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

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

CITY OF AUSTIN'S REPLY TO CLOSING ARGUMENTS

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

COMES NOW, THE CITY OF AUSTIN ("CITY"), a protestant in these proceedings, and pursuant to Order No. 12, submits its reply to the closing arguments previously filed herein.

I. ISSUES

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

The Applicant postulates that if the permit application meets the regulatory requirements then it is automatically deemed to "safeguard the health, welfare, and physical property of the people and the environment."[1] This argument however, is fatally flawed in that the entity charged with reviewing the permit application to determine if it meets the regulatory requirements, the ED, (A) does not consider at all whether or not the application will safeguard the health, welfare, and physical property of the people and the environment when performing its review; and (B) does not make any determination with regards to key issues such as land use compatibility or conformance with the regional solid waste management plan, that are determinative as to whether or not a permit application safeguards the health, welfare, and physical property of the people and the environment.[2]

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[1] WMI Closing Brief at pp. 24-25.
[2] CR. V. No. 11, 2404:15-20; 2410:12 to 2411:22; 2413:17-19; 2473:13-20.

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.

The Applicant argues that its application is protective of groundwater and surface water because the IWU and the ACRD Facility are not unique.[3] This is not true. There was no testimony or evidence indicating the presence of another facility in Texas or the U.S. with an operating MSW facility with the presence of a large industrial or hazardous waste facility located in the middle of it. The site characteristics clearly presents unique hazards and challenges that require that this be clearly addressed in the facilities permit to protect the environment and public health and safety as per the regulatory requirement to consider site history and site specific conditions in designing the monitoring system.

The Applicant paints the picture that hazardous wastes are routinely disposed of in municipal solid waste landfills and cites the example that MSW landfills can receive industrial waste and hazardous waste from multiple small quantity generators and multiple sources of household hazardous waste.[4] This is grossly out of context. The IWU is not waste from multiple small quantity generators or homes. It is the concentrated bulk hazardous waste consisting of solvents, acids, PCB's and other highly toxic wastes; tens of thousands of drums and hundreds of thousands of gallons.[5]

The Applicant states that the rules most relevant to the protection of groundwater and surface water concern the design and installation of the landfill's liner and leachate collection systems, and that no one has challenged the adequacy of the leachate management system.[6] This is not true. Much of the City's testimony regarding the IWU was focused on concerns regarding

[3] WMI Closing Brief at p. 13.
[4] WMI Closing Brief at p. 14.
[5] CR. V. No. 2 at pp 102-103; CR. V. No. 7 at pp. 1335-1340.
[6] WMI Closing Brief at p. 26.

the possibility of migration and discharge of leachate from the IWU. This is directly a concern about the IWU leachate management system, and yet neither the IWU nor the Phase I areas has a liner or leachate collection system.[7]

The Applicant asserts that the rules don't apply to the IWU because it's not an MSW unit.[8] This is also incorrect. The Executive Director's expert Avakian testified that if a unit contains household waste then by definition it would be a municipal solid waste landfill unit."[9]

The Executive Director refers to protection from an "...abundance of plans and agreements...".[10] There is no such abundance. TCEQ monitoring oversight is present only through the permit, and the only "agreement" is the *voluntary* agreement with the City that is not enforceable by the TCEQ. There is no requirement in the *voluntary* agreement with the City for the TCEQ to review reports or to require assessment or corrective action.

2. Whether the application includes adequate provisions for groundwater monitoring, in compliance with agency rules, particularly the sufficiency of the Groundwater Monitoring Plan and the Point of Compliance to assess effects of the IWU and Phase I on the groundwater.

The Executive Director states that all parties agree that the property line must be monitored as the regulations require from the entirety of the facility.[11] The exclusion of part of the facility from monitoring and point of compliance systems is not consistent with this requirement. The presence of the industrial waste unit and Phase I areas, which contain both municipal and industrial wastes, within the municipal solid waste facility is a unique and site-specific condition that is relevant to the design of a groundwater monitoring system for the facility.

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[7] CR. V. No. 3, 442:15-21.
[8] WMI Closing Brief p 23.
[9] CR. V. No. 11, 2491:12-17.
[10] Executive Director Closing Brief p.19.
[11] Executive Director Closing Brief p. 23.

Although the Applicant asserts that the IWU and WMI facility are not unique, there simply was no testimony or evidence indicating the presence of another facility in Texas or the U.S. with an operating MSW facility with the presence of a large industrial or hazardous waste facility located in the middle of it. The Applicant is permitting a facility which on its face is unique and presents unique hazards and challenges that require them to be clearly addressed in the facility's permit to protect the environment and public health and safety as per the regulatory requirement to consider site history and site specific conditions in designing the monitoring system.

The Applicant claims that the proposed monitoring system and wells are sufficient because there are more wells than the prior system, and that the voluntary agreement with the City enhances their claim.[12] This doesn't make sense. WMI stated they are not obligated to monitor the areas in the voluntary agreement with the City, and that they did not consider them in designing the system. In addition, the new wells are not "more down gradient" than the existing wells. In fact, WMI has added only one well, and the point of compliance wells will not be tested for contaminants known to be migrating from the IWU.[13] In reality, wells placed in drainage way would be more directly down gradient than any well in the existing or proposed permit monitoring system.[14] As City expert Lesniak testified, given the volumes and hazards of wastes known to be in IWU, placing wells through possible waste along drainage way is justified.[15]

[12] WMI Closing Brief pp. 19-20.
[13] CR. V. No. 5, 1017.
[14] APP 202, 3020.
[15] CR. V. No. 10, 2148:24 to 2149:4.

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 Executive Director clearly has the latitude under §330.401 (b) to require additional monitoring requirements where site-specific conditions have the potential for groundwater contamination. The Executive Director implies that because WMI has provided copies of reports of contaminants detected under the voluntary agreement it has with the City to the TCEQ, that somehow this supports the monitoring system efficacy. This is illogical. The Executive Director acknowledges the report of dioxane detection and yet would not agree that this documented, site specific condition, warrants additional monitoring requirements. In fact, releases of dioxane are documented in the voluntary monitoring reports, as well as repeatedly detected from PZ-26, but were deleted from the reports provided to the TCEQ and the City.

4. Whether the application includes sufficient information demonstrating how the MSW facility will comply with applicable TPDES storm water permitting requirements.

The Applicant, in its Closing Argument, contends that the City wants WMI to present a "substantive demonstration of TPDES compliance" in this MSW permit application.[16] This is untrue. What the City has done is bring attention to the fact that the Applicant will not be able to comply with state law implementing the Clean Water Act and designed to prevent adverse impacts to neighboring property and the environment, and therefore, this is yet another reason to add to the growing list as to why the permit application should be denied.[17]

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

The Applicant, in its Closing Argument, asserts that because Mr. Dominguez testified that the Facility Surface Water Drainage Report in the application meets all regulatory

[16] WMI Closing Brief at p. 39.
[17] *See* Ch. 402 Clean Water Act and Ch. 26 of the Texas Water Code; TF 1, 8:172-174, & 9:187-191, 194-197.

requirements, it therefore includes adequate provisions for erosion control.[18] The Applicant is essentially asserting that a self-serving conclusory statement can serve as the basis for meeting its burden of proof that the application includes adequate provisions for erosion control. The City is not just seeking "more specificity" with regards to erosion controls to be used at the facility; the City is seeking specificity period. The application currently provides no detail as to when, where, or how the list of potential erosion controls will be used. In fact the use of erosion controls at all is left entirely up to the facility operator who is not trained in the use or placement of erosion controls. The design engineer is the person best able to determine the most effective controls for a site, and the placement and timing of those controls for the prevention of erosion. The Applicant argues that the rules don't require it to provide information on how erosion controls will be utilized at the site; but what they fail to acknowledge is that the rules also do not *prevent* the Applicant from including such information in its application. Indeed, in a situation such as this, it is not merely interesting or amusing to the neighboring landowners to have such information put into the permit application; but rather because WMI has demonstrated such poor erosion control historically, it is imperative that WMI include mandatory and enforceable phased implementation of erosion controls to be able to meet the TPDES stormwater discharge limits and prevent adverse impacts to neighboring property and the environment.[19]

The Applicant, in its Closing Argument, also argues that the TCEQ guidance document on erosional stability does not require specific configurations or locations for controls.[20] However, the Applicant fails to mention that the TCEQ guidance document on erosional stability does require an applicant to "describe soil stabilization practices, perimeter controls, top and side runoff controls, collection, conveyance, and containment structures *at the areas where they will*

[18] WMI Closing Brief at p. 40.
[19] CL 1. 4:67 to 5:102; CL 3; CL 4.
[20] WMI Closing Brief at p. 43.

be installed at the site for the intermediate cover phase top dome surfaces and external embankment side slopes. *Include a description of, and specifications for*, temporary sediment retention structures *for all phases of development.*"[21]

Additionally, the Applicant alleges that Mr. Lesniak failed to take into account "erosion control and sediment removal that will occur upstream" of the bio-filtration pond.[22] However, upon examination of the testimony cited by the Applicant, it is apparent that Mr. Lesniak did take into account that WMI currently uses erosion and sedimentation controls incorrectly, so that there will not be any removal of sediment upstream of the biofiltration pond.[23] What is even more confusing to the reader is Applicant's unsupported statements to the effect that "calculations in the erosion and sedimentation control plan demonstrate that . . . soil loss . . . will be well below permissible soil loss."[24] This is in fact not demonstrated at all in the application, because there is no basis shown for the initial sediment concentrations. Further, the Applicant, in its Closing Argument, continues to mislead the court when it claims that WMI's "application proposes to incorporate not just one, but many different best management practices for erosion and sedimentation control. The sediment removal that will be achieved by such measures was simply ignored by the City's witnesses."[25] The application does not show, nor did the Applicant's expert witness testimony indicate that "many different best management practices for erosion and sedimentation control" will be used at the facility. For example, Mr. Dominguez specifically explained that he did not consider total suspended solid ("TSS") values at the site when designing the erosion and sedimentation control plan for the facility.[26] Additionally, the

[21] APP-15 at 2 (emphasis added).
[22] WMI Closing Brief at pp. 43-44.
[23] CR. V. No. 10, 2170:5-22.
[24] WMI Closing Brief at p. 44.
[25] WMI Closing Brief at p. 44.
[26] CR. V. No. 3, 488:19-24.

site history and witness observations show that WMI has not achieved appropriate sediment removal in the past.[27]

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

The TCEQ regulations require the landfill owner or operator to submit a report demonstrating their plan to minimize erosion *during all phases* of landfill operations with the intent of controlling soil loss and sediment transport from top dome surfaces and external embankment side slopes.[28] Landfill cover phases are defined as daily cover, intermediate cover, and final cover.[29] The Application fails to address the daily cover phase at all.

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

The Applicant, in its closing Argument, tries to downplay the fact that there is an admitted error in the closure plan portion of the application, by stating that correcting the soil specification will not affect any other portion of the application[30] This is incorrect. Mr. Dominguez himself testified to the fact that the infiltration rates would also need to be reviewed and potentially modified as well.[31] Pursuant to TCEQ rules, the Applicant must submit evidence to meet its burden of proof on the application.[32] Therefore if an application is missing a component, or misrepresents the fact, no amount of expert testimony should be allowed to rehabilitate the flawed application.

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[27] CR. V. No. 10, 2170:11-19; CL 1, 4:67 to 5:102; CL 3; CL 4.
[28] 30 T.A.C. § 330.305(d).
[29] APP-15 at 1.
[30] WMI Closing Brief at p. 55.
[31] CR. V. No. 3, 535:11 to 536:10.
[32] 30 T.A.C. §§ 80.117(b), 305.2(1), 330.51(a),(b)(1),(3).

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.

The fact that the Applicant has the audacity to claim in its Closing Argument, that it, a corporation, is in a better position to determine what is in the public interest and what is compatible with the surrounding land uses, than the City of Austin, Travis County, and the Capital Area Council; of Governments ("CAPCOG") is absurd.[33] The elected officials of both the City and the County, as well as the appointed officials of the CAPCOG, those charged with making policy decision for the region, have all concluded that the WMI facility is no longer a compatible land use and that the permit application should be denied.[34]

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.

As expected, the Applicant has attempted in its Closing Argument, to construe the TCEQ rules regarding land use information to be submitted as part of a permit application, as all that is required to prove that they are a compatible land use.[35] This is obviously not the case. The TCEQ rules specify the land use information that must be submitted with the application, they do not indicate that mere submission of information equals a compatible land use.[36] To imply otherwise is would render the determination meaningless. In fact, ED expert Udenenwu confirmed that with regards to land use compatibility, the ED only looks to make sure the applicant has provided the information required by the TCEQ rules; the ED does not evaluate the information to determine if the facility expansion is actually a compatible land use or not.[37]

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[33] WMI Closing Brief at p. 56.
[34] Joe Word 3; Jon White 3; COA 2.
[35] WMI Closing Brief at p. 57.
[36] 30 T.A.C. §330.61(g),(h).
[37] CR. V. No. 11, 2404:15-20.

The Applicant goes on to argue that there is "no evidence in the record" to support the conclusion "that continued landfill operations in the area will adversely impact human health or the environment."[38] One must assume then that the Applicant did not review its own application, prefiled testimony, prefiled testimony of the protestants, nor paid attention during the 11 day hearing; because if the Applicant had it would be aware of the overwhelming amount of evidence demonstrating that the WMI facility is currently adversely impacting human health and the environment; and since WMI is not proposing to do anything different under its proposed permit for expansion, the facility will continue to adversely impacting human health and the environment. There is an abundance of testimony to the effect that nuisance conditions of odors, windblown waste, mud on roadways, noise, and vectors are all affecting the residents who live near the facility.[39] There is also evidence that development would be even more robust in this location if there was not an active landfill in the area.[40] Further the record is replete with evidence that the area around the facility is growing at a very rapid pace and that as such more and more receptors are near the facility so as to be adversely impacted by the nuisances generated by the WMI facility.[41]

The Applicant also is creative in its word choice when it states that "the proposed expansion will not cause waste disposal operations to be any closer than the most proximate existing distance to a residence".[42] What the Applicant conveniently neglects to mention, is that

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[38] WMI Closing Brief at p. 58.
[39] Jon White 1, 10:22 to 11:6; MM-1, 2:13-15, 20-23, 24-29, 3:5-8, 21-28, 4:1-3; AN-1, 10:27-31, 11:4-18; DR-1, 2:20-31, 3:1-20, 27-31, 4:1-21, 24-30, 5:1-14.
[40] NNC 4, 13:21 to 14:5 ("About two years ago, someone made an offer in writing to purchase the property, and then when they found out that Waste Management had purchased this Wilder Tract . . . they withdrew their offer."); NNC 3, 23:19 to 24:17; CR. V. No. 9, 1978:25 to 1979:12 ("one of the developers out there indicated that that area hasn't been developed because of the landfill situation in this area.")
[41] Jon White 1, 14:14-17; APP 202, 20 & 179.
[42] WMI Closing Brief at p. 59.

the proposed expansion will move closer to other residences.[43] Not the residences that the facility is currently the closest to, but others. Which means a new set of individuals will become more adversely affected by the facility.[44]

The Applicant also attempts to tell the Protestants what they think when it states, that Protestants "are driven by the unfounded expectation that the ACRD Facility, under its current permit, would cease accepting waste some time prior to November 2015."[45] The City, County, nearby property owners, businesses, developers, and residents all had an expectation based upon representations made by WMI, that the WMI landfill would close upon reaching its currently permitted capacity by 2015.[46] If WMI does not think the Protestants should have this expectation, then perhaps it shouldn't have made the representations to the TCEQ and to the Travis County Commissioners Court, that it would cease operations under its current permit by 2015.

Finally, the Applicant alleges that governmental bodies cannot prohibit landfill operations without specifically designating areas where municipal solid waste disposal will not be prohibited.[47] While the Applicant correctly states the law, it is incorrect to assume that the City or the County have prohibited landfill operations anywhere. Both the City and the County are protesting this expansion as being an incompatible land use among other reasons. Furthermore, Travis County *has* specifically offered to facilitate relocating the WMI facility to another site.[48]

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[43] GG-1, 3:23 to 4:2; CR. V. No. 9, 1995:10-15, 2001:15 to 2002:17.
[44] CR. V. No. 9, 2001:15 to 2002:17.
[45] WMI Closing Brief at pp. 59-60.
[46] Joe Word 1, 5:114 – 6:115; Jon White 1, 17:21-23, 27:16-21; CR. V. No. 10, 2260:24-25.
[47] WMI Closing Brief at p. 60.
[48] Jon White 1, 17:3-8.

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.

The Applicant defers to its site operating plan ("SOP") for its plan to prevent nuisance conditions.[49] This is not adequate to prevent the creation of nuisances, as the proposed SOP fails to differ in any meaningful way from the facility's current SOP, under which nuisance conditions of odors, windblown waste, mud on roadways, noise, and vectors are all affecting the residents who live near the facility.[50] Although the SOP would be the appropriate way to mitigate many of the nuisances felt by the neighboring landowners, the Applicant has chosen to disregard the effects it is having on its neighbors and continue to do the minimum required by law.[51] This is not acceptable in an area such as this where a landfill is located in an urban area.

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

Once again, the Applicant in its Closing Argument flat out misrepresents what the evidence has shown with regards to the noise generated by the WMI facility.[52] Mark McAfee, the owner of a nearby business, testified that noise from the heavy machinery at the property is audible at his property.[53] Additionally, citizen witness Delmer Rogers, testified that the noise generated by WMI is a problem for him as well.[54] The Applicant further misrepresents the evidence before the Judge when it states that no party challenged the adequacy of the facility's proposed buffer zone to buffer the noises that are a nuisance to nearby property owners.[55] This is

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[49] WMI Closing Brief at p. 60.
[50] Joe Word 1, 8:178 to 9:193; Jon White 1, 10:22 to 11:6; MM-1, 2:13-15, 20-23, 24-29, 3:5-8, 21-28, 4:1-3; AN-1, 10:27-31, 11:4-18; DR-1, 2:20-31, 3:1-20, 27-31, 4:1-21, 24-30, 5:1-14.
[51] CR. V. No. 3, 452:13-19.
[52] WMI Closing Brief at p. 61.
[53] CR. V. No. 10, 2252:22 to 2253:14; 2280:20-21 (Judge Scudday: "He's indicated there's noise out there during the activities. There's noise.").
[54] NNC 2, 22:2-7.
[55] WMI Closing Brief at p. 64.

untrue. City expert Joe Word testified that noise generated from a landfill travels much greater distances than 125 feet.[56] And Mr. McAfee and Mr. Rogers described their concerns with the noise despite buffer zones.[57]

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

For the Applicant to argue, as they have in their Closing Argument, that only a facility which seeks to operate outside its currently authorized hours should be subject to having its hours modified would be pointless for situations such as this case.[58] WMI is already authorized to operate 24/7 except for Sundays.[59] Further, the Applicant alleges that no party challenged the adequacy of the facility's proposed buffer zone to buffer the noises that are a nuisance to nearby property owners.[60] This is untrue; as previously stated, City expert Joe Word testified that noise generated from a landfill travels much greater distances than 125 feet.[61] Additionally, a citizen, Mark McAfee testified that he is able to hear the noise created by the heavy machinery on his property despite the buffer zone.[62] Another citizen, Delmer Rogers, testified that the noise generated by WMI is a problem for him as well.[63]

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

The Applicant contends that the goal of the TCEQ rules for buffer zones, namely to provide visual screening of the disposal activities, will be accomplished via the 125-foot buffer

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[56] Joe Word 1, 7:148-150 ("noise . . . travel[s] distances much greater than 125 feet."), 11:244-247 ("A person standing 125 feet from this activity will still consider it to be a very noisy location.").
[57] CR. V. No. 10, 2252:22 to 2253:14; 2280:20-21; NNC 2, 22:2-7.
[58] WMI Closing Brief at p. 63.
[59] APP 202, tech. comp. 3394:¶3.
[60] WMI Closing Brief at p. 64.
[61] Joe Word 1, 7:148-150 ("noise . . . travel[s] distances much greater than 125 feet."), 11:244-247 ("A person standing 125 feet from this activity will still consider it to be a very noisy location.").
[62] CR. V. No. 10, 2252:22 to 2253:14; 2280:20-21 (Judge Scudday: "He's indicated there's noise out there during the activities. There's noise.").
[63] NNC 2, 22:2-7.

zone it plans to implement.[64] There are two important facts to point out here: First, a 125-foot buffer zone is the bare minimum required by the TCEQ regulations; once again highlighting WMI's complete disregard for going above and beyond to make this facility more acceptable to its neighbors; and Second, the 125-foot buffer, whether vegetated or not, will not provide visual screening of the disposal activities from the neighborhood that it is moving closer to, Pioneer Crossing.[65] This is due to the fact that the elevation of the expansion area will be approximately the same elevation as Pioneer Crossing, and the area between WMI and Pioneer Crossing is a very low area.[66] Therefore, 125-foot buffer or not, the residents of Pioneer Crossing will have an un-screened view of the disposal activities occurring on the proposed expansion area.

Finally, it is important to point out that the Applicant failed to address the impact of nuisances generated by the landfill on surrounding neighbors, and the lack of impact a 125-foot buffer has on any of them. Merely complying with the 125 foot buffer requirement is not sufficient to mitigate the nuisance impacts on surrounding properties. Nuisances such as odors, litter, dust, noise, and sediment-laden storm water runoff, can and do travel distances much greater than 125 feet. [67]

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

The Applicant attempts to manipulate the evidence regarding its poor operating performance by stating that because it has not received a citation since 2002 means that there have not been any violations since that time.[68] Once again, the evidence in the record clearly indicates that this is not true. In fact, neighbors were told by the TCEQ to stop making

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[64] WMI Closing Brief at p. 64.
[65] CR. V. No. 9, 1995:10 to 1996:6.
[66] CR. V. No. 9, 1995:10 to 1996:6.
[67] Joe Word 1, 7:144-156; 12:256-272.
[68] WMI Closing Brief at p. 61.

complaints because it would do no good.[69] It was at that time that the neighbors took their complaints to the Travis County Commissioners Court, and in fact to this day complain about the nuisance violations that the WMI facility continues to generate.[70]

D. Whether the application should be denied because Applicant allegedly began construction of the proposed lateral expansion prior to the issuance of the draft permit, in violation of agency rules.

In its Closing Argument, the Applicant attempts to convince the Judge that the sedimentation and bio-filtration pond that currently exists in the area proposed for expansion is not actually part of the landfill expansion.[71] Applicant now claims that the ponds are "mitigation for the loss of a stock tank that the City defined to be a critical environmental feature".[72] What the Applicant fails to disclose, however, is that the mitigation is only required because the stock tank is being removed because of the landfill expansion.[73] If there were no expansion occurring, there would be no need for the ponds as mitigation. The construction of the two ponds is clearly WMI's first step in constructing the proposed expansion prior to the issuance of a permit from the TCEQ.

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.

In its Closing Argument, the Applicant appears to contend that it is in a better position to determine whether or not the proposed expansion conforms to the goals and objectives of the RSWMP than the executive committee charged with implementing the RSWMP.[74] Notwithstanding the Applicant's self-serving interpretation of the RSWMP, the CAPCOG voted not once, but *twice* that WMI's application for expansion is not compatible with land use in the

[69] MM 1, 4:4-14; TC 6; CR. V.No. 10, 2114:23-25 & 2115:1-2.; CR. V.No. 9, 2071:12-17.
[70] *Id.*
[71] WMI Closing Brief at p. 67.
[72] WMI Closing Brief at p. 67.
[73] TF-3.
[74] WMI Closing Brief at p. 69.

area, and that it does not conform with the RSWMP.[75] It is important to recognize that Section 363.066 of the Texas Health and Safety Code requires all solid waste management activities to conform to their adopted RSWMP. The statute does allow the TCEQ to grant a variance from the adopted RSWMP under procedures and criteria adopted by the commission.[76] WMI has received a determination of noncompliance with the RSWMP; WMI has not sought a variance from the TCEQ[77]; therefore the proposed expansion is prohibited by law.[78]

II. SUMMARY

The very purpose of this evidentiary contested case hearing is to determine whether or not the permit application provides sufficient information that the proposed expansion will not "cause, suffer, allow, or permit the collection, storage, transportation, processing, or disposal of municipal solid waste . . . in such a manner that causes . . . the creation or maintenance of a nuisance, or the endangerment of the human health and welfare or the environment." The Applicant cannot overcome its burden of proof by only providing self-serving conclusory testimony. Additionally, as stated in Section 5.228(e) of the Water Code, neither the Executive Director nor any of its staff may sustain the Applicants' burden of proof, by testimony or evidence. The Executive Director's participation or determination may be used to complete the administrative record, but not to carry the burden of proof.[79] In this case, the ED has gone out of its way to support the Applicant's burden of proof via it's prefiled testimony, questions during the hearing, and finally in its closing argument, and it's argument must be viewed in light of its skewed participation in favor of the Applicant.

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[75] COA 2.
[76] TEX. HEALTH & SAFETY CODE § 363.066(b).
[77] CR. V.No. 2, 209:7 – 210:4.
[78] TEX. HEALTH & SAFETY CODE § 363.066.
[79] 30 TAC 80.108(d) and (e) and 30 TAC 80.127(h).

III. FINDINGS OF FACT

1. The Applicant did not properly assess the drainage channel between the IWU and Phase I area and consequently critical characteristics were not taken into account in the groundwater monitoring system and point of compliance design. (CR. V. No. 5, 939:8-11 & 942:20-21 & 943:3-10).

2. Groundwater levels in PZ 31 are consistently several feet higher than the base of the tributary between the IWU and Phase I. (CR. V. No. 10, 2140:9-16).

3. The TCEQ rules require a groundwater monitoring plan for the proposed permitted facility. (30 T.A.C. § 330.403).

4. Groundwater monitoring wells should be placed along the point of compliance and they must ensure detection of groundwater contamination from municipal solid waste landfill units within the facility in the upper most aquifer. (30 T.A.C. § 330.403).

5. The evidence demonstrates that both the Phase I unit and the IWU contain household waste. (APP 202, p. 1481; CR. V. No. 3, 339).

6. The Phase I and IWU are both solid waste management units and municipal solid waste units. (CR. V. No. 11, 2487:20-21).

7. The groundwater monitoring system does not take all of the factors required by 30 T.A.C. § 330.403(b) into account.

8. The IWU is located within the facility and in-between the East Hill, West Hill and Phase I area units. (APP 202, 47).

9. The IWU and Phase I areas share these same characteristics as the West Hill expansion area.

10. The Phase I and IWU areas are pre-subtitle D unlined units, which contain solvents, acids, and saline solution, all of which are known dangers to human health and the environment. (APP-1; CR. V. No. 5, 1043:2-9).

11. The types of wastes contained in the Phase I and IWU areas have physical properties that make releases difficult to detect with traditional groundwater monitoring systems. (CR. V. No. 11, 2482:6-16).

12. The application proposes a less protective design for the Phase I and IWU area than it does for the West Hill expansion area. (CR. V. No. 5, 1029:20 to 1030:16)

13. The monitoring design for the IWU did not take into account the materials in the IWU. (CR. V. No. 11, 2488:8-23).

14. The groundwater monitoring plan proposed in the application has only one well, MW 11, which could detect any of the potential contaminants in groundwater from the IWU.

15. 1,4 Dioxane has consistently been found in PZ 26 and in PZ 31. (CR. V. No. 10, 2139:13 – 2142:5).

16. 1,4 Dioxane is evidence of human induced contamination. (CR. V. No. 5, 1041:20 – 1042:16).

17. MW 11 is only being monitored for the Appendix 1 list and the Appendix 1 list does not contain 1,4 dioxane. (CR. V. No. 10, 2142:8-11).

18. The Appendix 1 constituents list does not include a number of the contaminants that were found in the sampling of the industrial waste unit. (CR. V. No. 10, 2135:25 & 2136:8).

19. WMI has not shared all monitoring data from the WMI/COA voluntary monitoring agreement wells with the City of Austin or the TCEQ. (CR. V. No. 10, 2140:1-2).

20. WMI had knowledge of, but failed to disclose to the City or to the TCEQ that monitoring data, detected in the monitoring under the WMI/CoA Agreement, reported the highest levels of 1,4 dioxane for the site ever. (CR. V. No. 10, 2141:9-10).

21. WMI had knowledge of, but failed to disclose to the City or to the TCEQ that monitoring data, detected in the monitoring under the WMI/CoA Agreement, reported a detection of trichlorobenzene, which had never been previously found in these wells. (CR. V. No. 10, 2141:7-8).

22. The Voluntary Monitoring Agreement between WMI and the City of Austin is not enforceable by the TCEQ. (CR. V. No. 5, 1000:13-20, CR. V. No. 10, 2133:14).

23. This site has historically had poor erosion and sedimentation control. (CR. V. No. 10, 2170:11-19; CL 1, 4:67 to 5:102; CL 3; CL 4).

24. This site has historically had poor revegetation of intermediate cover. (CR. V. No. 10, 2170:11-19; CL 1, 4:67 to 5:102; CL 3; CL 4).

25. This site has historically had problems with other source control methodologies such as silt fencing, mulching, or limiting areal coverage of disturbed soil. (CR. V. No. 10, 2170:11-19; CL 1, 4:67 to 5:102; CL 3; CL 4).

26. The current sedimentation and detention ponds are not effective in the removal of total suspended solids removal. (TF 1, 3:67-68 & 4:69-72).

27. The application incorrectly predicts annual soil loss in violation of TCEQ regulations.

28. The application fails to provide facility personnel or TCEQ inspectors guidance on how erosion and sediment controls are to be installed and used at the facility.

29. The Applicant has not demonstrated that the roadways cited are capable of withstanding the significant number of heavy trucks that landfill traffic will generate. (CR. V. No. 6, 1080:3-8 & 1092:2-5, 9-15, 17-25 & 1093:1-3).

30. The Applicant has not shown that the roadways will not be adversely impacted by mud trafficked onto them during wet weather conditions at the facility. (CR. V. No. 6, 1080:9-17 & 1081:6-25).

31. The City, County, nearby property owners, businesses, developers, and residents had an expectation based upon representations made by WMI that the WMI landfill would close upon reaching its currently permitted capacity in 2015. (Joe Word 1, 5:114 – 6:115; Jon White 1, 17:21-23, 27:16-21; CR. V. No. 10, 2260:24-25).

32. The area surrounding the WMI facility is one of the fastest growing areas in the City. (APP 300, 17:27-30).

33. The WMI landfill and the adjacent property are located within the City's Desired Development Zone, which is an area that the City has designated for future growth and development. (GG 1, 6:3-5).

34. There is evidence that the presence of the WMI facility has deterred, and is deterring, development in the area. (CR. V. No. 9, 1979:9-12).

35. After November 1, 2015, WMI will be the only active landfill in the area. (Joe Word 1, 5:114 – 6:115).

36. Noise from heavy machinery on the WMI facility can be heard from neighboring properties. (Joe Word 1, 11:244-247; MM-1, 3:21-26; DR-1, 5:8-14; CR. V. No. 10, 2252:22 to 2253:14; 2280:20-21).

37. The proposed site operating plan that is not significantly different from the existing site operating plan.

38. Nuisances such as odors, litter, dust, noise, and sediment-laden storm water runoff, can and do travel distances much greater than 125 feet. (Joe Word 1, 7:144-156; 12:256-272).

39. WMI was assessed the largest fine ever levied by the TCEQ on a MSW operator in the State of Texas for violations at this facility. (Jon White 1, 18:11-12; 19:6-7; Joe Word 1, 6:129-130).

40. The nuisances generated by the WMI facility continue to this day. (Joe Word 1, 6:121-124 & 7:150-156; TC 6; MM 1, 3:5-29 & 4:1-3).

41. The Capital Area Council of Governments ("CAPCOG") is the regional solid waste planning agency recognized by the TCEQ for the ten county region that the WMI facility is located in. (Joe Word 1, 7:158-160).

42. The CAPCOG executive committee twice voted to determine that the WMI application was not in conformance with the adopted and approved RSWMP. (COA 2).

43. WMI has not sought an exception to the RSWMP. (CR. V.No. 2, 209:7 – 210:4).

44. The Applicant has not obtained the required site plan permit for the expansion of the facility from the City of Austin. (COA 13; TF 1, 10-11:225-231).

45. WMI has constructed two ponds as part of the proposed expansion. (CL 1, 6 & 9).

IV. CONCLUSIONS OF LAW

1. The expansion and operation of WMI's landfill is a land use that is incompatible with land uses in the area of its site.

2. WMI's application failed to prove that the expanded facility will pose no reasonable probability of adverse effects on the health, welfare, environment, or physical property of nearby residents or property owners, as required by 30 T.A.C. § 330.61(h).

3. The Applicant has failed to demonstrate that the application includes adequate provisions to prevent the creation or maintenance of a nuisance, in violation of 30 T.A.C. § 330.15(a)(2).

4. The operational hours proposed in the application are not appropriate for the location of this facility.

5. The application fails to contain adequate provisions for buffer zones or landscape screening.

6. The application fails to conform with the Regional Solid Waste Management Plan, as required by Section 363.066 of the Texas Health and Safety Code.

7. The evidence at the hearing established that natural drainage conditions would be significantly altered by the proposed expansion in violation of 30 T.A.C. §§ 330.63(c)(1)(C) and 330.305(a).

8. Evidence contained in the WMI application demonstrates that WMI's landfill is not protective of surface water, in violation of 30 T.A.C. §§ 330.303 – 330.307.

9. The Applicant has failed to demonstrate how the facility will comply with applicable TPDES storm water permitting requirements.

10. The groundwater monitoring system proposed in WMI's application failed to meet the requirements of 30 T.A.C. §§ 330.403 – 330.407.

11. The groundwater monitoring system proposed in the application is not designed to detect potential groundwater contamination and leaks from the units within the facility, in violation of 30 T.A.C. § 330.403.

12. Evidence contained in WMI's application and adduced in the hearing demonstrate that WMI's landfill is not protective of groundwater, in violation of 30 T.A.C. § 330.15.

13. The groundwater monitoring system proposed in the application does not provide for adequate constituent sampling.

14. The groundwater monitoring system should include the placement of wells around the IWU to the east, the south, the southeast and southwest.

15. The groundwater monitoring system should include a more robust constituent list for sampling.

16. The existing MSW monitoring system is not adequate for detecting contaminants from the IWU.

17. The application does not include adequate provisions for daily or intermediate cover.

18. The application fails to demonstrate the adequacy of roadways accessing the facility, as required by 30 T.A.C. §330.61(i)(1).

19. The Applicant failed to obtain all necessary approvals from local governments and submit those as part of its application, as required by 30 T.A.C. §330.61(h)(1).

20. WMI began construction of the proposed lateral expansion prior to the issuance of at permit, in violation of 30 T.A.C. §330.7(a).

21. WMI failed to demonstrate that the expansion and operation of its landfill will comply with the requirements of the Solid Waste Disposal Act, Tex. Health & Safety Code Ann. § 361.001, *et seq.*

22. WMI's application does not meet the requirements of the TCEQ for issuance of a permit to expand its landfill facility.

23. The evidence in the record concerning WMI's application is insufficient to meet the requirements of the TCEQ for issuance of a permit to expand the landfill facility.

24. WMI's application fails to satisfy all application provisions of the TCEQ's rules in 30 T.A.C. Chapter 330 in effect at the time of filing the application.

25. The proposed expansion of WMI's landfill facility will not meet all of the applicable requirements of the TCEQ's rules found in 30 T.A.C. Chapter 330 in effect at the time of filing the application.

26. Pursuant to the authority of and in accordance with applicable laws and regulations, the TCEQ should deny the issuance of Permit No. MSW-249D.

V. ORDERING PROVISIONS

NOW THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY THAT:

1. The application of Waste Management of Texas, Inc. for a municipal solid waste permit amendment; Permit No. MSW-249D authorizing the lateral expansion and operation of a Type I municipal solid waste facility be denied and all exceptions inconsistent therewith be overruled.

2. Waste Management of Texas, Inc. pay the total transcript costs of the contested case hearing.

3. The effective date of this Order is the date the Order is final, as provided by 30 T.A.C. § 80.273 and § 2001.144 of the Administrative Procedure Act.

4. The Chief Clerk of the Texas Commission on Environmental Quality shall forward a copy of this Order to all parties.

5. If any provision, sentence, clause or phrase of this Order is for any reason held to be invalid, the invalidity of any portion shall not affect the validity of the remaining portions of the Order.

6. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and other requests for specific or general relief, if not expressly granted herein, are hereby denied for want of merit.

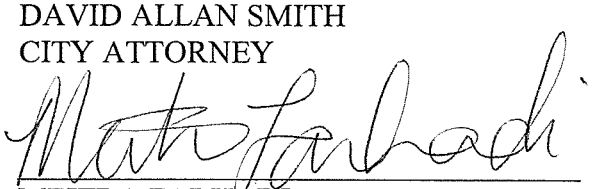
TEXAS COMMISSION OD ENVIRONMENTAL QUALITY

_____

Buddy Garcia, Chairman

RESPECTFULLY SUBMITTED,

DAVID ALLAN SMITH
CITY ATTORNEY



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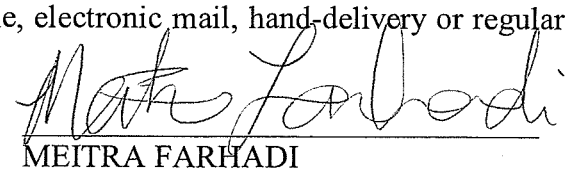
CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2009, a true and correct copy of the City of Austin's Closing Argument was served via facsimile, electronic mail, hand-delivery or regular first-class mail to the persons listed below.



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