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Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*
Mark R. Vickery, P.G., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 20, 2009

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Ms. LaDonna Castañuela, Chief Clerk
Office of Chief Clerk, MC 105
Texas Commission on Environmental Quality
P.O. Box 13087
Austin TX 78711-3087

RE: TCEQ Docket No. 2006-0612-MSW
Waste Management of Texas, Inc.

Dear Ms. Castañuela:

Enclosed for filing, please find one (1) original via e-filing and seven (7) copies of the **Executive Director's Exceptions**. Please time stamp one extra copy and return to the undersigned attorney for her file.

If you have any questions or comments, please call me at (512)239-2999.

Sincerely,

A handwritten signature in cursive script, appearing to read "Amie Dutta Richardson".

Amie Dutta Richardson, Attorney
Environmental Law Division
MC 173

cc: Service list (delivery as indicated in certificate of service)

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

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

EXECUTIVE DIRECTOR'S EXCEPTIONS

I. INTRODUCTION

This case involves a major amendment application for a lateral expansion of a Municipal Solid Waste (MSW) landfill. Specifically, at issue is whether the Texas Commission on Environmental Quality (TCEQ or Commission) should approve the application and issue proposed permit amendment MSW-249D (Application) to Waste Management of Texas, Inc. (Applicant or WMTX). The Administrative Law Judge (ALJ) has issued a proposal for decision (PFD) proposing a draft order that the Commission issue the permit amendment as presented in the Application and draft permit with two recommendations. The ALJ's two recommendations are: (1) that the Applicant reduce the operating hours of the facility from a 24/6 schedule to a Monday through Friday, 7 am to 7 pm, schedule, and (2) that the Applicant revise the groundwater monitoring system by moving the point of compliance (POC) to add four wells already in existence under a voluntary, private agreement between the Applicant and the City of Austin.¹ This permit amendment contested case is the first to be heard by an ALJ under the new MSW rules at 30 Texas Administrative Code (TAC) Chapter 330, effective March 27, 2006.

II. STANDARD OF REVIEW

Section 361.0832(c) of the Texas Health & Safety Code (THSC) provides that the Commission may overturn an underlying finding of fact that serves as the basis for a decision in a contested case only if the Commission determines that the finding was not supported by the great weight of the evidence. In addition, section 361.0832(d) states that the Commission may overturn a conclusion of law in a contested case only on the grounds that the conclusion was clearly erroneous in light of precedent and applicable rules.

¹ See City of Austin Ex. No. 6.

III. DISCUSSION

The Executive Director of the TCEQ (ED) generally agrees with the ALJ's PFD and Draft Order except for the ALJ's recommendations regarding operating hours and groundwater monitoring.

A. Operating Hours

Based on his review of the lateral expansion Application and in consideration of the great weight of the evidence presented at the contested case hearing, the ED recommends the Commission overturn the ALJ's recommendation and instead approve the current operating hours for landfill operations and waste acceptance. WMTX current permit and existing facility has the following alternate operating hours known as the 24/6 schedule. The alternate hours currently authorized for the existing permitted facility are specifically 9 pm Sunday nights through 7 pm Saturday, and if necessary 7 am to 4 pm Sundays, for both landfill operations and waste acceptance. The ED has already authorized the current WMTX 24/6 schedule for the existing permit and preliminarily determined the 24/6 schedule is acceptable for the lateral expansion Application. In his PFD, the ALJ recommends reducing the operating hours to five days a week from 7 am to 7 pm.

First, the ED respectfully recommends that the ALJ's findings of fact relating to operating hours should be overturned because the great weight of evidence demonstrated the lateral expansion is in compliance with TCEQ rules, and because the preponderance of the evidence clearly demonstrated the expansion will have a limited impact on the surrounding community. The ED does not agree that Protestants' testimony about noise and lights from the facility justified recommending reduced operating hours considering other parts of the PFD where the ALJ determined that the Applicant met its burden of proof on several other rules and evidence relating to impact on the surrounding community. Specifically, the ALJ held that the Applicant met its burden of proof to show compliance with rules relating to control of nuisance factors through the required operational standards of Chapter 330, Subchapter E; landfill gas management; transportation, traffic and roads; and land use compatibility. In short, voiced concerns associated with noise and lights are only one consideration when assessing the impact of operating hours on the surrounding community. Therefore, the ED recommends overturning

the findings of fact because the great weight of evidence favors the Applicant who proved that the impact of lateral expansion would be limited.

Second, the ED respectfully recommends that conclusions of law and suggested revisions to the draft permit relating to a reduction of current operating hours be overturned on the grounds that the conclusion was clearly erroneous in light of precedent and applicable rules. The ED has consistently interpreted 30 TAC § 330.135 to mean that applicants may propose alternate hours which are then evaluated on a case-by-case basis, and often authorized as the plain language of the rule provides. The ED recognizes that the Commission may restrict the hours based on considerations, such as potential impacts on the community, weighed against an applicant's need for the proposed hours. The rulemaking history supports the ED's interpretation. In both 2004 and 2006 rulemaking adoptions regarding Chapter 330, the Commission responded to comments about alternate operating hours, simply stating that rather than requiring any kind of justification from an applicant, the Commission would continue to make these decisions on a case-by-case basis considering the potential impact on surrounding communities.²

In this case at hand, the ED has reviewed the evidence presented by both the Applicant and the Protestants on a variety of rules and issues relating to the potential impact on the surrounding community. The ED offers that the weight of evidence, the applicable precedent and the clear intent of the applicable rules regarding the potential impact on surrounding communities all support overturning both findings of fact and conclusions of law regarding the ALJ's recommendation to reduce operating hours. For these reasons, the ED respectfully excepts to the ALJ's basis for recommendation to reduce the WMTX operating hours.

B. Groundwater Monitoring

As an important preliminary matter, the ED notes his support for parties to contested case hearings to resolve underlying issues, especially those issues to which TCEQ rules and statutes do not apply. In the case at hand, the City of Austin and WMTX entered into a private, voluntary agreement in 2002 to install and monitor wells. The wells were installed and placed to

² See 29 Tex. Reg. 11070 (November 26, 2004). See also 31 Tex. Reg. 2502, 2565 (March 24, 2006). It is important to note that the ED offered similar arguments in his exceptions to a similar PFD regarding WMTX's neighboring landfill: BFI Sunset Farms.

detect any releases from an older landfill known as the Industrial Waste Unit (IWU). The IWU stopped receiving waste before the applicability date of both TCEQ MSW and the Federal Resource Conservation and Recovery Act, Subtitle D applicable statutes and regulations. Because it stopped receiving waste before October 9, 1991, the TCEQ MSW rules and Federal RCRA, Subtitle D regulations do not apply.³ Thus, based on evidence presented, ED considers the IWU to be a Pre-Subtitle D unit. Accordingly, and for clarity's sake, the ED will refer to the private agreement wells monitoring this Pre-Subtitle D unit as the Pre-Subtitle D monitoring wells. In addition to the IWU, evidence was offered regarding another older landfill unit known as the Phase I Unit located in part on the southern border of WMTX's property. Evidence showed the Phase I Unit also stopped receiving waste before October 9, 1991, and therefore, is also a Pre-Subtitle D unit.

The ED would also like to emphasize that although not a party to the voluntary, private agreement, the ED does and will continue to monitor sampling results for any significant releases, which might trigger assessment monitoring and/or a TCEQ corrective action under any number of regulatory programs, including the Texas Risk Reduction Program at 30 TAC Chapter 350 or the MSW Corrective Action as required by 30 TAC Chapter 330. Since the voluntary, private agreement has been in effect, there have been no such triggering events, namely no detectable releases of constituents of concern of such a level to be applicable to these TCEQ programs. In addition, although though not required by the rules, there was uncontroverted evidence that one WMTX monitoring well, MW-11, can serve to monitor any detectable migration of a constituent of concern from either of the two Pre-Subtitle D units.

First, the ED respectfully recommends overturning findings of fact relating to moving the POC and adding the Pre-Subtitle D monitoring wells in light of the great weight of evidence regarding the notable lack of detectable releases from the Pre-Subtitle D monitoring wells network, combined with uncontroverted evidence that both of these Pre-Subtitle D units stopped receiving waste long before federal and state regulations were enacted. Evidence in the Application and testimony offered also demonstrated that the Pre-Subtitle D monitoring wells are not the only wells on the WMTX property designed to monitor and protect groundwater from

³ See 40 CFR § 258.1. For a more detailed discussion, please review the ED's closing argument's Background section.

releases from units on the facility property.⁴ In addition to the Pre-Subtitle D wells, WMTX also has a network of monitoring wells placed along an existing (POC) to detect releases from their existing MSW regulated facility. In the Application, WMTX now proposes changes to the POC to accommodate the new units proposed in the lateral expansion. This existing and proposed well network is and will be regulated under MSW rules at 30 TAC Chapter 330 and Federal RCRA Subtitle D regulations at 40 CFR Part 258. Moreover, the evidence showed that the total length of the proposed POC is now greater than the existing POC. The Application states there will be more groundwater monitor wells (from the current 15 to a total of 31) in order to monitor WMTX proposed new units. For clarity's sake, the ED will refer to these wells as the WMTX monitoring wells. The great weight of evidence supports the Applicant's proposed POC but only for the WMTX monitoring wells, not the Pre-Subtitle D wells.

Second, the ED respectfully offers that any conclusions of law supporting a permit condition to move the POC in order to add the Pre-Subtitle D monitoring wells would be clearly erroneous in light of precedent and applicable rules. The applicable rule, 30 TAC § 330.3(106), defines POC as "a vertical surface located no more than 500 feet from the hydraulically downgradient limit of the waste management unit boundary, extending down through the uppermost aquifer underlying the regulatory units, and located on land owned by the owner of the facility." The Pre-Subtitle D units and monitoring wells are not "waste management units" or "regulatory units" as those terms are used in the POC definition. Only the WMTX monitoring wells and the WMTX proposed POC in their Application comply with the definition of POC in the rule.

In addition, as recently as 2006, the Commission considered and rejected a proposal for new groundwater monitoring well spacing requirements to apply to closed landfills. *See* 31 Tex. Reg. 2502, 2573 (March 24, 2006). The Commission responded to that proposal by stating that "the commission has adequate authority, without this provision, under existing rules that provide for detection monitoring, assessment monitoring, and corrective action to address groundwater contamination from closed landfills." *See* 31 Tex. Reg. 2502, 2573 (March 24, 2006).

In this case at hand, the ED has reviewed the weight of evidence, the role of precedent, and the intent of the applicable rules. For these reasons, the ED respectfully recommends

⁴ *See* WMTX Ex. APP-202, ATT 5-5, for example.

overturning the findings of fact, the conclusions of law, and the ALJ's recommendation for a new permit condition relating to moving the POC and adding the Pre-Subtitle D monitoring wells.

VIII. SUMMARY

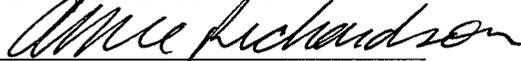
Based on evidence admitted and issues identified in the record, the ED contends that all regulatory requirements for an MSW landfill expansion were met by the Applicant. The ED reserves the right to make a final recommendation after due consideration of the parties exceptions. The ED is prepared to follow whatever final order or request issued by the Commission. Therefore, the ED stands by the preliminary decision to issue this MSW lateral expansion permit amendment and Draft Permit as written.

Respectfully submitted,

Texas Commission on Environmental
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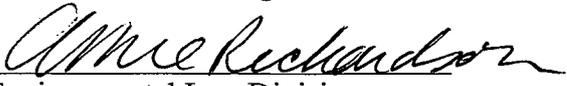
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REPRESENTING THE EXECUTIVE DIRECTOR
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CERTIFICATE OF SERVICE

I certify that on August 20, 2009, the foregoing Executive Director's Exceptions were sent by first-class mail, e-mail, and facsimile to all persons on the attached mailing list.


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STYLE/CASE: WASTE MANAGEMENT OF TX, INC.
SOAH DOCKET NUMBER: 582-08-2186
REFERRING AGENCY CASE: 2006-0612-MSW

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