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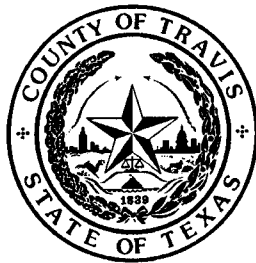
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May 29, 2009

*Via Hand Delivery*

The Honorable Roy Scudday  
Administrative Law Judge  
State Office of Administrative Hearings  
300 West 15<sup>th</sup> Street, Suite 502  
Austin, Texas 78711

**Re: SOAH Docket No. 582-08-2186**  
**TCEQ Docket Number 2006-0612-MSW**  
**Waste Management of Texas, Inc. Permit Amendment Application**

Dear Judge Scudday:

Enclosed please find Travis County's Reply to Closing Arguments pursuant to Order Nos. 2, 3 10, and 12 in the above-referenced proceeding. All parties are being served with copies pursuant to the attached Certificate of Service. If you have any questions, please call our office at (512) 854-9513.

Sincerely,

A handwritten signature in cursive script that reads 'Sharon Talley'.

Sharon Talley  
Assistant Travis County Attorney

**SOAH Docket No. 582-08-2186  
TCEQ Docket Number 2006-0612-MSW**

<b>IN THE MATTER OF THE APPLICATION OF WASTE MANAGEMENT OF TEXAS, INC. PROPOSED SOLID WASTE PERMIT AMENDMENT No. 249D</b>	<b>§ § § § §</b>	<b>BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS</b>
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**TRAVIS COUNTY’S REPLY TO CLOSING ARGUMENTS**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

COMES NOW Travis County and files this, its combined Response to the Applicant Waste Management of Texas, Inc. (“WMTX”), City of Austin, Northeast Neighbors Coalition (“NNC”), the Executive Director, Office of Public Interest Counsel (“OPIC”), and TJFA, L.P.’s closing arguments in the above-referenced matter. Travis County re-urges its request that this permit expansion application be recommended for denial.

**I. INDUSTRIAL WASTE UNIT AND PHASE I**

WMTX argues that the Industrial Waste Unit (IWU) and Phase I should not be considered in this application because they have been in existence through “[f]our major permitting actions and more than three decades.” However, what WMTX fails to acknowledge in this statement is that the last major permitting action for this facility occurred in 1991, when the area surrounding the facility could be (and was) described as rural. Now the area surrounding the facility is suburban, and increasingly urban.

WMTX also fails to acknowledge that there have been numerous “hits” for hazardous constituents in groundwater coming from the IWU, and that most, if not all of these constituents were detected after the last major permitting action. The combination of exploding population growth in the area and hazardous constituents leaving the site makes the IWU and Phase I particularly relevant to this application, and WMTX must demonstrate in this application that it has taken appropriate measures to protect human health and the environment.

The IWU and Phase I have not been closed, as WMTX suggests in its closing argument, and they have been included in previous permitting actions. (TR, p. 1355, ll. 4-12)

## **II. SPECIFIC RESPONSES**

### **1. 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.**

Contrary to WMTX’s assertion in its closing that it has added groundwater monitoring wells to protect human health and the environment, this application does not increase the number of groundwater monitoring wells that will detect potential releases of contaminants from either the IWU or Phase I. In fact, the testimony at this hearing indicated that in this application, only MW-11 is placed in a location that is capable of monitoring a release from the IWU (TR, p. 1346, ll. 10-19) This single groundwater monitoring well is separated from the IWU and Phase I by a natural channel which creates a preferential pathway for groundwater, yet WMTX suggests that it was intended

to and will monitor a large area that includes both the IWU and Phase I. (TR, p. 935, ll. 2-14) If it monitors the IWU and Phase I, it will do so only incidentally, as described by Mr. Avakian (TR, p. 2441, ll. 8-14), and not intentionally, as WMTX would now have us believe. Its placement is inadequate to monitor those units, and WMTX does not propose to monitor them in any other way. (TR, p. 1348, l.11 – p. 1349, l. 11; TR, p. 930, l. 16 – p. 932, l. 8)

WMTX states that no substantive design changes are proposed for the eastern portion of the West Hill, the East Hill, the IWU, or Phase I other than making improvements to the facility’s groundwater monitoring system “to add wells and make it more protective.” In fact, there are no proposed changes that make the groundwater monitoring system more protective of Phase I or the most potentially dangerous unit on the whole facility, the IWU.

**2. 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.**

WMTX argues that it should not be required to monitor groundwater for constituents other than those on Appendix I because: (1) “EPA determined that facilities that sample and analyze their groundwater monitoring wells for the Appendix I constituents ‘should be able to detect, with reasonable confidence, nearly every type of release’ from a MSW landfill;” and (2) the ED can only add constituents to a detection monitoring list if the constituents are indicative of a release from a regulated MSW unit, and the IWU and Phase I are not regulated MSW units. Both arguments are ludicrous. In numerous

instances, potentially hazardous constituents or markers indicating potentially hazardous releases have been detected on the WMTX facility and down-gradient off the facility. (TR, p. 1343, l. 20 – p. 1345, l. 14; Technically Complete Application, pp. 2490, 2532, 2535, 2594, 2643-2649, 2680-2681, 2813; TR, p. 1638, l. 20 – p. 1640, l. 11; Exhibit TJFA-205) WMTX responded to these releases variously by closing or moving its monitoring wells, claiming that the releases were from other sources, or covering them up. (TR, p. 1344, l. 14 – p. 1346, l. 9; Technically Complete Application, p. 2532; TR, p. 2464, l. 18 – p. 2465, l. 3; Exhibit TJFA-29) By doing so, WMTX has actually taken steps to not detect or report releases of hazardous substances. Those steps are inconsistent with the EPA's stated expectation, and actively avoid it.

Furthermore, the EPA's statement can only be true if EPA is assuming proper placement of the monitoring wells. In this application, as discussed above, only one well is placed so that it might possibly catch a release from the IWU, and that well is so placed only incidentally. (TR p. 1348, l.11 – p. 1349, l. 11) And can WMTX seriously be arguing that it is permissible to ignore releases of potentially harmful chemicals from a portion of its landfill, the landfill for which it admits responsibility, the landfill that is located in a suburban and rapidly urbanizing area, merely by making the ludicrous claim that the units that appear to be leaking might possibly be definitionally excluded from this application? As discussed above, the IWU and Phase I should be included in this application, and we urge the ALJ to recommend that WMTX be required to monitor both the IWU and Phase I for all constituents that have been detected in wells that have intentionally or incidentally monitored those units to date.

- 3. 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.**
  - a. 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.**

Travis County agrees with the compelling arguments on land use compatibility advanced by the City of Austin, NNC, TJFA, and OPIC in their respective closing arguments, and hereby incorporates them into its response.

*Waste Management*

WMTX misleadingly emphasizes the fact that its land use expert, John Worrall, gathered the data required by the TCEQ for its expansion application. It is a false presumption—and one heavily relied upon by WMTX—that gathering minimally required data demands the conclusion that it is a compatible land use. Simply satisfying the core land use informational requirements does not mean that the Applicant has proven that the WMTX landfill is compatible with surrounding land use, or that it should be given a determination of compatibility. Indeed, the evidence presented at this hearing showed that the land use is incompatible. (Exhibit COA-2; TR, p. 1935, l. 18 – p. 1936, l. 11; Direct testimony of Greg Guernsey, p. 6, ll. 1-15; Direct testimony of Joe Word, p. 5, l. 106 – p. 7, l. 156; Direct testimony of Jon White, p. 16, l. 4 – p. 18, l. 4)

Applicant placed great emphasis in its closing argument on the fact that the landfill has existed for over 30 years. According to WMTX, this automatically means its facility is compatible with surrounding land use. This simply is not true. As OPIC stated in its

closing argument, if WMTX's presumption were correct, there would be no need for a land use determination in this matter. However, there is no land use compatibility exclusion for solid waste facilities that are seeking to expand. All municipal solid waste facilities are required to demonstrate that their entire facilities are compatible with surrounding land use. 30 TAC §330.61(h). It is patently obvious from community growth patterns that the use of the land surrounding the landfill has changed dramatically in the past 39 years. This is no longer a rural area far from the center of Austin. There are 1,447 homes currently located within one mile of the landfill, and a staggering 50,078 residences located within five miles of the landfill. (APP-302, p. 7) The Applicant's own expert, Mr. Worrall, has predicted there will be an additional 10,000 residences in this area by 2017 (APP-302, p. 21), although developers are planning for as many as 25,000 additional residences. (APP-302, p. 7)

Travis County vehemently disagrees with WMTX's statement that Mr. Worrall "alone" evaluated the information required by the Commission in the context of land use compatibility. CAPCOG, Greg Guernsey, Joe Word, and Jon White all evaluated the information required by the Commission, and their conclusions were consistent, although they differed from the conclusion reached by Mr. Worrall. Mr. Guernsey, Mr. Word, and Mr. White are of the opinion that the expansion of the WMTX landfill in this increasingly urban, residential area, will adversely impact human health and/or the environment. (Direct testimony of Joe Word, p. 6, ll. 121-126; TR, p. 1935, l. 18 – p 1937, l. 11; TR, p. 2003, ll. 5-18) More importantly, CAPCOG is also of the opinion that the expansion of the WMTX landfill in this increasingly urban, residential area will adversely impact

human health and/or the environment (and it must be noted that WMTX failed to address this fact in its closing argument). There is ample evidence in the record to support the opinions of CAPCOG, Mr. Guernsey, Mr. Word, and Mr. White. (Exhibit COA-2; Direct testimony of Greg Guernsey, p. 6, ll. 1-15; Direct testimony of Joe Word, p. 5, l. 106 – p. 7, l. 156; Direct testimony of Jon White, p. 16, l. 4 – p. 18, l. 4)

In addition, Mr. Worrall’s conclusion that the WMTX landfill will not adversely impact human health or the environment is fundamentally flawed because he did not consider the impact the IWU would have on human health or the environment. He performed no research regarding the IWU located on the facility (TR, p. 660, l. 23 – p. 661, l. 1), and did not consider it at all when he performed his land use analysis. (TR, p. 664, ll. 15-18) When pressed on cross-examination, he admitted that if he knew that a hazardous waste facility was causing groundwater contamination, he would have “difficulty determining that we’ve got land use compatibility.” (TR, p. 793, ll. 11-20) Given the evidence admitted in this proceeding that the Industrial Waste Unit is leaking and causing groundwater contamination both on-site at the WMTX landfill and off-site at other properties, it is clear that Mr. Worrall’s compatibility determination fails.

In its closing, Applicant argues that its proposed expansion will not adversely impact human health or the environment. This is indeed a key factor to be considered in making a land use determination, and one that is far more important than the lip service paid to it by WMTX, but it is by no means the only factor that must be considered. The TCEQ’s regulations list numerous decisive factors—seemingly ignored by WMTX—that must be considered in a thorough land use determination: proximity to existing residences,



schools, daycare centers, historic sites, or business establishment; and notably, the impact on cities, communities, groups of property owners or individuals by *analyzing the compatibility of land use*, zoning in the vicinity, *community growth patterns*, and other factors associated with the public interest. 30 TAC §§330.61(g) & (h). Here, the WMTX landfill is located in dangerous proximity to three protected establishments: the Children's Courtyard; Bluebonnet Trails Elementary School; and the Barr Mansion. (APP-302, p. 9) In addition, the landfill is currently surrounded by over 1,447 residences. (APP-302, p. 9)

As previously discussed in Travis County's closing argument, since 1990, the area surrounding the landfill has been and remains the fastest growing area in all of Austin. (APP-302, p. 6) By 2015, the land use surrounding the WMTX landfill will be completely different than what it is in 2009. (APP-302, p. 21) A minimum of 10,000 new residences will be added to this area, bringing the total of homes within a five-mile radius of the landfill to more than 67,000. (APP-302, p. 21) Significantly, BFI's Sunset Farms landfill will cease accepting waste at this location on November 1, 2015, leaving the WMTX facility as the only landfill still operating in the middle of 67,000 residences. The growth patterns in this community clearly demonstrate that this area is no longer compatible with the operation of a municipal solid waste facility, and that there should be no waste handling in this area after November 1, 2015.

Furthermore, it is important to note that this expansion, if approved, would move the operations of the landfill closer to numerous residences. In its closing argument, the Applicant relies on its false premise in the Application that the proposed expansion will

not cause waste disposal operations to be any closer than the most proximate existing distance to a residence, school, daycare center, historic site, or business establishment within one mile of the existing WMTX landfill. This is a deliberate misreading of the statute, and abuses its intent, which is to ensure that the expansion of a solid waste facility does not move its operations closer to any of the above-listed receptors—and not simply to what is currently the most proximate residence to the landfill. Mr. Worrall admitted under cross-examination that the proposed expansion would bring the center of operations for the WMTX landfill closer to the Pioneer Crossing neighborhood. (TR, p. 685, ll.6-9)

It is also patently untrue that the responsible governmental entities have not fulfilled their obligations under Chapter 361 of the Texas Health and Safety Code to state where solid waste facilities should be located. Travis County, the City of Austin, and CAPCOG have been quite clear with both WMTX and BFI (whose landfill is immediately adjacent to the WMTX facility) that the time for landfills in this area has come to an end. (Travis County Exhibit JW-3) Evidence was presented that Travis County has made offers to both BFI and WMTX to facilitate identifying and relocating their operations to new green field sites in Travis County that are more compatible with surrounding land use. (Direct testimony of Jon White, TC Exhibit JW-1, p. 16, l. 4 – p. 18, l. 4) Travis County is committed to helping find a location within its borders for local waste to be disposed in an area that is compatible with surrounding land use. Evidence was presented that WMTX has known for a number of years that Travis County, the City of Austin, and CAPCOG have expected and encouraged both WMTX and BFI to stop waste disposal

operations in this area by November 1, 2015. (Direct testimony of Jon White, TC Exhibit JW-1, p. 16, l. 4 – p. 18, l. 4) Evidence was presented that BFI used this knowledge and negotiated with these agencies a closure date of its facility by November 1, 2015. (Direct testimony of Jon White, TC Exhibit JW-1, p. 16, l. 4 – p. 18, l. 4) WMTX, on the other hand, turned its back on the local governments, and has presented absolutely no evidence that it has made any effort to respect the wishes of the public and communities surrounding its landfill.

Travis County urges the ALJ to recommend denial of this application. If, however, the ALJ somehow finds that the permit amendment application should be approved, Travis County urges the inclusion of a closure date of November 1, 2015. Not only will this provide ample time and opportunity for WMTX to close down its facility and relocate to a new location within Travis County, but it will provide CAPCOG, the City of Austin, and Travis County the opportunity to help WMTX find a new location.

*Executive Director*

As the ED is not authorized by statute to make a land use determination, the ED should have limited his closing argument to a determination of whether the Applicant included the information required by TCEQ rules in its application. The law is quite clear that it is the TCEQ Commissioners who make the determination on land use compatibility, using the information provided by the Applicant, by CAPCOG, and by local governments and other interested parties who participate in a contested hearing. Tex. Health & Safety Code, §§361.062, 361.069, 363.066. The ED summarized some of the evidence presented on this matter in his closing argument, pointing out that both the

City's expert, Greg Guernsey, and the Applicant's expert, John Worrall, agreed in testimony that the expansion would bring land filling operations closer in proximity to the Pioneer Crossing PUD than was previously authorized by the TCEQ. However, Travis County respectfully disagrees with the ED's spurious and improper recommendation of approval of the permit based on land use compatibility, as this recommendation insultingly oversteps the authority granted to the ED in 30 TAC §§80.108(e) & 80.127(a)(4).

- 4. 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.**

*Waste Management*

WMTX offered little in its closing argument to support its contention that the application includes adequate provisions to prevent nuisances from occurring, other than stating that its plan to prevent nuisances, including odors, spilled or windblown waste, dust control and maintenance of site access roads is contained in the SOP section of its application. The Applicant discounted the concerns of Mr. White (a representative of Travis County) and Mr. Word (a representative of the City of Austin) primarily because Mr. White and Mr. Word based their concerns in part on WMTX's compliance history. As may well be expected from any commercial offender, WMTX has a unique view of its own compliance history. However, as discussed in further detail in Item 8 below, the Applicant's compliance history is far from ideal, and is evidence of its inability or its

disinclination to follow the laws of the State of Texas and the rules set forth by the TCEQ.

Travis County shares OPIC's concerns that the SOP was drafted by Mr. Dominguez without any attempt to address the nuisance issues that have dominated WMTX's history since at least the early 1990's. Mr. Dominguez testified that the only mechanism he had included in the SOP to address nuisance odors was the use of daily cover, and that he did not consider any other potential nuisances when designing the rest of the SOP. (TR p. 443, l. 1 – p. 444, l. 18) Given the longstanding concerns of the neighbors and their testimony about the history and the ongoing problems from odors, spilled and windblown waste, dust, and the site access roads (Exhibit TC-6), one would expect this to be a primary concern of WMTX in designing a new SOP for an expansion in an increasingly residential area. Yet WMTX gave absolutely no consideration to the concerns of its neighbors in developing the SOP for this application. (TR p. 443, l. 1 – p. 444, l. 18)

*Executive Director*

The ED noted in his Closing Argument that nine separate witnesses – Mr. Chandler, Mr. White, Mr. Guernsey, Mr. Word, Mr. McAfee, Mr. Nauert, Mr. Rogers, Mr. Williams and Mr. Wilkins all raised concerns—often different concerns—related to odors emanating from the WMTX facility. And yet, somehow, because Mr. Udenenwu was able to check off the requisite boxes on his checklist stating that WMTX had listed procedures in the Odor Management Plan, the ED believes that the Application contains adequate provisions to control odors. (TR p. 2392, l. 2 – p. 2396, l. 13) This is beyond ridiculous. The TCEQ's rules simply state that the SOP must have an odor management

plan that addresses the sources of odors and includes general instructions to control odors or sources of odors, and that those plans must include the identification of special wastes that require special attention. 30 TAC §330.149. Mr. Udenenwu, based solely on his verification that those procedures were listed in the Odor Management Plan section of the application, offered the opinion that the application was sufficient to address odor problems. This simplistic approach belies years of complaints and ignores the concerns of nine testifying individuals in this hearing, including five adjacent property owners who testified that WMTX's current plans do not work in containing nuisance odors. It is noteworthy that the ED seems to discount the opinion of Mr. White because the ED mistakenly believes Mr. White concentrated on past complaints in forming his opinions. In fact, the testimony from Mr. White was that his opinion was based on the sum total of all the complaints received by Travis County concerning the odors—complaints which numbered in the hundreds, and which were repeatedly, continuously, and vociferously made throughout the past decade, and many of which were admitted in evidence in this matter. (Exhibit TC-6) Numerous individuals presented evidence of current concerns of odors emanating from the WMTX facility, which is clear proof that the measures employed by WMTX to contain nuisance odors are simply not sufficient.

Likewise, the ED backhandedly acknowledged the Protestants' concerns about spilled and windblown waste, dust control, and maintenance of site access roads. The ED pointed out that eight witnesses provided evidence at this hearing that the procedures included in the SOP are not sufficient to properly address the problems that have plagued the WMTX landfill operations in the past concerning spilled and windblown waste, and

that five witnesses expressed concerns about the site access roads, in particular about the amount of mud on these roads. Yet the ED still managed to make a determination that the provisions contained in the application are sufficient to address these concerns.

In short, although the ED was presented with testimony from many individuals regarding repeated nuisances occurring at the WMTX landfill, the ED still determined that this application will ensure that these nuisances won't occur in the future. This is an insultingly trite conclusion. These nuisances are occurring now and have occurred incessantly in the past. It is ludicrous to conclude that they will now magically stop because WMTX says they will. It is no doubt an easy task for the Applicant to put down on paper a promise to operate in a certain way. But when the overwhelming evidence is that WMTX has made this promise before, and yet nuisances have occurred and are still occurring, a reasonable person must question whether the practices specified by the Applicant in its application are sufficient.

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

*Waste Management*

Contrary to the Applicant's belief, evidence was presented at the hearing concerning nuisance problems created by noise coming from the operations at the WMTX landfill. (TR p 2252, l. 22 – p. 2253, l. 18) WMTX appears to be under the impression that the only statutory authority regulating the noise it generates at its landfill is related to buffer zones. To the contrary, 30 TAC §330.135 specifies the hours during which a solid waste facility may operate, and this restriction on a facility's operational hours is clearly a

restriction intended to address the noise generated at a landfill. Furthermore, a facility is prohibited from operating in a way that causes a nuisance for surrounding residents and property owners. Noise is clearly a nuisance, and one which can severely impact the use and enjoyment of one's property, not to mention the health and welfare of individuals who cannot sleep due to overnight operations. In fact, WMTX's blatant refusal to acknowledge there is statutory authority regulating noise is further evidence that the application does not contain adequate provisions to control noise.

*Executive Director*

As the ED discussed noise and operational hours together, Travis County's response to the ED's arguments follows below.

**6. Whether the landfill's operational hours are appropriate.**

*Waste Management*

WMTX offered little argument for its proposed operational hours, other than to state that they are exactly the same as its currently permitted hours under Permit No. MSW-249C. In its closing argument, WMTX discusses the fact that the TCEQ rules changed in 2004 to require landfills to limit operations to 7:00 a.m. to 7:00 p.m. Monday through Friday, but that the rules allowed exceptions. WMTX points out that the preamble to that rulemaking specified that the new rules *do not change the operating hours authorized in a facility's current permit*. However, WMTX is applying to operate under a **new** permit, MSW-249D. The Legislature's intent in promulgating this new operational rule should not be discounted by the ALJ. WMTX's current permit is set to expire. WMTX is



applying for a new permit. In the event a new permit is issued, there is no better time than now to ensure that the intent of the Texas Legislature is honored by restricting WMTX's operational hours.

*Executive Director*

The ED considered noise and operational hours to be related, and Travis County agrees they are closely related. However, because Travis County is concerned about neighbors, compatibility, and appropriate land use, it disagrees with the ED's statement that the TCEQ MSW permitting rules have no prescribed limitation or curtailment of hours directly due to excessive noise. Clearly, 30 TAC §330.135 specifies that an MSW facility is only to operate between the hours of 7:00 a.m. and 7:00 p.m., Monday-Friday, unless otherwise approved in the authorization for the facility. This new rule is clearly intended to curtail 24/7 operation by landfills. As this application is made under the new rules, and as the area surrounding this facility is becoming increasingly urban, if this application is approved, the facility's operational hours should be limited to daylight hours on Mondays through Fridays. Even the ED admits that he would not be opposed to limiting the hours of operation or waste acceptance to reduce traffic in an attempt to address Protestants' concerns about noise. Travis County, the City of Austin, NNC, and OPIC all argued in their closings that the proposed operational hours are inappropriate, especially considering the surrounding residential land use. The noise generated from these facilities is a nuisance which has plagued the neighbors for many years, and in the event this permit is somehow granted, Travis County repeats its previous request to the

ALJ to recommend limiting the operational hours of the WMTX landfill to 7:00 a.m. to 7:00 p.m. Monday through Friday only, with no exceptions.

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

*Waste Management*

The application does not include adequate provisions for buffer zones and landscape screening. The TCEQ rules require a minimum of 125 feet of buffer zones surrounding the expansion area. 30 TAC §330.543(b)(2)(c). However, evidence was presented that this may not be appropriate for the WMTX facility, given the close proximity of this landfill to over 57,000 residences. (Direct testimony of Joe Word, p. 7, ll. 142-156)

Travis County is troubled that the Applicant has made so little effort at landscape screening in this application. (Technically Complete Application, p. 03272) Mr. Worrall testified that he had not performed any analysis of screening as part of his land use determination. (TR, p. 682, ll. 2-23) He even went so far as to suggest, demeaningly, that in his opinion, the neighbors would be better served by screening the landfill themselves by placing trees in their own yards, a stunningly inappropriate shift of responsibility for mitigation of this nuisance. (TR, p. 817, ll. 2-10) This landfill is surrounded by residences and other businesses. Additional screening is certainly needed on the entire WMTX facility, if there is to be any attempt by WMTX to make this landfill compatible with its surrounding land use. Disturbingly, WMTX has offered no evidence that it has made this attempt at compatibility, or even that it cares about compatibility with neighboring residential land use. WMTX has repeatedly voiced the opinion that since the

landfill predates the majority of residences, WMTX need not concern itself with compatibility. (TR, p. 656, ll. 2-11) The fact that WMTX has not proffered any evidence of intent to screen its landfill, or offered any other in situ measures, is further proof of the little regard it holds for its neighbors.

*Executive Director*

Interestingly, the ED takes great care in its closing argument to explore the Commission's intent in revising rules relating to buffer zones and screening. The ED states that the buffer zones were dramatically increased in the new rules, from 50 feet to 125 feet, in large part due to concerns of noise, odors, windblown waste, and protection of surface water. What this change does in reality is demonstrate exactly what the opposing parties have been saying—landfills are incompatible nuisances, and the rules on buffer zones and screening were increased by the Commission in an attempt to make landfills, as a whole, less impactful nuisances for neighboring residents and property owners.

Yet the ED analyzed this portion of the application on a purely bureaucratic basis. The ED states that Mr. Udenenwu testified that the application addresses all the technical elements for buffer zones. He points out that the application includes provisions for cover, and for some vegetation, but there is no determination that this vegetation is sufficient to properly screen the landfill. Nor did the ED make a determination that this screening was sufficient to minimize nuisances for the neighboring residents or property owners. Mr. Udenenwu simply checked boxes on his checklist that indicated a cover was listed, and that some vegetation was listed. Other than the state-mandated increase in

buffer zones, there is basically no difference between the screening proposed in the WMTX's expansion application and its current practices. And clearly, WMTX's current practices have not been working. Given the history of documented complaints, it is clear that the screening proposed in the application is insufficient to ensure that there is no reasonable probability of adverse effects on the health, welfare, environment, or physical property of nearby residents or property owners.

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

*Waste Management*

When discussing compliance history, the Applicant proudly proclaims its revised "average" performance since 2004. However, in making a determination to grant an expansion permit during a contested case hearing, the ALJ is entitled to consider the entirety of the Applicant's compliance history, and not simply a summary of its history for the past five years. 30 TAC §60.3, Tex. Health & Safety Code, §361.084(c) & (d).

An examination of the entirety of WMTX's compliance history paints a very different picture than the one WMTX wants the court to see. WMTX first filed Version 1 of its application for Permit No. MSW-249D in 2005, not long after it entered into an agreed order resolving a large number of rule violations in 2004. It is not surprising that WMTX was motivated to resolve those issues before filing its application, nor is it surprising that as an Applicant for a permit amendment, WMTX has been on its best behavior since filing its application four years ago. Furthermore, evidence was presented during this

hearing that Barry Kalda of the TCEQ told several residents not to bother complaining to the TCEQ anymore about the landfill. (Direct testimony of Mark McAfee, p. 4, ll. 4-14)

WMTX would have one believe that the sum total of its past violations is contained in the 10 events listed in the 2004 Agreed Order. Yet an examination of this order and supporting documentation shows that there were almost one thousand actual violations that were the basis for the \$244,420 fine paid by the Applicant. (Exhibit TJFA-27, Penalty Calculation Worksheet) In fact, *fifty-one* violation events led to one citation on WMTX's failure to maintain negative pressure at each landfill gas collection wellhead; *twenty-six* violation events led to one citation for WMTX's failure to maintain either a nitrogen level of less than 20 percent or an oxygen level of less than 5 percent in the landfill gas; *seven* violation events led to one citation for WMTX's failure to take monthly temperature readings at *six* wells during a *twelve*-month period, and that *six* wells were not monitored at all; *sixty-five* violation events led to one citation for WMTX's failure to take monthly temperature readings at *six* wells during a *twelve*-month period, and *six* wells were not monitored at all; twenty-three violation events led to one citation that WMTX deviated from the operating plan by allowing the leachate head to rise more than 12 inches above the liner, and that the exceedances were for over *twenty-four months*, and that they ranged from a few inches to over *sixteen feet* above the 12-inch limit.; and that *eight hundred* odor complaints led to one nuisance odor citation. (*Id.*)

In addition to the almost 1,000 violations, there have been hundreds of complaints to the City of Austin and to Travis County. (Exhibit TC-6) These complaints are not as

isolated in time as the Applicant would have one believe. The hundreds of letters comprising Travis County Exhibit TC-6 were all received by the Travis County Commissioner's Court after the entry of the 2004 Agreed Order. Testimony from multiple witnesses demonstrates that the nuisance odors are still occurring. Additionally, evidence was presented that the neighbors of the landfill stopped complaining to the TCEQ about nuisances after they were told by TCEQ staff that it was pointless to do so. (Direct testimony of Mark McAfee, p. 4, ll. 4-14)

When WMTX was fined the reduced amount of \$244,420 by the TCEQ in 2004, it was still the largest fine ever assessed against an MSW operator in the State of Texas. If there is a facility whose compliance history does not warrant expansion, this is it.

*Executive Director*

The ED agrees with the Applicant that it has earned an "average" status over the past five years. However, the ED has not considered the entirety of WMTX's compliance history in making its determination that the "average" status is sufficient for the Applicant's expansion permit. Again, 30 TAC §60.3 and Tex. Health & Safety Code, §361.084(c) & (d) allow the entirety of the Applicant's compliance history to be considered as part of a contested case hearing.

- 9. Whether the application should be denied based on the fact that Applicant allegedly began construction of the proposed lateral expansion prior to the issuance of the draft permit, in violation of agency rules.**

*Waste Management*

As previously discussed in Travis County's closing argument, the Applicant began construction of detention ponds as part of its expansion process prior to the issuance of

the draft permit. The Applicant, in its closing argument, shrugs off this improper construction, noting that it “does not concern a statutory or regulatory requirement applicable to WMTX’s pending application.” Alas, WMTX is mistaken. 30 TAC §330.7(a) clearly states that no person—not even Waste Management—can begin construction of a lateral expansion *without having first received a permit from the Commission*. The evidence is clear that Waste Management began construction of the detention ponds described in its Application. Multiple witnesses—Mr. Chandler, Mr. Lesniak, Mr. Franke, and notably, even WMTX’s own principal engineer, Mr. Dominguez—testified that the sedimentation and detention ponds already constructed in WMTX’s expansion area were in the exact same location and were the exact same shape as the ponds proposed by Mr. Dominguez in WMTX’s expansion application. Although he claimed these ponds were not the ponds he designed, Mr. Dominguez admitted that the completion of a few additional features would magically turn the ponds already constructed into the ponds he designed for this application. In fact, they are the ponds he designed. The construction of those ponds prior to approval of the permit is most definitely grounds for denial of WMTX’s application. Once again, the Applicant has flagrantly violated the rules of the TCEQ.

*Executive Director*

Travis County is glad the ED acknowledges the overwhelming evidence that WMTX began construction of its proposed sedimentation and detention ponds prior to TCEQ’s issuance of the permit. Travis County is in agreement with the ED that the TCEQ rules prohibit applicants from commencing physical construction of waste management units

before the issuance of the permit. However, Travis County is puzzled by the ED's reiteration that the existence of such illegal construction activities would not affect the sufficiency of the contents of the application. This was not the question posed to all parties by the ALJ for closing arguments. The question was whether the Applicant violated agency rules in beginning construction before the issuance of a permit, and whether that was grounds for denial of the application.

The ED has answered that yes, agency rules prohibit commencing physical construction prior to the issuance of a permit. For reasons known only to the ED, he refused to state whether this was grounds for denial of the application. It clearly is, and the ED knows that it is. Indeed, the ED implied as much in his response, but for some reason, refused to actually write down the answer to the question posed by the ALJ. Because it seems difficult for the ED to actually write these words down, Travis County will state that yes, pursuant to 30 TAC §330.7(a), this application should be denied because the Applicant violated agency rules by beginning construction of the proposed lateral expansion prior to the issuance of the draft permit.

**10. 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.**

*Waste Management*

Despite what the Applicant seems to believe, the issue is most definitely whether or not WMTX's application is in compliance with CAPCOG's Regional Solid Waste Management Plan (RSWMP). There is ample evidence in the record to support



CAPCOG's finding that WMTX's application fails to conform with its RSWMP. The January 31, 2006, and April 14, 2008, letters from CAPCOG clearly detail CAPCOG's specific reasons for finding non-conformance. (Exhibit COA-2)

A diversionary question was raised as to whether or not CAPCOG's initial determination in January 2006 was made pursuant to an approved RSWMP, but the record reflects that the RSWMP was approved by the TCEQ, and that CAPCOG reaffirmed its initial determination of non-conformance in May 2008 following the TCEQ's approval of the RSWMP. CAPCOG, in an abundance of caution, reviewed WMTX's application under both its 2002 RSWMP and 2005 RSWMP, and categorically listed precise reasons how the application failed to conform with both the 2002 RSWMP and the 2005 RSWMP.

The Commission approved CAPCOG's RSWMP in May 2007. The approved RSWMP included a requirement that solid waste facilities must conform with current and future local land use and that they must be sited in such a way that they do not pose a nuisance to neighbors and communities. In addition to CAPCOG's finding in Exhibit COA-2, as previously discussed, extensive evidence was admitted in this hearing demonstrating that WMTX's landfill is not compatible with current and future land use. (Direct testimony of Greg Guernsey, p. 6, ll. 1-15; Direct testimony of Joe Word, p. 5, l. 106 – p. 7, l. 156; Direct testimony of Jon White, p. 16, l. 4 – p. 18, l. 4)

Travis County urges the ALJ, and the Commission, to support CAPCOG's finding that the WMTX application does not conform with its RSWMP, and to deny the expansion application accordingly.

*Executive Director*

In its Closing Argument, the Executive Director noted that WMTX had submitted the Application to CAPCOG for review for compliance with its RSWMP. He also noted that CAPCOG took the position that the proposed permit amendment application does not conform to its RSWMP. Finally, the ED pointed out that Commission is the ultimate decision maker as to whether an application is in conformance with a RSWMP. There was substantial evidence presented at this hearing that the application is not in conformance with the RSWMP in regards to land use conformity and local facility siting. Again, Travis County implores the ALJ and the Commission to follow CAPCOG's findings.

**11. Transcript Costs**

Travis County re-urges its request that it not be assessed transcript costs in this proceeding.

**III. PROPOSED FINDINGS OF FACT**

1. WMTX improperly identified its facility in its application, particularly the Phase I area.
2. WMTX improperly stated in its application that a portion of the former Travis County landfill was located on its property.
3. WMTX, in its application, improperly identified the area within its boundaries, but south of the IWU as a portion of the "Travis County Landfill (Closed)."
4. During the hearing, WMTX agreed to refer to the area south of the IWU as Phase I, and not as a portion of the former Travis County landfill.

5. During the hearing, WMTX agreed that it was solely responsible for any waste within its permit boundary, including waste deposited in the IWU and the Phase I area.
6. WMTX's mislabeling of the Phase I area, and its statement in its application that a portion of the Travis County landfill was located on its property, constitutes a submission of insufficient and/or false information.
7. By submitting insufficient, incomplete, inaccurate, and/or false information concerning the Phase I area in its application, WMTX failed to provide assurance that operation of its site would pose no reasonable probability of adverse effects to the health, welfare, environment or physical property of nearby residents and/or property owners, as required by 30 TAC §330.57(d).
8. The IWU and Phase I must be considered and addressed in this application.
9. WMTX's application failed to provide for adequate protection of groundwater, particularly in relation to the effects of the IWU and Phase I on groundwater.
10. WMTX's application failed to provide for adequate protection of surface water, particularly in relation to the effects of the IWU and Phase I on surface water
11. WMTX is required to monitor the groundwater for the entire ACRD facility.
12. WMTX failed to demonstrate in its application how it will adequately monitor the IWU and/or Phase I areas for groundwater.
13. The groundwater monitoring system proposed in the application should sample and analyze for constituents in addition to those required to be tested by agency rules.
14. The groundwater monitoring system proposed in the application should specifically be required to sample and analyze constituents that have been detected in monitoring wells that either intentionally or incidentally monitor or have monitored for releases from the IWU or Phase I.
15. The application failed to include adequate provisions for proper slope stability, particularly in relation to the proposed "piggyback" liner system.
16. The application failed to include adequate provisions to manage landfill gas.
17. The application failed to include adequate provisions for cover.
18. The application failed to provide adequate information related to transportation.

19. The application failed to include adequate provisions for closure and post-closure.
20. There are currently 1,487 residences located within one mile of the ACRD facility.
21. The ACRD landfill is located in Austin Planning Area 22, which had the largest population growth in the entire City of Austin between 1990 and 2000, increasing by 133.2%, from 40,528 to 94,522.
22. From 2000 through May 2008, the area within a five-mile radius of the ACRD landfill added 7,835 new households.
23. Developers have planned a total of 17,963 lots for single-family housing in the area surrounding the ACRD landfill.
24. Developers have planned an additional 8,778 multi-family housing units in the area surrounding the ACRD landfill.
25. Combined, there are 26,741 new households planned in the area surrounding the ACRD landfill.
26. There are one school, one daycare center, one historical site, and five recreational areas located within one mile of the ACRD facility.
27. The Bluebonnet Trails Elementary School is located approximately 4,823 feet from the ACRD facility.
28. The Children's Courtyard is located approximately 3,445 feet from the ACRD facility.
29. The Barr Mansion is located approximately 2,400 feet from the ACRD facility.
30. The expansion area proposed by WMTX in its application will bring the area of active landfilling closer to a historical site, the Barr Mansion.
31. Children have been unable to play outside at the Children's Courtyard and Bluebonnet Trails Elementary School because of nuisance odor conditions coming from the landfill areas.
32. Nuisance conditions have been caused by operation of the ACRD facility in the past.

33. Nuisance conditions continue to occur on occasion as a result of the operation of the ACRD landfill.
34. WMTX failed to include adequate provisions to address spilled and windblown waste in its application.
35. WMTX failed to include adequate provisions to address nuisance odors in its application.
36. WMTX failed to include adequate provisions to address dust in its application.
37. WMTX failed to include adequate provisions to address maintenance of site access roads in its application.
38. WMTX failed to include adequate provisions for screening in its application.
39. The area surrounding the ACRD landfill is located in the City of Austin's Desired Development Zone, and is an area experiencing rapid residential growth.
40. The land use in the area surrounding the ACRD landfill has changed since landfilling operations first began in 1970, becoming increasingly residential in use.
41. The operation of the ACRD landfill constitutes a land use that is incompatible with the residences surrounding the facility.
42. Developers of land surrounding the ACRD facility have focused their development on parcels of land furthest from the landfill.
43. Neighbors and owners of property in the vicinity of the ACRD landfill believed that the ACRD landfill would cease operations at the expiration of its Permit No. MSW-249C, sometime between 2010 and 2015.
44. The ACRD landfill is immediately south/southwest of the BFI Sunset Farms Landfill.
45. BFI has committed to cease all waste-handling operations at its Sunset Farms Landfill no later than November 1, 2015.
46. WMTX has capacity remaining on its Permit No. MSW-249C to continue operations through approximately 2014, assuming current waste acceptance rates.
47. The ACRD landfill is located in the City of Austin, Texas, and/or its ETJ.

48. The ACRD landfill is located in Travis County, Texas.
49. The City of Austin does not believe the continued operation of the ACRD landfill is a land use that is compatible with the residences located adjacent to the facility.
50. Travis County does not believe the continued operation of the ACRD landfill is a land use that is compatible with the residences located adjacent to the facility.
51. The proposed expansion is incompatible with existing land use in the surrounding area.
52. The Capital Area Council of Governments (CAPCOG) does not believe the continued operation of the ACRD landfill is a land use that is compatible with the residences located adjacent to the facility.
53. Operations at the ACRD landfill have resulted in noise-related nuisance conditions which have interfered with adjacent, residential and/or commercial land use.
54. WMTX's application does not contain adequate provisions to control noise, both at the facility and from the trucks traveling to and from the landfill.
55. Residents who live near the ACRD landfill are concerned about its operating 24 hours a day, 6 days a week.
56. The operational hours proposed by WMTX are inappropriate for a landfill operating in a residential area.
57. WMTX received the highest fine ever levied by the TCEQ against a municipal solid waste facility in 2004.
58. The Applicant was originally fined \$881,508 by the TCEQ in 2004 for several violations of its rules.
59. The \$881,508 fine was reduced to \$244,420 as part of Agreed Order No. 2004-0384-MLM-E.
60. The TCEQ received approximately 800 odor complaints concerning the landfill prior to the entry of the 2004 Agreed Order.
61. As part of the Agreed Order, WMTX implemented corrective measures at its facility.

62. The number of complaints decreased significantly after WMTX implemented these corrective measures.
63. Hundreds of additional complaints concerning the WMTX landfill have been filed with other governmental bodies, primarily the City of Austin and Travis County.
64. WMTX's compliance history warrants denial of this expansion application.
65. WMTX's proposed expansion does not conform to CAPCOG's approved Regional Solid Waste Management Plan.
66. CAPCOG reviewed WMTX's expansion application under both its 2002 and 2005 RSWMP's (which were pending approval from TCEQ and were subsequently approved) and found that WMTX's expansion application did not conform to either version of its RSWMP.
67. The TCEQ formally adopted CAPCOG's 2002-2022 RSWMP on May 31, 2007, with minor changes unrelated to the provisions under which CAPCOG found WMTX's application did not conform to the plan.
68. On April 16, 2008, after formal approval of its RSWMP by the TCEQ, CAPCOG reaffirmed its earlier determination that the WMTX expansion application did not conform to its RSWMP.
69. CAPCOG performed a land use/impact study as part of its evaluation of the WMTX application, and found that the continued operation of the WMTX landfill would be an incompatible land use for this area.

#### **IV. PROPOSED CONCLUSIONS OF LAW**

1. The application does not provide adequate protection of groundwater, in violation of 30 TAC §330.403.
2. The slope stability analyses provided in WMTX's application failed to demonstrate that the proposed expansion would be sufficiently stable, particularly in relation to the "piggyback" liner system, in violation of 30 TAC §330.337.
3. The groundwater monitoring system proposed in WMTX's application failed to meet the requirements of 30 TAC §330.403.
4. The application does not provide adequate protection of surface water, in violation of 30 TAC §330.303.

5. WMTX failed to include sufficient information in its application to demonstrate that WMTX's landfill is protective of groundwater, particularly in relation to the Industrial Waste Unit and Phase I area, in violation of 30 TAC §§330.403 & 330.57(d).
6. WMTX's application failed to demonstrate the sufficiency of the Groundwater Monitoring Plan and the Point of Compliance to assess effects of the Industrial Waste Unit and Phase I area on groundwater, in violation of 30 TAC §330.403.
7. The expansion and operation of WMTX's landfill is incompatible with residential land uses in the area of its site, in violation of 30 TAC §330.61(h).
8. WMTX's application failed to demonstrate that the proposed expansion of its facility was compatible with surrounding land use and that the facility will not adversely impact human health or the environment, in violation of 30 TAC §§330.61(h) & 330.15(a).
9. WMTX failed to demonstrate that the application provided adequate provisions to prevent the creation or maintenance of a nuisance condition, specifically odors, in violation of 30 TAC §330.245.
10. WMTX failed to demonstrate that the application provided adequate provisions to prevent the creation or maintenance of a nuisance condition, specifically spilled and windblown waste, in violation of 30 TAC §§330.233 & 330.235.
11. WMTX failed to demonstrate that the application provided adequate provisions to prevent the creation or maintenance of a nuisance condition, specifically dust, in violation of 30 TAC §330.237(b).
12. WMTX failed to demonstrate that the application provided adequate provisions to prevent the creation or maintenance of a nuisance condition, specifically maintenance of site access roads, in violation of 30 TAC §330.237(c).
13. WMTX failed to demonstrate that the application provided adequate provisions to control a nuisance condition, specifically noise, in violation of 30 TAC §330.239.
14. WMTX failed to demonstrate that its operational hours are appropriate for a landfill located within five miles of 57,000 residences, in violation of 30 TAC §330.229.
15. WMTX's application failed to include adequate provisions for buffer zones or landscape screening, in violation of 30 TAC §§330.239 & 330.534.



16. WMTX's application failed to prove the expanded facility will pose no reasonable probability of adverse effects on the health, welfare, environment, or physical property of nearby residents or property owners, in violation of 30 TAC §330.15(a).
17. WMTX's compliance history does not warrant an expansion, according to 30 TAC §60.3.
18. The evidence in the record demonstrates that WMTX began construction of the proposed lateral expansion prior to the issuance of the draft permit, in violation of 30 TAC §330.7.
19. WMTX's continued operation does not conform to CAPCOG's Regional Solid Waste Management Plan, in violation of 30 TAC §330.641(d) and Texas Health and Safety Code §363.066.
20. The expansion proposed in this application does not conform to CAPCOG's Regional Solid Waste Management Plan, in violation of 30 TAC §330.641(d) and Texas Health and Safety Code §363.066.
21. The information supplied by WMTX in its application failed to contain information of sufficient completeness, accuracy and clarity to provide assurance that operation of the site would pose no reasonable probability of adverse effects to the health, environment or physical property of nearby residents or landowners, in violation of 30 TAC §330.57(d).

## **V. PROPOSED ORDERING PROVISIONS**

Travis County re-urges its request that the following provisions be ordered:

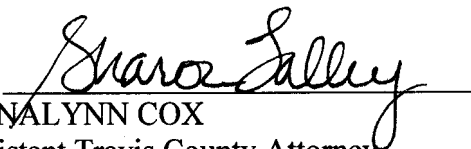
1. That the Application of Waste Management of Texas, Inc. for a lateral expansion permit No. MSW-249D be denied.
2. In the alternative, in the event the application is granted, that WMTX's permit to accept waste and operate as a transfer station expire on November 1, 2015.
3. In the alternative, in the event the application is granted, that WMTX be restricted to operating during daylight hours, Monday-Friday.
4. In the alternative, in the event the application is granted, that WMTX be ordered to move its point of compliance line or install additional monitoring wells on an additional point of compliance line in the drainage ditch south of the IWU and

north of the Phase I area, and in any other location deemed necessary to adequately monitor the entire facility.

5. In the alternative, in the event the application is granted, that WMTX be required to test for the following additional constituents: 1,4-dioxane, methylene chloride, 1,2,3-trichlorobenzene, and any other potentially hazardous constituents found in wells monitoring groundwater from the IWU.
6. That all references to the Phase I area as the Travis County Landfill be deleted from the draft permit.
7. That the Applicant, Waste Management of Texas, Inc. pay all transcript costs.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

**I hereby certify that on May 29, 2009, a true and correct copy of Travis County's Reply to Closing Arguments was served via facsimile, Electronic Delivery, First-Class Mail and/or Hand Delivery to the persons listed below.**

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**TCEQ Chief Clerk**

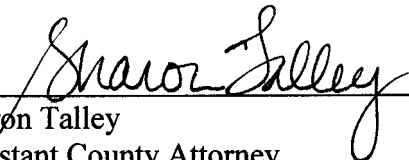
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*Via Facsimile*

**Administrative Law Judge**

The Honorable Roy Scudday  
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