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

IN THE MATTER OF THE APPLICATION OF WASTE MANAGEMENT OF TEXAS, INC. PROPOSED SOLID WASTE PERMIT AMENDMENT No. 249D	§ § § § §	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

TRAVIS COUNTY'S CLOSING ARGUMENT

COMES NOW, Travis County, Texas (Travis County), a party protestant in this matter, and pursuant to Order No. 12, submits its closing arguments.

I. INTRODUCTION

Applicant, Waste Management of Texas, Inc. (WMTX), had the burden of proof in these proceedings to demonstrate that its application for amendment of its permit included adequate provisions for protection of human health and welfare and the environment such that it met or exceeded the requirements of Texas law, including Chapters 361 and 363 of the Texas Health & Safety Code, and that it met or exceeded the requirements of the rules and regulations of the Texas Commission on Environmental Quality. Travis County submits that WMTX has failed to meet its burden with respect to a number of those requirements, as discussed more fully below. Travis County further submits that WMTX's application should be denied because it has failed to meet its burden of proof, and requests that the Administrative Law Judge (ALJ) issue a proposal for decision (PFD) recommending denial of the application.

II. PARTIES

At the preliminary hearing held on April 16, 2008, the ALJ designated the following parties:

Waste Management of Texas, Inc. (WMTX, Waste Management, or Applicant)

Giles Holdings, L.P. (Giles)

TCEQ Executive Director (ED)

TCEQ Office of Public Interest Council (OPIC)

TJFA, L.P. (TJFA)

Northeast Neighbors Coalition (together with individuals and other associations including Cecil and Evelyn Remmert and Alfred Wendland, Harris Branch Residential Property Owners Association, Williams, Ltd., Mark and Melanie McAfee, Janet Smith, Jean Breazeale, John Wilkins, George K. Edwards, John P. Murphy, Alto S. and Rosemary M. Nauert, and Bob Lanford, individually and as trustee) (NNC or Neighbors)

Travis County, Texas (Travis County or County)

City of Austin, Texas (City or COA)

III. JURISDICTION

WMTX requested a direct referral of its application to the State Office of Administrative Hearings for a contested case hearing. On April 14, 2008, the TCEQ held a public meeting. The Chief Clerk of the TCEQ set the date for the preliminary hearing in the matter for April 16, 2008, two days after the scheduled public hearing, and mailed notices as required by 30 TAC §§39.501 (e)(3) & (4) and 80.5. WMTX arranged for publication of notice in accordance with 30 TAC §§ 39.405 & 39.501. On April 16, 2008, a preliminary hearing was held, at which counsel for the ED offered proof of

compliance with jurisdictional requirements, and the ALJ accepted jurisdiction over the application.

IV. PROCEDURAL HISTORY

WMTX filed its initial application for amendment of its permit with the TCEQ in August 2005. After several Notices of Deficiency (NODs), and after receipt of a letter dated January 31, 2006, from the Capital Area Council of Governments (CAPCOG), in which CAPCOG found:

1. that the proposed expansion would not conform with current and future land use in the area;
2. that there were significant local concerns about the site; and
3. that the permit amendment application did not conform with the Regional Solid Waste Management Plan (*See*, Travis County Exhibit JW-4),

WMTX made the decision to amend and re-file its application under new rules adopted by the TCEQ in 2006 (effective March 27, 2006). By choosing to re-file its application under the new rules, WMTX avoided the otherwise insurmountable obstacle to even a declaration of technical completeness created by CAPCOG's determination of nonconformance. Prior rules would have required that WMTX's application demonstrate compliance with the RSWMP to be declared technically complete. Former 30 TAC §330.51 (b)(10). The 2006 amendments to the rules eliminated this requirement, giving WMTX an alternative to negotiating with CAPCOG for such approval. The new rules only required that WMTX demonstrate that it had submitted the proposed amendment to CAPCOG for review. 30 TAC §330.61 (p).

Version 1 of the application was declared administratively complete by the ED on September 15, 2005. The ED sent the Applicant Notices of Deficiencies (NODs) seven times, on November 7, 2005, January 30 and March 17, 2006, and April 3, July 2, September 20, and November 2, 2008. The application was amended 10 times, in December 2005, March and October 2006, May, August, October, and December 2007, and February, April, and May 2008. Version 4 of the application was declared technically complete by the ED on January 4, 2008, although the application was amended three times after that date.

V. BACKGROUND FACTS[1]

The WMTX Austin Community Recycling and Disposal Facility (ACRD) is an existing Type I Municipal Solid Waste Disposal Facility consisting of 288.6 acres located at 9900 Giles Road, approximately 250 feet north of the intersection of Giles Road and US Highway 290 in Travis County, Texas. This facility was first permitted to accept waste in 1970.

WMTX is requesting an amendment to existing Permit No. 249C to expand the ACRD 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 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.

[1] With the exception of the first paragraph of this section, which is derived from the Technically Complete Application, the information in this section is found in Exhibit ED-1, p. 12, l. 33 – p. 13, l. 15.

Access to the landfill is provided via a site entrance road on Giles Lane. Traffic counts at the driveway and Giles Lane show that the landfill facility currently generates 390 vehicles per day. This is expected to increase to 667 vehicles per day by 2025 based on annual growth rates from the Capital Area Council of Governments' Regional Solid Waste Management Plan.

Authorized wastes are currently being accepted at the Facility at the rate of approximately 447,658 tons-per-year. The Facility proposes to ultimately accept 673,183 tons-per-year of authorized waste by the final full year of site operations.

VI. ISSUES

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

1. Whether the application includes adequate protection of ground water and surface water, in compliance with agency rules, particularly in relation to the effects of the IWU and Phase I on the groundwater and surface water.

This application fails to demonstrate that ground water and surface water from the Industrial Waste Unit (IWU) and/or Phase I area are addressed at all, and certainly not in any manner that protects human health and welfare or the environment. Applicant has not met its burden of proof on this issue. Instead, Applicant first attempted to shift responsibility for Phase I by labeling the area as belonging to Travis County, thereby implying that any issues related to Phase I were the responsibility of Travis County. (APP-202, p.7, and numerous other references throughout the application) This allegation is untenable, and certainly not supported by any evidence presented by the Applicant or anyone else in this proceeding. However, when confronted with evidence contrary to its implications, rather than admit that it did not address issues that should have been

addressed in this application, Applicant merely shrugged (figuratively), and said it didn't recall why it would have done such a thing (TR, p. 183, l. 23 – p. 184, l.20; TR, p. 449, ll. 6-14), but it would re-label the area as Phase I if it would make Travis County happy. This figurative sheepish shrug failed to rectify the Applicant's blatant attempt to exclude Phase I and the IWU from this application, in violation of 30 TAC §330.57(d). (*See*, TR, p. 1352, ll. 4-20 & TR, p. 1356, l.16 – p.1359, l.10) This failure, which amounts to submission of false information, remains unaddressed, and pursuant to §330.57(d), constitutes grounds for denial of the permit.

Dr. Robert Kier testified that the IWU at the ACRD is nearly 4 decades old and contains unidentified, unprofiled, and unmanifested buried industrial waste, including many thousands of barrels of liquid waste that for a long period of time had stockpiled upon them heavy cover material intended for other parts of the landfill. (TR, p. 1335, l.9 – p. 1349, l. 19) Dr. Kier also testified that although there are no monitoring wells currently situated perfectly to monitor groundwater leaving the IWU, records show the persistent presence of potentially hazardous constituents in current monitoring wells and piezometers that, although not ideally placed to take such measurements, are situated such that they are the most likely of the existing wells to catch such releases from the IWU. (TR, p. 1343, l. 11 – p. 1349, l. 11)

Don Smith, the Applicant's general manager, and its only witness representing the corporation, testified that WMTX was responsible for all wasted on the entire ACRD facility, and that its responsibility for monitoring groundwater encompassed the entire facility, including Phase I and the IWU. (TR, p.112, l. 25 – p. 114, l. 11). Yet the Applicant has failed to demonstrate that it monitors Phase I or the IWU in any

meaningful way, and consequently, Applicant has failed to demonstrate that the application includes adequate provisions for the protection of human health and welfare, and the environment in general. Travis County urges denial of the application based on this failure.

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 thru groundwater.

The applicant has failed to make adequate provision for groundwater monitoring for the entire facility, particularly with respect to the IWU and Phase I. Just one monitor, which is less than ideally placed (MW-11), is represented as having the capability of monitoring discharges from a large section of the facility, including the IWU and Phase I. (TR, p. 935, ll. 2-14) MW-11 is located to the west side of the channel that runs between the IWU and Phase I. As the channel represents a preferential pathway for groundwater, and MW-11 is on the far side of that preferential pathway, its ability to capture releases from the IWU and Phase I is questionable at best. (TR, p. 1348, l. 11 – p. 1349, l. 11) The point of compliance line was specifically drawn to exclude the IWU and Phase I. (TR, p. 1352, ll. 4-20) Throughout its application and in testimony, WMTX referred to these units as "closed." However, no evidence whatsoever was offered to show that either WMTX or any of its predecessors complied with the closure requirements of §330.453 of the TCEQ Rules (for MSW units that stopped receiving waste before October 9, 1991), §330.454 of the TCEQ Rules (for MSW units that received waste on or after October 9, 1991, but stopped receiving waste before October 9, 1993), or §330.455 of the TCEQ Rules (for MSW units that received waste on or after October 9, 1993).

These rules cover the spectrum of closure possibilities, and each section requires documentation to be filed with the TCEQ, as well as approval by TCEQ of various aspects of the closure plan. No such documentation was found by Dr. Kier in his exhaustive investigation. (TR, p. 1355, ll. 4-12) No such documentation was produced by WMTX either, and WMTX is obligated under the TCEQ rules to demonstrate that its entire facility is appropriately monitored for groundwater.

Even the TCEQ recognized Applicant had no intention of including monitoring of the IWU or Phase I as part of this application. Mr. Avakian, who reviewed the Applicant's proposed groundwater monitoring system for the ED, testified that he thought potential groundwater impacts from the industrial waste unit were "monitored incidentally." (TR, p. 2441, ll. 8-14)

Several witnesses testified that the Applicant's Groundwater Monitoring Plan was inadequate to protect human health and the environment, particularly in light of the confirmed the presence of potentially hazardous constituents in groundwater apparently migrating from the IWU, and that a more appropriate placement for the point of compliance would be the drainage pathway down-gradient of the IWU and between the IWU and the Phase I area. (TR, p. 1356, l. 16 – p. 1359, l. 10; TR, p. 1906, l. 8 – p. 1907, l. 8) Travis County urges the ALJ to deny the application based on Applicant's failure to include adequate provisions in its application for the protection of human health and the environment by failing to provide for adequate monitoring of the IWU and Phase I. Alternatively Travis County urges the ALJ to require the Applicant to monitor groundwater from the IWU and Phase I areas, and to require movement of the point of compliance or installation of additional monitoring wells along an additional point of

compliance between the IWU and Phase I, and in any other location deemed necessary to accomplish this monitoring.

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

The failure of the application to address monitoring of groundwater in the IWU is particularly troublesome in light of the Applicant's knowledge of and attempt to cover up the presence of hazardous substances in groundwater leaving the IWU. Several potentially hazardous substances that do not occur naturally, including 1,4-dioxane, methylene chloride, and 1,2,3-trichlorobenzene, have been detected in wells that are monitored as part of a voluntary monitoring agreement with the City of Austin. Records admitted as Exhibit TJFA-24 regarding a sampling event at the ACRD on October 20, 2004, indicate that those substances were present, specifically in PZ-31, at levels that would have required action by WMTX had those levels been detected in wells designated as monitoring wells instead of in wells monitored only pursuant to the voluntary monitoring agreement with the City. (*See*, Exhibit COA-6) When such substances are detected in monitoring wells that are part of a facility's detection monitoring system approved by the TCEQ, those substances are verified through a re-sampling program, and if verified, an alternate source demonstration might be performed, or the well might be placed in assessment monitoring where additional testing might be required. (30 TAC § 30.407 (b); TR, p. 1167, l. 20 - p. 1168, l. 6, *et seq.*) Although WMTX submitted sampling data with this application that purports to be comprehensive data from a span of many years including 2004, it specifically omitted the data obtained in the October 20, 2004, sampling event. (Technically Complete Application, p. 2532; TR, p. 2464, l. 18 -

p. 2465, l. 3) Exhibit TJFA-29, a revised report to the TCEQ regarding this October 20, 2004 sampling event, states, "The analysis by Method 8260B for sample PZ-31 was performed at a dilution due to the high presence of target compounds," yet explains the revision as follows: "This report is being revised to turn off the results for sample PZ-31 per client request." (TR, p. 2452, l. 2 - p. 2454, l. 13) Travis County urges the ALJ to deny this application based on WMTX's failure to present data of sufficient completeness, accuracy, and clarity to provide assurance that there will be no adverse effects on the health, welfare, environment, or physical property of nearby residents or property owners, as required by 30 TAC §330.57 (d). In the alternative, Travis County urges the ALJ to require Applicant to monitor groundwater at the facility for discharges of 1,4-dioxane, methylene chloride, and 1,2,3-trichlorobenzene, and any other potentially hazardous constituents detected in wells monitoring groundwater from the IWU.

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 application fails to adequately address slope stability with respect to the piggyback liner system. The placement of a piggyback liner over waste has inherent potential for failure, and must be investigated and modeled carefully to avoid such failure. The underlying waste, by its nature, is not stable, as it subsides over time at rates that vary depending on the type of waste, its exposure to moisture, and other factors. (TR, p. 1735, ll. 11-25) In this application, the Applicant does not purport to know the condition of the waste that is present in the area where it is proposing to install the piggyback liner. (TR, p. 387, ll. 22-24). It performed a number of calculations in its attempt to reassure the application's reviewers that the placement was appropriate and

safe. However, the data it gathered to perform those calculations are unexpected, and therefore, highly suspect. The Applicant identified 112 data point measurements it took to calculate the rate of settlement of the waste under the piggyback liner, but it used just 69 of those data points to perform the actual calculations, discarding nearly 40% of its collected data. (TR, p. 410, ll. 2-14) The discarding of the data from the survey points appears arbitrary, and the Applicant did not explain the exclusion of those data in the application. (TR, p. 1733, ll. 11-13) Mr. Dominguez attempted to explain in testimony, but his explanation that the survey points were excluded because they produced anomalous results only raises more questions about the reliability of the data in general. (TR, p. 393, ll. 3-9; TR, p. 393, l. 23 – p. 394, l. 1-12) For example, some of the results that showed increases in elevation over time in spite of Applicant's assertion that no waste was being applied in that location at the time. Even the results that showed settlement appeared to indicate unexpectedly slow rates of settlement. (TR, p. 1733, l. 3 – p. 1736, l. 10)

Mr. Chandler testified that the results shown in Applicant's appear suspect because they seem to predict long-term settlements that are in the mid-single digits, which is not supported by the literature. (TR, p. 1736, ll. 4-10) He further expressed concern that the data is unreliable because of the extrapolation of the data is far beyond, in fact 47 years beyond, the end point of the data that was collected. (TR, p. 1739, ll. 17-25) The questionable data are of major concern, as they raise the specter of "garbage in, garbage out."

With respect to the performance of the piggyback liner itself, reliable information regarding probable settlement rates is highly important, as under-prediction of those rates

can result in failure of the liner to operate as designed. (TR, p. 382, l. 23 – p. 383, l. 2) The piggyback liner consists of two components, a geosynthetic component and a clay component. (TR, p. 383, ll. 14-20) The tensile strengths of the two components are very different, which means the clay component has much less capacity to "sag" than the geosynthetic component of the liner. When the piggyback liner is placed over waste for which the settlement rate has been underestimated, a depression created by greater than expected settlement of the underlying waste can cause the clay component of the liner to crack as it tries to fill the void. When the clay component of the liner cracks, the entire burden of the waste sitting on top of the piggyback liner rests on the geosynthetic component of the liner, which means the liner will not be performing as represented in the application. (TR, p. 406, l. 14 – p. 407, l. 1; TR, p. 1740, l. 13 – p. 1741, l. 12) Furthermore, the crack in the clay liner can cause the geosynthetic component of the piggyback liner to sag further, potentially beyond its tensile limit, thereby causing the entire liner to fail.

The use of flawed data in the calculations of settlement rates under the piggyback liner raises concerns that the liner might move or fail. The waste underlying the piggyback liner is an inherently unstable platform for the piggyback liner that is to be conjoined with it. There is no doubt that it will settle. Consequently, it is imperative to be certain that that underlying waste will not settle in such a way that it causes the piggyback liner to shift, slide, or settle at a higher rate than the design of the liner will accommodate. The inherent instability of that waste has potential to degrade the integrity of the piggyback liner, with catastrophic potential for slope failure, or even for failure of the liner itself. Applicant's modeling, with its numerous unexpected and questionable

results, and its discounting of a high percentage of its results, does not inspire confidence in its calculations, and consequently, does not provide adequate information to ensure that the piggyback liner will remain in place and will not fail.

The questionable nature of the data upon which the Applicant's calculations regarding settlement under the piggyback liner are based casts grave doubt upon whether the application includes adequate provisions for the protection of human health and welfare, and the environment. With the design of its proposed piggyback liner, Applicant has again failed to meet its burden to demonstrate adequate provision for protection of human health, welfare, and the environment, and for this reason, Travis County urges the ALJ to recommend that the application be denied.

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

The application does not address management of landfill gas in the Phase I area, and leaves whole sections of the Facility unmonitored for landfill gas. (TR, p. 438, l. 22 – p. 439, l. 4) The TCEQ's rules require that the Applicant ensure that "the concentration of methane gas does not exceed 5% by volume in monitoring points, probes, subsurface soils, or other matrices *at the facility boundary defined by the legal description in the permit*...." 30 TAC §330.371 (a)(2) (emphasis supplied). A permanent perimeter monitoring network is required for the ACRD. *Id.* at §330.371 (h)(2). WMTX is not monitoring landfill gas in the IWU or the Phase I area. WMTX has failed to provide for monitoring for landfill gas around the entire perimeter of the facility as required by the TCEQ's rules, and the application should be denied based on this failure.

8. Whether the application includes adequate provisions to prevent the ponding of water over waste on the landfill, in compliance with agency rules.

The Applicant has failed to demonstrate that the application contains adequate provisions to prevent ponding of water over waste on the landfill. The TCEQ's rules, specifically 30 TAC §330.245(k), require that "[a]ny ponded water at the facility shall be controlled to avoid its becoming a nuisance." Evidence was presented that water has ponded over waste in the area between the IWU and Phase I to the extent that wetland vegetation is now present in that area. (TR, p. 1121, l. 25 – p. 1125, l. 2; TR p. 1748, l.1 – p. 1750, l. 24) This ponding is not addressed anywhere in the application, nor was any evidence presented that Applicant intended to implement any measures to control it. The application should be denied based on this failure to address ponding of water over waste as required by agency rules.

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

The Applicant has failed to provide adequate provisions for cover in its application. The Facility has a history of odor and other issues (TR, p. 2245. ll. 1-6), and a long history of complaints regarding nuisance issues related in one way or another to lack of adequate cover. (*See*, Exhibit TC-6) Lack of cover also creates aesthetic issues for the landfill's neighbors. Again, there is a long history of community opposition to the landfill and complaints regarding these issues, going back at least to 1990, as evidenced by Exhibit TC-7, the 1990 agreement between Applicant and the landfill's neighbors. The application should be denied based upon this failure to adequately provide for cover.

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

The Applicant has failed to adequately provide information relating to transportation in its application. Although some testing was done with respect to the primary routes to the landfill, specifically, U.S. 290, Giles Road, and Johnny Morris Road (TR, p. 1101, ll. 10-16), there was uncontroverted testimony that trucks bearing the Waste Management logo illegally utilize other routes, specifically Sprinkle Road, every day to reach Applicant's facility. (TR, p. 2252, ll. 3-21) Applicant made no attempt to address this problem and the concomitant problem it poses for the neighbors and other citizens who need to use those roads. No analysis was performed regarding the potential hazards caused by mud dropped on the roads by trucks leaving the landfill facility (TR, p. 1080, l. 9 through p. 1081, l. 25). Applicant did not perform any analysis regarding the other potential traffic nuisance factors to residents, such as noise (TR, p. 1096, ll. 9-12), or potholes (TR, p. 1108, ll. 20-25), or with respect to the potential for wear and tear on the roads caused by heavy truck traffic (TR, p. 1080, ll. 3-6). Travis County urges denial of the application based upon Applicant's failure to adequately address transportation issues.

12. Whether the application includes adequate provisions for closure and post-closure, in compliance with agency rules.

The Applicant has failed to meet its burden of proof with respect to provision for closure and post-closure, as it has failed entirely to address closure and post-closure procedures for the IWU and Phase I. Throughout its application, Applicant variously described those areas as belonging to someone else, or as closed. However, Applicant failed to demonstrate on any level that either unit had been closed or that any post-closure

plan was in place for either unit. (*See*, TR, p. 1355, ll. 4-12) Further, although the Applicant has provided in this application plans for closure and post-closure with respect to the remainder of Applicant's existing facility (referred to as the East Hill and the West Hill) and for the proposed expansion area, those plans are minimal at best. The closure and post-closure plans submitted by the Applicant may technically meet the TCEQ's general requirements for closure and post-closure plans for a landfill, but those requirements do not account for the presence of a landfill in an already suburban and rapidly urbanizing area such as the area around the ACRD. Applicant has failed to address the inherent incompatibility of a landfill in this location with the current and expected future surrounding land uses in its closure and post-closure plans, and consequently, those plans are inadequate to address closure and post-closure for this landfill. (See, TR, p. 2002, l. 8 – p. 2004, l. 16; TR, p. 1935, l.18 – p. 1936, l. 11) Travis County urges denial of the application based upon Applicant's failure to adequately address closure and post-closure.

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.

While the application does include some information relating to land use in the area, Travis County does not believe that the information provided in the application is sufficient to show that the WMTX facility will not adversely impact human health or the environment. More importantly, Travis County strongly believes that the evidence

overwhelmingly shows that this facility is not compatible with the surrounding residential land use, and that the application for expansion should be denied.

The WMTX Landfill is an Incompatible Land Use

Several statues are relevant to this matter, and specify a minimum of information which the Applicant must provide to assist the Commission in making a determination on land use compatibility. 30 TAC§330.61(g) and 30 TAC§330.61(h) However, simply including this information does not make a landfill compatible; rather, it is only the very beginning to an extremely involved determination to be made by CAPCOG, the ALJ and the TCEQ on land use compatibility.

To that end, the Texas Legislature provided for the creation of area-specific Councils of Governments ("COG"s) and granted them the authority to develop regional solid waste management plans and to make determinations on land use compatibility with respect to solid waste facilities in their respective areas. In this matter, the Applicant was required to submit its expansion application to the Capital Area Council of Governments ("CAPCOG") so that CAPCOG could review the proposed expansion and make its determination as to land use compatibility and as to whether or not the proposed expansion conformed with CAPCOG's Regional Solid Waste Management Plan ("RSWMP"). The COG's recommendation is presented to the Commission as a supplement to the information provided by the Applicant to assist the Commission in making a determination on the issue of compatibility. The ED makes no finding on this issue; this decision rests solely with the Commission.

During this process, Dan Eden, Deputy Director of the TCEQ, instructed CAPCOG that an evaluation of the land use/impact study submitted by WMTX as part of

the Application was within its role as a regional planning entity. (Exhibit APP-9) Thus, CAPCOG proceeded to review Waste Management's expansion request and made a determination that it did not conform to its RSWMP, and that the expansion of this facility was incompatible with surrounding land use in the area.

While the facility may well have been compatible with surrounding land use when it was originally permitted, over thirty years have passed since this location first began accepting waste and operating as a landfill. At that time, the surrounding land was "rural and sparsely developed," (Travis County Exhibit JW-1, p. 11., l. 23 – p. 12. l. 1), there were only 170 residences within one mile of the site, and there were no schools or daycare centers. By 2008, however, this one-mile area contained 1,487 residential homes, the Bluebonnet Trails Elementary School, and a daycare center, The Children's Courtyard – all of which are uses that are incompatible with expansion of this landfill. (Exhibit APP-302, p. 7) There has been considerable growth in this area since the landfill was first permitted, particularly in the last decade. The evidence presented by Waste Management's own expert in this area, John Worrall, demonstrates this growth, particularly the series of photographs contained in APP-302, pages 00026 – 00032. (see also the photographs contained in Travis County Exhibit JW-9, pp. 1-12; and TJFA Exhibit 206, pp. 1-19) The difference in the land use depicted in the twenty-six years captured by these photographs is staggering. Clearly, the land use has undergone dramatic change during this time, and what was once an open, rural area is now urban and residential.

The WMTX facility is located in Austin Planning Area 22, which had the largest population growth in the entire City of Austin between 1990 and 2000. The population

grew 133.2%, from 40,528 to 94,522. (Exhibit APP-302, p. 00006) From 2000 through May 2008, the area within a five mile radius of the landfill added 7,835 new households, and accounted for nearly 9% of all households formed within Travis County during this timeframe. (Exhibit APP-300, p. 16, l. 4-7) Developers have planned a total of 17,963 lots for single family housing, as well as an additional 8,778 multi-family housing units in the ACRD landfill area. (Exhibit APP-302, page 00018) Mr. Worrall estimates that almost 10,000 new households will be added to this area by 2017. (Exhibit APP-302, p. 00021) These are shockingly large numbers, and in light of their magnitude, it is inconceivable how anyone could believe that the operation of this facility would be compatible with such overwhelmingly residential land use. Both Jon White, Travis County's expert in this matter, and Greg Guernsey, the City of Austin's expert in this matter, strongly disagree with Mr. Worrall's conclusions, and both believe the continued operation of this facility is incompatible with existing and future land use in this area. (Travis County Exhibit JW-1, p. 10, l. 18 –p. 11, l. 14; City of Austin Exhibit GG-1, p. 3, ll. 16-27; City of Austin Exhibit GG-1, p. 5, l. 22 – p. 6, l.15)

In addition, evidence established that through 2004, more than 800 complaints concerning landfill operations in this area have been filed with the TCEQ and hundreds of additional complaints have been filed with the Travis County Commissioners Court and the Austin City Council. (TJFA Exhibit 27; TC Exhibit 6; TR p. 2246, ll. 6-18; and Travis County Exhibit JW-1, p. 1936, l. 21 - p. 1937, l. 21; City of Austin Exhibit JW-1, p. 6, ll.122-124) Many of these complaints were odor-related. Evidence was presented that both Bluebonnet Trail Elemntary School and the Children's Courtyard daycare center have made multiple reports of odors, and have even had to keep the children inside

due to complaints of children and teachers being ill from the effects of the odors. (City of Austin Exhibit JW-1, p. 7, ll. 148-156) In his testimony, Delmer Rogers discussed the odors he personally smelled and the loud noises he personally heard while on the school, daycare and park properties in the Harris Branch area. (NNC Exhibit DR-1, p. 5, ll. 10-14). Delmer Rogers also provided testimony regarding complaints from one of his tenants about skin rashes, discomfort and odor. (NNC Exhibit DR-1, p. 5, ll. 21-23) Evan Williams, Delmer Rogers, and Mark McAfee also provided testimony about the odors they have smelled in the vicinity of the landfill. Mr. Rogers stated that the odor problems were at a peak in the summers of 2007 and 2008, and that the heat and the south winds seemed to magnify the problems from the odors. (NNC Exhibit DR-1, p. 2, ll. 29-30). Mr. Williams testified that "when there is a breeze or heat or both, there can be an overpowering stench that smells of rotting garbage. This interferes with my enjoyment of the property and my guests' enjoyment of the property and negates any reasonable development scenario." (NNC Exhibit EW-1, p. 2, ll. 11-14) Mr. Williams, Mr. Wilkins, Mr. Rogers and Mr. McAfee all testified they believed these odors to come from the WMTX landfill rather than from the BFI landfill based on the direction the wind was blowing at the times they smelled the odors. (NNC Exhibit DR-1, p. 2, ll. 29-30; NNC Exhibit EW-1, p. 2, ll. 15-17; NNC Exhibit JW-1, p. 2, l. 27-29; and NNC Exhibit MM-1, p. 3, ll. 5-20)

There are other incompatibilities associated with the landfill that are nuisances for the adjacent residents and property owners. Mr. Williams, whose family has owned their property since the 1960s, (NNC Exhibit EW-1, p.1, l. 22) was greatly concerned about the windblown trash and dust, and testified that when the winds are strong, he finds

numerous plastic bags caught in trees on his property. (NNC Exhibit EW-1, p. 3, ll. 9-13) He also expressed his concerns about the birds and buzzards that circle above the landfill and come onto his property (NNC Exhibit EW-1, p.2, ll. 23-24), the dust generated by the daily operation of the landfill, and about the loud noise caused by the large, rumbling garbage trucks, especially as they "constantly tear up the road because of the weight. They hit the bumps that they create and it causes a very loud noise, almost like some type of gunshot." (NNC Exhibit EW-1, p. 3, ll. 1-3) Mr. Williams testified about his fears that these nuisances will only increase if the landfill is allowed to increase its size. (NNC Exhibit EW-1, p. 3, ll. 9-13)

Even more troubling with respect to the nuisances confronting adjacent landowners is the fact that the operation of the WMTX landfill has resulted in trespass and harm to the property of nearby residents. Mr. Williams produced photographic evidence of the runoff from the WMTX landfill onto his property. (see NNC Exhibits EW-6, EW-7, and EW-8) NNC Exhibit EW-8 shows what at first glance appears to be a road, but per Mr. Williams, "is in fact a drainage swale that collects runoff. The runoff then flows over the rocks and concrete 'riprap' you can see in front of the fence. This water then flows onto my property and into the creek." (NNC Exhibit EW-1, p. 4, ll. 27-31) Mr. Williams has also found "many tens" of dead bird carcasses on his property. (see NNC Exhibits EW-4 and EW-5)

Testimony was provided establishing that there have been years of adverse interactions between WMTX and its residential neighbors, and that evidence of this adverse interaction, dates back to at least the time of the 1990 Agreed Order between WMTX and several neighbors. (Travis County Exhibit No. 7; Travis County Exhibit JW-

1, p. 10, l. 18; and TR p. 1936, ll. 16-24) This is a clear indication of incompatibility. Such adversity would not exist were this landfill a compatible land use. Indeed, as the number of residences in this area continues to grow, this incompatibility will be greatly exacerbated. (TR p. 2006, ll. 14-17) Of additional note in this regard is the fact that the Applicant's expert in this area, Mr. Worrall, refused to identify any number of residences or residential structures that could be used as a benchmark for determining when such residential use would become incompatible with an adjacent landfill. (TR, p. 717, l. 16 – p. 725, l. 23)

The Applicant's Land Use Analysis is Faulty

Several faulty conclusions are contrived by the Applicant's land use expert, John Worrall, in his land use analysis. First, Mr. Worrall testified that his land use analysis is premised on the assumption that the WMTX facility will operate in compliance with the TCEQ rules and the laws of the State of Texas. (TR, p. 575, ll. 20-25) This, however, is an abjectly false premise, as the Applicant, in direct violation of the Texas Administrative Code and the Texas Health and Safety Code, began construction on the landfill expansion before it had a permit.[2] More importantly, it was established during cross examination that Mr. Worrall did no research into WMTX's compliance history (beyond reading the 2004 Agreed Order between the TCEQ and WMTX. (TR, p. 579, l. 7 – p. 580, l. 6) He did not review the hundreds of complaints filed with the TCEQ, Travis County or the City of Austin, and did not believe this was necessary to make a determination as to compatibility – it being apparently more important to Mr. Worrall's opinion to simply assume his client was always compliant with the law. Mr. Worrall was thus blissfully (or

[2] Discussed more fully in Item D below.

deliberately) ignorant of the number of complaints filed against the Applicant, and the Applicant ensured this ignorance by failing to provide him with any copies of the complaints, or to discuss the number or the substance of those complaints with him. (TR, p. 582, l. 7 – p. 583, l. 7) Worrall made no attempt whatsoever to speak with any member of the public, or to the school or daycare center located near the Facility about their concerns. (TR, p. 580, l. 14; TR, p. 673, ll. 3-7) Mr. Worrall stated that if nuisance conditions were occurring, it could be a factor in his analysis, but that he couldn't state for certain without knowing what other factors existed. (TR, pp. 575, l. 24 - - p. 578, l. 13) And, of course, "knowing what other factors existed" would be impossible without researching them, asking for them, or discussing them with the neighboring community. The fact that Mr. Worrall assumed the facility would always be compliant with state laws and not operate in any manner that could cause nuisances, yet performing absolutely no research into its compliance history or the complaints levied against it, must cast doubt on any conclusions reached by Mr. Worrall. Travis County believes that in order to conduct any meaningful analysis of land use and compatibility issues, it is imperative to consider all possible nuisance issues and to closely examine the facility's compliance history with respect to those issues. Mr. Worrall considered neither.

Second, Mr. Worrall is more concerned about historical land use than about current or future land use, and he takes the position that because the landfill existed first, it will always be a compatible land use. He refuses to acknowledge that compatibility in this area has changed since 1970. Multiple witnesses testified that land use can change over time, and that as it does, compatibility can change; and that in this situation, compatibility clearly had changed over time. (City of Austin Exhibit GG-1, p. 6, ll. 3-8;

City of Austin Exhibit JW-1, p. 9, l. 204 – p. 10, l. 221; Travis County Exhibit JW-1, p. 13, l. 3 – p. 14, l. 17; and Travis County Exhibit JW-5) Mr. Guernsey stated that "as the number of rooftops or number of households that are – living next to a landfill increases, the incompatibility would also increase." (TR, p. 2019, ll. 13-20) The fact that residences and businesses moved to the area after the landfill does not confirm compatibility, nor does it mean that those residents or businesses find the operation of the landfill to be compatible. 30 TAC§330.61(h) states that "a primary concern is that use of any land for a municipal solid waste facility not adversely impact human health and environment." Nowhere in Chapter 330 does it state that compatibility is a function of who arrived first in the area. Instead, the focus for the Commission in making its land use determination is on human health and the environment. Contrary to Mr. Worrall's apparent conclusion that concerns of residents should be discounted because they moved to the landfill, the fact that ever-growing numbers of people now live in close proximity to the landfill makes the consideration of impacts on human health and the environment even more important.

Thus, we reach a third failing in Mr. Worrall's analysis – he did not consider the impact this facility and its IWU would have on human health and the environment. Mr. Worrall simply or deliberately ignored this issue and provided no testimony as to whether this facility would impact human health and the environment. He performed no research regarding the IWU located in the facility (TR, p. 660, l. 23 – p. 661, l. 1) and did not consider it at all when he performed his land use analysis, (TR, p. 664, ll. 15-18) although when pressed on cross examination, he testified that if he knew that a hazardous waste facility was causing groundwater contamination, he would have "difficulty determining

that we've got land use compatibility." (TR, p. 793, ll. 12-20) Again, Mr. Worrall's failure to perform even the most basic, independent, research into the potential for releases from the IWU casts doubt on the validity of his conclusions. This is especially so, in light of the evidence presented during the course of this hearing indicating that there is contamination of the groundwater in this area, and that its likely source is from the IWU. (TJFA Exhibit 200, p. 55, l. 19 – p. 68, l. 18)

Fourth, Mr. Worrall proffered an erroneous assumption that the growth occurring in this area is an indicator that the landfill is compatible with existing and future land use. In fact, there is no way of knowing if the presence of the landfill has deterred growth, because we have no idea how differently, or how much more, this area might have developed were the landfills closed or not there. (City of Austin Exhibit GG-1, p. 4, ll. 5-16) In that regard, Mr. Guernsey testified that the developers of the two planned unit developments closest to the landfill, the Harris Brach subdivision and the Pioneers Crossing subdivision, had intentionally developed the lots furthest away from the landfill first. (City of Austin Exhibit GG-1, p. 4, l. 5 – p. 5 – 1. 12; City of Austin Exhibit GG-3, pp. 1-2) In addition, Mr. Williams, Mr. McAfee and Mr. Wilkins all testified it was their understanding that the WMTX landfill was to cease operating in the 2010-2015 timeframe. (NNC Exhibit JW-1, p. 3, l. 29 – p. 4, l. 2; TR, p. 2230, ll. 4-24; and NNC Exhibit EW-1, p. 5, ll. 15-16) Both Mr. Williams and Mr. Wilkins testified they have been unable to sell their property to developers because the WMTX landfill is still in operation. (NNC Exhibit EW-1, p. 5, ll. 16-27; NNC Exhibit JW-1, p. 3, l. 24 – p. 4, l. 2)

Finally, Mr. Worrall has incorrectly stated that the use of this land by WMTX as an MSW facility represents a compatible land use because municipal and regional growth

policies suggest its siting to be consistent with their major goals and concerns. (Exhibit APP 302, p. 10). This is patently false. CACPCOG is the primary governmental body that articulates regional growth policies in this area, and they have firmly stated that they have local facility siting concerns relating to WMTX: it being their position that the siting of this facility poses a nuisance to neighbors and communities. (Travis County Exhibit JW-4; City of Austin Exhibit 2) Both Travis County and the City of Austin are on record as opposing the expansion of this facility due to their concerns that it is an incompatible land use and that it does not comply with their individual municipal and regional growth policies. Yet Mr. Worrall espouses that he is more qualified to evaluate policies of CAPCOG, Travis County and the City of Austin than those entities themselves. As he stated, "I don't think they have examined it as carefully as I have." (TR p. 592, ll. 21-22) His statement that the use of this land for the disposal of municipal solid waste is consistent with local policies is mere bolstering, and a tortured misreading of those policies. All testimony presented at this hearing by the entities who adopted, maintain and enforce those policies unambiguously asserts that the expansion of this landfill is incompatible with those policies and with land use in this area.

Conclusion

To conclude, Travis County believes the overwhelming weight of the evidence shows that this facility is incompatible with existing and future land use. Mr. Worrall did absolutely no research into whether the use of the facility would pose a risk to human health and the environment. Indeed, the only relevant evidence presented at this hearing demonstrates that the use of this land as a landfill has caused nuisance conditions in the past, and based on the Applicant's poor compliance history, it will likely continue in the

future if this expansion is authorized. It is true that Mr. Worrall did collect some information regarding land use in the area – he simply or deliberately failed in his analysis of the data he collected. CAPCOG, a neutral, unbiased, governmental body (that has not been paid over $20,000 by Waste Management (TR, p. 657, l. 10 – p. 658, l. 18), and which is the entity tasked by the State of Texas to analyze compatibility in light of local policies, and to determine whether the expansion of this facility is consistent with its RSWMP, believes the use of this site for a MSW facility to be an incompatible land use; and a use which adversely impacts human health and environment. Travis County therefore urges the ALJ to adopt the findings of CAPCOG on this matter.

In the alternative, if the ALJ finds that the permit amendment should be approved, Travis County urges the inclusion of a closure date of November 1, 2015, to be mandated in the permit. The landfill immediately adjacent to the north of the WMTX facility, BFI's Sunset Farms, entered into a binding agreement with the City of Austin to cease accepting waste and operating as a transfer station no later than November 1, 2015[3]. Travis County believes that if WMTX were to be mandated the same closure date in this matter, the incompatibility with surrounding residential, business and open land use would be ameliorated on that date.

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.**

While WMTX's Site Operating Plan ("SOP") contains several provisions designed to help prevent or minimize nuisance odors, many of the measures described in

[3] A decision from Judge Newchurch is due in the next month on BFI's expansion application, and in that proposed draft permit, BFI agreed to stop accepting waste at their landfill no later that November 1, 2015.

the application are rendered ineffective because they are too flexible and provide far too much discretionary control to the Applicant. (TR, pp. 1938-1939; and City of Austin Exhibit JW-1, p. 8, l. 178 – p. 12, l. 272) In his testimony, Jon White expressed Travis County's concern regarding these discretionary procedures: "(G)iven the history of inadequate compliance and enforcement at this facility, these procedures should be mandatory, not discretionary." (Travis County Exhibit JW-1, p. 26, ll. 8-9) The City of Austin has similar concerns about these discretionary procedures (City of Austin Exhibit JW-1, p. 8, l. 180 – p. 9, l. 193)

While the SOP contained in the Application does include some minimal provisions to control spilled and windblown waste, Travis County does not believe those provisions are sufficient to prevent the recurrence of this nuisance. Testimony by Dr. Robert S. Kier, and photographs admitted in evidence, show the extent of the windblown waste on the working face and the fences surrounding the facility. (TJFA Exhibit 208, pp. 8-11) Both Jon White and Joe Word identified the county and city's concerns about spilled and windblown waste, and their beliefs that it is currently an ongoing nuisance affecting the neighboring residents. (Travis County Exhibit JW-1, p. 26, ll. 15-18; City of Austin Exhibit JW-1, p. 11, l. 232 – p. 12, l. 272) The impact of increased buffer zones is discussed in further detail below.

While 30 TAC§ 330.61(i)(1) requires the Applicant to provide in its Application data on the adequacy of roads that the owner or operator will use to access the site. WMTX did not provide any such information in its Application; nor did its traffic expert, Mike McInturff, because of his self imposed definition of the word "adequacy,"' discuss it in his report. He merely stated that his "assessment of the adequacy of the reads is to

identify the capacity of the roadways to accommodate current traffic and site traffic as required by TCEQ and to report what the weight limits are." (TR, p. 1095, l. 12 – p. 1096, l. 8) Much like Mr. Worrall's land use analysis, Mr. McInturff dodges the real issue relating to roads -- safety, maintenance and land use compatibility. There is no discussion by WMTX about the maintenance of site access roads anywhere in the Application nor is it to be found in the testimony of any of Applicant's witnesses or of those witnesses of the Executive Director who also abdicated discussion of the availability and adequacy of site access roads. The only testimony regarding this issue came from impacted individuals in the community who are concerned about both the traffic on these roads as well the damage to them caused by the repeated heavy garbage truck traffic. (NNC Exhibit EW-1, p. 2, l. 29 – p. 3, l. 6; NNC Exhibit DR-1, p. 3, ll. 13-16; and NNC Exhibit DR-1, p. 3, l. 27 – p. 4, l. 21)

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

The application does not provide adequate provisions to control noise, and there was no testimony proffered by the Applicant on this matter. Several of NNC's witnesses testified to the nuisance of noise generated by trucks traveling to and from the landfill, as well as to the noise of the operations at the landfill. (NNC Exhibit EW-1, p. 2, l. 29 – p. 3, l. 6; and NNC Exhibit DR-1, p. 3, l. 27 – p. 4, l. 21)

Mr. Worrall testified that he was present at several public meetings at which the residents publicly presented their concerns about the landfill, including noise generated by the operations of the facility, yet he did not take into account any of their concerns when revising his land use analysis, nor did he make any suggestions to the Applicant as

to how it might address the resident's concerns. Mr. McInturff, the traffic expert retained by Waste Management, testified that he was not aware of any specific noise level requirements for roadways and that he did not consider or evaluate the noise generated by traffic in any way as part of his traffic analysis. (TR, p. 1096, ll. 18-23)

The only evidence in the record on this issue relates to the noise being a nuisance and may be found in the testimony of Jon White, Joe Word, Evan Williams, Delmer Rogers and Mark McAfee. (NNC Exhibit EW-1, p. 2, l. 29 – p. 3, l. 6; NNC Exhibit MM-1, p. 3, ll. 24-29; NNC Exhibit DR-1, p. 3, l. 27 – p. 4, l. 21; Travis County Exhibit JW-1, p. 10, l. 22 – p. 11, l. 6; and City of Austin Exhibit JW-1, p. 11, ll. 244-250) The Applicant has not met its burden to demonstrate how the application includes adequate provisions to control noise, in compliance with 30 TAC §330.239 and to show what measures it intends to take to minimize noise pollution. In addition, WMTX has failed to show how this noise pollution is compatible with the surrounding residential land use.

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

Testimony was provided that the application allows for the Applicant to operate its landfill from 9:00 p.m. Sunday through 7:00 p.m. Saturday, and if necessary, between 7:00 a.m. to 4:00 p.m. on Sundays. No additional authority from the TCEQ is apparently required to operate on these additional Sunday hours. 30 TAC §330.135 states that a Site Operating Plan must specify the hours when the Facility will be operating, and that the waste acceptance hours may be anytime between 7:00 a.m. and 7:00 p.m., Monday through Friday, unless otherwise approved in the authorization for the facility.

Applicant's specified intent to operate its facility for basically 24 hours a day, 6 days a week is not in any sense of the word compatible with the presence of 1,447

residences located within one mile of the facility, or with the presence of 57,913 homes currently located within five miles of the facility. The Applicant has not met its burden to establish that these operating hours are necessary or appropriate given the land use surrounding the facility. Greg Guernsey, City Planner for the City of Austin, testified it was his opinion as a City Planner that these operational hours are inappropriate for a landfill operating in a residential area, and suggests the operating hours be limited to daylight hours to lessen the impact on the surrounding residential land use. (City of Austin GG-1, p. 5. ll. 16-18) Given the current proximity of this landfill to over 57,000 residences, Travis County believes the preponderance of the evidence suggests that these operational hours are not appropriate and are incompatible with residential land use. While Travis County believes this application should be denied, in the event that the Applicant's lateral expansion is granted, Travis County would urge the ALJ to restrict the operational hours of the facility, and that it only be allowed to accept waste between the hours of 7:00 a.m. and 7:00 p.m. Monday through Friday, with no exceptions.

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

Evidence was presented that the buffer zones and landscape screening proposed by Applicant are insufficient for a landfill located in an increasingly urbanized setting. (City of Austin Exhibit JW-1, p. 12, ll. 256 – 272) The only mention of landscape design and/or screening contained in the application is related to closure. Absolutely nothing contained in the application discusses screening around the landfill while it is operating in the middle of 57,000 residential homes.

John Worrall provided little testimony as to the adequacy of buffer zones and landscape screening, other than to testify that it would require an analysis to see where the Applicant might place trees on the landfill. (TR, p. 817, ll. 11-24) Mr. Worrall was not asked by WMTX to perform such an analysis as part of his land use determination. (TR, p. 817, ll. 13-24) In fact, he went so far as to demeaningly testify that in his opinion the best way to screen a landfill to place trees in individual property owner's own yard, rather than on the landfill property itself. (TR, p. 817, ll. 2-10)

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

The Application should be denied based on the Applicant's compliance history, as there is no better indicator of the Applicant's ability to follow the rules and laws of the State of Texas than by looking at its previous conduct. 30 TAC Chapter 60 requires that WMTX's entire compliance history be taken into consideration when an expansion is requested. Many different factors are to be considered, including but not limited to: enforcement orders, consent decrees, chronic excessive emissions events, investigations, and notices of violations.

Testimony was given that during recent operation under Permit 249-C, WMTX entered into two Agreed Orders with TCEQ concerning alleged violations on its part: 2002-0935-MLM-E (City of Austin Exhibit 1) and 2004-0384-MLM-E. (City of Austin Exhibit JW-4; Travis County Exhibit JW-6) As a result of the 2004 Agreed Order, WMTX was originally ordered to pay a fine of $881,508 -- which amount was later reduced by the TCEQ to $244,420. Regardless, testimony established that even the

$244,420 was, at the time, the highest fine ever assessed against a MSW landfill operator in the State of Texas.

Specifically, as mentioned in the Executive Summary for the 2004 enforcement matter against WMTX, the TCEQ noted that it had received approximately 800 odor complaints concerning both the WMTX landfill and its neighboring BFI landfill, and that "most of these complaints cited a rotting garbage and/or gassy odor." (TR, p. 2057; and Exhibit TJFA 27) The TCEQ further noted in its Executive Summary that "the number of complaints received by the TCEQ Region 12 office has declined significantly since the Respondent [WMTX] implemented the corrective measures described in Section 1.11 of the proposed agreed order." Joe Word testified that it seemed likely that the Respondent in that matter, WMTX, was probably the cause of most of those 800 complaints since the corrective measures undertaken by WMTX corresponded with the significant decline in the number of complaints. (TR, p. 2058, ll. 4-11)

Testimony was also established that numerous complaints had been lodged with both Travis County and the City of Austin, the two local governments impacted by the WMTX landfill. Mark McAfee testified about his and other neighbors' frustrations at not being able to convince the TCEQ to take action against WMTX for numerous nuisance infractions, stating that they ultimately turned the force of their complaints towards Travis County and the City of Austin in an attempt to receive at least some support from their government. (TR, p. 2210, ll. 5-23; TR, p. 2244, l. 5 – p. 2246, l. 18; and TR, p. 2228, l. 22 – p. 2229, l. 7)

Clearly, there is a history of WMTX's non-compliance with the TCEQ rules and the laws of Texas. Travis County, the City of Austin and CAPCOG (see Travis County

Exhibit JW-4; see also City of Austin Exhibit 2) have all stated that they believe Waste Management's history of non-compliance is a factor that must be considered when making a determination of compatibility.

Indeed, the Applicant's compliance history can hardly be discussed without also discussing its incompatibility. Waste Management's own land use expert, John Worrall, testified that he made a presumption that the landfill would be legally compliant when he made his determination of compatibility. (TR, p. 575, ll. 20-23) He did not perform any research into WMTX's compliance history in making his determination of compatibility (TR, p. 579, ll. 21-23), a fatal flaw in the validity and veracity of his analysis.

Furthermore, WMTX's own actions throughout this expansion application make it difficult to believe that there is any likelihood that it will comply with the rules of the agency and the laws of Texas. First, the Applicant improperly began construction of its proposed lateral expansion prior to the issuance of the draft permit -- a clear violation of 30 TAC§330.7(a) and the Texas Health and Safety Code. (see also detailed discussion in Item D below) Second, the Applicant misleadingly, improperly, falsely and repeatedly stated in its Application that a rather large portion of the (closed) Travis County landfill was located on its property. Not a single witness on behalf of the Applicant could or would recall why they decided to start labeling the area "Travis County landfill" in Version 2 of its expansion application.

Travis County does not believe the information provided by the Applicant to the Executive Director was of sufficient completeness, accuracy and clarity to provide assurance that operation of the site would pose no reasonable probability of adverse effects to the health, welfare, environment or physical property of nearby residents or

landowners as required by 30 TAC§330.57(d). By not accurately labeling the older areas of their Facility, notably the Phase I area (speciously labeled by the Applicant as Travis County Landfill), and the Industrial Waste Unit, the Applicant provided insufficient information for a thorough determination to be made as to whether the Facility was being properly monitored for groundwater and for landfill gas. This is a prime example of how the Applicant has consistent difficulty complying with TCEQ's rules and state laws. The Applicant's failure to provide sufficient information is alone grounds for denial of the lateral expansion per 30 TAC §330.57(d) -- and Travis County argues that the application should be denied on these grounds.

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.

The Application should be denied. 30 TAC§330.7(a) specifically states that "No person may commence physical construction of ... 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." (emphasis added)

ATT 2-6, found on page 620 of APP-202, details the proposed ponds as they are to be constructed as part of WMTX's expansion. Exhibit TJFA 202 is a recent photograph of the ACRD facility, and it captures two ponds at the western boundary of the expansion area which have clearly already been constructed, and filled with water. Charles Dominguez, the engineer who designed these ponds for the Applicant and who sponsored this Application, testified that these two already constructed ponds were very

similar in shape and size to the ones he proposed in ATT 2-2 and ATT 2-6 of the Application, and that the constructed ponds were "in about the same place and about the same size and configuration." (TR, p. 371, ll. 23-24)

Mr. Dominguez speciously attempted to distinguish these two, already constructed ponds from those he had designed by pointing out that his proposed ponds would contain additional features. (TR, p. 372, ll. 2-8) However, he admitted that if they included those features, "they would be the same ponds." (TR, p. 372, ll. 18-24) He admits that the location and configuration are the same, (TR, p. 460, ll. 15-18) but appears to expect us to believe that once the expansion is permitted, these ponds will somehow be replaced with other ponds that do meet the specifications of his design. In fact, those are the ponds proposed in the application, and although they might not be finished-out to Mr. Dominguez's specifications, construction of the ponds was clearly begun before the expansion permit was issued, in clear violation of 30 TAC§330.7(a).

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

The Applicant has failed to provide any information at all regarding conformance with the RSWMP, and consequently has failed to meet its burden of proof on this issue. Applicant submitted Parts I and II of the application to CAPCOG for review for compliance with CAPCOG's RSWMP, and WMTX included documentation showing it had requested a review letter from CAPCOG. However, the fact of this submission does not provide any information regarding conformance with the RSWMP, and Applicant has not mentioned the RSWMP or addressed conformance with the RSWMP anywhere in the application or in testimony.

30 TAC§330.641(d) states that "If a regional plan is adopted by the commission, public and private solid waste management activities and state regulatory activities shall conform to the adopted regional or local solid waste management plan." Similarly, Section 363.066(a) of the Texas Health and Safety Code states that "On the adoption of a regional or local solid waste management plan by commission rule, public and private solid waste management activities and state regulatory activities must conform to that plan." CAPCOG has had approved Regional Solid Waste Management Plans in place since 1992. WMTX has entirely failed to address conformance with CAPCOG's RSWMP in this application. Submission of the application to CAPCOG for review, and inclusion of the submittal letter in the application has allowed WMTX to achieve "Technically Complete" status on this issue, but has in no way complied with the mandatory regulatory and statutory requirements of this issue.

The Capital Area Council of Governments (CAPCOG) is the agency tasked under Chapter 330 of the Texas Administrative Code to establish a Regional Solid Waste Management Plan for the area in which the WMTX landfill is sited. CAPCOG reviewed Waste Management's expansion application under both its 2002 and 2005 adopted regional solid waste management plans. (Travis County Exhibit JW-4; City of Austin Exhibit 2) We note that WMTX made no attempt to address the CAPCOG determination or findings in any of the nine revisions it made to the application after it received the first CAPCOG letter in January 2006, including the five revisions it made after the TCEQ adopted CAPCOG's most recent RSWMP in May 2007.

CAPCOG found that the WMTX expansion application did not conform with its RSWMP, and issued a letter of non-conformance to WMTX on January 31, 2006. (Travis

County Exhibit JW-4; City of Austin Exhibit 2) Following the final adoption of its RSWMP by TCEQ, CAPCOG issued a second letter of non-conformance concerning the WMTX expansion application on April 14, 2008. (City of Austin Exhibit 2) In its original letter dated January 31, 2006, CAPCOG specified a multitude of reasons why it believes that the WMTX expansion application does not conform to its RSWMP. As this plan has been adopted, the Applicant must demonstrate conformance with this RSWMP under both Section 30.641(d) of the Texas Administrative Code and Section 363.066 of the Texas Health and Safety Code. Applicant has failed to demonstrate conformance with CAPCOG's adopted RSWMP.

It is important to note that the Executive Director of the TCEQ is not granted authority under Chapter 330 to make a determination on land use compatibility, and has made no such determination in this matter. The ED has merely noted that the Application submitted by the Applicant included the required submittal letter to CAOCOG for review according to 30 TAC§330.61(p). CAPCOG made its determination, and stated in no uncertain terms that this expansion does not conform with its RSWMP. Travis County respectfully requests the ALJ to affirm CAPCOG's findings that WMTX's expansion application does not conform with the RSWMP, and to recommend that this application be denied.

VII. TRANSCRIPT COSTS

30 TAC§80.23 specifies a list of factors to be considered when determining the allocation of transcript costs:

(A) the party who requested the transcript;

(B) the financial ability of the party to pay the costs;

(C) the extent to which the party participated in the hearing;

(D) the relative benefits to the various parties of having a transcript;

(E) the budgetary constraints of a state or federal administrative agency participating in the proceeding;

(F) in rate proceedings, the extent to which the expense of the rate proceeding is included in the utility's allowable expenses; and

(G) any other factor which is relevant to a just and reasonable assessment of costs.

Travis County is a governmental entity with budgetary constraints, and clearly the legislature, in drafting the rules, acknowledged that deference should be given to governmental participants in contested case hearings by including (E) in its list of factors. By virtue of a public resolution, Travis County requested and was granted participation in this contested case proceeding – one aspect of which was to represent the public interest relating to land use and, in the process, it is hoped, to assist the ALJ in making a considered determination regarding land use compatibility -- a factor which is not considered by the ED. It was thus absolutely necessary for Travis County to seek party status in this matter to ensure this public interest issue was heard.

In addition, Travis County believes that "the financial ability of the party to pay costs" is an important consideration and in doing so it should be determined that Travis County pay no costs of this transcript, or at most a very limited portion of the costs. The Applicant presented testimony from ten witnesses – more than double the number of witnesses presented by any other party – and likely derives the most benefit from the

making of this transcript. Travis County therefore requests the ALJ attribute 100% of the transcript costs to the Applicant.

VIII. SUMMARY

Travis County requests that the Administrative Law Judge (ALJ) deny Waste Management of Texas, Inc.'s application for a lateral expansion. WMTX has failed to demonstrate by a preponderance of the evidence that the expansion of this landfill would be compatible with the surrounding residential, business and public land uses. WMTX has not demonstrated that the application will pose no reasonable probability of adverse effects on the health, welfare, environment or physical property of nearby residents or property owners. The application does not provide any documentation demonstrating conformance with CAPCOG's RSWMP. The Applicant has completely failed to demonstrate how they are providing adequate protection for groundwater and surface water, particularly in relation to the effects of the IWU and Phase I. The application does not provide adequate provisions for proper slope stability, particularly in relation to the "piggyback" liner system. The Applicant's compliance history does not warrant an expansion, and in direct violation of the applicable law, the Applicant began construction of the proposed lateral expansion prior to the issuance of the draft permit. In addition, the Applicant provided false, misleading, inaccurate and incomplete data to the Executive Director throughout the ten revisions of this application concerning the location, ownership and status of the Phase I area.

In the alternative, and only in the alternative, should some form of approval of this application be recommended, Travis County requests the ALJ order the facility to cease accepting waste and operating as a transfer station on November 1, 2015. Travis

County also requests the ALJ find that the Applicant failed to establish that around-the-clock operating hours are appropriate, and limit the operational hours to daylight hours Monday – Friday only. In order to ensure the IWU is properly monitored, Travis County urges the moving of the point of compliance line or adding monitoring wells to establish an additional point of compliance in the area south of the IWU and in any other location deemed necessary to adequately monitor the entire facility, and that Applicant be required to monitor and analyze groundwater for additional constituents.

IX. FINDINGS OF FACT

Travis County respectfully reserves its right to file proposed findings of fact in its reply argument as contemplated in Order No. 12.

X. CONCLUSIONS OF LAW

Travis County respectfully reserves its right to file proposed conclusions of law in its reply argument as contemplated in Order No. 12.

XI. ORDERING PROVISIONS

Travis County requests that the following provisions be ordered:

1. That the Application of Waste Management of Texas, Inc. for a lateral expansion in MSW249-D be denied.

2. In the alternative, in the event the application is granted, that WMTX's permit to accept waste and operate as a transfer station expire on November 1, 2015.

3. In the alternative, in the event the application is granted, that WMTX be restricted to operating during daylight hours, Monday-Friday.

4. In the alternative, in the event the application is granted, that WMTX be ordered to move its point of compliance line or install additional monitoring wells on an additional point of compliance line in the drainage ditch south of the IWU and

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

5. In the alternative, in the event the application is granted, that WMTX be required to test for the following additional constituents: 1,4-dioxane, methylene chloride, 1,2,3-trichlorobenzene, and any other potentially hazardous constituents found in wells monitoring groundwater from the IWU.

6. That all references to the Phase I area as the Travis County Landfill be deleted from the draft permit.

7. That the Applicant, Waste Management of Texas, Inc. pay all transcript costs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2009, a true and correct copy of Travis County's Closing Argument was served via facsimile, Electronic Delivery, First-Class Mail and/or Hand Delivery to the persons listed below.

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