

**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
REPLY TO EXCEPTIONS**

COMES NOW applicant Waste Management of Texas, Inc. (“*Applicant*” or “*WMTX*”) and, per 30 Tex. Admin. Code § 80.257(a), files this reply to the exceptions of Protestants and the Office of Public Interest Counsel (“*OPIC*”) to the Administrative Law Judge’s (“*ALJ*’s”) Proposal for Decision (“*PFD*”) in the above-captioned matter. These parties’ exceptions lack support in the evidentiary record and cannot be reconciled with the statutory and regulatory requirements applicable to WMTX’s application. Accordingly, Protestants’ and OPIC’s exceptions provide no basis for amending the PFD or any provision of the order proposed by the ALJ (the “*Proposed Order*”).

With one limited exception discussed below, all of Protestants’ and OPIC’s exceptions concern issues that were fully addressed in WMTX’s Closing Argument and Reply to Closing Arguments. Protestants failed to refute or otherwise rebut the evidence put forward by WMTX, which, as the ALJ determined, resolved each of the contested issues in favor of issuance of the proposed permit. Protestants’ and OPIC’s exceptions add nothing new to the discussion and debate. These parties’ exceptions are largely, if not entirely, restatements of their closing arguments. In fact, many of the arguments that these parties put forth in their exceptions were taken verbatim from the respective party’s closing briefs and merely repackaged and reargued as

“exceptions” to the ALJ’s PFD. The parties’ attempts at rearguing these very same claims in their exceptions serve no constructive purpose.

WMTX will not compound the unnecessary burden on the Commission, the ALJ, and the parties by repeating its prior, prevailing arguments in response to Protestants’ and OPIC’s repetitious claims. Given that the arguments put forth by Protestants and OPIC in their exceptions were fully briefed and argued by the parties, and thoroughly considered by the ALJ, they can be resolved by reference to the ALJ’s PFD and Proposed Order and WMTX’s Closing Argument and Reply to Closing Arguments. Accordingly, WMTX incorporates its closing briefs herein for all purposes and respectfully refers the Commission to its Closing Argument and Reply to Closing Arguments, as well as the ALJs’ treatment of these issues in his PFD and Proposed Order.

The one limited exception noted above concerns Protestant TJFA’s claim in its exceptions regarding the recirculation of leachate and gas condensate.¹ Notably, TJFA attempts to support this exception solely by reference to a federal rule.² Tellingly, TJFA does not reference the Commission’s own rule that governs the recirculation of leachate and gas condensate at municipal solid waste facilities in Texas – 30 Tex. Admin. Code § 330.177.³ TJFA withholds citation to the Commission’s rules because it cannot reasonably be disputed that the provisions of WMTX’s application concerning leachate/gas condensate recirculation comply with the applicable TCEQ regulation – the regulations that govern this case.⁴

¹ See TJFA’s Exceptions at 106-08.

² See *id.* at 107 (citing 40 C.F.R. § 258.28(a)(2)).

³ See also 30 TEX. ADMIN. CODE § 330.65(c).

⁴ See Ex. APP-202 at 3415.

Although not articulated as such in TJFA's exceptions, TJFA's leachate/gas condensate recirculation claim is nothing more than a thinly-veiled attack on the validity of the applicable TCEQ rule. TJFA attempts to advance a claim that the Commission's rule governing leachate/gas condensate recirculation (30 Tex. Admin. Code § 330.177) does not square with the rule's counterpart federal regulation (40 C.F.R. § 258.28(a)(2)).⁵ If TJFA wishes to pursue that claim, then it must do so through a challenge to the rulemaking proceeding in which the TCEQ rule at issue was promulgated.⁶ TJFA cannot collaterally attack the validity of the Commission's rules in the context of this permit proceeding. In this case, the sole question is whether WMTX's application complies with the applicable TCEQ rules.⁷ It does, and its compliance with the Commission's rule concerning leachate/gas condensate recirculation is indisputable.

While the Commission should not entertain an attack on its rules in the context of a permit proceeding, it should be noted that this would not be the first time that the Commission has heard and rejected the very same claim that TJFA attempts to advance. In the TCEQ rulemaking proceeding in which the applicable leachate/gas condensate recirculation rule was promulgated, Texas Disposal Systems ("**TDS**") filed public comments claiming that the proposed Commission rule (30 Tex. Admin. Code § 330.177) violated the federal rule (40 C.F.R. § 258.28(a)(2)) because the Commission's rule would allow leachate and gas condensate derived from a lined landfill unit to be recirculated into another lined landfill unit at the same facility.⁸ TCEQ noted TDS's comment in the preamble to the final rule and did not change the rule in

⁵ See TJFA Ex. 400 at 160:12 to 161:11, 184:19 to 185:9 (Chandler).

⁶ See TEX. GOV'T CODE § 2001.038.

⁷ See 30 TEX. ADMIN. CODE § 55.210(b).

⁸ See 31 TEX. REG. 2502, 2514, 2567 (Mar. 24, 2006).

response to that comment.⁹ In this case, TJFA is attempting no more than a second run at changing the Commission's leachate/gas condensate recirculation rule, making the very same claim in its exceptions that TDS made – and that TCEQ rejected – in the rulemaking proceeding. As set forth above, this contested case is the wrong forum for a rulemaking challenge.

CONCLUSION

For the foregoing reasons, and those set forth in WMTX's closing briefs, Protestants' and OPIC's exceptions to the ALJ's PFD are not supportable and provide no basis for amending the PFD or the ALJ's Proposed Order. Accordingly, Applicant WMTX respectfully requests that the ALJ's Proposed Order be modified as proposed in WMTX's Brief in Response to the ALJ's PFD and issued by the Commission with those modifications.

Respectfully submitted,

Vinson & Elkins L.L.P.

2801 Via Fortuna, Suite 100

Austin, Texas 78746

Telephone: 512.542.8729

Facsimile: 512.236.3257


Bryan J. Moore/SBN 24044847

John A. Riley/SBN 16927900

Rachel B. Chester/SBN 24065039

COUNSEL FOR APPLICANT
WASTE MANAGEMENT OF TEXAS, INC.

⁹ See *id.* at 2567.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing reply has been served on the following on this the 31st day of August, 2009:

Hon. Roy G. Scudday
Administrative Law Judge
State Office of Administrative Hearings
300 W. 15th Street, Suite 502
Austin, Texas 78701

State Office Of Administrative Hearings

Amie Dutta Richardson
Steve Shepherd
Tim Reidy
Texas Commission on Environmental Quality
P.O. Box 13087, MC-173
Austin, Texas 78711-3087
PH: 512.239.0600
FAX: 512.239.0606
arichard@tceq.state.tx.us
sshepher@tceq.state.tx.us
treidy@tceq.state.tx.us

*Representing the Executive Director of the Texas
Commission on Environmental Quality*

Amy Swanholm
Office of Public Interest Counsel
Texas Commission on Environmental Quality
P. O. Box 13087, MC-103
Austin, Texas 78711-3087
PH: 512.239.6823
FAX: 512.239.6377
aswanhol@tceq.state.tx.us

*Representing the Texas Commission on
Environmental Quality Office of Public Interest
Counsel*

Meitra Farhadi
Assistant City Attorney
City of Austin
301 W. 2nd St., Box 1088
Austin, Texas 78767-1088
PH: 512.974.2310
FAX: 512.974.6490
Meitra.farhadi@ci.austin.tx.us

Representing the City of Austin

Annalynn Cox
Assistant County Attorney
Travis County
314 W. 11th Street, Suite 420
P. O. Box 1748
Austin, Texas 78767
PH: 512.854.9513
FAX: 512.854.4808
Annalynn.cox@co.travis.tx.us

Representing Travis County

Jim Blackburn
Mary W. Carter
Adam Friedman
Blackburn Carter, P.C.
4709 Austin
Houston, Texas 77004
PH: 713.524.1012
FAX: 713.524.5165
jbb@blackburncarter.com
mcarter@blackburncarter.com
afriedman@blackburncarter.com

Representing Protestants 1

Erich M. Birch
Angela K. Moorman
Birch, Becker & Moorman, LLP
7000 North Mopac Expressway
Plaza 7000, Second Floor
Austin, Texas 78731
PH: 512.514.6747
FAX: 512.514.6267
ebirch@birchbecker.com
amoorman@birchbecker.com

Representing TJFA, L.P.

Paul Terrill
The Terrill Firm
810 West 10th St.
Austin, Texas 78701
PH: 512.474.9100
FAX: 512.474.9888
pterrill@terrill-law.com

Representing Giles Holdings, L.P.

Bridget Bohac
TCEQ Office of Public Assistance
Texas Commission on Environmental Quality
P. O. Box 13087, MC-108
Austin, Texas 78711-3087
PH: 512.239.4000
FAX: 512.239.4007

TCEQ Office of Public Assistance

Docket Clerk
TCEQ Office of Chief Clerk
Texas Commission on Environmental Quality
P. O. Box 13087, MC-105
Austin, Texas 78711-3087
PH: 512.239.3300
FAX: 512.239.3311

TCEQ Office of Chief Clerk



Bryan J. Moore

US 56707v.1