box 13087
Austin, Texas 78711-3087
Fax (512) 239-6377
aswanhol@tceq.state.tx.us

The Honorable Roy Scudday
Administrative Law Judge
State Office of Administrative Law
300 W. 15th Street, Suite 504
P.O. Box 13025
Austin, Texas 78711
Fax: (512)-475-4994

LaDonna Castañuela
Texas Commission on Environmental
Quality
Office of Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087