

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 TO  
THE SUPPLEMENTAL PROPOSAL FOR DECISION AND PROPOSED ORDER**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE OF SAID COURT:

**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). After a remand of the proceedings, the Administrative Law Judge (ALJ) issued a supplemental proposal for decision (PFD) and a draft order. The ALJ recommends upholding the existing operating hours as currently permitted and contained in the draft license condition. In addition, the ALJ offers, as a convenience to the Commissioners, the revisions to the proposed order as requested by the Commissioners' Interim Order of October 20, 2009. 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.

### III. DISCUSSION

The Executive Director of the TCEQ (ED) generally agrees with the ALJ's Supplemental PFD and Draft Order and recommends the Commission adopt the Draft Order.

Based on his review of the lateral expansion Application and in consideration of the great weight of the evidence presented at the remand of the contested case hearing, the ED recommends the Commission approve the current operating hours for landfill operations and waste acceptance. WMTX current permit and existing facility have 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.

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.<sup>1</sup>

In regard to the remand proceedings heard on December 2, 2009, 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

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<sup>1</sup> See 29 Tex. Reg. 11070 (November 26, 2004). See also 31 Tex. Reg. 2502, 2565 (March 24, 2006).

potential impact on surrounding communities all support upholding both findings of fact and conclusions of law regarding the ALJ's recommendation to reduce operating hours. For these reasons, the ED respectfully recommends approval of the ALJ's decision and proposed order regarding the WMTX operating hours.

#### **VIII. SUMMARY**

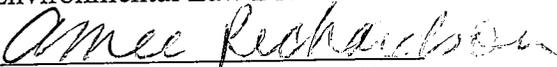
Based on evidence admitted and issues identified in the record, the ED contends that all regulatory requirements for an MSW landfill expansion were met by the Applicant. Overall, throughout the initial proceeding and the remanded proceeding, the preponderance of evidence supported compliance with all applicable TCEQ statutes and rules relating to this amendment as required by Section 5.557(a) of the Texas Water Code and the procedural rules at 30 TAC § 55.210. 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  
Quality

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REPRESENTING THE EXECUTIVE DIRECTOR  
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**CERTIFICATE OF SERVICE**

I certify that on January 25, 2010, the foregoing Executive Director's Exceptions to Supplemental PFD and Proposed Order were sent by first-class mail, e-mail, and/or facsimile to all persons on the attached mailing list.



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**SOAH DOCKET NUMBER:** 582-08-2186  
**REFERRING AGENCY CASE:** 2006-0612-MSW

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