

Buddy Garcia, *Chairman*  
Larry R. Soward, *Commissioner*  
Bryan W. Shaw, Ph.D., *Commissioner*  
Mark R. Vickery, P.G., *Executive Director*



## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

May 8, 2009

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

CHIEF CLERKS OFFICE

2009 MAY -8 PM 1:36

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

Re: Executive Director's Closing Arguments  
TCEQ Docket No. 2006-0612-MSW  
SOAH Docket No. 582-08-2186

Ms. Castañuela:

Enclosed for filing is the "Executive Director's Closing Argument."

Please find one copy of this letter to you, and one copy of the Closing Argument. Please file stamp these documents and return to Amie Richardson, Attorney, Environmental Law Division, MC 173. If you have any questions or comments, please call me at 512/239-2999.

Sincerely,

A handwritten signature in cursive script that reads "Amie Richardson".

Amie Dutta Richardson  
Attorney  
Environmental Law Division

Enclosures

cc: Attached service list  
via e-mail

Buddy Garcia, *Chairman*  
Larry R. Soward, *Commissioner*  
Bryan W. Shaw, Ph.D., *Commissioner*  
Mark R. Vickery, P.G., *Executive Director*



## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

May 8, 2009

The Honorable Roy Scudday  
Administrative Law Judge  
State Office of Administrative Hearings  
300 W. 15<sup>th</sup> Street, Suite 502  
Austin, Texas 78701

Re: Executive Director's Closing Arguments  
TCEQ Docket No. 2006-0612-MSW  
SOAH Docket No. 582-08-2186

Dear Administrative Law Judge Roy Scudday:

Enclosed is a true and correct copy of the "Executive Director's Closing Argument."

The original Closing Argument was filed with the Office of the Chief Clerk of the Texas Commission on Environmental Quality on this day by Amie Richardson, Environmental Law Division, MC 173. If you have any questions or comments, please call me at 512/239-2999.

Sincerely,

A handwritten signature in cursive script that reads "Amie Dutta Richardson".

Amie Dutta Richardson  
Attorney  
Environmental Law Division

Enclosures

cc: Attached service list

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

2009 MAY -8 PM 1:36

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

CHIEF CLERKS OFFICE

**EXECUTIVE DIRECTOR'S CLOSING ARGUMENT**

**I. INTRODUCTION**

This is a Municipal Solid Waste landfill expansion contested case hearing to determine whether the Texas Commission on Environmental Quality should approve a permit amendment, proposed as MSW-249D, and issue the permit to Waste Management of Texas, Inc.

**II. PARTIES**

The parties are as follows: the Applicant, Waste Management of Texas, Inc. (Applicant or WMTX); Protestants, Travis County, City of Austin, Northeast Neighbors Coalition; as well as the Office of Public Interest Counsel of the Texas Commission on Environmental Quality (TCEQ or Commission), the Executive Director of the TCEQ, and other individuals who did not participate in the live hearing, the pleadings or the discovery but who are on the attached service list. Another party, TJFA, L.P., is both an affected person and is affiliated with a competitor of WMTX.<sup>1</sup>

**III. JURISDICTION AND STANDARD OF REVIEW**

The TCEQ has jurisdiction over aspects of municipal solid waste (MSW) management under the stated purpose of Texas Health and Safety Code (THSC), Chapter 361 which authorizes the Commission to control all aspects of the management of MSW.<sup>2</sup> The WMTX application is the first to be reviewed under the 30 TAC Chapter 330 (effective March 27, 2006).

The Standard of Review in this proceeding is governed by the Texas Water Code enabling procedural rules of Chapter 30 Texas Administrative Code. Issues and evidentiary

<sup>1</sup> ALJ Scudday has taken Judicial Notice of this status at Tr. p.1287:20-21. The Executive Director does not dispute any judicial notice.

<sup>2</sup> See THSC §§ 361.011, 361.024, 361.061. See also 31 TexReg 2538-39 (March 24, 2006 implementing new 30 Texas Administrative Code (TAC) Chapter 330) and 30 TAC § 330.1 *et seq.*

relevancy are limited in a direct referral matter. Pursuant to HB801 amendments to the Texas Water Code at §5.557(a) and 30 TAC §55.210, the central issue to be decided is whether the application complies with all applicable statutory and regulatory requirements. Thus, the Executive Director primarily considers evidence relating directly to how an applicant complies with a relevant statute or rule of MSW permitting found in THSC Chapter 361, the current 30 TAC Chapter 330, and any other statute or regulation only if directly applicable to the application requirements.

#### **IV. PROCEDURAL HISTORY**

The permit amendment application<sup>3</sup> (Application) was received on August 26, 2005, in accordance with the version of 30 TAC Chapter 330 that was effective prior to the March 2006 revisions of Chapter 330 rules (March 2006 Revisions). WMTX subsequently elected to update the Application to meet the March 2006 Revisions. The updated Application was submitted on October 20, 2006. A Notice of Receipt of Application and Intent to Obtain Permit (NORI) was prepared, and the TCEQ Office of the Chief Clerk mailed the NORI on or about September 15 or 16, 2005. WMTX published the NORI on October 14, 2005 in the *Austin American-Statesman* (English version) and in *El Mundo* (Spanish version). The WMTX Application was declared technically complete on January 4, 2008. A Notice of Application and Preliminary Decision (NAPD) was prepared, and the TCEQ Office of the Chief Clerk (OCC) mailed the NAPD on February 8, 2008. WMTX published the NAPD on February 14 and 15, 2008 in the *Austin American-Statesman* (English version) and in *El Mundo* (Spanish version).

Changes were made to the Technical Summary and the Draft Permit after the Executive Director declared the WMTX Austin Community Recycling and Disposal Facility Application Technically Complete on January 4, 2008. The Executive Director considered the changes to be minor and not affecting any permit condition. As a result of the revisions, the Executive Director revised and re-issued the Technically Complete Package under an Addendum to the Technically Complete Letter dated January 17, 2008. Executive Director staff prepared the Draft Permit Package for the Application and delivered it to the TCEQ's OCC on January 22, 2008.

Executive Director staff also made changes to the Draft Permit Package and minor

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<sup>3</sup> All references to the Application refer to Exhibit APP202 and pagination of APP202 and to alleviate excessive footnoting and citation when general sections and appendices are mentioned there are not footnote or page references.

changes to the NAPD as proposed by WMTX. The revised NAPD was that mailed by the TCEQ's OCC and published by WMTX in February 2008.

A public meeting was held at the Texas Education Agency Region XIII Education Service Center in Austin, Texas on April 14, 2008. A preliminary hearing was held on April 16, 2008, at State Office of Administrative Hearings (SOAH) Office in Austin, Texas at which time parties were admitted.

The Executive Director prepared a Response to Comments (RTC) and filed it with the TCEQ's Office of the Chief Clerk on June 13, 2008.<sup>4</sup>

A contested case hearing was held from March 30, 2009 to April 13, 2009 at State Office of Administrative Hearings Office in Austin, Texas. All items listed as the administrative record as described in 30 TAC §80.118 were admitted, including the RTC pursuant to 30 TAC §80.126 because this contested case hearing arose out of a direct referral under 30 TAC §55.210.<sup>5</sup>

## **V. BACKGROUND**

WMTX seeks an amendment for expansion of the municipal solid waste facility permitted under MSW Permit No. 249C is located at 9900 Giles Road approximately 250 feet north of the intersection of Giles Road and Highway 290 in Austin, Travis County, Texas. The street address is 9900 Giles RD Austin, Texas 78754. WMTX requested the expansion under the proposed MSW Permit No. 249D application (Application), which expands the Facility laterally by adding 71.11 acres to the permitted boundary for a total permitted area of 359.71 acres while maintaining the current maximum elevation of 740 feet above mean sea level (ft-msl).

The proposed lateral expansion will increase the permitted disposal capacity from 26,463,170 cubic yards to approximately 39,137,000 cubic yards and extend the anticipated remaining life to 2025 (19.4 years starting from 2006). The landfill will have a maximum below-grade excavation to elevation of 484 ft-msl (at the deepest bottom of leachate sump) and a maximum elevation of final cover of 740 ft-msl.

Authorized wastes are currently accepted at the Facility at the rate of approximately 447,658 tons-per-year. The Facility proposes ultimately to accept 673,183 tons-per-year of

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<sup>4</sup> See ED Exhibit No. 3

<sup>5</sup> Tr. pp. 2302:19 – 2308, 1,25 regarding ED1, ED2, ED3, APP100, APP103, APP203, APP205, APP206, APP208, APP209.

authorized waste by the final full year of site operations.

In addition to the issues regarding the amendment to expand the 249C units, much testimony and evidence was presented about whatever may be left of two older units on WMTX property: an older unit called the Industrial Waste Unit (IWU) and the Phase I area. Because the ALJ has requested discussion on these units and because Protestants interrogated witnesses at length, the Executive Director offers the following regulatory background and discussion.

The IWU and the Phase I units are located in around and under the central and southern portions respectively of the Austin Community Recycling and Disposal Facility. The two units closely resemble solid waste disposal units under modern TCEQ rules, but they predate any applicable environmental laws and regulations, thereby not qualifying for regulatory terms of art. The Applicant and other witnesses have confirmed with an abundance of testimony and statements in the Application that the IWU stopped receiving waste sometime in the early 1970s and that the Phase I unit stopped receiving waste sometime in the 1980s. In the Application, WMTX states that the Pre-Subtitle D cells at the IWU were constructed with an in-situ clay barrier, a minimum 3 foot thick compacted clay liner or a combination of both.

The older units are not subject to current statutes and rules regarding the proposed expansion. To understand why, the Executive Director offers some history on the MSW program. The State of Texas RCRA Subtitle D program was approved by EPA as an appropriate RCRA Subtitle D implementing 40 C.F.R. Parts 257 and 258 in 1993.<sup>6</sup> In the 1993 version of Chapter 330 as approved by EPA to implement the Subtitle D program, 30 TAC 330.1(b) states:

To the extent that a standard has been changed by this chapter, the permittee may continue to operate under standards contained in previous issued permits, except for those requirements mandated by EPA 40 [CFR] Parts 257 and 258, which implement certain requirements of Subtitle D of [RCRA]<sup>7</sup>

The United States Resource Conservation and Recovery Act at Subtitle D, 42 U.S.C. §6491 *et seq.*, Solid Waste Disposal Act §4001 *et seq.* (RCRA) and its applicable federal regulations found at 40 C.F.R. Parts 239, 257 and 258 were examined by the Executive Director to see if the above exception applied to these older units. First, it is important to note that EPA granted Texas a Subtitle D program in 1993, the Texas program has not needed to go through EPA

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<sup>6</sup> 18 TexReg 1486 (March 9, 1993) as proposed and 18 TexReg 4023 (June 18, 1993) as adopted.

<sup>7</sup> 18 TexReg 4023 (June 18, 1993)

approval for sometime as explained in 40 C.F.R. §239.2(a)(2), “state Subtitle D permit programs which received full approval prior to November 23, 1998, need not submit new applications for approval under this part. This long-standing EPA approval means that the older units would preexist the existence of RCRA Subtitle D and Texas MSW statutes and rules.

The Executive Director has determined the stated exception of the 1993 version of 30 TAC §330.1 does not apply. EPA is very clear at 40 C.F.R. §258.1(c), which states that, “these criteria do not apply to municipal solid waste landfill units that do not receive waste after October 9, 1991.” Abundant undisputed evidence was offered to suggest both the IWU and the Phase I stopped receiving waste well before the 1990s so they are not subject to the criteria of 40 C.F.R. Part 258. Thus, the units are not subject to modern MSW statutes and rules, and more importantly, this review of the proposed MSW application 249D.<sup>8</sup>

However, it is vitally important to understand that the Executive Director is not saying that a documented release from these units would not be subject to other environmental laws and statutes, rather the Executive Director is simply stating that the issue of impacts of the IWU and Phase I on surface water and groundwater are outside the Standard of Review for this proceeding. The evidence offered at the contested case hearing on the nature and characterization of the waste is limited to the context of RCRA, Subtitle D and TCEQ MSW statutes and rules, and not any other environmental media or statutory/regulatory programs. Thus, the Executive Director has similarly limited his analysis of the IWU and Phase I to the evidence offered and this context for the sake of clarity.

Unless and until a documented release occurs, the older units have not been shown to impact surface water and groundwater, at least in this proceeding.

Generally, on the issues relating to the monitoring of these units and the older waste in around and under the newer MSW, the Executive Director is not opposed to any number of possible scenarios relating to the concerns voiced by Protestants, but offers more detail under the following issue by issue discussion.

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<sup>8</sup> Both Mr. Avakian and Mr. Udenenwu have testified in this vein at Tr. pp. 2411:24 and 2442:3-21.

## 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 groundwater 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**

The Application includes information that adequately addresses the requirements in 30 TAC §330.61(k) relating to groundwater and surface water.<sup>9</sup> WMTX provides data in Section 3.4 of Parts I/II about the site-specific groundwater conditions at and near the site, data on surface water at and near the site as specified in 30 TAC §330.61(k).<sup>10</sup> WMTX provides data in Section 3.4 of Parts I/II about the site-specific groundwater conditions at and near the site, data on surface water at and near the site as specified in the following rule.<sup>11</sup>

The rule at 30 TAC §330.61(k) requires the owner or operator of an MSW facility to submit three items relating to groundwater and surface water:

- data about the site-specific groundwater conditions at and near the site;
- data on surface water at and near the site; and
- information demonstrating how the facility complies with the Texas Pollutant Discharge Elimination System (TPDES) storm water permitting requirements and the Clean Water Act §402, as amended.

Generally speaking, the Applicant's expert witnesses, Mr. Jay Winters, P.G., and Mr. Charles Dominguez, P.E., were qualified experts and provided their sealed the groundwater and surface water statements in the Application and orally confirmed under oath that stated the systems in place for the Facility are appropriate.<sup>12</sup>

The Executive Director has testified that the Application adequately addresses the protection of groundwater and surface water and offers the following detailed discussion of sub-issues. The Applicant proposes proper containment and isolation of deposited waste and

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<sup>9</sup> Prefiled Testimony of Matthew Udenenwu at 21:4-22, 34.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* and Prefiled Testimony of Dominguez generally and APP202.

<sup>12</sup> Tr. p. 829:19-22. Prefiled Testimony of Dominguez and Winters. Tr. pp. 825:25--828:25(qualifying Mr. Winters as a groundwater scientist as well).



associated leachate from surrounding potential receptors. The Application proposes storm water management structures and systems that safely manage drainage into and from the site. Overall, the Application adequately prevents the discharge of contaminated water and/or solid waste into area surface waters and/or drainage ways.

**Protection of Groundwater:**

The narratives, analyses, material specifications, construction methods, testing, and quality assurance and quality control procedures described in the referenced documents indicate that the liner system design and the liner quality control plan meet the requirements contained in 30 TAC Ch. 330, Subchapter H. WMTX provides narratives that describe the liner design and construction details in Section 5 of Attachment 3 in Part III of the Application and a Liner Quality Control Plan that details liner construction quality assurance and quality control processes in Appendix E of Attachment 3. WMTX provides details showing that the proposed liner system incorporates short-term and long-term hydrostatic uplift pressure relief systems, using underdrain dewatering and ballasting methods respectively, for liners constructed below the groundwater table at the site. The WMTX Application provides calculations in Attachments C and D to Appendix E in Attachment 3 to demonstrate the adequacy of the proposed dewatering and ballasting systems respectively, to perform as intended.

The WMTX Application provides in Sections 6 and 6.1 of Attachment 3 for leachate and contaminated water management systems (collection, removal, storage, treatment and disposal) that meet the requirements specified in the MSW management rules at 30 TAC §§330.207, 330.305(g) 330.331(a)(2), 330.333, and 330.337(d). The leachate management system is designed to collect and remove generated leachate to designated collection sumps, collection ponds, recirculation into the waste mass, and/or for disposal and to maintain less than 30 centimeters of leachate depth on the liner. The contaminated water management plan is designed to capture water that has come into contact with solid waste; remove them via portable pumps, hoses, and pipes into portable tanks, tanker trucks, or directly into local publicly owned treatment works (POTW) for off-site treatment and disposal.

The Applicant has identified the uppermost aquifer and explained the groundwater flow path. The Applicant provided an analysis of the most likely pathway(s) for pollutant migration in Section 2 of Attachment 5, and illustrated pathways schematically in a groundwater flow path

map in Figure ATT5-4 in the Application.<sup>13</sup> In these parts of the Application, WMTX analyzed potential pathways for pollutant migration and concluded that in the event of a release through a penetration of the primary barrier liner system, the most probable pathway for the migration of contaminants will be through groundwater transport at the Stratum I/II interface. Mr. Winters testified that the uppermost aquifer is located at “the transition zone between the weathered and unweathered Taylor formation”<sup>14</sup> and also calls the area the transition between strata IB and II.<sup>15</sup>

The geological methods for finding the uppermost aquifer were explained by the Applicant and by and large confirmed by even the Protestant experts and evidence. Mr. Winters testified as to the methods employed, prior investigations reviewed and other data like boring location maps and boring logs used to make the determination of where the uppermost aquifer is located during nearly his entire live testimony at the contested case hearing on April 2, 2009. Mr. Pierce Chandler, P.E. a TJFA, L.P. expert also agreed that the landfill is on the Taylor Formation and added it is one of the better places for a landfill.<sup>16</sup>

TJFA, L.P.’s expert witness, Dr. Robert S. Kier, Ph.D, P.G., also testified regarding geology. Before mentioning Dr. Kier’s opinions for the first time it is important to note that in addition to representing TJFA, a competitor to WMTX, Dr. Kier also has stated his bias against TCEQ in that he does not believe that TCEQ is an independent third party.<sup>17</sup> Nevertheless, Dr. Kier could agree that the landfill is in the Taylor Formation.<sup>18</sup> Dr. Kier testified that he had only reviewed data pertaining to the expansion area and current facility from 2000, specifically the JD Consulting report (APP1), and his own personal workproduct.<sup>19</sup>

This testimony by Protestant experts, though scholarly, entertaining, and often educational, failed to analyze or provide any substantial and credible evidence to show the Application does not comply with applicable rules.

Therefore, the Application includes adequate provisions to ensure proper containment and isolation of deposited waste and associated leachate from groundwater and surrounding

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<sup>13</sup> APP202.

<sup>14</sup> Tr. p. 839:17-25.

<sup>15</sup> Tr. p. 853:9-20. *See also* Tr. p. 911:13-22.

<sup>16</sup> Tr. p. 1646:5-8.

<sup>17</sup> Tr. pp. 1302:2—1302:6.

<sup>18</sup> Kier Prefiled at 12:1.

<sup>19</sup> Kier Prefiled at 20:16.

potential receptors. The evidence admitted and the Application demonstrate that there are adequate provisions to protect groundwater in compliance with the Commission's rules.

**Protection of Surface Water:**

The proposed plan for surface water protection complies with 30 TAC § 330.61(k).<sup>20</sup>

**Surface Water Features and Drainage Ways:**

Pursuant to 30 TAC § 330.61(k) regarding data on surface water features at and near the site, the Application states in Section 3.4.2 of Parts I/II of the Application that the site is located within the Walnut Creek Watershed of the Lower Colorado River Basin.<sup>21</sup>

The major surface water features and drainage ways within the vicinity of the site are listed as Ferguson Creek, Walnut Creek, Harris Branch, Gilliland Creek, Decker Creek, and Walter E. Long Lake. Several tributaries/branches of these major creeks are scattered around the vicinity of the site. Figures 1-1 and 1-2 of Parts I/II of the Application show the locations of these features. As the Application states, the natural drainage way (the central drainage way) runs through and separates the site into two separate fill areas (the East and West Hills). The central drainage way incorporates two constructed sedimentation ponds. An additional natural drainage feature (the southwestern drainage) crosses the southwestern portion of the existing site. Both drainage ways are tributaries of the Walnut Creek.

**Surface Water Drainage Report and Management Plan:**

The surface water drainage report provides discussions, designs, and analyses that address all the elements specified in 30 TAC §330.63(c), §330.303, §330.305, and §330.307, including run-on and runoff controls, erosion and sedimentation controls, preservation of existing drainage patterns, control of contaminated water, and periodic inspection and maintenance of the surface water management structures, in a manner that meet the requirements of the above-referenced rules. WMTX addressed the protection of surface water in and around the Facility by providing a surface water drainage report in Part III, Attachment 2 (*Facility Surface Water Drainage Report*) and in the Appendixes that accompany Attachment 2, and presents a contaminated water management plan in Part III, Attachment 3, Section 6.1 of the Application.

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<sup>20</sup> Udenenwu Prefiled, ED1, at 21:4—22:34

<sup>21</sup> *Id.* At 28:1 to 30:43.

The contaminated water management plan includes analyses and descriptions of techniques and control practices to keep stormwater from coming in contact with solid waste by using cover practices, diversion and retention structures, methods and practices for managing stormwater that come in contact with solid waste, including collection, storage, discharge and treatment methods includes provisions all designed to prevent unauthorized discharges into area surface waters and/or drainage ways.

For the proposed condition, WMTX indicates that the drainage collection systems will include interceptor berms, downslope channels, and perimeter channels as in the existing condition. The portion of the existing system (the east hill and the eastern portion of the west hill) that drain into the central drainage way will not be modified by the expansion. WMTX proposes to develop a detention pond along the west-central portion of the expanded facility permit boundary. Storm water from the western portion of the west hill and the new expansion area will be routed through this pond. Storm water flowing through the central drainage way is routed through two sedimentation ponds constructed within the drainage way and discharges into an unnamed tributary of Walnut Creek where the drainage way intersects the southern permit boundary. The west pond discharges into a tributary of the Walnut Creek which parallels the northwestern boundary of the permit boundary.

Existing or Permitted Drainage Patterns will not be Adversely Altered:

The WMTX Application includes adequate provisions that demonstrate that existing or permitted drainage patterns will not be adversely altered as a result of the landfill development as required by MSW regulations.<sup>22</sup> According to 30 TAC §330.63(c)(1)(C), an applicant should provide sample calculations to verify that existing drainage patterns will not be adversely altered. Also, 30 TAC §330.63(c)(1)(D)(iii) specifies that discussions and analyses must be submitted to demonstrate that existing drainage patterns will not be adversely altered as a result of the proposed landfill development and 30 TAC §330.305(a) specifies that existing or permitted drainage patterns must not be adversely altered.

The surface water drainage report that WMTX provides in the Application at Part III, Attachment 2 (*Facility Surface Water Drainage Report*) and in the Appendixes that accompany Attachment 2, includes discussions and analyses and design calculations for the collection,

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<sup>22</sup> Udenenwu Prefiled at 31:1 to 32:3.

control, detention, and discharge of storm water run-on into and run-off from the site for the currently permitted (pre-development) and for the proposed expanded landfill (post-development) conditions.

WMTX states in Section 3.0 (*Post-Development Drainage Conditions and Design*) of Attachment 2 in Part III of the Application that the off-site drainage basins contributing flow to the developed landfill will remain the same as those for the pre-development conditions. The storm water discharge points at the Facility boundary remain the same as the pre-development conditions, excepting two discharge points (CP1 and CP6) that have flows to them rerouted. Drainage run-off from the site into the Walnut Creek tributaries in the southwestern and southern boundaries of the site is retained.

WMTX provides discussions and calculation results in Section 3.1 and in Figure Nos. ATT2-1B and ATT2-2 within Attachment 2 which compare the predevelopment and the proposed development drainage flow rates, discharge volumes and velocities at the Facility boundary discharge points to demonstrate that the existing drainage patterns will not be adversely altered as a result of the proposed landfill expansion. WMTX also provides narratives and analyses and calculation results in Section 3.0 (*Post-Development Drainage Conditions and Design*), Figure Nos. ATT2-1B and ATT2-2, and in Appendix A of Attachment 2, to demonstrate that all the drainage structures have been sized and appropriately lined ( using vegetation, turf reinforcement mat, rock rip rap, etc.) to handle the peak flow from at least a 25-year, 24-hour storm event, to control surface erosion, and to ensure that the construction of the MSW landfill and the drainage control features, as designed, will prevent a significant alteration in the peak storm water discharge rate, discharge volume, and flow velocity off the developed site as required.

The drainage patterns will not be adversely altered. Even Mr. Lawrence Dunbar, P.E., J.D., an expert for TJFA, on live cross-examination, testified that, upon reflection, he agrees drainage patters would not be adversely altered. His revelation occurred when he considered older methods and newer methods were not compatible. In other words, when the appropriate methodologies are applied to his review of prior applications and modifications, pre-development and existing conditions, then calculations prove that the drainage patterns would

not be adversely altered.<sup>23</sup> Mr. Matthew Udenenwu, EIT, representing the Executive Director, also reconsidered Mr. Dunbar's testimony and positions and agreed that it is not necessary to compare go back to far into the older conditions because the new rule simply does not require such an analysis.<sup>24</sup> Mr. Udenenwu clarified that the Executive Director examines prior modifications for compliance with this rule.<sup>25</sup>

### Flood Protection

WMTX provides floodplain evaluation narratives in Section 5.0 (*Floodplain Evaluation*) of Attachment 2 and the Federal Emergency Management Agency's (FEMA) Flood Insurance Rate Maps (FIRM) for the area in Appendix B-5 (*Floodplains*) of Parts I/II of the Application to demonstrate that a small portion of the site is located within a 100-year floodplain, but that the landfill waste disposal area is located outside of the 100-year floodplain and waste disposal operations will not occur within the 100-year floodplain.

Therefore, the evidence admitted and the Application demonstrate that there are adequate provisions to protect surface water in compliance with the Commission's rules.

WMTX provides a surface water drainage report that covers management and control of stormwater run-on and run-off that covers the entire Facility as proposed, including the IWU and the Phase I areas. For reasons of equity and respect for the concerns raised by those parties, the Executive Director would not be opposed to informal arrangements regarding monitoring of these units or even as part of a permit condition -- subject to review by TCEQ as appropriate. The Executive Director agrees that the Applicant is required to monitor any source of contamination within its permit boundary as will be discussed in the next issue.<sup>26</sup> Also, the Executive Director will continue to monitor reports from the City of Austin/WMTX voluntary agreement and if a documented release or emergency arises, the TCEQ will respond.

The Executive Director reviewed the Application and other evidence presented at the contested case hearing and concluded that neither older unit affects surface water drainage or groundwater protection in ways different from the rest of the units or any other conceivable source of concern within the Facility.

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<sup>23</sup> Tr. pp. 1539:2-23 and pp. 1540-1544:24.

<sup>24</sup> Tr. pp. 2347:23—2349:24 and pp. 2350--2353

<sup>25</sup> Tr. p.2407:18-21.

<sup>26</sup> City of Austin 6.

**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.**

Groundwater Monitoring Plan

30 TAC § 330.401 requires the owner or operator of a municipal solid waste landfill unit to conduct groundwater monitoring. The Applicant's expert has testified, in addition to reading rule 30 TAC §330.403(a) into the record, that "the purpose of the groundwater monitoring system is to yield samples representative of the groundwater to provide a means to detect any potential releases from the landfill."<sup>27</sup> A groundwater monitoring system must consist of a sufficient number of monitoring wells, installed at appropriate locations and depths, to yield representative groundwater samples from the uppermost aquifer.<sup>28</sup> The proposed groundwater monitoring system is shown on the drawing labeled ATT5-5, in Attachment 5 of the Application.

30 TAC § 330.63(f) of requires an applicant for an MSW permit provide a Groundwater Sampling and Analysis Plan (GWSAP) that meets the requirements of 30 TAC § 330.63(f) and Subchapter J of Chapter 330. The GWSAP is included as Appendix B of the Application.<sup>29</sup> A GWSAP must include procedures and techniques for sample collection, sample preservation and shipment, analytical procedures, chain of custody controls, and quality assurance and quality control, provide for the measurement of groundwater elevations, and include sampling and analytical methods that are appropriate for groundwater sampling that accurately measure hazardous constituents and other monitoring parameters in groundwater samples.<sup>30</sup> 30 TAC § 330.407 requires the owner or operator of a Type I municipal solid waste landfill unit to conduct detection monitoring, sets the standards for the evaluation and reporting of monitoring results, and requires the owner or operator to initiate assessment monitoring if a statistically significant increase over background levels of any tested constituent is detected. Rule 30 TAC § 330.409 sets out the procedures for evaluating and acting on the results of assessment monitoring.

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<sup>27</sup> Tr. p. 8318-23 and 836. *See also* Tr. p. 912:15-22.

<sup>28</sup> 30 TAC § 330.403.

<sup>29</sup> APP202 at 3085.

<sup>30</sup> 30 TAC § 330.405.

Mr. Don Hultman and Ms. Diana Rader testified for Applicant regarding Groundwater Sampling and Analysis Plan (GWSAP). The Applicant provided a Groundwater Sampling and Analysis Plan containing a detection monitoring program as required by § 330.63(f)(5)<sup>31</sup>. Mr. Hultman testified that the GWSAP is “sample collection, the measurements, the QA/QC [quality assurance/quality control] related to field activities, followed by the laboratory analysis, some of the QA/QC requirements of that, followed by statistical analysis of those data.”<sup>32</sup> Mr. Hultman refers to Volume V of VI, Attachment 5 at page 3085, Appendix B to Attachment V, Part III to discuss procedures.<sup>33</sup> Mr. Hultman testified that the purpose of detection monitoring is to determine if there has been a release from the landfill.<sup>34</sup> Mr. Winters prepared the groundwater monitoring system and testified about it extensively.<sup>35</sup> He is a qualified groundwater scientist as evidenced by his resume and testimony.<sup>36</sup>

#### Groundwater Characterization Report

The Groundwater Characterization Report contains an analysis of the most likely pathway(s) for pollutant migration, in Section 2 of Attachment 5, as required by 30 TAC § 330.63(f)(3).<sup>37</sup> Part III, Attachment 5 of the Application contains a report entitled “Groundwater Characterization and Monitoring Report.”<sup>38</sup> The report also identifies the uppermost aquifer, as required by 30 TAC § 330.63(e)(5)(F).<sup>39</sup> Section 4.1 of the report discusses the existing groundwater monitoring system at the Facility,<sup>40</sup> while Section 4.2 discusses the proposed groundwater monitoring system.<sup>41</sup> Section 4.1 of the report states that the Facility is currently monitored by 15 groundwater monitoring wells screened at the Stratum I/II interface.

As part of its Groundwater Characterization and Monitoring Report, WMTX submitted a topographic map, delineating the waste management area, the property boundary, the proposed point of compliance, and the proposed location of groundwater monitoring wells.

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<sup>31</sup> Avakian Prefiled at 8:22—9:3, 13:16—14:17 and 15:4—15:11.

<sup>32</sup> Tr. p. 1132:1-25.

<sup>33</sup> Tr. p. 1133:1-7.

<sup>34</sup> Tr. p. 1137:10-16.

<sup>35</sup> Tr. p. 825:22-24 and Tr. of April 2, 2009 generally.

<sup>36</sup> Tr. pp. 825:25--828:25.

<sup>37</sup> *Id.* at 2991.

<sup>38</sup> App-202 at 2787 - 3138.

<sup>39</sup> *Id.* at 3000.

<sup>40</sup> *Id.* at 2999.

<sup>41</sup> App-202 at 2999.



Mr. Winters was the Applicant's consultant who designed the groundwater monitoring system of wells, and he discussed the placement, spacing and design of the wells in his live testimony.<sup>42</sup> Mr. Winters also discussed the placement of wells both horizontal spacing and vertical depth in his testimony.<sup>43</sup> Two wells are located upgradient (MW-5A and MW-15), while 13 wells are located downgradient (MW-2C, MW-7, MW-8, MW-9, MW-10, MW-11, MW-12, MW-13, MW-20, MW-21, MW22A, MW-33, and MW-34). Section 4.2 of the report provides that the proposed monitoring system will consist of 31 monitoring wells screened at the Stratum I/II interface. The proposed groundwater monitoring system will be comprised of 12 existing monitoring wells (MW-2C, MW-8, MW-9, MW-10, MW-11, MW-12, MW-13, MW-15, MW-20, MW-21, MW-30, and MW-34) and 19 additional wells (MW-35 – MW-53). Section 4.2 of the report also states that the locations and depths of the monitoring wells are designed to allow determination of the quality of groundwater passing the point of compliance and ensure the detection of groundwater contamination at the Stratum I/II interface, prior to any contaminants entering the Edwards Aquifer.

The Application provides an analysis of the most likely pathway(s) for pollutant migration, in Section 2 of Attachment 5, as required by 30 TAC §§ 330.63(f)(3), and illustrates pathways schematically in a groundwater flow path map in Figure ATT5-4 in the Application. The Applicant illustrated pathways schematically in a groundwater flow path map in Figure ATT5-4.<sup>44</sup> Regarding potential pathways for pollutant migration, the Applicant concluded in Section 2 of Attachment 5 that in the event of a release through a penetration of the primary barrier liner system, the most probable pathway for the migration of contaminants will be through groundwater transport at the Stratum I/II interface.<sup>45</sup>

WMTX also provides information regarding hazardous constituents, as required by 30 TAC Chapter 330, §§ 330.63(f)(2), (6), and (7) in the Groundwater Characterization and Monitoring Report (Attachment 5 to Part III of the Application). The rules require at 30 TAC § 330.63(f)(2) a description of any plume of contamination that has entered the groundwater from an MSW management unit at the time that the Application was submitted. The Application did

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<sup>42</sup> Tr. pp. 1029:5 -- 1031:20.

<sup>43</sup> Tr. pp. 837 -839. *See also* Tr. p. 913:1-12 and 915:8 -- 918:22.

<sup>44</sup> *Id.* *See* APP 202.

<sup>45</sup> *Id.*

not indicate that any plume of contamination had entered the groundwater from an MSW management unit at the site at the time the Application was submitted.<sup>46</sup> Therefore, §§ 330.63(f)(6) and (7) do not apply. Mr. Arten Avakian, P.G., representing the Executive Director, discussed how the Applicant submitted information and data regarding the site-specific groundwater conditions at and near the site in his prefiled testimony.<sup>47</sup> The Applicant included that information in Figure ATT5-5 in Attachment 5 (Groundwater Characterization and Monitoring Report) in Part III of the Application.<sup>48</sup> :

#### Point of Compliance

A point of compliance monitoring system must be installed to determine the quality of groundwater passing the point of compliance and to ensure the detection of groundwater contamination in the uppermost aquifer.<sup>49</sup> The point of compliance is defined as “a vertical surface located no more than 500 feet from the hydraulically downgradient limit of the waste management unit boundary, extending down through the uppermost aquifer underlying the regulated units, and located on land owned by the owner of the facility.”<sup>50</sup> Background monitoring wells must be installed to determine the quality of background groundwater that has not been affected by leakage from a unit.<sup>51</sup>

Mr. Winters also discussed point of compliance extensively after reading the applicable definition at 30 TAC §330.3(106) and stated the point of compliance is where you establish your monitoring network and that establishes the point where groundwater would be expected to be leaving the site.<sup>52</sup> Mr. Winters testified that he determined the point of compliance and agreed that Attachment 5-5 of APP202 correctly depicted his designation.<sup>53</sup> Looking at APP202, ATT 5-5, the point of compliance line “goes up and around the industrial waste unit and then just past the industrial waste unit it turns back the south” through MW46, MW51 and MW11 terminating MW13 and “basically encompasses from the northwest corner all the way over to the northeast

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<sup>46</sup> *Id.*

<sup>47</sup> Prefiled Testimony of Arten Avakian at 8:8-17.,

<sup>48</sup> *Id.* See also APP 202.

<sup>49</sup> 30 TAC § 330.403(a)(2).

<sup>50</sup> 30 TAC § 330.3(106).

<sup>51</sup> 30 TAC § 330.403(a)(1).

<sup>52</sup> Tr. p. 920:1-23.

<sup>53</sup> Tr. p. 921:5-18.

corner of the site.”<sup>54</sup> Attachment 5-4 of APP202 depicts as its title describes, the Groundwater Flow Path Map and identifies upgradient and downgradient portions of the site and to establish flow patterns for the Facility.<sup>55</sup>

It is important to note that the POC does not influence the engineering of the landfill. Mr. Dominguez, engineer of record for the Application, testified that the location of the point of compliance would not affect his design of the landfill because the design aspects of the landfill “go right up to the permit boundary, and the point of compliance is not at the permit boundary on every location of this landfill.”<sup>56</sup> Mr. Dominguez also testifies that the point of compliance “by definition is hydraulically downgradient, and there’s portions of the site that are not downgradient. So the point of compliance wouldn’t be along that portion of the landfill.”<sup>57</sup> He then clarified on cross-examination by counsel for TJFA, LP, that the point of compliance is located at downgradient portions of the landfill.<sup>58</sup>

The Executive Director has reviewed the evidence presented at the contested case hearing and concludes that that the proposed point of compliance (POC) and groundwater monitoring system design meet the requirements of 30 TAC § 330.63(e) and (f).<sup>59</sup> The proposed POC improves and increases the overall amount of groundwater monitoring at the Facility. The Executive Director has considered the evidence and the rule and offers the opinion that the proposed POC is consistent with the definition of POC in 30 TAC § 330.3(106), which defines POC as “a vertical surface located no more than 500 feet from the hydraulically downgradient limit of the waste management unit boundary, extending down through the uppermost aquifer underlying the regulatory units, and located on land owned by the owner of the facility.” The total length of the proposed POC is now greater than the existing POC and there will be more groundwater monitor wells (from the current 15 to a total of 31). The Applicant has also proposed to install 10 additional, deep monitoring wells in the western portion of the Facility. The proposed groundwater monitoring system meets the default 600-foot-maximum groundwater monitoring well spacing requirement in § 330.403(a)(2).

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<sup>54</sup> Tr. pp. 922: 9 -- 923:18.

<sup>55</sup> Tr. p. 928:10-21.

<sup>56</sup> Tr. p. 272:12-25, APP202 at ATT 5-5.

<sup>57</sup> Tr. p. 274: 3-14.

<sup>58</sup> *Id.*

<sup>59</sup> The source of this paragraph is the RTC, ED3, at 27-28.

The Application proposes a point of compliance (POC) as required and defined by 30 TAC §330.3(106) (Figure ATT5-5) that, according to information in Attachment 5, intercepts groundwater flow paths from all units at the site before groundwater following those paths can flow past the Facility permit boundary. The segment of the permit boundary between MW-11 and MW-12 (the points at which the proposed point of compliance (POC) turns toward the inner part of the Facility, away from the permit boundary) is upgradient from waste in that area of the Facility, and therefore would not be an appropriate position for the POC. The Application provides a discussion in Section 4.2 of Attachment 5 that details the criteria for selecting well locations along the proposed POC. The Executive Director recommends that the information in the Application is adequate to support the applicant's conclusion that the proposed POC and monitor well locations meet the requirements of § 330.403.

#### Monitoring of the IWU and Phase I Area

The Applicant considers these older units their responsibility, but the question remains as to how that responsibility will be evidenced. At the contested case hearing, Mr. Donald Smith of WMTX, testified for WMTX regarding groundwater monitoring, and stated "anything that happens within those permit boundaries (existing and proposed) is Waste Management's responsibility."<sup>60</sup> Mr. Smith also testified that in relation to Phase I and the IWU that the point of compliance will monitor flow of groundwater from anywhere suggesting WMTX understands that the point of compliance line and groundwater monitoring plan could monitor a variety of constituents flowing in the groundwater.<sup>61</sup> The Applicant's witness, Mr. Winters, testified that his review of the groundwater characterization included the entire Facility, meaning "everything within the property boundary or the permitted boundary."<sup>62</sup>

Incorporating by reference his previous discussions of the IWU and Phase I offered thus far, the Executive Director has considered that all parties agree that the property line, defined (subject to debate) as the permit boundary on the southern side, must be monitored as the statutes and regulations require to protect neighbors from any releases by any media (air, water, and waste) from the entirety of the Facility both the 249C units, the older units, and the new units to

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<sup>60</sup> Tr. pp. 113:2 -- 114:11. *See also* Tr. pp.134-135.

<sup>61</sup> Tr. p. 130:4-9, 134:6 -- 135:6.

<sup>62</sup> Tr. pp. 840:12 -- 841:3.

be constructed. However, the Executive Director can appreciate that there is a limit to what can be covered by just one amendment application, namely this proposed 249D.

There are already an abundance of plans and agreements in place to monitor the property line. For example, the Executive Director is aware and informally participates in a voluntary agreement between WMTX and the City of Austin<sup>63</sup> regarding the IWU that predates this permitting action.<sup>64</sup> In addition to reviewing the Application and the current permitted 249C facility, the TCEQ has and continues to receive and review the Applicant's reports as required by the contract with the City of Austin regarding the IWU, which includes the results of groundwater monitoring in three wells (MW-29A, MW-32, and PZ-26) and inspections for evidence of groundwater seeps at the surface.<sup>65</sup> The reports concluded that there were no signs of groundwater seepage to the ditches on the south side of the IWU.<sup>66</sup>

The Executive Director is also aware that there is abundant testimony from a variety of witnesses to confirm that that IWU and Phase I area are already monitored by existing and proposed wells in the present Application. Mr. Winters also testified that he agrees that "any water that drains off the site between MW11 and MW21 would be monitored by one of those two wells" and if water is leaving the site anywhere between MW11 and MW51, one of those two monitor wells would be the wells that would indicate the water is leaving the site."<sup>67</sup> Mr. Avakian also agreed that MW11 could serve to monitor the IWU.<sup>68</sup> Although not required for this permitting action, it was noted by several witnesses and in the Application that groundwater flow paths cross through or under the Phase I area and the Industrial Waste Unit (IWU), then converge upgradient of existing monitor well MW-11, and then pass through or near MW-11. Therefore, the groundwater impacted by Phase I area and the IWU are monitored by MW-11, whether or not that was the intent of the Applicant in preparing the 249D application and whether or not the monitoring of older units is required by the MSW rules applicable to this Application.

According to the Application, the POC and increased groundwater monitoring wells are

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<sup>63</sup> City of Austin 6.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Tr. p. 933:7-19.

<sup>68</sup> Tr. p. 2486:2-12.

more suitably located to monitor the IWU and the Phase I Area, as portions of the proposed POC are more directly downgradient of those waste units than the existing POC and current groundwater monitoring well system. Specifically, Section 3.1.2 of the Groundwater Characterization and Monitoring Report in Attachment 5 of Part III of the Application describes the voluntary groundwater monitoring program for the IWU, and states that analytical data collected under the program are compared to health-based standards established in accordance with the provisions of the Texas Risk Reduction Program detailed in 30 TAC Chapter 350.<sup>69</sup>

There is also a considerable question remaining as to whether these older units are a justifiable concern and are even hazardous under EPA and TCEQ enforceable standards. The Groundwater Characterization and Monitoring Report states that data collected by the Applicant as a part of the voluntary monitoring plan provides that the constituent levels of in the groundwater, storm water, and soils are well below prescribed action levels and currently do not pose a potential threat to potential on-site or off-site receptors. The monitoring system along the proposed POC in the vicinity of the IWU and Phase I Area will continue to include MW-11 and MW-12, and will be supplemented by six additional monitoring wells (MW-30, 44, 45, 46, 50, and 51.)<sup>70</sup> Mr. Winters has testified that the current groundwater monitoring system is adequate to detect a release from the IWU and Phase I area before it reaches the perimeter of the property.<sup>71</sup> Mr. Winters testified that the reason there are no monitoring wells between MW11 and MW51 is because there is “a significant area between MW11 and MW51 that is not downgradient” and later clarifies that downgradient means that the groundwater monitoring system includes the Waste Management Units, the IWU and the Phase I areas and that this information is included in the Application (although not explicitly).<sup>72</sup>

Dr. Kier testified that the proposed groundwater monitoring system is deficient due its failure to properly monitor the IWU and Phase I Area.<sup>73</sup> Dr. Kier testified that there could be additional wells between MW51 and MW46 somewhere along the drainage course.<sup>74</sup> Dr. Kier agreed with other witnesses, such as Mr. Winters, that there is a continuum of waste across the

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<sup>69</sup> RTC, ED 3, at 32

<sup>70</sup> Tr. pp. 921:25, 923:4, 932:24, 971:25, 995:15, 23, and 1043:19.

<sup>71</sup> Tr. pp. 1022:22 -- 1023:23.

<sup>72</sup> Tr. pp. 934-935.

<sup>73</sup> Prefiled Testimony of Kier at 21:16 – 24; 82:13 – 100; 88:17

<sup>74</sup> Tr. pp. 1357:7—1358:23.

permit boundary but still recommend more wells be drilled into the waste between Phase I and the WMTX property boundary.<sup>75</sup>

Dr. Kier also testified about his review of secondary materials obtained from Applied Materials and other sources to discuss the nature of the waste and groundwater contamination stemming from the IWU.<sup>76</sup> The Executive Director was rather surprised by this new and late-breaking review by Dr. Kier, especially considering that Applied Materials is not a party in this case an Applied Materials representative was not called to offer direct evidence. Dr. Kier stated that the proposed groundwater monitoring system is deficient due to the fact that strata designations contained in the Application differ from past borings,<sup>77</sup> the Application does not demonstrate that the groundwater monitoring well spacing is based on site-specific factors,<sup>78</sup> and the constituents monitored for are inadequate.<sup>79</sup> Finally, Dr. Kier testified that the GWSAP does not comply with the March 2006 rule revisions to Chapter 330.<sup>80</sup> While Dr. Kier was testifying over two days he prepared a new table summarizing his findings regarding his review of the City of Austin Contract reporting of constituents, but the chart clearly shows no detections in excess of any applicable PCL.<sup>81</sup> Dr. Kier also conceded that because he is a geologist he cannot tell what the effect is.<sup>82</sup>

Mr. Winters stated that when he designed the groundwater monitoring system he accounted for leachate leaks that he had seen in records that occurred from the Phase I unit and that this information did not change his monitoring design.<sup>83</sup> During cross-examination by Protestant counsel, Mr. Winters examined the JDC report and the Thermoretec report regarding the IWU and the presence of waste in the property.<sup>84</sup> Mr. Winters clarified that even the creek on the east side of MW11 and the south pond structure would not deter MW11 from groundwater monitoring for contaminants because of diffusion and dispersion.<sup>85</sup> Mr. Winters was presented

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<sup>75</sup> Tr. pp. 1354:22 –1355:3

<sup>76</sup> Tr. pp. 1336:17—1337:4.

<sup>77</sup> Kier Prefiled p. 23:5 – 13, 107:1 – p. 110:8.

<sup>78</sup> *Id.* p. 100:10 – 112:11.

<sup>79</sup> *Id.* pp. 112:13 – 113:21.

<sup>80</sup> *Id.* p. 23:14 –15, 114:1 – 116:8.

<sup>81</sup> TJFA 24, Tr, pp. 1479:5-22 and pp. 1500:21 – 1502:20.

<sup>82</sup> Tr. pp. 1355:22—1356:6.

<sup>83</sup> Tr. pp. 1005 -- 1009.

<sup>84</sup> Tr. pp. 939-964.

<sup>85</sup> Tr. p. 965 and p. 1051:10-20.

with a cross-section at APP202 p. 1481 and opined from this drawing that “there is a continuum of trash across the southern boundary.”<sup>86</sup> Mr. Winters also testified that the weathered clay strata shown in the drawing at APP202, p. 1481, suggests that the weathered clay strata is the uppermost aquifer.<sup>87</sup> Mr. Winters then examined APP202, ATT4-19A and ATT5-1, and testified regarding groundwater flows and agrees that “under the currently proposed groundwater monitoring system, the industrial waste unit and Phase I unit will be monitored.”<sup>88</sup> Mr. Winters also testified that under a voluntary agreement MW32, PZ-26, and MW29A are also monitored.<sup>89</sup>

Thus, Executive Director would not be opposed to consolidating all these already existing methods of monitoring and addressing these concerns in some fashion either as part of an informal settlement agreement relating to this proceeding or in another context -- subject to TCEQ approval.<sup>90</sup>

**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 under agency rules.**

The Executive Director has considered new evidence presented at the contested case hearing regarding dioxane and other constituents monitored in the City of Austin contract with WMTX (City of Austin Ex. 6) and would not be opposed to WMTX or other parties’ sampling for this constituent in addition to those constituents already included in the GWSAP. 30 TAC § 330.419(a) already requires sampling and analysis of the groundwater monitoring system for the constituents listed in Appendix I to 40 C.F.R. Part 258. As part of the Application process for the 249D Application, the Executive Director did not require the Applicant to add any constituents to the groundwater monitoring program beyond those required by 30 TAC § 330.419(a). Under 30 TAC § 330.419(c), the Executive Director may add inorganic or organic constituents to those required to be tested if they are reasonably expected to be in or derived from the waste contained in a unit or if they are likely to provide a useful indication of releases from a municipal solid waste management unit to the groundwater.

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<sup>86</sup> Tr. p. 977:22-23.

<sup>87</sup> Tr. p. 978:20-23.

<sup>88</sup> Tr. p. 988:12-16 and preceding discussion regarding groundwater flow with details following at Tr. pp. 989-991.

<sup>89</sup> Tr. p. 995:6-23.

<sup>90</sup> Tr, pp. 2493:25 – 2494:12.



The problem with monitoring for probable constituents released by the IWU or Phase I is that they are not municipal solid waste units, and as discussed under Issue A.2., there is considerable debate about which constituents to monitor. Dr. Kier admits that the planned monitoring for constituents listed in 40 CFR Part 258, Appendix I will also serve to prevent release of hazardous constituents from the landfill and cannot confirm from his research of the IWU whether Table 3 of City of Austin 6 what exactly would be in an accurate list of constituents to monitor releases from the IWU although he does describe some options.<sup>91</sup> The Executive Director continues to review all reporting from various monitoring results from both those required by the MSW 249C permit and the Voluntary Agreement with City of Austin.<sup>92</sup>

All parties acknowledge that the IWU is currently monitored pursuant to the “Voluntary Groundwater Monitoring Plan for the Industrial Waste Unit at Austin Community Landfill.”<sup>93</sup> Under this voluntary agreement, WMTX is required to collect groundwater samples from monitoring wells downgradient of the IWU (MW-29A, MW-32, and PZ-26).<sup>94</sup> These samples are analyzed for organic and inorganic indicator parameters, and closely compare to the groundwater protection standards for Class 3 aquifers contained in the Texas Risk Reduction Program (TRRP) 30 TAC Chapter 350, and are also reported to the TCEQ.<sup>95</sup> Mr. Winters also testified that under a voluntary agreement MW32, PZ-26, and MW29A are also monitored.<sup>96</sup> He discusses the differences between the MSW required monitoring system, Appendix I of 40 C.F.R. Part 258 and TCEQ TRRP have protective concentration limits in 30 TAC Chapter 350.<sup>97</sup>

Specific evidence was presented regarding dioxane. Mr. Winters testified that though he had not seen any reports regarding dioxane, but at the hearing Mr. Winters examined a report regarding PZ26 from June 8, 2007 showing exceedence of the reporting limit of 200 parts per billion reporting limit.<sup>98</sup> On the spot, Mr. Winters noted that there is a difference between the reporting limit, the detection limit and the confirmation of a long-term release.<sup>99</sup> Mr. Winters

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<sup>91</sup> Tr. pp. 1332:15—1334:9 and 1360:9—1369:7.

<sup>92</sup> Tr. pp. 2444:1-6.

<sup>93</sup> City of Austin 6 (Agreement between the City of Austin and Waste Management of Texas, Inc.).

<sup>94</sup> *Id.* at p. 14-15.

<sup>95</sup> *Id.* at p. 1 and 17.

<sup>96</sup> Tr. p. 995:6-23.

<sup>97</sup> Tr. p. 996:17-- 999:25.

<sup>98</sup> Tr. p. 1036:18-25 and Tr. p. 1040:4-6.

<sup>99</sup> Tr. p. 1041.

later confirmed that the constituent could be monitored through the existing system of wells around the IWU, specifically MW-30, MW- 44, and MW-11.<sup>100</sup> However, Mr. Winters also stated that sampling just for MSW constituents as required by 40 C.F.R. Part 258, Appendices I and II could also detect a release from the IWU.<sup>101</sup> Mr. Avakian also agreed that MW11 could serve to monitor the IWU.<sup>102</sup>

Dr. Kier offered similar testimony that applicable Part 258 methods and use of the Appendices can detect releases of hazardous constituents but did not necessarily agree that MW11 would detect everything.<sup>103</sup> Dr. Kier was also shown a report not offered into evidence by City of Austin regarding dioxane and was not personally aware or able to produce any primary source evidence of dioxane release or any other constituent release from WMTX property.<sup>104</sup> Mr. Hultman also discussed a number of reports from Waste Management regarding constituents monitoring which did not rise to an actual detection of release based on alternative source demonstrations.<sup>105</sup> Mr. Hultman was not personally aware of any detections of dioxane, but did testify hypothetically that he was unaware of the appropriate procedure for dioxane.<sup>106</sup> Upon further examination the Executive Director has confirmed that the Applicant included the dioxane reports in the Application, which is part of the formal record.<sup>107</sup>

In light of this evidence regarding other sources like the IWU and Phase I, the credibility of reports showing constituents like dioxane in the reports in the Application, plus the concern shown by the Protestants, the Executive Director would not oppose a groundwater monitoring system that includes additional sampling of specific constituents. The Executive Director will require that the new constituent monitoring plan cannot significantly alter the design of the landfill and the proposed GWSAP. The concern about significant alterations is to address the possibility that the previous declaration of technical completeness would be undone and thereby requiring re-notice and another hearing on the entire Application – in effect nullifying the entire hearing process at considerable cost to all parties. The Executive Director would welcome the

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<sup>100</sup> Tr. pp. 1043:10-1044:13 and APP202 at 1486 (ATT4-19D) and ATT 5-5.

<sup>101</sup> Tr. p. 1053:5-17.

<sup>102</sup> Tr. p. 2486:2-12.

<sup>103</sup> Tr. pp. 1332:15—1334:9 and 1360:9—1369:7.

<sup>104</sup> Tr. pp. 1360:9—1369:7

<sup>105</sup> Tr. p. 1146-1165.

<sup>106</sup> Tr. pp. 1172:14-1174:19.

<sup>107</sup> APP202 at 2532 there begins a listing for results for dioxane.

opportunity to review any technical proposals by any party to this contested case or by the Administrative Law Judge in his Proposal for Decision for conformity to agency rules.

**4. Whether the Application includes sufficient information demonstrating how the MSW Facility will comply with applicable TPDES storm water permitting requirements.**

30 TAC § 330.61(k)(3) requires the owner or operator of a MSW facility to provide information demonstrating how the facility will comply with applicable Texas Pollutant Discharge Elimination System (TPDES) storm water permitting requirements and Section 402 of the Clean Water Act (CWA). This information may include, but is not limited to: (1) a certification statement indicating that the owner or operator will obtain the appropriate TPDES permit coverage when required, or (2) a copy of the permit number for coverage under an individual wastewater permit.<sup>108</sup>

Parts I and II of the Application contain the Ground and Surface Water Statement.<sup>109</sup> In Section 3.4.3 of the Ground and Surface Water Statement Waste Management indicates that the Facility has a Storm Water Prevention Plan, and has filed a Notice of Intent (NOI) with the TCEQ.<sup>110</sup> Section 3.4.3 lists the Facility's TPDES Multi-Sector General Permit number.<sup>111</sup> The Application also includes a certification statement indicating that Waste Management will obtain the appropriate TPDES coverage as required by the permit expansion.<sup>112</sup> WMTX indicates that the Facility's currently permitted surface water management plan consists of interceptor berms on the cover of the landfill routing storm water into downslope channels which feed into perimeter channels located at the base of the landfill. The perimeter channels route the storm water into the central and/or southwestern natural drainage ways. Storm water from the landfill's east hill currently discharges into the central drainage way and the two ponds located therein. Storm water from the landfill's west hill discharges into both the central and the southwestern drainage ways. Storm water exits the site where the drainage ways intersect the site boundary. The drainage ways discharge into unnamed tributaries of the Walnut Creek.

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<sup>108</sup> 30 TAC § 330.61(k)(3).

<sup>109</sup> App-202 at 31.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 105.

The City of Austin's witness, Mr. Charles "Chuck" Lesniak, testified that without additional erosion and sedimentation controls Waste Management would not be able to comply with the 100 mg/L Total Suspended Solids (TSS) "discharge limit" in its TPDES Multi-Sector General Permit.<sup>113</sup> At the hearing, Mr. Lesniak clarified that the 100 mg/L TSS "discharge limit" is actually a benchmark monitoring requirement.<sup>114</sup> Mr. Lesniak testified that the City of Austin does not monitor storm water discharges for TSS, and that his opinion was not based on any numeric storm water quality data.<sup>115</sup> Should the permit expansion be granted and Waste Management exceed the 100 mg/L benchmark monitoring requirement for TSS in its Multi-Sector General Permit, TCEQ's Pollution Prevention Team would investigate the exceedance, and identify: (1) additional potential sources of pollution, such as spills that might have occurred, (2) necessary revisions to the Good Housekeeping Measures section of the Storm Water Pollution Prevention Plan (SWP3), (3) additional Best Management Practices (BMPs), including and schedule to install or implement the BMPs, and (4) other sections of the SWP3 where revisions may be appropriate.<sup>116</sup> This regulatory action would be separate and apart from Waste Management's MSW permit.

Mr. Udenenwu, testified that by providing its current Multi-Sector General Permit number and certifying that it would obtain the appropriate TPDES coverage as required by the expansion of the Facility, Waste Management complied with 30 TAC § 330.61(k).<sup>117</sup>

The Executive Director was not presented with any new evidence at the hearing that would cause him alter his original assessment that the Application includes sufficient information demonstrating how the Facility will comply with applicable TPDES storm water permitting requirements.

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

Various issues presented for discussion in the Closing Argument relate to erosion control. In addition to the extensive surface water controls discussed under issue A.1. and A.4. as well as

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<sup>113</sup> CL-1 (Prefiled Testimony of Chuck Lesniak) p. 8:161 – 173.

<sup>114</sup> Tr. p. 2110:7 – 16; Tr. p. 2155:11 – Tr. 2156:6.

<sup>115</sup> Tr. pp. 2110:23 – 2111:11; Tr. p. 2158:21 – 2159:12.

<sup>116</sup> TF-5 (TPDES Multi-Sector General Permit) at 48.

<sup>117</sup> ED-1, Udenenwu Prefiled Testimony pp. 21: 4 – 22:34.

the following discussion on cover in A.6., there are erosion and sedimentation control measures taken regarding the erosional stability of the top dome surfaces and external embankment side slopes at the Facility, WMTX provides in Section 4.0 (*Erosion and Sedimentation Control Plan*) and Appendix E (*Sample BMP Specifications*) of Attachment 2, necessary information on the techniques and management practices employed for erosion and sedimentation control during all phases of landfill development. WMTX provides calculations in Appendixes D (*Interim Erosion and Sediment Control Analysis*) and F (*Soil Loss Due to Erosion*) of Attachment 2 to demonstrate that during all phases of the landfill operation, closure, and post closure care, flow velocities for all proposed slope grades and soil cover types at the Facility are within the permissible non-erodible velocities, and that the potential soil loss does not exceed the permissible soil loss for comparable soil slope lengths and soil cover conditions as required.

For the active disposal areas, daily cover conditions, and for soil stockpiles, WMTX proposes to use various best management practices, including silt fences, earthen berms, and rock berms, to divert and/or contain surface runoff and to stabilize disturbed surfaces to minimize surface erosion and soil loss. When Mr. Udenenwu testified regarding the Application and the adequacy of berms and erosion control measures, he concluded the detail in the Application is adequate.<sup>118</sup> Concerning the erosional stability of the final cover, 30 TAC §330.305(d) specifies that the landfill design must provide effective erosional stability to the top dome surface and external embankment side slopes during all phases of landfill operation, closure, and post-closure;<sup>119</sup> WMTX provides in Section 4 (*Erosion and Sedimentation Control Plan*) and in Appendixes D (*Interim Erosion and Sediment Control Analysis*), E (*Sample BMP Specifications*), and F (*Soil Loss Due to Erosion*) of Attachment 2, discussions, analyses, and calculations which adequately demonstrate that the erosion and sedimentation control structures and practices proposed for the Facility will ensure peak flow velocities and soil loss rates that are within permissible values to maintain effective erosional stability of the landfill during all phases of landfill operation, closure, and post-closure care.

WMTX provides in Section 4.4 (*Erosion and Sedimentation Control for Final Cover Areas*) of Attachment 2 in Part III of the Application, descriptions of the erosion and

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<sup>118</sup> Tr. p. 2398:3-25 and Udenenwu prefiled regarding erosion.

<sup>119</sup> Udenenwu prefiled at 43:9-43.

sedimentation control structures and practices proposed on the final cover to minimize surface erosion and soil loss. These include the cover grading, vegetation, and runoff interceptor berms and downchutes. Mr. Dominguez testified that landscaping benches and add-on berms are already in place along the east side of the East Hill facing Giles Road. Mr. Dominguez also testified that they create a concave slope between berms, not a convex slope.<sup>120</sup> Drawings provided in Figure No. ATT2-3 in Attachment 2 contain details of the final cover erosion and sedimentation control structures proposed at the Facility. WMTX provides calculations in Appendixes F (*Soil Loss Due to Erosion*) of Attachment 2, to show that the estimated rate of soil loss due to erosion on the top dome surfaces and external embankment slopes of the final cover are within permissible values, and in Table 4 of Appendix A in Attachment 2, to show that the estimated peak velocities for top surfaces and external embankment slopes are within the permissible non-erodible velocities.

As discussed above, WMTX provides discussions, data, and analyses which adequately demonstrate that the final cover system design is consistent with 30 TAC §§330.457 and 330.305(d), (e) and will be adequate in minimizing surface water infiltration, erosion and soil loss. WMTX provides a final cover slope stability analysis which adequately demonstrates that the final cover grades provide sufficient factor of safety against any slope failure. At the contested case hearing, Don Smith of WMTX testified that the erosion and sedimentation controls were prepared in accordance with regulatory statutes and that regular inspections of the controls would be done by the operations manager or the environmental protection manager.<sup>121</sup>

The Executive Director, having reviewed the applicable rules, the Application, testimony and evidence presented, concludes that the applicant has presented adequate provisions for erosion control, in compliance with agency rules.

**6. Whether the Application includes adequate provisions for proper slope stability, in compliance with agency rules, particularly in relation to the proposed “piggyback” liner system.**

The requirement for evaluation of MSW landfill stability is specified in relation to provisions for MSW landfill foundation evaluation contained in 30 TAC §330.337(e). However there is no specific rule or statute requiring slope stability. Mr. Chandler has extrapolated the

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<sup>120</sup> Tr. p. 256:4-13.

<sup>121</sup> Tr. p. 194:11-14 and 18-23.

rules regarding unstable areas at 30 TAC §330.559 to create a slope stability analysis for this application.<sup>122</sup> Mr. Chandler opines that the unstable areas could include the area where the proposed expansion adjoins existing waste within the pre-Subtitle D area on the northwestern portion of the currently permitted landfill boundary on which WMTX proposes to install a piggy-back liner (the first in Texas) and leachate collection system. Mr. Chandler contends that the existing waste mass within the pre-Subtitle D area qualifies as a man-made structure. Mr. Chandler also opines that the same unstable area condition applies to the two older units at the Facility namely the IWU and the Phase I area as they are man-made structures.<sup>123</sup> Mr. Chandler also briefly discussed a slope failure at the Facility in 1999, but had no specific or direct evidence of the event relevant to this application or the contested case hearing standard of review which requires an analysis of the proposed 249D, not a review of previous events or theories relating to previous applications.<sup>124</sup> Mr. Chandler also testified that tension cracks exist on the IWU cover soil.<sup>125</sup> Mr. Dominguez testified regarding cracks viewed at the site and stated they were actually desiccation cracks.<sup>126</sup>

The WMTX Application includes adequate provisions for proper slope stability of the proposed landfill expansion. WMTX provides discussions in Sections 4.3.2 (*Stability Analyses*) and 5.3 (*Piggyback Liner System Design*) of Attachment 3 in Part III of the Application which indicate that slope stability analyses were performed on representative sections of the landfill at different stages and configurations to predict the stability of the landfill slopes. WMTX provides detailed slope stability analyses data for each of the different configurations (excavation, liner system, waste, final filled configuration, piggy-back liner system, and final cover) in Appendix C of Attachment 3. Mr. Charles G. Dominguez, P.E., a registered professional engineer in the State of Texas, License No. 83247, sealed the slope stability analyses documents.

WMTX concludes from the results of the slope stability analyses that each of the landfill configurations evaluated has an adequate factor of safety to maintain the landfill in a stable

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<sup>122</sup> Chandler prefiled testimony at 37: 5 and at 43(listing 8 bases for his opinion.) *See also* Tr. pp.1656:25 – 1657:4(wherain Chandler agrees there is not a specific TCEQ rule relating to slope stability.)

<sup>123</sup> Chandler prefiled testimony at 42:4.

<sup>124</sup> Chandler prefiled testimony at 43:10. *See also* Tr. pp. 1666:4 to 1668:24 and p. 1764:5-8.

<sup>125</sup> Chandler prefiled at 82:7.

<sup>126</sup> Tr. p. 2525:1-6.

condition. Mr. Chandler testified that TCEQ rules do not dictate a factor of safety<sup>127</sup> and offered extensive testimony citing learned treatises on the subject, particularly relating to strength of clays and soils.<sup>128</sup> Mr. Dominguez also offered testimony regarding various strengths of clays and soils.<sup>129</sup>

WMTX states in Section 4.1 of Appendix E of Attachment 3 that prior to beginning of construction activities, it will conduct confirmatory testing of geosynthetic materials to ensure that the strengths of the materials assumed in the stability calculations are available. Mr. Chandler testified extensively on the nature of confirmatory testing, but gave no indication that WMTX would not use confirmatory testing to ensure that the strengths of the materials assumed in the stability calculations are available.<sup>130</sup> Mr. Dominguez later testified on rebuttal that site specific testing was involved in assessing strengths.<sup>131</sup>

A number of witnesses testified regarding landfill settlement calculations in relation to the older waste that will underlie the piggyback liner. Mr. Chandler testified regarding the data used by WMTX used in the Application and cited Koerner's and Qian's treatises on settlement calculations as published values for settlement, but overall Mr. Chandler agreed that once waste has been put in place it will not increase in height but rather it will settle relatively quickly at first and then slow down.<sup>132</sup> Mr. Dominguez explains the settlement data used in the Application to note that the piggyback liner will overlie older waste whose settling phase is nearly complete and that the older waste specific to this application for a piggyback liner has followed established settlement patterns.<sup>133</sup> Mr. Udenenwu agreed that the hill has followed normal settlement patterns and that he had verified the WMTX calculations regarding settlement.<sup>134</sup>

Some concern was expressed that the piggyback nature will create an improper vertical expansion but that concern was alleviated on the record. The piggyback liner and expansion do

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<sup>127</sup> Chandler prefiled at 49:8 and at 78:6. *See also* TJFA409, Chandler prefiled at 103, 122 and Tr. p. 1690-1695, 1707-1717, 2521:20-25 and 2523:15-21 and APP23.

<sup>128</sup> Chandler prefiled at 49:l. 8 and at 78:l. 6. *See also* TJFA409, Chandler prefiled at 103, 122 and same citations to Tr. p. 1690-1695, 1707-1717, 2521:20-25 and 2523:15-21 and APP23.

<sup>129</sup> Tr. pp. 2537:5 to 2543:5.

<sup>130</sup> Chandler prefiled at 69, 158:5, TJFA 407, and Tr. p. 1682:14-25.

<sup>131</sup> Tr. pp. 2510:17 to 2512, l. 3. *See also* APP21.

<sup>132</sup> Chandler prefiled at 147:7, APP202 figures F1 and F2, and Tr. p. 1733:8-10, and Tr. p. 1738:13-25 regarding APP225, and prefiled exhibit TJFA 438 at pp. 20, 22.

<sup>133</sup> Tr. pp. 2543:6 -- 2556:9, 2583:6-10, and 2600:5-17.

<sup>134</sup> Tr. pp. 2339:3 to 2340:2.



not create a vertical expansion as defined in 30 TAC §330.543(b)(2)(B). Mr. Chandler, an expert for TJFA, L.P., in his prefiled testimony said the definition of vertical expansion at 30 TAC §330.543(b)(2)(B) did not apply to a vertical expansion.<sup>135</sup> Mr. Chandler describes how the height on the permitted side slopes may be increase by about ten feet because of the piggyback, but eventually concedes that the overall permitted maximum height of the landfill is not increased. Mr. Chandler appears to be extrapolating the clear definition in 30 TAC §330.543(b)(2)(B).<sup>136</sup> Mr. Chandler also agreed on cross-examination that the piggyback liner is now a requirement under 30 TAC Chapter 330.<sup>137</sup> Dr. Beth Gross testified as to the reliability of piggyback, overlay as she describes, liners, stating, “Overlay liners are new in Texas; they are not new elsewhere.”<sup>138</sup>

Mr. Chandler’s expertise and testimony could serve to assist WMTX as they construct the proposed units, but as to the weight of the evidence, on balance, his testimony was largely academic, theoretical, hypothetical in nature and did not provide an analysis of the applicable TCEQ rule requirements for landfill design and construction.<sup>139</sup>

The existing regulations did not envisage classifying old waste masses as unstable areas for the purpose of piggyback liner designs. The Executive Director recognizes that existing waste masses are compressible columns that demand special design considerations to minimize settlement and ensure stability in the event that a composite liner is proposed on them. WMTX provides settlement analysis for the piggyback liner area which indicates that of the underlying waste will be minimal. To further reduce settlement and boost the stability of the existing waste mass, WMTX states that it will pre-load the waste mass in the area that will receive piggyback liner with soil stockpile which will be removed prior to the construction of the piggyback liner. The piggyback composite liner will be comprised of, from top to bottom, 2-foot thick protective cover soil, double-sided geocomposite drainage layer, 60-mil linear low-density polyethylene (LLDPE) geomembrane liner textured on both sides, and a 2-foot compacted clay liner, in accordance with the requirements of 30 TAC §330.331(a).

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<sup>135</sup> Chandler prefiled at 25:11 and Tr. pp. 1648:13—1650:1.

<sup>136</sup> *Id.*

<sup>137</sup> Tr. p. 1651:17-22, and pp. 2343:1 – 2345:23.

<sup>138</sup> Tr. p. 2610:5 --2612:11.

<sup>139</sup> Tr. pp. 2341:11 to 2342:25 (Udenenwu testifies regarding value of books versus examination of the Application itself.)

Therefore, the Executive Director offers that the Application includes adequate provisions for proper slope stability, in compliance with agency rules, particularly in relation to the proposed “piggyback” liner system.

**7. Whether the Application includes adequate provisions to manage landfill gas, in compliance with agency rules**

TCEQ Rules 30 TAC § 330.63(g) and § 330.371 require control of landfill gas to prevent possible explosive hazards due to migration and accumulation of methane. An applicant for a municipal solid waste permit must include a landfill gas management plan (LGMP) as a part of the Site Development Plan (SDP) contained in Part III of the Application.<sup>140</sup> The LGMP must comply with all of the requirements of Subchapter I of Chapter 330.<sup>141</sup> Under Subchapter I, a LGMP must include 1) a description of how landfill gases will be managed and controlled; 2) a description of the proposed system(s), including installation procedures and time lines for installation, monitoring procedures, and procedures to be used during maintenance; and 3) a backup plan to be used if the main system breaks down or becomes ineffective.<sup>142</sup>

In the RTC<sup>143</sup>, the Executive Director indicated how the Application proposes to monitor and control landfill gas. The Executive Director noted that subsurface gas migration and surface emissions are controlled by containment systems (liners and covers), and by an active gas collection and control system (GCCS) which applies a vacuum to the landfill through gas extraction wells installed in the waste.<sup>144</sup> Gas migration in the subsurface is currently monitored, and will continue to be monitored, using a system of gas monitoring probes installed along the perimeter of the site to intercept potential gas migration pathways in the subsurface.<sup>145</sup> The probes are screened from approximately 5 feet below the surface down to the depth of the seasonal low groundwater level at each probe location, with total screen intervals ranging from about 10 feet to 93 feet.<sup>146</sup> The GCCS is described in Section 5 of the LGMP in Attachment 6 to

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<sup>140</sup> 30 TAC § 330.63(g).

<sup>141</sup> *Id.*

<sup>142</sup> 30 TAC §§ 330.371(g)(1)-(3).

<sup>143</sup> ED3

<sup>144</sup> *See* ED3 at 29.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

Part III of the Application.<sup>147</sup> The perimeter, subsurface monitoring system and monitoring procedures are described in Section 4 of the LGMP.<sup>148</sup> Section 5.1 of the LGMP acknowledges that the surface of the landfill will continue to be monitored for emissions in accordance with 40 CFR Part 60, Subpart www.<sup>149</sup>

In his prefiled testimony, Arten Avakian reasserted the conclusion of the Executive Director's Response to Comments that the Applicant prepared a Landfill Gas Management Plan that addressed all of the requirements of Subchapter I of 30 TAC Chapter 330.<sup>150</sup> Mr. Avakian stated that the Applicant provided a Landfill Gas Management Plan that addressed all of the requirements of Subchapter I, in Attachment 6 to Part III of the Application.<sup>151</sup>

TJFA raised several issues concerning the LGMP in the prefiled testimony of Mr. Chandler. These concerns are summarized as follows:

First, Mr. Chandler raised a concern in his testimony that the perimeter monitoring system has a large gap in coverage, and that the large gap in coverage in the perimeter monitoring system is adjacent to an area that has a documented history of offsite migration of landfill gas.<sup>152</sup> By a "gap," Mr. Chandler appears to refer to the gap between gas probes P-9 and P-10, where the Phase I unit exists on the property line.<sup>153</sup> The Applicant addresses this gap in the Application where it states that the area between those probes is occupied by waste from the Phase I unit, and installation of wells through waste is "not feasible or advisable."<sup>154</sup> The Applicant's witness, Mr. Winters and Mr. Dominguez mentioned the unknown impacts of drilling through waste on several occasions and offered that any tests from these probes and wells would be of unsound method and reliability.

Second, Mr. Chandler submitted testimony that the LGMP does not protect against endangerment to human health and the environment, pursuant to 30 TAC § 330.15(a)(3), because the supplemental monitoring device, "Landtec GEM 500 or equivalent," may cause injury or

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> See ED6 at 14.

<sup>151</sup> *Id.*

<sup>152</sup> See generally TJFA400 at 161-69.

<sup>153</sup> *Id.* at 162:5-15.

<sup>154</sup> APP202 at 3149.

death if used in confined spaces.<sup>155</sup> The Application states that the Landtec GEM 500 will be used in accordance with the manufacturer's instructions and considering the danger involved and the evidence was not presented of any issues in the past, the Executive Director considers the benefits of this technology outweigh the risk.<sup>156</sup>

Third, Mr. Chandler asserts that the LGMP would allow recirculation of the condensate without regard to the unit of the ACL that produced the condensate.<sup>157</sup> Mr. Chandler states that the Application must indicate that condensate be recirculated into the same unit from where it derived.<sup>158</sup>

The Applicant was the only other party to submit prefiled testimony on the issue of landfill gas management. Mr. Dominguez indicates that the LGMP is included in Attachment 6 of the technically complete application, and asserts that the LGMP complies with the requirements of Subchapter I of Chapter 330.<sup>159</sup>

During the live hearing, counsel for TJFA asked Mr. Dominguez several questions regarding the LGMP.<sup>160</sup> Questions on this matter focused primarily on the issue over probe spacing raised by Mr. Chandler in his prefiled testimony.<sup>161</sup> Mr. Dominguez reasserted that probes were not placed between P-9 and P-10 because of the impracticability of placing probes through existing waste.<sup>162</sup>

The Executive Director has offers that the Application is adequate to meet the applicable TCEQ Rules 30 TAC § 330.63(g) and § 330.371 regarding control of landfill gas.

**8. Whether the Application includes adequate provisions to prevent the ponding of water over waste on the landfill, in compliance with agency rules.<sup>163</sup>**

30 TAC § 330.167 prohibits the ponding of water over waste, regardless of its origin. Any ponding that occurs in the active portion of a landfill or on a closed landfill must be eliminated, and the area where the ponding occurred must be filled in and regraded within seven

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<sup>155</sup> *Id.* at 158-60.

<sup>156</sup> APP202 at 3155 and 3156.

<sup>157</sup> Chandler Prefiled at 160-61.

<sup>158</sup> *Id.*

<sup>159</sup> APP200 at 85-86 of Dominguez prefiled testimony.

<sup>160</sup> *See* Tr. p. 292-297.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 293.

<sup>163</sup> *Please see also* Issue B.1. relating to surface water.

days of the occurrence.<sup>164</sup> An applicant for an MSW permit must submit a Ponding Prevention Plan as a part of its Site Operating Plan (SOP).<sup>165</sup> The Ponding Prevention Plan must contain a description of the techniques to be used at the landfill to prevent the ponding of water over waste, an inspection schedule to identify potential ponding sites, corrective actions to remove ponded water, and general instructions to manage water that has been in contact with waste.<sup>166</sup>

The Ponding Prevention Plan (the Plan) is contained in Section 4.22 of Part IV of the Application.<sup>167</sup> The Plan indicates that ponded water over waste-filled areas will be prevented through: (i) thorough compaction of waste to limit differential waste settlement/ consolidation, (ii) proper grading of final waste slopes to the elevations shown in the Closure Plan, which provide surface water drainage without depressions or low spots, (iii) proper grading of interim waste slopes to promote positive water surface drainage, and (iv) installation of upgradient diversion berms to minimize the amount of water entering the disposal site.<sup>168</sup> The Plan provides that waste fill areas will be inspected on a weekly basis in order to identify depressions or other potential ponding sites.<sup>169</sup> Should ponding occur, the Plan states that WMTX will remove the accumulated water with a small portable pump and fill the area of ponding with clean soil within seven days of the observation.<sup>170</sup>

Witnesses offered their personal knowledge of ponding and flow at the site. Mr. Chandler testified that the presence of plants typically found in wetlands in the man-made drainageway that runs between the IWU and the Phase I Unit evidenced ponding in that area.<sup>171</sup> The City of Austin's witness, Mr. Lesniak, testified that during site visits he had seen ponded water in the man-made drainageway "many times."<sup>172</sup> Mr. Udenenwu, acknowledged that the Application indicates that waste had been buried beneath the man-made drainageway.<sup>173</sup> Mr. Udenenwu testified that during site visits he witnessed water flowing through the drainageway, but never

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<sup>164</sup> 30 TAC § 330.167.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> App-202 at 3407 – 3408.

<sup>168</sup> App-202 at 3407.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> Tr. pp. 1746:25 – Tr. 1750:24; *See also* City of Austin 10 (Photograph previously marked TJFA-13) and 11 (Photograph previously marked TJFA-14).

<sup>172</sup> Tr. p. 2130:1 – 20.

<sup>173</sup> Tr. p. 2369:7 – 19.

ponding in that area. In response to clarifying question from The Honorable Judge Scudday, Mr. Udenenwu testified that the MSW rules do not address the situation where water is running over buried waste.<sup>174</sup>

No photographic evidence of ponding water in the man-made drainageway was presented during the hearing; nor does WMTX Compliance History indicate any Final Enforcement Orders or written Notices of Violation (NOVs) associated with ponded water.<sup>175</sup> Mr. Udenenwu, and Mr. Dominguez testified that the SOP complies with 30 TAC § 330.65 and the requirements of Subchapter D of Chapter 330—which includes 30 TAC § 330.167.<sup>176</sup>

Thus, the Executive Director was not presented with any new evidence at the hearing that would cause him to alter his original assessment that the Application includes adequate provisions to prevent the ponding of water over waste at the Facility.

**9. Whether the Application includes adequate provisions for cover, in compliance with agency rules.**<sup>177</sup>

The Application includes adequate provisions for daily, alternate material daily, intermediate, and final cover systems, all in compliance with agency rules. WMTX addresses the landfill cover systems (daily, intermediate, and final cover) in Section 4.21 of the SOP in a manner that is consistent with the requirements in 30 TAC § 330.165. It should be noted that cover is cross-referenced to discussions of odor and erosion.<sup>178</sup> As Mr. Chandler testified, odor can be related to how soon waste is covered.<sup>179</sup>

Rule 30 TAC § 330.165 sets the requirements for daily cover in MSW Type I landfills. WMTX provides discussion under Section 4.21 of the SOP on the Application of daily cover over the working face or active disposal area, and operating procedures to be followed when applying the daily cover, which meets the above rule requirements. It states that the daily cover will consist of a minimum of six inches of compacted earthen material that has not been

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<sup>174</sup> Tr. pp. 2369:7 – 2372:5.

<sup>175</sup> App-103 (January 2008 Compliance History Report) & App-104 (December 2008 Compliance History Report).

<sup>176</sup> ED-1 (Prefiled Testimony of Matthew Udenenwu) p. 12; ll. 25 – 28; *See also* App-200 (Prefiled Testimony of Charles Dominguez, P.E.) p. 92; l. 2 – l. 22.

<sup>177</sup> This discussion is borrowed heavily from Mr. Udenenwu's prefiled testimony.

<sup>178</sup> Tr. 192, ll. 14- 22, 343, ll. 7-19, and 1745, l. 17 to 1746, l. 24.

<sup>179</sup> Tr. pp. 1741:18—1742:8.

previously mixed with garbage, rubbish, or other solid waste and that the daily cover will be applied at the end of each working day or at least once every 24 hours.

WMTX proposes to use ADC materials (tarp) on a very limited basis (during conditions (e.g. extreme weather events or other natural disasters) that prohibit access to borrow soils for a period). WMTX discusses use of ADC at the site under Section 4.21 of the SOP. WMTX also provides an ADC operating plan that addresses all the technical requirement in 30 TAC §330.165(d) in Appendix E of the SOP.

WMTX discusses use of intermediate cover for areas of the landfill that will be inactive for longer than 180 days under Section 4.21 of the SOP in a manner that meets the requirements in 30 TAC § 330.165(c). The rule provisions in 30 TAC § 330.165(c) specify, among other specifics listed in ED3 and Mr. Udenenwu's prefiled testimony, that all areas that have received waste but will be inactive for longer than 180 days must provide intermediate or final cover.

As discussed in detail in prefiled testimony, WMTX provides discussions, data, and analyses which adequately demonstrate that the final cover system design is consistent with 30 TAC §§ 330.457 and 330.305(d)-(e), and will be adequate in minimizing surface water infiltration, erosion, and soil loss.<sup>180</sup> WMTX provides a final cover system design narrative in Section 2.0 (*Final Cover*) of Attachment 7 and a final cover system quality control plan in Appendix A (*Final Cover Quality Control Plan*) of Attachment 7 in Part III of the Application that are consistent with the requirements in 30 TAC § 330.457, relating to design and construction of a cover system to minimize infiltration and erosion, and 30 TAC §§ 330.305(d)-(e), relating to design to provide effective long-term erosional and geotechnical stability. Mr. Dominguez testified that Attachment 2, Section 4 includes soil loss analysis and calculations, such as the maximum length of uninterrupted slope that can be on the intermediate cover.<sup>181</sup> Mr. Dominguez also discussed vegetation and the assumptions of growth rates to achieve cover over time.<sup>182</sup> WMTX corrected the description of soils in the Application regarding drainage and erosion concerns to be soil type D on the Heiden soil type identification in Volume 6 of the Application.<sup>183</sup>

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<sup>180</sup> Tr. p. 323:19-21.

<sup>181</sup> Tr. p. 467: 9-24.

<sup>182</sup> Tr. p. 478:10-25 and pp. 498:12 -- 500:23.

<sup>183</sup> Tr. p. 369:9-21 and p. 535:4-24.

Mr. Chandler testified that materials for cover have greatly improved over time and that much of his prefiled testimony did not apply to the Application's presentation of geotextiles.<sup>184</sup> Mr. Lesniak of City of Austin expressed concerns about the final cover only in relationship with ponding and surface water in theory and in relation to the existing facility, but did not apply his discussion to the Application, the applicable rules, or the proposed units.<sup>185</sup>

The Application includes adequate provisions for daily, alternate daily, intermediate, and final cover systems, all in compliance with agency rules.

**10. Whether the Application includes adequate provisions to protect endangered or threatened species, in compliance with agency rules.**

TCEQ rules 30 TAC § 330.61(n), § 330.157, and § 330.551 require applicants to consider the impact of the proposed development upon endangered or threatened species and their critical habitat. The rules require applicants to submit an Endangered Species Act compliance demonstration, determine whether the facility is in the range of endangered or threatened species, have a biological assessment prepared by a qualified biologist in accordance with standard procedures of the U.S. Fish and Wildlife Services (USFWS) and the Texas Parks and Wildlife Department (TPWD) to determine the effect of the facility on the endangered or threatened species, and contact the USFWS and TPWD for locations and specific data relating to endangered and threatened species in Texas.<sup>186</sup>

The endangered or threatened species protection rules also specify that a facility and the operation of a facility must not result in the destruction or adverse modification of the critical habitat, or cause or contribute to the taking of any endangered or threatened species.<sup>187</sup> A facility's SOP (SOP) must also identify the criteria for the protection of any identified endangered species.<sup>188</sup>

The Executive Director submitted prefiled testimony and exhibits concerning the adequacy of the Application to address endangered and threatened species. The prefiled

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<sup>184</sup> Tr. p. 1686:15-23 and 1709:4-22.

<sup>185</sup> Tr. p. 2126:4-23.

<sup>186</sup> 30 TAC § 330.61(n)(2).

<sup>187</sup> 30 TAC § 330.157.

<sup>188</sup> *Id.*



testimony of Matthew Udenenwu<sup>189</sup> and the RTC<sup>190</sup> both assert the position of the Executive Director.

The Executive Director offers, especially in light of no controversy or evidence presented through cross-examination, that the Application meets the standards regarding TCEQ rules 30 TAC § 330.61(n), § 330.157, and § 330.551, requiring applicants to consider the impact of the proposed development upon endangered or threatened species and their critical habitat.

**11. Whether the Application provides adequate information related to transportation, as required by agency rules.**

Pursuant to 30 TAC § 330.61(i), applicants must provide data and documentation on the status of roads near the Facility, namely:

- 1) data on the availability and adequacy of the roads that are used to access the site;
- 2) data on the volume of vehicular traffic on access roads within one mile of the proposed units, both existing and expected, during the expected life of the Facility;
- 3) project the volume of traffic expected to be generated by the Facility on the access roads within one mile of the proposed facility;
- 4) submit documentation of coordination of all designs of public roadway improvements associated with the site entrances with the agency responsible for maintaining the public roadway involved, including documentation of coordination with TXDOT for traffic and location restrictions; and
- 5) analysis of the impact of the facility upon airports in accordance with 30 TAC § 330.545, and documentation of coordination with the Federal Aviation Administration (FAA) for compliance with airport location restrictions.<sup>191</sup>

Mr. Udenenwu submitted prefiled testimony arguing that the Application included a transportation and traffic analysis that meets the requirements of 30 TAC § 330.61(i).<sup>192</sup> The analysis is located in Section 3.2 of the Application, as well as in Appendix A-4 of Parts I/II. The Applicant states in Section 3.2 of Parts I/II of the Application that WHM Transportation Engineering Consultants, Inc. (WHM) performed a detailed road and traffic analysis for the

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<sup>189</sup> ED1 at 25.

<sup>190</sup> ED3 at 32.

<sup>191</sup> See 30 TAC §§ 330.61(i)(1)-(5).

<sup>192</sup> See ED Exhibit No. 1 at 19.

proposed expansion of the Facility.<sup>193</sup> The study involves an analysis of the site access routes and collection of traffic counts on the roadways that serve the Facility.<sup>194</sup>

Mr. Udenenwu submits that the Application contains sufficient information pertaining to the availability and adequacy of roads for accessing the Facility.<sup>195</sup> The Application indicates that the primary access routes to the landfill are Giles Road, Johnny Morris Road, and US 290.<sup>196</sup> These roads are listed as 4-lane, asphalt surfaced public roadways that allow up to 80,000 pounds maximum gross weight vehicles and no maximum vehicle height restrictions.

The prefiled testimony of Mr. Udenenwu continues that the Application includes appropriate information concerning the existing and expected volume of vehicular traffic on these roads.<sup>197</sup> US 29, Giles Road and Johnny Morrison Road are given as 31,948 and 54,631, 6,394 and 10,934, and 6,285 and 10,747 vehicles per day respectively. Of this vehicle per day count, the projection of the existing and future daily traffic generated by the Facility is 390 and 667 vehicles per day respectively.<sup>198</sup>

Mr. Udenenwu further testified that the Application included information documenting coordination with TXDOT for traffic and location restrictions, as required by 30 TAC §330.61(i)(4).<sup>199</sup> He also noted that the Application contained appropriate coordination with FAA as required by 30 TAC § 330.61(i)(5).<sup>200</sup> According to his testimony, the Application provided discussions in Section 3.2.4 which state that the nearest public use airport, the Austin-Bergstrom Airport, is located approximately 8.25 miles southwest of the Facility, and that one

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<sup>193</sup> *Id.*

<sup>194</sup> *Id.* According to Mr. Udenenwu, the Applicant provides a summary of the results of the analysis and details of the study in Section 3.2 and Appendix A-4 of Parts I/II of the Application respectively to address the data and other information required by the above referenced rule. *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *See id.* at 63. The applicant indicates that public access to the Facility is and will continue to be via the existing driveway on Giles Road. *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* Mr. Udenenwu noted that the transportation study indicates that the landfill traffic accounts for 4.9 percent of the total traffic utilizing Giles Lane under current condition. This will increase to 5 percent under the projected conditions.

<sup>199</sup> *Id.* Appendix A-4 of APP202 includes a letter dated January 13, 2005 from the TXDOT Austin District indicating no objections to the traffic study provided by WMTX. *Id.*

<sup>200</sup> *Id.* According to Mr. Udenenwu, FAA correspondence concerning airport location restrictions, found in Appendix B-1 of Parts I/II, indicate that the FAA has no objections to the proposed expansion from the standpoint of bird hazards. *Id.*

general aviation airport, the Birds Nest Airport is located about 5.1 miles northeast of the site.<sup>201</sup>

The Applicant's expert Mr. John Michael McInturff testified regarding transportation and traffic.<sup>202</sup> Mr. McInturff offers four conclusions: 1) there are no existing or future restrictions on the Facility access roadways within one mile of the Facility that would preclude safe and efficient operations of traffic in the area; 2) there are no height or weight restrictions on the Facility access roadways that would limit access to the facility; 3) the roadway capacity of the Facility access roadways will operate at acceptable levels of service throughout the estimated life of the Facility; and 4) all intersections within one mile of the Facility will operate at acceptable levels of service, if U.S. 290 is updated as planned.<sup>203</sup>

Travis County expressed concerns about whether the traffic study submitted in the Application included traffic data from both landfill facilities. Mr. McInturff asserted that the nature of the traffic study is to assess both the landfill traffic volume and the overall volume, and therefore both facilities were considered in the study of overall volume.<sup>204</sup> Travis County inquired as to whether US 290 would still provide an adequate level of service if it were not updated, to which Mr. McInturff responded that the road would reach Level of Service F if not updated, but that this scenario would occur regardless of the existence of landfill traffic.<sup>205</sup> Finally, Travis County asked a series of questions attempting to clarify how traffic will be affected during the construction period on US 290, and Mr. McInturff opined that the construction once started would likely provide for traffic impacts and diversions and finish ahead of schedule.<sup>206</sup> Travis County and the other parties did not offer their own witnesses or direct evidence through cross-examination regarding the issue of transportation.

In light of the evidence presented, the Executive Director concludes that the Application adequately addresses TCEQ rule 30 TAC § 330.61(i) relating to transportation.

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<sup>201</sup> *Id.* According to Mr. Udenenwu, the Application states that the proposed expansion was critically evaluated to determine if any incompatibility exists with the Birds Nest Airport. *Id.*

<sup>202</sup> *See generally* APP500.

<sup>203</sup> *See* McInturff prefiled at 10:20-30.

<sup>204</sup> *See* Tr. p. 1072.

<sup>205</sup> *Id.* at 1073-78.

<sup>206</sup> *Id.* at 1082-88.

**12. Whether the Application includes adequate provisions for closure and post-closure, in compliance with agency rules.<sup>207</sup>**

TCEQ's MSW management rules at 30 TAC §330.21(c), 330.63(h), and 330.63(i), MSW facility closure and post-closure plans must be prepared in accordance with Subchapter K of 30 TAC Chapter 330 (relating to Closure and Post-Closure). Section 330.63(h) and Subchapter K of 30 TAC Chapter 330 list the requirements for the closure plan and are provided in the Application.<sup>208</sup>

WMTX provides a final contour map of the Austin Community Recycling and Disposal Facility in Figures ATT7-1A through ATT7-1C and cross-section maps in Figures ATT7-5A through ATT7-11 in Attachment 7 to Part III of the Application. The maps include all the applicable technical elements specified in the rule.

WMTX provides in Section 2 (*Final Cover*) and Appendix A (*Final Cover Quality Control Plan*) of Attachment 7, narratives, design details, analysis, material specification, construction, and testing methods and reporting requirements for the final cover system proposed for the Facility that address all the applicable technical elements specified in the rule.

WMTX defines the estimated largest area of the landfill ever requiring a final cover during the active life of the landfill to be approximately 69.9 acres in Section 4.0 of Attachment 7. WMTX indicates that parts of the landfill, including the entire "East Hill" and the eastern sections of the "West Hill" have already received final cover.

WMTX defines the estimated maximum inventory of waste ever on site over the active life of the landfill to be approximately 39,137,000 cubic yards in Section 3.0 of Attachment 7. This represents the total estimated airspace at the Facility.

WMTX provides a schedule for completing all activities necessary to satisfy the closure criteria and includes descriptions of key activities it will carry out during the closure period in Section 5.0 of Attachment 7. WMTX indicates that final closure activities will be completed

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<sup>207</sup> As previously stated under issues A.1-4., since no documentation is available, the ED is inclined to categorize the IWU and Phase I units as units that stopped receiving waste prior to October 9, 1991 and therefore subject to the closure requirements in 30 TAC §330.453. Thus, this provision is only triggered if WMTX or another party at the live hearing provided documentation to demonstrate otherwise. It is the ED's impression that no such documentation was offered.

<sup>208</sup> The source for this discussion is ED3 and Mr. Udenenwu's prefiled testimony regarding this issue because there was little testimony offered on this subject.

within 180 days after initiation of final closure activities as required.

Concerning the post-closure care plan, WMTX provides a post-closure care plan in Attachment 8 (Post-Closure Care Plan) of Part III of the Application. The plan addresses the applicable requirements in 30 TAC §§330.463 and 330.465. These requirements include a plan by the owner or operator to retain the right of entry to the closed landfill, maintain and operate the leachate collection system, the groundwater monitoring system, and the landfill gas monitoring system and to conduct inspections at least semiannually and carry out necessary maintenance and/or remediation activities on the final cover and drainage facilities. The plan also provides information on the WMTX official responsible for overseeing the post-closure care activities during the post-closure period. The Plan proposes a 30-year post-closure care period consistent with 30 TAC §330.463(b)(1). WMTX does not propose any post-closure land use on the closed landfill at this time.

Therefore, WMTX has by the information provided in Attachments 7 and 8 of the Application demonstrated that its final closure plan and post-closure care plan comply with all the required technical elements listed in Subchapter K of the 30 TAC.

In addition, WMTX provides in Attachment 9 of Part III of the Application, a detailed written cost estimate for closure and for post-closure care, and narrative and documentation that indicate that it maintains and will continue to maintain financial assurance for closure and post-closure care for the Austin Community Recycling and Disposal Facility.

According to 30 TAC §330.63(j), applicants must submit a cost estimate for closure and post closure care in accordance with Subchapter L of Chapter 330, 30 TAC, as well as a copy of the documentation required to demonstrate financial assurance as specified in Subchapter R of 30 TAC Chapter 37. Authorization to operate a facility is contingent upon the maintenance of financial assurance in accordance with Chapter 37, Chapter 330, and the provisions contained in the permit.

In its cost estimates for closure and post-closure care, WMTX shows the cost of hiring a third party to close the largest area of the landfill ever requiring final closure at any time during the active life of the Facility. WMTX also provides cost estimates for conducting post-closure care activities in accordance with the post-closure care plan for the Facility. WMTX provides line items for calculating the cost estimate for closure and for post-closure care in Tables ATT9-

1 and ATT9-2 respectively. WMTX provides explanations and definitions of the line items in Appendix A of Attachment 9. WMTX calculates the cost estimate for closure to be approximately \$7,186,799 (2006 dollars) and cost estimate for post-closure care as approximately \$4,654,923 (2006 dollars).

The financial assurance for closure and for post-closure care will be based on the above amounts. WMTX states that the Facility conditions will be reviewed annually and these amounts will be adjusted as conditions change at the landfill and annually for inflation. WMTX provides a copy of the documentation required to demonstrate current evidence of financial assurance in Appendix B of Attachment 9. These estimates are part of WMTX's demonstration to meet the financial assurance requirements in TCEQ rules.

Applicant's witnesses also discussed this issue, but Protestants did not offer any live testimony or extensive cross-examination on this topic. Don Smith of WMTX and Charles Dominguez, P.E., engineer of record both testified that post-closure is WMTX responsibility.<sup>209</sup> Mr. Udenenwu discussed this issue in both his prefiled which is relied upon for this closing narrative and affirmed his review at the live hearing.<sup>210</sup> No witness expressed concerns about cost estimates or post-closure plan compliance save concerns about the older units -- the IWU and the Phase I area -- which are not subject to these rules as previously explained.

Therefore, WMTX provides adequate information related to its cost estimates for closure and post-closure care in accordance with 30 TAC §§330.503 and 330.507.

**13. Whether the Application includes adequate provisions to show that the MSW Facility shall not cause or contribute to significant degradation of wetlands in compliance with agency rules.**

Rule 30 TAC §§ 330.61(m)(2)-(3) requires an applicant to provide a wetlands determination under applicable federal, state, and local laws, discuss wetlands in accordance with 30 TAC § 330.553, and identify wetlands within the facility boundary. Section 330.553 prohibits the location of landfill units in wetlands, unless an applicant makes the demonstrations specified under the rule. The Executive Director has evaluated the Application as follows.

Mr. Udenenwu indicated that the Application contained appropriate information to satisfy

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<sup>209</sup> Tr. at 114, ll. 8-11 and at 241, ll. 4-7.

<sup>210</sup> Tr. at 2325 at ll. 5 through 2329 at l. 15 and at 2362 at ll. 1-8.

the requirements of 30 TAC § 330.61(m).<sup>211</sup> The Application includes a discussion of wetlands located within the site in Section 3.6.2 of Parts I/II of the Application. This discussion states that Horizon Environmental Services, Inc. performed a wetland determination that included the entire proposed expansion area and the undeveloped portions of the existing facility.<sup>212</sup> The wetlands assessment submitted by the Applicant identified three features as jurisdictional waters of the United States: a tributary along the western boundary of the expansion area and two small drainages that extend onto the site a short distance, all associated with the Walnut Creek tributary that crosses the site along the northwest boundary of the existing permitted area.<sup>213</sup> The lowermost reach of the main Walnut Creek tributary in the southwestern corner of the expansion area meets the wetlands criteria for the TCEQ and for the City of Austin.<sup>214</sup> Also, one pond in the north central portion of the expansion area meets the criteria for wetlands as established by the City of Austin.<sup>215</sup>

Mr. Udenenwu noted that the two small drainages referenced above are considered hydrologically ephemeral, as indicated in the Application.<sup>216</sup> The proposed expansion will impact the northernmost drainage, but the impact will be less than 1/10th of an acre; therefore, the project will be covered under the Nationwide Permit (NWP) Number 39 and/or Number 43 and does not require notice to the U.S. Army Corps of Engineers.<sup>217</sup>

Mr. Udenenwu indicated that the pond in the north central portion of the expansion area will be impacted by the proposed development, according to the information provided in the Application. This impact will be mitigated in accordance with the City of Austin Site Development Permit by developing a 10.38 acre area that includes the proposed sedimentation/detention pond west of the expansion area to meet the provisions in the City of Austin approved Restoration and Wetlands Mitigation Plan.<sup>218</sup> The Applicant obtained the City of Austin Site Development Permit and the Travis County Flood Hazard Area Development

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<sup>211</sup> See ED Exhibit No. 1 at 25:1-5.

<sup>212</sup> *Id.* at 24. According to Mr. Udenenwu, the wetlands determination evaluated the Facility for applicable federal, state, and local laws, regulations, and rules regarding wetlands. *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

Permit as required.<sup>219</sup>

The only other pertinent, direct testimony on this matter was submitted by the Applicant through the prefiled testimony of Mr. C. Lee Sherrod. Mr. Sherrod concluded that, based on the contents of the Application, no MSW storage or processing would occur in any area that would constitute a wetland under state and federal definitions.<sup>220</sup> Mr. Sherrod further concluded that because less than 1/10th of an acre is potentially impacted by the proposed expansion, the only authorization needed is from the Nationwide Permit (NWP) Number 39 and/or Number 43.<sup>221</sup>

TJFA raised the issue of whether wetlands existed elsewhere on the Facility, but did not offer their own wetlands expert.<sup>222</sup> Mr. Sherrod agreed that wetland vegetation was depicted in photographs supplied by counsel for TJFA,<sup>223</sup> and that he observed wetland vegetation in other parts of the Facility.<sup>224</sup> However, Mr. Sherrod asserted that the vegetation suggested by the counsel for TJFA was a part of a man-made drainage way that should not be classified as a wetland, despite the presence of wetland vegetation.<sup>225</sup> TJFA, Travis County, and the City of Austin raised certain issues through cross examination, but offered little to no direct evidence to rebut the Executive Director's preliminary determination.

After reviewing the evidence, the Executive Director maintains that the Application contains sufficient information to comply with 30 TAC §§330.61(m)(2)-(3) and 30 TAC §330.553.

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<sup>219</sup> *Id.*

<sup>220</sup> See APP Exhibit No. 600 at 17:17. See also 30 TAC § 330.553(b) ("New municipal solid waste landfill units, lateral expansions, and material recovery operations from a landfill shall not be located in wetlands . . .").

<sup>221</sup> APP Exhibit No. 600 at 18:16-29.

<sup>222</sup> See Tr. p. 1117:20 – 1118:7. Counsel for TJFA directed Mr. Sherrod to photographs of vegetation that appeared to be wetland vegetation. *Id.* Mr. Sherrod agreed that the photographs depicted wetlands vegetation. *Id.* These photographs were offered as TJFA Nos. 13 and 14, but were denied admittance for failure to authenticate. *Id.* at 1122:4-12. Counsel for the City of Austin later successfully submitted those photographs as COA Nos. 10 and 11, through cross-examination of Mr. Pierce Chandler. See Tr. p 1750:25-1752:2.

<sup>223</sup> See Tr. p. 1118.

<sup>224</sup> See Tr. p. 1123.

<sup>225</sup> See Tr. p. 1124.



**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.**

- 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.**

Pursuant to 30 TAC §330.61(h), the Executive Director requires an applicant to provide information regarding the likely impacts of a facility 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 to assist the Commission in evaluating the impact of a site on the surrounding area. To that effect, an applicant is required to provide a variety of information.<sup>226</sup> WMTX provides information that addresses the above requirements in Section 3 (*Existing Conditions Summary*) of Parts I/II of the Application.<sup>227</sup>

Concerning the character of the surrounding land uses, WMTX states that the surrounding lands within one mile of the site include developed portions with a variety of commercial, industrial, residential, institutional and recreational uses, which make up approximately 30 percent of the area within one mile of the site.<sup>228</sup> The remaining (70%) areas within one mile of the site are mostly undeveloped "open" land. The fraction of the permit boundary considered to be in the City of Austin is in the Desired Development Zone as opposed to the other zoning designation, the Drinking Water Protection Zone.<sup>229</sup>

Existing uses of the site and the surrounding area within one mile of the Facility boundary are shown on the Land Use Map provided in Figure 3-2 and in Appendix A-2 of Parts I/II of the Application.<sup>230</sup> The maps show all the applicable elements listed in 30 TAC §330.61(g), including the Facility boundary, existing zoning on and surrounding the property,

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<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> Tr. pp. 808:22 -- 809:23.

<sup>230</sup> *Id.*

and actual uses within the Facility and within one mile of the Facility. WMTX also provides discussions in Section 3.1 of Parts I/II of the Application that describe the land use and identify actual uses within one mile of the Facility boundary. Mr. Charles G. Dominguez, P.E., a registered professional engineer in the State of Texas, License No. 83247, sealed the map shown in Figure 3-2 of Parts I/II of the Application, while the maps in Appendix A-2 of Parts I/II of the Application are part of the Land Use Analysis performed by RVi-Richardson Verdoorn on behalf of WMTX for the proposed expansion.

The Applicant's land use expert, Mr. John Worrall, presumes compliance with TCEQ rules in making his land use determinations. Mr. John Worrall stated that he presumes WMTX's compliance with all applicable TCEQ rules regarding operations in preparing his land use analysis.<sup>231</sup> In APP302 at page 10, Mr. Worrall testified that the expansion itself is not a significant land use change, because the landfills have been there for many years.<sup>232</sup> Mr. Worrall testified that the growth has continued around the landfill, suggesting that there is no evidence that growth, particularly residential use, is being deterred by the landfill's existence.<sup>233</sup> Mr. Worrall also stated that WMTX has satisfied the TCEQ rules relating to land use, 30 TAC §§330.61(g) and (h) and that the net effect of the landfill on land use is minimal.<sup>234</sup> Mr. Worrall charted these land uses and revised his analysis in December of 2008 before submitting his prefiled exhibits for the hearing.<sup>235</sup> He found no significant changes from his previous analysis.<sup>236</sup>

Several witnesses testified regarding the effect of the expansion and proximity to neighboring uses.<sup>237</sup> Concerning proximity of residences and business establishments, WMTX states that about 1,183 residences are located within one mile of the site, with the nearest residence approximately 326 feet southwest of the Facility.<sup>238</sup> Approximately 56 businesses (commercial and industrial) are located within one mile of the Facility; the nearest business, The

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<sup>231</sup> Tr. p. 567:23-25.

<sup>232</sup> Tr. p. 652:14-22.

<sup>233</sup> Tr. p. 665:12-17 and p. 709:12-14. *See also* Worrall prefiled at 18:6-8.

<sup>234</sup> Worrall prefiled at 18:6-21 and 19:9. *See also* Tr. p. 671:25 to 672:1-4 and the conclusions on p10 of APP302.

<sup>235</sup> APP302 at 4 and APP202, Vol 1, at 174, Tr. p. 592:16-19 (CAPCOG letter did not play a role in analysis) and at 771: 9-18 (regarding no significant change to aerial photos and some disturbed land).

<sup>236</sup> APP302 at 4 and APP202, Vol 1, at 174, Tr. p. 592:16-19 (CAPCOG letter did not play a role in analysis) and at 771: 9-18 (regarding no significant change to aerial photos and some disturbed land).

<sup>237</sup> Worrall prefiled at 13:28 and Tr. pp. 710:22 – 712:18.

<sup>238</sup> Udenenwu prefiled at 18:16-18.

Sunset Farms Landfill, is adjacent to the north boundary of the site. Two former waste disposal units, the IWU and the Phase I area, are located on and adjacent to southwest of the closed East Hill section of the Facility. Mr. Worrall testified that the closest residence to the landfill is in the southwest corner of Colonial Place subdivision, approximately 305 feet away and that the permit boundary does not change with the expansion.<sup>239</sup> Both Mr. Worrall and a protestant, Mr. Mark McAfee, stated that the expansion would not bring the Facility closer in proximity to the Barr Mansion property.<sup>240</sup> However, Mr. Gregory Guernsey of City of Austin included in his prefiled testimony that the expansion will be closer in proximity to the Pioneer Crossing PUD, and Mr. Worrall agreed with this testimony in his live testimony.<sup>241</sup>

The Texas Health & Safety Code §361.089 and rule 30 TAC §305.66(c) provide that the Commission may, for good cause, deny an application for reasons pertaining to land use. The Commissioners, at their Agenda meeting, are the ultimate decision maker on issues related to land use compatibility.

The Executive Director offers the opinion that WMTX provides information in Section 3 of Parts I/II of the Application that adequately met the requirements specified in 30 TAC §330.61(h) to assist the Commission in evaluating the impact of the site on surrounding areas, and if asked by the Commissioners, the Executive Director would offer a recommendation of approval of the permit.<sup>242</sup>

**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.**

TCEQ rule 30 TAC § 330.15(a)(2) prohibits a person from collecting, storing, transporting, processing, or disposing of MSW, or operating a solid waste facility in a manner that creates a nuisance. Rule 30 TAC § 330.65 requires an applicant for an MSW permit to provide a Site Operating Plan (SOP) that provides the general procedures for facility management for day-to-

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<sup>239</sup> Tr. p. 684:2-22, and Worrall prefiled at 13:27.

<sup>240</sup> Tr. p. 713:18 -- 715:14. McAfee testimony is at Tr. p. 2268:13 -- 2269:4, but Mr. McAfee also testified that the zero effect of proximity does not alleviate the nuisance concern for him at p. 2269:13-23.

<sup>241</sup> Tr. p. 685 and Exhibit GG-3.

<sup>242</sup> *Id.*

day operations at the facility. The SOP must include a description for how the provisions in Subchapter D of Chapter 330 (relating to Operational Standards for Municipal Solid Waste Landfill Facilities) will be implemented.<sup>243</sup> Subchapter D of Chapter 330 contains Operational Standards regarding odor control,<sup>244</sup> the control of spilled and windblown waste,<sup>245</sup> and dust control and the maintenance of site access roads.<sup>246</sup>

Odor:

30 TAC § 330.149 requires applicants for an MSW permit to include an Odor Management Plan as part of their SOP. Plans for odor management must include the identification of wastes that require special attention, such as septage, grease trap waste, dead animals, and leachate.<sup>247</sup>

The Application offers the following in the Odor Management Plan contained in Part IV of the Application.<sup>248</sup> Section 4.13.1 of the Odor Management Plan identifies wastes which are potential sources of odor upon receipt, listing sludges, grease trap waste, and dead animals.<sup>249</sup> The Application also acknowledges that improperly handled leachate and ponded water containing contaminants could become sources of odor as well.<sup>250</sup> Section 4.13.2 of the Odor Management Plan states odor generation and odor emissions are to be minimized by the implementation of leachate handling procedures, the placement of cover materials, the elimination of ponded water, and landfill gas control.<sup>251</sup> The Application states that approved sludges and grease trap waste will be incorporated into the working face of the facility, and that carcasses of animals will be covered immediately with three feet of waste or two feet of soil.<sup>252</sup> Section 4.13.3 of the Plan prescribes the corrective action measures to be implemented when offensive odors are detected at certain areas within the facility.<sup>253</sup> These measures include

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<sup>243</sup> 30 TAC § 330.65.

<sup>244</sup> 30 TAC § 330.149.

<sup>245</sup> 30 TAC § 330.139 & § 330.145.

<sup>246</sup> 30 TAC § 330.153.

<sup>247</sup> 30 TAC § 330.149.

<sup>248</sup> APP202 pp. 3399 – 3401.

<sup>249</sup> *Id.* p. 3399.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> APP202 p. 3399.

<sup>253</sup> *Id.* pp. 3999 – 3401.

increasing the amount of daily cover at the working face, inspecting leachate collection sumps, aerating the leachate evaporation pond, inspecting leachate injection areas for possible ponding and/or “pop outs,” adjusting the Gas Collection and Control System (GCCS) to apply more vacuum at certain wells, removing ponded water, operating a perimeter misting system to neutralize odors, and promptly managing spills of odorous substances.<sup>254</sup>

Protestants testified about odor management. Mr. Chandler testified that WMTX did not identify liquid waste solidification, leachate recirculation, gas utility vents, aeration of leachate ponds, and spray application of leachate as potential sources of odor requiring special attention.<sup>255</sup> Travis County’s witness, Mr. Jon White, testified that he was concerned that WMTX’s operational practices and track record may create a future public nuisances, and in doing so concentrated on the past complaints regarding some agreed orders and complaints from the earlier part of the decade without presenting any new evidence of current concerns.<sup>256</sup> The City of Austin’s witness, Mr. Guernsey, testified that the Application as proposed does not sufficiently mitigate the negative impacts of odor on the residential areas adjacent to the landfill, but did not elaborate on specific concerns with compliance under the rules.<sup>257</sup> City of Austin witness Mr. Joe Word testified that he was concerned that odor would negatively impact nearby property owners and the general public.<sup>258</sup> Mr. McAfee, Mr. Alto Nauert, Mr. Delmer Rogers, Mr. Evan Williams, and Mr. John Wilkins all testified that they were concerned about odors emanating from the Facility.<sup>259</sup>

Mr. Udenenwu, testified that the Odor Management Plan in Section 4.13 of the Application complies with all of the elements specified in 30 TAC § 330.149 for the management of odors.<sup>260</sup> Mr. Udenenwu testified that the Applicant identified the sources of odors at the Facility which require special attention, detailed the methods to be used to minimize odor generation and emissions, and described source specific corrective action measures to be

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<sup>254</sup> *Id.* See also discussion of issue relating to landfill gas.

<sup>255</sup> Chandler prefiled p. 184: 9 – 17.

<sup>256</sup> JW-1 p. 18:6 – 16; p. 25:21 – p. 26:18; Tr. pp. 1937:21- 1939:13.

<sup>257</sup> GG-1 (Prefiled Testimony of Greg Guernsey) p. 6:8 – 15.

<sup>258</sup> JW-1 pp. 10:10 – 11:6.

<sup>259</sup> MM-1 p. 2:21 – 29; p. 3:5 – 20; AN-1 pp. 10:27 – 11:3; DR-1 p. 2:21 – 30; p. 5:21 – 23; JAW-1 p. 1:16 – 18; p. 2: 27 – 29; p. 3:24 – 27; EW-1 p. 2:7 – 17.

<sup>260</sup> ED1 p. 56:41 – 53.

taken in response to odor events.<sup>261</sup>

The Executive Director offers that the Application includes adequate provisions to prevent the creation or maintenance of odor.

Spilled and Windblown Waste:

30 TAC § 330.139 requires that the working face of a landfill be maintained and operated in a manner that controls windblown solid waste. Windblown waste and litter at the working face must be controlled by using engineering methods or measures, including portable panels, temporary fencing, and perimeter fencing or comparable engineering controls.<sup>262</sup> Litter scattered throughout the site, along fences and access roads, and at the gate must be picked up once a day on the days that the facility is in operation.<sup>263</sup> The SOP must delineate the engineering methods used to control windblown waste and litter, and describe the procedures used to comply with the daily litter pick-up requirement.<sup>264</sup> The owner or operator of an MSW facility is also required to take steps to encourage vehicles hauling waste to the site to properly enclose or secure their loads, in order to prevent the escape of any part of the load due to blowing or spilling.<sup>265</sup>

In the Application, section 4.8 of the SOP sets out how the Applicant proposes to control windblown waste and litter at the facility.<sup>266</sup> The Applicant states that in order to control windblown debris and odors, reduce the possibility of fires, prevent scavenging, and improve the operation of the site, a minimum of six inches of daily compacted cover soil or approved Alternative Daily Cover (ADC) will be placed over all exposed wastes at the end of each working day or at least once every 24 hours.<sup>267</sup> Additionally, portable and stationary litter fences will be used to aid in the control of windblown material.<sup>268</sup> Section 4.8 of the SOP provides that windblown waste and litter scattered throughout the site, along fences and access roads, and at the gate, will be picked up by Facility personnel once a day on the days the Facility is in operation and returned to the working face.<sup>269</sup> The Applicant will keep a daily log of their pick-

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<sup>261</sup> *Id.* at p. 57: 9 – 26.

<sup>262</sup> 30 TAC § 330.139(1).

<sup>263</sup> 30 TAC § 330.139(2).

<sup>264</sup> 30 TAC § 330.139 (1) & (2).

<sup>265</sup> 30 TAC § 330.145.

<sup>266</sup> APP202 p. 3395.

<sup>267</sup> *Id.* See also discussion on cover issue.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

up litter and debris to document compliance with this requirement.<sup>270</sup> Section 4.11 of the SOP provides that the Applicant's Site Manager will, as necessary, post signs at the site entrance requiring incoming loads to be enclosed or covered, report offenders to the Travis County Sheriff's office, impose litter control surcharges, or take other similar measures to encourage vehicles hauling waste to the site to properly enclose or secure their load.<sup>271</sup> The SOP states that once a day, on days when the facility is in operation, site personnel will cleanup waste materials spilled or otherwise deposited along access roads to the facility for a distance of two miles in either direction from the facility entrance.<sup>272</sup> These roads include Giles Road, U.S. Highway 290, Blue Goose Road, and Johnny Morris Road.<sup>273</sup>

Protestants expressed some concerns. Mr. Chandler testified that the Applicant should add additional engineering measures and operational practices should be added to the SOP to address windblown waste.<sup>274</sup> Travis County's witness, Mr. Jon White, testified that litter from the Facility would negatively impact surrounding property owners and the general public.<sup>275</sup> The City of Austin's witness, Mr. Guernsey and Mr. Joe Word, testified that the Application as proposed does not sufficiently mitigate the negative impacts of litter on the residential areas adjacent to the landfill.<sup>276</sup> Mr. Rogers, Mr. Nauert, Mr. Wilkins, and Mr. Williams testified that they were concerned about windblown trash.<sup>277</sup>

Mr. Udenenwu, testified that Section 4.8 of the SOP addresses all the applicable technical elements for control of windblown solid waste and litter in a manner that meets the requirements of 30 TAC § 330.139.<sup>278</sup> Mr. Udenenwu noted that the Application describes the engineering measures and operational practices that the Applicant will use to control and manage windblown waste and litter at and around the site.<sup>279</sup>

Overall, the Executive Director offers that the Application includes adequate provisions to control spilled and windblown waste.

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<sup>270</sup> APP202 at 3395.

<sup>271</sup> *Id.* p. 3398.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> Tr. pp. 1753:20 – 1755:14.

<sup>275</sup> JW-1 pp.10:22 –11:8; 16:10 – 16; and pp. 25:21 – 26:18.

<sup>276</sup> GG-1 pp. 6:8 – 15; JW-1 p. 6:121 – 124; p. 11:232 – 236.

<sup>277</sup> DR-1 p. 2:20 – 22; p.4:24 – 27; AN-1 p. 11:16; JAW -1 p. 3:18 – 19; EW-1 p. 2: 6 – 9; p. 3:7 – 11.

<sup>278</sup> ED-1 p. 54: 40 – 42.

<sup>279</sup> *Id.* p. 54:25 – 34.

Dust Control and Maintenance of Site Access Roads:

Rule 30 TAC § 330.153(b) provides that dust from on-site and other access roadways must not become a nuisance to surrounding areas. The owner or operator of an MSW facility must provide a water source and necessary equipment or other means of dust control approved by the Executive Director.<sup>280</sup> Rule 30 TAC § 330.153(a) requires the owner or operator of an MSW facility to provide all-weather roads from the facility to access public roads, and within the facility to the unloading area(s) designated for wet-weather operation. Tracked mud and associated debris at the access to the facility on the public roadway must be removed at least once per day on days when mud and associated debris are being tracked onto the public roadway.<sup>281</sup> The methods for controlling mud and associated debris tracked onto public roadways must be specified in the SOP.<sup>282</sup> Finally, the owner or operator of an MSW facility must maintain all on-site and other access roadways in a clean and safe condition.<sup>283</sup> Litter and any other debris must be picked up at least daily and taken to the working face.<sup>284</sup> Access roadways must be regraded to minimize depressions, ruts, and potholes.<sup>285</sup> The frequency of regrading must be specified in the SOP.<sup>286</sup>

Section 4.15 of the Application describes how the Applicant will control dust and maintain on-site and other access roadways.<sup>287</sup> The Application states that an on-site water truck will be equipped and used for dust control on an as-needed basis.<sup>288</sup> The Applicant will provide all-weather site access roads consisting of compacted gravel, crushed stone, asphalt, concrete, or other road building material from the Facility to Giles Road, and within the Facility to the unloading area(s) designated for wet-weather operation.<sup>289</sup> The Applicant may use a sweeper and/or bulldozer bucket to remove tracked mud and associated debris at the access to the Facility on the public roadway at least once per day on days when mud and associated debris are being

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<sup>280</sup> 30 TAC §330.153(b).

<sup>281</sup> 30 TAC §330.153(a).

<sup>282</sup> *Id.*

<sup>283</sup> 30 TAC §330.153(c).

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> App202 p. 3401 - 3402.

<sup>288</sup> *Id.* at 3401.

<sup>289</sup> *Id.* at 3401.



tracked onto the public roadway.<sup>290</sup> Section 4.15 states that truck traffic leaving the site will exit via a 3,256 foot paved road, which will help clean off excess mud before reaching the public roadway.<sup>291</sup> Trucks may also utilize an on-site wheel wash facility, as necessary, before exiting the site.<sup>292</sup> The Applicant states that on-site access roads will be inspected on a daily basis, and that mud will be removed from on-site access roads, as necessary, to prevent tracking mud onto roads outside the facility.<sup>293</sup> The SOP requires litter and debris to be picked up on and around on-site roads and ditches on a daily basis on days when the facility is operating.<sup>294</sup> The SOP provides for regrading when there is an accumulation of mud on site access roadways, or when the roadway conditions require filling of potholes, removal of rocks or other debris, or other maintenance activities.<sup>295</sup> On-site roadways are to be inspected approximately every two months, and the results of these inspections and any required maintenance are documented.<sup>296</sup>

The Protestants expressed concerns about dust and mud. Mr. White, testified that dust emanating from the Facility and mud tracked onto roadways by vehicles exiting the Facility would negatively impact surrounding property owners and the general public.<sup>297</sup> Mr. Word, testified that dust emanating from the facility and mud tracked onto Giles Road would adversely impact residential areas adjacent to the landfill.<sup>298</sup> Mr. Nauert, Mr. Rogers testified that they were concerned with dust coming off of the Facility, and mud being tracked from the Facility onto surrounding roadways.<sup>299</sup> Mr. Williams testified that he was concerned with dust blowing off of the Facility.<sup>300</sup> The witnesses did not address how compliance with the SOP would not address these concerns or how the Application did not meet the standards set under the applicable rules.

Mr. Udenenwu, testified that the SOP in the Application has met the requirements set forth in 30 TAC § 330.153 regarding dust suppression and the maintenance of site access

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<sup>290</sup> *Id.*

<sup>291</sup> APP202 at 3401.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.* at 3401 – 3402.

<sup>294</sup> *Id.* at 3402.

<sup>295</sup> APP202 at 3402.

<sup>296</sup> *Id.*

<sup>297</sup> JW-1 at 10:22 – 11:8; 16:10 – 16; 25:21 – 26:18.

<sup>298</sup> JW-1 at 6:121 – 124; 11:237 – 243.

<sup>299</sup> AN-1 at 11:16 – 21; DR-1 at 2:20 – 22; 3:27 – 4:21.

<sup>300</sup> EW-1 at 3:7 – 13.

roads.<sup>301</sup> Mr. Udenenwu's review of the Application states that the proposed use of an on-site water truck is a sufficient method of dust control.<sup>302</sup> Mr. Udenenwu review of the Application states that the Applicant's proposal to minimize the tracking of mud and associated debris from the landfill onto public roadways complied with 30 TAC § 330.153(a).<sup>303</sup> The Applicant proposes that truck traffic leaving the site will exit via a 3,265 foot long paved road, utilize a wheel-wash facility, and the Applicant will also require daily pick up of mud and debris on days when it is being tracked onto public roadways.

The Executive Director offers that the Application includes adequate provisions regarding dust control and the maintenance of site access roads.

3. **Whether the Application includes adequate provisions to control noise, in compliance with agency rules, and**
4. **Whether the landfill's operational hours are appropriate.**

The Executive Director considers noise and operating hours to be related as there are no TCEQ MSW rules directly relating to noise aside from the following discussion regarding buffer zones and screening at B.5. TCEQ MSW permitting rules also have no prescribed limitation or curtailment of hours directly due to excessive noise. Noise ordinances are typically a matter of local government law and ordinances. At the contested case hearing, there was no evidence offered regarding local controls of noise from landfills or zoning. Mr. McInturff testified that he is not aware of noise limits for roadways.<sup>304</sup> Mr. Worrall stated that noise was a consideration for him in his land use analysis, but only in the context of what the rules provide.<sup>305</sup> Mr. Worrall also concluded that the noise impact will not change because of the location of site access.<sup>306</sup> Mr. White of Travis County generally testified that the SOP provides enhancements to address noise.<sup>307</sup>

Because common sense dictates that noise can only occur when the site is operating, the Executive Director relates this issue to rules regarding operating hours and limits his discussion

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<sup>301</sup> ED-1 at 59:23 – 31.

<sup>302</sup> *Id.* at 59:14 – 21.

<sup>303</sup> *Id.* at 58:41 – 59:12.

<sup>304</sup> Tr. p. 1096:17-23.

<sup>305</sup> Tr. p. 567:1-12 and p. 681:21-23.

<sup>306</sup> Tr. p. 693:6-11.

<sup>307</sup> Tr. pp. 1937:14 -- 1938:13.

to the applicable rules. Rule 30 TAC §330.135(a) states that the waste acceptance hours and operating hours must be specified. The rule indicates that the hours specified may be the hours stated in the rule, or any other times proposed and subsequently approved in an authorization. Operating hours are defined at 30 TAC §330.3 (98), and the hours of waste acceptance are defined at 30 TAC §330.3 (171).

The WMTX Application includes provisions for operating hours that meet the MSW management rules in 30 TAC §330.135. WMTX detailed the operating hours for the Austin Community Recycling and Disposal Facility in Section 4.6 (Operating Hours) of the SOP. The Austin Community Recycling and Disposal Facility as currently permitted operates from 9:00 p.m. Sunday through 7:00 p.m. Saturday and, if necessary, from 7 a.m. to 4 p.m. on Sunday. The Applicant proposes to maintain these hours of operation.

Although the Executive Director would not be opposed to limiting the hours of operation or waste acceptance to reduce traffic in order to address the Protestants' concerns with the current 249C facility,<sup>308</sup> the Executive Director has considered the evidence presented and offers that the operating and waste disposal hours presented in the Application comply with TCEQ rules.

**5. Whether the provisions proposed for buffer zones and landscape screening comply with agency rules.**

The requirements for buffer zones are specified in 30 TAC §330.141(b) and §330.543(b) and were significantly revised as part of the 2006 revisions to Chapter 330.<sup>309</sup> According to 30 TAC §330.543(b)(2), existing landfills are to maintain their permitted buffer zones. For lateral expansions of an existing landfill, as in the proposed 249D, the owner or operator must establish and maintain a minimum 125-foot buffer zone measured from the edge of the horizontally expanded portion of the landfill.<sup>310</sup>

The Commission's intent in revising rules relating to buffer zones is significant to evaluating this issue and other issues relating to noise, odors, windblown waste and protection of surface water. In response to numerous comments, the preamble of the rule states:

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<sup>308</sup> Tr. p. 2253:4-8, and pp. 1996:24 to 1997:2.

<sup>309</sup> "Buffer zone" is defined in 30 TAC §330.3(19) as "a zone free of municipal solid waste processing and disposal activities within and adjacent to the facility boundary on property owned or controlled by the owner or operator."

<sup>310</sup> 30 TAC §330.543(b)(2)(C).

The commission believes that the 125-foot buffer zone distance for a Type I landfill strikes a balance between the interests of all commenters and ensures adequate space to meet the performance requirements established in §330.543(b)(3)(B)(i) - (iv) to provide for: visual screening; access for emergency response, maintenance, and monitoring; control of odors and windblown waste; and control of drainage and sediment runoff.<sup>311</sup>

In addition to these new rules, several other TCEQ rules relate to the screening of solid waste. The Executive Director is required to coordinate with the Texas Department of Transportation (TXDOT) for existing or proposed facilities within 1000 feet of an interstate or primary highway to determine the need for screening or special operating requirements under 30 TAC §330.23(a). An applicant must identify, as part of the facility layout maps, provisions for the maintenance of natural windbreaks, such as greenbelts, where they will improve the appearance and operation of the facility and, where appropriate, plans for screening the facility from public view under 30 TAC §330.61(d)(7). Under 30 TAC §330.175, an applicant must provide visual screening of deposited waste materials where the Executive Director determines that screening is necessary, or as required by the permit. Under 30 TAC §§330.543(b) and 330.141, an applicant must provide for visual screening of solid waste processing and disposal activities as part of a specific engineered design alternative to meet specific buffer zone requirements.

The Executive Director has reviewed the Application for compliance with the new MSW rules pertaining to buffer zones. Mr. Udenenwu testified that the narratives and discussions provided by the Applicant in Section 4.9 of the SOP address all the applicable technical elements for buffer zones in a manner that is consistent with the provisions in 30 TAC §§330.141 and 330.543.<sup>312</sup> According to Mr. Udenenwu, the buffer zone provision in the expansion area is consistent with the new buffer zone requirement for lateral expansion areas, and all proposed buffer zones are located within the facility boundary or on property adjacent to the facility boundary that is owned or controlled by the Applicant.<sup>313</sup>

The Application contains sufficient information to satisfy the screening requirements of the rules. According to the prefiled testimony of Mr. Udenenwu, the Facility is located within

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<sup>311</sup> 31 TexReg 2580 (March 24, 2006).

<sup>312</sup> See ED Exhibit No. 1 at 55:42-56:5.

<sup>313</sup> *Id.* at 55:33-37.

1000 feet of US Highway 290,<sup>314</sup> and so the Executive Director coordinated with TXDOT, as required in 30 TAC §330.23(a), through a letter dated April 18, 2006.<sup>315</sup>

According to Mr. Udenenwu, the Application addresses the screening of deposited waste as required in 30 TAC § 330.175.<sup>316</sup> He notes that the Application provides in Section 2.5 of Attachment 7 in Part III and in Section 4.25 of the SOP, that the east and south slopes of the East Hill at the landfill have been landscaped and continue to be vegetated, and that existing vegetation in the buffer zone will be maintained as needed to provide visual screening of disposal operations from public view.<sup>317</sup> The Application also provides that waste deposited on elevated portions of the landfill will be covered by daily, intermediate, or final covers, described in the SOP and in the Final Closure Plan.<sup>318</sup>

The only other direct testimony concerning buffer zones was provided by the City of Austin by Mr. Word.<sup>319</sup> Mr. Word testified that “simply complying with the 125 foot buffer requirement is not sufficient to assure that there will be no impact.”<sup>320</sup> However, Mr. Word’s interpretation of the buffer zone requirement conflates the concepts of buffer zones and land use compatibility and is more properly offered as a rulemaking comment.<sup>321</sup> While it is conceivable that additional buffer zone footage might be more compatible with local land uses, the requirement for buffer zones under TCEQ MSW rules and for land use compatibility under TCEQ statutes are separate considerations. As previously stated, noise control is often a matter of local government control, not TCEQ MSW rule interpretation.

It should be noted that TJFA’s expert agrees that buffer zones also mitigate noise, odor and light pollution yet understands the practical limits of these mitigation measures. Mr. Chandler, when questioned as to whether an increase in buffer zone size would mitigate the

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<sup>314</sup> *Id.* at 62:38.

<sup>315</sup> *Id.* According to Mr. Udenenwu’s testimony, TXDOT expressed in a letter dated October 7, 2005, that it will work cooperatively with the landfill owner to understand the proposed expansion of the landfill and proposed changes to the gas management plan, and how they may affect transportation planning. *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> *Id.* The Applicant provides details of the approved landscaping plan in Appendix B of Attachment 7. *Id.*

<sup>318</sup> *Id.* See also the discussion of cover.

<sup>319</sup> See COA Exhibit JW-1 at 7.

<sup>320</sup> *Id.* See also *id.* at 11-12.

<sup>321</sup> See COA Exhibit JW-1 at 7 (“If all that an applicant needed to do to demonstrate that a facility will not adversely impact human health or the environment is provide a 125 foot buffer, there would be no reason for the rules to require consideration of land use in vicinity of the landfill.”).

effects of light pollution and noise on nearby properties,<sup>322</sup> Mr. Chandler agreed that increasing the buffer zone would help in that regard, but qualified his statement to note that applicants are limited by the physical confines of the site as to how large a buffer zone can be.<sup>323</sup> Mr. Chandler testified that the visual screening required by the new rules would aid in reducing noise and that some noise but cannot be helped since it is a factor of the OSHA required backup beepers on heavy equipment.<sup>324</sup>

Thus, the Executive Director has evaluated evidence presented and the Application and determined that the Application meets the applicable rules regarding visual screening and buffer zones in 30 TAC §§330.141(b) and 330.543(b) as well as other rules as specified above.

**C. WHETHER THE APPLICATION SHOULD BE DENIED BASED ON THE APPLICANT'S COMPLIANCE HISTORY, IN ACCORDANCE WITH STATE LAWS AND AGENCY RULES.**

Chapter 5 of the Texas Water Code requires that the Commission consider an applicant's compliance history before issuing a permit amendment.<sup>325</sup> As part of the administrative and technical reviews of the permit application, the TCEQ examines the compliance history of an applicant's business as a whole and the particular site, pursuant to the criteria in state rule at 30 TAC Chapter 60. The compliance history includes multimedia compliance-related components about the site under review.<sup>326</sup> These components include the following: enforcement orders, consent decrees, court judgments, criminal convictions, chronic excessive emissions events, investigations, notices of violations, audits and violations disclosed under the Audit Act, environmental management systems, voluntary on-site compliance assessments, voluntary pollution reduction programs and early compliance. More details on compliance history can be found on the TCEQ website at <http://www.tceq.state.tx.us/compliance/enforcement/history/about.html>.

At the time the Executive Director determined the WMTX Application was

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<sup>322</sup> See Tr. p. 1758.

<sup>323</sup> *Id.*

<sup>324</sup> Tr. pp 1756:13 -- 1757:25.

<sup>325</sup> Tex. Water Code §5.754(e)(1) and (i)

<sup>326</sup> See App-103 (January 2008 Compliance History Report) & App-104 (December 2008 Compliance History Report).

administratively complete (September 15, 2005), the most recent compliance history was obtained for the 249C facility, for the compliance period between September 1, 2000 and August 31, 2005. The report indicated a classification of “average.” An updated compliance history was obtained at the time the Application was declared technically complete (January 4, 2008) for the compliance period between January 2, 2003 and January 2, 2008; the updated compliance history also indicated a classification of “average.” Mr. Udenenwu testified in addition to the Compliance History Report, he does consider the details of the compliance history and does not just read the classification.<sup>327</sup>

At a contested case hearing, the site classification is not subject to challenge pursuant to 30 TAC §60.3(g). During the contested case hearing discovery and live hearing, the site classification remained average. No new information was alleged or proved with any direct evidence to show any dispute as to the site classification. It is significant that there has not been a current or recent enforcement action or specific complaint with direct evidence or exhibits presented in the live hearing, only references to and interpretations of older orders in the compliance history with limited anecdotal discussion about the violations alleged and the underlying investigations.<sup>328</sup>

The Executive Director has determined that the “Average” status is adequate for this Applicant’s proposed Permit No. 249D and recommends Commission approval of the permit in regard to compliance history.<sup>329</sup>

**D. 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.**

Although this issue was discussed at the contested case hearing and alleged by a few expert witnesses, the Executive Director must evaluate this issue under Chapter 330 and in the context of the proposed Application. The rules in Chapter 330 shed some light on this issue:

No person may commence physical construction of a new municipal solid waste (MSW) management

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<sup>327</sup> Tr. p. 2401:9-20.

<sup>328</sup> Tr. p. 2253:4-8 and Tr. pp. 2279:20 – 2280:22. *See also* APP103 (January 2008 Compliance History Report) & APP104 (December 2008 Compliance History Report).

<sup>329</sup> *Id.*

facility, a vertical expansion, or a lateral expansion without first having submitted a permit application in accordance with §§330.57, 330.59, 330.61, 330.63, and 330.65 of this title (relating to Permit and Registration Application Procedures) and received a permit from the commission, except as provided otherwise in this section.<sup>330</sup>

The definitions section of Chapter 330 tempers the scope of the above language with the definition of “commence physical construction,” which is defined as the following:

The initiation of physical on-site construction on a site for which an application to authorize a municipal solid waste management unit is pending, the construction of which requires approval of the commission. Construction of actual waste management units and necessary appurtenances requires approval of the commission, but other features not specific to waste management are allowed without commission approval.<sup>331</sup>

This definition indicates that the permissibility of the construction on this site depends, in part, on whether the constructed element alleged is 1) the actual waste management unit, 2) a necessary appurtenance to a waste management unit, or 3) a feature that is specific to waste management.

Several Protestants alleged the Applicant began construction before the issuance of the draft permit. Mr. Chandler based his allegations on personal observations made on a December 10, 2008 site visit.<sup>332</sup> While on his visit, he observed “constructed sedimentation and detention ponds in the expansion area of the ACL.”<sup>333</sup> TJFA also submitted two aerial photographs, TJFA Exhibit Nos. 450 and 202, for the purpose of indicating that two ponds were added to the site between April 30, 2006 and December 4, 2007.<sup>334</sup> Finally, TJFA identified several portions of the Application appearing to indicate that the ponds identified in the aerial photography were the same ponds proposed as a part of the expansion.<sup>335</sup> Mr. Lesniak also indicated that the proposed sedimentation pond already appears to be built.<sup>336</sup> However, Mr. Lesniak seemed to raise the existence of the sedimentation pond in support of run-off protection, and not for purposes of showing that the Applicant was engaged in construction before the approval of the proposed permit.

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<sup>330</sup> 30 TAC § 330.7(a).

<sup>331</sup> 30 TAC § 330.3(26).

<sup>332</sup> See Chandler prefiled at 185.

<sup>333</sup> *Id.* at 186.

<sup>334</sup> *Id.* at 191.

<sup>335</sup> *Id.* at 188-89.

<sup>336</sup> See COA Exhibit CL-1 at 6, 9.



The Applicant has an explanation. As offered both in the prefiled testimony of Mr. Chandler for TJFA,<sup>337</sup> and in the Application, there is an explanation for the pre-expansion in the Application, Part I/II, Section 2.3 and Figure 2-1-6A.<sup>338</sup> The Applicant proposed to begin excavation of the future ponds as a method for borrowing soil, and for temporary sedimentation trapping during access road construction.<sup>339</sup> Mr. Chandler testifies that this explanation was “contradictory,” and that the ponds indicated in Figure 2-1-6A were depicted as only partially constructed even though aerial photographs depicted them as “completed.”<sup>340</sup>

The issue of whether the ponds appearing in TJFA Exhibit 202 were the same as the proposed detention and sedimentation ponds described in the permit application was a recurring subject under cross-examination. Mr. Smith identified the ponds on TJFA Exhibit 202.<sup>341</sup> Mr. Smith agreed that the identified portion of the exhibit showed ponds,<sup>342</sup> but was unclear as to whether he knew they were there before having seen the exhibit.<sup>343</sup> Mr. Smith agreed that the ponds were in the expansion area of the site, as depicted in TJFA Exhibit 202.<sup>344</sup> Mr. Dominguez agreed that the ponds in TJFA Exhibit 202 were of the same basic shape and in the same location as the ones shown in the Application.<sup>345</sup> However, Mr. Dominguez would not conclude that the identified ponds were the exact same as those proposed in the Application because the identified ponds did not include several aspects of the proposed, completed ponds, namely concrete weirs, stand pipes, and a biofiltration system.<sup>346</sup> Mr. Dominguez agreed that the ponds depicted in TJFA Exhibit 202 were the same as those on COA Exhibit TF-3, page 10 of 16.<sup>347</sup> However, Mr. Dominguez again could not say whether the ponds in the aerial photo – TJFA Exhibit 202 – were exactly the same as the ones in COA Exhibit TF-3.<sup>348</sup> Again, his explanation was that he could not say that the ponds were identical because the ponds as they

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<sup>337</sup> See TJFA Exhibit 400 at 194.

<sup>338</sup> See APP Exhibit 202 at 14-15, 132.

<sup>339</sup> *Id.*

<sup>340</sup> Chandler prefiled at 194.

<sup>341</sup> See Tr. p. 154-155.

<sup>342</sup> *Id.* at 154:21-155:1.

<sup>343</sup> *Id.* at 155:8-14.

<sup>344</sup> *Id.* at 155:15-22.

<sup>345</sup> See Tr. p. 371.

<sup>346</sup> *Id.* at 371:2-8.

<sup>347</sup> *Id.* at 460:11-14.

<sup>348</sup> *Id.* at 460:17-19.

existed at the time were not completed as specified in the Application.<sup>349</sup>

Mr. Lesniak performed the same exercise of identifying the proposed ponds in the permit application and comparing them to those depicted in the aerial photograph, TJFA Exhibit 202.<sup>350</sup> Mr. Lesniak identified in TJFA Exhibit 202 what were, in his opinion, ponds containing water that were in the location of the ones proposed.<sup>351</sup> Counsel for TJFA also had Mr. Lesniak read the definition of “structural component”<sup>352</sup> as well as the latter half of 30 TAC § 330.7(a) (concerning commencement of physical construction), and had Mr. Lesniak opine as to meaning of that provision.<sup>353</sup> Mr. Lesniak agreed that 30 TAC § 330.7(a) requires a permit before construction, but also noted that the ponds he observed on the site and in TJFA Exhibit 202 were not completed.<sup>354</sup> Mr. Franke of the City of Austin also agreed that the ponds in the northwest corner of the Facility expansion area were substantially the same as those in Mr. Franke’s prefiled testimony.<sup>355</sup>

While the Executive Director acknowledges that the rules prohibit applicants from commencing physical construction of waste management units before the issuance of the permit, the existence of such construction activities would not affect whether the contents of the Application were sufficient.

**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.**

Pursuant to THSC §§361.011, 361.062, 361.066, and 361.089, the Commission is the ultimate decision-maker as to whether an application for a solid waste management permit or facility is in compliance with an adopted RSWMP.<sup>356</sup> As required by THSC §361.011, the Commission is responsible for, and controls all aspects of, the management of municipal solid waste. The role of councils of governments in determining whether permit applications comply

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<sup>349</sup> *Id.* at 461:10-14.

<sup>350</sup> *See* Tr. p. 2119-20.

<sup>351</sup> *Id.* at 2120:8-11.

<sup>352</sup> 30 TAC 330.3(152).

<sup>353</sup> Tr. p. 2127-29.

<sup>354</sup> *Id.* at 2129:19-25.

<sup>355</sup> *Id.* at 2187.

<sup>356</sup> *Id.*

with an RSWMP is to make the initial determination of compliance and conformity. The Commission has not delegated its authority to CAPCOG to make a final decision regarding whether permit applications comply with the adopted RSWMP. CAPCOG's findings are advisory in nature, and not binding on the Commission. The Commission may also grant a variance pursuant to THSC §363.066 as discussed by Northeast Neighbor's Coalition, but this would only apply to plans adopted by commission rule. Furthermore, the Commission may amend CAPCOG's findings in light of its authority under THSC §§361.011, 361.066, and 361.089, and make a final determination regarding the Application's compliance with the RSWMP.

The Executive Director does not make a determination as to whether a solid waste management permit application or facility complies with an adopted Regional Solid Waste Management Plan (RSWMP).<sup>357</sup> Pursuant to 30 TAC §330.61(p), the Executive Director requires an applicant to provide documentation showing that Parts I and II of the Application were submitted for review to the applicable council of government for compliance with the RSWMP. The Applicant provided the Executive Director with the required documentation in Appendix A-1 of Parts I/II of the Application.

In accordance with 30 TAC §330.61(p), a review letter is not a prerequisite to a final determination on a permit or registration application. In a letter dated January 31, 2006 addressed to the Executive Director, the CAPCOG took the position that the proposed permit amendment Application does not conform with the applicable Regional Solid Waste Management Plan (RSWMP) based on concerns relating to the Facility's compliance history, siting, management, and method of operation, as well as compatibility with surrounding land use and significant local concerns about the site. Appendix A-1 of Parts I/II of the Application contains a letter dated October 19, 2006 addressed to Mr. Helmers of CAPCOG. Golder Associates of Houston, Texas prepared the letter on behalf of WMTX. The letter indicates that WMTX submitted Parts I/II of the Application to CAPCOG and requested CAPCOG's review letter as required.

The Applicant has met the requirements in 30 TAC §330.61(p) in the Application.<sup>358</sup>

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<sup>357</sup> Tr. pp. 2401:9—2402:1.

<sup>358</sup> *Id.*

**VII. SUMMARY**

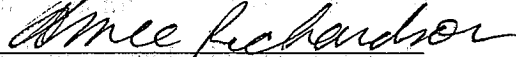
Based on evidence admitted, the Executive Director contends that all regulatory requirements for an MSW landfill expansion permit amendment were met by the Applicant. Therefore, the TCEQ's Executive Director reaffirms his preliminary decision to recommend Commission approval of the MSW permit amendment No. 249D.

Respectfully submitted,

Texas Commission on Environmental  
Quality

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**CERTIFICATE OF SERVICE**

I certify that on May 8, 2009, the foregoing Executive Director's Closing Argument was sent by first-class mail and e-mail to all persons on the attached mailing list.



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MC 173

CHIEF CLERKS OFFICE  
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**SOAH DOCKET NUMBER:** 582-08-2186  
**REFERRING AGENCY CASE:** 2006-0612-MSW

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