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

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

**APPLICANT WASTE MANAGEMENT OF TEXAS, INC.'S BRIEF IN RESPONSE
TO THE ADMINISTRATIVE LAW JUDGE'S PROPOSAL FOR DECISION**

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COMES NOW Applicant Waste Management of Texas, Inc. (“*Applicant*” or “*WMTX*”) and, per 30 Tex. Admin. Code § 80.257(a), files this brief in response to the Administrative Law Judge’s (“*ALJ*’s”) Proposal for Decision (“*PFD*”) in the above-captioned matter. With the few, limited exceptions set forth below, WMTX finds the ALJ’s PFD to be thorough, well reasoned, and supported by the evidence put forth in this proceeding. Accordingly, WMTX accepts – with the following few, limited exceptions – the ALJ’s PFD and proposed order (“*Proposed Order*”).

I.
ARGUMENT

A. LIMITING THE FACILITY’S CURRENTLY PERMITTED HOURS OF OPERATION IS NOT SUPPORTED BY THE EVIDENCE OR APPLICABLE REGULATION

In his PFD and Proposed Order, the ALJ correctly finds that noise from the Austin Community Recycling and Disposal Facility (“*ACRD Facility*”) “*does not and will not rise to a level that would constitute a nuisance.*”¹ The ALJ also finds that WMTX’s application at issue “proposes sufficient provisions to avoid causing a nuisance.”² Nevertheless, the ALJ proposes to limit significantly the ACRD Facility’s currently authorized hours of operation to “mitigate the noise conditions that are inherent with the operation of an MSW landfill.”³ For the reasons set

¹ Proposed Order at 39 (Proposed Finding of Fact No. 219) (emphasis added).

² *Id.* (Proposed Finding of Fact No. 220).

³ *Id.* (Proposed Finding of Fact No. 211).

forth below, any limitation on a landfill's existing, permitted operating hours should be based on evidence of nuisance or other conditions specific to the site at issue, not on noise conditions that may be inherent in the operation of any landfill and that do not, and will not, rise to a level that would constitute a nuisance. As the ALJ finds and as the record reflects, operations at the ACRD Facility have not caused, and will not cause, noise that would constitute a nuisance or that is otherwise extraordinary.

1. WMTX's Application Does Not Propose To Expand The Facility's Existing, Permitted Operating Hours

In this case, WMTX has not applied to change the permitted hours of operation for the ACRD Facility. WMTX's application does not propose to expand the facility's operating hours beyond those currently authorized in the ACRD Facility's existing permit, which was issued in 1991.⁴ Notably, there is no evidence in the record of even a single violation for nuisance conditions at the facility caused by noise at any hour, including evening and weekend hours. Indeed, there is no evidence in the record that the ACRD Facility has ever been cited for a noise-related violation of any kind at any time. Nor is there any evidence in the record that the noise produced by operations at the facility is extraordinary.

2. WMTX Satisfied Its Burden Of Proof With Respect To The Facility's Hours Of Operation

Section 330.135 of the Texas Commission on Environmental Quality's ("*TCEQ's*" or the "*Commission's*") rules provides that the waste acceptance hours of a municipal solid waste ("*MSW*") facility "may be any time between the hours of 7:00 a.m. and 7:00 p.m., Monday through Friday, *unless otherwise approved in the authorization for the facility.*"⁵ The rule also provides that "transportation of materials and heavy equipment operation" may be conducted any

⁴ See Ex. ED 1 at 53:42-43 (Udenenwu); see also PFD at 63, 64; Proposed Order at 6, 38 (Proposed Findings of Fact Nos. 41, 208, 209); Ex. JW-5 at 5.

⁵ 30 TEX. ADMIN. CODE § 330.135(a) (emphasis added).

time between the hours of 5:00 a.m. and 9:00 p.m., “*unless otherwise approved in the authorization for the facility.*”⁶ MSW permit applicants that request authorization to accept waste beyond the 7:00 a.m. to 7:00 p.m. time period, or to transport materials and operate heavy equipment prior to 5:00 a.m. or after 9:00 p.m., are not required to justify the necessity of such operating hours or prove that the requested hours of operation are appropriate for the facility. TCEQ’s rules do not require such demonstrations; § 330.135 requires only that operating hours outside of those specified in the rule be specifically authorized in the facility’s permit. TCEQ’s rules do not otherwise prescribe or limit the operating hours of any MSW facility.

In this case, it cannot be reasonably disputed that WMTX met its burden of proof with respect to the application’s compliance with all requirements applicable to the ACRD Facility’s operating hours. WMTX’s application addresses and complies with each requirement of § 330.135. The Site Operating Plan (“*SOP*”) in the application specifies the facility’s waste acceptance hours, the hours when materials may be transported on- or off-site, and the hours when heavy equipment may operate.⁷ These hours are also specifically listed in the draft permit that the TCEQ Executive Director prepared.⁸ Additionally, the TCEQ Engineering Specialist that reviewed WMTX’s application testified that the operating hours specified in the application meet the requirements of § 330.135.⁹ There is no evidence in the record to the contrary.

Because WMTX met its burden of proof, the burden fell to the protesting parties that sought to limit WMTX’s authorized hours of operation. The ALJ did not find that any party demonstrated or produced sufficient evidence – by any standard of proof or production – that noise or evening or weekend operations at the ACRD Facility have created, or will create, a

⁶ *Id.* (emphasis added).

⁷ *See* Ex. APP-202 at 3394.

⁸ *See* Ex. APP-206 at 3.

⁹ *See* Ex. ED 1 at 53:27-43 (Udenenwu).

nuisance condition. Rather, the ALJ finds only that a preponderance of the evidence establishes that limiting operating hours to the default weekday-only hours provided in § 330.135 “will mitigate the noise conditions that are inherent with the operation of an MSW landfill.”¹⁰ As set forth below, WMTX respectfully submits that the ALJ’s finding is not supported by sufficient evidence in the record and is not otherwise a sufficient basis for limiting the ACRD Facility’s authorized operating hours.

3. Any Limitation On A Landfill’s Existing, Permitted Operating Hours Should Be Based On Evidence Of Nuisance Conditions Specific To The Site At Issue

As discussed above, the applicable TCEQ regulation governing facility operating hours, § 330.135, specifies default operating hours that any landfill may claim without “specific approval” from the agency, but the rule also provides that a facility may be permitted to operate beyond the specified default hours if the facility’s operating hours are “approved in the authorization for the facility.”¹¹ If, as the ALJ proposes, noise that may be *inherent* in the operation of any landfill is a sufficient basis to preclude landfills from operating beyond the default hours specified in § 330.135, then, because all landfills share this inherent quality, no facility in the state could ever obtain the “specific approval” expressly authorized by § 330.135 for operations outside of the default operating hours. The regulatory provision allowing operations beyond the default hours would be rendered meaningless if a quality inherent to all landfills can serve to preclude its applicability.

The appropriateness of an authorization that requires site-specific approval should be based on site-specific conditions, not conditions that may be inherent to all such facilities statewide. Any limitation on the site-specific operating hours authorized in a landfill’s existing

¹⁰ Proposed Order at 39 (Proposed Finding of Fact No. 211).

¹¹ 30 TEX. ADMIN. CODE § 330.135(a).

permit should be based on evidence of nuisance or otherwise distinct conditions that are specific to the landfill at issue. Revoking the “specific approval” of the ACRD Facility to operate in accordance with the hours “approved in the authorization for the facility” should be based on conditions at the ACRD Facility that go beyond those conditions that are inherent in the operation of any MSW landfill at any site.

Considering site-specific conditions as the basis for prescribing limits on a MSW facility’s operating hours is consistent with statements made by TCEQ in the SOP rulemaking wherein the agency promulgated the default operating hours and “specific approval” language in § 330.135.¹² In that rulemaking, TCEQ received comments contending “that a variance from the operating hours designated in the rule should only be granted on a showing of good cause.”¹³ TCEQ declined to adopt such a requirement, explaining that the agency would continue to make decisions regarding the appropriateness of a facility’s operating hours on a “case-by-case basis” considering the potential impact that the facility at issue may have on the surrounding community.¹⁴

As discussed above and as further addressed below, WMTX respectfully submits that there is no evidence, or insufficient evidence, in the record of nuisance noise conditions or even non-nuisance noise conditions at the ACRD Facility that may provide a basis for restricting the facility’s existing, permitted operating hours. Indeed, WMTX respectfully submits that the record evidence does not even establish – by a preponderance of the evidence – noise conditions that are arguably inherent in the operation of a landfill.

¹² The language of current § 330.135 was first promulgated in 2004 as § 330.118. *See* 29 TEX. REG. 11,054, 11,088 (Nov. 26, 2004).

¹³ *Id.* at 11,069.

¹⁴ *Id.* at 11,070.

4. There Is No Evidentiary Basis For Restricting The ACRD Facility’s Currently Permitted Hours of Operation

In support of his proposal to restrict the ACRD Facility’s operating hours to the default weekday-only hours in § 330.135, the ALJ cites the testimony of Protestant witnesses Mr. Guernsey, Mr. Word, Mr. McAfee, and Mr. Rogers. Mr. Guernsey and Mr. Word are employees of Protestant City of Austin. Notably, neither the City of Austin nor Protestant Travis County objects to BFI being authorized to operate the adjacent Sunset Farms Landfill for 24 hours a day, seven days a week (i.e., “24/7”).¹⁵ Although the ACRD Facility’s existing, permitted hours of operation are less than the 24/7 operating hours currently authorized for the adjacent Sunset Farms Landfill, the City of Austin and Travis County contend that WMTX’s operating hours should be limited to the default weekday-only hours in § 330.135. These governmental entities offer no credible evidence in support of their position to limit the ACRD Facility’s existing hours, but to allow the neighboring BFI landfill to operate all hours of the day, every day of the week. Furthermore, neither of the two local governments has passed a noise ordinance to address their claimed concerns. In any event, neither the City of Austin nor Travis County offered any evidence of site-specific conditions at the ACRD Facility that may provide a basis for limiting the hours authorized in the facility’s existing permit.¹⁶

a. Mr. Guernsey’s Testimony

The testimony of the City’s witnesses – the testimony relied upon by the ALJ as proof of “inherent” noise conditions at MSW landfills – was generalized, conclusory testimony that was

¹⁵ See *In re Application of BFI Waste Systems of North America, LLC, for Type I MSW Permit No. 1447A*, SOAH Docket No. 582-08-2178, TCEQ Docket No. 2007-1774-MSW, Proposal for Decision at 111 (May 8, 2009), available at <http://www.soah.state.tx.us/pfdsearch/pfds/582/08/582-08-2178-pfd1.pdf> [hereinafter *BFI Sunset Farms PFD*].

¹⁶ Indeed, Travis County’s lone witness, Mr. White, testified that management of the ACRD Facility “has been quite good since 2004” and that the enhanced SOP in WMTX’s application addresses some of the County’s nuisance concerns. Trial Tr. at 1911:7-12, 1937:21 to 1938:7 (White).

not specific to the ACRD Facility. Mr. Guernsey was the only witness to even suggest the possibility of limiting the facility's operating hours. Mr. Guernsey suggested that the operations of the ACRD Facility should be limited to daylight hours "[t]o lessen the impact on the existing and proposed residential uses and adjacent civic uses."¹⁷ That was the extent of Mr. Guernsey's testimony regarding operating hours.

Mr. Guernsey did not discuss any particular hours, nor did he distinguish between weekdays and weekends in making his suggestion. He did not cite § 330.135 or any other rule, or any statute, ordinance, zoning designation, or other requirement or prohibition as a basis for limiting the ACRD Facility's hours of operation. Mr. Guernsey's suggestion was not based on any site-specific analysis or observations, or on any expert witness testimony. He did not support his operating hours suggestion with any facts concerning evening or weekend operations. Indeed, Mr. Guernsey does not claim to have ever heard any noise or observed any "impact" of any kind from operations at the ACRD Facility, although he claims to have visited the area surrounding the facility on multiple occasions.¹⁸

Additionally, Mr. Guernsey did not claim any expertise or familiarity with the ACRD Facility's operations, or with MSW collection, hauling, management, and disposal. Mr. Guernsey also did not consider the impacts that his suggestion would have on traffic in the area of the facility and on the waste collection and disposal needs of the many customers that WMTX and the ACRD Facility service in Central Texas.

b. Mr. Word's Testimony

Another of the City of Austin's witnesses, Mr. Word, testified that "[b]ackup alarms on garbage trucks and construction equipment, heavy diesel engines, and bird abatement methods

¹⁷ COA Ex. GG-1 at 5:16-17 (Guernsey).

¹⁸ *See id.* at 3:1-3 (Guernsey).

can generate considerable noise.”¹⁹ Mr. Word did not contend that he had ever observed such “considerable noise” at the ACRD Facility, although he too claims to have visited the facility and surrounding area on numerous occasions.²⁰ Likewise, Mr. Word opined that noise that *can* be generated from a MSW facility *can* be heard at a distance of 125 feet from the facility (i.e., at the edge of the facility’s buffer zone), but here again, Mr. Word made no claim that he has ever observed any noise from the ACRD Facility, at any distance from the facility.²¹ Moreover, Mr. Word did not offer an opinion on whether noise that *can* be generated from a MSW facility *can* be heard at a distance of 305 feet from the facility, which is the distance to the residence nearest to the ACRD Facility.²²

Mr. Word also did not take into account the noise reduction that is and will be achieved by the vegetation in the ACRD Facility’s buffer zone. Protestant TJFA’s expert witness, Mr. Chandler, testified that “[v]egetation actually kills noise pretty well” and that a facility’s buffer zone would tend to mitigate the effects of noise on nearby properties.²³ In its application, WMTX commits to providing a minimum 125-foot buffer zone around solid waste processing and disposal activities in the expansion area, as required by TCEQ’s current MSW rules.²⁴ WMTX also commits to maintaining the vegetation in the buffer zone around the facility.²⁵ Considering both the proposed expansion area and the existing facility, the buffer zone around

¹⁹ COA Ex. JW-1 at 11:244-246 (Word).

²⁰ *See id.* at 4:86 to 5:97 (Word).

²¹ *See id.* at 11:244-247 (Word).

²² *See* Ex. APP-302 at 9. The proposed expansion of the ACRD Facility does not change the distance to the most proximate residence. *See id.*

²³ Trial Tr. at 1757:7-10, 1758:1-5 (Chandler).

²⁴ *See* Ex. APP-202 at 392, 3395-96; 30 TEX. ADMIN. CODE § 330.543(b)(2)(C); *see also id.* at § 330.543(b)(2)(D) (providing that the 125-foot buffer zone requirement in TCEQ’s revised MSW rules “shall apply only to newly permitted airspace and shall not apply to any previously permitted airspace”).

²⁵ *See* Ex. APP-202 at 3415.

the perimeter of the entire site will range in width up to 955 feet.²⁶ Unloading, processing, storage, or disposal activities that may create noise will not occur within the buffer zone.²⁷

As discussed in WMTX’s Closing Argument, TCEQ has no rules that specifically regulate or otherwise specifically address noise from MSW landfill operations. By contrast, in the same 2006 rulemaking wherein TCEQ revised the entirety of its MSW rules, including those pertaining to landfills, TCEQ promulgated § 330.239 that expressly regulates only MSW transfer stations – not landfills – requiring such facilities to “provide screening or other measures to minimize noise pollution.”²⁸ This rule is notable for two reasons: (1) there is no counterpart to this transfer station rule that similarly regulates “noise pollution” at MSW landfill facilities and (2) the rule provides that noises may be minimized through screening, such as buffer zones. Given the regulatory history, and given that transfer stations and other MSW storage and processing facilities are only required to maintain a 50-foot buffer,²⁹ it is reasonable to conclude that TCEQ did not find it necessary to specifically regulate noise from MSW landfills due to the 125-foot buffer requirement that new and expanded landfills must meet.

c. Testimony of Mr. McAfee & Mr. Rogers

Mr. McAfee and Mr. Rogers own property in proximity to the ACRD Facility. Although Mr. McAfee testified to hearing equipment noise at night that seemed to be coming from both the ACRD Facility and the adjacent Sunset Farms Landfill,³⁰ Mr. McAfee also admitted that he has not resided on his property near the two landfills since 1996.³¹ Mr. McAfee also admitted

²⁶ See *id.* at 392, 3395-96.

²⁷ See *id.* at 392, 3395; 30 TEX. ADMIN. CODE §§ 330.141(a), 330.543(a).

²⁸ 30 TEX. ADMIN. CODE § 330.239; see also *id.* § 330.63(b)(2) (requiring “transfer stations” to “provide designs for noise pollution control”).

²⁹ See *id.* § 330.543(b)(1).

³⁰ See Ex. MM-1 at 3:23-26 (McAfee).

³¹ See *id.* at 1:16-17 (McAfee); Trial Tr. at 2205:16-19, 2206:2-5, 2206:20-25 (McAfee).

that he routinely has customers at his property during the day and on the weekends and that none of his customers has ever complained about noise from the ACRD Facility.³²

With respect to noise, Mr. Rogers specifically stated that his concern was with noise levels at schools in the vicinity of the ACRD Facility.³³ Even assuming that such a concern has merit, it is only applicable during weekday daylight hours when classes are in session (i.e., it is not applicable during the evening and weekend operating hours that the ALJ proposes to limit). Moreover, Mr. Rogers did not claim to have heard noise from the ACRD Facility at his home, nor did he provide testimony regarding evening or weekend operations at the facility.

5. Weekday-Only Operating Hours Are Not The “Norm” For Central Texas Landfills

In his PFD, the ALJ states that “[t]he Commission has determined that accepting waste from 7:00 a.m. to 7:00 p.m. on weekdays should be the norm.”³⁴ WMTX respectfully submits that the Commission has made no such determination, particularly with respect to the landfills in Central Texas.³⁵ As discussed above, the Sunset Farms Landfill, which is located immediately adjacent to the ACRD Facility, is currently permitted to operate 24/7.³⁶ Additionally, a contested case hearing regarding BFI’s proposal to expand that landfill was recently concluded and the ALJ in that proceeding has recommended that the Commission maintain the facility’s existing hours of operation and authorize BFI to operate the expanded Sunset Farms Landfill any time of the day, on any day of the week.³⁷

³² See Trial Tr. at 2278:8-24 (McAfee).

³³ See Ex. DR-1 at 5:7-14 (Rogers).

³⁴ PFD at 64.

³⁵ See, e.g., *BFI Sunset Farms PFD*, *supra* note 15, at 111 (noting that 24/7 operations are consistent with other landfills in Travis County and with industry practice).

³⁶ See *id.*

³⁷ See *In re Application of BFI Waste Systems of North America, LLC, for Type I MSW Permit No. 1447A*, SOAH Docket No. 582-08-2178, TCEQ Docket No. 2007-1774-MSW, Letter from Hon. William

The Texas Disposal Systems Landfill, which is also located in Travis County, is authorized to operate 24 hours a day, six days a week.³⁸ Further to the south, the Mesquite Creek Landfill was recently permitted by the Commission to accept waste on Monday through Friday from 4:00 a.m. to 8:00 p.m., and on Saturday from 4:00 a.m. to 3:00 p.m.³⁹ In another, more recent Central Texas permitting decision, the Commission authorized the Williamson County Landfill to accept waste on Monday through Friday from 5:00 a.m. to 8:00 p.m., and on Saturday from 6:00 a.m. to 4:00 p.m.⁴⁰ The hours of operation for the Mesquite Creek Landfill and the Williamson County Landfill were authorized by the Commission in accordance with the same regulatory language found in § 330.135 – i.e., in accordance with rules specifying default 7:00 a.m. to 7:00 p.m. weekday-only waste acceptance hours and allowing waste acceptance beyond the default hours upon specific approval from the Commission.⁴¹

Additionally, in the rulemaking promulgating the language of § 330.135, TCEQ clarified that the rule’s default operating hours were not intended to “normalize” operating hours at all MSW facilities statewide. The language of the current rule was first promulgated in 2004.⁴² In the preamble to that rulemaking, TCEQ explained the intent of the rule and its application to existing facilities:

The commission does not intend for the amended rules to . . . limit the currently authorized operating hours of a facility. As a result, the commission does not expect the rules to interfere with the delivery of solid waste service

G. Newchurch, State Office of Administrative Hearings, to Les Trobman, TCEQ General Counsel (June 29, 2009), available at <http://www.soah.state.tx.us/pfdsearch/pfds/582/08/582-08-2178-exc1.pdf>.

³⁸ See TCEQ Permit No. MSW-2123.

³⁹ See *Order Granting the Application for Permit No. MSW-66B to Waste Management of Texas, Inc.*, TCEQ Docket No. 2006-1931-MSW, SOAH Docket No. 582-07-0863, at 33 (Oct. 1, 2008).

⁴⁰ See *Order Granting the Application for Permit No. MSW-1405B to Williamson County*, TCEQ Docket No. 2005-0337-MSW, SOAH Docket No. 582-06-3321, at 38 (Feb. 17, 2009).

⁴¹ See 30 TEX. ADMIN. CODE § 330.118 (2005).

⁴² As discussed above, the language of current § 330.135 was first promulgated in 2004 as § 330.118. See 29 TEX. REG. 11,054, 11,088 (Nov. 26, 2004).

...

The intent of the rules is to require that a facility's site operating plan accurately reflects the hours when the facility will accept waste, allow materials to be transported on or off site, and the hours when heavy equipment may operate. *The rules do not change the operating hours authorized in a facility's current permit.*⁴³

At no point in the preamble to the rulemaking or in its implementation of the new rule did TCEQ suggest that the default operating hours in current § 330.135 were intended to be the "norm" among facilities statewide. Rather, by allowing existing facilities to continue to operate within their current, permitted hours, TCEQ indicated that the agency did not intend or expect to establish the default operating hours in § 330.135 as the hours of operation for all facilities.

6. Limiting The Facility's Waste Acceptance Hours To Weekdays Between 7:00 a.m. And 7:00 p.m. Would Have Unintended, Negative Consequences

The ALJ's proposal to limit the ACRD Facility's waste acceptance hours from 7:00 a.m. to 7:00 p.m. only on weekdays would limit waste acceptance at the facility to 60 hours per week. The ACRD Facility is currently authorized to accept waste 151 hours per week. While the facility's waste acceptance hours would be much less than half of the hours currently authorized, there is no indication or reason to believe that waste generation will be reduced commensurate with the proposed reduction in the facility's waste acceptance hours. In fact, the calculations in WMTX's application demonstrate that the amount of waste routed to the facility is projected to increase each full year that the facility is in operation.⁴⁴

In the scenario created by the ALJ's proposal, WMTX's options are limited. WMTX could divert waste to the other Central Texas landfills that it operates (the Williamson County Landfill and the Mesquite Creek Landfill) that, as discussed above, are authorized to accept

⁴³ *Id.* at 11,059, 11,060 (emphasis added); *see also id.* at 11,069 (providing that existing MSW authorizations "will remain in force" and that, even though the default hours in § 330.135 (then § 330.118) "do not include Saturday," a permittee "can continue to operate under the hours authorized in its existing permit," including operations on Saturday, if authorized in the facility's existing permit).

⁴⁴ *See* Ex. APP-202 at 12-13, 961-62.

waste well beyond the weekday hours of 7:00 a.m. and 7:00 p.m.⁴⁵ This approach, however, would increase the distance that each load must be hauled to the point of disposal, thereby increasing the amount of truck traffic on area roadways, which in turn would increase the cost of disposal and vehicle emissions. It would also increase the landfill-related traffic in the vicinity of the other area landfills, which likely would not be well received by the residents in those communities. Decreasing the waste received by the ACRD Facility in an amount commensurate with the ALJ's proposed restriction on waste acceptance hours would also significantly increase the active life of the ACRD Facility – a consequence that runs counter to Protestants' desires to see the facility close as soon as possible.⁴⁶

If the ALJ's proposed restriction on waste acceptance hours is adopted, WMTX's other option to account for the narrowed window of waste acceptance and the ever increasing amount of waste receipts would be to increase the number of loads through the facility's gates between the weekday hours of 7:00 a.m. and 7:00 p.m. The waste received by the ACRD Facility – which is currently received within a window of 151 hours per week – would have to be trucked into the facility within a significantly narrowed window of 60 hours per week, and the number of trucks through the gate will increase yearly with the projected increase in waste receipts. This approach would have the negative effect of increasing the amount of landfill-related traffic on area roadways during peak traffic hours and may result in queues of hauling trucks at the facility's gate waiting to enter the landfill.

With respect to the traffic currently on area roadways, the study conducted by WMTX's expert traffic engineer, Mr. McInturff, demonstrates that the number of vehicles on the roads

⁴⁵ See generally Trial Tr. at 161:25 to 162:9, 244:5-13 (Smith) (discussing the possibility of routing waste to the Williamson County Landfill and the Mesquite Creek Landfill).

⁴⁶ See generally *id.* at 236:21 to 238:10 (Smith) (discussing how increasing or decreasing the flow of waste into the ACRD Facility will affect the facility's active life).

used to access the ACRD Facility significantly increases between the early morning hours and 7:00 a.m., and trails off significantly in the evening hours after 7:00 p.m.⁴⁷ The peak traffic hours are between the weekday hours of 7:00 a.m. and 7:00 p.m. – the hours when all of the waste would have to be hauled into the ACRD Facility if the ALJ’s proposed restriction on waste acceptance hours is adopted. Collecting and receiving waste at the facility during off-peak hours helps to reduce the landfill-related traffic on area roadways during the times when the roads are most heavily trafficked. It keeps large waste collection and hauling vehicles out of the downtown, campus, and commercial areas during times of heavier commuter, pedestrian, and bicycle traffic; it limits the number of waste vehicles accessing business areas during business hours; it allows waste to be collected in the vicinity of schools during times when there are fewer buses or cars headed to and from school; it ensures prompt collection of wastes after area businesses, such as shopping malls, restaurants, and bars, close.

Restricting waste acceptance to weekday hours would also have the unintended consequence of precluding much of the public from using the landfill. Permitting the ACRD Facility to accept waste during weekend hours is important for area residents who work and cannot make a trip to the facility on weekdays during normal business hours. Additionally, with the BFI Sunset Farms Landfill scheduled to close in 2015, the landfills open to area residents will already be limited. Closing the ACRD Facility on weekends will leave area residents with no convenient disposal option.⁴⁸

Furthermore, businesses generate waste throughout the weekend. These customers cannot go from Friday afternoon to Monday morning without waste collection, and haulers

⁴⁷ See Ex. APP-202 at 276-78.

⁴⁸ See generally Trial Tr. at 244:1-4 (Smith) (testifying that 94-percent of the waste that is disposed of at the ACRD Facility is generated in Travis County).

cannot collect waste from these customers on Friday evening and during weekend hours if they do not have an open landfill for disposal of the waste.

7. WMTX's Specific Exceptions To The ALJ's Proposal Regarding Operating Hours

For the foregoing reasons, Applicant WMTX respectfully excepts to the ALJ's proposed Findings of Fact Nos. 211 and 212, proposed Conclusions of Law Nos. 7, 45, and 46, proposed Ordering Provision No. 1, and those portions of the PFD (pages 63-64) in which the ALJ proposes to limit the ACRD Facility's permitted hours of operation to the default weekday-only operating hours in § 330.135. WMTX's proposed revisions to these portions of the ALJ's Proposed Order are detailed in *Attachment A* to this brief.

WMTX respectfully requests that Permit No. MSW-249D be issued authorizing the ACRD Facility to maintain its existing, permitted hours of operation. Alternatively, should the Commission determine that some limitation on the ACRD Facility's hours of operation is justified and legally supportable, WMTX respectfully requests that the Commission authorize the facility to accept waste from 4:00 a.m. to 8:00 p.m. or sundown (whichever is later) on weekdays, and from 4:00 a.m. to 4:00 p.m. on Saturdays. Should the Commission impose such limitations on the ACRD Facility's waste acceptance hours, then WMTX would also respectfully request authorization to transport materials on- or off-site and operate heavy equipment Monday through Saturday from 3:00 a.m. to 10:00 p.m., and on Sunday from 5:00 a.m. to 9:00 p.m. These alternative hours are consistent with the operating hours recently authorized by the Commission for the two Central Texas landfills discussed above – the Mesquite Creek Landfill and the Williamson County Landfill.⁴⁹

⁴⁹ The Mesquite Creek Landfill is authorized to accept waste Monday through Friday from 4:00 a.m. to 8:00 p.m., and on Saturday from 4:00 a.m. to 3:00 p.m., and to transport materials on- or off-site and operate heavy equipment Monday through Saturday from 4:00 a.m. to 9:00 p.m., and on Sunday

B. THE FACILITY’S PERMITTED GROUNDWATER MONITORING NETWORK SHOULD NOT BE REQUIRED TO INCLUDE THE GROUNDWATER WELLS THAT ARE SEPARATELY MONITORED PER WMTX’S VOLUNTARY AGREEMENT WITH THE CITY OF AUSTIN

In his PFD and Proposed Order, the ALJ correctly finds that the former industrial waste unit (“*IWU*”) at the ACRD Facility was closed in 1973 and that – although not required by the applicable regulations – WMTX’s application proposes to increase the number of groundwater monitoring wells that will monitor the closed IWU.⁵⁰ The ALJ likewise correctly finds that the first MSW disposal unit at the Facility – the Phase I Unit – was closed in 1979 and that WMTX’s application also proposes to increase the number of groundwater monitoring wells that will monitor the closed Phase I Unit, which also is not required by the applicable regulatory requirements.⁵¹ Additionally, the ALJ recognizes that WMTX’s application does not propose to expand, re-open, or re-design either the IWU or the Phase I Unit.⁵² Finally, the ALJ finds that WMTX met its burden of proof with respect to all issues (other than the operating hours issue discussed above).⁵³

from 5:00 a.m. to 9:00 p.m. *See Order Granting the Application for Permit No. MSW-66B to Waste Management of Texas, Inc.*, TCEQ Docket No. 2006-1931-MSW, SOAH Docket No. 582-07-0863, at 33 (Oct. 1, 2008).

The Williamson County Landfill is authorized to accept waste Monday through Friday from 5:00 a.m. to 8:00 p.m., and on Saturday from 6:00 a.m. to 4:00 p.m., and to transport materials on- or off-site and operate heavy equipment Monday through Saturday from 3:00 a.m. to 10:00 p.m. *See Order Granting the Application for Permit No. MSW-1405B to Williamson County*, TCEQ Docket No. 2005-0337-MSW, SOAH Docket No. 582-06-3321, at 38 (Feb. 17, 2009).

⁵⁰ *See* PFD at 4, 27, 28; Proposed Order at 5 (Proposed Finding of Fact No. 35), 21 (Proposed Finding of Fact No. 122), 22 (Proposed Finding of Fact No. 124), 33 (Proposed Finding of Fact No. 173), 54 (Proposed Conclusion of Law No. 47).

⁵¹ *See* PFD at 4, 27, 28; Proposed Order at 5-6 (Proposed Finding of Fact No. 36), 21 (Proposed Finding of Fact No. 122), 33 (Proposed Finding of Fact No. 173), 55 (Proposed Conclusion of Law No. 49).

⁵² *See* PFD at 8; *see also* Ex. APP-200 at 12:24-26 (Dominguez); Ex. APP-202 at 121, 123, 124, 126, 127, 129-31, 133, 135, 137, 139, 141, 143; Trial Tr. at 298:16-18, 299:11-24, 330:12 to 331:5 (Dominguez); *id.* at 1506:8 to 1507:3 (Kier).

⁵³ *See* Proposed Order at 50 (Proposed Conclusion of Law No. 7).

Nevertheless, the ALJ proposes to revise WMTX's draft permit to require the addition of four more groundwater monitoring wells "to mitigate the potential threat . . . should contaminants from the IWU and/or the Phase I Unit migrate towards the boundaries of the Facility."⁵⁴ For the reasons set forth below, WMTX respectfully submits that there is no regulatory or evidentiary basis for including these four additional wells in the ACRD Facility's permitted groundwater monitoring network.

1. The Closed Phase I Unit Should Be Readily Dismissed As A Basis For Inclusion Of The Four Wells At Issue

In his PFD, the ALJ bases his proposal to include the additional four wells on "the potential threat . . . should contaminants from [the IWU] migrate from the boundaries of the facility."⁵⁵ In the PFD, the Phase I Unit is *not* cited as a basis for inclusion of the four wells at issue. However, as quoted above, in the ALJ's Proposed Order the four wells are proposed for inclusion in the ACRD Facility's permitted groundwater monitoring network "to mitigate the potential threat . . . should contaminants from the IWU *and/or the Phase I Unit* migrate towards the boundaries of the Facility."⁵⁶ Given this incongruity between the PFD and Proposed Order, the ALJ's citation of the Phase I Unit in his Proposed Order as a basis for his proposal to include the four wells at issue may be inadvertent. In any event, the closed Phase I Unit can be readily dismissed as a basis for inclusion of the additional wells.

For the reasons set forth below, there is no evidentiary or regulatory basis for including the four additional wells in the ACRD Facility's permitted groundwater monitoring network. However, even assuming that the proposed inclusion of the additional wells is legally

⁵⁴ Proposed Order at 22 (Proposed Finding of Fact No. 126); *see also id.* at 55 (Proposed Conclusions of Law Nos. 48, 50).

⁵⁵ PFD at 29-30.

⁵⁶ Proposed Order at 22 (Proposed Finding of Fact No. 126) (emphasis added); *see also id.* at 55 (Proposed Conclusions of Law Nos. 48, 50).

supportable, the wells should only be considered for purposes of monitoring the IWU, not the Phase I Unit.

The groundwater wells at issue are not part of the ACRD Facility's existing, permitted groundwater monitoring network. The four wells are monitored by WMTX solely in accordance with a voluntary agreement with the City of Austin (discussed below) that specifically and exclusively concerns the closed IWU.⁵⁷ These wells were not designed to monitor, and do not monitor, the closed Phase I Unit to the south of the IWU.⁵⁸ No party contends, nor is there any evidence to support a finding, that these wells are capable of monitoring the Phase I Unit. Leachate in the closed Phase I Unit flows within the unit from east to west to the northwest toe of the unit, which is downgradient of the four wells at issue that monitor the IWU per the voluntary agreement with the City of Austin.⁵⁹ In the unlikely event that there is a release from the northwest toe of the Phase I Unit, the release would flow to the south – in the opposite direction of the four wells at issue – and would be detected by existing groundwater monitoring well MW-11.⁶⁰

Furthermore, the ALJ expressly finds that there is “no migration of leachate from the Phase I Unit to the perimeter of the ACRD Facility.”⁶¹ Accordingly, there is likewise no basis to find that additional monitoring wells are necessary “to mitigate the potential threat to human

⁵⁷ See COA Ex. 6; PFD at 19.

⁵⁸ See *generally* Proposed Order at 7 (Proposed Finding of Fact No. 43) (discussing the location of the Phase I Unit relative to the IWU and noting that these two closed units are separated by a drainage way).

⁵⁹ See PFD at 21; Proposed Order at 13 (Proposed Finding of Fact No. 86); WMTX's Reply to Closing Arguments at 14.

⁶⁰ See Trial Tr. at 1017:1-8, 1023:17-23 (Winters); WMTX's Reply to Closing Arguments at 3-12; Proposed Order at 21 (Proposed Finding of Fact No. 120) (discussing the location of MW-11 relative to the Phase I Unit); Ex. APP-202 at 3022 (showing MW-11 located hydraulically downgradient from the northwest toe of the Phase I Unit).

⁶¹ PFD at 21; *see also* Proposed Order at 14 (Proposed Finding of Fact No. 88).

health and the environment should contaminants from . . . the Phase I Unit migrate *towards the boundaries of the Facility*.”⁶² Moreover, as discussed above, if contaminants were to migrate from the Phase I Unit to the boundaries of the ACRD Facility, those contaminants would be detected by existing well MW-11, not the four wells at issue that monitor the IWU per the voluntary agreement with the City of Austin.

Additionally, as discussed in more detail below with respect to the IWU, given the ALJ’s findings that the Phase I Unit was closed in 1979⁶³ and, therefore, stopped receiving waste prior October 9, 1991,⁶⁴ the Phase I Unit is not subject to the groundwater monitoring requirements in TCEQ’s rules.⁶⁵ WMTX is not required to install or incorporate any new wells to monitor the Phase I Unit. Nevertheless, as the ALJ finds, WMTX’s application proposes to increase the number of groundwater monitoring wells at the ACRD Facility that will serve to detect a potential release of contaminants from the Phase I Unit.⁶⁶

Thus, with respect to the closed Phase I Unit, the ALJ finds that (1) there is no off-site migration of contaminants and (2), although not required by TCEQ’s rules, WMTX’s application proposes to increase the number of monitoring wells that will serve to detect a potential release of contaminants from the Phase I Unit. Accordingly, for all of foregoing reasons, WMTX respectfully submits that the closed Phase I Unit cannot legally or reasonably provide a basis – in whole or in part – for the inclusion of additional wells in the ACRD Facility’s permitted groundwater monitoring well network.

⁶² Proposed Order at 22 (Proposed Finding of Fact No. 126) (emphasis added); *see also id.* at 55 (Proposed Conclusions of Law No. 50).

⁶³ *See* PFD at 4; Proposed Order at 5-6 (Proposed Finding of Fact No. 36).

⁶⁴ *See* PFD at 27; Proposed Order at 55 (Proposed Conclusion of Law No. 49).

⁶⁵ *See* 30 TEX. ADMIN. CODE §§ 330.5(c), 330.401(a); *see also* PFD at 27; Proposed Order at 55 (Proposed Conclusion of Law No. 49).

⁶⁶ *See* PFD at 27, 28; Proposed Order at 21 (Proposed Finding of Fact No. 122); *see also* WMTX’s Reply to Closing Arguments at 3-4, 10-12.

2. The Limited Regulatory Requirements That Apply To The Closed IWU Do Not Include Any Requirement To Install Or Incorporate Additional Groundwater Wells To Monitor The IWU

As discussed in detail in WMTX’s Closing Argument, the IWU has been closed for decades and is not subject to continued regulation as an active MSW landfill unit.⁶⁷ The ALJ reviewed the evidence and agrees with this assessment of the IWU. Specifically, the ALJ finds that the IWU stopped receiving waste prior October 9, 1991, having closed in 1973.⁶⁸ For the reasons set forth below and in WMTX’s Closing Argument, the legal significance of the ALJ’s finding, which is supported by the record evidence, is that there is no requirement to install or incorporate additional groundwater wells to monitor the IWU. Nevertheless, as with the closed Phase I Unit, WMTX’s application proposes to increase the number of groundwater monitoring wells at the ACRD Facility that will serve to detect a potential release of contaminants from the IWU.⁶⁹

Per § 330.5(c) of TCEQ’s current MSW rules – indeed, per the MSW rules that have been in place in Texas since the state’s adoption in 1993 of regulations implementing the federal criteria for MSW landfills under Subtitle D of the Resource Conservation and Recovery Act (“*Subtitle D*”) – the only regulatory requirements that apply to MSW landfill units that stopped receiving waste before October 9, 1991, are the limited closure and post-closure care provisions of 30 Tex. Admin. Code §§ 330.453 and 330.463(a).⁷⁰ The October 9, 1991, cutoff date in

⁶⁷ See WMTX’s Closing Argument at 9-22.

⁶⁸ See PFD at 27; Proposed Order at 55 (Proposed Conclusion of Law No. 49).

⁶⁹ See PFD at 27, 28; Proposed Order at 21 (Proposed Finding of Fact No. 122); *see also* WMTX’s Reply to Closing Arguments at 3-4, 10-12.

⁷⁰ See 30 TEX. ADMIN. CODE § 330.5(c). Current § 330.5(c) requires compliance with § 330.453, which in turn requires compliance with § 330.463(a). *See id.* § 330.453(f). Current § 330.5(c) is substantively identical to former § 330.3(b), which was promulgated by TCEQ’s predecessor agency, the Texas Water Commission, in 1993 to implement the federal Subtitle D criteria. *See* 18 TEX. REG. 4023, 4037 (June 18, 1993). Additionally, with the exception of current § 330.453(d), which provides for approval of alternative final cover designs, current § 330.453 is substantively identical to § 330.251, as

§ 330.5(c) for waste receipts is not an arbitrary deadline. The date corresponds to the date that the United States Environmental Protection Agency (“*EPA*”) promulgated its regulations implementing the federal Subtitle D criteria for MSW landfills.⁷¹ In that rulemaking, EPA specifically provided that the Subtitle D criteria “do not apply to municipal solid waste landfill units that do not receive waste after October 9, 1991.”⁷² When TCEQ’s predecessor agency, the Texas Water Commission (“*TWC*”), promulgated rules in 1993 to implement the Subtitle D standards, the state agency agreed with its federal counterpart regarding the applicability of the Subtitle D criteria: “[F]acilities which did not receive waste after October 9, 1991, are not subject to these rules proposed to be adopted to comply with federal Subtitle D requirements.”⁷³

Accordingly, at both the federal and state level, the question of Subtitle D applicability arises only with respect to MSW landfill units that received waste after October 9, 1991. MSW landfill units in Texas that ceased waste receipts prior to that date are not subject to the Subtitle D criteria that went into effect after the units ceased receiving wastes. Hence the

promulgated in 1993. *See* 18 TEX. REG. at 4074-75. Likewise, current § 330.463(a) is substantively identical to former § 330.254(a), with the exception of current § 330.463(a)(3), which authorizes TCEQ to require an investigation of closed MSW units if there is evidence of a release from any such unit. *See* 18 TEX. REG. at 4076.

⁷¹ *See* 56 FED. REG. 50,978 (Oct. 9, 1991). This Federal Register promulgation of EPA’s Subtitle D final rule is included in Exhibit TJFA 104. Accordingly, for ease of reference, all references to this Federal Register promulgation in this brief will be cited to Exhibit TJFA 104, followed by the Federal Register citation in parentheses.

⁷² 40 C.F.R. § 258.1(c); Ex. TJFA 104 at 23, 24, 30, 62, 63 (56 FED. REG. at 51,000, 51,001, 51,007, 51,039, 51,040) (“EPA never intended to include within the scope of the revised [c]riteria inactive [MSW landfills] that stopped receiving waste prior to the date of promulgation of today’s rule . . .”).

⁷³ 18 TEX. REG. 1485, 1487 (Mar. 9, 1993); *see also id.* at 4029 (“Subtitle D closure and post-closure care maintenance requirements apply to [MSW landfill] units that receive waste after October 9, 1991.”).

In the preamble to its 1993 final rule, the TWC noted that it had committed “to establishing municipal solid waste regulations that were no more stringent than Subtitle D, unless such measures were necessary to protect key resources such as the Edwards Aquifer.” *Id.* at 4024. Following that policy, the TWC refused to include various requested provisions in the state’s rules implementing Subtitle D, among them a request to “require ground-water monitoring of all MSW sites.” *Id.*; *see also* 31 TEX. REG. at 2538 (stating the Commission’s position that the March 2006 revisions to TCEQ’s MSW rules “are consistent with, and do not exceed, the standards set by federal law”).

language of § 330.5(c), which renders MSW landfill units that stopped receiving waste before October 9, 1991, exempt from all of TCEQ's current (i.e., Subtitle D) MSW rules, with the exception of the agency's limited pre-Subtitle D closure and post-closure care provisions in §§ 330.453 and 330.463(a).

With respect to the issue at hand – the proposed addition of additional wells to monitor the closed IWU – no provision of § 330.453 or § 330.463(a) requires the installation or incorporation of additional groundwater wells to monitor the IWU. There is no such requirement applicable to the IWU. Per § 330.463(a), WMTX is required only to continue any groundwater monitoring program that was in effect during the active life of the IWU, and such monitoring program is required to be continued only through the five-year post-closure period following closure of the IWU. The applicable regulatory requirement is to “continue” any monitoring program that was in place during the active life of the unit; there is no requirement to enhance the monitoring program by including additional wells. In any event, as the ALJ finds, the IWU was closed in 1973 and, while there is no evidence of any groundwater monitoring program in place during the active life of the IWU, even if one did exist at the time, there is no regulatory obligation to continue the program today.

Furthermore, the groundwater monitoring requirements in TCEQ's MSW rules are found in § 330.401 through § 330.421. Per § 330.5(c), none of those provisions are applicable to the closed IWU. Indeed, § 330.401 specifically provides that closed units “may continue to monitor groundwater using the well location requirements contained in previously issued authorizations,” and that only “new solid waste management units” are required to certify compliance with TCEQ's groundwater monitoring requirements.⁷⁴

⁷⁴ 30 TEX. ADMIN. CODE § 330.401(a), (e).

Accordingly, there is no regulatory basis for requiring the addition of additional groundwater monitoring wells to monitor the closed IWU. Nevertheless, as the ALJ finds and as discussed below, WMTX's application proposes to increase the number of groundwater monitoring wells at the existing ACRD Facility that will serve to detect a potential release of contaminants from the IWU.⁷⁵

3. WMTX's Application Proposes To Increase The Number Of Wells That Will Monitor The IWU

Currently, groundwater monitoring well MW-11 is the only well in the permitted monitoring network for the existing ACRD Facility that will detect a release from the IWU.⁷⁶ As demonstrated above, WMTX is not required to retain this well for purposes of monitoring the IWU; nor is WMTX required to add additional wells to the ACRD Facility's groundwater monitoring network for purposes of monitoring the IWU. Nevertheless, WMTX's application proposes to retain MW-11 in the network and to add two additional wells to the network (MW-30 and MW-44) that will monitor the IWU.⁷⁷

In accordance with the record evidence, the ALJ finds that the IWU will be monitored by wells MW-11, MW-30, and MW-44.⁷⁸ The ALJ makes no finding – nor is there evidence to support a finding – that these three wells are inadequate to detect a release of contaminants from the IWU. Indeed, WMTX's expert geologist, Mr. Winters was unequivocal in his testimony that

⁷⁵ See PFD at 27, 28; Proposed Order at 21 (Proposed Finding of Fact No. 122); *see also* WMTX's Reply to Closing Arguments at 3-4, 10-12.

⁷⁶ Dr. Kier testified that monitoring well MW-11 is – to some degree – capable of monitoring the IWU. *See* Trial Tr. at 1325:7 to 1326:9, 1470:10 to 1471:8, 1471:24 to 1472:11, 1485:24 to 1486:3 (Kier). Another of TJFA's witnesses, Dr. Uliana, testified that MW-11 is downgradient of the IWU. *See id.* at 1616:12-14 (Uliana). The City of Austin's witness, Mr. Lesniak, also testified that MW-11 is, "to some extent, downgradient of the IWU" and that groundwater from the central portion of the ACRD Facility flows in the general direction of MW-11. *Id.* at 2143:17-25 (Lesniak).

⁷⁷ *See* WMTX's Reply to Closing Arguments at 3-4, 10-12.

⁷⁸ *See* Proposed Order at 21, 22 (Proposed Findings of Fact Nos. 122, 124).

these wells will serve to detect a potential release of contaminants from the IWU.⁷⁹ Furthermore, the ALJ determined that there was insufficient evidence to show that contaminants from the IWU have migrated off-site.⁸⁰

As the foregoing demonstrates, although not required by TCEQ's rules, WMTX's application proposes to increase the number of monitoring wells that will monitor the closed IWU, and the record evidence demonstrates that these wells will detect a potential release of contaminants from the IWU. Accordingly, WMTX respectfully submits that there is no evidentiary or regulatory basis to include four additional monitoring wells in the ACRD Facility's permitted groundwater monitoring well network to monitor the closed IWU – a unit that is not required to be monitored and that has not been shown to have released contaminants off-site in the unit's more than 30-year history.

4. WMTX's Voluntary Agreement With The City Of Austin Does Not Concern WMTX's Pending Application

Although there does not appear to be any misunderstanding among the parties or the ALJ regarding the nature and purpose of the voluntary agreement between WMTX and the City of Austin, it nevertheless should be noted that the agreement was not entered into as a result of negotiations between WMTX and the City of Austin during the permitting process for WMTX's pending application. The agreement was executed in 2002, approximately three years before WMTX filed its application.⁸¹ WMTX and the City of Austin did not enter into the agreement to resolve, and the agreement does not resolve, the City of Austin's protest of WMTX's application, or any issue in dispute between the parties regarding the application. Furthermore,

⁷⁹ See Trial Tr. at 989:11 to 990:2; 1016:22-25, 1023:12-16, 1037:2-8, 1043:15-20, 1044:5-6, 1055:4-13 (Winters).

⁸⁰ See PFD at 21; Proposed Order at 14 (Proposed Findings of Fact Nos. 87, 88).

⁸¹ See COA Ex. 6 at COA 1759; PFD at 2 (noting the initial filing of WMTX's application in August 2005).

no provision of the agreement requires or allows the agreement to be incorporated into, or to otherwise be a requirement of, the ACRD Facility's MSW permit.

5. Even If The Commission Finds Legal Support And Justification For The Inclusion Of Wells From The Voluntary Agreement With The City Of Austin, Well PZ-31 Should Be Excluded On Technical Grounds

For the reasons set forth above, WMTX maintains that there is no evidentiary or regulatory basis to include the four additional monitoring wells at issue in the ACRD Facility's permitted groundwater monitoring well network to monitor the closed IWU. However, even if the Commission finds legal support and justification for the inclusion of wells from the voluntary agreement with the City of Austin, the Commission should not order all four wells to be included in the ACRD Facility's monitoring network. As discussed below, one of the four wells at issue (piezometer PZ-31) is used only to obtain groundwater level measurements; it is not monitored, and was never intended to be monitored, for groundwater quality data. Any groundwater quality data obtained from PZ-31 would be inherently unreliable. Accordingly, under no circumstances should this well be included in the ACRD Facility's groundwater monitoring well network.

Per its voluntary agreement with the City of Austin, WMTX agreed to sample and analyze groundwater from two wells that already existed on-site (monitoring well MW-29A and piezometer PZ-26) and from another monitoring well (MW-32) that WMTX installed per the terms of, and after entering into, the agreement.⁸² These three wells are located downgradient of the IWU and are sampled and analyzed per the terms and procedures of a groundwater monitoring plan that is appended to the voluntary agreement and that is specific to these wells.⁸³ As noted above, none of these wells are included in the current, permitted groundwater

⁸² See COA Ex. 6 at COA 1765, 1776.

⁸³ See *id.* at COA 1761-85 ("Voluntary Groundwater Monitoring Plan for the Industrial Waste Unit at Austin Community Landfill").

monitoring well network for the ACRD Facility. These wells are not monitored per TCEQ's rules or per the terms of the ACRD Facility's current permit. These wells are monitored on a voluntary basis by WMTX solely per the terms of the agreement with the City of Austin.

Also per the terms of its agreement with the City, WMTX agreed to install piezometer PZ-31 to the south of the IWU, between the IWU and a drainage way that runs from east to west between the IWU and the Phase I Unit.⁸⁴ Here again, this piezometer is not included in the current permitted groundwater monitoring well network for the ACRD Facility. The express purpose of PZ-31 was that it "be used for water level measurements only."⁸⁵ That is, PZ-31 was installed solely for the purposes of measuring groundwater levels; it was not installed for purposes of sampling and analyzing groundwater quality. The agreement between WMTX and the City of Austin specifically states that PZ-31 is not to be sampled for groundwater quality data because this piezometer is likely installed through waste and any "water quality data collected from this piezometer would possibly be cross-contaminated with MSW leachate."⁸⁶

Accordingly, PZ-31 is likely impacted by waste and not capable of yielding representative groundwater data. Therefore, should the Commission find evidentiary support and legal justification for the inclusion of wells from WMTX's voluntary agreement with the

⁸⁴ See *id.* at COA 1765.

⁸⁵ *Id.*

⁸⁶ *Id.* at COA 1765-66. The boring log for PZ-31 does not indicate that waste was encountered in the installation of that piezometer. See Ex. APP-202 at 1676. However, during its investigation of the IWU, ThermoRetec advanced boring MW-31 in approximately the same location as PZ-31. Cf. Ex. APP-202 at 2400 (showing location of MW-31) and Ex. COA 9 (showing location of PZ-31). The ThermoRetec boring log for MW-31 does indicate that MSW was encountered in that boring. See Ex. APP-202 at 2446; see also Trial Tr. at 2148:17-23 (Lesniak) (discussing concern regarding the presence of waste in the location of PZ-31).

City of Austin, the Commission should not order piezometer PZ-31 to be included in the ACRD Facility's monitoring network.⁸⁷

6. WMTX's Specific Exceptions To The ALJ's Proposal Regarding The Addition Of Additional Groundwater Monitoring Wells

For the foregoing reasons, Applicant WMTX respectfully excepts to the ALJ's proposed Findings of Fact Nos. 126 and 128, proposed Conclusions of Law Nos. 28, 48, and 50, proposed Ordering Provision No. 1, and those portions of the PFD (pages 29-30) in which the ALJ proposes to include four additional monitoring wells in the ACRD Facility's permitted groundwater monitoring well network. WMTX's proposed revisions to these portions of the ALJ's Proposed Order are detailed in *Attachment A* to this brief.

C. EXCEPTION TO THE ALJ'S PROPOSED FINDINGS REGARDING WMTX'S CONSTRUCTION OF THE SEDIMENTATION AND BIO-FILTRATION POND

In his Proposed Order, the ALJ proposes findings regarding WMTX's construction of a sedimentation and bio-filtration pond that the City of Austin permitted and required as a mitigation measure.⁸⁸ While the ALJ's proposed findings do not recommend denial of, or any changes to, the draft permit for the ACRD Facility expansion, WMTX respectfully excepts to the findings for the reasons set forth in WMTX's Closing Argument and Reply to Closing Arguments, which WMTX incorporates by reference herein.⁸⁹ Specifically, Applicant WMTX respectfully excepts to the ALJ's proposed Finding of Fact No. 237 and the related portions of

⁸⁷ See 30 TEX. ADMIN. CODE § 330.403(a) (providing that the permitted groundwater monitoring system must "yield representative groundwater samples"); *id.* § 330.421(a), (a)(1)(B) (providing that groundwater monitoring wells well must be constructed in a manner that provides for "collection of representative groundwater samples" and "that will not introduce contaminants into the borehole or casing" of the well); *see also id.* § 330.421(b) (providing that, "[w]here monitoring wells are installed in unusual conditions, all aspects of the installation shall be approved in writing in advance").

⁸⁸ See generally Proposed Order at 9 (Proposed Finding of Fact No. 56) ("WMTX has obtained development permits from the City of Austin for the new sedimentation/water quality pond that is being proposed in the permit application.").

⁸⁹ See WMTX's Closing Argument at 67; WMTX's Reply to Closing Arguments at 103-04.

the PFD (pages 71-72). WMTX's proposed revisions to Finding of Fact No. 237 are detailed in *Attachment A* to this brief

D. OTHER MISCELLANEOUS, MINOR REVISIONS TO THE ALJ'S PROPOSED ORDER ARE PROPOSED IN ATTACHMENT A

In certain instances in the ALJ's Proposed Order there are, what appear to be, minor, inadvertent, typographical and other non-substantive errors and omissions that, if left unaddressed, could be potentially misleading or otherwise confusing. Applicant assumes and acknowledges responsibility for many of these errors and omissions, as the Proposed Findings of Fact and Conclusions of Law submitted by Applicant to the ALJ contained a number of incorrect – albeit inadvertent – regulatory citations, predominantly ones to TCEQ's MSW rules in effect prior to March 27, 2006. Applicant regrets and apologizes for the oversight and the efforts required to correct the mistakes. To address these errors and omissions, WMTX proposes certain, limited revisions to the ALJ's Proposed Order, as set forth in *Attachment A* to this brief.

II.
CONCLUSION

For the foregoing reasons, WMTX respectfully requests that Permit No. MSW-249D be issued authorizing the ACRD Facility to maintain its existing, permitted hours of operation and to monitor groundwater using the groundwater monitoring network proposed in WMTX's application. To that end, and to resolve WMTX's other limited exceptions and proposed revisions to the ALJ's Proposed Order, WMTX respectfully requests that the Proposed Order be revised as proposed in *Attachment A* and issued by the Commission with those revisions.

Respectfully submitted,

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A large, stylized handwritten signature in black ink, appearing to read 'B. J. Moore', is written over a horizontal line.

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WASTE MANAGEMENT OF TEXAS, INC.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing brief has been served on the following on this the 20th day of August, 2009:

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US 42085v.1

ATTACHMENT A

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

<p style="text-align: center;">APPLICATION OF WASTE MANAGEMENT OF TEXAS, INC. FOR A MUNICIPAL SOLID WASTE PERMIT AMENDMENT; PERMIT NO. MSW-249D</p>	<p>§ § § § §</p>	<p style="text-align: center;">BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS</p>
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ATTACHMENT A

TO

**APPLICANT WASTE MANAGEMENT OF TEXAS, INC.’S BRIEF IN RESPONSE
TO THE ADMINISTRATIVE LAW JUDGE’S PROPOSAL FOR DECISION**

For the reasons set forth in Applicant Waste Management of Texas, Inc.’s (“*WMTX’s*”) Brief in Response to the Administrative Law Judge’s (“*ALJ’s*”) Proposal for Decision (“*WMTX’s Brief in Response to PFD*”), WMTX respectfully proposes the following revisions to the ALJ’s Proposed Order:

PAGE NO(S).	PROVISION	PROPOSED REVISION(S)	BASIS FOR PROPOSED REVISION(S)
3	Finding of Fact No. 13	The Notice of Receipt of Application and Intent to Obtain Municipal Solid Waste Permit Amendment containing the information specified in 30 Tex. Admin. Code (TAC) § 39.411 was published on October 14, 2005, in the <i>Austin American-Statesman</i> , and in Spanish in the <i>El Mundo</i> newspaper.	Incorrect citation; <i>see</i> Ex. APP-203. Note that the requirement to publish notice in an alternative language applies only to MSW applications filed on or after November 30, 2005. <i>See</i> 30 TAC § 39.405(h)(1).
3	Finding of Fact No. 15	<i>Delete Proposed Finding of Fact No. 15 in its entirety.</i>	Inapplicable.
3	Finding of Fact No. 20	<i>Revise citation to: 30 TAC § 39.411.</i>	Incorrect citation.
4	Finding of Fact No. 24	<i>Revise citation to: 30 TAC § 39.413.</i>	Incorrect citation.
4	Finding of Fact No. 26	<i>Revise citation to: 30 TAC § 39.411.</i>	Incorrect citation.

PAGE NO(S).	PROVISION	PROPOSED REVISION(S)	BASIS FOR PROPOSED REVISION(S)
11-12	Finding of Fact No. 74	On the central portion of the site between the East and West Hills, where the IWU and Phase I Unit are located, groundwater flow is generally to the south and south west <u>east</u> from the West Hill, and to the south east <u>west</u> from the East Hill. . . .	See Ex. APP-202 at 1400.
22	Finding of Fact No. 125	In 2002, WMTX entered into a voluntary agreement with the City of <u>Austin</u> in which WMTX agreed to incorporate <u>monitor</u> two existing wells (MW-29A and PZ-26) as downgradient sampling points <u>for the IWU</u>	See COA Ex. 6; WMTX's Brief in Response to PFD.
22	Finding of Fact No. 126	<i>Delete Proposed Finding of Fact No. 126 in its entirety.</i>	See WMTX's Brief in Response to PFD.
23	Finding of Fact No. 128	With the incorporation of the additional four wells into the groundwater monitoring system and the realignment of the POC to incorporate those four wells, † The Draft Permit <u>will</u> include adequate provisions for groundwater monitoring.	See WMTX's Brief in Response to PFD.
25	Finding of Fact No. 139	The 100-year peak flow runoff was incorrectly calculated in the <u>a</u> 1996 amendment <u>modification</u> application to be 977 cfs: <u>using a method of calculation that would not be a permissible method to use under TCEQ's current MSW rules</u> , when, in fact, if was calculated correctly <u>using the permissible method under TCEQ's current MSW rules</u> , it sh <u>ould</u> have been calculated to be 1,239 <u>1,931</u> cfs.	See Trial Tr. at 1555:7 to 1557:2, 1558:10-14 (Dunbar).

PAGE NO(S).	PROVISION	PROPOSED REVISION(S)	BASIS FOR PROPOSED REVISION(S)
25	Finding of Fact No. 140	Using the correct method of calculation, the Application shows that the current <u>100-year</u> peak flow at the southern boundary (CP-7) is actually 1,239 <u>1,931</u> and the projected peak flow after the expansion will be 1,310 <u>1,971</u> cfs.	<i>See</i> Ex. APP-202 at 636.
33	Finding of Fact No. 173	Because the IWU and Phase I Unit are pre-Subtitle D landfill units <u>that stopped receiving waste before October 9, 1991</u> , they are only subject to the rule at 30 TAC § 330. 463 <u>453</u> ,	<i>See</i> 30 TAC § 330.5(c); incorrect citation.
38	Finding of Fact No. 210	Protestants have the burden of proof to show that the current operating hours for the facility should be changed to conform with the default hours set forth in § 330.135, 7:00 a.m. to 7:00 p.m., Monday through Friday. WMTX met its burden of proof with respect to the <u>Application's compliance with all requirements applicable to the ACRD Facility's operating hours.</u>	<i>See</i> WMTX's Brief in Response to PFD.
39	Finding of Fact No. 211	<i>Delete Proposed Finding of Fact No. 211 in its entirety.</i>	<i>See</i> WMTX's Brief in Response to PFD.
39	Finding of Fact No. 212	There is no <u>insufficient</u> evidence to show that the Facility's operational hours need to be different from the default hours of 7:00 a.m. to 7:00 p.m., Monday through Friday <u>limited.</u>	<i>See</i> WMTX's Brief in Response to PFD.
40	Finding of Fact No. 227	The compliance history of the Facility shows the only <u>Facility-related alleged</u> violations	Clarification; <i>see</i> Ex. APP-103 at 2; Ex. APP-104 at 3 (listing one alleged transporter violation from a 2005 Agreed Order in TCEQ Docket No. 2004-0384-MLM-E).

PAGE NO(S).	PROVISION	PROPOSED REVISION(S)	BASIS FOR PROPOSED REVISION(S)
44	Finding of Fact No. 237	The commencement of construction of the two ponds prior to the approval of the Application, in apparent violation of 30 TAC § 330.7(a) , is not a sufficient basis for denial of the Application.	See WMTX's Brief in Response to PFD.
49	Conclusion of Law No. 2	<i>Revise 30 TAC citations to:</i> 30 TEX. ADMIN. CODE §§ 39.405 and 39.501. <i>Revise TEX. GOV. CODE citations to:</i> TEX. GOV. CODE ANN. §§ 20031.051 AND 20031.052.	Incorrect citations.
49	Conclusion of Law No. 4	The provisions of 30 TEX. ADMIN. CODE ANN. Ch. 330 in effect as of March 227, 2006 apply to the Application.	See 31 TEX. REG. 2502, 2690 (Mar. 24, 2006).
50	Conclusion of Law No. 7	The burden of proof was on the Applicant, in accordance with 30 TEX. ADMIN. CODE ANN. § 80.17(a). WMTX met its burden with respect to all referred issues except the proposed hours of operation <u>to demonstrate that the Application complies with all applicable statutory and regulatory requirements.</u>	See WMTX's Brief in Response to PFD; 30 TAC § 55.210(b).
51	Conclusion of Law No. 15	<i>Revise 30 TAC citation to:</i> 30 TEX. ADMIN. CODE § 330.51(b)(5)61(k)(3).	Incorrect citation.
51	Conclusion of Law No. 22	<i>Revise 30 TAC citations to:</i> 30 TEX. ADMIN. CODE ANN. §§ 330.45 , 330.57(c)(3), and 330.63.	Incorrect citation.
51	Conclusion of Law No. 23	<i>Revise 30 TAC citations to:</i> 30 TEX. ADMIN. CODE ANN. §§ 330.57(c)(4), <u>330.65</u> , and 330.127.	Incomplete citation.
52	Conclusion of Law No. 24	<i>Revise 30 TAC citations to:</i> 30 TEX. ADMIN. CODE ANN. §§ 330.15, 330.1421 – 330.1379.	Incorrect citation.

PAGE No(s).	PROVISION	PROPOSED REVISION(S)	BASIS FOR PROPOSED REVISION(S)
52	Conclusion of Law No. 28	With the incorporation of the wells covered by the voluntary agreement with the City of Austin, MW-29A, MW-32, PZ-26, and PZ-31, into the groundwater monitoring system covered by the permit and the reconfiguration of the point of compliance to include those four wells, <u>The Application will meet</u> the requirements of 30 TEX. ADMIN. CODE ANN. §§ 330.63 (b)(4) , 330.401, 330.403, 330.405, and 330.407, concerning groundwater protection.	See WMTX's Brief in Response to PFD; incorrect citation.
52	Conclusion of Law No. 29	Revise 30 TAC citations to: 30 TEX. ADMIN. CODE ANN. §§ 330.56(k) , 330.63(f); and Subchapter J of Chapter 330.	Incorrect citation.
52	Conclusion of Law No. 30	Revise 30 TAC citations to: 30 TEX. ADMIN. CODE ANN. §§ 330.63(c)(1)(D)(iii) and 330.305(a).	Incorrect citations.
53	Conclusion of Law No. 33	Revise 30 TAC citations to: 30 TEX. ADMIN. CODE ANN. §§ 330.3545, 330.3547, 330.553, 330.555, 330.557, and 330.559.	Incorrect citations.
53	Conclusion of Law No. 35	Revise 30 TAC citations to: 30 TEX. ADMIN. CODE ANN. §§ 330.63(d) (C)(3) and (4)(G), and 330.339.	Incorrect citation.

PAGE NO(S).	PROVISION	PROPOSED REVISION(S)	BASIS FOR PROPOSED REVISION(S)
53	Conclusion of Law No. 36	<p>Applicant is not proposing to site a new MSW landfill or lateral expansion within five miles of any <u>large general public commercial</u> airport <u>runway end</u> serving turbojet or piston-type aircraft, as confirmed in correspondence with the Federal Aviation Administration and in compliance with 30 TEX. ADMIN. CODE. ANN. §§ 330.61(i)(5) and 330.545(b). <u>The existing Facility is, and the lateral expansion of the Facility will be, within a six-mile radius of a small general service airport runway end used by piston-type aircraft. Applicant notified the affected airport and the Federal Aviation Administration, in compliance with 30 TEX. ADMIN. CODE. ANN. §§ 330.61(i)(5) and 330.545(b). In accordance with 30 TEX. ADMIN. CODE. ANN. §§ 330.61(i)(5) and 330.545(d), the Facility and lateral expansion were critically evaluated and determined not to be incompatible with respect to aircraft operations at the affected airport.</u></p>	See 30 TAC § 330.545; Ex. APP-202 at 27-28, 398-426.
53	Conclusion of Law No. 39	<p><u>Solid waste management activities at the Facility is compatible conform</u> with the applicable regional solid waste management plan, pursuant to TEX. HEALTH & SAFETY CODE ANN. § 361.062<u>363.066</u>.</p>	Clarification; incorrect citation.
41	Conclusion of Law No. 41	<p>The buffer zones established by Applicant between the edge of fill and the Facility boundary are compliant with the MSW rules, including 30 TEX. ADMIN. CODE ANN. §§ 330.141(b) and 330.543(b).</p>	Clarification; see Ex. APP-202 at 3395-96.

PAGE NO(S).	PROVISION	PROPOSED REVISION(S)	BASIS FOR PROPOSED REVISION(S)
54	Conclusion of Law No. 45	The operating hours proposed in the Application have <u>not</u> been shown to not be <u>in</u> appropriate.	See WMTX's Brief in Response to PFD.
54	Conclusion of Law No. 46	<i>Delete Proposed Conclusion of Law No. 46 in its entirety.</i>	See WMTX's Brief in Response to PFD.
55	Conclusion of Law No. 48	<i>Delete Proposed Conclusion of Law No. 48 in its entirety.</i>	See WMTX's Brief in Response to PFD.
55	Conclusion of Law No. 50	The proposed groundwater monitoring system as revised to incorporate the wells covered by the voluntary agreement with the City of Austin-- MW-29A, MW-32, PZ-26, and PZ-31-- into the groundwater monitoring system covered by the permit and the reconfiguration of the POC to include those four wells will adequately monitor the Phase I Unit area of the Facility and protects human health and the environment in compliance with 30 TEX. ADMIN. CODE ANN. §§ 330.63(bf)(4), 330.401, 330.403, 330.405, and 330.407.	See WMTX's Brief in Response to PFD; incorrect citation.
56	Ordering Provision No. 1	<i>Revise Proposed Ordering Provision No. 1 to read, in its entirety:</i> The attached Type I Municipal Solid Waste Permit no. MSW-249D is granted to Waste Management of Texas, Inc., with the following changes: Final Cover Quality Control Plan The specification for the soils to be used in the final cover should be revised to specify SCS Hydrologic Soil Group D for that soil.	See WMTX's Brief in Response to PFD.