

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

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

**NORTHEAST NEIGHBORS COALITION’S RESPONSE TO CLOSING ARGUMENTS
FROM WASTE MANAGEMENT OF TEXAS, INC., CITY OF AUSTIN, TRAVIS
COUNTY, EXECUTIVE DIRECTOR, OFFICE OF PUBLIC INTEREST COUNSEL,
AND TJFA, L.P.**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE

COME NOW, Northeast Neighbors Coalition (“NNC”) and Parties aligned with NNC (collectively “NNC” or “Protestants 1”) and file this its combined response to the Applicant, Waste Management of Texas, Inc. (“WMTX”), City of Austin, Travis County, Executive Director of the Texas Commission on Environmental Quality (“ED”), Office of Public Interest Counsel of the Texas Commission on Environmental Quality (“OPIC”), and TJFA, L.P., in the above referenced matter. Protestants 1 reiterate its request that this permit application for expansion of the Austin Recycling and Disposal Facility (“ACRD”) be recommended for denial. We agree with the Closing Arguments submitted by the City of Austin, Travis County, OPIC and TJFA and hereby adopt and incorporate those Closing Arguments herein. Accordingly, in the following paragraphs we specifically respond only to WMTX and the ED’s Closing Arguments.

We repeat the arguments made in our closing argument and throughout this hearing that the existing facility and the proposed expansion are not compatible with the surrounding community; the existing landfill and the proposed expansion violate the prohibition against operating a landfill in a manner that causes nuisance conditions; the application fails to demonstrate that it conforms to the Regional Solid Waste Management Plan; and the existing

landfill and the proposed expansion violate the prohibition of operation of a landfill in a manner that endangers human health and welfare or the environment.

ED ARGUMENTS

LAND USE COMPATIBILITY AND NUISANCE

We find the argument presented by the ED curious regarding Land Use Compatibility. According to the ED, the Executive Director requires an applicant to provide information regarding land use compatibility and other factors to assist the commission in evaluating the impact of a site on the surrounding area. If the application need only present evidence in a “non real world setting,” why bother to have a contested case hearing at all. The ED notes that Mr. John Worrel, the Applicant’s land use expert, presumes compliance with TCEQ rules in making his land use determination. He also presumes Waste Management’s compliance with all applicable TCEQ rules regarding operations in preparing his land use analysis.¹ In the real world, however, this is not true. Presuming compliance with the TCEQ rules is a mistake when there is a history of noncompliance, as there is with this facility. Citizen after citizen testified regarding the effect of the expansion and proximity to neighboring uses. Citizens Mr. Rogers, Mr. Nauert, Mr. Wilkins and Mr. Williams, submitted testimony about windblown trash as well as odors and other nuisance conditions. Perhaps more importantly but at least as importantly, the City of Austin and Travis County witnesses testified about their concerns regarding the expansion of this facility specifically with regard to incompatibility with the surrounding communities.

Because this facility impacts nearby neighborhoods, the issue of IWU and Phase I must be addressed. If the permit expansion is granted, we respectfully request that a groundwater sampling system include sampling specific constituents related to IWU, Phase I and other

¹ ED Arg. at 48.

sources of concern be included in the permit as suggested by the ED. We prefer, however, that the application be recommended for denial and the TCEQ take this issue up separately with WMTX.

CAPCOG

With regard to CAPCOG, it has been the position of the TCEQ in the past, that the review by the local COG is advisory, rather than a final determination on a permit or registration application. However, when CAPCOG takes the position that this amendment application does not conform with the applicable Regional Solid Waste Management Plan based on concerns relating to the “facility’s compliance history, siting, management, and method of operation, as well as compatibility with surrounding use and significant local concerns about the site,” it should not be discounted.² If all an applicant needs to do is submit a letter identifying that it had submitted Parts I/II of the application to CAPCOG and requested CAPCOG’s review letter, it is a colossal waste of time for everyone involved. CAPCOG had to review the application and various other procedures to determine nonconformance. Although the 330 rules have changed, the statute has not. Health & Safety Code § 363.066(a) still requires “... private solid waste management activities ... must conform to that plan”. Therefore, a mere letter indicating submission of the application to CAPCOG and request for review does not meet the requirements of the statute.

NUISANCE

The citizen witnesses, the City of Austin’s witness and Travis County’s witness all testified that nuisance issues were a concern to the nearby neighborhoods. Again, the TCEQ is presuming compliance as opposed to looking at the real world circumstances of this permit. We specifically call attention to the exhibits presented by Mr. Evan Williams showing evidence of

² ED Arg, at 65.

runoff from the facility directed toward and flowing onto his property as well as dozens of dead birds on his property. This is the real world experience owning property near ACRD. If this permit were to be issued, then in response to these nuisance issues, Protestants 1 suggest that the operating hours be changed to 7:00 a.m. to 7:00 p.m. Monday through Friday and transportation of materials and heavy equipment operation must not take place between the hours of 9:00 p.m. and 5:00 a.m. any day.

WMTX ARGUMENTS

We repeat the arguments presented above regarding land use incompatibility and nuisance. WMTX relies on their expert Mr. Worrall's opinion that the application for expansion is compatible with the surrounding land uses. The Applicant dismisses the City of Austin and the Travis County witnesses' testimony that the issuance of the permit to expand the facility will adversely impact human health or the environment.³ The Applicant does not understand that even if there had been 30 years of landfill operations in the area, the surrounding area has changed which means in this case, incompatible land use. The Applicant also dismisses testimony by citizens who live in the area, Mr. McAfee, Mr. Nauert, Mr. Williams, Mr. Wilkins and Mr. Rogers regarding their concerns and their day to day experiences with the landfill. The last violation of the ACRD facility occurred in 2002. However the citizens have and will continue to experience negative impacts from the operation of this landfill. Indeed testimony by these citizens is clear that it does impact them in a very negative way.

It seems odd that the Applicant "argues" there is an existing MSW Landfill with an uncertain and indeterminable amount of active life remaining.⁴ It is our understanding that an

³ WMTX Arg. at 58.

⁴ WMTX Arg. at 59.

annual accounting of remaining capacity is reported to the TCEQ with an estimate of “active” life remaining.

Protestants 1 present below, parts of an argument made by OPIC in a similar case which we believe is applicable to this case. Protestants 1 cannot understand how the expansion at this location could be found to be appropriate, given the overwhelming evidence of rapid and encouraged development in the immediate vicinity of the landfill location. Protestants 1 is likewise not persuaded by Applicant’s experts that opine that if a landfill merely operates as permitted that it is a compatible land use.

It appears that the facts required for the analysis are not in dispute. No one questions the sufficiency of John Worrall’s report. However, it is clear that the parties disagree on the correct interpretation and use of the data. The ED did not actually analyze the information.

The Applicant’s witness appears to base his compatibility determination on the idea that since homes and parks and schools are being constructed in the surrounding area where ACRD’s site is already located, then by default ACRD’s site is compatible. When discussing growth trends of Austin, he again notes that the growth has occurred during the operation of the landfill. Mr. Worrall seems to conclude that so long as the landfill is operating per its permit conditions, then it will always be a compatible land use.

Protestants 1 cannot agree that because the landfill was there first, then compatibility with surrounding land uses should be assumed. Land use compatibility analyses are used to determine not only whether it is appropriate to site a new landfill in a certain location, but also to expand the capacity of an existing landfill, considering current and probable future conditions. To agree with the Applicant, there would be no need to ever conduct a land use analysis for an amendment application.

The Applicant did not demonstrate that expansion of the landfill will be compatible with surrounding land uses. The Applicant merely established that growth is rapidly occurring and then assumed that if the landfill is operating properly, then land use is compatible since the landfill was there before much of the growth. ACRD is asking for an amendment to expand operations, and current conditions must be considered. The record raises questions as to whether the current landfill operations are compatible with current residential growth and development in the surrounding neighborhoods. Certainly, expanded operations would be inconsistent with such uses.

CONCLUSION

We find it especially noteworthy that the local governments, City of Austin and Travis County, have taken the position to oppose this amendment application. Protestants I request that the Administrative Law Judge recommend denial of this amendment application.

Respectfully submitted,

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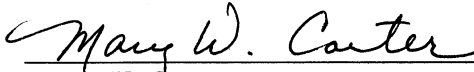
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CERTIFICATE OF SERVICE

On this 29th day of May, 2009, a true and correct copy of the foregoing instrument was served on all attorneys of record by the undersigned via regular U.S. Mail, and/or Certified Mail/Return Receipt Requested, and/or hand delivery, and/or facsimile transmission, and/or Federal Express Overnight Mail, and/or electronic mail (e-mail).



Mary W. Carter

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