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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
P.O. Box 13025
Austin, Texas 78711-3025

Re: **WASTE MANAGEMENT OF TEXAS, INC.**
SOAH DOCKET NO. 582-08-2186
TCEQ DOCKET NO. 2006-0612-MSW

Dear Judge Scudday:

Enclosed for filing is the Office of Public Interest Counsel's Closing Arguments in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Amy Swanholm".

Amy Swanholm, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

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

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

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S
CLOSING ARGUMENTS**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE SCUDDAY:

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (the Commission or TCEQ) and files this Closing Argument in the above-referenced matter.

I. INTRODUCTION

Waste Management of Texas, Inc. 9900 Giles Rd., Austin, TX 78754 (WM or Applicant) applied for a permit amendment to authorize an expansion of their existing permit, to increase the volume and site life of the Austin Community Recycling and Disposal Facility, (Facility) a Type I municipal solid waste landfill facility located on Giles Road, approximately 250 feet north where Giles Road and Highway 290 meet in Austin, Travis County, Texas. The proposed expansion would add 71.11 acres to the permitted boundary of the Facility, for a total permitted area of 359.71 acres. Although certain areas could increase in elevation as part of the proposed expansion, the current maximum elevation of 740 feet would not change.

The Facility is currently permitted to receive municipal solid waste, or solid waste resulting from, or incidental to, municipal, community, commercial, institutional, and recreational activities, including garbage, rubbish, ashes, street cleanings, dead animals, abandoned automobiles, and all other solid waste other than industrial solid waste. The Facility

can also receive brush, construction-demolition waste, special waste, nonhazardous Class 2 and Class 3 industrial solid waste, and non-hazardous industrial solid waste that is Class 1 only because of asbestos content.

II. PROCEDURAL HISTORY

The Texas Commission on Environmental Quality (TCEQ) received the application on August 6, 2005 and the Executive Director (ED) declared it administratively complete on September 15, 2005. The application was declared technically complete on January 4, 2008. On April 14, 2008, the ED held a public meeting in Austin, Texas, and on April 16, 2008, a preliminary hearing was held at the State Office of Administrative Hearings (SOAH) where parties to the contested case hearing were officially named and jurisdiction was taken. Named parties include the Applicant, TJFA, Travis County, The City of Austin, the ED, and OPIC. The hearing on the merits was held March 30, 2009 through April 13, 2009. This matter has been directly referred to the State Office of Administrative Hearings (SOAH) for a contested case hearing, therefore no issues have been specified by the Commission.

III. ANALYSIS

A. Expansion of the Facility is not compatible with surrounding land uses.¹

The Texas Health and Safety Code and the TCEQ rules require the Commission to consider land-use issues when evaluating a permit application.² “A primary concern is that the use of any land for a municipal solid waste facility not adversely impact human health or the environment.”³

WM and the Executive Director agree that the proposed expansion would be compatible with surrounding land uses because the Facility is already in operation and can be operated in a

¹ See *Order No. 12 Ruling on Evidence, Setting Schedule for Arguments, Adopting Common Outline, and Requiring Proposed Findings and Conclusions (Order No. 12)*, page 3, section B, subsection 1.

² Texas Health and Safety Code § 361.069 and 361.089; 30 TAC § 330.061(g), (h).

³ 30 TAC § 330.061(h).

manner that is in compliance with TCEQ rules. TJFA, The City of Austin, and Travis County presented testimony that the Facility is incompatible with surrounding land uses because there was an expectation that all landfills in the area would close by 2015, the area is becoming increasingly urbanized, the presence of the landfill has deterred development in certain areas, surrounding landowners find the Facility to be a nuisance, and the Capital Area Council of Governments (CAPCOG) determined that it was incompatible.

OPIC cannot find that the expansion at this location is appropriate, given the overwhelming evidence that the Facility is incompatible with the increasing development and continued anticipated growth trends in the area, and will therefore adversely impact the surrounding area.⁴ OPIC is likewise not persuaded by Applicant's experts who opine that if a landfill merely operates as permitted, it is a compatible land use.

It appears that the facts required for the analysis are not in dispute. No one questions the sufficiency of John Worrall's report prepared for WM in accordance with 30 TAC §330.61. However, it is clear that parties disagree on the correct interpretation and use of the data. The Executive Director did not actually analyze the information. Mr. Udenenwu confirmed that the ED conducted no independent analysis on whether the Facility expansion is compatible with surrounding land use.⁵ The scope of the ED's review was only to ascertain whether the information required by 30 TAC §330.61 has been submitted in the application.

The Applicant's witnesses appear to base their compatibility determination on the idea that since homes, parks and schools are being constructed in the area where WM's site is already located, then by default the site is compatible. Mr. Worrall explains that landfill uses predate nearly all other land uses in the area.⁶ He elaborates that the closest residence, businesses, daycare facility, and school were all constructed after WM began operation of the landfill.⁷ When discussing growth trends of Austin, he notes that significant residential growth occurred since 2000 and is projected to continue through 2017.⁸ Mr. Worrall also found that the area

⁴ See 30 TAC § 330.61(h)(2), (3), and (4).

⁵ Tr. vol. 11 at pp. 2404, lns. 15-20.

⁶ See Ex App-300, prefiled testimony of John Worrall, page 14, line 27 through page 15, line 8.

⁷ See Ex App-300, prefiled testimony of John Worrall, page 15, lines 1-5.

⁸ See Ex App-300, prefiled testimony of John Worrall, page 16, lines 4-11.

around the landfill included the fastest growing sector of the city of Austin for the years 1990-2000.⁹

Apparently, Mr. Worrall assumes that as long as the landfill is operating in accordance with its permit conditions, then it will always be a compatible land use.¹⁰ He only assumed that the Facility was operating within the rules, though,¹¹ and did not look into the compliance history of the Facility,¹² despite admitting that if a landfill was creating nuisance conditions for nearby individuals, it could be incompatible with surrounding land use.¹³ This is particularly problematic, given that he also did not speak to any surrounding landowners when completing his land use analysis.¹⁴

OPIC cannot agree that because the landfill was there first, then compatibility with surrounding land uses should be assumed. Land use compatibility analyses are used to determine whether it is appropriate to site a new landfill in a certain location, or to expand the capacity of an existing landfill, considering current and probable future conditions. If WM's position were correct, there would be no need to ever conduct a land use analysis for an amendment application.

Further, WM has not used the information gathered as part of the land use compatibility analysis to mitigate any nuisance problems that may be currently caused by the existing landfill. As Charles Dominguez stated, an extensive land use study was performed, and that information was summarized in the appropriate portion of the application.¹⁵ But, Mr. Dominguez also testified that he did not apply the results of the report when creating the site operating plan for the Facility, stating that he can not think of any regulation requiring the site operating plan to be compatible with surrounding land use.¹⁶ Notably, the site operating plan "must include

⁹ See Ex App-300, prefiled testimony of John Worrall, page 16, lines 2-3.

¹⁰ See Ex JW-1, prefiled testimony of John Worrall, page 25, lines 12-17.

¹¹ Tr. vol 4, at pp. 567.

¹² Tr. vol 4. at pp. 578.

¹³ Tr. vol. 4 at pp. 575-578 (specifically pp. 577, ln. 19 and pp. 578, lns. 8 and 13).

¹⁴ Tr. vol 4 at pp. 563, lns. 19-23.

¹⁵ Tr. v. 3 at pp. 453.

¹⁶ Tr. v. 3 at pp. 452.

provisions for site management and the site operating personnel to meet the general and site-specific requirements of Subchapter D.¹⁷ Subchapter D contains provisions for ensuring that the Facility will be operated in a manner that minimizes impact on the surrounding area, including provisions for operating hours,¹⁸ control of windblown wastes,¹⁹ management of waste transported to the Facility,²⁰ and visual screening of waste,²¹ among other protective provisions.

The site operating plan would have been the appropriate vehicle for addressing many of the concerns surrounding landowners have with the existing facility, and the expansion of the facility. Precautions could have been taken, given the increasing urbanization of the area. Yet according to Mr. Dominguez' own testimony, the Applicant appears to have gathered the information required by 30 TAC § 330.61(g) and (h), but ignored the implications it raised. And the ED only reviewed the land use analysis and site operating plan to determine whether it included the required data and referenced the proper rules, not to determine whether the conclusions regarding land use compatibility were sound.

In addition, Jon White for Travis County stated that although the proposed site operating plan offers improvements over the existing site operating plan,²² the language of the application and the draft permit provide WM with flexibility that may allow it to skirt the rules designed to protect against nuisance conditions.²³ WM could have incorporated stringent language to address the increased growth of the area and complaints of surrounding landowners into its application,²⁴ but instead appears to have only minimally included language claiming to meet nuisance related requirements.

¹⁷ 30 TAC § 330.127.

¹⁸ 30 TAC § 330.135.

¹⁹ 30 TAC § 330.139.

²⁰ 30 TAC § 330.145.

²¹ 30 TAC § 330.175.

²² Tr. v. 9 at pp. 1938, lns. 1-3.

²³ Tr. v. 9 at pp. 1938, lns. 7-13.

²⁴ See Tr. vol 9 at pp. 1938, lns. 7-20; see also tr. at pp. 1940, lns. 20-24.

Finally, OPIC can not ignore the fact that that there were concerns with land use compatibility at this facility as early as 1972.²⁵ Neither can OPIC discount opposing parties' extensive testimony regarding the facility's incompatibility with the Regional Solid Waste Management Plan.

OPIC finds that WM did not demonstrate that expansion of the landfill will be compatible with surrounding land uses. WM merely established that growth is rapidly occurring and then assumed that if the landfill is operating properly, then land use is compatible since the landfill was there before much of the growth. It has done little to address the nuisance issues associated with expanding a landfill located in an increasingly urban area. Furthermore, should the proposed expansion be approved, operations will continue in the area well past the current estimated closing date. This would only exacerbate the incompatibility, as the area surrounding the Facility is estimated to continue growing.²⁶ The landfill is located in an increasingly urban area near individuals who have found their lives already disrupted by the landfill, yet WM proposes to expand, while ignoring any impacts this may have on the surrounding community. Therefore, OPIC finds that expansion of the landfill will be incompatible with surrounding land use, and must recommend the ALJ make a commensurate finding.

B. WM has not met its burden to show the application sufficiently demonstrates how the MSW facility will comply with applicable TPDES storm water permitting requirements.²⁷

30 TAC § 330.61(k) requires an applicant to submit "information demonstrating how the municipal solid waste facility will comply with applicable Texas Pollutant Discharge Elimination System (TPDES) storm water permitting requirements and the Clean Water Act, §402."²⁸ This information must include, but is not limited to, "a certification statement

²⁵ Tr. vol. 6 at pp. 1339 ln. 6 to pp. 1340, ln. 22;

²⁶ See Ex App-300, prefled testimony of John Worrall, page 16, lines 4-11.

²⁷ See *Order No. 12*, page 3, section B, subsection 1.

²⁸ 30 TAC § 330.61(k).

indicating the owner/operator will obtain the appropriate TPDES permit coverage when required or a copy of the permit number for coverage under an individual wastewater permit.²⁹

According to the ED, their review of the application on this issue only addressed whether WM was planning to apply for a TPDES permit, not whether the application and draft permit drawn up in accordance with the information contained in the application would comply with TPDES rules.³⁰ For the Applicant, Mr. Dominguez was not aware that he had certified that the facility intended to comply with TPDES, although he does say that the current site has a TPDES permit.³¹ When questioned, he stated that the benchmark for total suspended solids (TSS) in stormwater runoff from the site was 100 mg/l. When determining this number, though, he did not take into account studies showing the current facility is not always meeting this benchmark value.³² Furthermore, he did not take into account required TSS values when designing the erosion and sedimentation plans for the proposed expansion,³³ nor the apparent difficulty in getting groundcover established on the current site. Therefore, although the applicant has submitted the minimal certification required by 30 TAC § 330(k)(3)(A), OPIC questions whether the applicant has sufficiently demonstrated how the proposed facility will comply with applicable TPDES stormwater runoff requirements.

C. The application does not include adequate protection of groundwater, in compliance with agency rules, particularly in relation to the effects of the IWU and Phase I on the groundwater and surface water.³⁴

First, there has been significant testimony showing that the industrial waste unit (IWU) area contains a large amount of hazardous waste, deposited sometime during the early 1970s. Generally, wastes disposed of in the area include spent acids, caustics, solvents, waste

²⁹ Id.

³⁰ Tr. vol. 11 at pp. 2400-2401.

³¹ Tr. vol. 3, at pp. 471, lns. 4-8.

³² Tr. vol 3. at pp. 474-475.

³³ Tr. vol. 3 at pp. 488.

³⁴ See *Order No. 12*, page 3, section A, subsection 1.

hydrocarbons, and contaminated industrial process water.³⁵ In addition, municipal solid waste has been placed over the IWU area,³⁶ no liner is in place below the IWU, and no plan is in place to monitor landfill gas on the IWU and Phase I areas.³⁷ This is problematic considering that groundwater contamination may have and may continue to escape the current permitted boundary³⁸ and the IWU may not have ever been properly closed.³⁹

Because there are substantial questions regarding whether the proposed facility will adequately protect groundwater, OPIC cannot recommend the permit be granted. Furthermore, the lack of groundwater protection increases OPIC's concern that this facility is incompatible with the surrounding land use.

D. If the permit is approved, additional groundwater monitoring should be required.⁴⁰

There has been sufficient testimony presented to justify inserting additional groundwater monitoring requirements into the draft permit, should the permit not be denied. Even if the application's current provisions comply with the Chapter 330 requirements for monitoring wells, due to the myriad unknowns associated with the industrial waste unit (IWU) and Phase 1 areas, greater precautions should be taken to protect the quality of Texas' ever dwindling groundwater supply.⁴¹

³⁵ Tr. vol. 2 at pp. 102-103; Tr. vol. 7 at pp. 1335-1340.

³⁶ Tr. vol 3 at pp. 339.

³⁷ Tr. vol. 3 at pp. 442, lns. 15-21.

³⁸ Tr. vol. 6 at pp. 1295, ln 4 to pp. 1296, ln. 25.

³⁹ Tr. vol. 3. at pp. 329, lns. 8-17; tr. vol. 7 at pp. 1412-1420.

⁴⁰ See *Order No. 12*, page 3, section A, subsection 2.

⁴¹ The Precautionary Principle as drafted and finalized at a conference at the Wingspread Conference Center, Racine, Wisconsin, 23-25 January 1998: Where an activity raises threats of harm to the environment or human health, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically. <http://www.gdrc.org/u-gov/precaution-3.html> United Nations Environment Programme (UNEP) Principle 15 of the Rio Declaration on Environment and Development states: In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. <http://www.unep.org/Documents/Multilingual/Default.asp?documentid=78&articleid=1163>

Donald Smith testified for WM that for the portion of Phase I within WM's responsibility, it was his general understanding that installation of groundwater monitoring equipment would be required.⁴² Regarding monitoring a landfill unit within the permit boundary that has been closed, Mr. Hunt testified that this is required, and that closed units outside of the permit boundary would at the very least need post-closure monitoring.⁴³ Monitoring wells down gradient to Phase I and the IWU may be included in the draft permit, but opposing parties have raised significant questions about whether these wells would be enough to detect most releases from the IWU and Phase I. Further, monitoring equipment not included in the application currently exists and could be easily incorporated into the draft permit, although even these may not be sufficient to address all possible releases.

In addition, Jay Winters testified for WM that if there were a good technical reason for installing additional monitors between Well 11 and Well 51, cost would not preclude it.⁴⁴ Therefore, should this expansion be granted, additional monitoring requirements that sufficiently address issues raised by protesting parties should be included in the final permit.

E. The Facility, as operated under the proposed site operating plan, may create a nuisance.⁴⁵

OPIC is concerned that, should the expansion be approved, it will create and maintain nuisance conditions in the area, specifically regarding offensive odors. If the draft permit and site operating plan are approved in their current state, the applicant may be in violation of the TCEQ rule which states "a person may not cause, suffer, allow, or permit the collection, storage, transportation, processing, or disposal of municipal solid waste (MSW), or the use or operation of a solid waste facility to store, process, or dispose of solid waste...in such a manner that causes...the creation and maintenance of a nuisance..."⁴⁶ Also, "the site operating plan must have an odor management plan that addresses the sources of odors and includes general

⁴² Tr. vol. 2 at pp. 113, ln. 12 to pp. 114, ln. 17.

⁴³ Tr. vol. 6 at pp. 1208-1210.

⁴⁴ Tr. vol. 5 at pp. 1047-1048.

⁴⁵ See *Order No. 12*, page 3, section B, subsection 2.

⁴⁶ 30 TAC § 330.15(a)(2).

instructions to control odors or sources of odors. Plans for odor management must include the identification of wastes that require special attention such as septage, grease trap waste, dead animals, and leachate."⁴⁷

Odor control can be achieved through proper site maintenance as well as proper maintenance and operation of the landfill gas collection system. But OPIC questions whether WM has sufficiently addressed how it will control odors to a level that would not create and maintain a nuisance to surrounding homes, businesses, schools and childcare facilities. Mr. Smith, testifying generally regarding WM's odor control mechanisms, stated that the landfill would use daily cover to mitigate odors.⁴⁸ However, he also stated that this was the only mechanism he was aware of to address nuisance concerns.⁴⁹ Mr. Smith, stated that any odor complaints received by WM would be thoroughly investigated to determine if the existence of nuisance odors could be confirmed.⁵⁰ But, Mr. Dominguez, who created the proposed site operating plan for the facility, did not make any attempt to address nuisance concerns, beyond preparing the application according to his understanding of TCEQ rules.⁵¹

It is undisputed in the record that landfills will have generalized odors and other potential unpleasant conditions associated with them. Odors will escape and neighbors will likely be impacted due to proximity. And it appears that WM has included the appropriate language in its application to meet the ED's technical review.

But, the record raises question as to whether the facility can expand operations without also creating odor and other nuisance conditions for individuals around the landfill. Jon White for Travis County stated that although the proposed site operating plan offers improvements over the existing site operating plan,⁵² the language of the application and the draft permit provide

⁴⁷ 30 TAC § 330.149.

⁴⁸ Tr. vol. 2 at pp. 190-191.

⁴⁹ Tr. vol. 2 at pp. 192.

⁵⁰ Tr. vol. 2 at pp. 202-203.

⁵¹ Tr. vol. 3 at pp. 442-444.

⁵² Tr. v. 9 at pp. 1938, lns. 1-3.

WM with flexibility that may allow it to skirt the rules designed to protect against nuisance conditions.⁵³

WM has provided little testimony to show how it will address the inherent incompatibility of expanding an already problematic odor source for an extended period of time in an area becoming increasingly urbanized. WM did not consider odor (or any other nuisance) complaints when creating the proposed site operating plan and the plan provides no concrete language for addressing nuisance concerns. Therefore, OPIC cannot find that WM has shown it will not create a nuisance, giving further weight to OPIC's argument that this landfill is incompatible with the surrounding land use.

F. The application should be denied if WM began construction of the proposed lateral extension prior to the issuance of the draft permit, in violation of agency rules.⁵⁴

If indeed construction has commenced on the proposed expansion of the Facility, and the feature constructed is not within the definitional exception,⁵⁵ than WM violated 30 TAC § 330.7(a) and the application should be denied.⁵⁶ Beginning construction before a permit has been issued shows a blatant disregard for TCEQ's permitting process. Further, if Applicant is willing to disregard this rule, OPIC has little faith that WM will comply with other, less verifiable rules. Allowing the expansion of a landfill that is managed in this manner, so close to a growing population center, is contrary to the public interest of the state of Texas and the TCEQ's responsibility to ensure landfills are constructed and managed in a manner that meets the solid waste needs of Texas, while also minimizing the landfill's impact on human health and the environment.

⁵³ Tr. v. 9 at pp. 1938, lns. 7-13.

⁵⁴ See *Order No. 12*, page 3, section D.

⁵⁵ See 30 TAC § 330.3(26).

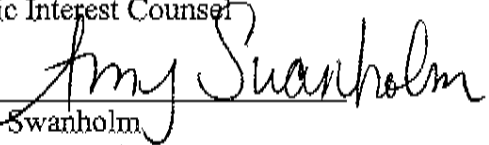
⁵⁶ "No person may commence physical construction of a new municipal solid waste (MSW) management facility, a vertical expansion, or a lateral expansion without first having submitted a permit application in accordance with §§330.57, 330.59, 330.61, 330.63, and 330.65 of this title (relating to Permit and Registration Application Procedures) and received a permit from the commission, except as provided otherwise in this section." 30 TAC § 330.7(a). This facility would not qualify for any of the permit-by rule exceptions contained in this section.

IV. CONCLUSION

OPIC recommends the ALJ find that WM did not demonstrate by a preponderance of the evidence that the expansion of this landfill would be compatible with the surrounding commercial and residential land uses. OPIC also recommends finding that WM failed to establish that the proposed expansion will not create a nuisance, and further failed to demonstrate that the draft permit adequately protects groundwater. If the proposal for decision recommends granting the application, OPIC recommends requiring additional groundwater monitoring wells, testing for additional constituents, and altering the Point of Compliance to accurately reflect possible release pathways. Furthermore, if the permit is granted, the site operating plan should specifically address how WM will prevent nuisance conditions.

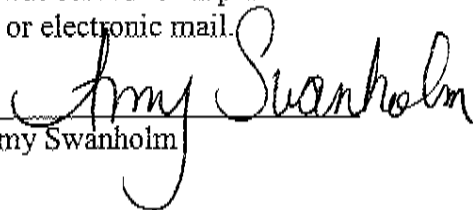
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2009, the foregoing document was served to all persons listed on the attached mailing list via deposit in US mail, hand delivery or electronic mail.



Amy Swanholm

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