

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

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

**TRAVIS COUNTY'S EXCEPTIONS**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

COMES NOW Travis County and files this, its Exceptions to the Administrative Law Judge's Proposal for Decision issued in the above-referenced case on July 21, 2009.

Travis County strongly disagrees with Administrative Law Judge (ALJ) Roy Scudday's Proposal for Decision in which he recommends that Proposed Solid Waste Permit No. 249D be issued. Particularly, Travis County disagrees with the ALJ's findings that the expansion of this landfill is compatible with the residential land use in the surrounding area, with the ALJ's finding that the Application conforms with the Capital Area Council of Government's (CAPCOG) Regional Solid Waste Management Plan (RSWMP), and with the ALJ's findings that the Applicant makes adequate provisions for monitoring landfill gas and groundwater, and that Applicant has demonstrated that the proposed expansion would pose no reasonable probability of adverse effects on the health, welfare, environment, or physical property of nearby residents or landowners..

While Travis County adamantly disputes the granting of this permit amendment application, if the application is granted over Travis County's objection, we agree with the

ALJ's findings that the hours of operation for the landfill should be restricted to Monday-Friday 7:00 a.m. - 7:00 p.m.; that the four additional monitoring wells identified by the ALJ should be added to the groundwater monitoring system; and that the groundwater monitoring plan should be modified to move the point of compliance to include those four monitoring wells.

As a local government constitutionally charged with safeguarding its citizenry, Travis County continues to urge the ALJ to deny the application in its entirety. Specifically, Travis County excepts to Findings of Fact Nos. 42, 77, 123, 124, 128, 162, 163, 164, 165, 183, 191, 192, 194, 195, 196, 197, 200, 203, 207, 214, 215, 216, 217, 218, 219, 220, 223, 230, 237, 242, 247, 249, 250, and 251-256; and Conclusions of Law Nos. 7, 9, 11, 28, 29, 31, 37, 39, and 40.

### **Land Use Compatibility**

Travis County, as the directly concerned local government, believes that the continued operation of the WMTX landfill beyond the length of its current permit is incompatible with its surrounding land use, and urges reconsideration of this matter and an emphatic rejection of this application for expansion.

While the facility may not have been incompatible with surrounding land use when it was originally permitted, more than thirty years have passed since this location first began accepting waste and operating as a landfill. When the landfill was originally opened, 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 astonishing and presents conclusive evidence that this part of Travis County has undergone dramatic change, and that what was once an open, rural area is now suburban and residential.

The WMTX facility is located in Austin Planning Area 22, which experienced the largest population growth in the entire City of Austin between 1990 and 2000. In that 10-year period, the population of this area increased by 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, 1. 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)

Mr. Worrall's basic premise appears to be that the mere fact that growth has occurred while the landfills were operating constitutes compatibility. This argument is a fallacy. We have no way of knowing how much more the population of this area might have grown had the landfills not been present. In fact, other factors such as the area's proximity to the city center and major employers, the relatively low-cost of housing for an area so close to downtown, and the understanding that the landfills would cease operation and leave the area have lured residents in spite of the current presence of the landfills. The evidence presented during this hearing is that tremendous residential growth has occurred in the area—growth that was not foreseen by the land use experts when WMTX last sought an expansion of its landfill in 1990. That growth has changed the character of the area so that it is no longer compatible with the landfills.

The mere fact that Travis County and the City of Austin, the two local governments concerned, presented evidence of tremendous growth in this area does not mean, by any stretch of the imagination, that the County's and the City's primary concern with compatibility is that it will adversely affect development in the area. Such argument is a

poorly disguised misdirection. Indeed, an examination of the evidence presented by both the County and the City shows that the two local governments' compatibility concerns are founded upon an interest in the health and quality of life of the thousands of adversely impacted individuals living in the vicinity of this landfill, and of the literally hundreds of children who attend the elementary school and the daycare center located within one mile of the landfill.

The evidence presented at this hearing demonstrates that scores of odor complaints were presented to the TCEQ and to Travis County during WMTX's operation under its existing permit. Through 2004, more than 800 complaints concerning landfill operations in this area were filed with the TCEQ, and hundreds of additional complaints were made to 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) Evidence was presented that both Bluebonnet Trail Elementary School and the Children's Courtyard daycare center made multiple reports of debilitating odors that required staff to keep the children inside due to complaints and illness from the effects of the odors. (City of Austin Exhibit JW-1, p. 7, ll. 148-156) In his testimony, one of the neighbor complainants, Delmer Rogers, discussed the odors he 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). Mr. Rogers also provided testimony regarding his tenants' complaints of skin rashes, discomfort, and the impacts of the overwhelming landfill odor. (NNC Exhibit DR-1, p. 5, ll. 21-23) Mr. Rogers and other neighbor complainants, Evan Williams 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 southerly winds magnified 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 wind direction during 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 profound nuisances for the nearby 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 that he fears these nuisances will only increase if the landfill is allowed to expand. (NNC Exhibit EW-1, p. 3, ll. 9-13)

Even more troubling with respect to the nuisances confronting nearby landowners is the fact that the operation of the WMTX landfill has resulted in trespass and harm to the property of adjacent residents. Mr. Williams produced photographic evidence of the runoff from the WMTX landfill onto his property. (NNC Exhibits EW-6, EW-7, and EW-8) NNC Exhibit EW-8 shows what at first glance appears to be a road, but according to 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. (NNC Exhibits EW-4 and EW-5)

Testimony was provided establishing that there have been years of extremely contentious and adverse interactions between WMTX and its residential neighbors, and that evidence of this conflict dates back to at least the time of a 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 animosity between WMTX and its neighbors simply would not exist were this landfill a compatible land use. Indeed, as the number of residences in this area continues to grow, this acrimony will be greatly exacerbated. (TR p. 2006, ll. 14-17)

Because there are so many instances of so many different violations occurring at the WMTX landfill, one must unavoidably conclude that WMTX is not following its Standard Operating Plan. If it were operating properly, and following the statutes and rules set forth by the Texas Legislature and the TCEQ, surely Mr. Rogers and Mr. McAfee would not be continuing to experience odor problems; surely Mr. Williams would not be continuing to find dead bird carcasses nor huge amounts of runoff from the landfill on to his property; and surely the children at Bluebonnet Trails Elementary School and the Children's Courtyard would not be forced to skip recess on their playgrounds because of the horrific odors emanating from the landfill. These abuses only reinforce Travis County's belief that the continued operation of the WMTX landfill is inappropriate and incompatible with the surrounding land use, and that its expansion application should be denied.

Admittedly, this was a lengthy, highly technical, two week long hearing, and it is understandable that one might not recall specific testimony and evidence presented by all eight parties. But at this important juncture, Travis County feels compelled to re-emphasize that crucial, overwhelming evidence was presented by the County and the City that established that the WMTX landfill is incompatible with the estimated 25,000 residents projected to be living within 5 miles of the facility. The emphasis is and must be on protecting the residents who live in this adversely impacted area. Travis County is concerned about WMTX's non-compliance with TCEQ rules and state laws and the concomitant incompatibility that arises from such behavior. Travis County is concerned about WMTX's operations inhibiting residents and school children from being outside in their yards or on their playgrounds, from participating in activities the rest of us rightly



take for granted. Travis County is concerned about listening to its citizenry and doing what it can as a local government to ensure that its citizens are not subjected to a decision that will impose many years of these nuisance conditions upon them. Travis County has made its formal governmental position known—it is time for landfilling in this area to end.

### **CAPCOG**

In his Proposal for Decision, the ALJ stated that “the desires of the City, the County, and NNC for the ARCD Facility to cease operations is not a legal basis for denying this Application.” (p. 60) In response to this statement, Travis County feels compelled to point out that both Travis County and the City of Austin are members of the Capital Area Council of Governments (CAPCOG). CAPCOG is the agency tasked under Chapter 330 of the Texas Administrative Code to establish a Regional Solid Waste Management Plan (RSWMP) 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, and determined that the application did not conform with either RSWMP. (Travis County Exhibit JW-4; City of Austin Exhibit 2) Travis County urges the ALJ and the Commissioners to adopt the determination made by CAPCOG. COGs are a creation of the Legislature, and the Legislature granted them the authority and the duty to create Regional Solid Waste Management Plans, and to locally evaluate applications for solid waste facilities. Why? Because as the elected representatives of the people most impacted by a solid waste facility, the members of the COG are the most knowledgeable and the most informed about the citizenry and the territory they represent, and the most able to strike a balance between the needs of their constituents for

solid waste services and the compatibility of a solid waste facility's proposed location with the surrounding land uses. CAPCOG spent years developing its Regional Solid Waste Management Plan. When it received WMTX's application to expand its ACRD facility, CAPCOG spent months evaluating the proposed expansion before making its determination that the expansion was not compatible with surrounding land use. Not to honor CAPCOG's determination of non-conformance is to blatantly ignore the most interested and affected local governmental agencies that comprise the very COG in which this landfill is located.

The Applicant is required to demonstrate conformance with CAPCOG's RSWMP under both Section 30.641(d) of the Texas Administrative Code and Section 363.066 of the Texas Health and Safety Code. Waste Management presented absolutely no evidence at this hearing demonstrating conformance with CAPCOG's RSWMP. WMTX has failed to meet its burden with respect to this issue, and Travis County respectfully requests that the ALJ and the Commission affirm CAPCOG's findings that WMTX's expansion application does not conform to its RSWMP, and find that this application must be denied.

### **Compliance History**

The Applicant's compliance history clearly establishes that the WMTX facility is incompatible with the residential land use in close proximity to the landfill. In his PFD, the ALJ agrees with Protestants that compliance history should be considered when making a land use determination. For the following reasons, Travis County therefore urges a

reconsideration of the entirety of the Applicant's compliance history before the Commission makes a determination on compatibility.

Based on the Applicant's compliance history, the Application should be denied. There is no better indicator of the Applicant's ability, or in this case, the Applicant's inability, 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.

During this hearing, extensive testimony and documentary evidence was presented that showed that while operating under its current Permit 249-C, WMTX entered into two Agreed Orders with TCEQ concerning operations violations: 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 ordered to pay a fine of \$244,420—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 the landfills, 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 WMTX was probably the cause of most of those 800 complaints since the corrective measures required to be undertaken by WMTX corresponded with a decline in the number of complaints. (TR, p. 2058, ll. 4-11)

WMTX filed Version 1 of its application for Permit No. MSW-249D in 2005. This was shortly after it entered into the 2004 agreed order that addressed its large number of rule violations. It is not surprising that WMTX was motivated to resolve those issues before filing its application. This application, by virtue of its volume and detail must have been planned and well into the documentation stage long before the agreed order was signed. Nor is it surprising that as an Applicant for a permit amendment, WMTX has been on its best behavior since filing its application four years ago.

In addition to the almost 1,000 complaints to the TCEQ, there have been hundreds of complaints to the City of Austin and to Travis County, the two local governments impacted by the WMTX landfill. (See Exhibit TC-6) These complaints are not as isolated in time as the Applicant would have one believe. The hundreds of letters comprising Travis County Exhibit TC-6 were all received by the Travis County Commissioner’s Court after the entry of the 2004 Agreed Order. Furthermore, at this hearing, multiple witnesses testified that nuisance odors are still occurring, and that the neighbors of the landfill stopped complaining to the TCEQ about nuisances after they were told by TCEQ staff that it was pointless to do so. (Direct testimony of Mark McAfee, p. 4, ll. 4-14) Mark McAfee testified about his and other neighbors’ frustration at not being able to convince the TCEQ to take action against WMTX for numerous nuisance infractions, stating that the neighbors

ultimately turned the force of their complaints toward Travis County and the City of Austin in hopes that their local governments could help them. (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, WMTX has a history of non-compliance with TCEQ rules and the laws of Texas, and this non-compliance continued past the entry of the Agreed Order in 2004. Furthermore, WMTX's own conduct during the course of this expansion application make it difficult to believe there is any possibility that it will comply with TCEQ rules or state law if the application is granted. First, the Applicant deliberately and 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. 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 would state why the Applicant decided to start labeling the area “Travis County Landfill” in Version 2 of its expansion application. Travis County believes this was not merely a mistake, but was a deliberate move calculated by WMTX to bolster its attempt to exclude this area from consideration in its expansion application. When the move failed, all memories of the attempt appear to have been wiped clean, as WMTX accepted the original label for the area without any apparent consequence for the intentional falsity.

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 at every opportunity attempted to bend or avoid the TCEQ's rules and applicable 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.

These recent examples of WMTX's failure to comply with the TCEQ's rules and state law, coupled with the testimony of citizens that the problems with WMTX have not abated and that the number of complaints to the TCEQ decreased simply because they were told by the TCEQ's representative not to continue reporting problems to the agency, constitute clear and alarming evidence that WMTX continues to push the envelope of non-compliance with the law in its operation of the ACRD Facility.

#### **Groundwater and Landfill Gas Monitoring**

During the hearing on this matter, WMTX's representatives consistently and repeatedly stated in testimony that WMTX takes full responsibility for all waste buried on its facility, including the waste buried in Phase I, which has been described as a "continuum of waste" that is located along the southern boundary of the ACRD facility

and adjacent to the closed Travis County Landfill. (TR, p. 112, l. 22 – p. 114, l. 11; TR, p. 133, ll. 11-13; TR, p. 134, ll. 6-18; TR, p. 26, ll. 8-13; TR, p.167, ll. 11-15) However, Applicant's Landfill Gas Management Plan has a gap in coverage of approximately 3,000 feet along this boundary, and its Groundwater Monitoring System has a similar gap along the same boundary.

The ALJ seems to accept without question Applicant's bald assertions that it is not "feasible" to place gas monitoring probes or groundwater monitoring wells along the southern boundary of its facility. In fact, it is entirely feasible to do so. Compliance with the TCEQ's rules would not require WMTX to install probes or wells through waste, as WMTX proclaims. It is feasible to remove the waste along the boundary. (TR, p. 296, ll. 10-17) It is feasible to install a wall at the boundary. (TR, p. 296, l. 18 – p. 297, l. 6) Separation of this facility from the Travis County facility was apparently presumed to be necessary by Waste Management's team when it performed due diligence research on the facility in 1981. (See Exhibit TC-2; TR, p. 177, ll. 17 -24) There is no provision of the law or the TCEQ's rules that waives these monitoring requirements because compliance would involve incurring an expense. The waste along this boundary is not a "barrier;" it can and should be removed. Travis County is WMTX's immediate neighbor to the south of the ACRD facility, and is thus immediately affected by WMTX's failure to comply with these rules. WMTX's argument that it should not be required to comply with the rules is specious. It should be recognized as such, and WMTX should be required to remove the waste along the boundary, and to monitor landfill gas and groundwater as required by law.

## **Conclusion**

Travis County urges the ALJ to revisit his decision and to find that the application of WMTX to expand its ACRD facility should be denied. WMTX has failed to demonstrate that its operation of the ACRD would pose no reasonable probability of adverse effects on the health, welfare, environment, or physical property of nearby residents or landowners. What WMTX has demonstrated by its history of noncompliance with state laws and rules is complete disregard for its neighbors. WMTX can and should be held to the standards set by the TCEQ; it can and should be required to monitor its emissions as required by law.

Landfilling operations are, plain and simple, incompatible with the large number of residences now located in the vicinity of the landfill. The fact that the number of residences in the area is predicted to skyrocket in the next decade only strengthens the argument against compatibility. The historical use of this area for waste disposal activities is drawing to a close, with one of the three landfills in the area closed, and a second to be closed by agreement in 2015. As was established during the hearing, the closure date for the second of the three landfills was carefully selected to coincide with the expected end of waste disposal activities at WMTX's ACRD under its current permit. Allowing WMTX to expand now would continue those incompatible activities for many years into the future of this rapidly urbanizing area.


The local governments with oversight of the area surrounding the landfill, Travis County and the City of Austin, have both strongly expressed their belief that this area is not compatible with waste disposal operations. After an intensive review of the



application, CAPCOG, the agency charged by the Legislature to evaluate compatibility, found that the proposed expansion does not conform to the Regional Solid Waste Management Plan. Travis County urges the ALJ to respect the findings of CAPCOG and the formal finding of the concerned local governments, and deny WMTX's permit amendment application as an incompatible land use.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

**I hereby certify that on August 20, 2009, a true and correct copy of Travis County's Exceptions was served via facsimile, Electronic Delivery, First-Class Mail and/or Hand Delivery to the persons listed below.**

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